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Summary of the HTWK Study „Effects of the Act improving Law Enforcement on Social Networks (NetzDG) in practice“

1. Regulatory content of the NetzDG

With the Act improving Law Enforcement on Social Networks (NetzDG), the German government intended to react to Hate Speech and Fake News in Social Media in 2017. On October 1, 2017, the Act came into force. Its main regulatory content includes

- a reporting obligation for social networks on the handling of certain user generated content that is the subject of complaints (§ 2),
- the establishment of a complaints management system with the obligation to delete within tight deadlines (§ 3),
- the designation of a domestic authorized representative and a person authorized to receive requests for information (§ 5),
- Violations of these obligations – e.g. failure to provide an adequate complaint procedure – can be punished with substantial fines against the company up to 50 million Euro (§ 4).

The central regulatory approach of the NetzDG 2017 is the establishment of a reporting procedure aimed at deleting content subject to complaints within certain deadlines. However, this only applies to content on social media that is punishable under the facts specified in Section 1 (3) of the NetzDG. According "unlawful content" is content that fulfils the requirements set out in sections 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in conjunction with 184d, 185 to 187, 201a, 241 or 269 of the German Criminal Code (StGB). This includes, for example, offensive content, incitement to hatred, or public calls for criminal acts or threats.

The relevant standard of Section 3 (2) Nos. 2 and 3 NetzDG obliges social networks to remove or block such (criminal) illegal content "without delay”, as a rule of thumb “within seven days" after receiving a complaint. If the content that is the subject of the complaint is "obviously illegal", it must be deleted within 24 hours.

Social networks that "do not, not correctly or not completely provide" a complaints procedure with a corresponding "handling" of complaints in conjunction with § Section 30 (2) sentence 3 OWiG can be sanctioned with fines of up to 50 million euros according to section 4 (1) no. 2 NetzDG.

The Act improving Law Enforcement on Social Networks has provoked criticism concerning freedom of speech because it creates incentives for providers to delete contents although they have not been proven illegal.

Contrary to the announcement by the German government that a later evaluation of the law would refer to this critical aspect, the evaluation commissioned by the Federal Ministry of Justice and Consumer Protection (BMJV) in 2020 did not include an empirical investigation of whether there is “overblocking” on large social networks. Nor were any indications of the existence of such a practice identified in the evaluation report.

For these reasons, among others, a research team at the Faculty of Computer Science and Media at the University of Applied Sciences (HTWK) in Leipzig has come together to carry out a further partial evaluation of the effects of the NetzDG in practice.

2. Relevance of the NetzDG in Practice

With regard to the three Social Media Networks investigated, Facebook, YouTube, and Twitter, the study findings indicate that the Network Enforcement Act (NetzDG) has little effects upon deletions and blocking of user content in Germany. The vast majority of content resulting from complaints is removed in accordance with the network's own community standards / terms and conditions (T&C). In contrast, the proportion of content removed under the NetzDG is marginal. Due to the considerable increase in automated T&C content removals, especially on Facebook and YouTube, NetzDG blocking is almost irrelevant in comparison. The analysis of the NetzDG fine enforcement practice and monitoring reports pursuant to Section 3 (5) of the NetzDG also tends to indicate that the Network Enforcement Act has no direct, significant regulation effect. This assessment results in particular from the following points of view:

- All of the social networks studied practise a priority review of complaint-related content according to their own community guidelines or T&C. This even applies to complaints received via a NetzDG form or submitted by the complainant with reference to the NetzDG. Therefore, the vast majority of content removals in NetzDG complaints (approx. 80%-90%) take place because of an assumed violation of the guidelines or terms and conditions, but not because of an affirmed offense according to Section 1 (3) of the NetzDG.[1] This results, in particular, from the fact that their own community standards, which are primarily examined, are often broader in terms of the prohibited content than the criminal law requirements of Section 1 (3) of the NetzDG. Only in individual exceptional areas, such as Section 86a of the Criminal Code, is there in some cases, a subsidiary blocking of content under the NetzDG.
- In addition, the vast majority of content removals on the two major social networks YouTube and Facebook are now carried out on the basis of automated detection and not on the basis of user complaints.[2] Such deletions, which are not founded upon any specific reason, are not covered by the NetzDG from the outset. These content removals, which occur millions of times over, are not taken into account in the NetzDG semi-annual reports. Of the 34,711,336 videos deleted from YouTube in 2020, 94.36% were removed due to automatic detection, i.e. without user complaints. In the case of content removals by the social network Facebook, the proportion of measures taken without user complaints is also steadily increasing. For the area of "hate speech" for example in the 4th quarter of 2020 automatic removals increased to 97.1%, which corresponds to 26.1 million pieces of content removed due to an assumed violation of the terms and conditions (hate speech) in the period from October to December 2020. This compares to a total of 397 content removals due to incitement to hatred following NetzDG reports in double the timeframe from July to December 2020.
- In 2017, the NetzDG legislator assumed that there would be 500 substantiated fine proceedings against social networks each year in the area of complaints management, which would require a personnel expenditure of 39.5 positions with personnel and additional costs totalling approximately 4 million euros per year.[3] In fact, in the period from 2018 to 2020, the responsible authority of the Federal Office of Justice (Bundesamt für Justiz) did not issue any penalty notices in the area of complaint management.[4] This also indicates a rather marginal practical significance of the Network Enforcement Act, which is geared exclusively toward fine notices in terms of legal consequences.

[1] See II.5.b) and c), IV.2.c)cc)(1) as well as V.2.d) and 3.a).
[2] See II.5.b).
[3] BT-Drs. 18/12356, p. 3 f. and II.5.e).
[4] See II.5.e)bb).

- The monitoring commissioned by the Federal Office of Justice pursuant to Section 3 (5) of the NetzDG arrives at findings in the semi-annual reports 1/2019, 2/2019 and 1/2020 that cannot prove the effectiveness or practical impact of the NetzDG in the case of reported clearly illegal content. The percentages of timely content removal after notification determined via monitoring – admittedly without disclosure of the methodology – are on average lower than the deletion rate determined by jugendschutz.net in the monitoring process before the NetzDG came into force and which was used by the legislator to justify the necessity of the NetzDG.[5]

Since the findings presented point to a minor regulatory effect of the Network Enforcement Act in practice, it could be considered necessary to catch up on the examination of the suitability, necessity and appropriateness of the Act with regard to its constitutionality, which was only cursorily undertaken by the legislature in 2017, and was also not carried out in the legal evaluation commissioned by the BMJV in 2020 [see also 5.e)aa) below].

In the context of the relevance of the NetzDG in practice, it must also be taken into account that the general applicability of the NetzDG for almost all market-relevant providers with their registered office in another EU member state (in particular Facebook, YouTube, Twitter, TikTok, Instagram) is rejected by the prevailing opinion due to the country of origin principle according to Art. 3 of the E-Commerce Directive (ECRL).[6] Accordingly, the survey of social networks as part of the qualitative study revealed that the video-sharing service YouTube denies that the NetzDG is legally binding and currently only implements it voluntarily.[7] Moreover, a practical application of the NetzDG to providers with exclusive headquarters outside the EU area is non-existent – apart from individual requests for legal assistance from the Federal Office of Justice, which have so far been fruitless.[8]

3. Analysis of the 2018-2020 Semi-annual Reports

The analysis of the six semi-annual reports in the period from 2018 to 2020 shows that the three social networks examined, Facebook, YouTube and Twitter, essentially implement the reporting requirements of Section 2 (2) of the NetzDG sufficiently. In some cases, the service providers choose different data bases, in particular for the presentation of complaints received or content subject to complaints, as well as for the proportion of content removed and its differentiation by complaint reason. Since all three of the networks investigated have also integrated or added NetzDG compliance into the previously established complaints management system in accordance with their own general terms and conditions standards, the challenge of sufficiently transparent differentiation of the effects of the different compliance systems arises in the presentation of the report.

The respective differences in the reporting implementations by the three networks examined also complicate the comparative analysis. In addition, there are some differences in the reporting figures determined, for example, for complaints received. These are mainly due to the different reporting channels implemented by the social networks, which were also created for NetzDG complaints mostly in parallel to the reporting structure already established before the Network Enforcement Act came into force.

[5] See II.5.d) as well as III.2.b) and c).
[6] *Eifert*, in: Eifert/Gostomzyk, Netzwerkrecht, 2018, p. 24; *Hoven/Gersdorf*, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 30th edition, 2019, § 1 NetzDG Rn. 9; *Liesching*, in: Spindler/Schmitz, TMG - Kommentar, 2nd edition 2018, § 1 NetzDG Rn. 13 ff, each with further references.
[7] See IV.2.c)aa)(2).
[8] See the comments in the BfJ statement on the NetzDGÄndG of 15.6.2020, esp. p. 11 and II.5.f)bb).

The differences in reporting implementation and complaint management are – in addition to the individual organizational freedom of the companies – primarily due to very unspecific legal requirements of the NetzDG, which, in some cases, do not take into account the reality of the application of social networks. This also applies to the reporting requirements formulated in Section 2 (2) of the NetzDG. Thus, from the outset, it appears inadequate with regards to the regulatory intention of transparency that the legislator did not consider the already existing complaint and deletion structures, which were geared to its own community standards. The extensive overlap between compliance with the terms and conditions and implementation of the NetzDG considerably undermines the informative value of the contents of the report, especially since the three social networks have established a priority review of their own standards – in a legally compliant manner – even in the case of complaints that explicitly relate to a violation under the criminal offenses specified in Section 1 (3) of the NetzDG.

Insofar as information is provided in this regard in the semi-annual reports of the three social networks, this indicates that the vast majority of complaints received under the NetzDG were not based on a violation of criminal offenses pursuant to Section 1 (3) of the NetzDG, but on violations of their own community standards (approx. 80% - 90%). Whether this content subject to removal would also have led to blocking in the event of a (lower-ranking) review under the NetzDG alone is obviously not clear from the report information. With this in mind, however, the report information on deletions made is of virtually no informative value with regard to the effectiveness of NetzDG regulation. Similarly, there is no significant information value with regards to the removal of terms and conditions, as this does not take into account the proactive measures taken by the social networks (see above) or the cases subject to complaints via other user reporting channels.

4. Indications of "Overblocking"

The classification of the criteria identified in the present study as indications of "overblocking" tends to indicate that the Network Enforcement Act provides incentives for the rapid deletion of content subject to complaint, even in cases of doubt, in the sense feared by the Scientific Services of the Bundestag[9] and the prevailing legal literature[10], which could have been realized in application practice.

However, a precise investigation is made more difficult by the fact that the evaluation of the NetzDG commissioned by the federal government did not include an empirical investigation into the existence of "overblocking",[11] and the three monitoring reports commissioned by the Federal Office of Justice within the meaning of Section 3 (5) of the NetzDG are based upon an inadequately explained methodology and an insufficient number of cases.[12] Therefore, there is still a lack of sufficiently valid data, which could not be made up for in the context of this independent partial evaluation.

[9] WD 10 – 3000 – 037/17, p. 17.
[10] e.g. *Feldmann*, K&R 2017, 292, 295 f.; *Hain/Ferreau/Brings-Wiesen*, K&R 2017, 433, 435; *Heidrich/Scheuch*, DSRITB 2017, 305, 315 f.; *Kalscheuer/Hornung*, NVwZ 2017, 1721, 1723; *Koreng*, GRUR-Prax 2017, 203, 204; *Ladeur/Gostomzyk*, K&R 2017, 390 ff.; *Liesching* in: Spindler/Schmitz, 2018, § 1 NetzDG Rn. 22 ff.; *Lüdemann*, in Eifert/Gostomzyk, Netzwerkrecht, 2018, 153, 156 ff.; *Müller-Franken*, AfP 2018, 1, 9; *Nolte*, ZUM 2017, 552, 555 ff.; *Papier*, NJW 2017, 3025, 3030; *Wimmers/Heymann*, AfP 2017, 93, 98; s.a. *Frenzel*, JuS 2017, 414, 415; *Guggenberger*, ZRP 2017, 98, 100; *Hoven/Gersdorf* in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 2019, § 1 NetzDG Rn. 9 mwN.; a.A. *Eifert*, in Eifert/Gostomzyk, Netzwerkrecht, 2018, 9, 35; *Schwartmann*, GRUR-Prax 2017, 317.
[11] *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 51: „not feasible within the framework of this evaluation due to a lack of verifiable decision-making material".
[12] See II.5.d) and III.2.c).

Moreover, the methodological analysis of the application practice of complaint management and deletion compliance of large social networks is complicated by the fact that "overblocking" in the sense of "too much removal" of content that complies with criminal law is counteracted by the deletion of content in violation of their own (sometimes very broad) community guidelines, which is dominant in all networks and is also regarded as fundamentally compliant with the law. [13] With this in mind, the theory of a fine-driven "flight from the NetzDG into the general terms and conditions" is plausible[14] and, in view of the priority check of own standards over the criminal offenses of Section 1 (3) of the NetzDG, also likely.[15] However, this is difficult to empirically prove due to the described ambivalence of opposing review and deletion regimes under the T&C and the NetzDG.

However, the fact that it is hardly possible to prove this precisely using scientific methods does not allow the conclusion to be drawn that the thesis of “overblocking” is "mere speculation" due to the lack of empirical research.[16] Rather, a serious jurisprudential approach requires the alternative development of other instruments and parameters, which can be evaluated as indications for or against the existence of “overblocking”. As such, the following criteria were systematically elicited and classified as follows:

- **Ratio of T&C to NetzDG deletions[17]:** The three social networks examined (Facebook, YouTube and Twitter), remove content predominantly in accordance with their own community standards that were examined as a matter of priority. In contrast, blocking of content that is the subject of complaints according to the NetzDG, which was only examined as a subsidiary measure, is comparatively marginal and has hardly any relevance. The findings support the thesis, also considered "plausible" in the legal evaluation commissioned by the Federal Ministry of Justice[18], that the NetzDG encourages or promotes a shift to increased deletion in accordance with community guidelines that are predominantly broader in scope than the offences under the Criminal Code.
  The fact that all of the social networks studied implement a clear priority of review according to their own community standards even for content submitted by users via the NetzDG reporting form, i.e. with reference to the criminal offenses listed in Section 1 (3) of the NetzDG, indicates such a "flight" into deletions according to general terms and conditions[19], which is partly caused by the NetzDG. Such an approach is likely to "skim off" a large amount of content that is not covered by the terms and conditions, as it were, which could

[13] e.g. OLG Nürnberg, Urt. v. 4.8.2020 – 3 U 3641/19, GRUR-RR 2020, 543, 546 Abs. 62 ff.; OLG Dresden NJW 2018, 3111 ff. = MMR 2018, 756, 758 Rz. 18; OLG Dresden, Urt. v. 12.5.2020 – 4 U 1523/19, MMR 2021, 64, 65 f; OLG Karlsruhe, Beschl. v. 25.6.2018 – 15 W 86/18, NJW 2018, 3110 f. = MMR 2018, 678 (m. Anm. *Mafi-Gudarzi*); OLG München NJW 2018, 3115, 3117 = MMR 2018, 753 in Bezug auf AGB-Regeln mit „objektivierbaren Kriterien“ (Hassrede), also OLG München, Urt. v. 18.2.2020 – 18 U 3465/19, MMR 2021, 71, 73; see also OLG München, Urt. v. 7.1.2020 – 18 U 1491/19; OLG Oldenburg, Urt. v. 1.7.2019 – 13 W 16/19, MMR 2020, 41, 42; OLG Stuttgart, Beschl. v. 6.9.2018 – 4 W 63/18, NJW-RR 2019, 35, 37 = MMR 2019, 110; OLG Schleswig, Urt. v. 26.2.2020 – 9 U 125/19; LG Frankfurt/M. v. 10.9.2018 – 2-03 O 310/18, MMR 2018, 770; see also LG Frankenthal, Urt. v. 8.9.2020 – 6 O 23/20 – Verdachtslöschung, MMR 2021, 85 f. m. Anm. *Zipfel*; *Beurskens*, NJW 2018, 3418, 3420; *Friehe*, NJW 2020, 1697, insb. 1699 f.; *Spindler*, CR 2019, 238 ff.; s.a. *Elsaß/Labusga/Tichy*, CR 2017, 234; a.A. LG Karlsruhe v. 12.6.2018 – 11 O 54/18, BeckRS 2018, 20324; LG Frankfurt/M. v. 14.5.2018 – 2-03 O 182/18, MMR 2018, 545 Rz. 14 m. Anm. *Müller-Riemenschneider/Specht*; *Schwartmann/Mühlenbeck*, ZRP 2020, 170.
[14] In this sense *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 53.
[15] See V.2.d). and V.3.a).
[16] *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 54.
[17] See V.2.d). and V.3.a).
[18] *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 53.
[19] See also *Eifert,* Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 29: „The higher the requirements under the NetzDG, the greater the incentive for network providers to channel complaints into the less-regulated Community Standards Complaints system.“.

at least give rise to cases of doubt in an examination under the NetzDG/StGB and would entail more in-depth examination and consideration processes.
With this in mind, it can be assumed that the threat of fines and the tight deletion deadlines of the NetzDG have contributed to the fact that social networks have established an examination and deletion strategy that takes precedence over the NetzDG according to broadly defined T&C standards with dynamic scope extension tendencies. This compliance strategy largely minimizes the risk of fines being imposed under Section 4 of the NetzDG for failure to delete content that the Federal Office of Justice could subsequently classify as (criminally) illegal.

- **Time between receipt of complaint and deletion[20]:** The high proportion of deletions/blockings within 24 hours (approx. 80%-95%) can be interpreted on the basis of the legal and factual analysis as an indication of the possible existence of "overblocking", insofar as the time of 7 days[21] regularly required according to the legislator for careful examination of the illegality of content under the NetzDG is almost not used.
- **Absence of fine proceedings under Section 4 (1) No. 2 NetzDG[22]:** It can be assumed that actual "overblocking" is accompanied by the fact that – contrary to the legislator's forecast in 2017 (500 substantiated fine proceedings per year)[23] – almost no fine sanctions under Section 4 (1) No. 2 NetzDG are imposed upon social networks due to ascertainable "underblocking" (failure to delete illegal content under Section 3 (2) Nos. 2 and 3 NetzDG).[24] Since the NetzDG came into force in 2017 and until the conclusion of this evaluation report, the Federal Office of Justice has not issued a penalty notice against any social network on the basis of Section 4 (1) No. 2 of the NetzDG for systemic non-deletion of illegal content.[25]
- **Effect and plausibility of legal counter-mechanisms to prevent "overblocking"[26]**: The flexibility of the deletion periods pursuant to Section 3 (2) no. 3 a) and b) of the NetzDG, including the possibility of consulting a recognized institution of voluntary self-regulation, cited by the German government and some of the legal literature[27] as regulatory mechanisms against "overblocking" have so far had no practical significance in the application of the NetzDG. Consequently, they cannot have any effect in terms of preventing or minimizing trends of "overblocking".[28]
  The restriction of the threat of a fine under Section 4 (1) no. 2 of the NetzDG to "systemic failure" in the case of incorrect decisions not to delete illegal content is not suitable for limiting incentives among the NetzDG-addressees (social networks) for broad and rapid deletion of content subject to complaint in cases of doubt with a view to avoiding the imposition of fines.[29]
- **Self-assessment of social networks[30]:** All three of the social networks surveyed were critical of the tight timeframe of the NetzDG with regard to sufficient criminal law review, especially with regard to the difficult and interpretative statement offenses. In some cases, it is clearly conceded by the social networks that a legal review of the content is not possible in a short period of time, while the 24 hours stipulated by the NetzDG force quick review

[20] See V.2.e). and V.3.b).
[21] BT-Drucks. 18/12356, p. 23; also *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 52.
[22] See V.2.f). and V.3.c).
[23] BT-Drs. 18/12356, p. 3 f.
[24] As has been explained, the absence of such fine proceedings over a longer period of time allows for the possibility of the existence of overblocking, but it does not necessarily indicate such overblocking in the sense of an increased probability of its existence.
[25] Stellungnahme des BfJ zum NetzDGÄndG v. 15.6.2020, p. 14.
[26] See V.2.g). and V.3.d).
[27] Bericht der Bundesregierung zur NetzDG-Evaluierung, 2020, p. 22; *Schwartmann*, GRUR-Prax 2017, 317, 318.
[28] See V.3,d)aa) and bb).
[29] See V.3,d)cc).
[30] See V.2.h). and V.3.e).

and decision-making processes. The video-sharing service YouTube even explicitly admits that the substantial fines and the tight deadlines of the NetzDG create a "strong incentive" to delete content in almost all cases of doubt, and that the service also prefers immediate processing (even in cases of doubt) in its application practice in order to avoid potentially high fines.

5. Overall Cursory Evaluation of the NetzDG

a) NetzDG-induced pressure to move toward AGB deletion structures

The findings outlined above, namely that the Network Enforcement Act is of only marginal importance in practice (see 2. above) and that there are predominant indications of possible “overblocking” (see 4. above), do not contradict each other. Rather, both partial results support the thesis that the restrictions of the NetzDG (tight deletion deadlines and high threats of fines) have led to an increased evasion of the social networks into a broadly defined, internal compliance with terms and conditions, which precedes the external NetzDG compliance and, as it were, lets them run into the void.

The evaluation carried out by *Eifert* on behalf of the BMJV also recognizes this in its approach, insofar as it states: "The higher the requirements under the NetzDG are, the greater the incentive for network providers to channel complaints into the less heavily regulated system of complaints under community standards".[31]

If, however, NetzDG complaints are primarily examined and removed by the social networks not according to the NetzDG criminal offenses[32], but according to their own community standards, which tend to be more broadly defined, this also leads to the exclusion of user-generated content from accessibility, which would not have had to be removed according to the standards of criminal law - also in the area of tension of freedom of expression - and thus according to the NetzDG. However, this largely corresponds to the "overblocking" assumed by the Scientific Services of the Bundestag[33] and the prevailing legal literature[34], and the pressure to avoid the law caused by the NetzDG restrictions seems to encourage this.

Separate from this is the question of the legal conformity of deletions according to community standards, which go beyond legal prohibitions and restrictions. This is acknowledged in principle by a large part of the case law and legal literature, although here, too, the third-party effect of constitutional rights is sometimes used to postulate the need for a balancing of interests.[35] In the present context, however, the focus is not upon the legality and/or legal-political legitimacy of such deletions of general terms and conditions.

Rather, the primary question is whether the NetzDG, with its strict deletion obligations subject to fines and tight time limits, promotes an evasive movement in such a way that globally active social networks pre-empt checks under national (criminal) law with global compliance with

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[31] *Eifert*, Evaluation des NetzDG im Auftrag des BMJV, 2020, p. 29.
[32] § 1 Abs. 3 NetzDG i.V.m. §§ 86, 86a, 89a, 91, 100a, 111, 126, 129 bis 129b, 130, 131, 140, 166, 184b i.V.m. 184d, 185 bis 187, 201a, 241 oder 269 StGB.
[33] WD 10 – 3000 – 037/17, p. 17.
[34] e.g. *Feldmann*, K&R 2017, 292, 295 f.; *Hain/Ferreau/Brings-Wiesen*, K&R 2017, 433, 435; *Heidrich/Scheuch*, DSRITB 2017, 305, 315 f.; *Kalscheuer/Hornung*, NVwZ 2017, 1721, 1723; *Koreng*, GRUR-Prax 2017, 203, 204; *Ladeur/Gostomzyk*, K&R 2017, 390 ff.; *Liesching* in: Spindler/Schmitz, 2018, § 1 NetzDG Rn. 22 ff.; *Lüdemann*, in Eifert/Gostomzyk, Netzwerkrecht, 2018, 153, 156 ff.; *Müller-Franken*, AfP 2018, 1, 9; *Nolte*, ZUM 2017, 552, 555 ff.; *Papier*, NJW 2017, 3025, 3030; *Wimmers/Heymann*, AfP 2017, 93, 98; s.a. *Frenzel*, JuS 2017, 414, 415; *Guggenberger*, ZRP 2017, 98, 100; *Hoven/Gersdorf* in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 2019, § 1 NetzDG Rn. 9 mwN.; a. A. *Eifert*, in Eifert/Gostomzyk, Netzwerkrecht, 2018, 9, 35; *Schwartmann*, GRUR-Prax 2017, 317.
[35] See footnote 13.

terms and conditions that tend to include extensive prohibitions within the framework of their community standards, thereby removing content that should not have been qualified as illegal under national regulation or at least as "doubtful cases" subject to intense scrutiny.

This phenomenology supported by the present study, however, corresponds to the concern already expressed in 2017 by the former President of the Federal Constitutional Court (BVerfG) Prof. *Dr. Dr. h.c. Hans-Jürgen Papier* that "it is not surprising" that "private providers decide to delete as a precaution and in case of doubt."[36] According to the findings of the present study, this is not only likely in individual cases, but is also a systematic precaution due to the general advance of a broad compliance with general terms and conditions. This, of course, raises the question for *Papier* whether the legislator of the Network Enforcement Act has sufficiently taken into account the objective constitutional value decision in favor of freedom of speech in Article 5 (1) of the German Constitutional Law.[37]

b) Suitability and definiteness of the NetzDG reporting requirements

The information to be published by social networks in semi-annual reports pursuant to Section 2 (2) of the NetzDG is primarily geared towards audit and deletion compliance under the NetzDG. However, since this does not correspond to the broad reality of application, according to which content removal is implemented by means of deletions that are increasingly independent of cause, as well as complaints management via reporting channels that are independent of the NetzDG, the report information has virtually no validity in terms of representativeness and significance.

This is shown, for example, by Facebook's NetzDG reporting information on "complaints received about illegal content" [Section 2 (2) No. 3 NetzDG] and the "number of complaints that led to the deletion or blocking of the content complained about" [Section 2 (2) No. 7 NetzDG] in the reporting period. According to the semi-annual report published in January 2021, Facebook received a total of "4,211 NetzDG complaints" in the period between July 1, 2020 and December 31, 2020, in which "a total of 4,401 contents were named."[38] Of these, 1,117 NetzDG complaints would have led to the deletion or blocking of a total of 1,276 pieces of content.

In contrast, the NetzDG report does not state that in the same period of the 2nd half of 2020, in 49 million cases content was removed by Facebook based upon their community standards in the area of "hate speech" alone. Furthermore, of the 1,276 pieces of content deleted in the NetzDG report, 87.9% were removed not because of the NetzDG[39], but due to an assumed violation of Facebook's own community standards, which were given priority.[40] A total of only 154 pieces of content in the 2nd half of 2020 were "blocked in Germany due to a violation of a provision of the German Criminal Code listed in the NetzDG."[41]

Moreover, other report details pursuant to Section 2 (2) of the NetzDG are not based upon verifiable principles, but solely on the information provided by the complainants. This applies, for example, to the breakdown "according to complaints from complaints bodies and complaints from users" (Section 2 (2) no. 3 NetzDG). The social networks point out that they cannot check whether the information provided in the report about the origin of the complainant is correct. In this respect, the semi-annual reports indicate that the information in the

[36] *Papier*, NJW 2017, 3025, 3030.
[37] *Papier*, NJW 2017, 3025, 3030.
[38] 2nd HJB 2020, p. 4.
[39] Deletions based on Section 1 (3) of the NetzDG in conjunction with the criminal offenses mentioned therein.
[40] 2nd HJB 2020, p. 12.
[41] 2nd HJB 2020, p. 12.

complaints is incorrect to a considerable extent. For example, Twitter states in its NetzDG report published in January 2021: "Through a more detailed analysis of the complaints where »For a complaint body« was selected, we find that only 0.7% of these reports originate from actual complaint bodies."[42]

The lack of significance, coverage of all content removals, differentiation and correctness of the reporting information, as well as the lack of comparability of the information provided by the respective providers, does not primarily stem from inadequate handling by the social networks studied. As has already been explained (see 3. above), the inadequacies mentioned are rather due to an indeterminate version of the legal reporting requirements according to Section 2 (2) of the NetzDG, which in part misses the application reality of social networks. Apart from the uncritical information on "general efforts" (No. 1), on the transmission of complaints (No. 2), on organization, equipment and competence (No. 4) and on association memberships (No. 5), the reporting requirements that are important to audit and deletion compliance (especially Nos. 3 and 7) are only suitable to a very limited extent for providing a transparent and comprehensive overview of the effects of the Network Enforcement Act on complaint-related content disclosures.

c) Compatibility NetzDG – European regulatory approach

In the context of the present investigation, only cursory consideration can be given to the embedding of the regulatory approach of the Network Enforcement Act in the framework of European Union law as well as the approaches to a new regulation of digital services intended by the European Commission.

As has already been explained in the context of this study[43], according to the prevailing legal literature, the NetzDG does not, in principle, apply to market-relevant social networks based in another EU Member State due to the country-of-origin principle (Art. 3 E-Commerce-Directive, ECD).[44] This is supported by the fact that, in contrast to the exceptions in Article 3 (3) ECD, the restrictions set out in (4) and (5) are not intended to apply generally, but only to official protective measures after consideration of individual cases.[45] In this respect, the NetzDG is not directed at a specific service, as required by Article 3 (4) ECRL, but rather at all services that are social networks within the meaning of Section 1 (1) of the NetzDG.[46]

Therefor the social networks are in part already assuming that the NetzDG is not legally binding for them and are emphasizing that they are currently only implementing the NetzDG "voluntarily" on the basis of similar objectives.[47]

The version of the Digital Services Act (DSA) currently proposed by the European Commission, however, principally retains the country-of-origin principle of the E-Commerce Directive.[48] The background to the EU Commission's plans in this context is also to put an end to the current

[42] 2nd HJB 2020 Twitter, p. 18 fn. 10.
[43] See II.5.f).
[44] *Eifert*, in: Eifert/Gostomzyk, Netzwerkrecht, 2018, p. 24; *Feldmann*, K&R 2017, 292, 296; *Hain/Ferreau/Brings-Wiesen*, K&R 2017, 433 f.; *Heidrich/Scheuch*, DSRITB 2017, 305, 317; *Hoeren*, Beck-Expertenblog from 30/3/2017; *Hoven/Gersdorf*, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 30th edition 2019, § 1 NetzDG Rn. 9; *Liesching*, MMR 2018, 26, 29; *Spindler*, ZUM 2017, 473, 474 ff.; *Spindler*, K&R 2017, 533, 535 f.; *Wimmers/Heymann*, AfP 2017, 93, 96 f.; a.A. *Schwartmann/Mühlenbeck*, ZRP 2020, 170, 172.
[45] *Eifert*, in: Eifert/Gostomzyk, Netzwerkrecht, 2018, p. 24; *Spindler*, ZUM 2017, 474, 476 f.
[46] In detail: *Liesching*, Das Herkunftslandprinzip der E-Commerce-Richtlinie und seine Auswirkung auf die aktuelle Mediengesetzgebung in Deutschland, 2020, p. 7 ff.
[47] Qualitative interview YouTube, p. 5 f. (question 4).
[48] Art. 1 (5) a) of the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC of 15.12.2020 - COM (2020) 825 final, hereinafter DSA proposal; see therefore note 33 of the proposal.

fragmentation of national regulations through harmonizing, directly applicable EU standards.[49] Therefore the regulatory approach of the DSA overlaps and counteracts the national construct of the Network Enforcement Act in several respects.

On one hand, the proactive removal of user-generated content (e.g. through automatic detection)[50], which is increasingly dominant among social networks and independent of complaints, is established under the DSA proposal.[51] This is likely to further marginalize the already comparatively low practical significance of complaint-initiated content removal – even after the NetzDG.

On the other hand, the DSA proposal provides for a completely different system than the NetzDG for taking national enforcement efforts into account in the case of assumed violations of the law. This relates in particular to the "orders to act against illegal content" provided for in Article 8 of the DSA Proposal, issued by the relevant national judicial or administrative authorities, also on the basis of applicable national law in accordance with Union law.[52]

d) Conclusions

aa) The findings of the study that the Network Enforcement Act is largely not applied in practice in the area of the review and deletion compliance of social networks in the removal of user-generated content (see 2.), and also the indications of the existence of "overblocking" in the sense of the networks' evasion of a broadly defined compliance with general terms and conditions that precedes the review of the Network Enforcement Act (see 4.), indicate the need for a comprehensive review of the Network Enforcement Act with regard to its constitutionality. This essentially concerns two aspects:

- If the statutory obligations of the NetzDG, which are subject to fines, are of only minor practical significance in terms of the intended regulatory goals, and are nevertheless accompanied by considerable implementation burdens for the affected norm addressees, questions arise with regard to the sufficient suitability, necessity and appropriateness of the law.
- If the criteria identified in the present investigation point to the existence of “overblocking” in the sense of a NetzDG-enforced evasion by social networks into upstream, broad general terms and conditions review and deletion systems, it is necessary to review whether the legislator of the Network Enforcement Act has sufficiently taken into account the objective constitutional value decision in favor of freedom of expression in Article 5 (1) of the constitutional law.

bb) The raison d'être of the Network Enforcement Act could also be questioned in terms of legal policy due to its only marginal practical significance in the context of compliance with the market-relevant social networks and in view of the widespread lack of compatibility with the regulatory approach of the Digital Services Act presented by the EU Commission in December 2020. In this context, it would also have to be taken into account that a repeal of the NetzDG

[49] also Paper of the Research Services of the German Bundestag, No. 10/20 (15/09/2020), p. 1: „current fragmentation of regulations“.
[50] See II.5.b).
[51] Art. 6 DSA Proposal: "Intermediary service providers shall also be eligible for the exclusions of liability referred to in Articles 3, 4 and 5 if, on their own initiative, they carry out voluntary investigations or other activities to detect, identify and remove illegal content or to block access to illegal content, or take the necessary measures to comply with the requirements of Union law and, in particular, this Regulation".
[52] In this context, the implications for the application of the country-of-origin principle elaborated in note 33 of the DSA proposal are also relevant.

would probably have hardly any impact – for example, in the sense of significant deficits in law enforcement – on the current practice of applying the law.

This can be assumed, in particular, if the expansion of capacities in the area of criminal prosecution, which can already be observed in several federal states, is continued for a more precise enforcement of the criminal offenses of §§ 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in conjunction with 184d, 185 to 187, 201a, 241 or 269 of the German Criminal Code, which are the only ones targeted by the NetzDG. In view of this, it would be beneficial to eliminate the pressure to avoid the NetzDG and to comply with broad and advance terms and conditions with millions of content removals within 24 hours. This is because such content is generally no longer accessible to criminal prosecution after it has been deleted very early due to a violation of the terms and conditions, and thus tends to hinder the effective enforcement of criminal law in terms of clarification and prosecution, rather than being beneficial to it.

The elimination of a network enforcement law that is virtually meaningless in practice would also promote early new regulation by the national legislature, which would better correspond to the future EU-wide binding requirements of the Digital Services Act and thus ensure effective law enforcement in the future in the area of content that is (criminally) prohibited in Germany on large social networks.