

DEALING WITH DIGITAL SOCIAL NETWORKS: THE GERMAN "*NETZWERKDURCHSETZUNGSGESETZ*" (NETWORK ENFORCEMENT ACT) - A CHALLENGING BALANCE BETWEEN COMBATING HATE CRIMES AND PROTECTING THE FREEDOM OF EXPRESSION

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Abstract: *The regulation of digital social networks with regard to the dissemination of the so called "hate crimes" has become a current issue within the German public and the legal community. With the "Network Enforcement Law", the German Parliament has passed an "experimental" law, which proved to be rather efficient in practise but also invited some criticism from human rights groups and is currently under review by the European Commission.*

Key words: *hate crimes, Netzwerkdurchsetzungsgesetz, Facebook, Freedom of expression, E-Commerce-Directive*

1. Introduction

One of the most "current" issues in the European Union in the sense of the topic of the Brasov conference of November 9/10, 2018 „Current Issues within EU and EU Member States Legal Framework" is certainly the regulation of the so-called "digital social networks". Usually the term "digital social network" is used to describe an online service, which offers various opportunities to share information and to establish certain relations between persons or entities using this network. This type of network becomes more and more popular in Germany as well as at international level and information published within these networks is, in principle and if the author has this intention, instantly visible to the public. To an extent, such published information may violate provisions of the penal law set up to protect specific personal rights of concerned persons; the question of effective regulation arises, particularly as these rights are usually protected at a constitutional level. The German Network Enforcement Law (*Netzwerkdurchsetzungsgesetz*) which came into force on October 1, 2017, may be considered a first attempt to deal with this subject.

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2. The Regulation

2.1. Factual and Regulatory Background

Facebook, as the most relevant example: has about 28 million users only in Germany today, from which 21 million use Facebook on an everyday basis (Statista, 2018). Even more relevant, Facebook also becomes more and more a news channel from which people receive their political and otherwise relevant information. According to a survey of the Reuter Institute of the University of Oxford, 23% of the respondents of a survey stated that Facebook would be the main source of news to them; in the US, this proportion is even higher than that and extends to about 41% (Reuters Institute, 2015).

When it comes to the regulation, the first question is always: Does the regulation make sense or not in economic and legal terms? For a couple of years, Germany (as well as the European Commission) rather took the position that the new digital sector of the economy would develop properly only within a liberal legal framework with as little regulation as possible. This seemed specifically to be true with regard to the generally assumed backlog of the EU countries with regard to the digital media in comparison to the US.

A certain shift in this view occurred in the German Ministry of Justice after 2014 when Heiko Maaß became Federal Minister of Justice (since 2017, Heiko Maaß is Federal Minister for External Affairs), when two developments became visible. (1) The social media industry was (and still is) in fact dominated by US-American quasi-monopoles which, as was the dominant public perception, did not (and, due to the European legislation in the sector, did not have to) care too much about the German legal framework. (2) The rise of right wing parties in connection with the so called “refugee crisis”, was often seen in connection with Ms. Merkels famous claim “Wir schaffen das!” (We can do it!) from 2015 and the opening of the German borders for refugees from Syria. Because of the rising numbers of refugees entering Germany, openly xenophobic positions became more widespread within the population. Consequently, escalating xenophobia and hatred within the social networks reflected these developments, which, in a sharply rising number of cases, openly violated German penal law.

2.1. Hate Crime Codified: Relevant Penal Provisions

Which penal provisions are concerned? As it may be regarded as typical for the German legal system, including penal law, all relevant provisions are codified in the German Penal Code, specifically Insult, Defamation, Public Incitement to Crime and Incitement to Hatred, including „Denial of the Holocaust” (Translation: German Federal Ministry of Justice 2015):

Section 111

Public incitement to crime

(1) Whosoever publicly, in a meeting or through the dissemination of written materials (section 11(3)) incites the commission of an unlawful act, shall be held liable as an abettor (section 26).

(2) If the incitement is unsuccessful the penalty shall be imprisonment not exceeding five years or a fine. The penalty must not be more severe than if the incitement had been successful (subsection (1) above); section 49(1) No 2 shall apply.

Section 130

Incitement to hatred

(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population,

shall be liable to imprisonment from three months to five years.

(2) Whosoever

1. with respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services

shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply *mutatis mutandis*.

Section 185

Insult

An insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine.

Section 186

Defamation

Whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine and, if the offence was committed publicly or through the dissemination of written materials (section 11(3)), to imprisonment not exceeding two years or a fine.

2.3. Draft and Mechanism

To avoid costs and other problems related to the editorial editing of their vast informational contents the typical networks (specifically Facebook and Twitter) were claiming a “carrier privilege”. According to this view, they would only offer a technical platform to the users, but have no responsibility as to the web content, which is stored on their servers. To get crime in social media under control and to break up this obstruction attitude of the big social media networks, the Ministry of Justice came up with the draft of the “Act to Improve Enforcement of the Law in Social Networks”. After some modifications and amendments within the legislative procedure, the law came into force on October 1, 2017 (with the short name “Netzwerkdurchsetzungsgesetz” / NetzDG; there is an English language version available, which is edited by the German Federal Ministry of Justice, which can be retrieved from: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.).

How does the law work?

(1) Applicability is independent from the legal seat of the provider; instead, the location of the violation is significant only. This is as important for the functioning of the law, as it is problematic with regard to EU-Law. The European subsidiaries of the big social media networks are usually located in countries like Ireland, having the most liberal legislation framework from their perspective, and, finally yet importantly, the best tax deals to offer. According to Art. 3 of the 'Directive on electronic commerce' (European Parliament and European Council, 2000), states in Art. 3, that, at first, each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field. Second, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. This, in context, is widely understood as the “Country of origin principle”, which prohibits other Member States from imposing additional legal requirements to the functioning of e-commerce services to the requirements imposed by the Member state of legal establishment.

(2) The applicability of the NetzDG is limited to social networks only (ergo no messenger apps like “WhatsApp”) with minimum 2 million users in Germany. (3) The law imposes very short deletion terms (just 24 hours for “content that is manifestly unlawful” and 7 days for “unlawful content”. The term is running from the moment the network is notified on the violation by a user or public authority. (4) Considerable fines are to be applied (up to 5 million € per case) if a network does not comply with its duty to delete or create operative structures to enforce the law or does not comply with its obligation to report incidents to the public authorities and to handle complaints. (5) Finally, all social media networks have to set up a person authorized to receive complaints in Germany, who must be easily accessible.

2.3. Implementation of the Law

As the NetzDG came into force only roughly a year ago, it may be too early to draw a conclusive balance already. Nevertheless, some developments are already recognizable. At first, the social networks obviously strive to meet the requirements of the law. As an example, they currently employ about 1.000 so called “content moderators” who check and delete content (Becker, A., 2018). Further, the incidence of hate crimes on the main social media networks has dropped considerably, according to recent surveys. Finally, no fines according to the law had to be imposed yet.

3. Criticism and Preliminary Outline

Criticism centres on the negative impact of the freedom of expression, protected by Art. 5 of the German constitution which states (Translation: Tomuschat, C., Currie, D. P., 2014):

Article 5

[Freedom of expression, arts and sciences]

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

In this regard, it is widely argued that forcing private social network companies to delete certain (illegal) content, but leaving the entire deletion procedure to these companies only, without the means of legal protection, which would be accessible if public authorities were involved in the evaluation and deletion procedure, might violate the freedom of expression. It has surely to be admitted that it is due to the legal mechanism of the law that there is no public involvement in the deletion procedure.

Only the network (in fact by its content moderators) verifies the allegedly unlawful content and decides on deletion. As a result, the networks seem to rather walk on the safe side: in case of doubt, deletion is generally preferred. In addition, it is to be observed that the networks rather tend to implement their own “community” standards in contrast to limiting the deletion procedure strictly to violations of German penal law, as the NetzDG requires it. Therefore, in the current practise, restrictions of the freedom of speech are present which are not prompted by the violation of laws (as German Constitution requires it). Consequently, the German Constitutional Court is currently dealing with several complaints in this respect, it remains to be seen if the NetzDG is regarded as unconstitutional in certain aspects.

Further: the applicability of the law, independently of the legal seat of the network, might be in conflict with Art. 3 of the E-Commerce-Directive, which states that an entity under that law has only to comply with those laws applicable in the country of its legal headquarter. The European Commission, in general terms, seems to be positive towards the NetzDG and has repeatedly stressed that such kind of regulation might be indispensable. Still, the law is currently under revision due to the alleged conflict with the E-Commerce-Directive as well as with the European Convention on Human Rights. So only time will tell if the apparently quite efficient “experimental” law implemented in Germany also has a future in the European context.

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