

EuroISPA's points of critique on the German Draft Act amending the Network Enforcement Act (NetzDG)

EuroISPA is the voice of the European Internet industry, representing over 2.500 Internet Service Providers across Europe, all along the Internet value chain, including providers of all sizes and business models. EuroISPA has been closely following ongoing discussions on the German Network Enforcement Act (NetzDG), in the broader context of the association's work on EU initiatives on intermediary liability.

While sharing the important objective of combating hate speech online, we would like to voice our concerns on several elements of the proposal, as we see it posing a risk towards a fragmentation of the European internal market and placing excessive additional burdens on providers offering services in Germany. As the President of the European Commission Ursula von der Leyen has announced a Digital Services Act in her political guidelines, which shall also address the challenges of hate content online, we urge Germany to refrain from enacting amendments to the NetzDG and instead wait for the upcoming new framework.

We support legislative consistency across the Digital Single Market

- The aim of the present draft is to make reporting channels more user-friendly, to increase the value and the comparability of transparency reports, and to create rules for out-of-court dispute settlements. EuroISPA notes that such additional obligations risk to fragment the European internal market, as online platforms operating in different European Member States would have to put in place specific compliance mechanisms for the German market. In our opinion it is questionable whether such a restriction on the freedom to provide an information society service from another Member State is in compliance with Art. 3(2) of the E-Commerce Directive¹.
- Before further amending the NetzDG², we encourage the German government to wait for the European Commission to present its proposal for a Digital Services Act, as announced by the President of the European Commission, Ursula von der Leyen, in her political guidelines³, in order to ensure legislative consistency with the upcoming EU framework.
- In this context, reference should be made to the European Commission's opinion of 22 November 2019 (C (2019) 8585 final)), which deals with the French legislative procedure for combatting hate content on the Internet, which was notified under Directive (EU) 2015/1535⁴. The European Commission asked France to postpone its legislative initiative, as the Commission plans to take action itself through the Digital Services Act.

¹ [Directive 2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

² [Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken \(Netzwerkdurchsetzungsgesetz – NetzDG\)](#)

³ [A Union that strives for more: My agenda for Europe](#)

⁴ [Directive \(EU\) 2015/1535](#) of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services

The interaction between the AVMSD and the NetzDG is not conducive to user-friendly reporting channels

- The draft bill proposes amendments aiming to transpose the Audiovisual Media Services Directive ⁵ (AVMSD) in German law. Therefore, alongside large social networks, video-sharing platforms will also be included in the scope of application of the NetzDG. Depending on the size of the video-sharing platform and the country where it is headquartered, services will be subject to different obligations according to the NetzDG. Essentially, this will result in a different set of rules being applied depending on the principles of country of origin and *lex loci solutionis*. According to the explanatory memorandum, the differentiation should reflect whether the category of content concerned fall under Art. 28b AVMSD or not.
- As a result, the adopted provision means that video sharing platform service provider whose headquarter is in Germany are subject to all the provisions of the NetzDG, regardless of the actual minimum number of users (2 million users), in context to content defined in Articles 111, 130, 131, 140, 166 and 184b of the German Criminal Code.
- Small video sharing platform services based in Germany, however, are obliged only to selected regulations under the NetzDG. They do not have to apply the obligations to report (Art. 2), to delete during a fixed deadline (Art. 3) or to notify (Art. 3a) the identified content.
- To companies with a headquarter in a Member State of the European Union other than Germany though, the NetzDG does not apply *prima facie* but they can also be obliged to comply with individual regulations under the NetzDG by the order of the competent authority.
- The consequences of such a regulation need to be considered. The same piece of content, viewed in Germany, would be treated differently depending on the country of domicile of the service provider.
- EU law demands that companies make their complaint channels more user-friendly; however, the intersection between the AVMSD and the NetzDG and the ensuing differentiation of rules based on the principles of country of origin and *lex loci solutionis* would lead to results which are not understandable to the layman user. Therefore, it is debatable whether such complex legal provisions are conducive to a reporting channel which will ultimately be more user-friendly. This reinforces the point made above, according to which national legislators should avoid complex national unilateral action. Instead, EuroISPA encourages Member States to strive for a harmonized EU approach – according to the principle of subsidiarity - for the development of an appropriate legal framework.

Trade secrets should be protected

- The German legislator wants to oblige the operators of social networks to provide information on the use of automated content recognition procedures. The required information includes the type, scope, and functionality of the procedure used. Under certain circumstances, there is a risk that social network operators would be forced to disclose applicable trade secrets.
- Therefore, it should be clarified that, when respecting such transparency obligations, operators of social networks should not be asked to disclose commercially and operationally sensitive information, including for example algorithms and other industry secrets.

⁵ [Directive \(EU\) 2018/1808](#) of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities

The risks of double reporting should be mitigated

- Numerous additional requirements for the complaint procedures are provided for the social network operators in Section 3(2) of the draft bill, including a duty of information according to which the social network operator would need to inform the complainant, among other things, about the possibility of filing a criminal complaint.
- EuroISPA agrees that new obligations to act against illegal content online need to be balanced with new obligations to treat the end user fairly. However, the obligation to inform the user may increase the risk of double reporting (by the complainant and the operator of a social network) of identical content to the competent authorities. In EuroISPA's opinion, the risk of double reports should be reduced as much as possible to ensure effective criminal investigation and prosecution.