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## Guidelines

### on the revision of the Network Enforcement Act

Berlin, 16 April 2020

In response to several right-wing extremist attacks in Germany, various measures to curb hatred, incitement and right-wing extremism on the internet have been discussed. Among other things, the federal and state Interior and Justice Ministers as well as the German federal government have passed resolutions with recommendations to strengthen the rule of law, to prosecute offenders more effectively and to extend the obligations for social network operators under the Network Enforcement Act (NetzDG).

Based on this, two draft laws on the participation of associations have been published in very short succession by the responsible German Federal Ministry of Justice and Consumer Protection (BMJV).

In December 2019, the draft law to combat right-wing extremism and hate crime was presented. Among other things, the legislative package is intended to create a reporting obligation in the NetzDG, which aims to identify users who publish illegal content. On 19 February 2020, the draft law was adopted by the Federal Cabinet. The draft had already been submitted to the European Commission for notification a few days earlier.

In January 2020, a draft law to amend the NetzDG was presented. In particular, the amendment act is intended to extend the existing obligations, such as the content of transparency reports from social network operators, and to create procedures for out-of-court dispute settlement. On 1 April 2020, the Federal Cabinet approved the draft bill to amend the NetzDG. This draft law is also subject to notification by the European Commission and was submitted a few days before the cabinet's decision.

eco – Association of the Internet Industry supports the containment of hate, incitement and right-wing extremism as well as the fight against illegal content on the internet. In order to align the goals intended by the draft laws with the options of social network operators, eco sees the need to formulate some guidelines for the ongoing debate.

- **Legal certainty on scope and terminology**

With the formulation on the applicability of the NetzDG, the legislators have attempted to introduce a legal definition for the term “social network”. Practical experience shows that the review of the underlying wording has led to legal uncertainties among service providers, which are usually only eliminated if a minimum number of users is required. The legislators should consider a possible reform plan to create the necessary clarity of standards with regard to the applicability of the NetzDG. Furthermore, it needs to be clarified whether the legislators want additional service providers to comply with the provisions of the NetzDG and to what extent this inclusion is reasonable and feasible.

- **Agreement on reasonable and proportionate reporting obligations**

With the introduction of the NetzDG, the legislators have already created extensive reporting obligations for social network operators. These include information on the number of complaints received in the reporting period, a breakdown of the reasons for complaints and the number of



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content deletions or blockings based on these complaints. Initial evaluations of all transparency reports of the last two years show that on average 24.1 percent of all user complaints justify the deletion or blocking of content. In order to properly implement the reporting obligations, social network operators have made considerable investments in recent years in developing and optimizing their complaints and reporting systems. In the event of a possible revision of the reporting obligations, it must be ensured that only non-sensitive information is published. Sensitive information is usually considered to be information that may be related to trade secrets or innovations.

- **Adequate requirements for the complaints procedure**

In addition to the reporting obligation, the NetzDG includes minimum requirements for the procedure for dealing with user complaints. In particular, the legislators' requirements relate to the way the complaints procedure is designed and the deadlines for deleting or blocking reported content. When revising the existing obligations, the legislators should ensure that they are proportionate to the purpose of the law. An increasing shift of sovereign duties to private companies is not in users' interest and ultimately casts a questionable light on the Federal Government's handling of the advancing digitalisation. In addition, investments already made in developing and optimizing the complaints process should not be subsequently devalued and impaired by possible adjustments to the complaints procedure.

- **Shaping framework conditions for regulated self-regulation**

In order to evaluate or process user complaints, or to weigh up individual legal issues specific to a case, social network operators can involve recognized, regulated self-regulation institutions in the case handling process. With the introduction of the NetzDG, the legislators have already created this option as well as the requirements for the institutions. Building on this, the regulated self-regulation institutions have taken personnel and organizational precautions in recent years to be able to handle cases in the context of the NetzDG. The option of involving regulated self-regulation institutions is to be assessed positively and should be maintained or not be restricted in a revision of the NetzDG. However, experience to date shows that the procedure for recognizing such institutions is very lengthy. Therefore, a revision of the NetzDG should be used to establish and permanently ensure an efficient and accelerated recognition procedure.

- **Dealing with reporting obligations**

One of the central demands resulting from the discussions of the past months is the introduction of a reporting obligation in the NetzDG. This means that social network operators will be required to transfer content and user data from the complaints process to a central office at the state prosecution or criminal investigation authorities. For various reasons, establishing such a reporting process is seen as questionable. It is currently unclear whether such a far-reaching reporting obligation will be appropriate and actually contribute to effectively combating right-wing extremism and hatred on the internet. For this reason, the introduction of such a broad obligation for social network operators should be dispensed with and instead the institutions of the rule of law should be provided with the necessary personnel and technical capacities.

- **Designing legally secure procedures for out-of-court dispute settlements**

With the cabinet draft for the amendment of the NetzDG, procedures for out-of-court dispute settlements (counter submission and arbitration) are to be created in the NetzDG for the first time. In



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order to make the counter-notification procedure mandatory, social network operators will have to provide additional funding for technical, personnel and organizational measures. In addition, options for establishing and integrating independent arbitration boards are to be created.

The legislators should clarify the objective to be achieved by out-of-court dispute settlements. If the disputed content is to be restored at the end of the respective proceedings, it will be necessary to discuss whether and how the dispute settlement procedures and their time requirements can be carried out while observing the applicable retention period pursuant to the NetzDG. It is also necessary to clarify whether and, if so, what civil-law claims the users would have against the operators of social networks after having gone through a counter-notification and an arbitration procedure.

- **Agreement on a European Community standard to combat hate and hatred on the internet**

A comparison of the European law-enforcement area shows that the Federal Republic of Germany dared to go it alone at an early stage with its decision to introduce the NetzDG. When commenting on the notification of the French legislative procedure to combat hate content on the internet in its opinion [C\(2019\) 8585 final](#) dated 22.11.2019, the European Commission announced that a European legislative act was being sought.

Ultimately, the EU Commission is asking the French Republic to suspend national legislative procedures. Considering such an initial position, it remains unclear why the German legislators have submitted two procedures at once to extend and revise the NetzDG instead of becoming involved in the European legislative process. The legislators should act with extreme caution to prevent disintegration of European legislation.

### **Guidelines for a revision of the NetzDG**

eco has dealt intensively with the drafts for the expansion and revision of the NetzDG. The following guidelines should therefore be taken into account in the course of further reform processes:

- The companies concerned need a clear scope of applicability for the NetzDG. Only if this is defined clearly enough can the platform operators intended by the legislators fulfil their obligations within the law.
- When formulating the reporting obligations, care must be taken to ensure that they are well designed and proportionate. An adjustment to the existing provisions should not lead to social network operators being obliged to disclose business secrets.
- The obligations for dealing with complaints should be in line with the legal requirements and objectives under discussion and should be proportionate. The time limits for handling complaints should allow for a proper and objective examination, which also allows for an assessment of individual circumstances.
- The possibility of including regulated self-regulation must be strengthened. Regulatory measures in this context should aim to establish clear rules for recognition and legally binding deadlines for decisions on the recognition procedure.
- The introduction of a reporting obligation is seen as questionable and requires a legally secure framework for social network operators. In addition, further discussion is needed as to whether such a measure would effectively solve the problems addressed in the political debate.



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- The introduction of out-of-court dispute settlements needs to be clarified. In this context, it must first be clarified whether the processing of a complaint including out-of-court dispute settlement can be carried out within the retention period of deleted or blocked content as provided for by the NetzDG.
- Similarly, a legally compliant situation must be created for social network operators in connection with out-of-court dispute settlements. To this end, the legal consequences of the implementation of dispute settlements must be clarified in advance with regard to possible subsequent civil law disputes.

When looking at the problems seized upon by the NetzDG from a European perspective, it becomes clear that no European approach exists so far. For this reason, common standards for dealing with hate content on the internet should be discussed at a European level. In this context, it should be pointed out that the EU Commission has already announced its own activities and has promised the timely adoption of corresponding EU legislation. A corresponding legislative restraint on the part of the Federal Republic of Germany would therefore be desirable.

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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 digitalization. That is why eco advocates for a free, technology-neutral, and high-performance Internet.