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Opinion

on the draft bill of the German Federal Ministry of Justice and Consumer Protection regarding an act for improving law enforcement on social networks (*Netzwerkdurchsetzungsgesetz*, NetzDG)

30 March 2017

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On 14 March of this year, the Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz, BMJV) published a draft bill regarding an act to combat what is termed fake news and hate speech on social networks and called for opinions on the draft. We are pleased to provide our opinion on this matter and elucidate the impact of the planned initiative on the games sector.

The BIU, the German Games Industry Association, is the association of the German computer and video games industry. Its 26 members are developers, publishers and suppliers of digital games. The member companies of the BIU represent over 85 per cent of the German market and around 55 per cent of the employees of the German games sector. The BIU sponsors gamescom, the world's largest event for computer and video games. Additionally, the BIU is a partner of the Entertainment Software Self-Regulation Body (USK) and the Stiftung Digitale Spielekultur (Foundation of Digital Games Culture) and a joint organiser of the German Computer Games Awards. As an expert partner for media and for political and social institutions, the BIU answers all questions on the topic of digital games.

1. General remarks

An intense debate as to the impact that fake news, bots and hate speech could have on social discourse in general and the pending German parliamentary elections in particular is raging in the media and interested sections of the public. In this context, we understand why the Federal Ministry of Justice and Consumer Protection considers itself obliged to protect society and democracy from the potential harm arising from the dissemination of hatred and manipulation of public opinion. However, the current draft only appears to be partly suited to this end. The draft law's scope of application lacks focus and, while it imposes numerous, detailed reporting obligations on the providers of social networks, the draft fails to increase still-required powers for criminal prosecution. To protect the formation of democratic will and thus ultimately freedom of opinion, one citizen's freedom of expression may not, as a precaution, be disproportionately limited in favour of another's. This trade-off between two holders of basic rights is often highly complex and cannot be reached quickly by or by legal laypeople. From a democratic perspective, imposing this difficult trade-off decision on companies alone also seems questionable – especially given that the platform providers will probably adopt a practice following the principle of 'if in doubt, delete', given the short deadlines combined with high fines. However, this would run counter to the 'in dubio pro libertate' principle of media law, which assumes that freedom of expression is permitted in the first instance and its unlawfulness has to be proven.

We fundamentally support the Federal Government's position that content and platform providers bear a level of social responsibility that they need to meet day in, day out. For that reason, the computer and video games sector has for many years been keenly involved in the protection of minors to ensure that stringent statutory standards for the protection of minors are also successfully applied and effective in practice.

2. On section 1: Area of application

Today's computer and video games and games consoles offer a wide range of opportunities for social interaction with the aim of generating one's own content (known as user-generated content). Many games require a (pseudonymised) registration, but this is not mandatory. A wide variety of games can also be used without prior registration. As a rule communication during a game is fleeting and only accessible by a strictly limited number of players within that game. In multiplayer games there is the option to chat with other players or to speak with them directly via headsets (voice chat), for example to agree a joint game strategy. Additionally, many games also enable users to create their own game character, and users may upload third-party content for this purpose or to set up profile pictures. The providers of today's games already have very extensive rules of usage and conduct in place. Any breaches of these are sanctioned, for instance by community managers, who are also available for instance to answer any questions about the game or to mediate in the event of any conflicts. As well as these community managers, some of whom themselves come from the community and are networked with it, there are support teams who review complaints and have trusting and successful partnerships with bodies such as jugendschutz.net. Breaches of the conduct rules may be reported by the users, and are then reviewed and frequently sanctioned with multilevel penalties. Also, games usually offer the capability for individual users to be blocked.

2.1 Unclear object of regulation

According to the wording of the draft bill (NetzDG-E), the law covers not only platforms that exhibit the core characteristic of a social networks, in other words, that enable social interaction on any topic between unlimited numbers of people, but also covers platforms in which fleeting communication only takes place between two or more people or where the publication of content is not the key feature. Such a broadly defined area of application means that for example email services, dating portals and computer and video games and games consoles are also covered.
According to the justification within the current draft, the draft is aimed at social networks with the power to influence opinions and specifically does not want to cover all service providers as defined under the German Telemedia Act (Telemediengesetz, TMG), yet the wording of the draft does not achieve this objective.

2.2 The regulatory objective of the NetzDG-E is not a relevant issue in games

The highly unspecific wording of section 1 para. 1 NetzDG-E means that computer and video games and games consoles fall within its scope, although these are not relevant to the formation of opinions and are not used to a significant extent for the dissemination of hate crime and fake news. In that context, the draft's reasoning explicitly refers to the discussions conducted prior to the draft with social networks and representatives of civil society within a task force of the BMJV. The representatives of the games sector were not invited to these task force discussions. The Ministry was obviously aware that no findings of relevant breaches on other networks such as computer and video games and games consoles apply.

In a predominantly competitive environment such as a multiplayer game, name-calling and insults are going to happen. However, these usually refer to a gaming situation and are

expressed for example in a chat or via voice chat. Thus, such statements are situation-dependent and fleeting, and accordingly cannot be further disseminated and thus also not deleted. Their very character, combined with the only semi-public environment, means that such events are specifically not aimed at influencing public opinion. There are already mechanisms for these incidents to be reported, and they are also sanctioned in line with the rules of use and conduct. In the competitive environment of a game, it needs to be remembered that such reports are sometimes also deliberately abused, for instance to exclude a better player from a game. Such false reports need to be checked, and in most cases the accused is afforded the opportunity to make a statement. The NetzDG-E provides no leeway for such checks and opportunities to hear both sides. However, such diligence is essential for fair play and to satisfy the principle of 'in dubio pro libertate'.

Providers of computer and video games and games consoles have an interest in guaranteeing fair play and fair and respectful interaction in their games. After all, users will only be willing to spend money on using or buying such games if the games are fun. Trends over recent years show clearly that games are being increasingly used for users to interact with other players. This would not be possible if providers did not guarantee a fair gaming environment. Today the providers of computer and video games and consoles already have functioning rules of usage and conduct in place, some of which feature multilevel complaints procedures that are deployed successfully. The complaints procedures are transparent and easily accessible. Both voluntary and paid community managers and support staff who speak the players' native languages are available as points of contact. Providers of computer and video games and games consoles already operate successful partnerships with bodies such as jugendschutz.net.

This means that there is no need for regulation of computer and video games either in terms of their content or their organisation, and it would be disproportionate to impose strict compliance requirements on games providers despite there being no regulatory gap.

It is therefore essential that the scope of application of the NetzDG-E is properly fleshed out as soon as possible.

Alternative proposed wording of section 1 para. 1 NetzDG-E:

> *'This Act applies to all providers of telemedia who operate for-profit offerings on the internet* ***that are designed to facilitate access to and the sharing and discussion of content on any topics whatsoever*** *(social networks)* ***and have a substantial influence on the formation of public opinion in Germany****. Platforms with offerings that are structured in a journalistic/editorial manner for which the service provider accepts responsibility* ***and fleeting public statements and networks for private messages*** *are not defined as social networks under this Act.'*

2.3 The de minimis threshold is too low

The de minimis threshold of two million registered users proposed in section 1 para. 2 NetzDG-E is far too low and is unsuited to effectively limiting the scope of applicability in both qualitative and quantitative terms.

First, the supposedly high number of two million users is not a relevant order of magnitude even today. According to the reasoning of the draft bill, the BMJV assumes that the limitation in section 1 para. 2 NetzDG-E will mean that only ten companies in Germany are covered by the law's scope of application. This assumption is not tenable. If we consider the members of the BIU alone, several members would easily exceed this figure.
And second, the de minimis threshold is unsuitable in several qualitative respects. Registered users are not a meaningful criterion for the relevance of a network as this number says nothing about the users' level of activity and thus the relevance of the platform. As a rule, the number of registered users increases constantly as users tend not to actively deregister from platforms, but simply stop using them. A more meaningful criterion for the relevance – and thus also the potential influence of a social network on public opinion – should only comprise figures on the number of active users, for example monthly active users = MAU, weekly active users = WAU or daily active users = DAU. Further, the distinction 'domestic' does not enable accurate separation of users. It is unclear whether this refers to users who were present in Germany at the time of registration or users who are present in Germany at the time of use. In view of the high fines, this is a relevant differentiation criterion for compiling an orderly report as defined at section 2 NetzDG-E.

3. On section 2: Reporting obligation: unmanageable and provides no insights

A general, quarterly reporting obligation for all companies that fall within the scope is disproportionate. There should only be an obligation to report if something worth reporting occurs during the reporting period.

Alternative proposed wording of new section 2 para. 3 NetzDG-E:

> *'There is no reporting obligation if fewer than 100 justified complaints have been made about unlawful content on a platform.'*

4. On section 3: Dealing with complaints about unlawful content: devise a practical process

In many cases it is difficult to assess whether a breach of personality rights as distinct from freedom of opinion constitutes an unlawful offence, and this can often only be conclusively determined by a judicial ruling. Under the NetzDG-E the provider must 'immediately' take note of the complaint. As also set down in section 10 TMG, in cases where the NetzDG-E applies, the legal definition of section 121 para. 1 sentence 1 German Civil Code (BGB) must be used in order to ensure standardised use of the term as required by the lawmakers. The provider is required to act 'without undue delay'. In this context the justified concerns of the parties involved as well as all circumstances of the individual case need to be taken into account; the stipulation of generally applicable, static timescales such as are provided for in section 3 para. 2 sentence 2 NetzDG-E is therefore not possible. Similarly, a shorter deadline as provided for in section 10 TMG cannot be reconciled with art. 14 para. 1 lit. b of the E-Commerce Directive. And similarly, from a purely practical perspective, a deadline of 24 hours is frequently not

workable – and not only for the providers of computer and video games and gamers consoles. A thorough legal analysis cannot be provided, even if support teams are available 24/7.

In practice the short timescale for the deletion of unlawful content in combination with the high fines would result in a situation where content would be deleted and users blocked in case of doubt, and not after unambiguous clarification of the matter. A further complicating factor is the fact that the NetzDG-E provides no opportunity for the accused party to object. As false reports are often made about individual users in computer and video games, standard games practice to date has been to give the accused a right of reply. This should still be possible and desirable in the difficult trade-off between freedom of opinion and breach of personality rights, because not every statement, no matter how hurtful and inappropriate, is unlawful.