

IT & Communications
Germany

July 2017

Germany obliges social media companies to delete "Hate Speech"

The German Federal Parliament has adopted a bill which aims to enhance the enforcement of social media platform providers' legal obligation to delete certain online content which violates German criminal law.

The Network Enforcement Act ("NEA") (in German: Netzwerkdurchsetzungsgesetz) obligates social media platform providers that have at least 2 million registered users in Germany to establish internal compliance systems (see below, at 2) and to ensure the deletion or blocking of "unlawful" content within statutorily established deadlines (see below, at 3). Violations of the obligations under the NEA are subject to hefty fines (see below, at 4). It is expected that the NEA will be challenged before the German Federal Constitutional Court for violation of the constitutional guaranty of freedom of speech (see below, at 5.). The German Act is part of a development, both at national and at EU levels, to counter the publication of unlawful content on social media platforms (see below, at 6). Social media companies operating on the German market will need to comply with their obligations under the NEA regarding the implementation of the complaint procedure by January 1, 2018 (see below, at 7.).

On 7 July 2017, the Act passed the German Federal Council; the NEA will enter into force on 1 October 2017.

1. Scope of applicability: "Hate Speech"

Several attempts by the Federal Ministry of Justice to persuade social media platform providers to address the perceived growth of "hate crimes" and the publication of other illegal content on social media platforms have led to certain improvements of platform providers' internal complaint management procedures. The Ministry, however, considered the voluntary commitments to be insufficient. Therefore, the NEA is designed to "incentivize social networks to process complaints regarding hate crimes and other punishable contents more quickly and more comprehensively".

The requirements under the NEA to establish internal compliance systems and to ensure the deletion or blocking of "unlawful" content apply to all social media platforms that have at least 2 million registered users in Germany; they apply neither to platforms with journalistic, editorially arranged content (i.e. platforms without user-generated third party content) nor to platforms intended for individual communication or the dissemination of specific content (e.g. e-mail and messenger services). According to the legislative materials, no more than ten platform providers will currently be subject to the NEA.

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All providers of social media platforms must appoint a representative residing in Germany.

Application of the NEA is triggered if "unlawful content" is published on a social media platform and the provider has received a specific complaint regarding such "unlawful content". The term "unlawful content" is statutorily defined as content which violates expressly listed criminal offences under the German Penal Code (Strafgesetzbuch, "**StGB**"). These criminal offences include:

- Dissemination of propaganda material of unconstitutional organizations (Section 86 StGB),
- Encouraging the commission of a serious violent offence endangering the state (Section 91 StGB),
- Public incitement to crime (Section 111 StGB),
- Incitement to hatred (Section 130 StGB),
- Rewarding and approving of criminal offences (Section 140 StGB),
- Libel, defamation and threatening the commission of a felony.

2. Mandatory compliance systems

The NEA obligates platform providers that have at least 2 million registered users in Germany to establish effective and transparent procedures to deal with complaints regarding unlawful content. To this end, the platform provider has to establish an easily recognizable, directly accessible, and permanently available process for the submission of complaints regarding unlawful content. This procedure shall ensure that the provider will, without undue delay, take notice of the complaint and examines whether the content, which is the subject of the complaint, is unlawful and must be blocked or removed. The procedure implemented by the provider must further foresee that every complaint and every measure taken to remedy such complaint is documented (geographic restrictions apply).

The platform provider's management must control the handling of illegal content on a monthly basis. Personnel of the work units responsible for dealing with complaints must be offered training opportunities in German language at least every six months.

In addition to the procedural and organizational rules regarding their internal compliance systems, platform providers that have at least 2 million registered users in Germany are subject to detailed reporting requirements.

Providers of social networks which receive more than 100 complaints per year regarding unlawful content must outline their handling of illegal content in bi-annual reports in German language. These reports must be published in the Federal Gazette (Bundesanzeiger) as well as on the provider's website no later than one month after each half-year period. The publication on the website must be easily identifiable, directly accessible and permanently available. The bi-annual reports shall include, as a minimum, the following information:

- General description of the provider's efforts to prevent criminal offences on its platform
- A description of the complaint management procedures and the criteria for deleting or blocking content

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- The number of complaints received during the reporting period separating out those complaints that led to deletion or blocking of content, in each case broken down in various categories
- A description of the organization, personnel resources, professional and linguistic qualifications of the departments responsible for dealing with complaints as well as their training and supervision
- The number of complaints received that were forwarded to a third party expert (e.g. a lawyer) to prepare a decision
- The time between receipt of complaint and deletion or blocking of illegal content, broken down by category of complaint and processing time (within 24 hours/within 48 hours/within a week/at a later point in time).

All providers of social media platforms must appoint a person residing in Germany who is authorized to accept service from public authorities and from the courts and to identify such person clearly on the platform, allowing for direct contact. Furthermore, the platform provider is required to appoint a person residing in Germany empowered to receive information requests from German law enforcement authorities. This person is obligated to respond to information requests within 48 hours and, if a satisfactory response cannot be given, to provide reasons.

3. Obligations to remove "unlawful content"

The complaint procedure to be established by social media platform providers that have at least 2 million registered users in Germany must ensure that content which is "manifestly" unlawful shall be blocked or removed within 24 hours following receipt of the complaint. The law does not define what constitutes "manifestly" unlawful content; the legislative materials state that content is "manifestly" unlawful if "no in-depth review is required" to determine the unlawfulness.

Unlawful content which is not "manifestly" unlawful must be blocked or removed "without delay, generally within 7 days after receipt of the complaint". This 7 day-deadline may be exceeded if the determination of the unlawfulness of the content requires the validation of a factual statement or of other circumstances. In these cases, the platform provider may give the user, who has posted the allegedly unlawful content, an opportunity to comment on the complaint. The 7 day-deadline may also be exceeded if the platform provider requests an accredited "Institution of Regulated Self-Regulation" to handle the assessment of the relevant content and agrees to accept this institution's decision. If content is removed, it must be retained for evidence purposes for a duration of ten weeks (geographic restrictions apply).

The concept of "Regulated Self-Regulation" had been introduced into the NEA by the Federal Parliament in an attempt to allow for an objective third party to assess the "unlawfulness" of content. The NEA sets out the criteria which an "Institution of Regulated Self-Regulation" must meet in order to be approved by the Federal Office of Justice. Specifically, the members of the institution need to be independent and qualified; the institution needs to have the necessary resources to ensure the processing of complaints within 7 days; it needs to have a procedural code and must be jointly operated by several providers of social networks or institutions which provide the required resources. The model for the "Institution of Regulated Self-Regulation" are the existing organizations of voluntary self-

regulation which have been established under an Interstate Treaty for the Protection of Minors in the Media. This Interstate Treaty requires, in addition to the "independence and competence" of the appointed examining staff, that "representatives of the relevant groups of society" are included among the staff.

4. Enforcement through fines

Violations of the obligations under the NEA are administrative offences subject to fines.

Failure, by a platform provider, to appoint a representative in Germany and failure to respond to a request for information by a law enforcement authority may result in fines up to EUR 500,000.

Violations of the reporting obligations and the obligations to establish and monitor the compliance and complaint management system are subject to fines up to 5 million EUR. These fines may, in particular, be imposed if the complaint management procedure does not ensure the proper handling of complaints. This means that failure to block or delete unlawful content may be punished by severe fines. The legislative materials make it clear, however, that a fine for failure to block or delete unlawful content can only be imposed "if it is not an individual case". In other words, fines will be triggered if failures to delete indicate that the complaint management system is characterized by "systemic shortcomings".

The NEA foresees that administrative offences can be sanctioned also where they are committed outside of Germany.

The NEA provides for a novel procedure of preliminary ruling by the local court (Amtsgericht) at the seat of the Federal Office of Justice (city of Bonn). If the Office of Justice intends to impose a fine for not removing or blocking unlawful content, it should apply to the local court for a preliminary ruling regarding the unlawfulness of such content. According to the wording of the NEA, as amended by Parliament, the Office of Justice is not obliged to seek a preliminary ruling, but has limited discretion to do so. The application for a preliminary ruling shall be submitted together with the opinion of the platform provider. The court's decision can be rendered without oral proceeding. It cannot be appealed and is legally binding for the Office of Justice.

Social media providers that have been fined have the right to appeal such fines before the courts.

5. Constitutional challenge

The NEA has attracted strong criticism from the legal community, civil rights activists, and digital rights groups. Despite the Parliament's attempts to "soften" the NEA by allowing for the review of complaints by an "Institution of Regulated Self-Regulation" (see above, at 3) it is conceivable that the threat of heavy fines may lead to "over-blocking" of content by platform providers, which might be considered a violation of the constitutionally guaranteed freedom of speech.

Critics have already announced that they will challenge the NEA before the German Federal Constitutional Court. There are several procedural avenues which

social media platform providers, their users, and persons affected by "hate speech" could take to subject the NEA to constitutional scrutiny.

6. Global Outlook

A number of countries, particularly in the European Union, are currently considering or have recently adopted legislation to counter "hate speech". The Italian Cyberbullying Act, which entered into force on June 18, 2017, provides that any individual between 14 and 17 years of age (as well his/her parent or tutor) who has suffered cyberbullying acts may request the data controller or the "manager of the website or social media" to obscure, remove, or block any personal data of the minor, even if such acts do not constitute a crime. The Italian Cyberbullying Act does not expressly provide for specific sanctions in case of non-compliance with the blocking request by data controllers or managers of the website or social media. However, the minor (or parent/tutor) may send an identical request to the Italian Data Protection Authority which must take action within 48 hours from receipt of such request, if (i) the manager of the website has not confirmed that it has arranged for obscuring, removing or blocking the data within 24 hours after the initial minor's request, or (ii) the manager of the website has not done so within 48 hours, or (iii) it is not possible to identify the data controller or the manager of the website.

While a number of countries give authorities direct or indirect powers to order the blocking of hate speech or other unlawful content, the German NEA takes a novel approach in that it shifts the obligation to assess and determine the unlawfulness of content onto the social media provider itself. In this respect, Germany deviates from the approach at EU level which is based on voluntary self-regulation on the basis of the ["Code of Conduct on countering illegal online hate speech"](#) established in 2016. According to a [press release](#) recently published by the EU Commission, the results of the first evaluation of the viability of this approach show that "the companies have made significant progress in following up on their commitments" but "some challenges remain".

7. Next Steps for Social Media Companies

Since the NEA provides only for a very short transition period, social media platform providers which are subject to the NEA's obligations need to establish new or enhance existing internal compliance structures and establish the required complaint procedures by January 1, 2018. They will have to publish their first report on their handling of illegal content and related complaints by mid-2018. The NEA does not provide for a transition period regarding the appointment of the representative.

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