

Statement of the German Association for the Digital Economy (BVDW) e.V. concerning the TRIS notification 2020/65/D about the German Draft Act combating right-wing extremism and hate crime

14. April 2020

Preliminary Remarks

The German Association for the Digital Economy (BVDW) e.V. has been representing businesses in online marketing since 1995. Nowadays, it also incorporates many members from the traditional industry as well as globally operating IT players from all over the world. The more than 600 companies that are now organized within the BVDW thus cover the entire spectrum of the diverse digital economy. Its positions therefore represent a valid compromise of interests that applies to the industry as a whole.

Contact:

Katharina Rieke
Referentin Digitalpolitik
T: +49 30 206 218 617
rieke@bvdw.org

Statement

BVDW would like to use the opportunity to submit its views on the Draft Act combating right-wing extremism and hate crimes, which has been notified under Directive (EU) 2015/1535.

BVDW is fully committed to the goal of combating extremism and hate crime and thus welcomes the discussions of this issue at national as well as European level. Hate and extremism cannot have a place in our society. Free (political) discourse and thus the right to freedom of expression must be defended and effective criminal prosecution is of great importance for this.

At the same time, BVDW also needs to highlight the consequences of the proposed new law. The notified Act introduces a new obligation for the providers of social networks that are within the scope of the Network Enforcement Act (NetzDG) to notify the authorities, which is intended to improve the prosecution of hate and incitement to hatred online. The underlying idea of the new rule that deleting and blocking content/accounts will not be sufficient in the long term, but that persons

must be prosecuted, is fully understandable. However, BVDW is of the opinion that the proposed procedure goes too far and cannot be reconciled with data protection principles and does not offer sufficient protection of fundamental rights.

The new section stipulates that providers of social networks falling within the scope of the NetzDG must forward content and IP addresses (including port numbers) to a central office of the German Federal Criminal Police Office (BKA). This data must be forwarded if the provider has come to the conclusion that the reported content, which the provider has deleted or blocked, also violates certain elements of the German criminal law and is not justified.

This form of a proactive obligation to notify will lead to a large amount of data being transmitted to the BKA. In particular, this data will be transmitted without a case-related examination by the BKA itself or any other governmental body beforehand. It is entirely up to the provider to decide whether the criminal offences appear to have been committed or not, and thus whether or not forwarding the data is necessary. If the company makes a mistake in this decision, it can be fined according to § 4 of the NetzDG. This is in the end a transfer of sovereign tasks from criminal prosecution authorities to private companies, which the BVDW cannot support.

It is a very far reaching step that also does not comply with Art. 15 (2) of the E-Commerce Directive (2000/31/EC), because it goes against the therein prescribed reactive disclosure of data, when talking about information that allows the identification of users. The disclosure of this kind of data always needs to be based on a request by the competent authority. With this new obligation we would see massive amounts of data accumulated at the BKA and it would allow a deep intervention into the basic rights of people, without a constitutional control being provided.

The current NetzDG has already established an extensive catalogue of obligations and a high threat of fines that lead to worries about chilling effects on freedom of opinion and information. These worries are now deepened with a proposed obligation to forward identifying information to the BKA on large scale.

There is additionally the proposed rule that only allows providers to inform the users about the forwarding of their data four weeks after it has taken place. This is also very problematic and in BVDW's view incompatible with the requirements of data protection law as well as nullifying the rights of the data subjects. The notified Act introduces hence contrary provisions to the General Data Protection Regulation (EU) 2016/679. Article 23 of the GDPR allows Members States to restrict the data

protection principles to a certain extent but even here you need to conduct a fundamental rights and freedoms as well as proportionality assessment established in the GDPR. BVDW questions whether this balance has been rightly struck.

Furthermore, the notified Act would affect providers and users outside of Germany as well. The proposed rules apply to social networks that meet the threshold of 2 million registered users in Germany, no matter where they are established. It is hence not aligned with Art. 3 of the E-Commerce Directive (2000/31/EC). This entails the danger of a fragmentation of the digital single market. The exemptions stipulated in Art. 3(4) of the E-Commerce Directive however do not apply in BVDW's view. It is also here questionable whether these diverging rules are targeted and proportionate enough.

Lastly, BVDW would like to stress that the notified Act also does not properly align with the Commission's proposed e-Evidence Regulation (European Production and Preservation Orders for Electronic Evidence in Criminal Matters). The approach of those rules is that the enforcement authorities can only seek information from a service provider outside their jurisdiction by presenting a European Production Order, which in some cases must be authorized by a judicial officer. Additionally, the notified Act could contradict the proposed Digital Services Act, which seeks to establish a horizontal solution by introducing a single European regime for providers. It also seems to not align with the initiatives on Preventing the Dissemination of Terrorist Content Online which is being negotiated in trilogue at the moment, as well as the Code of Conduct on Countering illegal hate speech online.

BVDW is therefore of the opinion that national legislators need to take these European developments into account and should not establish a diverging national system. There should be a close cooperation to ensure the completion of the digital single market and a joint approach in order to reach the goal of effectively combating extremism and hate speech online.