Germany

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Country Summary: In response to public debate on the spread of hateful content online, Germany enacted the Network Enforcement Act (NetzDG) in 2017, which regulates criminal content on large social networks. While this did not create new speech related crimes, the law provides for reporting mechanisms of hateful content by users, take-downs obligations, and an obligation to report certain content (together with user identification data) to law enforcement. In 2023, the German Government announced that NetzDG will be repealed, as the EU's Digital Services Act (DSA) largely overrides it. Six amendments to the Criminal Code, all issued during Covid, introduced speech restrictive provisions: one law criminalizes engaging in the dangerous dissemination of personal data in a manner which is suited and intended to put that person in the danger of serious harm, one law extends criminal liability for insults against vulnerable groups or their members based on their belonging to this group, one law criminalizes the dissemination and possession of instructions to commit sexual abuse of children, one law punishes the violation of intimate parts of the body by taking photographs or other images, one law criminalizes disturbing public peace by threatening to commit offenses against sexual self-determination or to inflict dangerous bodily harm, one law punishes the rewarding and approval of offenses even where the offense has not yet taken place. Courts have not yet been asked to rule on these new provisions.

Introduction

In Article 19's Global Expression Report 2022, Germany ranked 9th out of 49 countries in Europe and Central Asia,[306] Reporters Without Borders 2022 World Press Freedom Index placed Germany 16/180 with a score of 82.04.[307] In Justitia's Free Speech Index, Germany ranks 15th out of 33 countries with a score of 66 (medium approval).[308] During the 2015-2022 reporting period, three major developments with potentially speech restricting impact can be observed for Germany, namely the introduction of statutory platform accountability laws, most prominently the NetzDG and subsequent amendments, case law fostering civil law filter obligations for online platforms (notice and stay-down), and amendments to the Criminal Code introducing new speech restricting rules (in response to new phenomena like "enemy lists"). These refer to collections of data, especially address data, but also information about the personal circumstances of other people, which are published on the Internet - by extremist groups, among others. Those affected are usually political opponents such as politicians, journalists and activists.

Starting in 2015, public awareness increasingly focused on the spread of hateful criminal content online (defamatory insults, incitement to hatred against ethnic groups, etc.). It was often perceived (and to some degree also monitored[309]) that many social networks were performing poorly when such content was flagged by other users, at times leaving reporting users with frustrating results or no reaction at all. To understand the political dynamics of the Mid 2010s, one should also keep in mind that (perhaps with the exception of Google/YouTube), social media companies of that time were still politically immature. Facebook and Twitter did not have the level of professional representation and political contacts (in Europe) as they do now. Some commentators argue that the "hate speech crisis" in Germany that started in 2015 was primarily fueled by right-wing rhetoric in response to the refugee crisis of this time. In my opinion, this is merely a symptom; another factor is much more decisive: the concurrent rise of algorithmic content curation. The algorithms in place were, at least at that time, often heavily aimed at maximizing user engagement, and thus rewarding borderline, provocative or aggressive content.[310]

[306] https://www.globalexpressionreport.org/regions-europe-and-central-asia
[307] https://rsf.org/en/index?year=2022
[308] https://futurefreespeech.com/interactive%20map/
[309] In 2016/2017 Jugendschutz.net, a German youth protection agency, monitored on large social networks' response to take-down requests. The German Lawmaker partially relied on these findings for the justification of the NetzDG (BT-Drs. 18/12356 p. 1-2).
[310] https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/

One of the arguments was that civil litigation could not effectively set boundaries. In the field of hate speech - and unlike for Copyright Law - private litigation was ill-suited to pressure online companies to strengthen their efforts.[311]

I. Legislation

NetzDG 2017 - pushing for take-downs and transparency

By the end of 2016, lawmakers started working on new statutory obligations including public oversight over the platforms' efforts to deal with ill content. In spring 2016, a draft Network Enforcement Act (NetzDG) was presented. The final Bill was approved by Parliament in summer 2017 and took full effect on January 1st, 2018. Here are the essentials:

- Criminal Content: The obligations under the law only apply to criminal content - where the dissemination would amount to a crime under the German Criminal Code (e.g., insult, defamation, incitement of hatred against ethnic groups).
- Large Social Networks: The law's main obligations only apply to large social networks (> 2 million users within Germany). After hesitating on this question for some time, the competent regulator finally decided to treat messenger-apps with large groups as social networks as well, sanctioning *Telegram* (case still pending).
- User-friendly reporting mechanisms: One of the main pillars of NetzDG 2017 is the obligation in § 3(1) S. 2 to maintain an easily recognizable and easy-to-use mechanism for submitting complaints about illegal content. Some companies, such as YouTube, incorporated these mechanisms within their flagging mechanisms. Facebook chose to introduce parallel mechanisms and, as a result, was fined for making the NetzDG-reporting-mechanism too hard to find.
- Take-down-obligations: While the draft NetzDG had contained a rather strict time-frame for obligatory take-downs, the final law's regime in § 3(2) is more flexible:
    - only systematic failure to deliver proper take-downs might be sanctionable,
    - while manifestly illegal content is expected to be taken down within 24 hours, more complex decisions shall only "in general" be taken within 7 days, plus an explicit exception (more time allowed) where the question of legality depends on facts,

[311] Affected persons (e.g., when a platform denied take-down of defamatory postings violating that person's rights) only very rarely took the efforts to sue the platforms. The first reported case dates back to 2017. Until today, only a few cases have been reported (mostly: strategic litigation supported by HateAid). The reasons for this lack of private enforcement can be explained as rational disininterest to sue (no deep pockets, no substantial damages to be expected, high risks and costs of litigation "just" over a single post).

- platforms might outsource certain take-down decisions to a self-regulatory body (Meta and Google are financing the NGO FSM for this, which is delivering a steady flow of well-reasoned and balanced content-decisions).

Platform transparency reports under the NetzDG show that millions of pieces of content have been reported to platforms under the NetzDG; take-down ratios vary, with averages at about 10-20% of the total number of complaints. Transparency reports indicate that platforms can handle the time-frames, with most decisions being taken within 24 hours.[312] So far, no sanction has been delivered for systematic failure to take-down content, however, a systemic failure case is currently pending against Twitter.

- Transparency Reporting: § 2 NetzDG obliges platforms to submit biannual reports on their handling of complaints, take-down numbers, processing times etc. All major platforms have regularly published such reports.
- Legal Representatives: § 5 NetzDG requires platforms to appoint a person authorized to receive service within Germany. This would allow for speedier initiation of civil proceedings, e.g. on take-down claims. Major platforms complied with the obligations; in most cases, law firms have been appointed as representatives.

NetzDG 2021 - In-house appeals and notifications of law enforcement

As the fear of overblocking had been a major point of criticism against the law, politicians soon began discussing user rights, which - together with a need to implement the 2018 Revision of the Audiovisual and Media Services[313] led to a 2021 Law amending the NetzDG.[314] Parallel to this, the Law to fight Right-Wing Extremism and Hate Crime[315] also introduced some major amendments (NetzDG 2021). Highlights include:

- Notification of Law Enforcement: § 3a NetzDG introduces an obligation to report certain content (together with user identification data) to law enforcement avenues when social networks take action after receiving a NetzDG-complaint and find reasonable suspicion for a serious crime. § 3a NetzDG served as a role model for Article 18 of the Digital Services Act. However, for social networks, § 3a NetzDG has been a red line. While none of them chose to file suit against the original NetzDG provisions, Google and Meta, and later TikTok and Twitter, took this particular obligation to court and have in large parts won their cases (argument: conflict with the country-of-origin-principle of the E-Commerce-Directive for procedural

[312] See Government Report on the Evaluation of the NetzDG (German), p. 11
[313] https://digital-strategy.ec.europa.eu/en/policies/revision-avmsd
[314] https://www.bundestag.de/dokumente/textarchiv/2021/kw18-de-netzwerkdurchsetzungsgesetz-836854
[315] https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-rechtsextremismus-701104

reasons; preliminary rulings now confirmed by a Court of Appeals,[316]) leaving § 3a NetzDG de-facto non-applied as of to date.

- Internal complaint-handling system: The new § 3b NetzDG made it obligatory to introduce an in-house appeals mechanism (plus safeguarding certain minimum standards). § 3b also allows for appeals from notice-senders (to appeal against platform decisions not to take action), thus potentially strengthening restrictive decisions in some cases. § 3b NetzDG has been widely applauded and served as a role model for Article 20 DSA. However, major platforms have successfully challenged the provision in court (together with § 3a, see above: violation of country-of-origin principle).

Lessons learned and a shifting rationale

In 2023, the German Government announced that the NetzDG will be repealed, which came as no surprise as the DSA largely overrides the NetzDG. Since its introduction in 2017, the law has been intensely analyzed by legal scholars and has undergone an extensive (government funded) evaluation.[317] Proceedings against Meta[318] have led to substantial fines for non-compliance (and to adjustments taken by the platforms), while similar proceedings against Telegram[319] and Twitter[320] are still pending. Overall, major platforms have made substantial efforts to comply with the law.

From a helicopter perspective, key take-aways looking back on 6 years of the NetzDG are:

- Big Tech is often willing to make efforts (but might exploit loopholes): The NetzDG showed that to a certain extent, platforms are willing to follow legislation, even if chances of successful litigation against a law are high. However, the NetzDG also showed that some platforms will use legal ambiguities in their favor and that administrative proceedings against the platforms are burdensome.
- Unresolved problems with fundamentally non-compliant services: The difficulties in enforcing the NetzDG against the messaging service Telegram shows that we might lack tools for enforcement against fundamentally non-compliant services (an issue unresolved in the DSA)[321].

[316] OVG NW, Beschluss vom 21. März 2023 – 13 B 381/22; https://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/20_230321/index.php.
[317] BT-Drs. 19/22610; https://www.bundestag.de/webarchiv/presse/hib/2020_09/794452-794452
[318]https://www.heise.de/news/NetzDG-Verstoesse-Facebook-hat-fuenf-Millionen-Euro-an-Strafen-gezahlt-6181705.html
[319] https://www.bundesjustizamt.de/DE/ServiceGSB/Presse/Pressemitteilungen/2023/20230302.html
[320] https://www.bundesjustizamt.de/DE/ServiceGSB/Presse/Pressemitteilungen/2023/20230404.html
[321] See on this HateAid, Quality over Speed - How to strengthen platform-accountability in the Digital Services Act (DSA) 15 February 2022, p. 11.

- Over-Estimation of Overblocking: The main concern in 2017 was that NetzDG would incentivize overblocking. This has been proven unfounded through NetzDG statistics (NetzDG-complaints have not significantly led to overblocking). The debate has been and still is, in parts, exaggerated and is fueled by narratives one-sidedly jumping on conclusions (academia/NGO dynamics play a role here).[322]
- A conflict with European Law: As litigation against the NetzDG (and the parallel KoPl-G in Austria) demonstrates, there is a high likelihood that the NetzDG (and similar national fragmentations) is in conflict with Art. 3(2) E-Commerce-Directive (country-of-origin principle)[323].
- No silver bullets, laws as a motor for "voluntary" efforts: The NetzDG started with a pretty narrow approach. In the end, the discussion and public debate surrounding the law (platforms should take more responsibility) might have had a greater impact on the resources and diligence spent by platforms on safety measures than the law itself.
- A shifting rationale: It is about protecting freedom. It is noteworthy also that the debate about speech restrictions, especially against Hate Speech, has seen significant shifts during the reporting period. Back in 2016, the debate heavily focused on incentivizing social networks to take-down Hate Speech for the sake of fighting this content[324] (stop the infringement!). The focus has shifted: Lawmakers and most scholars emphasize more and more that restricting one person's hateful speech might safeguard free speech and democratic discourse for others (argument: underenforcement of existing speech restrictions leads to silencing effects).[325]

Criminal Code

Since the introduction of the NetzDG, more and more voices have been raised for strengthening criminal law enforcement as well (argument: take-down and prosecute!)

Some procedural amendments were aiming at gathering more evidence channeled through a centralized federal agency (§ 3a NetzDG, see above). Other measures were aiming at

[322] Whilst this is the respected position of the esteemed author Justitia would like to direct readers to two reports which have discussed the relationship between the NetzDG and the rise in similar legislation in authoritarian and semi-authoritarian states: https://justitia-int.org/the-digital-berlin-wall-act-2-how-the-german-prototype-for-online-censorship-went-global-2020-edition/; https://justitia-int.org/the-digital-berlin-wall-how-germany-created-a-prototype-for-global-online-censorship/

[323] OVG NW, Beschluss vom 21. März 2023 – 13 B 381/22 (*Meta v. Germany,* regards NetzDG); see also Opinion of AG Spuznar, 8 June 2023 - C-376/22 (*Meta v. Komm Austria*, regards KoPl-G); see also Holznagel, D., 'Platform Liability for Hate Speech & the Country of Origin Principle: Too Much Internal Market?', Computer Law Review International, 2020, vol. 4, p. 107.

[324] BT-Drs. 18/12727, p. 1.

[325] BT-Drucks. 19/17741, p. 1, 15. The rationale now has been endorsed also by the Constitutional Court of Germany, Beschl. v. 19.5.2020 – 1 BvR 2397/19, par. 32.

specializing existing law enforcement (prosecutors/police departments, e.g. ZAC NRW (Zentral- und Ansorechstelle Cybercrime.[326]

However, the German lawmakers were also active in amending the Criminal Code, that is, introducing new offenses or amending existing ones to cover certain behavior which typically occurs through online interactions. Such legislation often aims at closing loopholes when new online phenomena emerge. The most prominent amendments cover:

- "enemy"- or "we will get you all"-lists: § 126a Criminal Code (StGB, english version),[327] introduced in 2021, makes it a criminal action when someone engages in the dangerous dissemination of personal data in a manner which is suited and intended to put that person in the danger of serious harm (background: Neo-Nazis threatening journalists or others through so called "enemy lists"). Critics fear that the ambiguous wording might put legitimate journalism at risk, though "civic information, … research or teaching, reporting about current or historical events, or similar purposes" is exempted from criminal liability. However, a criminal investigation based on § 126a was initiated against journalists[328] (working for Turkish media outlets, reporting on an opposition member in Turkey and displaying his house) in 2023.
- Hate-mongering insult: § 192a StGB, introduced in 2021, extends criminal liability for insult to cases where vulnerable groups or its members are insulted based on their belonging to this (ethnic, religious …) group (background: traditional insult - § 185 StGB – would not cover these cases which typically are not directed against identifiable specific persons; incitement to hatred in § 130 StGB requires a public impact which might not always be given).
- Instructions to commit sexual abuse of children: § 176e StGB, introduced in 2021, makes the dissemination and possession of such instructions a crime (background: such materials were sometimes discovered during investigations regarding child sexual abuse).
- Violation of intimate parts of the body by taking photographs or other images: criminal offense through § 184k StGB, introduced in 2021, covers so-called Upskirting and similar intrusive acts.
- Disturbing public peace by threatening to commit offenses, § 126 StGB: through amendments introduced in 2021, § 126 now also covers threats with a substantial offense against sexual self-determination or dangerous bodily harm

[326]https://www.justiz.nrw.de/JM/schwerpunkte/zac/index.php;
https://www.nytimes.com/2022/09/23/technology/germany-internet-speech-arrest.html
[327] https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1303
[328]https://www.lto.de/recht/hintergruende/h/durchsuchungen-tuerkische-journalisten-strafrecht-verfassungsrecht-gg-feindeslisten-126a-stgb-staatsanwaltschaft-darmstadt/

- Rewarding and approval of offenses in § 140 StGB: through 2021 amendments, the section now also covers cases where the offense has not yet taken place ("It would be good if politician X was executed").
- Threatening the commission of a serious criminal offense, § 241 StGB: originally, the norm only covered threatening with a felony-level offense; through amendments in 2021, it now also covers e.g. offenses against sexual self-determination (background: threatening with sexual harassment).

No verdicts based on the above-mentioned new norms have been reported so far.

II. Non-Legislative Developments

In Germany, in 2020, police searched 83 apartments and other buildings, seizing evidence like smart phones and laptops. 96 suspects were questioned about hateful posts they made online. One of the suspects was accused of making anti-Semitic comments while another insulted a female politician online.[329]

III. Enforcement

Courts Developing (Upload) Filter Obligations - The Real Deal

Filter obligations through private rights enforcement / litigation play a crucial role when it comes to restricting illegal content online. German courts have been spearheading the evolution of the law here. In a landmark decision in 2004,[330] the German Federal High Court laid the foundations for filter-obligations to be imposed on platforms through civil law. As a consequence, a proper notice might trigger future-oriented filter obligations (notice and stay-down instead of only notice and take-down). The Court extended its logic in this case to decide many other IP cases.

Most scholars argue that similar filter obligations might arise following personality rights infringements, with the landmark case *Künast v. Facebook* now pending before a court of appeals.[331] In this case, defamatory memes were spread on Facebook. Künast demanded Facebook not only to take-down a specific flagged posting, but also similar copies and shared instances of the graphical meme. The District Court agreed. It based its ruling on the undisputed feasibility of filtering for identical instances based on hash values, but also to filter for similar graphics through broadening hash value searches combined with examining results through PDNA (photo DNA) and OCR (Optical Character Recognition).

[329] https://www.reuters.com/article/us-europe-crime-internet-idUSKBN27J1C3
[330] BGH, Urteil vom 11. März 2004 – I ZR 304/01 - Internetversteigerung I.
[331] LG Frankfurt/M., Urteil vom 8.4.2022 – 2-03 O 188/21; Meta's Appeal is pending before Frankfurt Court of Appeals.

It remains to be seen whether this German case law is in line with Article 8 of the DSA. The Court of Justice of the European Union (CJEU) landmark ruling on Article 8 DSA in *Glawischnig vs. Facebook*[332] leaves room for some interpretation. In my opinion, a better analysis is seeing the German case as compatible with Art. 8 DSA.[333]

Conclusion

The above has considered three key legal developments in Germany – the NetzDG, civil law and amendments to the Criminal Code – to illuminate speech restrictive laws during the period under review. It discussed the context in which the NetzDG was drafted and set out the essential elements of the Act. It has covered revisions to NetzDG in 2021, aimed at bolstering user rights, and the twilight days of the Act amidst the passage of the DSA in the EU. This provides a useful juncture at which to assess NetzDG's impact over its 6 years in force. Also, on the theme of online speech regulation, this piece notes the importance of filter obligations through enforcement and litigation – as well as Criminal Code amendments aiming to close loopholes when new online phenomena emerge.

[332] ECJ Case C-18/18, decision of 3 October 2019 (*Glawischnig-Piesczek v. Facebook*).
[333] (1.) In my opinion, it seems a misinterpretation of the Glawischnig-decision that filter obligations would or should require a prior constitutive court order; (2.) It seems a misinterpretation that Art. 8 DSA would only allow for filter obligations which a provider can comply with by relying on 100%-false-positive-free technical solutions; (3.) Hence the German case law implies filtering for similar instances of a specific infringement, the obligations do not amount to general monitoring in conflict with Art. 8 DSA.