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Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation*

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Abstract

New legal challenges emerge from the Internet as social networks make it possible for false information to be published for political purposes as well as a new level of anonymous hate speech online. These challenges are amplified by the international connectivity of social media users. Legislators face a new task of balancing an effective fight against fake news and hate speech online with the right to freedom of expression. The "thin line" between unfavorable and illegal content must be upheld and respected by the laws counteracting the latter.

This paper takes a closer look at both hate speech and fake news and how they are counteracted against in the EU territory and specifically by the German legislator with the new Netzwerkdurchsetzungsgesetz (NetzDG). After examining hate speech and fake news, the paper gives a brief overview of the new German law and then continues to explore its effectiveness and legality in the national, European and international legal sphere. It ends with an overall evaluation of the situation regarding hate speech and fake news and offers improvements and alternatives for the NetzDG.

Summary

Keywords

Hate speech, Fake news, Freedom of speech, Social media, Internet

1. Introduction

In recent times, the impact of social media over our day-to-day life has continued to increase. Social networks replace news agencies, marketplaces, political forums and communication platforms for more than two billion people around the globe as of 2018.[1] With more than a quarter of the world's population and more than half of the people in the European Union being affected by social media,[2] there is an urgent need

[*] L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a referaggio anonimo.

[1] D. Ingram, *Facebook hits 2 billion-user mark, doubling in size since 2012*, in www.reuters.com, 27 June 2017.

[2] *Share of individuals in European countries using social networks in 2016*, in www. statista.com, December 2016

for a legal framework. As the internet continues to create a sphere outside the reach of national jurisdictions, the demand for a supranational legal framework to guarantee fair competition, consumer protection and individual rights seems to increase. This paper shall explore the latter, more precisely the fundamental right to freedom of expression, and how the German legislator and the European Union try to strike a balance between this right and combatting the concrete (legal) problems that arise from the leviathanic status of social media today. First, the following analysis will attempt to concretize the problems of fake news and hate speech online and explore what kind of legislation the European Union has passed to fight them. It will then scrutinise the effectiveness and constitutionality of the new German law created to combat fake news and hate speech online (*Netzwerkdurchsetzungsgesetz* or *NetzDG*[3]). Finally, alternative measures will be proposed, and a conclusion will be drawn.

2. The European framework

2.1 Freedom of expression

In 1976, the European Court of Human Rights (ECtHR) concluded that «Freedom of expression […] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population».[4] The court had stressed out the importance of the thin line between illegal content and solely unfavourably received information. A piece of legislation can only interfere with freedom of expression under the premise that purely illegal content is counteracted against while the thin line is upheld under all circumstances.

In the US-American constitution, freedom of expression is included in the First Amendment which emphasizes its important standing in the US legal system. Accordingly, the requirements for a restriction of an expression are high, as illustrated by the case law. In *Brandenburg v Ohio*, the US Supreme Court ruled that a restriction would only be justifiable if the expression was «directed to inciting or producing imminent lawless action and is likely to incite or produce such action».[5] This underlines the broad interpretation of freedom of expression and its standing in the US legal system, as these requirements persist since the judgement of 1969.

In the European legal tradition, the right to freedom of speech was less distinctive and ambiguously interpreted by the national legislators at the time. Only after the Second World War, the Council of Europe drafted a uniform right to freedom of speech in the European Convention of Human Rights (ECHR) for the territory of Europe.

Art. 10 ECHR protects freedom of expression, including the «freedom to hold opin-

[3] *Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act)*, Ministry of Justice and Consumer Protection, English Version, 12 July 2017.

[4] ECtHR, *Handyside v United Kingdom*, app. 5493/72 (1976), § 49.

[5] *Brandenburg v Ohio*, 395 US 444 (1969); in detail: E. Volokh, *The 'Speech Integral to Criminal Conduct' Exception*, in *Cornell Law Review*, 101, 2017, 993-997.

ions and to receive and impart information and ideas without interference by public authority». Paragraph 2 constitutes a possibility of restricting this freedom in order to preserve the integrity of a democratic society. Valid reasons for a restriction include «the prevention of disorder or crime, […] [and] the protection of the reputation or rights of others» which are to be scrutinized under the aspect of proportionality. This resembles a rather strict approach to freedom of expression when compared to the level of protection granted by the US-American legal system.

While the addition of Protocol 14 in 2010 would grant the Convention a legal status superior to secondary EU law but inferior to the treaties[6], the European Court of Justice denied this accession to the ECHR as the EU would then be «subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR».[7] However, the EU is bound to fundamental rights principles according to Art. 6 (2) of the Treaty on European Union (TEU). Additionally, the European Court of Justice (CJEU) agreed that treaties such as the ECHR «can supply guidelines which should be followed» and that the Court is «bound to draw inspiration».[8]

The second legal source, the Charter of Fundamental Rights of the European Union (EUCFR), gained full legal effect following the Lisbon Treaty of 2009. It protects fundamental rights in the jurisdiction of the Union with the status of primary EU law. Art. 11 EUCFR is equivalent to Art. 10 ECHR; however, being a Union treaty, it has a superior legal status.[9] Similar to Art. 10(2) ECHR, restrictions of Art. 11 EUCFR must be provided for by law and subject to proportionality according to Art. 52 EUCFR, which includes general provisions regarding the limitations of fundamental rights.

2.2 Service provider liability: The E-Commerce Directive

To evaluate solutions for the new phenomena of fake news and hate speech online, general liability for online content needs to be explored. Users and private uploaders remain responsible for the content they provide according to national laws of civil and criminal liability. The accountability of a digital platform depends on whether it is a content provider or a service provider. Content providers are treated equal to traditional publishers with full editorial liability for online content whereas service providers can be exculpated. In 2000, the European Union adopted the Directive 2000/31/EC («Directive on electronic commerce» or «E-Commerce Directive») to provide «legal certainty for business and consumers» regarding electronic services and commerce. The E-Commerce Directive differentiates between three types of service providers. According to Art. 12, «mere conduit» providers who solely transmit information with-

[6] E. Pache – F. Rösch, *Die neue Grundrechtsordnung der EU nach dem Vertrag von Lissabon*, in *Zeitschrift Europarecht*, 2009, 786.

[7] CJEU, Opinion no. 2/13 (2014), § 181.

[8] CJEU, 4-73, *Nold v Commission* (1974), § 13.

[9] G. Gaja, *Accession to the ECHR*, in A. Biondi – P. Eeckhout – S. Ripley (eds.), *EU Law After Lisbon*, Oxford, 2012, 194.

out initiating it or selecting or modifying the receiver or the content are not liable for the information. If information is stored temporarily, automatically and intermediately, the service provider can be excluded from liability as a «caching provider» under the conditions of Art. 13 (a) – (e) of the Directive. However, the social networks in question permanently store information and consequently amount to «hosting providers» as laid out in Art. 14 E-Commerce Directive. They are generally liable for the content uploaded to their platform and can only be excluded if they have «no actual knowledge of illegal activity or information» (Art. 14 a) or «upon obtaining such knowledge […], act[s] promptly to remove or to disable access to the concerned information» (Art. 14 b).

The European Court of Human Rights upheld a strict application of the requirement of knowledge regarding illegal content in *Delfi AS v Estonia*. In that case, it denied a violation of Art. 10 ECHR in the fining of a website for refraining from removing «clearly unlawful» comments by an anonymous user.[10] However, this could impose an indirect duty for websites to monitor all third-party content, according to the joint dissenting opinion of the judges Sajó and Tsotsoria,[11] which would effectively contradict Art. 15 of the E-Commerce Directive. The controversy of the judgement draws attention to the different stances regarding legal scrutiny between the ECtHR and the CJEU.[12] This approves a kind of heterogeneity regarding the balance between freedom of expression and liability for illegal content online for national legislators which also seems to emerge from the quasi dualistic jurisdiction in Europe.

2.3 Fake news

A 2017 study revealed that more than 40 Million people use the internet to inform themselves about the news in Germany at least once a week.[13] For 64% of the population aged 18-24 online media is the main source of information, more than half of which are social media. Almost three quarters of prospective teachers receive information about contemporary political events online. Nowadays, the internet and social media have a huge impact on public opinion-formation, especially in the younger generations. Consequently, the veracity of online information is more important than ever.

In recent years, the systematic spread of false information on social media has led to the development of the notion of "fake news". This spreading of false information has predominately arisen in the context of political events but has also occurred during scientific or natural events. Historically, the spreading of false information as a political tool has been used for centuries. When the city of Rome partially burnt down in the year 64 AD, Emperor Nero claimed that the Christian minority was responsible for the outbreak and used it as a justification for their persecution. Many of them were

[10] ECtHR, *Delfi AS v Estonia,* app. 64569/09 (2015).

[11] *Ibid.*, joint dissent opinion of the Judges Sajó and Tsotsoria, 68-86.

[12] In detail see M. Bassini – J. Barata Mir, *Freedom of expression in the internet: The ECtHR*, in O. Pollicino – G. Romeo (eds.), *The Internet and Constitutional Law*, London, 2016, 89-91.

[13] S. Hölig – U. Hasebrink, *Reuters Institute Digital News Survey,* 2017, 17.

publicly executed while the identity of the incendiary remained unclear.[14]
In 1835, The Sun, a New York newspaper, published a series of articles about the discovery of civilization on the moon known as the "Great Moon Hoax".[15] The newspaper became increasingly popular and was widely circulated before it was discovered a few weeks later that the articles had been a hoax. This is known as one of the first deliberate distributions of false news by a news agency since the emergence of printed news.
As for the novelty of the notion, there is no legal definition of "fake news". Arguably there should be a differentiation between "fake news" and simple false information. The Cambridge Dictionary defines the prior as «false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke».[16] Scholars on the other hand have proposed a rather narrow definition, which includes the creator's knowledge about the falsity, and consequently an intention to influence others.[17] The German Duden Dictionary summarizes this as a «manipulative intention» while spreading false information.[18] From a legal point of view, this raises the question whether the spreading of solely deliberate untrue information should be restricted by law or if any content including false information that is spread even unconsciously should be subject to legislation.
To effectively fight the problems arising with upcoming fake news, a broader approach should be taken to the definition of "fake news" since the malicious intent of the creator cannot always be determined, especially in the cyber sphere. As the identification of "fake news" as such is often difficult for the consumer, the unconscious sharing or spreading of false information should not be subject to sanctions. However, it can be subject to removal by the provider of the social network according to the NetzDG as discussed in the following.

2.4 Hate speech

The legal framework regarding hate speech faces new challenges through the distribution of the internet. For example, the problem of identification and localization online and therefore identifying the jurisdiction constitutes a difficult task. Additionally, a concrete legislation on fighting hate speech online could be considered a «Law of the Horse». In other words, it could amount to an unnecessary piece of legislation whose legal interests are already sufficiently protected by a more general law.[19] It is important

[14] M. Owen – I. Gildenhard, *Tacitus, Annals*, in *Latin Text, Study Aids with Vocabulary and Commentary*, 2013, 235-238 («*subdidit reos* […] meaning 'to put someone up on false charge' leaves us in no doubt as to Nero […] offering up scapegoats to cover his own perceived responsibility for the fire»).

[15] N. Hendley, *The Big Con: Great Hoaxes, Frauds, Grifts, and Swindles in American History,* Santa Barbara, 2016, 145-149.

[16] *"fake news"* in the Cambridge English Dictionary, April 2018,

[17] D. Klein – J. Wueller, *Fake News: A legal perspective*, in *Journal of Internet Law*, 20(10), 2016, 6; R. Ling – E. Tandoc – Z. Wei Lim, *Defining Fake News*, in *Digital Journalism*, 6(2), 2017, 147-148.

[18] *Fake News: Rechtschreibung, Bedeutung, Definition, Synonyme*, in www.duden.de, April 2018.

[19] F. Easterbrook, *Cyberspace and the Law of the Horse*, in *University of Chicago Legal Forum*, 1, 1996, 207-

to strike the right balance between effective measures against harassment in the internet and the right of individuals to freely express their opinion. A precise definition of the notion of hate speech in its implementation is consequently crucial.

In 2008, hate speech was defined by the Council of the European Union as «public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin».[20] The underlying wording originates from Art. 2 of the Additional Protocol to the Convention of Cybercrime which proposes a definition for racist and xenophobic material for the purpose of a harmonized legislation regarding cybercrimes.[21] In contradiction to "offline hate speech" the publication of such incitement is simplified by the means of the internet. In particular, social media opens many possibilities to share and spread individual harassment. In connection with the aspect of anonymity online, the problem of hate speech is amplified through the cyberspace. Whereas personal hate speech as a criminal offence is simply a matter of national criminal law, online hate speech must be considered on a larger scale. The internet can hardly be localized and therefore assigned to a national jurisdiction. A geographical determination of the information, based on the physical storage of the data, would pass the responsibility to the providers of networks and websites. For example, information could be stored on US territory but still be accessible in other jurisdictions. However, in other related jurisdictions, such as the US legal system, different scales might be applied in regard to defining criminal hate speech. Additionally, restricting access to online sources as a result would interfere with the right to information and seems like an inappropriate measure to fight hate speech.

This problem of jurisdiction is left to the member states and their definition of territory in the International Convention on Cybercrime of 2004. Relying on cooperation of member states and leaving the responsibility to national authorities seems like a missed opportunity to deal with the cyberspace jurisdiction problem via an international approach.[22] EU legislation in this regard applies the principle of nationality in addition to territoriality in an attempt to extend jurisdiction to EU citizens abroad.[23] However, as national legislators struggle to provide legal protection from online harassment, the competence of the European Union according to the subsidiarity principle in Art. 5 TEU is justified. In 2016, the European Commission published a Code of Conduct in cooperation with the "Big Four" of the internet (Facebook, Twitter, YouTube and Microsoft). To achieve the goal of combatting hate speech online, such IT companies should acknowledge their shared responsibility with the EU member states and there-

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[20] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

[21] Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003.

[22] C. van de Heyning, *Jurisdiction and constitutional protection*, in O. Pollicino – G. Romeo (eds.), *The Internet and Constitutional Law*, London, 2016, 39-40.

[23] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems, replacing the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

fore undertake measures so that «illegal hate speech online is expeditiously reviewed by online intermediaries and social media platforms».[24] In detail, the participating companies agree to review and, if necessary, remove content including hate speech, raise awareness through rules or community guidelines, and generally cooperate with the EU and its member states to promote and enforce the fight against hate speech online. In June 2017 and January 2018, the Commission determined the progress made through the Code of Conduct. The share of removed hate speech rose from 28% to 59% and then to 70% respectively while illegal content was processed twice as often in the first 24 hours after it was published in over 80% of the cases. Additionally, another two significant IT companies, Instagram and Google+, admitted to the agreement.[25] However, the Commission also stated that the process of fighting hate speech lacks an effective persecution by law enforcement agencies as well as feedback to the users flagging hate speech and submitting reports.

Despite the legislation's progress, its self-regulatory approach leaves the determination of whether content amounts to illegal hate speech to the providers of social networks and websites, more precisely their employees. This could ultimately lead to a private censorship where content that is simply unwanted by the providers is removed under the pretext of combatting hate speech. This again interferes with the individual right to freedom of expression as well as the right to information enshrined in Art. 10 ECHR. Lately, the European Commission published a recommendation for member states to regulate the fight against hate speech on a national level which promotes a similar approach as the Code of Conduct.[26] Whether such a piece of legislation can effectively counteract illegal hate speech will be reviewed by reference to the German NetzDG as an example.

3. The Network Enforcement Act (NetzDG)

The Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, hereinafter "NetzDG") was drafted in 2017 as a result of lacking effectiveness in social media mechanisms against illegal content online. In 2015, a task force was established by the German Ministry of Justice (BMJV) to work together with relevant social networks (Facebook, Google, Twitter) and NGOs that promote voluntary self-control of online content. The IT giants agreed to improve their user-flagging mechanisms and examine reported content 24 hours after it was published. They worked together with the NGOs to train employees and exchange information regarding reporting mechanisms to ultimately construct a code of conduct.[27]

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[24] *European Commission and IT Companies announce Code of Conduct on illegal online hate speech,* European Commission Press release, 31 May 2016.

[25] *Countering illegal hate speech online – Commission initiative shows continued improvement, further platforms join*, European Commission Press Release, 19 January 2018.

[26] *Commission Recommendation on measures to effectively tackle illegal content online*, European Commission Recommendation C (2018) 1177 final, 1 March 2018.

[27] *Ergebnispapier der Task Force "Umgang mit rechtswidrigen Hassbotschaften im Internet" vorgeschlagene Wege zur Bekämpfung von Hassinhalten im Netz*, German Ministry of Justice and Consumer Protection, in www.

However, an evaluation of the improvements in a research by jugendschutz.net, a German NGO, made it clear that the reporting mechanisms improved efficiency but the measures undertaken by the social networks were insufficient to guarantee a comprehensive protection from illegal content online.[28] On the basis of similar research in early 2017,[29] and the possible influencing of the presidential election of the United States in 2016 through fake news articles on Facebook, the BMJV presented a draft legislation for the NetzDG in April 2017.[30] It includes a legal obligation for social networks to report their processes that counteract illegal content online (Art. 2), to establish a mechanism to ensure the «report and takedown procedure» (Art. 3) and provisions on regulatory fines for non-compliance with the NetzDG (Art. 4). This underlying research was criticized for being carried out mostly by non-legal experts and also only two offences were evaluated (Art. 86a and Art. 130 of the German Criminal Code). Additionally, a recent study carried out by the Johannes Gutenberg-University Mainz shows that hate speech online is mostly a peripheral phenomenon and therefore overestimated by the legislator.[31]

3.1 Scope of application

The scope of the NetzDG is precisely narrowed down to social networks with more than two million registered users in Germany. Art. 1, (1) gives a legal definition of a social network as «platforms which are designed to enable users to share any content with other users or to make such content available to the public». Networks which aim to pursue specific topics or users, such as business networks, professional and technical platforms, online games and commercial websites are excluded from the cope.[32] As to the restriction of application in Art. 1, (2) not more than seven social networks in Germany are affected, all of which have already implemented measures to comply with the NetzDG.[33]

To ensure a strict interpretation of the notion of «unlawful content», Art. 1, (3) lists several offences according to the German Criminal Code (*Strafgesetzbuch* or *StGB*) that amount to the definition of unlawful content in the sense of this legislation. It includes

bmjv.de,15 December 2015.

28 *Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter Ergebnisse des Monitorings von Beschwerdemechanismen jugendaffiner Dienste*, German Ministry of Justice and Consumer Protection, in www.bmjv.de, 26 September 2016.

29 *Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter Ergebnisse des Monitorings von Beschwerdemechanismen jugendaffiner Dienste*, German Ministry of Justice and Consumer Protection, in www.bmjv.de, 14 March 2017.

30 *Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)*, German Ministry of Justice and Consumer Protection, in www.bmjv.de, 5 April 2017.

31 K.-H. Ladeur – T. Gostomcyk, *Das NetzDG und die Logik der Meinungsfreiheit*, in *Kommunikation & Recht*, 6, 2017, 390; P. Jürgens – M. Magin – B. Stark, *Ganz meine Meinung? Informationsmediäre und Meinungsbildung*, in *Landesanstalt für Medien Nordrhein-Westfalen*, 55, 2017, 154.

32 *Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)*, Drucksache 18/12356, 16 May 2017, 19 (hereinafter "NetzDG Draft").

33 *NetzDG: Sieben Unternehmen haben Kontaktstellen benannt*, in www.netzpolitik.org, 8 January 2018.

offences such as example public incitement of crimes (§ 111 StGB), threats to commit offences (§ 126 StGB), incitement to hatred (§ 130 StGB) and defamation of religions (§ 166 StGB) or people (§ 186 StGB) as examples of illegal hate speech. Offences that resemble the spreading of fake news are intentional defamation (§ 187 StGB), treasonous forgery (§ 100a StGB) and forgery of data (§ 269 StGB).

3.2 Reporting obligation

If a social network receives more than 100 complaints in a year, the provider is required to publish a biannual report about the exact number of complaints, the steps that are taken to counteract criminal acts online and the mechanisms that process complaints from users. Beyond that, the interorganizational structure of the network, industry associations, external consultations and time as well as results of received complaints are to be mentioned in the report according to the enumeration in Art. 2, (2). The legislator justifies this with a general accountability of «market-dominant intermediaries of internet-based communication»[34] for public transparency.[35] Another aspect of this reporting obligation is the retrospective evaluation of the effectiveness of the NetzDG.[36]

3.3 Procedures regarding complaints about unlawful content

Art. 3 of the NetzDG contains a comprehensive list of requirements to regulate the procedures «for handling complaints about unlawful content» (para. 1). According to the legislator, these requirements simply carry out the (consisting) legal obligation to remove illegal content, but on an online level.[37] It is therefore an aspect of regulatory compliance for providers of social networks. It includes a scrutiny of reported content regarding its illegality and its removal within strict time frames in case the illegality is confirmed. This obligation is highly contested and claimed to contradict constitutional and European law,[38] as discussed in the following. After constitutional concerns were raised in a public hearing of the Committee on Legal Affairs and Consumer Protection,[39] the legislator added the possibility of «self-regulation» by an institution pursuant to Art. 4(6).

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[34] M. Eifert, *Rechenschaftspflichten für soziale Netzwerke und Suchmaschinen*, in *Neue Juristische Wochenschrift*, 20, 2017, 1453.

[35] M. Liesching – P. Schmitz – G. Spindler, *Telemediengesetz mit Netzwerkdurchsetzungsgesetz – Kommentar,* Munich, 2018, *NetzDG* § 2 para. 1.

[36] *NetzDG Draft*, p. 20.

[37] *NetzDG Draft,* S. 21.

[38] M. Liesching – P. Schmitz – G. Spindler, *op. cit., NetzDG* § 3 para. 1.

[39] Session 153 of the Committee on Legal Affairs and Consumer Protection, Protocol Nr. 18/153, in www. bundestag.de, 19 June 2017.

3.4 Fines

Lastly, the NetzDG states the violations of the reporting duties or the procedures regarding complaints about unlawful content as an administrative offence, according to Art. 4. They are punishable with regulatory fines of up to 5 Million Euro. Art. 4(3) addresses the aforementioned problem of limited national jurisdiction as sanctions can be imposed «even if it is not committed in the Federal Republic of Germany». It follows an approach similar to the Anglo-Saxon extraterritoriality principle applied by the CJEU in competition law cases as the «Effects Doctrine». Such application out of the scope of national jurisdiction raises concerns under international law as discussed below.[40]

4. Legal concerns

The provisions of the NetzDG are subject to legal concerns in respect to international and European law as well as compatibility with the German Constitution (*Grundgesetz* or *GG*) which will be addressed in the following. Critics include UN Special Rapporteur on Freedom of Expression David Kaye[41], Council of Europe Secretary General Thorbjørn Jagland[42] and the international NGO Human Rights Watch[43]. In Germany, several legal experts and organizations started a collective petition against the law («Declaration for Freedom of Expression»).[44] Only recently, the German Liberal Party FDP started legal proceedings to attain a constitutional scrutiny of the NetzDG by the German Constitutional Court (*Bundesverfassungsgericht* or *BVerfG)*.[45]

4.1 Constitutionality

4.1.1 Interplay between the Grundgesetz and EU primary law

The ECHR and the EUCFR have the status of EU treaties and are therefore part of European primary law. The CJEU established two main principles regarding the relationship between European and national law i.e., direct effect and supremacy. The direct effect of European law was introduced in the *Van-Gend-en-Loos* decision of

40 V. Lowe, *International Law and the Effects Doctrine*, in *Cambridge Law Journal*, 48(1), 1989, 9.

41 *Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Human Rights, Office of the High Commissioner, in www.ohchr.org, 1 June 2017.

42 *Secretary General concerned about Internet censorship*, Council of Europe, in www.coe.int, 1 June 2017.

43 *Deutschland: NetzDG mangelhafter Ansatz gegen Online-Vergehen*, Human Rights Watch, in www.hrw.org, 14 February 2018.

44 Declaration on Freedom of Expression - In response to the adoption of the Network Enforcement Law ("Netzwerkdurchsetzungsgesetz") by the Federal Cabinet on April 5, 2017.

45 *Die erste Klage gegen das NetzDG läuft*, Freie Demokratische Partei, in www.fdp.de, 12 June 2018.

1963 in which the CJEU ruled that provisions of European law confer rights on the individual.[46] This means that national courts have to enforce these provisions *vis-à-vis* citizens of the member states. In the *Costa v ENEL* decision of 1964, the CJEU additionally ruled that European law prevails over national legislation.[47] In the follow-up judgement *Internationale Handelsgesellschaft*, the court expanded the supremacy of EU law even to fundamental human rights provisions in the constitution of a member state.[48] As this case dealt with an alleged violation of the *Grundgesetz*, the *BVerfG* stated its opinion on such undermining of national sovereignty, also known as *Solange I*. The court stated that in a «hypothetical case of a conflict between Community law and [...] the guarantees of fundamental rights in the Constitution» the latter would prevail as long as («*solange*») the EU organs did not remove the conflict of norms.[49] However, in the light of expanding fundamental rights standards on European level, the court revised the judgement in 1986 and ruled that *as long as* the European Communities «generally ensure an effective protection of fundamental rights» the *BVerfG* would refrain from exercising their judicial scrutiny (*Solange II*).[50] Therefore, the application of constitutional provisions would be overruled by sources of European primary law in a conflictual case.

However, the level of protection in national legislation was adapted to the European treaties by CJEU case law. Art. 53 ECHR entails the principle of minimum standard by the Convention, which can generally be set higher by the member states or the EU, as specifically stated in Art. 52 par. 3 («This provision shall not prevent Union law providing more extensive protection»). Contrarily, the CJEU pursues a uniform standard of the level of protection; it ruled that the standard in national provisions can neither be lower (*Åkerberg Fransson*[51]) nor higher (*Taricco*[52]) than that provided for by EU law. This effectively creates a *de facto* harmonization of fundamental human rights standards in the European jurisdiction.[53] However, it is debatable whether such process should be subject to CJEU law-making or if European constitutional provisions enshrining uniform standards are the next logical step of integration. This question will be disregarded at this point as it is not subject of the analysis this paper pursues.

4.1.2 Constitutional freedom of expression

a) Art. 5 I 1 Grundgesetz

The *Grundgesetz* protects the individual right to «express and disseminate […]

46 CJEU, 26-62, *Van-Gend-en-Loos* (1963).

47 CJEU, 6-64, *Costa v ENEL* (1964).

48 CJEU, 11-70, *Internationale Handelsgesellschaft* (1970).

49 BVerfGE 37, 271 – *Solange I*, (1974), § 56.

50 BVerfGE 73, 339 – *Solange II*, (1986), § 132.

51 CJEU, C-617/10, *Åklagaren v Hans Åkerberg Fransson* (2013).

52 CJEU, C-105/14, *Taricco* (2015); C-42-17, *M.A.S. and M.B* (2017).

53 E. Cannizzaro, *Towards a Uniform Standard of Protection of Fundamental Rights in Europe?*, in *European Papers*, 2, 2017, 5.

opinions in speech, writing and picture» in Art. 5(1). The notion of opinion is to be understood in a broad sense. It cannot be limited unless the expression amounts to an «abusive criticism» which is not protected by Art. 5. This approximately resembles the aforementioned thin line between a critical opinion worth protecting and an expression constituting unlawful conduct. However, the NetzDG allows for the hindering of the freedom of expression through social networks as intermediaries. While the law aims to follow a «legislative obligation to remove illegal content»[54], it promotes a *de facto* system of "removal in case of doubt" where content will be removed without scrutiny.[55] The "thin line" then becomes a broad strip of precarious content which will be removed altogether. The risk of a regulatory fine for the social network is converted to an omnipresent threat of removal. This could pose a "chilling effect" leading to users not exercising their *Grundrecht* to freedom of expression in the face of an imminent restriction.[56]

In reality, the obligations from the NetzDG leave the social network providers to make a simple economic decision between the cost of a wrong verdict and the establishment of a legal team to correctly scrutinize content or eventually the price of the regulatory fines. Users will rarely take action against an unjustified removal of their content in front of a court because of their typical structural inferiority, also including an economic consideration on their side. Additionally, since the NetzDG does not impose fines for an unlawful removal of rightful content,[57] the fear of the fines will outweigh justness most of the time.

On a larger scale, these regulations heavily influence the public process of developing opinions, which the NetzDG aims to protect.[58] The *BVerfG* evaluated this process as the «element of life» for the freedom of expression,[59] being «*un des droits les plus précieux de l'homme*»[60] in 1958. This process is carried out by the public broadcasters[61] and therefore, *mutatis mutandis*, by social media.[62] As the spectrum

54 *NetzDG Draft,* p. 22.

55 M. Liesching, *Die Durchsetzung von Verfassungs- und Europarecht gegen das NetzDG - Überblick über die wesentlichen Kritikpunkte,* in *MultiMedia und Recht,* 1, 2018, 27; M. Liesching – P. Schmitz – G. Spindler, *op. cit., NetzDG* § 1 para. 25; G. Spindler, *Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig?* in *Zeitschrift für Urheber- und Medienrecht*, 2017, 481.

56 ECtHR, *Goodwin v. UK,* app. 17488/90 (1996), § 39; A. Koreng, *Entwurf eines Netzwerkdurchsetzungsgesetzes: Neue Wege im Kampf gegen "Hate Speech"?* in *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht*, 2017, 204; N. Guggenberger, *Das Netzwerkdurchsetzungsgesetz – schön gedacht, schlecht gemacht*, in *Zeitschrift für Rechtspolitik*, 2017, 100; on "chilling effects" see in detail S. Assion, *Überwachung und Chilling Effects* in *Tagungsband zur Telemedicus Sommerkonferenz 2014 – Überwachung und Recht*, 2014.

57 K.-H. Ladeur – T. Gostomzyk, *Gutachten zur Verfassungsmäßigkeit des Entwurfs eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken*, 2017, in www.bitkom.org, 81.

58 N. Guggenberger, *op. cit.,* 100.

59 BVerfGE 7, 198, para. 33.

60 Art. 11 of the Declaration of the Rights of the Man and of the Citizen of 1789 ("*Déclaration des droits de l'homme et du citoyen de 1789*").

61 BVerfGE 12, 205; BVerfGE 57, 295.

62 BVerfG 1 BvR 134/03, § 59.

of opinions is indirectly limited by the NetzDG, it can be concluded that the law imposes obligations that violate the freedom to express opinions protected by Art. 5 GG.

b) Art. 5 II Grundgesetz

Naturally, freedom of expression is not unlimited. Article 5 II allows for certain restrictions by general laws, youth protection and personal honor. Due to the aforementioned broad interpretation of an «expression» in the sense of Art. 5 GG, the *BVerfG* ruled that an expression of illegal intentions should not be derogated if the illegal content remains in a theoretical state. Beyond that, the attempt to prevent harmful content resulting from an expression, as well as the general ban of expressions hostile to the constitution, pose a violation of Art. 5 GG.[63] According to the Court, sole worthlessness or dangerousness of an expression could not be reason for a restriction of such.[64]

Additionally, based on the importance of this *Grundrecht*, derogations must be subject to proportionality. Consequently, they must «pursue a legitimate aim and must be suitable, necessary and, in the strict sense, proportionate to achieving this aim».[65] Considering the scope of Art. 5 GG and the strict requirements to derogating laws developed in the *BVerfG* case law, it is unlikely that the NetzDG would withstand judicial scrutiny in regard to the justification of the obvious restrictions to Art. 5 GG.[66]

4.1.3 Principle of legal certainty

The principle of *nulla poena sine lege certa* is expressed in Art. 103 II GG. It is a crucial element of the general rule of law and obligates the legislator to formulate laws sufficiently precise to allow for legal certainty. The NetzDG neither provides a distinct definition of «obvious unlawful content» nor clearly state the obligations arising for the social networks. In fact, content *per se* cannot be «unlawful»; strictly speaking, only the conduct of distributing certain content can be subject to criminal law.[67] Convictions under German criminal law only arise if unlawfulness and guilt are confirmed by a court without any apparent exculpations or justifications. The legislator gives contradictory instructions on how the unlawfulness has to be assessed by the social network and how the procedure regarding removal must be designed.[68] Additionally, the provisions of the NetzDG fail to provide a sufficiently specific scope for the report

63 BVerfGE 124, 300, § 72.

64 BVerfGE 90, 241

65 BVerfGE 67, 157, § 173; BVerfGE 70, 278 § 286; BVerfGE 104, 337 § 347; BVerfGE 120, 274 § 318, 319; BVerfGE 125, 260 § 316.

66 K.-H. Ladeur – T. Gostomcyk, *Das NetzDG und die Logik der Meinungsfreiheit,* cit., 393.

67 M. Liesching, *op. cit.*, 26.

68 *NetzDG Draft,* p. 20.

pursuant to Art. 2.[69] Due to the shift of responsibility for this kind of assessment, no relationship between the court and the user is apparent. This impedes the possibility to take action against the "judgement" as the opponent of the user is typically the social network. An adjudicative scrutiny remains solely for the cases brought in front of the court by a user which seems to contradict the *Justizgewährungsanspruch* («right to access to justice») as part of effective legal protection in Art. 19 IV GG and Art. 20 III GG. Furthermore, the legislator explains the element of obviousness as «no deepened assessment [being] necessary».[70] This is not sufficient for legal certainty as the evaluation will be carried out by "legal amateurs".[71] However, to guarantee a uniform level of protection between the social networks, an adjudicative interpretation is indispensable.[72] The *Oberlandesgericht Hamburg* (Higher Regional Court) recently ruled that even the entitlement as «asshole» can be justified under certain reasons.[73] Consequently the necessity for a «deepened assessment» on a case-by-case basis becomes clear. In this regard, the claim of the legislator that certain content is «obviously unlawful» cannot be upheld.[74]

4.1.4 Privatization of law enforcement

Criminal law and prosecution are responsibilities of the state, according to Art. 74 GG. The NetzDG transfers this responsibility to private social network providers due to its obligation to decide whether content is illegal and therefore subject to removal. This shift of judicial competence was observed in the *Google Spain* case, where the CJEU ruled that individuals are entitled to removal of their information in the Google search engine. However, Google as the intermediary was in charge to assess if search results «appear to be inadequate, irrelevant or no longer relevant or excessive in the light of the time that had elapsed» and could therefore be removed.[75] The Advocate General in *Google Spain* warned of such a case-by-case analysis on behalf of the service provider.[76] Equally, the German constitutional judge Masing criticized the judgement of the CJEU as creating «private arbitration courts with far-reaching judgmental powers» and therefore extending Google's control on the individual.[77] A similar role is assigned to social networks in the NetzDG as they are equally obligated to evaluate content,

[69] K.-H. Ladeur – T. Gostomcyk, *Das NetzDG und die Logik der Meinungsfreiheit,* cit., 391-392.

[70] *NetzDG Draft,* p. 24.

[71] M. Liesching – P. Schmitz – G. Spindler, *op. cit., NetzDG* § 1 para. 7.

[72] R. Schwartmann, *Verantwortlichkeit Sozialer Netzwerke nach dem NetzDG*, in *Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgüter- und Wettbewerbsrecht*, 2017, 318; A. Koreng, *Entwurf eines Netzwerkdurchsetzungsgesetzes*, cit., 204.

[73] OLG Hamburg, 9 W 93/16, 14 November 2016.

[74] A. Koreng, *Hate-Speech im Internet – Eine rechtliche Annäherung*, in *Kriminalpolitische Zeitschrift*, 2017, 159.

[75] CJEU, C-131/12 (2015), § 72.

[76] CJEU, C-131/12, Opinion of Advocate General Jääskinen (2013), § 131.

[77] J. Masing, *Preliminary Analysis of the Google Decision of the CJEU*, in www.verfassungsblog.de, 14 August 2014.

undermining the judicial competence of the state in the process. The German Ministry of Economic Affairs and Energy addresses this as a «privatization of law enforcement».[78] Social networks already practice a certain evaluation of reported content in the lights of their Terms and Conditions to ascertain the rule of law.[79] But in the light of the regulatory fines leading to the aforementioned economic consideration, most judgements will be decided at the expense of users.

4.1.5 Other concerns

Additionally, the NetzDG contains contradictions with the federal jurisdiction, the principle of equality in Art. 3 GG, and the *nemo tenetur* principle.

a) Competence of the Federation

The competence to adopt a law is only of federal nature when prescribed by Art. 70 ff. GG. However, the NetzDG does not fall under the classifications of Art. 73(1) no. 7 GG (telecommunication) nor Art. 74(1) no. 11 GG (economic affairs). Art. 73(1) no. 7 GG concerns technical aspects of telecommunication in regard to standards and norms. However, the provision does not apply to measures regarding transferred content or its monitoring.[80] Art. 74(1) no. 11 GG is not applicable either because freedom of expression and effective cyber-prosecution outweigh the economic aspect. Therefore, such legislation would be a competence of the federal states («*Bundesländer*»).

b) Principle of equality

As mentioned before under concerns on a European level, the NetzDG imposes a seemingly arbitrary threshold of 2 million users to fall under the scope of the legislation. The intention of protecting small businesses is obvious, but a numerical threshold nevertheless contradicts Art. 3 GG. The question of why a social network with 1,9 million users should be treated differently than a social network with two million users is left open.

c) *Nemo tenetur* principle

The principle that no person is compelled to accuse themselves («*nemo tenetur se ipsum accusare*») is not only an aspect of the free development of one's personality in Art. 2 GG but it is also enshrined in Art. 14(3) lit. *g*) of the International Covenant on Civil and Political Rights of 1966 (ICCPR). The legislator specifically included the prosecution of natural persons responsible for violations of

[78] *Fake News & Hate Speech im Internet: Brief von Ministerin Zypries an den Vizepräsidenten der Europäischen Kommission*, German Ministry of Economics and Energy, in www.bmwi.de, 27 February 2017.

[79] M. Eifert, *op. cit.,*1451; A. Schiff, *Meinungsfreiheit in mediatisierten digitalen Räumen - Das NetzDG auf dem Prüfstand des Verfassungsrechts,* in *MultiMedia und Recht*, 2018, 368.

[80] H. Gersdorf, *Hate Speech in sozialen Netzwerken: Verfassungswidrigkeit des NetzDG-Entwurfs und grundrechtliche Einordnung der Anbieter sozialer Netzwerke,* in *MultiMedia und Recht*, 2017, 440.

the NetzDG, for example, the owner of the social network.[81] At the same time, the NetzDG obligates these natural persons to provide reports and documentations about their complaint-management-systems. This would effectively require them to deliver evidence as a foundation for their punishment, which contradicts the *nemo tenetur* principle.[82]

4.2 European law

4.2.1 Primary law

a) Freedom of expression in the European treaties

The freedom of expression in Art. 11 EUCFR and Art. 10 ECHR could potentially be violated by the NetzDG and its restrictive nature, that has been determined in the previous. Derogations of fundamental human rights in the ECHR are assumed if the public measure at hand appears to be «affecting» or even «chilling» for the individual.[83] Whereas the "chilling" character of the NetzDG is debatable,[84] it is undoubtedly «affecting» the providers of social networks as well as their users. Regarding the EUCFR, the *Dassonville Formula is to be applied mutatis mutandis,*[85] meaning that a derogation is assumed[86] through any measure «capable of hindering [individual rights], directly or indirectly, actually or potentially».[87] According to Art. 10(2) ECHR and the general clause of Art. 52(1) EUCFR, the measure must be prescribed by law and pursue a legitimate aim. Additionally, the necessity in a democratic society is required, including the suitability, necessity in a stricter sense and proportionality of the measure, all of which are assessed in the following in regard to the NetzDG.

The legal basis of the derogation is required to be adequately accessible and formulated with sufficient precision to enable individuals to regulate their conduct.[88] However, contradictions with the principle of legal certainty have been discussed on a constitutional level in the previous, emphasizing that the NetzDG seems to lack in sufficiently precise phrasing. Neither the social network nor its users are provided with provisions which allow them to regulate their conduct. According to section 4 (1) no. 2 NetzDG, the social network faces fines if it «fails to provide, provide correctly or to provide completely, a procedure mentioned [in section 3 (1) sentence 1] ». The requirements for the complete maintaining of an «effective and trans-

[81] *NetzDG Draft,* p. 12.

[82] B. Heymann – J. Wimmers, *Zum Referentenentwurf eines Netzwerkdurchsetzungsgesetzes (NetzDG) – eine kritische Stellungnahme*, in *AfP - Zeitschrift für Medien- und Kommunikationsrecht*, 2, 2017, 102.

[83] J. Meyer-Ladewig – M. Nettesheim - S. Von Raumer, *Europäische Menschenrechtskonvention – Handkommentar*, Baden-Baden, 2017, Art. 11, para. 15.

[84] A. Koreng, *Entwurf eines Netzwerkdurchsetzungsgesetzes,* cit., 204; N. Guggenberger, *op. cit.*, 100.

[85] W. Frenz, *Handbuch Europarecht Band 4: Europäische Grundrechte*, Dordrecht-Heidelberg-London-New York, 2009, para. 497.

[86] *Ibid.,* para. 1824.

[87] CJEU, 8/74, *Dassonville* (1974), § 5.

[88] ECtHR, *Barthold v. Germany,* app. 8734/79 (1985), § 45.

parent procedure for handling complaints about unlawful content» (*ibid.) are unclear and can therefore not enable the social networks to regulate their conduct. The removal of controversial content which is not amounting to any of the offences mentioned in the NetzDG has been reported only days after the law entered into force. For example, a tweet even by the former German Minister of Justice Heiko Maas, the main person responsible for the draft of the NetzDG, was deleted for unknown reasons.*[89] This illustrates that a recommendation for users to regulate their conduct can equally not be assumed. The lawful basis for derogating freedom of speech provisions in European treaties is consequently not apparent.

The requirement of a legitimate aim pursuant to the European provisions is subject to a broad interpretation.[90] Therefore, the prevention of crime and the protection of the interests of others can be considered legitimate aims pursued by the NetzDG in the sense of European law. Contrarily, the suitability of the law to transpose such aims into legal reality can only partially be assumed. The offences regarding fake news are rarely relevant[91] and the unlawful nature of content seems not to be the source of the problem but rather the circulation of virulent headlines and «alternative facts».[92] Both can hardly be prevented on a legal or even technical level and the legislator should consequently take another approach as discussed in the fourth part of this paper.

Preventing the commitment of hate speech offences cannot be assured by the scrutiny mechanism on the shoulders of the social networks either. It is more likely that the removal of possibly hateful content online leads to a further polarization of users (e.g. "echo chambers") as the process of public opinion-formation is distorted. Furthermore, no additional measures are undertaken by the NetzDG to enhance law enforcement and prosecute cyber-offenders to hold them liable under criminal law. Such provisions of less restrictive nature would promote the prevention of publishing unlawful content presumably even more effective, which also contradicts the necessity of the NetzDG in a stricter sense. A civil-procedural counterproposal lowering the barriers of imposing a refraining order for users of social media in the form of an online process was also made. This would simplify the enforcement of individual rights *vis-à-vis other individuals, including an* identification of the applicant to prevent abuse and a temporary blocking of the content until it is scrutinized by the judiciary.[93] In conclusion, less restrictive approaches would be similar or even more effective than the provisions of the NetzDG and consequently, a necessity in a stricter sense cannot be presumed.

To assess the proportionality, the relation between the degree of restrictiveness and the effectiveness of the law must be considered in the light of the derogated fundamental right. The provisions of the NetzDG promote a private law enforcement by the social networks, disregarding the included restrictions of the freedom of expression. At the same time, they cannot ensure the prevention of

[89] *Maas-Tweet über Thilo Sarrazin gelöscht*, in *Spiegel Online*, 8 January 2018.

[90] W. Frenz, *op. cit.,* para. 1848; H. Jarass, *Charta der Grundrechte der Europäischen Union – Kommentar*, Buch, 2016, Art. 11, para. 31.

[91] M. Liesching, *op. cit,* 29.

[92] R. Stoker, *Yes, there are 'alternative facts.' That's different from falsehoods*, in *The Washington Post*, 31 January 2017.

[93] In detail see R. Köbler, *Fake News, Hassbotschaft und Co. - ein zivilprozessualer Gegenvorschlag zum NetzDG*, in *AfP - Zeitschrift für Medien- und Kommunikationsrecht*, 4, 2017, 282-284.

crime and the protection of individual rights effectively. Considering the fundamental standing of the freedom of expression in the European treaties as a basic principle for democracy, the proportionality principle is hardly met.

As mentioned in the introduction, social networks nowadays also act as news agencies for the users. In this regard, the ECtHR ruled that the restriction of journalistic content is subject to even stricter scrutiny.[94] Therefore, the NetzDG would need to apply a higher standard regarding the derogation of such content, which is not apparent. Consequently, the provisions of the NetzDG are unlikely to withstand the judicial scrutiny of European courts in regard to the proportionality principle.

In summary, the NetzDG poses derogations of the freedom of expression, enshrined in Art. 11 EUCFR and Art. 10 ECHR, which cannot be justified for the various reasons mentioned.

b) Stance of the ECtHR

The ECtHR outlined the conditions for conforming with Art. 10 ECHR, more precisely regarding the liability of online service providers, in recent judgements. In *Delfi v Estonia, the removal of defamatory comments did not amount to a violation of* Art. 10 ECHR.[95] In the *Index.hu ZRT v Hungary* case on the other hand, the court ruled that offensive and vulgar speech can be protected by Art. 10 ECHR, as long as the expression does not amount to unlawfulness.[96] These seemingly contradictory judgements stress out the importance of a case-by-case analysis which guarantees the "thin line"[97], as also mentioned by the president of the *BVerfG*.[98] Removal by an online service provider is therefore only justified and proportionate in the sense of Art. 10 ECHR if the expression of opinion amounts to unlawful conduct.

However, a general obligation to remove content transfers the required case-by-case analysis to the social networks, therefore creating "chilling effects" on the network as well as every subject of scrutiny. The ECtHR approved the scrutiny in the hands of a private intermediary in the *Google Spain* judgement; however, such shift of judicial responsibility is questionable.[99] A different stance was taken by the ECtHR in the context of restricting journalistic activities which were addressing «political speech or matters of public interest».[100] The court ruled that such content would enjoy special protection under European law and can only be limited under very few conditions. As content in social media often includes

94 ECtHR, *Axel Springer v Germany*, app. 48311/10 (2014), § 54.

95 ECtHR, *Delfi AS v Estonia*, app. 64569/09 (2015).

96 ECtHR, *Index.hu Zrt v Hungary*, app. 22947/13 (2016).

97 *Ibid*., § 69.

98 H.J. Papier, *Rechtsstaatlichkeit und Grundrechtsschutz in der digitalen Gesellschaft*, in *Neue Juristische Wochenschrift*, 42, 2017, 3030.

99 J. Masing, *Preliminary Analysis of the Google Decision of the CJEU*, in www.verfassungsblog.de, 14 August 2014.

100 ECtHR, *Axel Springer v Germany*, cit., § 54.

expressions with political content, the NetzDG creates a similar unwanted effect which is not in accordance with Art. 10 ECHR.

In the light of the European judiciary, the NetzDG seems to be disproportionate to achieve its legitimate goal of fighting illegal content online. The broadly interpreted expression of one's opinion is restricted and with the current structure of the NetzDG, this restriction includes lawful comments which are on the protected side of the "thin line".[101]

4.2.2 Art. 3 E-Commerce Directive

As mentioned before, cybercrimes are accompanied by problems of jurisdiction in the cyberspace. The discussed conflict in international law also applies in the European context. Paragraph 1 of Art. 3 E-Commerce Directive introduces the principle of origin, according to which service providers fall under the jurisdiction of the state whose territory they are instated. Paragraph 2 additionally prohibits a restriction by states of service provider freedoms established in other member states. This principle is highly contested by scholars; however, this shall not be discussed at this point. Rather, the question to be considered is whether the NetzDG provides a derogation from the principle according to paragraph 4. It is clear that the law unfolds legal effect in other member states as the regulatory offences are fined disregarding the origin of the perpetrator according to Article 4(3).

Nonetheless, this derogation of the principle of origin could be justified according to the Directive. Art. 3(4) states that derogations are permitted if they are necessary for public policy, public health, national security or the protection of consumers. The legislator argues that the NetzDG introduces an effective complaint management that improves the prosecution of criminal offences[102] which appears to be a justified derogation according to Art. 3(4) lit. *a*) no. (i) E-Commerce Directive («in particular the prevention, investigation, detection and prosecution of criminal offences»). However, the European Commission stated that Art. 3(4) E-Commerce Directive does not include general measures in regard to financial services and that especially derogations have to be considered on a case-by-case basis. As the NetzDG imposes a general rule in Art. 4(3), the derogation might not be justified and therefore contradict European law.

4.2.3 Art. 14 E-Commerce Directive

Art. 14 of the Directive lays out a derogation from general content liability for service providers if the provider does not know about the existence of illegal content (para. 1 a). Additionally, a service provider will also be excused if they obtain knowledge about illegal activity and consequently remove or disable all access to such content (para. 1 b).

[101] H. Gersdorf, *op. cit.,* 446, 447.

[102] *NetzDG Draft,* p. 14.

Such exception shall occur «expeditiously», allowing for certain flexibility if interpreted literally.
The NetzDG on the other hand states fixed deadlines of 24 hours or seven days as required by Art. 3(2). Therefore, the German legislator carries out a legal interpretation of Art. 14 E-Commerce Directive in the NetzDG. According to Art. 267a of the Treaty on the Functioning of the European Union (TFEU) however, the interpretation of EU secondary law is under the exclusive jurisdiction of the CJEU. This was also ruled by the German Federal Supreme Court regarding the interpretation of Art. 14(1) E-Commerce Directive. The court stated that a collective definition of legal notions on a European level allows for further harmonization and therefore the German legislator can introduce «neither broader nor stricter regulations in the national legislation».[103] In this regard, there is no leeway in the legal adoption of the Directive through the member states.
Consequently, the German legislator oversteps its competence and disregards the flexibility aspect demanded by the Directive which ends in an incompatibility of the NetzDG with Art. 14 E-Commerce Directive. Additionally, the question arises as to whether legal pressure to assess the unlawfulness of content in a fixed time limit of 24 hours influences the quality of the assessment. In reality, this might lead to a hasty verdict which suffers from legal uncertainty just to avoid the regulatory fines.

4.2.4 Art. 15 E-Commerce Directive

Art. 15 of the Directive includes an indirect exemption from a service provider liability as it prohibits a statutory obligation to generally monitor all information. However, this is approximately what the NetzDG does in Art. 3, as the deadlines can realistically not be kept without an automatic system monitoring information of all users. The CJEU ruled in the *L'Oréal/eBay* decision that an obligation for websites to generally monitor information in order to prevent unlawful conduct contradicts Art. 15 E-Commerce Directive. The court also found a violation of Art. 3 E-Commerce Directive as measures of the Directive must be fair, proportional and not excessively costly.[104] The ruling was approved as applicable for social networks as well in the *Netlog* case, when the CJEU stated that filtering systems are prohibited even to prevent a violation of IP rights through the upload of copyright protected music.[105] As this was also approved by the German Federal Supreme Court,[106] a violation of Art. 15 E-Commerce Directive through the obligations of Art. 3 NetzDG is presumable. In conclusion, it is unlikely that the legislation would withstand judicial scrutiny in this regard.

[103] BGH I ZR 39, 12, § 19, in *Neue Juristische Wochenschrift,* 2014, 552-553.

[104] CJEU, C-324/09, *L'Oréal SA and Others v eBay* (2011), § 139.

[105] CJEU, C-360/10, *Sabam v. Netlog* (2012).

[106] BGH I ZR 240/12, § 51.

4.2.5 Other concerns

a) Art. 56 TFEU: Free movement of services

The free movement of services in the EU territory is one of the four freedoms of Art. 26(2) TFEU. Art. 56 TFEU prohibits any restriction on the freedom to provide services. The NetzDG imposes a restriction on the services provided by social networks through the application of German criminal law and the cross-border establishment of regulatory fines. Such restrictions can be justified under the requirements laid out in the *Säger* case by the CJEU.[107] The restricting measure must be indistinctly applicable, objectively necessary, and justified by imperative reasons to the public interest. Then again, it must not exceed what is necessary to achieve such imperative reasons. While effective criminal prosecution fulfills the requirement of public interest, the necessity of the NetzDG is contested as discussed in the previous.

b) Equal treatment

The principle of non-discrimination is the very basis of the European integrated market and it applies to many aspects of European law. It obligates states to treat their nationals and nationals from other member states the same way.[108] However, Art. 18 TFEU is only a «specific expression of the general principle of equality».[109] This general principle of equal treatment emerges from the different articles including a prohibition of discrimination (Art. 18, 36, 37, 45 II, 49, 56, 63 TFEU).[110] According to Art. 54 TFEU, companies enjoy this equality principle in the same manner as they are to be treated equal to natural persons. Additionally, Art. 14 E-Commerce-Directive does not take into account the size of a company.[111] The scope of the NetzDG merely includes such companies that amount to the definition of social networks according to Art. 1 and, specifically, for such with more than two million users. This unequal treatment including a seemingly arbitrary threshold violates the principle of equality on a European level.

c) Distortion of competition

The tool of regulating competition is under the exclusive competence of the EU, as competition regulations can only be effective on a European level. The former Minister of Economic Affairs Brigitte Zypries warned against a «fragmentation of the integrated market» through different legislation in EU mem-

[107] CJEU, C-76/90, *Säger v. Dennemeyer* (1991), § 15.

[108] CJEU, C-186/87, *Cowan v Trésor public* (1989), § 10.

[109] CJEU, C-280/93, *Germany v Council of the European Union* (1994), § 67.

[110] S. Glock, *Der Gleichheitssatz im Europäischen Recht – Eine rechtsvergleichende Analyse unter Berücksichtigung der Rechtsprechung in ausgewählten Mitgliedstaaten der Europäischen Union, des EGMR und des EuGH*, Gießen, 2007, 163-166.

[111] B. Heymann – J. Wimmers, *op. cit.,* 96.

ber states affecting competition.[112] Additionally, Art. 117 TFEU obliges member states to consult the European Commission before adopting a law that has an effect on EU competition. However, the German legislator failed to do and consequently contradicted European law.

4.3 International law

The NetzDG allows for sanctioning a regulatory offence against the legislation even if it is not committed in the state of Germany (Art. 4(3). This raises concerns about the compatibility of the NetzDG with the international law principle of territoriality. As mentioned before, cybercrime introduces the possibility of committing an offence in one state that unfolds effect in another state. This undermines the national obligation to criminal prosecution as an expression of sovereignty. The German criminal law applies to all offences that are committed in the territory of Germany (§ 3 StGB), but also for those that violate certain domestic legal interests while being committed abroad (§§ 5-7 StGB). However, according to international law, criminal law is limited by the national jurisdiction of other states as already ruled in the *Lotus* case.[113] A cross-border legal effect can especially be developed if «security, territorial integrity or political independence» are at risk.[114] The *BVerfG* adopted the rule that states may prosecute offences that threaten the «existence or other important legal interests of the state».[115] In this regard, the broad scope of the StGB is considered a violation of international law.[116]

Regarding the NetzDG, it is debatable whether it implements important legal interests of the state which would deny a contradiction to international law principles. The German legislator claims the NetzDG to be necessary to effectively combat and prosecute hate crimes and other punishable content which allows for a «peaceful living together of the liberal and democratic society».[117] However, the German Federal Supreme Court recently denied the application of German criminal law in the case of a Czech citizen that uploaded Nazi symbols to the internet. The court found a violation of § 86a StGB, which is also listed as an offence protected by the NetzDG in Art. 1(3). Nevertheless, it ruled that a sole online accessibility from Germany does not justify prosecution by the German authorities.[118] This indicates that the cross-border sanctioning in Art. 4(3) of the NetzDG could run dry for several offences. In conclusion, the NetzDG is not

[112] *Fake News & Hate Speech im Internet: Brief von Ministerin Zypries an den Vizepräsidenten der Europäischen Kommission*, German Ministry of Economics and Energy, in www.bmwi.de, 27 February 2017.

[113] *The case of the S. S. "Lotus"*, in *PCIJ Series A* No. 10, 7 September 1927.

[114] Harvard University (ed.), *Draft Convention on Jurisdiction with Respect to Crime*, in *The American Journal of International Law,* 29, Supplement: *Research in International Law*, 1935, 440.

[115] BVerfGE 92, 277 in *Neue Juristische Wochenschrift,* 1995, 1811, 1813.

[116] K. Ambos, *Münchener Kommentar zum Strafgesetzbuch*, Buch, 2017, para. 10-11 (with additional references).

[117] *NetzDG Draft,* p. 14.

[118] BGH III StR 88/14, 19 August 2014.

per se in violation of international law. However, the application of German criminal law for the offences listed in Art. 1(3) of the NetzDG must be under judicial scrutiny by the German Federal Supreme Court in case they are committed abroad.[119] A general application on the other hand could not be justified under international law.

5. Evaluation

5.1 Legality perspective

The German writer Kurt Tucholsky claimed that «the opposite of good is well-meant». The intentions of the legislator seem to be indeed «well-meant»[120] as an attempt was made to oppose difficulties arising from the internet. However, the result of these intentions has been a piece of legislation which effectively transfers the problem of grasping the "thin line" to social networks acting as «deputy sheriffs» on behalf of the state.[121] Their users end up being the bereaved parties as they have to fight the IT leviathans for their freedom of expression and it seems unlikely that they will win.
In the light of the empirical evidence that hate speech online is only a peripheral concern, legitimacy of the legislative activity, effectiveness and necessity of the NetzDG must be reconsidered.[122] The NetzDG aims to fight hate speech and fake news but has failed to pursue them effectively on two levels. For hate speech online, the NetzDG is not necessary. Social network providers are obligated to ascertain the rule of law[123] and they do so by establishing a code of conduct in their terms and conditions. If the "thin line" was crossed, and published content made the user liable under criminal law, authorities could start legal proceedings. Regarding the protection of individual rights, users have the possibility to request a refraining order under the rule of German Civil Law.[124] Contrarily, the problem that users are *de facto* not being prosecuted by the authorities is not properly addressed in the NetzDG. The removal of content in social networks might rather lead to a retreat to smaller websites out of the scope of the NetzDG. The radicalization of critical opinions was observed to be amplified in the context of similar opinions. Such process of polarization is also known as the «echo chamber phenomenon»[125] which is therefore possibly promoted by the NetzDG.[126]
Additionally, the NetzDG has been far from effective in achieving its goal of prevent-

[119] B. Heymann – J. Wimmers, *op. cit.,* 94.

[120] N. Guggenberger, *op. cit.*, 98 («well thought, poorly made»).

[121] *Ibid.,* 100.

[122] K.-H. Ladeur – T. Gostomcyk, *Das NetzDG und die Logik der Meinungsfreiheit,* cit., 390.

[123] T. Ceffinato, *Die strafrechtliche Verantwortlichkeit von Internetplattformbetreibern*, in *Juristische Schulung,* 5, 2017.

[124] BGH VI ZR 93/10, in *Neue Juristische Wochenschrift*, 2012, 148; A. Schiff, *op. cit.,* 367.

[125] J. Cappella – K. Jamieson, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment*, Oxford, 2010, 75-78.

[126] G. Nolte, *Hate-Speech, Fake-News, das »Netzwerkdurchsetzungsgesetz« und Vielfaltsicherung durch Suchmaschinen*, in *Zeitschrift für Urheber- und Medienrecht*, 7, 2017, 560.

ing fake news.[127] The provisions regarding fake news in the NetzDG are limited (§ 187 StGB) and they are rarely applicable to the fake news phenomenon.[128] In reality, the source of fake information can hardly be determined and made subject to criminal law. On a larger scale, the problem lies in the amplification by media services in social networks which have a commercial interest in publishing content that is appealing to the users. Recent studies show that it is more likely for users to disseminate information if it is false.[129] This implies that fake news produce a higher commercial profit in social networks.

However, media provider like newspapers are not held responsible for spreading fake information on social media even if such information heavily distorts the aforementioned public process of developing opinions. Just recently, the German boulevard newspaper *Bild* reported about the split-up between the two conservative parties in Germany (CDU and CSU) on Facebook. This caused an outrage by users, only to be revealed as a canard shorty after.[130] Incidents like that outline the commercial interest outweighing the importance of truthful news reports. To effectively prevent «experiences in the US presidential election» as the NetzDG aims to do,[131] the legislator must address the economic consideration behind publishing information without underlying proof of verity.

Notwithstanding the «well-meant» intentions behind the legislation, a basis for the exercise of legislative power is not apparent. The legislator oversteps its competence by underestimating fundamental rights and principles of law in a what seems to be a hastily drafted law. The enhancement of online prosecution or lawful measures against actual offences in social media, by contrast, would be justifiable. In conclusion, the restrictions emerging from the provisions of the NetzDG are neither effective nor necessary to achieve the goals set in the reasoning by the legislator.[132] The violations of several constitutional rights and principles cannot be justified and are in practice, with the words of Kurt Tucholsky, «the opposite of good» for users of social media.

However, the restrictiveness of the NetzDG in the European Context is unexpected. Regarding Germanys leading role in the European Union, a restrictive approach *vis-à-vis* American IT giants seems like a first step towards undermining their dominant global position.[133] Notwithstanding the legal problems arising from the NetzDG, it seems like a counter position to the excessively extensive view on freedom of expression in the US.[134] However, the duel between EU politics and US companies should

127 B. Holznagel, *Phänomen "Fake News" – Was ist zu tun?*, in *MultiMedia und Recht*, 2018, 21.

128 M. Liesching, *op. cit.,* 29.

129 S. Vosoughi – D. Roy – S. Aral, *The spread of true and false news online,* Research by the Massachusetts Institute of Technology (MIT), in *Science*, 359, 2018.

130 *"Titanic" legt Medien herein*, in *Spiegel Online*, 15 June 2018.

131 *NetzDG Draft,* p. 1.

132 *NetzDG Draft,* p. 1.

133 R. Schütz, *Regulierung in der digitalen Medienwelt - Fünf aktuelle Herausforderungen,* in *MultiMedia und Recht,* 2018, 37.

134 A. Heldt, *Terror-Propaganda online: Die Schranken der Meinungsfreiheit in Deutschland und den USA,* in *Neue Juristische Online-Zeitschrift*, 45, 2017, 1460.

not be carried out at the expense of the individual. Germany's strict position could be an inspiration for a possible EU-wide approach of fighting hate speech and fake news tying on the General Data Protection Directive.[135] Such a piece of EU legislation must be carefully constructed not to violate the standard of the freedom of expression in European jurisdiction, as the NetzDG seems to do.

5.2 Improvements and alternatives

In conclusion, the evaluation of content should not be exercised by the social networks themselves. However, the legislator could approach more effectively the legitimate rationale of the NetzDG through different measures. Incentives should be created to organize the assessment to be made by independent legal experts, as the NetzDG attempts to do with the introduction of «self-regulatory» measures in Art. 3(6). Another option could be a transfer of all reported content to a state authority for a quasi-judicial evaluation. Censorship would be counteracted through an anonymized process and the creation of case groups. The mere criminal nature of content would be assessed under a binding code of conduct elaborated between the government, legal experts, and NGOs. In the case of a criminal proceeding, the anonymization would be repealed to allow for an effective prosecution. The echo chamber phenomena could be prevented with a legislation applicable to all service providers regardless of their user count, demanding a share of their annual profits to fund such an authority.
This approach could be criticized as a state monitoring of content, as the reporting of content can easily be abused and effectively all content would be under judicial scrutiny. The operating expenses also must be taken into consideration. The deadlines should be removed completely as they possibly influence the accuracy of the assessment. However, the burden of proving whether an evaluation was done «expeditiously», as required by Art. 14 E-Commerce-Directive, should be up to the assessor.
On a broader scope, a binding EU legislation could be considered an effective alternative, which would include an authority on a European level to assess the compatibility of content in social media with a code of conduct established between the member states. The authority would be similar to the European Data Protection Board which ensures the application of the General Data Protection Directive. In case the code of conduct is violated by published content, the authority would transfer the case to national criminal prosecution authorities to prevent the undermining of national criminal law. The legislation should include a clear definition of the "thin line" where freedom of expression ends and criminal responsibility for the individual starts.
For the problem of fake news distorting political processes, the legislator should approach the connection between news and commercial profit. However, instead of fighting fake news, which is in practice not effectively possible, the focus should be on "promoting real news". An effective legislative approach could include a prohibition of financing news services within legal borders. This would lead to a division between non-profit "news providers" and commercially driven "story providers". The verity of

[135] *U.S. Websites Go Dark in Europe as GDPR Data Rules Kick In*, in *Wall Street Journal*, 25 May 2018.

information could be approved by a collaboration between state authorities, NGOs, and the users, including a kind of certification for users to efficiently identify "real news". As a voluntary code of conduct has proven to be ineffective,[136] such law would require binding obligations. A task for the legislator could be the improvement of the electronic process and therefore creating a foundation for a system which promotes "real news".

There are various possibilities at both national and European level to effectively approach the issues addressed by the German legislator in the reasoning for the NetzDG. A follow-up legislation on the General Data Protection Directive could be considered the next logical step for the integration not only of the European market, but also a more consistent protection of human rights in Europe. Other than the NetzDG, such a legislation needs to be in favor of the individual and binding for all the EU member states, while limiting the power of the US-American tech giants.

6. Conclusion

Freedom of expression is an individual right. Its underlying idea includes a development of an individual opinion in a public process. With the restriction of publishing opinions through private intermediaries based on economic consideration, such process seems unachievable. On the one hand, the universal freedom to express opinions also applies in a social network to the extent in which it is legally permissible to do so. Violations of criminal provisions or individual rights of others online on the other hand must be equally counteracted in an effective way. The "thin line" separating the protected expression of an opinion and an unlawful offence has to be carefully assessed. A seemingly insignificant removal of individual content restricts and damages the process of developing opinions as a whole, which cannot be justified under the principles of law.

The legislator seems to have realized the necessity of a strict approach *vis-à-vis* IT leviathans. The NetzDG takes a step in the right direction by trying to approach the threats posed by the general shift of activities to an online level. However, it fails utterly to create an effective countermeasure due to the fact that it violates constitutional and European laws and possibly international law in the attempt to achieve its goals.

On a larger scale, legislators need to work together with the users of social networks, legal experts, non-profit organizations and possibly with each other in order to strike the right balance between effective law enforcement against hate speech on the cyber level and protecting the right of the individual user in social networks. Consequently, this includes restrictive measures against the multi-billion-dollar IT companies behind those networks without burdening the individual. The problem of fake news and its accompanying distortion of political dialogue on the other hand is more complex and can hardly be solved with the legal instruments at hand. In this regard, the legislative focus should be on the seemingly indispensable tie between providing news and commercial interest.

[136] *NetzDG Draft,* p. 1.

Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation

A national law attempting to fight hate speech online and fake news equally with simple restrictive measures, such as provided for by the NetzDG, seems destined to be ineffective and ultimately unlawful.

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