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## STATEMENT

### on the notification of the German draft act to amend the Network Enforcement Act (2021/39/D)

Brussels, 24 March 2021

On 26 January 2021, the Federal Republic of Germany submitted a draft act to amend the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) to the European Commission, filed under number 2021/39/D.

In January 2020, the German Federal Ministry of Justice and Consumer Protection (BMJV) presented the initial version of the draft act to amend the NetzDG. The intention of the draft act is to strengthen the existing regulations in relation to the reporting obligations of social network operators and to increase user-friendliness in the complaints procedure. For this purpose, the act seeks to devise access to the complaints procedure and out-of-court procedures for disputes between social network operators, complainants and users. Finally, a few provisions of the European Audiovisual Media Services Directive (AVMS Directive (EU) 2018/1808) are intended to be transposed into national law. After some adjustments to the initial draft act, the Federal Republic of Germany submitted a first draft act to amend the NetzDG for notification to the European Commission, filed under number 2020/174/D. eco – Association of the Internet Industry submitted a statement on the notification procedure.

In June 2020, the German Bundestag's Committee on Legal Affairs und Consumer Protection held a hearing on the first version of the draft act. During the hearing, the social network operators raised various concerns regarding the disclosure of business secrets and data protection in relation to the planned amendments of the NetzDG. After the hearing, the draft act to amend the NetzDG was revised in various places, including an adaptation of the reporting obligation for the use of automatic content recognition procedures, and ensuring data protection in the appeal procedure. Nonetheless, there are still numerous legal uncertainties for the social network operators and the second draft also act ignores the current legal developments at the European level.

In the assessment of the second draft act to amend the NetzDG, special attention should be drawn to the following issues:

- **Regulations disregard the liability regime of the E-Commerce Directive**
- **Unequal treatment of social network operators und video-sharing platform services is built into the draft act**
- **National transposition violates the requirements of the AVMS Directive**
- **Country-of-origin is not taken into account**
- **Current legal development at the European level is not taken into account**



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Core amendments to the submitted second draft act will impair various European legal principles. Especially under the provisions of the Charter of Fundamental Rights of the European Union (2012/C326/02), the E-Commerce Directive (2000/31/EC) and the AVMS Directive, several concerns arise.

- **Regulations disregard the liability regime of the E-Commerce Directive**

The revision of the reporting obligation in Section 2 NetzDG is accompanied by significant changes for the social network operators. Based on Section 2 (2) NetzDG, the social network operators are to be obliged to describe the main features and functions of automatic content recognition systems. In addition, the operators are obliged to describe the coverage of the used tools and provide information on the use of training data. The regulation therefore continues to convey the impression that the social network operators are obliged to use automatic content recognition systems or automated upload filter to detect illegal content.

Based on Art. 15 (1) E-Commerce Directive, the Member States have committed to not adopting any general provisions for service providers to search for any kind of content – especially illegal content. In the current version of the NetzDG, the obligation implies the impression that social network operators are obliged to implement systems to search for illegal content, even where no suspicion exists. The planned reporting obligation involving automatic content recognition systems is not consistent with the liability regime of the E-Commerce Directive. According to Art. 15 (1) of the Directive, service providers are obliged to act if they have ascertained that a user has published illegal content, but there is no obligation to act proactively against illegal content. All in all, there is no European regulation which obliges service providers to proactively search for illegal content.

With Section 3b NetzDG (Appeal procedure) and 3c NetzDG (Arbitration), the Federal Republic of Germany is creating a legal basis for the implementation of out-of-court procedures. In future, social network operators will be obliged to implement such out-of-court procedures. In the Appeal procedure, all blocked or deleted content – not only the content from the complaints procedure – needs to be reviewed once more. Such a review is intended to take place on the basis of the justified request of the user or the complainant. In the first draft submitted for notification, only the content of the complaint procedure should be reviewed in an Appeal procedure. It remains unclear why such a significant extension is necessary. Based on such an extension of the obligation to carry out Appeal procedures, there is also the risk, that the self-formulated community standards of the social network operators will be restricted in their application.

Article 14 (3) E-Commerce Directive offers the possibility for the authorities and courts of the Member States to take further measures to prevent or stop infringement by service providers. Likewise, measures can be taken to remove or block content. For this reason, the admissibility of out-of-court procedures seems questionable. The concerns outlined above will promote fragmentation and impair the functioning of the Internal Market in Europe.



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- **Unequal treatment of social network operators und video-sharing platform services is built into the draft act**

The submitted draft act creates different legal provisions for social network operators and video-sharing platform services as defined by the AVMS Directive for handling illegal content. Under the provisions of the E-Commerce Directive, both sets of market participants – social network operators and video-sharing platform services – are considered to be service providers. As such, the unequal treatment of the two sets of service providers seems questionable from the perspective of EU law. All in all, unequal treatment of service providers of the same kind does not appear to be permissible.

- **National transposition violates the requirements of the AVMS Directive**

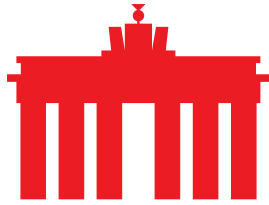
According to Art. 28b (3) AVMS Directive, the Member States are required to adopt appropriate measures for protecting different user groups – e.g. minors – against certain content on video-sharing platforms. This commitment includes content that impairs the physical, mental or moral development of minors, content that incites users to violence or hatred and content whose dissemination constitutes a criminal offence under European law. Based on Art. 28b (5) AVMS Directive, the Member States are responsible for developing procedures to review the appropriateness of the measures, with the obligation for the video-sharing platform services falling under Art. 28b (3) of the AVMS Directive. The Directive clarifies that, from a legal perspective, the national authority should act independently and should function separately from the government.

Section 3e NetzDG specifies which provisions apply to video-sharing platform services. The provision also prescribes that video-sharing platform services are subject to the supervision of the German Federal Office of Justice (BfJ). The Federal Office of Justice has been established as a federal authority in accordance with Article 87 (3) of the German constitution (Grundgesetz, GG). The autonomy of the authority set out in Article 87 (3) GG refers to the autonomous organisational structure of the institution but not to the autonomy or independence of its freedom of action. The Federal Office of Justice is not a legal entity. In its position as a federal authority, it is subordinate to the German Federal Ministry of Justice and Consumer Protection (BMJV) and the federal government.

With the partial transposition of the AVMS Directive into national law, the Federal Republic of Germany is creating a supervisory structure for video-sharing platform services in the NetzDG which violates the requirements of the AVMS Directive.

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

In its first statement on the notification of the amendment to the NetzDG, eco already criticised the violation of the country-of-origin principle, based on Art. 3



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and Rec. 22 of the E-Commerce Directive. According to Rec. 22, the supervision of digital services, e.g. of a service provider, is up to the country of origin. The competent authorities of a Member State are to ensure that protection of all citizens in the Union can be guaranteed.

The revised reporting obligations for social network operators does not respect the country-of-origin principle. Rather, the German Federal Republic ignores the exception to the country-of-origin principle of the E-Commerce Directive, which does not allow a blanket solution for national and wide-range measures. The reporting obligation of the NetzDG would affect an increasing number of social network operators. This completely disregards the fact that the existing exception was created in order to assess and resolve individual cases. The German legislator has set a precedent with the NetzDG, which will lead to an increasing fragmentation of the European Internal Market.

- **Current legal development at the European level is not taken into account**

With the notified draft act, the Federal Republic of Germany is attempting a further regulatory unilateral effort in Europe. Examples of similar or conflicting efforts at the European level relate to the proposed draft of the Digital Services Act (DSA), the Code of Conduct on countering illegal hate speech online, and the measures pursued by the EU Democracy Action Plan: for example, the guidance against disinformation.

In recent years, several Members States of the European Union have passed laws to combat illegal content online. The EU Commission has commented on the legal developments in France, Germany and Austria with words of warning and pointed out the risk of fragmentation of the Internal Market. In 2019, the EU Commission announced a revision of the E-Commerce Directive, which was adopted in 2000. The reform is intended to develop a legal framework for digital offerings that have developed in the meantime, to modernise liability issues, and to complement the existing framework. The reform of the E-Commerce Directive received the title of “Digital Services Act”. In December 2020, the EU Commission published its draft for the Digital Services Act, including revised liability requirements.

With its measures to amend the NetzDG, the Federal Republic of Germany does not give consideration to the principle of loyal cooperation laid down under Art. 4 (3) of the Treaty of the European Union (2010/C83/01). Based on the Treaty, the Member States have committed to supporting and respecting each other in order to carry out the tasks of the European Treaties. The EU Commission should raise concern regarding the draft act submitted for notification. The Federal Republic of Germany has amended the NetzDG through three reform procedures over the last two years. Instead of specifying the NetzDG more and more at national level, the efforts of the Federal Republic of Germany should be aimed at creating a harmonised and EU-wide legal basis for handling illegal content online based on the consultations for the DSA.



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- **Conclusion**

eco is expressly committed to the fight against illegal content online; a commitment supported, for example, through the eco Complaints Office.

The draft act submitted for notification has been revised after criticism for the companies concerned and following the parliamentary consultation process. However, from the perspective of the affected companies, there are still considerable issues arising from European law – e.g. the E-Commerce Directive and the AVMS Directive. The Federal Republic of Germany had the opportunity to dispel numerous concerns on the amendments of the NetzDG in the previous consultation process. eco regrets that the opportunity was not used to develop legally secure and proportionate regulations.

With the submitted draft act to amend the NetzDG, the Federal Republic of Germany has disregarded various und fundamental agreements of the European law – e.g. the country-of-origin principle. The German legislator's use of exceptions to regulate individual cases in the European Law to adjust the handling of illegal content online is unacceptable. Furthermore, the disregard of the existing liability regime – Art. 14 and 15 of the E-Commerce Directive – is questionable and requires a critical assessment by the EU Commission.

Finally, the submitted draft act conflicts with general principles of human and fundamental rights of the European Union. The obligations for social network operators provided by the NetzDG influences the right to a fair trial of every person, as guaranteed by Art. 6 of the European Convention on Human Rights. The numerous existing obligations will be once again further expanded upon by the submitted draft act. In cases of violations or disregard of the obligations under the NetzDG, the social network operators will be faced with high fines. The threat of fines increases the risk of restriction of freedom of opinion und information under Article 11 of the Charter of Fundamental Rights of the European Union (2012/C 326 (02)). In addition, the obligations of the NetzDG will impair the freedom to conduct a business under Art. 16 of the Charter.

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#### **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.