

Germany's NetzDG: A key test for combatting online hate

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**COUNTER
EXTREMISM
PROJECT**

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Overview

Germany's Network Enforcement Act, or NetzDG law¹ represents a key test for combatting hate speech on the internet.

Under the law, which came into effect on January 1, 2018, online platforms face fines of up to €50 million for systemic failure to delete illegal content. Supporters see the legislation as a necessary and efficient response to the threat of online hatred and extremism. Critics view it as an attempt to privatise a new 'draconian' censorship regime, forcing social media platforms to respond to this new painful liability with unnecessary takedowns.

This study shows that the reality is in between these extremes. NetzDG has not provoked mass requests for takedowns. Nor has it forced internet platforms to adopt a 'take down, ask later' approach. Removal rates among the big three platforms ranged from 21.2% for Facebook to only 10.8% for Twitter.

At the same time, it remains uncertain whether NetzDG has achieved significant results in reaching its stated goal of preventing hate speech. Evidence suggests that platforms are wriggling around strict compliance. Consider Facebook. The social network makes it difficult to fill out NetzDG complaints. Instead, Facebook prefers to cite their murkily defined community standards to take down vast amounts of content.

It is easy to understand the temptation to revert to self-defined and controlled community standards for takedowns; by using them, rather than NetzDG reporting standards, companies escape the potential risk of severe liabilities under the law.

Although the other big social media platforms, Google and Twitter, made it easier to report NetzDG complaints, the law did not change their behaviour significantly. They rejected almost four fifths of the complaints.

The Counter Extremism Project recently released a study that shows YouTube's efforts to proactively remove ISIS terrorist content is failing, in Germany and elsewhere.² Some 91% of the ISIS videos examined were uploaded more than once; 24% of terrorist videos remained online for more than two hours. YouTube is losing this game of whack-a-mole with ISIS campaigners. This suggests that self-regulation has not worked, yet the NetzDG law does not address re-uploads because the tech industry lobbied to have this provision deleted from the original draft bill. Under NetzDG, tech companies face no obligation to stop re-uploads, which effectively makes known terrorist videos available online in perpetuity. Every time the content appears online, it must be flagged and checked again. This is neither efficient nor effective.

The German government has not lived up to its responsibilities under the law, either. It has not yet offered a clearer definition of the law's vague description of "obviously illegal" content or

¹ "Act to Improve Enforcement of the Law in Social Networks" (2017), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.

² "The EGLYPH Web Crawler: ISIS Content on YouTube," 2018, https://www.counterextremism.com/sites/default/files/eGLYPH_web_crawler_white_paper_July_2018.pdf.

systematic failure of compliance. The government only plans to release a study of NetzDG's impact in three years' time.

In an era of instant communication, this delay seems far too long. Pressure is mounting inside the European Union for strong action to combat online hatred. France has proposed a law to fight 'fake news'. The European Commission itself has proposed a law to combat online terrorist propaganda. Both are narrower than NetzDG. We examine the Commission proposal at the end of this paper – and find that there are lessons to be learned from the European Union approach, including for NetzDG.

As is always the case with compliance obligations, there are costs associated which must be factored in by the companies affected. While the Big Three tech companies – Facebook, Google, and Twitter – are able to absorb these costs, new start-up platforms will find it more of a challenge. Perhaps even worse, the three major platforms have each come up with their own individual reporting formulas, making it difficult for users to flag NetzDG violations in a consistent and streamlined manner.

This paper begins by explaining the background that led to the development and passage of NetzDG. It examines the reaction to the law by civil society, platforms and the government. It concludes with suggestions, for platforms, civil society and the authorities, on ways to improve the law to be effective in the fight against online hate while keeping the internet open and free.

CEPS acknowledges the Counter Extremism Project's support for this research. The study was conducted in complete independence. It is based on interviews with regulators, company representatives, and civil society activists. The authors take full responsibility for its findings.

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1. The problem

Policymakers throughout Europe are grappling with the challenge of how to curb the prevalence of illegal web content. Algorithms that seek to maximise user engagement have created echo chambers and filter bubbles, which reinforce societal divisions and prejudices. Hateful language leads to real-world crime.³

Europeans are increasingly turning to regulation to address these digital side effects.

It can be challenging to determine the legality of content that falls under hate speech – or “incitement to hatred” as referred to in Germany’s criminal code. At what point the industry has done ‘enough’ is a political question beyond the scope of this paper. If history serves as a guide, many improvements (e.g. in the fight against online child sexual abuse material) stem from public pressure and assertive government action.

So far, the European Commission has addressed illegal web content with a mix of regulatory and non-regulatory measures. These include the Directive on combatting child sexual abuse material 2011/93/EU and the Directive on combatting terrorism 2017/541. Its Recommendation on measures to effectively tackle illegal content online (2018)1177 and the recently proposed Regulation on preventing the dissemination of terrorist content online deal with online content.

The Directive on Electronic Commerce (2000/31/EC) provides internet intermediaries with significant protections. Under the e-Commerce Directive, technology companies only become liable for content once it has been brought to their attention. They are exempt from being required to proactively filter content. This freedom has allowed social media to develop and thrive, but it has also contributed to the rapid dissemination of illegal content.

In recent years, tech companies have adopted voluntary measures include the formation of the European Union’s Internet Forum in 2015, the Global Internet Forum to Counter Terrorism (GIFCT), and the Code of Conduct on Combatting Hate Speech adopted in May 2016 and signed by Facebook, Twitter, YouTube, Microsoft, and later Instagram.

³ See for example the controversial study: Karsten Müller and Carlo Schwarz, “Fanning the Flames of Hate: Social Media and Hate Crime” (Warwick, 2018), <https://warwick.ac.uk/fac/soc/economics/staff/crschwarz/fanning-flames-hate.pdf>.

Since the Code's implementation, but more particularly the acceleration of reputational risk arising from media scrutiny and increased attention from European policy makers, the European Commission has reported some progress.

After the third monitoring, released in January 2018 the Commission reported that "companies have strengthened their reporting systems, making it easier to report hate speech, and have improved their transparency vis-à-vis notifiers and users in general". Subsequent rounds of EU monitoring demonstrated steady improvements in removal rates across the EU. In Germany, for example, the average rate of removals for Facebook, Twitter, and YouTube combined went from 52% in the first monitoring exercise (Dec 2016) to 100% in the third monitoring exercise the following year.

This 100% figure fuels debate. It could be interpreted to show that Facebook, Google and Twitter are taking down content without careful analysis, under pressure not only from the Code but more recently from NetzDG. But the 100% takedown refers only to little more than 200 pieces of content reported by two German accredited flaggers.⁴ Definitive conclusions are impossible to draw from such a small sample.

2. The genesis of NetzDG

At the beginning of 2015, Germany had accepted one million refugees, most from the Middle East. A right-wing anti-migrant backlash ensued. On social media, hate speech proliferated, targeting both refugees and government officials that were deemed responsible for Germany's open immigration policy.

Justice Minister Heiko Maas responded by creating a task force on hate speech. Between September 2016 and September 2017, the task force convened six meetings with Google, Facebook, Twitter and civil society representatives. Tech companies committed to creating user-friendly reporting tools and to removing most illegal content within 24 hours of notification.⁵ The government committed to discussing measures to improve the prosecution of online hate crimes.⁶

Maas subsequently vowed to test its results. His government assigned accredited flagger Jugendschutz.net, an organisation monitoring youth protection laws, to conduct an empirical assessment.

⁴ In Germany these were the Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (FSM) and Jugendschutz.net.

⁵ These include a better and more transparent enforcement of terms of service, access to German legal specialists, adequate training for content moderators, and the use of effective counter-narratives.

⁶ "Together against Hate Speech: Ways to Tackle Online Hateful Content Proposed by the Task Force against Illegal Online Hate Speech," 2015, https://www.fair-im-netz.de/SharedDocs/Downloads/DE/News/Artikel/12152015_TaskForceErgebnispapier_eng.pdf?__blob=publicationFile&v=2.

Over the course of two eight-week periods, July to August 2016 and January to February 2017, Jugendschutz.net investigated content that violated Article 130 (incitement to hatred and Holocaust denial) and Article 86a (use of symbols from unconstitutional organisations), and the Youth Protection Act. Based on 200 reported pieces of content per tested platform, Facebook removed 39%, YouTube 90% and Twitter 1%. Looking solely at content removed within 24 hours of being flagged, the rates fell to 31% for Facebook, 82% for YouTube and 0% for Twitter.⁷

Maas used the Jugendschutz.net findings to justify NetzDG. Opponents questioned the study's empirical basis.⁸ Maas stuck to his conclusion that social media was allowing too much illegal content online and not taking user complaints seriously.⁹ He affirmed that the big stick of the law was the only way to fight the scourge of illegal content.

The government wanted to act quickly. It introduced the NetzDG bill on March 27, 2017. Parliament approved it less than five months later despite considerable opposition, not only from its targets, Facebook, Google, and Twitter, but also from large segments of civil society. After several key amendments were made (see Appendix A1), the law passed virtually unanimously among the Christian and Social Democrats. Left-wing parliamentarians voted against it. The Greens abstained.

NetzDG applies to all for-profit social media platforms with at least two million registered users in Germany. Media is exempt, as are messaging services such as WhatsApp and Telegram designed for individual communication.

Under the law, social networks are obliged to set up an effective complaint mechanism and to produce a report every six months on how they have handled complaints. Criminal offenses that fall under the law include the breach of public peace, incitement to hatred, insult, and defamation. See Appendix Box 2 for a complete list.

Social networks have the additional option of setting up a self-regulation authority, to whom they can outsource the decision on content. The platforms must designate a domestic point of contact to receive information requests from German law enforcement, to which they must respond within 48 hours of receipt.¹⁰

⁷ "Löschung Rechtswidriger Hassbeiträge Bei Facebook , YouTube Und Twitter: Ergebnisse Des Monitorings von Beschwerdemechanismen Jugendaffiner Dienste" (Jugendschutz.net, 2017), http://www.astrid-online.it/static/upload/juge/jugendschutz.net_hassbeitrage_03_2017.pdf.

⁸ "Monitoring Des Beschwerdemanagements von Social-Media-Plattformen Bei Hassbotschaften," 2017, https://www.jugendschutz.net/fileadmin/download/pdf/17-06_Monitoring_Beschwerdemanagement_Social-Media-Plattformen_Hintergruende.pdf.

⁹ "Gemeinsam Gegen Hasskriminalität Im Netz – Wo Stehen Wir?" (Bundesministerium der Justiz und für Verbraucherschutz, 2016), https://www.bmjv.de/SharedDocs/Artikel/DE/2016/09262016_Gemeinsam_gegen_Hasskriminalitaet.html.

¹⁰ Act to Improve Enforcement of the Law in Social Networks.

Social networks must delete or block obviously illegal content within 24 hours. They have up to a week to decide on all other complaints. The seven-day period can be extended if the case remains unclear. The social network can contact the user who filed the complaint.

Fines only can be imposed for “systematic” breaches of the law. If the social network makes an honest mistake in judgment, or overlooks an item by error, it faces no liability.

Recent debate around NetzDG centred around a fundamental question: Who should be held accountable for content once it is deemed illegal by national law? The key piece of European legislation answering these questions is the e-Commerce Directive.

Whether NetzDG undermines the e-Commerce Directive is fiercely contested. During the drafting on the bill, free expression advocates, along with the tech industry, argued that the NetzDG proposal violates Article 14 of the e-Commerce Directive because it requires tech companies to proactively prevent re-uploads of illegal content.¹¹

In response to these criticisms, lawmakers watered down some crucial points of NetzDG. In the final text, tech companies are no longer obliged to proactively prevent re-uploads of previously designated illegal content.

This change angered many. Jugendschutz.net argued that re-upload obligations do not represent a general filtering obligation and were consistent with recitals 47 and 48 of the e-Commerce Directive:¹²

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

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

The final law received criticism from all sides. Supporters felt that NetzDG was too weak. The Lesbian and Gay Federation in Germany (LSVD) claimed that the list of criminal offences included in the law was incomplete and that the 24-hour limit is much too long for obviously

¹¹ Gerald Spindler, “Legal Expertise Commissioned by BITKOM” (Göttingen, 2017), <https://www.bitkom.org/noindex/Publikationen/2017/Sonstiges/Legal-Expertise-Official-2-0.pdf>.

¹² “DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL,” Pub. L. No. 2000/31/EC, 1 (2000), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

illegal content.¹³ The Central Council of Jews in Germany called for the law to apply to all tech companies, not only those with more than two million users.¹⁴ It said users should be required to identify themselves when registering with a platform so that they can be held accountable for their posts.¹⁵

Free expression advocates disagreed. They argue that anonymity allows whistle-blowers and other critics to speak without fear of retribution.¹⁶ Others criticised NetzDG for privatising law enforcement. The Federal Association for Information Technology (Bitkom) claimed the law shifts the responsibility for tackling illegal content away from public authorities and courts to private companies.¹⁷ The Association of the Internet Industry (eco) agreed, alleging that the state was abdicating its responsibility.¹⁸ Journalist organisations such as Reporters without Borders argued that courts, not social media platforms, should decide on the legality of content.¹⁹

These free expression advocates and industry representatives thought NetzDG would incentivise tech companies to make hasty decisions and take down legal content. Since no punishment exists for blocking or deleting legal content in Germany, the platforms would push the delete button to avoid the potential heavy fines. David Kaye, United Nations Special Rapporteur on freedom of opinion and expression, raised further concerns: he argued that decisions about the legitimacy of content would in many cases require an in-depth assessment of the context of speech, something social media companies would not be able to

¹³ Manfred Bruns, "Stellungnahme Des Lesben- Und Schwulenverbandes" (Karlsruhe, 2017), https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2017/Downloads/03302017_Stellungnahme_LSVD_RefE_NetzDG.pdf?jsessionid=88D528B3C3EF15D7D3ED45DD4F6770EB.2_cid297?_blob=publicationFile&v=2.

¹⁴ Daniel Botmann, "Stellungnahme Des Zentralrats Der Juden in Deutschland" (Berlin, 2017), https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2017/Downloads/03272017_Stellungnahme_ZdJ_RefE_NetzDG.pdf?_blob=publicationFile&v=2.

¹⁵ Ibid.

¹⁶ Markus Reuter, "New Hate Speech Law in Germany: Already Extended Before It Enters Into Force," *Netzpolitik.Org*, 2017, <https://netzpolitik.org/2017/new-hate-speech-law-in-germany-already-extended-before-it-enters-into-force/>.

¹⁷ Marie-Teresa Weber, "Bitkom Stellungnahme Zum Referentenentwurf Eines Netzwerkdurchsetzungsgesetzes" (Berlin, 2017), https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2017/Downloads/03302017_Stellungnahme_Bitkom_RefE_NetzDG.pdf?_blob=publicationFile&v=2.

¹⁸ "Starre 24h-Frist Zur Löschung Illegaler Inhalte Ist Realitätsfern Und Fördert Wahllose Löschkultur Im Internet," *Eco Verband Der Internetwirtschaft*, 2017, <https://www.eco.de/presse/starre-24h-frist-zur-loeschung-illegaler-inhalte-ist-realitaetsfern-und-foerdert-wahllose-loeschkultur-im-internet/>.

¹⁹ "Stellungnahme Zum Regierungsentwurf Des Gesetzes Zur Verbesserung Der Rechtsdurchsetzung In Sozialen Netzwerken (NetzDG)" (Berlin, 2017), https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2017/Downloads/04192017_Stellungnahme_RoG_RefE_NetzDG.pdf?_blob=publicationFile&v=2.

provide.²⁰ Human Rights Watch and other international critics also opposed NetzDG because, according to them, it would set a precedent for governments around the world to restrict online speech.²¹

Tech companies criticised the haste under which NetzDG was put in place, comparing it unfavourably with the European Commission's slow, measured and consultative approach. Germany should have insisted on more study and conducted an in-depth impact assessment, according to the tech companies. And it should have sought a European-wide law, rather than pursuing its own single-country approach.

The German Federal Office of Justice (BfJ) did not share these same sentiments. It claims that compliance rules for social networks serve to ensure that they will comply with their legal obligation to delete or block unlawful content quickly and comprehensively.²² Many criticisms were made about the draft law, which included the proactive filtering requirements to prevent re-uploads. The final version eliminated these clauses and weakened the argument about filtering. The adopted NetzDG text clarified that the large €50 million fines could only be levied against firms that "systematically" evaded the law. A simple mistake or a difference of appreciation about the legality of a certain piece of content fell outside the law's scope.

Against this backdrop, NetzDG went into effect on January 1, 2018. That same day, Twitter and Facebook took down a post from German far-right AfD politician Beatrix von Storch, accusing the Cologne police of appeasing "barbaric, gang-raping Muslim hordes of men".²³ Twitter first blocked the post based on German law and later, based on its own community standards, suspended the account of Titanic, a German satirical magazine, for mocking von Storch's tweet. These incidents reinforced the concern of NetzDG critics that the law, even in its diluted final form, would end up as a censorship tool.

3. Six months on, what happened?

Since these initial events, NetzDG has failed to generate any additional press reports of dubious false positives. No fines have been imposed. Although free expression groups continue to oppose the law out of censorship concerns, little evidence exists of widespread blocking. In July 2018, Facebook, Google (Google+ and YouTube) and Twitter issued their first six-month

²⁰ David Kaye, "Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression" (Geneva, 2017), <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>.

²¹ "Germany: Flawed Social Media Law," *Human Rights Watch*, 2018, <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>.

²² "Häufige Gestellte Fragen," Bundesamt für Justiz, 2018, https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/NetzDG/Fragen/FAQ_node.html;jsessionid=0_53C34F980F414BDFF7F3397BE33E259.2_cid377.

²³ Philip Oltermann and Pádraig Collins, "Two Members of Germany's Far-Right Party Investigated by State Prosecutor," *The Guardian*, 2018, <https://www.theguardian.com/world/2018/jan/02/german-far-right-mp-investigated-anti-muslim-social-media-posts>.

NetzDG report cards. Contrary to expectations, the law has generated only a trickle, not the feared flood, of takedown requests.

By submitting the required transparency reports and naming an authorised person to receive NetzDG complaints, the tech companies have complied with the law. When it comes to the prevalence of content illegal under NetzDG, the impact of the law is less clear. Users previously had the ability to fill out a complaint form for content that they considered illegal. Facebook, Twitter, and Google removed an average of 92% of the reported illegal hate speech within 24 hours.

The biggest surprise was how the three big social media platforms differed in implementing required reporting mechanisms. Google and Twitter changed their interface to integrate a NetzDG flagging tool into their standard flagging notice. This allows German users to file NetzDG complaints directly from the piece of content. In contrast, Facebook has a separate reporting form that can be found via its Help Center, which is only accessible after several clicks. This has resulted in far fewer NetzDG complaints at Facebook compared to YouTube and Twitter (Table 1).

Table 1. Overview of reported numbers by platform

Platform	Total items reported	Total Removal Rate	Removal within 24 hrs
Facebook	1,704	362 (21.2%)	76.4%
Google (YouTube)	241,827	58,297 (27.1%)	93.0%
Twitter	264, 818	28,645 (10.8%)	93.8%
Change.org	1,257	332 (26.4%)	92.7%

3.1 Facebook

Facebook claims to have dedicated large resources to meeting the law's requirements. It has 65 staff working on processing NetzDG complaints, which only amounted to 1,704 pieces of content. This averages fewer than five complaints per designated employee per month, but the staffing is flexible to allow for fluctuations in volume.²⁴

²⁴ Facebook NetzDG Transparency Report, July 2018 https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_july_2018_english-1.pdf?fbclid=IwAR3mIJeGMB-rqwkK2aZT6ymF1JEG1B2eC38UbvqclHhWo9OmFUyrBFMFa8Y.

The law's 24-hour constraint proved manageable when processing this small number of NetzDG complaints. It even permitted the company to consult external legal counsel 54 times before making a deletion decision.²⁵

In the first six months of the year, Facebook's NetzDG transparency report shows that 74 pieces of content were blocked in Germany for inciting to hatred.²⁶ Within the same period, it removed a total of six million pieces of content globally for violating its community rules on hate speech.²⁷

Compared to Google and Twitter, Facebook seems to be wriggling around strict compliance by making it easier to cite their self-defined 'community standards.'

Figure 1. Facebook's NetzDG Complaint Mechanism

NetzDG Reporting Form

Fill out this form to report content on Facebook that you believe is unlawful under Germany's Network Enforcement Act ("NetzDG"). Please note that this form is only for reports involving violations of the German Criminal Code listed in NetzDG. Allegations of illegality are a serious matter, and you may wish to seek guidance from an attorney or regulatory body.

Please note that content that is unlawful under the German Criminal Code may also go against Facebook's Community Standards. To report content as a Community Standards violation instead of under NetzDG, use the Report link that appears in the dropdown menu near the content itself. You can find more information on our Community Standards in the Help Center.

I understand and I wish to continue

Send

All reported content is first reviewed under Facebook's community standards. If these are violated, then the piece of content is removed globally and is not included in the specific NetzDG transparency report. If content only violates German law but not Facebook's terms of service, then the content is blocked only in Germany. This two-step approach has allowed Facebook to avoid having its broader content review process subject to NetzDG fines.

In some respects, Facebook's community guidelines are stricter than those under NetzDG. German law lists 21 different types of illegal content. Facebook bans many more categories including nudity. German law allows nudity.

²⁵ Facebook NetzDG Transparency Report, July 2018.

²⁶ Facebook NetzDG Transparency Report, July 2018.

²⁷ <https://transparency.facebook.com/community-standards-enforcement#hate-speech>

Numerous legal cases are open in Germany against Facebook over content removals. Judges have issued a series of contradictory rulings (Table 2). In some cases, plaintiffs challenged Facebook for deleting content that is legal under German law. In other cases, plaintiffs challenged Facebook for over-deleting based on its own definitions of hate speech. Some judges have ruled in favour of protecting the freedom of expression enshrined in Article 5 of the German Constitution,²⁸ while in other cases, judges asserted Facebook's right to enforce its community guidelines.

Contradictory decisions put Facebook in a difficult position. On the one hand, it is required to delete information, at the risk of significant fines, while on the other hand it runs a significant risk of being sued for deleting legal content. German court decisions are content and context specific, making it difficult to establish any kind of precedent. The contradictory decisions muddle the picture and underline the complexity of determining and dealing with illegal content.

Table 2. Recent lawsuits against Facebook

Case	Ruling
LG Offenburg (26.09.2018)	Facebook did not maintain the right to delete content that was legal according to German law.
LG Frankfurt (10.09.2018)	Facebook has the right to block a user account for 30 days due to hate speech, in some cases even if the content is protected under free speech.
OLG München (27.08.2018)	Facebook cannot delete posts that are legal in Germany.
OLG Dresden (08.08.2018)	Facebook can delete hate speech and temporarily block the affected user even if content does not violate German law.

3.2 Google

Google makes it easier than other companies to file NetzDG complaints, copying its existing user-friendly content complaint system. Simplicity generated an exponentially higher number of complaints than for Facebook: 241,827.

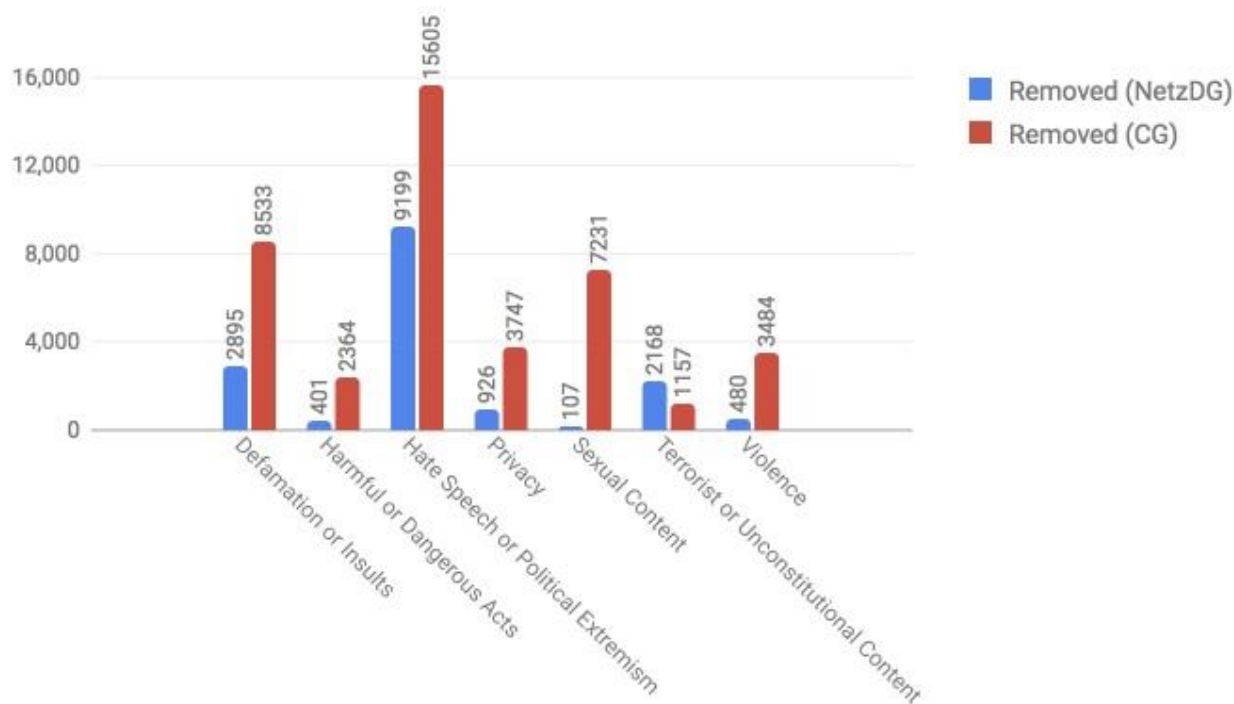
Despite the high number, little evidence exists to demonstrate over-blocking. During the first six months of 2018, Google rejected the majority of NetzDG complaints (about 73%).

²⁸ https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0041

Although the number of content moderators varies based on the number of complaints, about 100 people work exclusively on NetzDG complaints.²⁹

In its transparency reporting, Google went far beyond the minimum reporting requirement, including additional tables and statistics, such as side-by-side comparison of content removed due to community guideline violations vs. content removed due to NetzDG violations. Figure 2 shows additional content removed as a result of the law.

Figure 2. Community guideline enforcement vs. NetzDG statutes (Jan 1 – Jun 30, 2018)



Similar to Facebook, Google removes most content for violating community guideline violations. NetzDG complaints primarily relate to hate speech and political extremism. It remains unclear whether NetzDG content would have been reported via community guidelines in the absence of the law.

Google believes much of the spike in illegal content filings results from the simplification of YouTube’s complaint interface, not NetzDG. YouTube’s community guidelines and German criminal law have a large degree of overlap.³⁰

Instead of the 24-hour deadlines, Google would prefer a stipulation to remove illegal content “without undue delay.” Google supports a fast, less than 24 hours, rule for removal of obviously illegal content such as child porn. On difficult-to-determine legal or illegal content such as

²⁹ Google Germany (2018, August 27). Personal interview.

³⁰ Google Germany (2018, August 27). Personal interview.

“insults” or “defamation”, it would prefer more leeway. Final decisions on much difficult-to-determine content should be left up to judges, Google says.

3.3 Twitter

Twitter enjoys a strong reputation, even compared to other social media platforms, for protecting free speech. It has stood up to authoritarian regimes such as in Turkey, preferring in some cases to be banned rather than allow governments to dictate politically-motivated takedowns.

Its NetzDG results reflected its reputation. Like Google, the company made it easy to report complaints under NetzDG and received more than 260,000. It took the hardest line before taking down content, accepting a mere 10.8%.

This figure is in line with the company’s global percentage of content removals. About 60% of the complaints from users and trusted reporters dealt with incitement to hatred, insult, and defamation.

In order to comply with NetzDG, Twitter depends on a staff of 50 and a separate reporting flow to analyse German complaints. Elsewhere, content is first reviewed against Twitter’s terms and conditions. In Germany, it is analysed against the NetzDG’s narrower definition of illegal content. Takedowns are reported back to the Lumen Database, an independent third-party research project that studies cease and desist letters that concern online content.³¹

3.4 Change.org

A fourth company required to submit a NetzDG report is Change.org, an online platform for sharing petitions. It has more than five million German users.

For a small company with annual revenues of about half a million euros in 2017, the expense of implementing NetzDG was reasonable at 1% of total revenue.³² Rather than relying on advertisements, the platform raises money via membership fees, paid petition promotions, and crowdfunding. The cost of implementing NetzDG was estimated at about €5,000 and 30 working days in total, and the costs are predicted to be much lower going forward (5-10 working days).

According to its first NetzDG report, Change.org employs 12 people in its Berlin office. The user support team consists of four people, responsible for processing complaints during the regular

³¹ “Lumen: About Us” (Berkman Klein Center for Internet & Society at Harvard University, 2017), <https://www.lumendatabase.org/pages/about>.

³² Hackmack, G. (2018, October 4). Phone interview.

working hours. On weekends and holidays, the global policy team takes over. Since the law was implemented, the international team has treated the complaints based on NetzDG with priority, sometimes at the expense of complaints from other countries.

All violations of German law are included in Change.org's own community guidelines, since its terms of service dictate that users cannot violate national laws. Content that violates NetzDG is blocked in Germany and deleted. This was already the case before NetzDG went into effect.³³

Change.org has seen few additional complaints arising from NetzDG, probably because NetzDG is not well known among the platform's users. The company noted however that the number of complaints increased when there were media reports about NetzDG.³⁴

In Change.org's opinion, NetzDG does not restrict freedom of expression. Instead, company officials say the deletion of illegal content such as hate speech helps ensure a safe online environment and the free exchange of opinions.³⁵

3.5 Regulated self-regulation

NetzDG allows companies to set up self-regulatory systems together with an independent institution. Google and Facebook have decided to work with the Voluntary Self-Control for Multimedia Service Providers (FSM) – the association that works as an intermediary between media companies and the Commission for the Protection of Minors. In the case of NetzDG, the FSM will help tech companies review questionable content in compliance with criminal law.

Google sees its participation as a sign of willingness to build bridges. It sees it as a helpful alternative when courts are unable to be the final arbiter on illegal content.³⁶ Facebook believes it will help their content teams learn and increase create accountability and oversight.³⁷

Under these NetzDG partnerships, committees consisting of three lawyers will provide a legal opinion on the content they receive within seven days. Tech companies will continue to do most takedowns by themselves. The partnership committees will only receive about 5-10 'high-profile' cases per month.³⁸

This system provides several potential advantages. Unlike tech companies, which use service centres to decide on takedowns, this new body represents an independent authority staffed

³³ "NetzDG Bericht 1. Halbjahr 2018" (Berlin, 2018), <https://static.change.org/help/NetzDG-Bericht-2018.pdf>.

³⁴ Hackmack, G. (2018, October 4). Phone interview.

³⁵ Ibid.

³⁶ Google Germany (2018, August 27). Personal interview.

³⁷ Facebook Germany (2018, October 9). Personal interview.

³⁸ Drechsler, M. (2018, September 9). Personal Interview.

by lawyers able to make authoritative decisions. Over time, decisions on difficult pieces of content will create a useful library.

3.6 Government reaction

The German government continues to support NetzDG. In a statement,³⁹ the leading coalition partner, the Christian Democrat Party, argued that the transparency reports demonstrated no evidence of over-blocking. According to the party's parliamentary spokesman for digital affairs Tankred Schipanski, NetzDG represents an important building block to strengthen "responsible and respectful interaction".

The German government shares this opinion. In its view, the company transparency reports suggest that content was deleted quickly, with little outside help required, and at a manageable expense. While State Justice Secretary Gerd Billen said it was too early to deliver a definitive judgment, since "we are only at the beginning of assessing the impact of the Network Enforcement Act, it was right to establish clear statutory regulations and create appropriate pressure on the companies to take action in dealing with criminal content." It is necessary to have "clear regulations for user-friendly reporting options," he added, saying that he is investigating whether some social media platforms are still making it too difficult for their users.

Prosecutors have not brought a single case to court under NetzDG. The government only plans on doing a full analysis of the law's impact after three years. According to Germany's Minister of State for Digitization, Dorothee Bär, the process is "still ongoing".⁴⁰

4. International implications

Pressure is mounting throughout the European Union for strong action to combat online hatred. France has put forward a law to fight 'fake news'. The European Commission proposed a law in September to combat online terrorist propaganda. Both proposals are narrower than NetzDG.

The German government also favours a European solution. NetzDG author Maas believes that a German regulation for tech companies is only the first step – the ultimate goal is to have a European solution.⁴¹

³⁹ "Netzwerkdurchsetzungsgesetz Wirkt: Bilanz Nach 6 Monaten NetzDG," CDU/CSU Fraktion im Deutschen Bundestag, 2018, <https://www.cducsu.de/themen/innen-recht-sport-und-ehrenamt/netzwerkdurchsetzungsgesetz-wirkt>.

⁴⁰ German Federal Chancellery. (2018, October 9). Email Exchange.

⁴¹ "Heiko Maas Zum Kabinettsbeschluss Eines Gesetzes Zur Verbesserung Der Rechtsdurchsetzung in Sozialen Netzwerken" (Federal Ministry of Justice and Consumer Protection, 2017), https://www.bmjv.de/SharedDocs/Zitate/DE/2017/040517_Kabinetts_NetzDG.html?nn=6704238.

The European Commission proposal is limited to measures designed to fight terrorism and political extremism, not all types of illegal material. NetzDG fails to differentiate between terrorist incitement and counterfeit products.

By deciding to legislate, the Commission said it aimed to stop a proliferation of national initiatives within the EU such as NetzDG. In this sense, NetzDG has put pressure on the Commission to act. As the European Parliament considers the Commission proposal, it must find solutions for several tough issues.

What is “illegal terrorist content”? At present, each EU member has its own definition. The European Parliament needs to find a common classification. Since EU member states already have an agreed list of terrorist groups, it is reasonable to expect that they will come to a consensus.

A reasonable consensus also must be found on the scope of the new regulation. NetzDG limited itself to social media platforms. Arguably, WhatsApp and other communications services should have been included. The present Commission proposal not only includes these messaging services – it also includes cloud providers and open source software developing platforms. There is a growing use of cloud storage sites to spread extremist material.⁴²

Under the current proposal, “competent authorities” are required to oversee the new law and impose fines. What is the competent authority? It should be defined more clearly. It should be a judicial authority whose functions and responsibilities are detailed.

The proposal requires removals of terrorist content within an hour. NetzDG suggests that this requirement is feasible without resulting in unnecessary disruptions and costs.

Although the EU insists on automated filtering, it is restricted to a limited number of agreed-on terrorist groups. In this way, it skirts contravention of the cherished e-Commerce Directive Article 14 on general monitoring. If hosting providers fail to block or take down terrorist content by mistake, they should not face fines.

A final concern for the EU is the lack of a common European level for fines. National governments are left free to decide on the level of punishment in most cases. This introduces a risk that the same error may face different sanctions in different countries.⁴³

Beyond the European Commission proposal, additional measures are required to fight online terrorism. Under NetzDG, tech companies face no obligation to stop re-uploads, despite the fact that this was a clear objective when lawmakers set out to draft the law. Every time the content appears online, it must be flagged and checked again. This is neither efficient nor effective and should prompt the European Commission to implement binding obligations for

⁴² “ISIS’ Tactics Shift On The Battlefield & Over The Internet | Counter Extremism Project” (Counter Extremism Project, 2018) <https://www.counterextremism.com/press/isis-tactics-shift-battlefield-over-internet>.

⁴³ “Digital Single Market: Bringing down Barriers to Unlock Online Opportunities” (European Commission, 2018), https://ec.europa.eu/commission/priorities/digital-single-market_en.

platforms to work with Europol to build up a comprehensive database of hashes, to prevent re-uploads of known harmful content. Hashes are numeric values of a fixed length that can give content (in this case image, video, and audio files) a unique value – the conceptual equivalent of a digital fingerprint.

NetzDG itself is a step forward in the fight against terrorism, but its scope is too narrow and should be extended to smaller platforms. Terrorists are moving off the Big Three social networks to smaller platforms such as Gab.com.⁴⁴ The suspected shooter in the Pittsburgh synagogue mass murder used that forum to tout his anti-Semitic views and announce his intentions to kill Jews.⁴⁵

5. Recommendations for tackling illegal content

Establish clear reporting and enforcement standards

The three major social network platforms have each come up with their own individual reporting formulas, making it difficult in some cases for users to flag NetzDG violations. The reports follow their own individual company-specific structure. Recommended guidelines should be provided for the transparency reports so as to provide comparable numbers. The FSM (that facilitated self-regulation) could create a quality standard for complaint mechanisms enabling the certification of tech companies for user-friendly reporting. Tech companies should also continue to increase their capabilities and ensure that the appropriate skills and resources are available to implement laws such as NetzDG.

Target terrorist content

Different types of content merit different approaches. NetzDG includes 21 criminal offenses, failing to differentiate between different dangers (Box A2). The European Union law targets specific terrorist content uploaded by organisations on a commonly agreed list. This targeted approach limits the danger of over-blocking. When it comes to explicitly illegal online content, lawmakers should require the use of re-upload filters to address the issue, already common practice in the fight against child pornography. This was one of the original purposes of the law and it should be amended to oblige companies to use upload filters in these circumstances.

Establish a clearing house for disputed content

NetzDG requires social media platforms to inform both the person submitting the complaint and the author about any decision to take down content. This is accomplished via multiple-choice forms. A better approach for disputing content would be to create a clearing house for

⁴⁴ Twitter (2018, August 23). Phone interview.

⁴⁵ Kevin Roose, "On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full," *New York Times*, 2018, <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

complaints.⁴⁶ This would offer users better recourse for disputing deleted content. It would be an additional barrier against over-blocking and would keep tech companies accountable for how they enforce their terms of service.

More resources for law enforcement

Fighting online hate speech requires more than just deleting content from social media. The victims of hate speech must also be able to confront their aggressor via judicial procedure. Without the threat of prosecution, there is no adequate incentive for haters and trolls to discontinue their dangerous online behaviour.

State Criminal Police (LKA) organisations must ensure that cyber criminality is being addressed. They need the necessary cyber competences to cooperate with tech companies on prosecuting cybercrime. A positive example is the Central Point of Contact for Cybercrime (ZAC) for all companies and authorities in Schleswig-Holstein. Other federal states should look at implementing similar systems in order to streamline the fight against cybercrime.

Greater transparency

Understanding the complexities of social media and how algorithms function is critical for lawmakers, law enforcement authorities, and the cyber-competence of society. All tech companies should continue to allow research on their APIs so that progress (e.g. on the quick removal of ISIS propaganda) and trends (e.g. the spread of false information during elections) can be investigated. Facebook has disabled this option for independent researchers. Since aggregated numbers are difficult to verify, governments should require Facebook, Twitter and Google to allow access to 'raw' aggregated data for the purpose of analysis.

⁴⁶ "Stellungnahme Des Bundesrates," Pub. L. No. Drucksache 315/17 (Beschluss), accessed October 19, 2018, https://www.cr-online.de/0315_17_B.pdf.

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Annex

Table A 1. Key selected changes to the draft bill

SECTION	DRAFT	FINAL BILL
§ 1 Scope	For-profit internet platforms that allow users to share and exchange content with each other and the public.	For-profit internet platforms with the main purpose of allowing users to share and exchange content with each other and the public. Platforms designed for individual communication or specific kinds of content are excluded.
§ 2 Reporting Requirements	Quarterly; applies to all platforms with at least 2 million users.	Bi-annually; applies to platforms with at least 2 million users that receive more than 200 complaints in a calendar year.
§ 3 Handling of Complaints	Access to all unlawful content must be removed or blocked immediately and no later than 7 days after receiving the complaint.	The 7-day time limit may be exceeded if: a) the decision regarding the unlawfulness of the content is dependent on the falsity of a factual allegation or is clearly dependent on other factual circumstances; in such cases, the social network can give the user an opportunity to respond to the complaint before the decision is rendered; b) the social network refers the decision regarding unlawfulness to a recognised self-regulation institution pursuant to subsections (6) to (8) within 7 days of receiving the complaint and agrees to accept the decision of that institution.
	Any copies of unlawful content on the platforms must be removed or blocked immediately.	<i>No longer required</i>
	The procedure shall ensure that each complaint, along with the measure taken to redress the situation is documented within Germany.	The procedure shall ensure that each complaint, along with the measure taken to redress the situation, is documented within the scope of Directives 2000/31/EC and 2010/13/EU.

Box A 1. Provisions on regulatory fines (Section 4, NetzDG)

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

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

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

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

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

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

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

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

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

Box A 2. Criminal offences included in NetzDG

Network Enforcement Act

- § 86 (Dissemination of propaganda material of unconstitutional organisations)
- § 86a (Using symbols of unconstitutional organisations)
- § 89a (Preparation of a serious violent offence endangering the state)
- § 91 (Encouraging the commission of a serious violent offence endangering the state)
- § 100a (Treasonous forgery)
- § 111 (Public incitement to crime)
- § 126 (Breach of the public peace by threatening to commit offences)
- § 129 (Forming criminal organisations)
- § 129a (Forming terrorist organisations)
- § 129b (Criminal and terrorist organisations abroad; extended confiscation and deprivation)
- § 130 (Incitement to hatred)
- § 131 (Dissemination of depictions of violence)
- § 140 (Rewarding and approving of offences)
- § 166 (Defamation of religions, religious and ideological associations)
- § 184b in connection with § 184d (Distribution, acquisition and possession of child pornography; Distribution of pornographic performances by broadcasting, media services or telecommunications services)
- § 185 (Insult)
- § 186 (Defamation)
- § 187 (Intentional defamation)
- § 201a (Violation of intimate privacy by taking photographs)
- § 241 (Threatening the commission of a felony)
- § 269 (Forgery of data intended to provide proof)

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