

Important Legal Basis for the Processing of Complaints by the eco Complaints Office

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Note: This itemization of legal provisions is intended to provide a general overview of the legal basis for the work of the eco Complaints Office. In so doing, it does not claim to cover all the mentioned provisions in their entirety; rather, in each instance, it concentrates on a brief explanation of the aspects relevant to the work of the Complaints Office.

Provider Liability in Accordance with the Telemedia Act (TMG)

The legal basis of the eco Complaints Office's work includes, among other elements, the liability structure as regulated by the TMG.

In principle, each provider is responsible for its own content, as stipulated in Section 7 of the TMG (so-called "content providers").

Pursuant to Section 10 of the TMG, hosting providers (intermediaries) are only responsible for the information they store for a user if they become aware of its unlawful nature. In such cases, however, they must also take immediate action and take down or otherwise legalize this content.

The situation is somewhat different for access providers who provide access to third-party information or transmit it in a communication network. Pursuant to Section 8 of the TMG, such providers are not responsible for third-party information unless they have selected the information or its addressees, or have cooperated with a third party in order to commit unlawful acts.

In accordance with this structure, the eco Complaints Office therefore as a rule informs the hosting providers, platform providers, and/or content providers. The following legal provisions in particular determine when content is considered to be unlawful and is to be reported to the provider for the purpose of its take-down.

1. German Interstate Treaty on the Protection of Minors in the Media (JMStV) and German Youth Protection Act (JuSchG)

Among other areas, the German Interstate Treaty on the Protection of Minors in the Media (JMStV) regulates which types of content are prohibited in electronic media, the category to which the Internet belongs.

a. Absolute Prohibited Content

In Section 4 (1) of the German Interstate Treaty on the Protection of Minors in the Media (JMStV), there is a list of absolute prohibited content. Even with access restrictions for minors, this content may neither be made accessible nor disseminated via telemedia:

- Nos. 1 – 6 itemize a number of types of content, the dissemination of which may also constitute a criminal offense. These include, for example, incitement of the masses, the use of symbols of unconstitutional organizations, or the dissemination of propaganda material by these organizations. For more information on these types of content, see details below under the corresponding criminal law provisions (Sections 86, 86a, 130, 131, 130a, as well as parts of 184a to 184c StGB).

- Pursuant to No. 7, content glorifying war is prohibited – that is, content that glorifies war in a propaganda-like manner, for example by presenting warlike acts which are contrary to international law as legitimate recourse or which block out the negative consequences of war.
- According to No. 8, content that violates human dignity by, for example, representing people who are exposed to severe physical or mental suffering, is prohibited.
- No. 9 prohibits depictions of minors in unnatural sexualized poses, i.e. in sexualized poses that are not typical of their age.
- No. 11 prohibits works which are included in the List of Media Harmful to Young People pursuant to Section 18 of the Youth Protection Act (JuSchG). Included here are media likely to impair the development of children or adolescents or endanger their upbringing as self-reliant and socially competent persons.

b. Relative Prohibited Content

In addition to the absolute prohibited content already specified, there is also content that is not categorically prohibited, but that may not be made accessible to minors, or only minors of certain age groups.

- According to Section 4 (2) JMStV, the provider must ensure that only adults have access to certain content. This includes for example [“ordinary”] pornographic content (No. 1), content which is contained in the List of Media Harmful to Young People pursuant to Section 18 JuSchG (No. 2), as well as offers that are obviously highly harmful to minors (No. 3).
- Section 5 of the JMStV stipulates that the provider must ensure that minors of certain age groups are not normally cognizant of the developmentally impairing content. The age groups (6, 12, 16, and 18 years) and the content which is considered to be developmentally impairing are derived from Section 14 JuSchG.

The provider can comply with its obligation under this provision by means of various measures, for example, by choosing the time during which the offers are disseminated or made available, so that minors of the age groups concerned are not usually cognizant of the offers (Para. 3). An example of such is where content which is deemed to be developmentally impairing for persons under 16 years of age may only be made accessible between 10 p.m. and 6 a.m. (Para. 4, Clause 2).

2. German Criminal Code (StGB)

The provisions of the German Criminal Code (StGB) which are of particular relevance to the work of the eCo Complaints Office are:

a. Crimes Against Sexual Self-determination

- § 184 StGB, Freely Accessible Adult Pornography

Pornography may only be made accessible to adults. Making pornographic content freely available on the Internet is therefore prohibited under this provision. Anyone wishing to disseminate pornographic content must ensure that no minor can access it (attained particularly through closed user groups and age verification systems). Determining whether content is

pornographic is not always easy; generally speaking, content is deemed to be pornographic when it depicts sexual behavior in a coarsened manner which casts human beings as mere objects of sexual desire.

- § 184a StGB, Violent and Animal Pornography

The dissemination of pornographic content depicting acts of violence against a person or sexual acts involving animals is at all times prohibited.

- §§ 184b, 184c StGB, Child and Juvenile Pornography

Content which relates to sexual activities committed with, by, or before an under-aged person, which presents these persons partially or completely naked in unnatural sexualized poses, and the sexually provocative reproduction of the naked buttocks or genitalia of children, is not allowed to be distributed, produced, or owned.

- § 176b StGB, Grooming

Grooming is also prohibited under the category of criminal offenses concerning the sexual abuse of children. This includes, inter alia, influencing a child by making pornographic content accessible with the intention of, for example, leading the child to sexual activity. If this is done via the Internet, the scope of responsibility of the eco Complaints Office is brought into effect.

- § 201a StGB, Images of Naked Minors

Under this provision, offering images of naked persons under the age of 18 for payment – online or offline (Para. 3) – is prohibited.

b. State Security Offenses, Disturbance of the Public Peace

- Sections 86, 86a StGB, Propaganda Material and Symbols of Unconstitutional Organizations

Examples of these offenses are the use of a swastika, of the flag of the “Islamic State”, or of slogans of organizations which have been declared as unconstitutional.

- Section 130 StGB, Incitement of the Masses

Incitement of the masses is understood to mean invoking hate against a part of the population or a certain group in a manner which disrupts the peace. This includes, for example, an attack on human dignity through insults against such a group or of individuals because of their belonging to that group. The group or part of the population against which the incitement is directed may be associated, among other features, with nationality, religion, or sexual orientation. In addition, Holocaust denial is also punishable under incitement of the masses (Para. 3).

When interpreting Section 130 of the German Criminal Code, care must always be taken to ensure that it is interpreted in the light of the freedom of expression protected by the constitution (Article 5 GG – Basic Law for the Federal Republic of Germany).

- Sections 129, 129a StGB, Criminal and Terrorist Organizations

Online as well as offline, it is forbidden to recruit members or supporters to terrorist or criminal organizations (Sections 129 (1), 129a (5) StGB).

- Sections 111, 126, 130a StGB, Incitement to Crime, Threatening to Commit Crime, and Instructions to Crime

Content that incites an illegal act, threatens certain acts, or which could serve as a guide to such acts, is prohibited by these provisions.

- Section 131 StGB, Depictions of Violence

Extreme depictions of violence that violate human dignity by showing particularly cruel acts are prohibited. It is also forbidden to downplay or glorify extreme violence.

- Section 166 StGB, Revilement of Religious Faiths

Reviling religious confessions or a religious community is prohibited if it endangers public peace.

- § 90a StGB, Disparagement of the State and its Symbols

It is prohibited to disparage or deliberately denigrate the Federal Republic of Germany or one of its states, or to disparage the symbols, emblems, etc. of the Federal Republic or its states.

3. Act Against Unfair Competition (UWG)

Complaints about unsolicited advertising emails (spam) are processed by the eco Complaints Office according to the rules of Section 7 UWG. Pursuant to Section 7 (2) No. 3 of the UWG, advertising may only be sent by email if the recipient has expressly agreed to this in advance.

An exception to this is formulated in Section 7 (3) of the UWG: Within a customer relationship, email advertising is permitted under very strict conditions between the advertiser and the recipient.

Scope of Responsibility of the eco Complaints Office

The above assessment of legal provisions by the eco Complaints Office is not conclusive; the eco Complaints Office can also determine illegality of Internet content and take appropriate measures based on legal provisions not specified here.

It should also be noted that not every report of possible illegal content, regardless of its form, leads to action by the Complaints Office. In particular, the scope of responsibility of the eco Complaints Office is generally not brought into effect in cases of predominantly civil law issues (e.g. copyright infringements), or absolute criminal offenses (e.g. offenses involving slander, cf. Section 194 StGB), or other cases that would require extensive clarification of the facts.