ARTICLE 19

Germany: Draft Bill on the Improvement of Enforcement of Rights in Social Networks

April 2017

Legal analysis

Executive summary

In April 2017, ARTICLE 19 analysed the Draft Bill on the Improvement of Enforcement of Rights in Social Networks (the Draft Bill), which has recently been approved by the cabinet of the Federal Government of Germany. The analysis shows that the Draft Bill raises serious concerns under international human rights law, in particular the right to freedom of expression.

The Draft Bill proposes a regime for intermediary liability that incentivises, through severe administrative penalties, the removal and blocking of "clearly violating content" and "violating content", within time periods of 24 hours and one week respectively. This obligation applies without a determination of the legality of the content at issue by a court, and with no guidance to Social Networks on respecting the right to freedom of expression. Intermediaries are not competent to make these complex factual and legal determinations, and the Draft Bill provides no recourse to redress for users whose content is blocked or deleted unfairly pursuant to the Draft Bill.

The likelihood of Social Networks being over-vigorous in deleting or blocking content is compounded by the legal uncertainty pervading the Draft Bill. The threshold at which a Social Network's content removal and blocking processes will be considered so inadequate that it attracts administrative liability is unclear. Together with ambiguities in the definitions of key terms (including of "Social Network"), this is likely to create an environment wherein lawful content is routinely blocked or removed as a precautionary measure. The limited oversight provided by the Administrative Courts does nothing to address the risk of over-blocking, and provides little protection or due process to Social Networks that, in good faith, refrain from blocking or removing content in the interests of respecting freedom of expression.

While the Draft Bill does not create new content restrictions, it compels private companies to remove or block content on the basis of the German Criminal Code, specifying a series of provisions that clearly contradict international human rights law. This includes criminal prohibitions on "defamation of religions" (blasphemy), defamation of the President of the Federation, criminal defamation and insult, denial of National Socialist-era crimes, among others. While these provisions are rarely applied in Germany, the prospect of censorship on these bases expanding under the control of private actors is deeply troubling.

Amendments to the Telemedia Act, proposed in the Draft Bill, are also concerning, as they will significantly widen the bases by which law enforcement authorities are able to request user data from intermediaries without requiring a court order.

ARTICLE 19 is also concerned that the Draft Bill sets a dangerous example to countries that more vigorously enforce criminal laws against legitimate expression, who are also seeking to further enlist private companies in these efforts.

Summary of recommendations

1. The Draft Bill should be withdrawn, with consideration given to retaining Section 2 on reporting requirements in alternative legislation to increase transparency around online content moderation;
2. The German Criminal Code should be comprehensively revised to remove offences that are not compatible with international human rights law on freedom of expression;
3. The Telemedia Act should be revised to ensure that any requests from law enforcement authorities to intermediaries for user data is made on the basis of a court order.

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Introduction

In this legal analysis, ARTICLE 19 reviews the German Draft Bill on the Improvement of Enforcement of Rights in Social Networks (the Draft Bill) for its compatibility with international human rights law.

ARTICLE 19 notes that there are now several versions of the Draft Bill, including a version that has been sent for comments to stakeholders, the notification version, and the version that has been approved by the cabinet of the Federal Government. This analysis is based on the unofficial English translation of the version of the Draft Bill that has been sent to stakeholders.[1]

ARTICLE 19 has extensive experience in analysing laws pertaining to the right to freedom of expression online[2] as well as legislation on "hate speech". Intermediary liability for content created by third parties is a recurring issue and an area where we see increasing pressure on private companies to control information flows. Recently, we have expressed concerns at attempts in this regard at the European Union level,[3] which the Draft Bill emulates and expands upon. Our policy position on this is set out in "Internet Intermediaries: Dilemma of liability".[4] The types of content limitation foreseen in the Draft Bill are also the focus of several of ARTICLE 19's standard setting policies, including on "hate speech",[5] defamation,[6] and national security.[7]

The Draft Bill addresses specific forms of online intermediaries, defined as "Social Networks", and imposes duties on them, *inter alia*, to adopt particular complaints procedures regarding content that violates provisions of the German Criminal Code; to delete or block access to that content; and to report on their practices in this regard periodically to administrative authorities. Failure to abide by these conditions results in the imposition of administrative fines.

This analysis sets out relevant international human rights law standards before examining the main freedom of expression concerns with the Draft Bill. ARTICLE 19 finds that the Draft Bill does not comply with international human rights law, and recommends its withdrawal.

We also urge the German Government to bring its legislation into full compliance with international freedom of expression standards and we stand ready to provide further assistance in this process.

[1] The copy of this version of the Draft Bill is reproduced in the Annex to this analysis. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on a mistaken or misleading translation.
[2] See, for example, ARTICLE 19, Myanmar: Telecommunications Law, Legal Analysis, March 2017.
[3] ARTICLE 19, EU Commission Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision, June 2016.
[4] ARTICLE 19, Internet Intermediaries: Dilemma of Liability, 29 August 2013.
[5] ARTICLE 19, Hate Speech Explained: A Toolkit, December 2015.
[6] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2nd Edition, February 2017.
[7] ARTICLE 19, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1996.

International human rights standards

ARTICLE 19's comments on the Draft Bill are informed by international human rights law and standards, in particular regarding the interdependent and mutually reinforcing rights to freedom of expression and equality.

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[8] and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[9]

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed that the scope of the right extends to the expression of opinions and ideas that others may find deeply offensive,[10] and which may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law**; any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.

- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (ordre public), or of public health or morals;

- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[11]

Thus, any limitation imposed by the State on the right to freedom of expression, including to limit "hate speech," must conform to the strict requirements of this three-part test. Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law (see below).

At the European level, Article 10 of the European Convention on Human Rights (ECHR)[12] protects the right to freedom of expression in similar terms to Article 19 of the ICCPR, with permissible limitations set out in Article 10(2).[13] Within the European Union, the right to freedom of

[8] Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).
[9] The ICCPR has 167 States parties, including Germany.
[10] See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.
[11] *Op cit.*, para. 22.
[12] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.
[13] Article 10 (1) of the ECHR: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; Article 10 (2), The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety,

expression and information is guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union.

The right to equality

Article 1 of the UDHR states that "all human beings are born free and equal in dignity and rights" and Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration "without distinction of any kind," and Article 7 requires protection from discrimination. These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression, and equal protection of the law.

At the European level, the ECHR provides prohibits discrimination in Article 14 and more broadly in Protocol No. 12.

Limitations on "hate speech"

While "hate speech" has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:[14]

- Severe forms of "hate speech" that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;

- Other forms of "hate speech" that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;

- "Hate speech" that is lawful but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but should be protected from restriction under Article 19(3) of the ICCPR.

Obligation to prohibit

Article 20(2) of the ICCPR obliges States to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).[15]

The Rabat Plan of Action,[16] adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) ICCPR:[17]

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for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[14] For a full explanation of ARTICLE 19's policy on "hate speech", see Hate Speech Explained: A Toolkit, *op.cit.*

[15] HR Committee, General Comment No. 34, 21 June 2011, CCPR/C/GC/34, para. 52.

[16] The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012.

[17] The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council, see, for example: Report of the Special Rapporteur on protecting and promoting the right to freedom of opinion and expression on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, Heiner Bielefeldt, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media,

- **Incitement:** prohibitions should only focus on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence from the audience, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.

- **Six part threshold test:** to assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
  - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework and the media landscape;
  - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader;
  - **Intent** of the speaker to engage in advocacy to hatred; intent to target a protected group on the basis of a protected characteristic, and knowledge that their conduct will likely incite the audience to discrimination, hostility or violence;
  - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
  - **Extent and magnitude of the expression**: the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
  - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility or violence occurring as a direct consequence of the incitement.

- **Protected characteristics:** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.

- **Proportionate sanctions:** the term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.[18] Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.[19]

At the European level, the ECHR does not contain any *obligation* on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court of Human Rights (European Court) has recognised that certain forms of harmful expression must necessarily be

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Mutuma Ruteere, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

[18] Human Rights Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

[19] UN Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, paras. 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

restricted to uphold the objectives of the Convention as a whole.[20] The Court has also exercised particularly strict supervision in cases where criminal sanctions have been imposed by the State, and, in many instances, it has found that the imposition of a criminal conviction violated the proportionality principle.[21] Recourse to criminal law should therefore not be seen as the default response to instances of harmful expression, if less severe sanctions would achieve the same effect.

At the EU level, the Council's framework decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law" (2008/913/JHA) requires States to sanction racism and xenophobia through "effective, proportionate and dissuasive criminal penalties". It establishes four categories of incitement to violence or hatred offences that States are required to criminalise with penalties of up to 3 years imprisonment, including condoning, denying or grossly trivialising historical crimes. States are afforded the discretion of choosing to punish only conduct which is carried out in "a manner likely to disturb public order" or "which is threatening, abusive, or insulting", implying that limitations on expression not likely to have these negative impacts can legitimately be restricted. These obligations are broader and more severe in the penalties prescribed than the prohibitions in Article 20(2) of the ICCPR, and ARTICLE 19 has previously assessed that they do not comply with the requirements of Article 19(3) of the ICCPR.[22]

Permissible limitations

There are forms of "hate speech" that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR.

Lawful expression

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice and raise concerns over intolerance, but does not meet the threshold of severity at which restrictions on expression are justified. This also includes expression related to denial of historical events, insult of State symbols or institutions and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of 'hate speech' is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech.

Freedom of expression online and intermediary liability

The UN Human Rights Council (HRC) recognised in 2012 that the "same rights that people have offline must also be protected online".[23] The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or "offline" communications, as set out above.[24]

While international human rights law places obligations on States to protect, promote and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect

[20] European Court, *Erbakan v. Turkey*, App. No. 59405/00 (2006), para. 56 or *Gündüz v. Turkey*, App. No. 35071/97 (2004), para. 22.
[21] European Court, *Jersild v. Denmark*, App No 15890/89 (1992), para. 35.
[22] For a full analysis, see ARTICLE 19, Submission to the Consultations on the European Union's Justice Policy, December 2013.
[23] HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.
[24] General Comment No. 34, *op cit.*, para 43.

human rights.[25] Importantly, the UN Special Rapporteur on freedom of opinion and expression (Special Rapporteur on FOE) has long held that censorship measures should never be delegated to private entities.[26] In his June 2016 report to the HRC,[27] the Special Rapporteur on FOE, David Kaye, enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means. He further recognised that "private intermediaries are typically ill-equipped to make determinations of content illegality,"[28] and reiterated criticism of notice and takedown frameworks for "incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation," i.e. the danger of "self- or over-removal."[29]

The Special Rapporteur on FOE recommended that any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19 (3) of the ICCPR.[30]

In their 2017 Joint Declaration on "freedom of expression, 'fake news', disinformation and propaganda", the four international mandates on freedom of expression expressed concern at "attempts by some governments to suppress dissent and to control public communications through [...] efforts to 'privatise' control measures by pressuring intermediaries to take action to restrict content."[31] The Joint Declaration emphasises that:

> "[I]ntermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that."

They also outlined the responsibilities of intermediaries regarding the transparency of, and need for, due process in their content-removal processes.

At the European Union level, the E-Commerce Directive requires that Member States shield intermediaries from liability for illegal third party content where the intermediary does not have actual knowledge of illegal activity or information and, upon obtaining knowledge, acts expeditiously to remove or disable access to the information.[32] The E-Commerce Directive prohibits States from imposing general obligations on intermediaries to monitor activity on their services.[33]

The limited shield from liability for intermediaries provided by the E-Commerce Directive is in tension with the approach of the European Court. In *Delfi AS v. Estonia*, the Grand Chamber of the

[25] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The UN Human Rights Council endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.
[26] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, A/HRC/17/27, paras. 75-76.
[27] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016, A/HRC/32/38; para 40 – 44,
[28] *Ibid.*
[29] *Ibid.*, para. 43.
[30] *Ibid.*
[31] Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, adopted by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.
[32] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Article 14(1).
[33] *Ibid.*, Article 5.

European Court found no violation of Article 10 of the ECHR where a national court imposed civil liability on an online news portal for failure to remove "clearly unlawful" comments posted to the website by an anonymous third party, even without notice being provided.[34] A joint dissenting opinion highlighted that this "constructive notice" standard contradicts the requirement of actual notice in Article 14(1) of the E-Commerce Directive, necessitating intermediaries to actively monitor all content to avoid liability in relation to specific forms of content, thus additionally contradicting Article 5 of the E-Commerce Directive.[35]

Decisions subsequent to *Delfi AS* appear to confine it to its particular facts. In *Magyar Tartalomszolgáltatók Egyesülete and/et Index.hu Zrt v. Hungary*,[36] the European Court found a violation of Article 10 of the ECHR where a self-regulatory body of Internet content providers and an owner of an online news portal were held liable for defamatory comments posted by a third party, which the parties removed on receipt of notice (in this instance, the issuance of legal proceedings against them). In a separate decision, the European Court has determined that a State's inability to impose liability on a non-profit association for defamatory comments posted to their website by a third party did not violate the applicant's right to private life, as the comments were not "hate speech" or direct threats and were removed upon notice (though a formal notice-and-takedown was not in place).[37]

At the European level, the limited protection for freedom of expression provided to intermediaries through the E-Commerce Directive remains legally uncertain, with the protection of Article 10 of the ECHR turning upon whether or not the comments at issue were "hate speech" or direct threats, and consideration of the position and resources of the intermediary. Tensions therefore remain between the European Court's jurisprudence and the protections of the E-Commerce Directive, as well as with the guidance of the international freedom of expression mandates.[38]

[34] Grand Chamber of the European Court, *Delfi AS v. Estonia*, No. 64569/09, 16 June 2015.
[35] *Ibid.*, Judges Sajó and Tsotsoria's Joint Dissent Opinion. See also Gabrielle Guillemin, Delfi AS v Estonia Case Comment: Strasbourg Undermines Freedom of Expression, ARTICLE 19 Join the Debate, 1 October 2015.
[36] European Court of Human Rights, *Magyar Tartalomszolgáltatók Egyesülete and/et Index.hu Zrt v. Hungary*, No. 22947/13, 2 February 2016
[37] European Court of Human Rights, *Pihl v. Sweden*, No. 74742/13, 9 March 2017
[38] For further analysis, see: Dirk Voorhoof, Pihl v. Sweden: non-profit blog operator is not liable for defamatory users' comments in case of prompt removal upon notice, Strasbourg Observers, 20 March 2017.

Analysis of the Draft Bill

ARTICLE 19 finds that the Draft Bill contains various provisions that do not meet international standards on the right to freedom of expression, and create a serious danger of further incentivising the over-removal of expression that should be considered lawful under international human rights law.

Defining "Social Network"

Section 1(1) of the Draft Bill provides that "Social Networks" are "tele media providers who operate commercial platforms that allow users to exchange or share any kind of content with other users or make such content accessible to other users." The same provision excludes from the definition of Social Networks "[p]latforms with journalist content for which the platform operation takes full responsibility." Section 1(2) of the Draft Bill provides that obligations in relation to reporting (Section 2) and handling complaints (Section 3) apply only to Social Networks with more than 2 million users.

ARTICLE 19 finds that the definition of Social Network is too ambiguous and creates significant uncertainty about which entities the duties in the Draft Bill would apply to. This is in violation of the requirement of legal certainty under the first prong of the three-part test (Article 19 (3) ICCPR). In particular:

- **"Commercial":** it is not clear how commercial platforms will be distinguished from non-commercial platforms, and what criteria apply in making this determination.

- **Users exchanging or sharing "any kind of content" with other users, or making such content available:** these terms would seemingly bring a range of platforms that allow the posting of third party contributions or that connect to such content within the scope of the law. There is no requirement for the content to be publicly available. Gaming platforms that enable interaction between users, websites for instant messaging or email, sites with customer/user reviews of goods or services, platforms for collaborative working, and platforms that enable file-sharing or remote storage, may therefore be within the scope of provisions presented by the government as targeting a much narrower range of actors. What "making such content available" constitutes is also unclear, for example whether it covers hyperlinking to such content.

- **"Journalist content":** this term, which determines which tele media providers are exempt from duties as Social Networks, is not defined and therefore potentially subject to various interpretations. International human rights law advances an expansive and functional (rather than formal) understanding of "journalism," which would bring many online platforms partly or wholly within the potential scope of this exclusion.[39] It also is unclear whether this exclusion benefits platforms that contain some "journalist content" for which "full responsibility" (also not defined) is accepted, alongside other third-party content for which "full responsibility" is not automatically accepted (such as comments). This legal uncertainty may also incentivise platforms with journalist content to remove comment and discussion functions or subject them to restrictive prior screening, limiting space for freedom of expression online.

- **Two million users:** the Draft Bill gives no technical definition of a "user" and no guidance on how their number will be measured, in particular in relation to the temporal or geographic scope of this measurement. Platforms that have 2 million unique and active users per day are

[39] HR Committee, General Comment No.34, *op. cit.*, para 44: Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self publication in print, on the internet or elsewhere [...]"

much less numerous than those that reach this number of users quarterly or annually. How variables are factored into this determination is unclear, such as counting single individuals with multiple accounts, users who are only periodically using Germany-based IPs or users with VPNs. A Social Network's eligibility for this exclusion is therefore very unclear. Additionally, this exemption does not apply to obligations under Section 5 (requiring the appointment of representatives in Germany), bringing Social Networks of all sizes within the scope of punitive measures under Section 4(1)(7).

The ambiguity in the definition of Social Network within Sections 1(1) and 1(2) of the Draft Bill makes uncertain the scope of duties set out in subsequent sections. For those provisions that have the effect of limiting freedom of expression through the requirements aimed at Social Networks, ARTICLE 19 considers that they are not "provided for by law", as business enterprises cannot easily predict whether or not these provisions apply to them.

"Violating Content"

Section 1(3) of the Draft Bill defines "Violating Content" as content that contravenes any one of twenty-three provisions selected from the German Criminal Code (GCC).[40]

ARTICLE 19 is concerned that several of the provisions that form the basis of Violating Content for the purposes of the Draft Bill criminalise content that should not be limited under international human rights law. These include:

- **Criminal defamation and insult, including insult against a group** (Sections 185 – 187 and Section 130(1)(2) of the GCC): ARTICLE 19 has long advocated for the repeal of criminal defamation laws and their replacement with appropriate civil defamation laws, as criminal penalties are disproportionate means for protecting the reputation rights of individuals from injury.[41] The HR Committee has also called for decriminalisation, and affirmed that imprisonment is never an appropriate penalty for defamation.[42] ARTICLE 19 considers that the right to freedom of expression cannot be limited solely on the basis of protecting an individual or group's subjective feelings, and that insult laws therefore do not pursue a legitimate aim.[43] Furthermore, insult or defamation laws that allow individuals to sue on behalf of a group which does not itself have legal status, as with Section 130(1)(2), are not justifiable.[44]

- **Criminal defamation of the President of the Federation** (Section 90 GCC): for the same reason that generic criminal defamation laws violate international freedom of expression standards, so do those that relate specifically to public officials. There is no legitimate reason why the law should provide separate or heightened protection for the reputations of heads of state or public officials; such laws are abused in many parts of the world to limit criticism and stifle public

[40] The German Criminal Code promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799. The listed provisions in the Draft Bill are: Section 86 "dissemination of propaganda material of unconstitutional organisations" and Section 86a "using symbols of unconstitutional organisations", Section 89a "preparation of a serious violence offence endangering the state", Section 90 "defamation of the President of the Federation", Section 90a "defamation of the State and its symbols", Section 91 "encouraging the commission of a serious violence offence endangering the state", Section 100(a) "treasonous forgery", Section 111 "public incitement to crime", Section 126 "breach of the public peace by threatening to commit offences", Section 129 "forming criminal organisations", Section 129a "forming terrorist organisations", Section 129b "criminal and terrorist organisations abroad", Section 130 "incitement to hatred", Section 131 "dissemination of depictions of violence", Section 140 "rewarding and approving of offences", Section 166 "defamation of religions, religious and ideological associations", Section 185 "insult", Section 186 "defamation", Section 187 "intentional defamation ", Section 241 "threatening the commission of a felony", Section 269 "forgery of data intended to provide proof."

[41] ARTICLE 19, Defining Defamation, *op.cit.,* Principle 4.

[42] HR Committee, General Comment No. 34, *op. cit.*, para. 47.

[43] Defining Defamation, *op. cit.*, Principle 2

[44] *Ibid.*, Principle 2(b)(v).

debate. It is widely acknowledged that public figures must bear a higher degree of scrutiny and criticism than others, since they are involved in matters of public concern and must be accountable to the public.[45]

- **Criminal defamation of the state and its symbols** (Section 90a GCC): defamation laws, whether criminal or civil, can only be justified on the basis that they are needed to protect the reputations of individuals against injury. Laws that seek to protect the "reputation" of the State or nation as such, or its symbols, are incompatible with international human rights law, as they limit the right to freedom of expression without a legitimate aim.[46]

- **Defamation of religions, religious and ideological associations in a manner that is capable of disturbing the public peace** (Section 166 GCC): international human rights law protects people, and not abstract concepts, such as religion or belief systems. It is not a legitimate aim under Article 19(3) of the ICCPR to limit freedom of expression to protect religions or beliefs from criticism, or to shield followers of a religion or belief from offence. The repeal of blasphemy laws is supported by the HR Committee,[47] as well as recommended in the Rabat Plan of Action,[48] by numerous special procedures of the HRC,[49] the Venice Commission,[50] the Parliamentary Assembly of the Council of Europe,[51] and in the European Union's Guidelines on Freedom of Religion or Belief.[52]

  ARTICLE 19 notes that in 2011, HRC Resolution 16/18 moved past the divisive concept of "defamation of religions" to agree a package of measures to address religious intolerance without reference to this concept, with limitations on expression restricted to the incitement of imminent violence on the basis of religion or belief.[53] Various countries in Europe have decided to repeal their blasphemy laws since.[54] We do not consider that the limitation of Section 166 GCC to expressions made "in a manner likely to breach the peace" brings it into compliance with international human rights law. This qualification merely privileges persons likely to respond to legitimate expression with violence or other unlawful conduct, at the expense of the person engaged in legitimate expression (the so-called "assassin's veto"). As Section 166 GCC contains no intent requirement for the advocacy of discriminatory hatred that constitutes incitement to discrimination, hostility or violence, or a need to show likeliness that one of these outcomes will result as a consequence of the expression, it does not conform to the requirements of the ICCPR.[55]

- **Publicly approving of, denying or downplaying international crimes committed under the rule of National Socialism, or approving of, glorifying or justifying National Socialist rule of arbitrary force** (Sections 130(3) and (4) GCC): international human rights law does not permit limitations on freedom of expression to protect truth claims around historical events or to limit

[45] General Comment No. 34, *op. cit.*, para. 38; see also, Defining Defamation, *op. cit.*, Principle 11.
[46] General Comment No. 34, *op. cit.*, para. 47; see also, Defining Defamation, *op. cit.*, Principle 2.
[47] HR Committee, General Comment No. 34, *op. cit.*, para. 48.
[48] *Ibid.*
[49] Report of the Special Rapporteur on freedom of religion or belief, A/HRC/34/50, 17 January 2017; Report of the Special Rapporteur on FOE, A/71/33, 6 September 2016; Report of the Special Rapporteur on minority issues, A/HRC/28/64, 2 January 2015; UN Working Group on Arbitrary Detention, Opinion No. 35/2008 (Egypt), 6 December 2008, para. 38. The UN Human Rights Council special procedures have also been supported by regional mandates, see: Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation, 9 December 2008.
[50] The European Commission for Democracy through Law (the Venice Commission), The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, October 2008, para. 89.
[51] Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults, and hate speech against persons on grounds of their religion, 29 June 2007.
[52] EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief, 2013.
[53] ARTICLE 19, New Guide on Implementing UN HRC Resolution 16-18, 27 February 2017.
[54] For example, within the European context, the United Kingdom, Iceland, Norway, and Malta, have all recently repealed criminal prohibitions on blasphemy.
[55] For further analysis of these types of limitations, see Hate Speech Explained: A Tool Kit, *op. cit.*, p. 29 – 31.

the expression of opinions on those events, even if they are deeply offensive.[56] As the Special Rapporteur on FOE has found: "by demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events."[57] For the same reasons as in relation to Section 166 GCC, the qualification that such expression must be "capable of disturbing the public peace", or "violates the dignity of the victims", does not bring these provisions into conformity with international human rights law.[58] The Grand Chamber of the European Court of Human Rights has found the criminal enforcement of historical memory laws to be unnecessary and therefore against the ECHR where the denial included no intent to incite violence or hatred, and where the particular context meant these outcomes were not likely consequences of the expression.[59] At the same time, however, the Grand Chamber has affirmed that the denial or gross trivialisation of the holocaust "must invariably be seen as connoting an antidemocratic ideology and anti-Semitism", and therefore legitimately subject to restriction, with the historical context of a State seemingly being determinative.[60] Nevertheless, ARTICLE 19 advocates, in line with HR Committee General Comment No. 34, that absent an express requirement showing that denialism or glorification also constitute incitement as per Article 20(2) of the ICCPR, such provisions do not meet the necessity requirements of Article 19(3) of the ICCPR.

- **Other content restrictions incompatible with international human rights law** include prohibitions on: disseminating propaganda or using symbols of unconstitutional organisations, (Sections 86 and 86a GCC); "treasonous forgery", (Section 100(a) GCC); and "dissemination of depictions of violence" (Section 131). These provisions either do not pursue a legitimate national security interest, and/or do not require a sufficiently direct and immediate connection between the expression and the likelihood or occurrence of violence.[61]

ARTICLE 19 finds that requiring private enterprises to censor content that violates these provisions of the GCC brings those private enterprises into direct contravention of their responsibility under international human rights law to respect the right to freedom of expression.[62]

Other provisions of the GCC cited in the Draft Bill may pursue a legitimate aim but are framed too broadly, and therefore do not fully comply with the requirements of the ICCPR and the ECHR. Section 130(1) GCC, criminalises anyone who, "in a manner capable of disturbing the public peace", "incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them." Since this criminalises conduct that falls short of advocacy of hatred constituting incitement to discrimination, hostility or violence, the criminal sanctions foreseen do not meet the requirements of necessity and proportionality.

An explanatory memorandum accompanying the Draft Bill explains that only the objective elements (*actus reus*) of an offence should be considered, and not the mental elements (*mens rea*) or defences/justifications (even though these are determinative of criminal responsibility). This is not, however, reflected in the language of the Draft Bill. This makes it even less clear, and the scope of the type of content that Social Networks should remove potentially much broader.

[56] General Comment No. 34, *op. cit.*, para. 49.
[57] Report of the Special Rapporteur on FOE, 7 September 2012, A/67/357, para. 55.
[58] For further analysis of these types of limitations, see Hate Speech Explained: A Tool Kit, *op. cit.,* p. 32 – 34.
[59] Grand Chamber of the European Court, *Perinçek v. Switzerland*, No. 27510/08, 15 October 2015.
[60] *Ibid.*, para. 243.
[61] Johannesburg Principles, *op.cit.*; Principles 2 and 6.
[62] The Ruggie Principles, *op. cit.*

Handling complaints about Violating Content

Section 3 of the Draft Bill prescribes how Social Networks (as defined in Section 1(1)) will handle complaints about Violating Content (as defined in Section 1(3)). Only Social Networks with more than 2 million users are required to comply with this provision.

Processes for complaining about Violating Content

Section 3(1) of the Draft Bill requires that Social Networks "implement and maintain effective and transparent procedures" for the handling of complaints about Violating Content. This must be through a "readily recognisable, reachable directly as well as easily and constantly accessible procedure". Failure to comply with this section, either wilfully or negligently, opens a Social Network to fines of up to 5 million Euros (Section 4(2) of the Draft Bill).

While encouraging the institution of accessible, transparent and usable complaints procedures integrated to websites regarding unlawful content is a positive aim, achieving this objective on the basis of very subjective terminology and through the threat of severe financial penalties raises considerable concerns regarding legal certainty and proportionality. This is likely to discourage intermediaries from allowing user engagement on their platforms, and therefore chill freedom of expression, rather than incentivise more user-friendly complaint procedures.

ARTICLE 19 further notes that the vast majority of intermediaries that moderate content shared by users on their platforms make removal decisions on the basis of their terms of service, and not the national laws where a complainant is situated (unless a request is received by a national law enforcement authority requesting removal on this basis, preferably supported by a judicial order). It is unclear whether to comply with Section 3(1), a Social Network would need to amend their reporting mechanisms and supplement their terms of service to provide their users in Germany new categories for Violating Content expressly tied to the specified provisions of the GCC. Several of these provisions, for example on "defamation of religions", would not necessarily find corresponding restrictions in a Social Network's existing terms of service. How Social Networks should ensure the "accessibility" of complex matters of German Criminal law within amended or supplementary terms of service is unclear.

Other aspects of process appear positive, including the requirement that Social Networks acknowledge without undue delay receipt of a complaint (Section 3(2)(1)); inform the complainant and author of the content at issue of any decision reached and the reasons for this (Section 3(2)(5)); and provide training and counselling to content moderators (Section 3(4)). Intermediaries too infrequently provide this level of information to complainants or users whose content is subject to removal. However, it is potentially disproportionate to compel these practices through the threat of such severe administrative penalties (Section 4(2)).

Removal and blocking

Section 3(2)(2) and Section 3(2)(3) of the Draft Bill require Social Networks to block or delete "content that is a clear violation" within 24 hours upon receipt (or a longer term to be determined between a Social Network and relevant law enforcement authority), and "Violating Content" within 7 days of receipt. Section 3(2)(6) further requires Social Networks to block or delete "copies of the violating content" without undue delay.

Sections 4(1)(2) and 4(1)(3) of the Draft Bill make it an administrative offence for a Social Network to "not correctly" or "not completely" implement and maintain "effective and transparent procedures" pursuant to Section 3 ("Handling Complaints about Violating Content"). Section 4(2) provides administrative penalties of up to 5 million Euros for such violations. However, to impose liability for failures in removing or blocking content, the administrative body (specified in Section 4(4) as the Federal Office of Justice, *Bundesamt für Justiz*) must first seek a decision of the Administrative Court (Section 4(5)). This process requires the administrative body to furnish the Administrative Court with a statement by the Social Network, but does not provide for any oral

hearing or right of appeal, and does not include as parties either the user(s) whose Violating Content is at issue or the complainant.

ARTICLE 19 finds that the requirement in the Draft Bill that Social Networks remove Violating Content on the basis of notice provided by any party, without a court order, is against international freedom of expression standards. This type of duty has been criticised by the UN and regional freedom of expression mandates as an attempt to 'privatise' controls over public communications.[63] Specifically:

- It is unclear how a Social Network will be determined to have "not correctly" or "not completely" complied with the procedural requirements of the Draft Bill. This will presumably come down to assessments of the "effectiveness" of a Social Network's process for handling complaints. While singular failures to remove or block Violating Content within the prescribed time limits may not be indicative of an "ineffective" process, it is not clear what proportion of legally accurate complaints must lead to removal or blocking for a process to be considered "effective", and whether evidence of over-blocking would likewise make a process "ineffective". While statistics would be available through quarterly reports furnished by Social Networks under Section 2, these would not illuminate the proportion of complaints received or acted upon that concerned content actually found to be illegal by an independent court. This system of liability therefore creates significant legal uncertainty.

- Section 3(2)(2) and Section 3(2)(3) require private actors to make their own assessment of the legality of content following notification from parties who similarly aren't competent to make authoritative determinations on the legality of content. International standards require that liability only be imposed where an intermediary refuses to comply with an order from an independent, impartial, authoritative oversight body, such as a court. The threat of sanctions incentivises intermediaries to be over-cautious and err towards removal or blocking (or remove functions for third party comments entirely) to avoid liability.

- The Draft Bill provides no guidance to Social Networks on how they should differentiate "clear violations" from "Violating Content", and contains no duty on the part of Social Networks to consider user's rights to freedom of expression when making determinations (even though law enforcement authorities are required to make this consideration when acting to restrict freedom of expression pursuant to the GCC). Private companies are clearly not well placed to be making complex legal and factual determinations on the interpretation of the German Criminal Code, which require taking into account the content of expression, the mental state of the person publishing the content, the context in which that information is shared, and considerations of the impact of that expression on other individual's rights or broader State interests in national security or public order. The majority of these factors cannot be determined by a facial assessment of the content in issue (with the exception of child abuse images), requiring further investigatory work that would be beyond the capabilities or competence of any intermediary.

- The section 3(2)(6) obligation to delete or block *copies* of content seemingly does not require notice in relation to each offending copy. Notice in relation to one copy would therefore seemingly create a duty to search for duplicates of the same content. This raises questions of the compatibility of this requirement with the shield from liability for third-part content where there is no actual knowledge, under Article 14(1) of the E-Commerce Directive, and the prohibition on imposing monitoring obligations on intermediaries under Article 5.

- While the enforcement of fines for failure to remove or block content requires judicial authorisation under Section 4(4), the due process guarantees therein are inadequate, and provide no protection for good faith decisions to not remove or block content (including where the intermediary considers their responsibility to respect freedom of expression requires such

[63] Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, 2017, *op. cit.*

constraint). Similarly, there is no exemption from liability where a Social Network moves promptly to remove content following the decision of the Administrative Court.

- Section 3(2) and Section 4 provide no recourse for users whose lawful content is removed pursuant to the Draft Bill. Administrative authorities are only required to intervene in relation to failures to remove or block content, and no process is foreseen for users to complain about or seek review of illegitimate removal or blocking decisions taken on the basis of the Draft Bill.

- The sanctions foreseen under Section 4(2) of up to 5 million Euros are grossly disproportionate. The independence of the Administrative Body from political influence is a particular concern, and the limited judicial oversight provided in Section 4(5) does not provide sufficient safeguards against this.

Reporting requirements

Section 2(1) of the Draft Law requires Social Networks to provide quarterly reports on their handling of complaints about Violating Content. Section 2(2) details the information these reports must contain, including general information about the processes in place, numbers of complaints received (disaggregated on basis of complaint, and whether received from a public authority or private party), and on the outcome of decisions (disaggregated in the same way, with the time taken to delete or block). Failure to meet reporting requirements is an administrative offence, punishable with fines up to 500,000 Euros.

ARTICLE 19 considers that intermediaries should disclose these types of information, in particular in relation to removal or blocking requests made by States, and opposes any law that seeks to limit the disclosure of such information. Compelling disclosure is in the public interest, and in ARTICLE 19's view should extend to content removal and blocking practices broadly (for example, in relation to content removed for violating terms and conditions, which is otherwise lawful in the country concerned).

Individual responsibility for offences committed online

ARTICLE 19 is concerned that the Draft Bill focuses almost exclusively on the administrative liability of Social Networks seemingly as an alternative to seeking accountability of the authors of Violating Content. The removal of such content is unlikely to affect users' behaviour or deter the posting of further Violating Content, and will not impact the underlying causes of criminal behaviour. Given that there are alternative and more effective means of achieving this criminal law objective (that do not pose dangers such as over-blocking), the necessity of the Draft Bill is questionable.

A new Section 7 in the Draft Bill amends the Telemedia Act (Telemediengesetz) (which transposes the E-Commerce Directive into German law) to expand the list of grounds for "service providers" to provide information on a user's inventory data to include the enforcement of "rights that enjoy absolute protection" following a request from law enforcement.

ARTICLE 19 is concerned that this revision to the Telemedia Act expands the circumstances under which law enforcement can request user data from private companies without a court order.

Conclusion

ARTICLE 19 finds the Draft Bill, with the exception of Section 2, to be dangerous to the protection of freedom of expression in Germany, and that the system of liability it proposes may be replicated in other jurisdictions that have even weaker safeguards for human rights.

For these reasons, we recommend that the German Parliament reject the Draft Bill, while taking immediate measures to repeal provisions of the German Criminal Code that do not comply with international human rights law on freedom of expression.

Annex: The Draft Bill (unofficial translation)

First Draft Legislative Proposal Federal Ministry of Justice and Consumer Protection

Draft Bill on the Improvement of Enforcement of Rights in Social Networks (Social Network Enforcement Bill – *NetzDG*)

Dated …

The German Parliament has enacted the following bill:

Article 1
Draft Bill on the Improvement of Enforcement of Rights in Social Networks (Social Network Enforcement Bill – *NetzDG*)

§ 1
Scope

(1) The *NetzDG* applies to tele media providers who operate commercial platforms that allow users to exchange or share any kind of content with other users or make such content accessible to other users ("**Social Network**"). Platforms with journalist content for which the platform operation takes full responsibility are not deemed a Social Network under the *NetzDG*.

(2) The operator of a Social Network is not obliged pursuant to Sect. 2 and 3 if the number of its registered users is under 2 million.

(3) Violating content under Sect. 1 para. 1 is content that violates Sect. 86, 86a, 89a, 90, 90a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185 to 187, 241 or 269 of the German Criminal Code ("**Violating Content**").[W&C1]

§ 2
Reporting

(1) The operator of Social Networks are obliged to provide a report in German on the handling of complaints about Violating Content on their platform, including the information described in Sect. 2 para. 2, quarterly and publish the report on the *Bundesanzeiger* and their own homepage one month after the end of the respective annual quarter at the latest. The report published on the platform operator's own homepage must be easily be found and accessible at any time.

(2) The report must contain the following aspects as minimum standard:
1. General information on the actions the Social Network operator undertakes to prevent [stop] violating actions on its platform.

2. Information about the mechanism the provider provides for reporting violations and the principles the provider applies in order to determine whether reported content gets deleted or blocked.

3. Number of reported violations in the respective annual quarter, listed by: reports from official authorites *[Beschwerdestellen]* on the one hand and reports from users on the other hand as well as reason for the complaint.

4. Information about the organization, number of employees, language and professional *[fachlich]* skills of the unit that is responsible for handling the complaints as well training and supervision of the employees who are handling the complaints.

5. Information about membership in Social Media associations *[Branchenverbände]* and whether such association has a department for filing complaints *[Beschwerdestelle].*

6. Number of complaints that were discussed with external consultors in order to prepare a decision.

7. Number of complaints that were deleted or blocked in the respective annual quarter, listed by: listed by: reports from official authorites *[Beschwerdestellen]* on the one hand and reports from users on the other hand as well as reason for the complaint.

8. Time period between receipt of the complaint and deletion or blocking of Violating Content, listed by: (1) reports from official authorites *[Beschwerdestellen]* on the one hand and reports from users on the other hand, (2) reason for the complaint and (3) time periods "within 24 hours" / "within a week" / "later".

9. Information about the measures taken to inform claimant and the users for whom the reported content was stored about the decision about the complaint.

§ 3
Handling Complaints about Violating Content

(1) The operator of Social Media shall implement and maintain effective and transparent procedures pursuant to Sect. 3 para. 2 and 3 for handling complaints about Violating Content. The operator shall provide users with a readily recognizable, reachable directly as well as easily and constantly accessible procedure for re-porting Violating Content.

(2) The procedure shall procure that the operator of the Social Network
1. without undue delay *[unverzüglich]*, acknowledges the complaint and assesses whether the content is a violation and deletes or blocks it;
2. deletes or blocks content that is a clear *[offensichtlich]* violation within 24 hours upon receipt, unless the operator has agreed on a longer period of time with the competent law enforcement authority;

3. delete or block any Violating Content within 7 days upon receipt of the complaint;

4. in case of deletion, record the Violating Content for evidence purposes in Germany for a period of ten weeks;

5. without undue delay *[unverzüglich],* inform claimant and the user about any decision and provide them with reasoning ;and

6. delete or block any copies of the Violating Content on the platform without undue delay *[unverzüglich]* and;

7. implement effective measures against future uploads of the Violating Content.

(3) The procedure shall procure that any complaint and the measures taken are documented in Germany.

(4) The handling of complaints must be monitored and checked by the chiefs of the operator. Any organizational flaws with the handling of complaints must be stopped without undue delay *[unverzüglich].* The chiefs of the operator must offer their employees who are handling complaints German training and counseling on a regular basis, at least half a year.

(5) The procedure pursuant to Sect. 3 para. 1 may be audited and monitored by an official authority appointed by one of the administrative bodies identified in Sect. 4.

§ 4
Administrative Offense and Fines

(1) Who, wilfully or negligently, does not comply with
1. contrary to Section 2 paragraph 1 sentence 1 not, not correctly, not completely or not timely provides a report or not, not correctly, not completely, not in the prescribed way or not timely publishes a report,

2. contrary to Section 3 paragraph 1 sentence 1 not, not correctly or not completely holds available a procedure named in that section for the handling with complaints by official authorities or users that are resident or established in Germany,

3. contrary to Section 3 paragraph 1 sentence 2 not or not correctly provides a procedure named in that section,

4. contrary to Section 3 paragraph 4 sentence 1 not or not correctly supervises the handling of complaints

5. contrary to Section 3 paragraph 4 sentence 2 not or not timely stops organizational flaws,

6. contrary to Section 3 paragraph 4 sentence 3 not or not timely offers training or counseling,

7. contrary to Section 5 sentence 1 not or not timely appoints a representative in Germany for service in Germany or an agent for receiving information requests in Germany commits an administrative offence.

(2) The administrative offence pursuant to Sect. 4 para. 1, no. 7 may be fined with a penalty payment up to 50,000 EUR and in the other cases with a penalty payment up to 5 Million EUR. Sect. 30 para. 2, 3rd sentence of the German Law on Administrative Offences *[Gesetz über Ordnungswidrigkeiten]* applies.

(3) The administrative offence may also be enforced if it was committed outside Germany.

(4) The administrative body pursuant to Sect. 36 para. 1 no 1 of the German Law on Administrative Offences is the *Bundesamt für Justiz*. The Federal Ministry of Justice and Consumers Protection enacts in consultation with the Fed-eral Ministry of Interior and the Federal Ministry of Economic Affairs and Energy general administrative guidelines on the use of the discretion of the agency that imposes regulatory fines when opening fine proceedings and dimensioning the fine.

(5) If the administrative body [see Sect. 4 para. 4] wishes to render a decision based on a Violating Content (Sect. 1 para. 3) was not deleted or blocked, the administrative body must first obtain a court decision. The competent court is the court that has competence to decide about the decision of the administrative body. The application of the administrative body for a court decision shall be provide to the court together with a statement of the operator of the

Social Network. The court may decide without oral court hearing. The decision cannot be appealed and is binding for the administrative body.

§ 5
Representative in Germany

For the acceptance of service of documents on behalf of the operator, the operator shall, without undue delay *[unverzüglich],* appoint a representative in Germany (1) in administrative procedures under the *NetzDG,* vis-á-vis the administrative body, law enforcement and the competent court and (2) in civil procedures vis-á-vis the competent court. The operator shall also appoint a representative that is entitled to accept service on behalf of the operator for requests for information by German law enforcement authorities.

§ 6
Transition Provisions

(1) The report pursuant to Sect. 2 is due for the first time regarding the second annual quarter after the *NetzDG* enters into force.

(2) The procedures pursuant to Sect. 3 shall be implemented within 3 months after the *NetzDG* enters into force.

(3) The representative pursuant to Sect. 5 must be appointed within one month after the *NetzDG* enters into force.

Article 2
Amendment to the Telemedia Act

In Section 14 paragraph 2 of the Telemedia Act, that has been changed most recently by Article 1 of the bill of 21 July 2016 (BGBl. I S. 1766), the words “or other rights that enjoy absolute protection” are inserted after the word “property”.

§ 7
Entry into Force

The *NetzDG* enters into force on the first day of the second month after announcement.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

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