

Internet Intermediary Liability Reloaded

The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law

by Gerald Spindler*

Abstract: Fake News and hate speech are at the centre of discussions at least since Donald Trump won the U.S. elections in 2016. Politicians around the world fear the influence of social networks and distribution of fake news that will foster populism as well as blur the lines to traditional media. Thus, after having tried self-regulatory mechanisms which according to the belief of the German Government turned out to be unsatisfactory the German Govern-

ment brought in a new bill called „Netzwerkdurchsetzungsgesetz“ which should impose on social networks fines up to 50 Mio Euro if they do not comply with obligations to remove illicit content. The article deals with the structure of the act and its compatibility with European law, in particular the E-Commerce-Directive, based upon a legal expertise commissioned by the German Association of Telecommunication and Internet Industry.

Keywords: NetzDG; responsibility of social networks; Fake News; hate speech; E-Commerce-Directive

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A. Introduction

1 The German parliament has passed a new „Act improving law enforcement on social networks [Netzwerkdurchsetzungsgesetz – NetzDG]“ which has been notified to the EU-Commission on 27th of March 2017.¹ The act aims mainly – as the German notification points out – at

„the introduction of statutory compliance rules for social networks in order to encourage them to process complaints about hate speech and other criminal content more quickly and comprehensively.“

2 The German government states that social networks (and alike providers) should live up to their responsibility to immediately remove infringing

content – which according to the statement of the German government they still do not in a satisfying manner.²

3 To achieve a more satisfying level of removing illicit content and fake news the act provides in principal roughly two obligations:

- to report periodically to authorities as well as to the public their actions concerning complaints about illicit content and their organization to handle these complaints
- to remove in 24 hours content which is blatantly³ illicit and within 7 days all other illicit content. Providers may, however, refer the decision regarding unlawfulness to a recognised selfregulation institution within 7

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1 NotificationNumber2017/0127/D-SERV60. The notification wrongly named the Act „Netzdurchführungsgesetz – NetzDG“.

2 Notification „Brief statements of grounds“.

3 It is unclear if the German Act will refer to „blatantly“ (so the wording in the notification of the German Government) or to „manifestly“ (as used in the translation of the German act by the German Government).

days of receiving the complaint and if they agree to accept the decision of that institution.

- 4 If some of these obligations are not fulfilled, fines may be imposed up to 5 Mio Euro in case of deliberate or negligent non-compliance with the reporting obligations, violation of the obligation to have effective complaint management, etc., up to 50 Mio Euro for legal persons.
- 5 I will argue, that the new envisaged German act on social networks is not compatible with European law in several regards, such as
 - incompatible with the principle of country of origin as enshrined in Art. 3 of the E-Commerce-Directive⁴ as the act just refers to Art. 3(4) for service providers in other EU-member states. This reasoning disregards the case-by-case approach of Art 3(4) which does not allow for general derogations (cf. IV.)
 - incompatible with Art. 14, 15 E-Commerce-Directive with respect to recitals 46 and 48 regarding the notice-and-take-down procedure as the act substitutes the notion of „expeditiously” by fixed terms and thus leading to deviation from full harmonization (V.A)
 - introducing special requirements for the notion of „knowledge” in Art. 14 E-Commerce-Directive (V.B)
- 6 Some of the criticism against the proposed act have been dealt with during the parliamentary procedure, such as the proposed obligation to remove also copies as well as the missing judicial control concerning the disclosure of personal data. Hence, the article will do not deal with these issues.

B. Conflict with country of origin principle, Art. 3 E-Commerce-Directive

I. The international applicability of the act on social networks

- 7 The proposed act (Sec.1 (1)) applies to all operators of commercial telemedia services (roughly information society services according to the E-Commerce-Directive) who operate a platform which enables

⁴ 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 (Directive on electronic commerce), OJ No. L 178, p. 1 of 17.7.2000.

users to exchange any kind of content, to share this content or to make the content publicly available. Exempted are platforms with own journalistic-editorial content (journalistisch-redaktionell gestaltete Angebote) or small platforms with less than 2 Mio users registered in Germany.

- 8 Moreover, the application of the new enforcement obligations depends on certain illicit content which is enumerated in Sec. 1(3) of the act, referring mainly to communication offenses in criminal law such as defamation or rabble-rousing but also to distribution of every kind of pornography etc.
- 9 As the act does not provide for a territorial exemption all obligations of the new act apply to providers based in Germany as well as to those based in other countries, be it in other EU-member states or in third countries. The act does not contain any provision which would be alike Art. 3 of the E-Commerce-Directive (which has been implemented in Germany in Sec. 3 of the Telemedia-Act). The international applicability of the proposed act is also reflected in Sec. 4(3) which states explicitly that violations of the duties can also be fined when they take place outside Germany.
- 10 Thus, all providers with users in Germany will be affected, regardless of the location of their headquarters or their seat. Sec. 1(2) of the proposed act reflects this approach to international applicability when the provision stipulates a minimum threshold of 2 Mio users registered in Germany – hence, the only relevant criteria are users in Germany of the social network.

II. The country of origin principle

- 11 Given the applicability of the envisaged act to providers seated in other EU-Member States it is highly arguable if the act is compatible with Art. 3 E-Commerce-Directive:

1. Underlying rationale

- 12 The underlying rationale of the country of origin principle refers to the goal of harmonizing the legal framework for all information society providers in the EU, given the global character of the Internet. The EU clearly stated that goal in Recitals 1, 3, 5 and 10 of the E-Commerce-Directive.⁵ Moreover, Recital 22 point out that:

„(22) Information society services should be supervised at

⁵ See also CJEU 25.10.2011 – C-509/09 e-Date.

the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established."

- 13 Once again, the E-Commerce-Directive lays stress on the „freedom to provide services” and on „legal certainty” for providers, guaranteed by the country of origin principle. The Court of Justice of the EU took the same stance in the eDate advertising decision:⁶

„66 In relation to the mechanism provided for by Article 3 of the Directive, it must be held that the fact of making electronic commerce services subject to the legal system of the Member State in which their providers are established pursuant to Article 3(1) does not allow the free movement of services to be fully guaranteed if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established.

67 It follows that Article 3 of the Directive precludes, subject to derogations authorised in accordance with the conditions set out in Article 3(4), a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established.”

- 14 Hence, it is not overemphasized to qualify the country of origin principle as one of the cornerstones of the E-Commerce-Directive.

2. Applicability of the country of origin principle

- 15 The country of origin principle applies to the so-called „coordinated field” which is defined by Art. 2 h). The proposed German act provides obligations for providers to install complaint management systems, to establish in Germany a person who could be held responsible, to report periodically about the state of the complaints, and to remove illicit content in a prescribed way. Thus, the planned obligations clearly fall under the coordinated field, in particular requirements concerning behaviour of the service provider.

- 16 Hence, the envisaged act on enforcement of social

networks has to comply with the country of origin principle – which is confirmed indirectly by the official reasoning of the German government which states that there is no conflict with Art. 3 of the E-Commerce-Directive by invoking the exception of Art. 3 (4).⁷

3. Exceptions to the country of origin principle

- 17 Crucial for the evaluation of the proposed act is thus the compatibility with the country of origin principle, in particular with the exceptions which Art. 3 E-Commerce-Directive provides in Art. 3 (3) and Art. 3 (4). Whereas it is evident that Art. 3 (3) and the Annex cannot justify the planned act on social networks as no legal area or activity mentioned in the Annex is being covered the German government concentrates on Art. 3 (4). As this provision is crucial for the legal assessment it shall be cited here:

„Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,*

....

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,*

- notified the Commission and the Member State referred

⁶ CJEU 25.10.2011 – C-509/09 e-Date.

⁷ Begründung Regierungsentwurf NetzwerkdurchsetzungsG p. 13, 14.

to in paragraph 1 of its intention to take such measures.”

- 18 The German government contends in particular that the act would comply with the requirements of Art. 3(4) as the act would concern „a specific information service provider”. However, the reasoning misunderstands Art. 3(4) E-Commerce-Directive as this exception in Art. 3(4) applies exactly to a specific case, for instance procedures against one social network (judicial or administrative) etc. The exception in Art. 3(4) does not refer to a whole group of information service providers⁸ – in contrast to the proposed act which covers all kinds of social networks or other services such as E-Mail-providers⁹ and does not refer only to one specific case.
- 19 That Art. 3(4) does not refer to entire classes of information society providers is also reflected by Art. 3(4) b) i which requires the recipient state which wants to take action to ask beforehand the state of the origin of the service provider to take care of the (specific) provider. This procedure is clearly related to other uses of the country of origin principles enshrined, for instance, in financial markets Directive, such as the Market for Financial Instruments Directive (II).¹⁰ The procedure addresses the coordination between supervising authorities in order to guarantee the free flow of services in the European Union, to avoid establishing national barriers to services coming from another EU member state (European Pass). However, this procedure is not related to legal acts addressing whole class of service providers.
- 20 This interpretation of Art. 3(4) E-Commerce-Directive is affirmed if we take into account the general exceptions to Art 3(1) by Art. 3(3) E-Commerce-Directive referring to the annex. This annex contains exceptions referring to legal areas such as intellectual property rights or contractual consumer protection – and not specific cases. Such an annex would rather be unnecessary if Art. 3(4) could be applied to whole classes of information service providers as member states could easily invoke one

8 See also Weller in Beckscher Online Kommentar, Informations- und Medienrecht, § 3 TMG, Rz. 32; Nordmeier in Spindler/Schuster (eds.), Recht der elektronischen Medien, 3rd. ed. 2015, § 3 TMG Rz. 22; also Wimmers/Heymann, Archiv für Presserecht (Journal = AfP) 2017, 93, 97; Feldmann, Kommunikation und Recht (Journal = K&R) 2017, 292, 296.

9 As E-Mails also serve as a means to share information etc. Thus, every E-Mail-provider also has to be qualified according to the German Act as a „social network” as E-Mail-services can be qualified also as telemedia services.

10 Directive (2014/65/EU) of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173/349, 12.6.2014. See for instance, Art. 34 of the MiFID II and Art. 86 MiFID II concerning precautionary measures by the host state.

of the exceptions grounds provided for in Art. 3(4). This can also clearly be demonstrated if we look at the exceptions for consumer: Whereas Art. 3(3) and the Annex state an exception for all contractual protections concerning consumers, Art. 3(4) once again refers in general to consumer protection – the repeated (and extended) reference would not make any sense if Art. 3(4) could be understood in a way that whole classes or groups of cases are embraced by Art. 3(4).¹¹

- 21 Moreover, the French version clearly indicates that all exceptions are related to just one service provider rather than to a class of them:

„4. Les États membres peuvent prendre, à l’égard d’un service donné de la société de l’information, des mesures qui dérogent au paragraphe 2 si les conditions suivantes sont remplies:”

- 22 The French version (and all other romanian versions) makes it more clear than the German or English version that a singular is being used and only one specific case is being addressed.

- 23 Finally, and very clearly, the EU-Commission took the same stance in the Communication of 2003 regarding electronic financial services and derogations by member states:

„2.1.2. Concept of “given information society service”

A “given” service is taken to mean here that the Member State of destination may not, under Article 3(4), take general measures in respect of a category of financial services such as investment funds or loans.

To be covered by Article 3(4), the measure must, therefore, be taken on a case-by-case basis against a specific financial service provided by a given operator.

For example, it could be a measure such as a warning or a penalty payment taken by a country of destination against a bank proposing from its place of establishment in another EU country non-harmonised investment services to residents of that country. Such measures could, for instance, be taken on the ground that the bank was not complying with certain rules of conduct designed to protect consumers in the country of destination.

However, a Member State could not, on the basis of Article 3(4), decide that its entire legislation on, say, non-harmonised investment funds was applicable in a general and horizontal fashion to all services accessible to its residents.¹²

- 11 This is disregarded also by the German High Federal Court in the decision of 30.3.2006 – I ZR 24/03 BGHZ 167, 91, 101 f. – Arzneimittelwerbung im Internet. The court did not assess the relationship between the E-Commerce-Directive and other directives (here: prohibition of advertising for medical drugs).

- 12 Communication from the Commission to the Council, The

24 Thus, the Commission makes it very clear that Art. 3(4) refers to a case-by-case basis. In particular, every case has to be analyzed on grounds of the proportionality test¹³ – and not in a general way. Hence, there is no room for such an interpretation as the German government is undertaking.

4. Urgency (Art. 3(5))

25 Moreover, the German government argues that an instant action is needed to combat hate speech and other criminal actions in the Internet.¹⁴ However, it is highly questionable that a case for urgency can be construed: The issues at stake has already been known for a longer time, be it at the national or European level. That the US-elections has been influenced by fake news or activities at the social networks is just a prominent emanation of this general trend concerning communication on the Internet and in particular on social networks.

26 Nevertheless, these issues have been well known for years¹⁵ – for instance, the author of this expertise also has presented a large legal expertise on personality rights and enforcement problems on the Internet at the Deutsche Juristentag (the German Conference of all legal professions) in 2012.¹⁶ Hence, it should be out of question that the matter of defamation, hate speech, and fake news were already at stake in the last decade. Proportionality Test

27 Even though Art. 3(4) cannot be called into play to justify the proposed act it should be finally mentioned that the act has to pass at any rate the proportionality test. Without going into details here as these issues are out of the scope of the expertise, there are severe doubts if all categories of content foreseen by Sec. 1(3) of the proposed act would pass the proportionality test and could justify barriers to free flow of information society services, in particular with regard to risks to fundamental freedoms such as freedom of expression as granted by Art. 11 of the EU-Fundamental Rights Charta. If

European Parliament and the European Central Bank – Application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive, 14.5.2003, COM(2003) 259 final.

13 Communication from the Commission, COM(2003) 259 final point 2.2.4.

14 Begründung Regierungsentwurf NetzwerkdurchsetzungsG p 14.

15 See also *Wimmers/Heymann*, in: *Archiv für Presserecht* (Journal = AfP) 2017, 93, 98.

16 *Spindler*, *Persönlichkeitsrechte im Internet*, *Deutscher Juristentag 2012*, Gutachten F (Personality rights in the Internet, Legal Expertise for the German Conference of all lawyers, judges, and other juridical professions).

really all kinds of defamation could form a basis for additional obligations to information society services in other EU-member states is highly questionable.

III. Summary

28 The envisaged German Act violates the country of origin principle laid down in Art. 3 (2) E-Commerce-Directive. The exceptions in Art. 3 (4) E-Commerce-Directive only apply to a case-by-case approach and do not justify general laws applying also to providers in EU Member States. Finally, there is no evidence for a case of urgency according to Art. 3 (5) E-Commerce-Directive.

C. Specification of notice-and-take-down procedures and of „knowledge“

I. Provisions of the proposed Act

29 The proposed act raises also concerns about its compatibility with the provisions laid down in Art 14 E-Commerce-Directive, in particular the notice-and-take-down procedure and the notion of „knowledge“. In the notification for the planned act the German government states:

„The draft sets out legal standards for effective complaint management to ensure that social networks delete blatantly criminal content corresponding to an objective offence in one of the criminal provisions stated in § 1(3), as a rule 24 hours after receipt of the complaint from the user. The draft makes it compulsory to have effective, transparent methods for the prompt deletion of illegal content, including user-friendly mechanisms for registering complaints. (...) Service providers are bound to immediately remove illegal content they are storing for a user, or to block access to said content once they become aware of it. The compliance obligations laid down in this draft presuppose said requirement imposed on service providers and specify it further.“¹⁷

30 More specifically, the planned act will introduce scaled obligations for providers to remove illegal content or to block it:

- First, providers have to introduce an efficient complaint management, in particular mechanism for users to file complaints (Sec. 3(1) of the act)

17 Note, that the translation uses the word „manifestly“ instead of „blatantly“.

- Second, providers have to take care to take note expeditiously of the complaint and to assess the content on a legal basis (Sec. 3(2) Nr. 1 of the act). For blatantly¹⁸ criminal content concerning the criminal offences mentioned in Sec. 1(3) of the act providers have to remove the content within 24 hours after having received the complaint, with the exception of longer terms agreed upon with prosecuting authorities (sec. 3(2) Nr. 2 of the act)
- Third, to remove or block any illicit content within 7 days after having received the complaint (sec. 3(2) Nr. 3 of the act).
- However, the 7-days period may be exceeded if the social network refers the decision regarding unlawfulness to a recognised selfregulation institution pursuant to subsections (6) to (8) of Sec. 3 of the act within 7 days of receiving the complaint and agrees to accept the decision of that institution; the 7-days-period may also be exceeded if the complaint is based upon alleged false facts that need to be explored further.

31 All these duties are sanctioned by imposing fines on acting persons as well as the enterprise, in the latter case up to 50 Mio Euro (Sec. 4(1) and 4(2)).

II. Notice-and-take-down-procedure

32 By these means the act specifies the obligation of (host) providers enshrined in Art. 14 of the E-Commerce-Directive. These provisions are flanked by recitals 46, 48:

„(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply which can reasonably be expected from and which are specified by national law, in order to detect and prevent certain types of illegal activities.”

33 The liability privileges in Art. 12 – 15 E-Commerce-

18 Or as in the translation „manifestly”.

Directive are fully harmonizing, giving leeway to the Member States only where explicitly stated.¹⁹

34 Whereas Art. 14 just requires that a provider „upon obtaining knowledge or awareness, acts expeditiously to remove or to block access to the information” Sec. 3(2) Nr. 2 and Nr. 3 refer to fixed terms within a provider has to act, starting with the date of having received the complaint. In contrast Sec. 3(2) Nr. 1 of the planned act refers to Art. 14 (1) E-commerce-Directive when requiring the provider to take note expeditiously of the complaint and assess the legality of the content. Thus, the proposed German act deviates significantly in some issues from Art. 14 of the E-Commerce-Directive:²⁰

- First, instead of acting „expeditiously” the requirement to act within 24 hrs. or at least 7 days
- Second, by calculating the term starting with the reception of the complaint instead of referring to actual knowledge

1. Fixed terms

35 As mentioned, Art. 14 of the E-commerce Directive uses explicitly the term „expeditiously”, in the French version „promptement”, in the Spanish version „con prontitud”, in the Italian version „immediatamente”, in the Netherlands version „prompt”, in the German Version „unverzöglich”.

36 However, the E-Commerce-Directive does not specify what has to be understood by expeditiously – thus, it seems that the E-Commerce-Directive would leave some leeway for member states to specify this term. This perspective seems to be fostered by recital 46 S. 2 of the E-Commerce-Directive which obviously allows the member states to introduce procedures for the removal:

„the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level;”

37 However, the phrase has to be read carefully: The „procedures established” at national level refer explicitly to „this purpose” which refers to removal or disabling of access. Thus, procedures means ways of **how** to remove or block an access – but not **when** (or at which moment in time) a content has to be

19 Cf. German High Federal Court (Bundesgerichtshof) 04.07.2013 - I ZR 39/12 NJW (Neue Juristische Wochenschrift) 2014, 552 – Terminhinweis mit Kartenausschnitt, Paragraph 19, 20.

20 See also *Wimmers/Heymann*, Archiv für Presserecht (Journal = AfP) 2017, 93, 95.

removed. Recital 46 S. 1 states once again that the removal etc. has to be done expeditiously; S. 2 does not refer or specify this notion but just refers to the removal or disabling of access as such. This is confirmed by the second restriction in Recital 46 S. 2 which requires „the observance of the principle of freedom of expression” – hence, once again a requirement which concerns the removal as such in order not to discourage users from using their freedom of expression, but not the point in time when the removal has to be done.

- 38 Furthermore, Member States could argue that Recital 46 S. 3 allows them to specify requirements for removal or disabling information:

„this Directive does not affect Member States’ possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.”

- 39 However, this part of the recital clearly refers to requirements **prior** to the removal, hence for the procedure before removing or blocking a content – such as prior information to the owner of the content. For instance, the German High Federal Court introduced such a procedure in the context of injunctions against defamations in blogs, requiring the blog provider to ask the blogger for a statement referring to a complaint and then vice-versa the complainer if he would uphold his complaint in the light of this blogger’s statement.²¹ In contrast, the fixed terms of Sec. 3 (2) of the proposed act do not refer to such a procedure prior to the removal rather than specifies the term „expeditiously”.
- 40 In sum, Recital 46 allows to establish procedures for the removal or blocking of content as such but does not allow to specify the notion of „expeditiously” in Art. 14 of the E-Commerce-Directive.
- 41 There are also good reasons on the European level not to allow member states too much leeway in specifying Art. 14: Different terms in member states which would concretise the notion „expeditiously” by introducing fixed terms could very soon lead to a scattered landscape of liability privileges in Europe. Thus, whereas Germany provides for fixed terms of 24 hours or 7 days other member states could introduce complete different terms such as 7 hrs. or 48 hrs. etc. or even longer than 7 days. The intention of the E-Commerce-Directive to fully harmonise liability of intermediaries would thus be severely undermined.

21 German High Federal Court (Bundesgerichtshof), 25.10.2011 – VI ZR 93/10 BGHZ 191, 219 (Official edition of Decisions Vol. 191, p. 219) – Mallorca-Blogger; see also German High Federal Court (Bundesgerichtshof), 1.3.2016 – VI ZR 34/15 – Jameda, AfP 2016, 253.

- 42 The same phenomenon already has been stated concerning different notice-and-take-down procedures in Europe.²² Moreover, different terms in Member States have led, for instance, in consumer protection to a review of consumer protection directives and to a new directive in order to stick to fixed mandatory terms for all Member States so that legal insecurity shall be avoided.²³
- 43 Finally, there is no indication that the notion of „expeditiously” should not be interpreted on the European level by the Court of Justice of the European Union (CJEU) as an autonomous notion of the E-Commerce-Directive.

2. Obligation after having received a complaint

- 44 Secondly, the envisaged German act calculates all terms upon the reception of the complaint. However, Art. 14 (1) S. 2 b) explicitly refers the obligation to act to the „obtaining (of) such knowledge.” This deviation matters in different perspectives:

a.) Knowledge versus reception of a complaint

- 45 First, reception of an information cannot be equally treated as „knowledge” according to Art. 14 (1) E-Commerce-Directive. Whereas reception of an information refers – at least according to traditional German Doctrine enshrined in Sec.130 of the German Civil Code – to achieving control of an information, such as receiving a letter in a letter box, and does not relate to the actual knowledge (such as opening the letter) the term of knowledge in Art. 14 (1) refers to human actual knowledge of a content, that a human being has noted the content in an aware manner. As Art. 14 (1) E-commerce Directive intends to privilege neutral, automatized activities (as the CJEU noted)²⁴ only human knowledge is relevant for the liability privilege.²⁵ Hence, knowledge in the sense of Art.

22 Cf. *Verbiest/Spindler/Riccio/van der Perre*, Study on the liability of internet intermediaries (Markt/2006/09/E), 12.11.2007, <http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf> p. 15 and following with references to national reports.

23 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64 of 22.11.2011.

24 CJEU 12.7.2011 – C-324/09 L’Oreal v ebay Paragraph 113 and following.

25 If not, the E-Commerce-directive would be construed

14 (1) E-Commerce-Directive is not the same as the reception of the complaint. Whereas one could argue that in most cases reception of information would lead to the same result as knowledge, in particular concerning blatantly (or manifestly) criminal offenses, it may not be the same when calculating a 24 hrs. term.

b.) Knowledge of illicit content

46 Secondly, knowledge as used by Art. 14(1) E-Commerce-Directive does not only refer to the knowledge of the content as such rather than also knowledge of illicit character.²⁶ Whereas the German and English version are not clear the French or Spanish version clearly indicate that knowledge in Art. 14(1) E-Commerce-Directive also refers to the legal assessment of a content:

“le prestataire n’ait pas effectivement connaissance de l’activité ou de l’information illicites”

„conocimiento efectivo de que la actividad o la información es ilícita”

47 Hence, the reception of a complaint cannot be treated as the relevant knowledge in the sense of Art. 14(1) as knowledge requires also the legal assessment – which may take more time than 24 hrs.

48 Even though a thorough analysis of constitutional legal aspects of the planned act, such as dangers for the freedom of expression (Art. 11 Charter of fundamental rights of the European Union (2000/C 364/01)²⁷, is out of the scope of this analysis it should be noted that such fixed terms as they are provided for in the planned German Act could force providers into a dilemma when they have to check like a judge if a content is within the borderlines of freedom of expression (or arts etc.).²⁸ Hundreds of disputed decisions even between the highest courts

in such a way that the provider would have to introduce automated decision procedures which surely cannot take into account aspects of freedom of expression.

26 For the German discussion cf *Eck/Ruess*, *Multimedienrecht* (Journal = MMR) 2003, 363, 365; *Freytag*, *Computer und Recht* (Journal = CR) 2000, 600, 608; *Dustmann*, *Die privilegierten Provider*, S. 107; *Wimmer/Kleineidam/Zang*, *Kommunikation und Recht* (Journal = K&R) 2001, 456, 460 f.; *Berger*, MMR 2003, 642, 645; *Hoffmann*, MMR 2002, 284, 288; *Beckscher Onlinekommentar Informations und Medienrecht/Paal*, § 10 TMG Rn. 30; contravening opinion: *Beckscher Kommentar Recht der Teledienste /Jandt*, § 10 TMG Rn. 18; *Härting*, CR 2001, 271, 276. See also *Eck/Ruess*, MMR 2003, 363, 365; *Gercke*, MMR 2003, 602, 603.

27 OJ No. C 364, p. 1 of 18.12.2000. Issues of the German Constitution are out of scope of this expertise.

28 Cf. *Wimmers/Heymann*, *Archiv für Presserecht* (Journal = AfP) 2017, 93, in particular p. 99 and following.

in Europe highlighten these intrigue issues how to strike the balance between defamation and freedom of expression (for instance, of prominent persons such as Caroline of Monaco).²⁹

49 Regarding the planned German act, the provider has to take a decision in order not to be fined up to 50 Mio Euro. In contrast, if the provider would remove the incriminated information he risks only claims for damages of the user which are hardly to assess (immaterial damages etc.) and could result in very low sums. Thus, it is very likely (and economic rationale) that the provider will make up his mind to remove the information (or to block access to it). Thus, such an obligation would highly endanger the fundamental freedom of expression.³⁰

50 The E-Commerce-Directive takes such dangers explicitly into account: As recital 46 puts it, the provider has to take his decision with obedience to the principles of freedom of expression. However, if the provider faces fines up to 50 Mio Euro and if no judicial act is necessary to remove the information the balance is shifted to the detriment of freedom of expression.

c.) Knowledge and general complaints

51 Thirdly – and more important than all other arguments – the term used in the German act refers to a complaint – not specifying when a complaint may trigger the obligations to act. Hence, such a complaint could be formulated in a general way, not always enabling the provider to discern immediately the incriminated content. Even very general complaints could then trigger the obligations for the provider, resulting in fact in an obligation to inspect the case thoroughly.

52 In contrast, Art. 14 (1) E-Commerce-Directive refers to the content as such – thus, a specific content has to be named, the provider is not being held to monitor his servers (Art. 15). This perspective is affirmed by Art. 14 (1) 2nd. alternative which refers for civil damage claims to the knowledge of evident circumstances (!), in contrast to the knowledge of the content as such (Art. 14 (1) 1st. alternative). Such a distinction would not make any sense if knowledge in Art. 14 (1) 1st. alternative could be construed in such a way that also general hints would trigger already the obligation for the provider to act. Moreover, any obligation to thoroughly scrutinize

29 Cf. European Court of Human Rights 7.2.2012 - 40660/08 against German Federal Constitutional Court 26.2.2008 - 1 BvR 1626/07 and German High Federal Court of Justice (Bundesgerichtshof) 6.3.2007 - VI ZR 51/06.

30 Same result in also *Wimmers/Heymann*, *Archiv für Presserecht* (Journal = AfP) 2017, 93, 98.

a case by inspecting all circumstances and facts would contravene the objective of the E-Commerce-Directive to enhance automated business models.

- 53 Even concerning civil damages (Art. 14(1) 2nd. alternative) the CJEU clearly states that not all notifications will result in an „awareness” of facts and circumstances:³¹

„122 The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.”³²

- 54 The German parliament tried to specify the complaint in such a way that Sec. 3(2) No.1 refers only to complaints which concern a reported specific content. If this provision is apt to cope with the aforementioned European legal requirements remains doubtful as the act still remains somehow opaque what a “reported content” means.

III. Summary

- 55 In sum, the envisaged German Act deviates in several ways from the full harmonizing Art. 14 E-Commerce-Directive by:
- introducing fixed terms instead sticking to the „expeditiously” deletion or blocking access to an infringed information
 - referring to the reception of a complaint instead to „knowledge” as required by Art. 14 E-Commerce-Directive
 - not taking into account that „knowledge” according to Art. 14 E-Commerce-Directive requires also knowledge of the illegality of an information.
 - triggering obligations by a mere complaint and

not referring to a specific information.

D. Scope of application – legal insecurity

I. The planned Act

- 56 According to the reasoning of the German Government the act should be restricted „to the operators of large, influential social networks, instead of to all service providers as set out in the Telemedia Act [Telemediengesetz – TMG]”.³³ Moreover,

„the draft does not cover media platforms that publish their own journalistic and editorial content. The definition of a social network includes both the exchange of content between users in a closed or ‘gated’ community, and the public distribution of content. A minimum size is provided for relatively small companies (start-ups).”

- 57 Thus, the planned act defines social networks in Sec. 1(1) as those information society providers

„...who operate platforms in the Internet with an intention to make profit which enable users to share any kind of content mit other users or to make the content publicly available”³⁴

- 58 Only platforms with less than 2 Mio users registered in Germany are exempted (Sec. 1(2) of the planned act).

II. Compatibility with the E-Commerce-Directive

- 59 This broad definition raises concerns about legal certainty for information society providers and is not in line with the notion of information society providers which host information according to Art. 14 E-commerce-Directive. The definition of the planned act aims at social networks such as Facebook or Twitter but could be applied to any kind of service which enable users to exchange content. In the original version of the proposed act, even E-Mail-services would be concerned as well as any kind of cloud computing platform. It would have been sufficient that a user just shares his content outside the platform with other users by sharing a hyperlink or by just enabling them access to the platform – the definition unspecifically just required an „enabling” of sharing content which could be done by any means of uploading content and then sharing it. For

31 CJEU 12.7.2011 – C-324/09 L’Oreal v ebay.

32 Underlining by the author.

33 Notification of the Act.

34 Translation by the author.

example, services such as dropbox would be affected as well as other sharing platforms – which do not have any effect upon public discussions etc.

- 60 The German parliament dealt with this issue by introducing another exemption in Sec. 1(1) of the act:

“The same (cf. an exemption) shall apply to platforms which are designed to enable individual communication or the dissemination of specific content”.

- 61 However, only e-mail providers and strict individual communication is thus excluded; in contrast to the intent of the German parliament still professional networks such as LinkedIn or XING are encompassed as well as any kind of cloud provider.
- 62 Hence, taken literally there would be in the end no difference between host providers as referred to in Art. 14(1) E-Commerce-Directive and the planned German Act. Even though a provider probably could not have any knowledge of sharing activities of the users the planned German Act could apply – for instance, a cloud provider who stores content for his users would be faced to comply with the obligations of the planned German Act as the content stored in the cloud may be shared with other users.
- 63 Only if the notion of „enabling” in the planned German act can be construed in such a way that the platform itself has to offer sharing tools so that any „external” sharing activities are not concerned the definition will not cover all host providers of Art. 14(1) E-Commerce-Directive.

III. Inequal treatment

- 64 However, even though the German act may be specified by a restrictive interpretation it is highly questionable why these platforms (with internal sharing tools) should be treated differently from other host providers. As the cases in copyright law have shown sharing activities could be done by a variety of business models, such as placing links to content stored on other servers (such as rapidshare).
- 65 Moreover, Art. 14(1) E-commerce-Directive does not distinguish between small and big enterprises. A distinction between small and big information society providers may be justified on grounds of defending public security and interests as platforms with a lot of users are more likely to affect the public discussion – as the US-elections and the debate about „fake news” etc. have shown. However, the German Act refers to a variety of criminal offenses which cover not only offenses against public interest or security rather than also more individual legally

protected interests such as defamation. Hence, it is hard to justify a different treatment of small platforms which also endanger individual interests (as in cases of defamation etc.).³⁵ Thus, Art. 14(1) E-Commerce-Directive does not distinguish between offenses against public interests and individual interests (only between damages based upon civil law and other offenses). Moreover, Art. 14(1) E-Commerce-Directive applies to any kind of information society provider without regard to numbers of users or capital etc.

IV. Summary

- 66 In sum, the definition in the envisaged Sec. 1 of the German Act deviates from Art. 14 E-Commerce-Directive and the notion of providers of information services. The E-Commerce-Directive treats small and big providers in the same way – in contrast to the planned act. Moreover, the privileges and also obligations of Art 14 E-Commerce-Directive apply to all kind of offenses and illegal activities – in contrast to the planned act.

E. Conclusion

- 67 Whereas the German Act in principle aims at the right target – fighting fake news and hate speech – the way ahead seems to be more than problematic. In a digital single market the way ahead should not be taken by national legislators rather than the EU institutions. If such “specifications” of the ECRD would be allowed for national legislators any harmonisation of the ECRD would vanish soon. Hence, even though the goals of the German Act may be supported national legislators should not be competent to regulate notice-and-take-down requirements (in contrast to procedures). Moreover, what is needed is a thorough development of fast judicial procedures to handle complex conflicts of defamation cases where fundamental rights of freedom of expression are touched as well as personality rights.

³⁵ Same result in *Wimmers/Heymann*, Archiv für Presserecht (Journal = AfP) 2017, 93, 96.

Attachment: Unofficial Translation of the Network Enforcement Act³⁶

Editing status: 12 July 2017, 3:22 pm

Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)

The Bundestag has adopted the following Act:

Article 1

Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)

Section 1

Scope

(1) This Act shall apply to telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (social networks). Platforms offering journalistic or editorial content, the responsibility for which lies with the service provider itself, shall not constitute social networks within the meaning of this Act. The same shall apply to platforms which are designed to enable individual communication or the dissemination of specific content.

(2) The provider of a social network shall be exempt from the obligations stipulated in sections 2 and 3 if the social network has fewer than two million registered users in the Federal Republic of Germany.

(3) Unlawful content shall be content within the meaning of subsection (1) which fulfils the requirements of the offences described in sections 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in connection with 184d, 185 to 187, 241 or 269 of the Criminal Code and which is not justified.

Section 2

Reporting obligation

(1) Providers of social networks which receive more than 100 complaints per calendar year about unlawful content shall be obliged to produce half-yearly German-language reports on the handling of complaints about unlawful content on their platforms, covering the points enumerated in subsection (2), and shall be obliged to

publish these reports in the Federal Gazette and on their own website no later than one month after the half-year concerned has ended. The reports published on their own website shall be easily recognisable, directly accessible and permanently available.

(2) The reports shall cover at least the following points:

1. general observations outlining the efforts undertaken by the provider of the social network to eliminate criminally punishable activity on the platform,
2. description of the mechanisms for submitting complaints about unlawful content and the criteria applied in deciding whether to delete or block unlawful content,
3. number of incoming complaints about unlawful content in the reporting period, broken down according to whether the complaints were submitted by complaints bodies or by users, and according to the reason for the complaint,
4. organisation, personnel resources, specialist and linguistic expertise in the units responsible for processing complaints, as well as training and support of the persons responsible for processing complaints,
5. membership of industry associations with an indication as to whether these industry associations have a complaints service,
6. number of complaints for which an external body was consulted in preparation for making the decision,
7. number of complaints in the reporting period that resulted in the deletion or blocking of the content at issue, broken down according to whether the complaints were submitted by complaints bodies or by users, according to the reason for the complaint, according to whether the case fell under section 3 subsection (2) number (3) letter (a), and if so, whether the complaint was forwarded to the user, and whether the matter was referred to a recognised self-regulation institution pursuant to section 3 subsection (2) number (3) letter (b),
8. time between complaints being received by the social network and the unlawful content being deleted or blocked, broken down according to whether the complaints were submitted by complaints bodies or by users, according to the reason for the complaint, and into the periods “within 24 hours”/“within 48 hours”/“within a week”/“at some later point”,
9. measures to inform the person who submitted the complaint, and the user for whom the content at issue was saved, about the decision on the complaint.

³⁶ Source of the translation: German Federal Ministry of Justice and Consumer Protection, available at: <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?sessionid=214B47C122833D1E5BFFD3C37BEA9264.1_cid297?__blob=publicationFile&v=2>, last accessed 23 August 2017.

Section 3

Handling of complaints about unlawful content

(1) The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content in accordance with subsections (2) and (3). The provider shall supply users with an easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content.

(2) The procedure shall ensure that the provider of the social network:

1. takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked,

2. removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint; this shall not apply if the social network has reached agreement with the competent law enforcement authority on a longer period for deleting or blocking any manifestly unlawful content,

3. removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving the complaint; the 7-day time limit may be exceeded if

- a) the decision regarding the unlawfulness of the content is dependent on the falsity of a factual allegation or is clearly dependent on other factual circumstances; in such cases, the social network can give the user an opportunity to respond to the complaint before the decision is rendered;

- b) the social network refers the decision regarding unlawfulness to a recognised self-regulation institution pursuant to subsections (6) to (8) within 7 days of receiving the complaint and agrees to accept the decision of that institution,

4. in the case of removal, retains the content as evidence and stores it for this purpose within the scope of Directives 2000/31/EC and 2010/13/EU for a period of ten weeks,

5. immediately notifies the person submitting the complaint and the user about any decision, while also providing them with reasons for its decision,

(3) The procedure shall ensure that each complaint, along with the measure taken to redress the situation, is documented within the scope of Directives 2000/31/EC and 2010/13/EU.

(4) The handling of complaints shall be monitored via

monthly checks by the social network's management. Any organisational deficiencies in dealing with incoming complaints shall be immediately rectified. The social network's management shall offer the persons tasked with the processing of complaints training courses and support programmes delivered in the German language on a regular basis, this being no less than once every six months.

(5) The procedures in accordance with subsection (1) may be monitored by an agency tasked to do so by the administrative authority named in section 4.

(6) An institution shall be recognised as a self-regulation institution within the meaning of this Act if

1. the independence and expertise of its analysts are ensured,

2. appropriate facilities are in place and prompt analysis within a 7-day period is guaranteed,

3. it has rules of procedure which regulate the scope and structure of the analysis, stipulate the submission requirements of the affiliated social networks, and provide for the possibility to review decisions,

4. a complaints service has been set up, and

5. the institution is funded by several social network providers or establishments, guaranteeing that the appropriate facilities are in place. In addition, the institution must remain open to the admission of further providers, of social networks in particular.

(7) Decisions leading to the recognition of self-regulation institutions shall be rendered by the administrative authority named in section 4.

(8) Recognition can be wholly or partly withdrawn or tied to supplementary requirements if any of the conditions for recognition are subsequently no longer met.

(9) The administrative authority named in section 4 can also stipulate that the possibility for a social network provider to refer decisions in accordance with subsection (2) number (3) letter (b) is barred for a specified period if there is a reasonable expectation that the provider in question will not fulfil the obligations under subsection (2) number (3) by affiliating itself with the system of self-regulation.

Section 4

Provisions on regulatory fines

(1) A regulatory offence shall be deemed to have been committed by any person who, intentionally or negligently,

1. in contravention of section 2(1) sentence 1, fails to produce a report, to produce it correctly, to produce it completely or to produce it in due time, or fails to publish it, to publish it correctly, to publish it completely, to publish it in the prescribed form or to publish it in due time,

2. in contravention of section 3(1) sentence 1, fails to provide, to provide correctly or to provide completely, a procedure mentioned therein for dealing with complaints submitted by complaints bodies or by users whose place of residence or seat is located in the Federal Republic of Germany,

3. in contravention of section 3(1) sentence 2, fails to supply a procedure mentioned therein or to supply it correctly,

4. in contravention of section 3(4) sentence 1, fails to monitor the handling of complaints or to monitor it correctly,

5. in contravention of section 3(4) sentence 2, fails to rectify an organisational deficiency or to rectify it in due time,

6. in contravention of section 3(4) sentence 3, fails to offer training or support or to offer them in due time, or

7. in contravention of section 5, fails to name a person authorised to receive service in the Federal Republic of Germany or fails to name a person in the Federal Republic of Germany authorised to receive information requests from German law enforcement authorities, or

8. in contravention of section 5 subsection (2), second sentence, fails to respond to requests for information while acting as the person authorised to receive service.

(2) In cases under subsection (1) numbers 7 and 8, the regulatory offence may be sanctioned with a regulatory fine of up to five hundred thousand euros, and in other cases under subsection (1) with a regulatory fine of up to five million euros. Section 30(2) sentence 3 of the Act on Regulatory Offences shall apply.

(3) The regulatory offence may be sanctioned even if it is not committed in the Federal Republic of Germany.

(4) The administrative authority within the meaning of section 36(1) number 1 of the Act on Regulatory Offences shall be the Federal Office of Justice. The Federal Ministry of Justice and Consumer Protection, in agreement with the Federal Ministry of the Interior and the Federal Ministry for Economic Affairs and Energy, shall issue general administrative principles on the exercise of discretion by the regulatory fine authority in initiating

regulatory fine proceedings and in calculating the fine.

(5) If the administrative authority wishes to issue a decision relying on the fact that content which has not been removed or blocked is unlawful within the meaning of section 1(3), it shall first obtain a judicial decision establishing such unlawfulness. The court with jurisdiction over the matter shall be the court that rules on the objection to the regulatory fine order. The application for a preliminary ruling shall be submitted to the court together with the social network's statement. The application can be ruled upon without an oral hearing. The decision shall not be contestable and shall be binding on the administrative authority.

Section 5

Person authorised to receive service in the Federal Republic of Germany

(1) Providers of social networks shall immediately name a person authorised to receive service in the Federal Republic of Germany and shall draw attention to this fact on their platform in an easily recognisable and directly accessible manner. It shall be possible to effect service on this person in procedures pursuant to section 4 or in judicial proceedings before German courts on account of the dissemination of unlawful content. The same shall also apply to the service of documents initiating such proceedings.

(2) To enable the receipt of requests for information from German law enforcement authorities, a person in the Federal Republic of Germany shall be named who is authorised to receive such requests. The person so authorised shall be obliged to respond to such requests for information pursuant to the first sentence within 48 hours of receipt. In cases where the requested information is not exhaustively provided, reasons for this shall be included in the response.

Section 6

Transitional provisions

(1) The first issue of the report pursuant to section 2 shall be due in respect of the first half-year of 2018.

(2) The procedures pursuant to section 3 shall be introduced within three months of the entry into force of this Act. If the social network provider does not fulfil the requirements of section 1 until some later date, the procedures pursuant to section 3 shall be introduced within three months of this date.

Article 2

Amendment of the Telemedia Act

The Telemedia Act of 26 February 2007 (Federal Law

Gazette I p. 179), last amended by Article 1 of the Act of 21 July 2016 (Federal Law Gazette I p. 1766) shall be amended as follows:

1. The following subsections (3) to (5) shall be added to section 14:

“(3) Furthermore, the service provider may in individual cases disclose information about subscriber data within its possession, insofar as this is necessary for the enforcement of civil law claims arising from the violation of absolutely protected rights by unlawful content as defined in section 1 subsection (3) of the Network Enforcement Act.

(4) Before information is disclosed in accordance with subsection (3), a court order on the permissibility of such disclosure shall be obtained; this shall be requested by the injured party. Jurisdiction for issuing any such order shall lie with the regional court, regardless of the value of the claim. Territorial jurisdiction shall lie with the court in whose district the injured party has his domicile, his seat or a branch office. The decision shall be rendered by the civil division. The provisions of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction shall apply *mutatis mutandis* to the proceedings. The costs of the court order shall be borne by the injured party. The remedy of immediate complaint is admissible in respect of the regional court decision.

(5) The service provider shall be involved as an interested party in proceedings pursuant to subsection (4). It may inform the user that proceedings have been instigated.”

2. In section 15 subsection (5), the fourth sentence shall be worded as follows:

“Section 14 subsections (2) to (5) shall apply *mutatis mutandis*.”

Article 3

Entry into force

This Act shall enter into force on 1 October 2017.