



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

LEGAL REVIEW

**OF THE AUSTRIAN FEDERAL ACT ON
MEASURES TO PROTECT USERS ON COMMUNICATIONS PLATFORMS**

[KOMMUNIKATIONSPLATTFORMEN-GESETZ – KOPI-G]

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Executive summary

The Proposed Act addresses a complex regulatory concern: enforcement of certain criminal rules online, while protecting users' procedural rights. Larger platforms have been removing certain type of content before, based on their own terms of services; either for their own financial interests, or to satisfy promises, for instance under the EU Code of Conduct on countering illegal hate speech online.

Therefore, the biggest change brought about by the Proposed Act would not be the removal of criminal content, but the protecting of the rights of the individual users who post content on these platforms, in accordance with its title, which reads "measurements to protect the users of communication platforms". Thus, it would be crucial to make sure that the Proposed Act fulfils this goal and creates a robust protective regime for users' human rights. These rights in this context are the right to freedom of expression, the right to judicial remedy, and privacy. The tools for safeguarding these rights should be: transparency, access to court, and protecting the personal data of the user.

The Proposed Act's procedural rules ensure transparency of the platform's content removal decisions under the Proposed Act towards the users, the Broadcasting Authority and the public. The Authority's action is primarily to mediate and issue guidelines, and only secondarily to impose sanctions, which decreases the chances of indirect chilling effects. In order to further diminish the risk of unjustified intervention with the freedom of expression rights of the users, some amendments are recommended to the Proposed Act.

First and foremost, it is crucial that those users whose content got removed have access to legal remedy. Restriction of freedom of expression should always be subject to judicial review. It is not clear from the Proposed Act how this would be ensured, as the complaint procedure does not entail an administrative decision, which could be appealed against in court. The Proposed Act should be clear on how the review procedure leads to an eventual judicial review.

Second, insult and blasphemy are not considered as illegal independently from contextual circumstances, and there is no international agreement on their criminalization. It is recommended to remove these from the list of those illegal contents that must be removed by platform providers.

Third, the transparency requirements should be robust and without loopholes. They ought to extend to all content removal decisions of platform providers (either under the Proposed Act or under their terms of services); including content organizing algorithms, beyond what is already in the Proposed Act.

For the sake of legal security, the definition of platform providers should be as precise as possible, and there is still scope for improvement. From the perspective of human rights, on the one hand, a wide scope has the benefit that even with smaller platforms, decisions on content take place in a transparent framework where content providers have the right to remedy; and provides protection against distribution of criminal content on smaller sites, which have been seen e.g. on 4chan. However, on the other hand, a wide scope can impose a disproportionate burden on non-profit companies and small start-ups and constitute an entry barrier, which could have negative implications for users and freedom of expression.

To better protect freedom of expression and the procedural rights of the users, it is recommended to allow more time to the user whose content was removed to initiate a review procedure.

As a final note, it should be considered that social media platforms' economic and social influence cannot be overestimated, and yet, their exact role, their legal duties and responsibilities have not yet been comprehensively defined. The Proposed Act should be regarded as an opportunity to set out the substance and the limits of the rights and duties of platforms towards their users: including respect for personal data and the obligation of neutrality towards opinions, which also entails the prohibition of discrimination among users and their content.

Specific recommendations

1. The biggest change that the Proposed Act can bring about would be providing effective safeguards for the users to protect their freedom of expression, procedural rights, and other human rights, such as the right to privacy and dignity. Therefore, it is recommended that the Proposed Act strengthen these measurements, to ensure a robust system of protecting human rights, at least in the following fields: judicial review, transparency without loopholes, user-friendly deadlines.
2. The Proposed Act appears to not ensure judicial oversight of the platform providers' decisions about third party content. Even though there is a complaint procedure, it does not deliver an administrative decision. It is not clarified how, without a decision, the users can exercise their right to remedy and turn to the court. This is a drawback when it comes to securing procedural rights and indirectly infringing on freedom of expression. Restrictions on freedom of expression should always be open to judicial review.
3. Transparency requirements should extend to all of the platforms' content moderation activities. Beyond the removal of content, it should include the algorithmic organizing of content, such as de-prioritizing or prioritizing, aggregation, selection, etc. The platforms should provide this information in a clear and easily accessible way to the users, to the Authority and to the public. There should be no loopholes in the transparency obligations, such as those in the German Network Enforcement Act (NetzDG), which were addressed in the recent draft amendment (see Chapter 7).¹
4. The list of criminal content which is to be removed should contain only content which is illegal irrespective of its context, or which is otherwise easily assessed by the platform providers. Blasphemy in its present wording should be removed from this list. The evaluation of the criminalization of insult and of denial of holocaust is mixed among international organizations. In any case, insult is not a type of content that can be easily judged by platform providers; therefore, it is recommended to be removed from the Proposed Act.
5. The definition of the platforms that are subject to the Proposed Act is not without ambiguities. The interpretation which can be sought from the Authority should not replace an unambiguous and clear definition.
6. The lawmakers should consider giving guidelines to the platform providers on what basis they should take their decisions: whether it should happen by a qualified lawyer, an authorized person or committee (at least the review decision), whether to consider the context, the speaker, to hear the content-provider, etc.
7. For users whose content has been removed, the deadline for initiating a review and to complain against the review decision should be sufficiently long to exercise their right to remedy against a perceived violation of their freedom of expression. Instead of the currently proposed two weeks, the deadline should be at least three months.
8. Although there is no positive obligation on the state in this regard, defining the duties of platform providers towards the users would be a positive legislative example and serve as a good practice, and it would better reflect the meaning of the Proposed Act's title: protection of users. These duties and responsibilities should include the respect and protection of users' personal data, platforms' obligation to non-discrimination, and transparency of algorithmic

¹ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes
https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_NetzDGAendG.pdf?__blob=publicationFile&v=3

principles. In particular, Chapter 2 of the Council of Europe Recommendation ‘on the roles and responsibilities of internet intermediaries’ should be followed.²

² Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14, or in German: <https://emr-sb.de/europarat-zur-rolle-und-verantwortlichkeit-von-internet-intermediaeren/>

Part 1 International standards and OSCE commitments

1. OSCE Commitments on freedom of expression

The OSCE's founding Helsinki Final Act (1975) declared the commitment of the participating States to "respect human rights and fundamental freedoms."³ The participating States, to which Austria belongs, pledged to act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights, and to fulfil their obligations as set forth in the international declarations and agreements, including the International Covenant on Civil and Political Rights.

The OSCE participating States repeatedly expressed the importance of the dissemination of information to the public, and made commitments to improve the functionality of the mass media.⁴

The OSCE participating States declared that everyone should have the right to freedom of expression, including the rights of persons belonging to minorities to express freely, preserve and develop their ethnic, cultural, linguistic or religious identity. At the same time, the participating States pledged to take effective measures, including the adoption of laws, to provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred.⁵ The States reaffirmed that any restriction in the exercise of the right to freedom of expression will be prescribed by law, and in accordance with international standards. Besides the rights of the media, also

*"the public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards."*⁶

The OSCE participating States further condemned all manifestations of intolerance, and especially of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism, and promised to promote effective measures aimed at their eradication. They requested the OSCE Office for Democratic Institutions and Human Rights (ODIHR) to pay special attention to these phenomena.⁷ The Lisbon Summit Declaration (1996) declared a commitment to address the problems of intolerance and racism, etc.⁸ The commitment reiterated that freedom of the press and the media are among the basic prerequisites for truly democratic and civil societies. In a joint declaration, the participating States expressed their will to promote and enhance harmonious relations between ethnic, religious, linguistic and other groups. The OSCE Representative on Freedom of the Media (RFoM) was to encourage pluralistic debate and

³ Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975, Helsinki; Charter of Paris for a New Europe, 19-21 November 1990, Paris. OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 3. October, 2020.

⁴ Concluding Document of the Madrid Meeting. (Second Follow-up Meeting to the Helsinki Conference) 9 September 1983, Madrid, and Concluding Document of the Vienna Meeting, 15 January 1989, Vienna.

⁵ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, Copenhagen (9.1.), (32), (40.1). and Report of the CSCE Meeting of Experts on National Minorities, 19 July 1991, Geneva; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 October 1991, Moscow, (38.1).

⁶ Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE 3 October 1991, Moscow

⁷ CSCE Budapest Document 1994, Towards a Genuine Partnership in a New Era, 5-6 December 1994, Budapest.

⁸ Lisbon Document 1996, 2-3 December 1996, Lisbon.

monitor hate speech.⁹ In the same meeting, the OSCE Ministerial Council called on OSCE institutions, including the RFoM

“to pay increased attention to manifestations of aggressive nationalism, racism, chauvinism, xenophobia, anti-Semitism and violent extremism, to countering intolerance and discrimination on the ground of racial or ethnic origin, religious, political or other opinion and to fostering respect for rule of law, democratic values, human rights and fundamental freedoms, including freedom of expression, thought, conscience, religion or belief”.¹⁰

The Ministerial Council also decided to take strong public positions against ‘hate speech’¹¹ and to take the necessary measures to prevent the abuse of the media and information technology for terrorist purposes.¹² The participating States reiterated their commitments to combat hate crimes as well as incitement to hate crimes in 2004.¹³ In the same meeting, the OSCE participating States expressed their concern that hate crimes can be fuelled by racist, xenophobic and anti-Semitic propaganda on the internet, and decided that the *“participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights”*. Furthermore, it added that the OSCE RFoM should give early warning when

“laws or other measures prohibiting speech motivated by racist, xenophobic, anti-Semitic or other related bias are enforced in a discriminatory or selective manner for political purposes”.¹⁴

The OSCE participating States pledged to foster exchanges directed toward identifying effective approaches for addressing the issue of racist, xenophobic and anti-Semitic propaganda on the internet, that do not endanger the freedom of information and expression.¹⁵

In 2006, the Ministerial Council expressed its grave concern with the use of the internet for terrorist purposes, and invited participating States to increase their monitoring of websites of terrorist organizations and their supporters, and to counter it in line with human rights standards.¹⁶ In one of several documents, addressing violent extremism and the threat of terrorism, the Ministerial Council called upon the participating States to enhance *“public-private partnerships to develop practical measures to counter the use of the Internet and other means for the purposes of inciting violent extremism and radicalization that lead to terrorism, ... including via social media, to counter violent extremist messaging”*.¹⁷ In addition, it called upon the participating States to address the threat posed by narratives used by terrorists, including public justification of terrorism, incitement and recruitment.¹⁸

⁹ Document of the Ninth Meeting of the Ministerial Council, 4 December 2001, Bucharest, The Bucharest Plan of Action for Combating Terrorism (Annex to MC(9).DEC/1) (11), (12).

¹⁰ Ibid. at V.

¹¹ Decision No. 6. Tolerance and Non-Discrimination (MC(10).DEC/6), (8).

¹² Document of the Tenth Meeting of the Ministerial Council, 7 December 2002, Porto, OSCE Charter on Preventing and Combating Terrorism.

¹³ Tolerance and the Fight Against Racism, Xenophobia and Discrimination (PC.DEC/621 of 29 July 2004) Annex to MC.DEC/12/04, in Document of the Twelfth Meeting of the Ministerial Council, 7 December 2004, Sofia.

¹⁴ Promoting Tolerance and Media Freedom on the Internet (PC.Dec/633 of 11 November 2004) Annex to MC.DEC/12/04, (1), (4), in Document of the Twelfth Meeting of the Ministerial Council, 7 December 2004, Sofia.

¹⁵ Ibid. at (7).

¹⁶ Decision No. 7/06. Countering the use of the Internet for Terrorist Purposes (MC.DEC/7/06), in Document of the Fourteenth Meeting of the Ministerial Council, 4-5 December 2006, Brussels.

¹⁷ Document of the Twenty-Second Meeting of the Ministerial Council, 3-4 December 2015, Belgrade, Ministerial Declaration on Preventing and Countering Violent Extremism and Radicalization that Lead to Terrorism (MC.DOC/4/15)

¹⁸ Document of the Twenty-Third Meeting of the Ministerial Council, 8-9 December 2016, Hamburg, Declaration on Strengthening OSCE Efforts to Prevent and Counter Terrorism (MC.DOC/1/16)

The Ministerial Council also addressed the problem of child pornography distributed and viewed through the internet and encouraged States to take specific measures, in particular to criminalize the intentional viewing and possession of child pornography.¹⁹

In 2018, the Ministerial Council decided that the safety of journalists also includes digital safety and that they should be protected from intimidation, threats and harassment, including through digital technologies.²⁰

The OSCE RFoM addressed the issue of social media usage through various activities and publications since.²¹ Its Social Media Guidebook (2013) pointed out that the regulation of the European Union's E-Commerce Directive is ambiguous and subject to criticism. What is more important, social media platform providers are between a rock and a hard place when they decide about removal of content, lacking clear guidelines and definition of their duties and responsibilities.²²

Privacy rights have also been among the concerns of the OSCE, especially as a counterbalance of the efforts to fight terrorist content.²³

2. Regulatory background of social media platform providers

Social media platforms have become the primary vehicles of information exchange in large parts of the population worldwide. Their influence is tremendous in the field of business, society, health, politics and other areas. Yet, their duties and responsibilities are not clearly delineated, despite their constantly growing power and the controversies that have circumvented their operation since 2016.

The European Union's regulatory approach has been defined by the E-Commerce Directive (ECD),²⁴ which was created before the advent of peer-to-peer internet technology's domination of the online environment. Only a few years after the passing of the ECD in 2000, Facebook and similar social media networks emerged, followed by many other platform providers in the field of business (eBay, Amazon), travel (booking.com, Airbnb, etc.) and several other sectors. Platforms have stepped into the distribution chain between users and internet service providers (ISPs, who were regulated as 'mere conduits' in the ECD) as a new actor, and their exact roles have not been clearly defined, in the almost two decades that have elapsed since. This created a considerable leeway for these companies to define their own rules and standards while trying to balance between consumer and state expectations, as well as their business interests.

In 2016, the European Commission introduced self-regulation, the Code of Conduct on countering illegal hate speech online, which was signed by the major platform providers (Facebook, Microsoft, Twitter and YouTube) to combat illegal hate speech.²⁵ Since then,

¹⁹ Document of the Fifteenth Meeting of the Ministerial Council, 29-30 November 2007, Madrid Decision No. 9/07. Combating Sexual Exploitation of Children on the Internet (MC.DEC/9/07).

²⁰ OSCE Ministerial Council Decision No. 3/18, <https://www.osce.org/files/mcdec0003%20safety%20of%20journalists%20en.pdf>

²¹ 2013 Social Media Guidebook. <https://www.osce.org/files/f/documents/e/9/99563.pdf>, accessed 4 October 2020.

²² Marissa Moran and Douglas Griffin (2013) Legal and ethical implications of regulating online commentary in OSCE countries, in: 2013 Social Media Guidebook. <https://www.osce.org/files/f/documents/e/9/99563.pdf>, accessed 4 October 2020.

²³ Document of the Twelfth Meeting of the Ministerial Council, 7 December 2004, Sofia, IV. Decisions of the Ministerial Council Decision No. 3/04. Combating the use of the Internet for Terrorist Purposes (MC.DEC/3/04) and the Document of the Fourteenth Meeting of the Ministerial Council, 4-5 December 2006, Brussels, Decision No 7/06. Countering the use of the Internet for Terrorist Purposes (MC.DEC/7/06).

²⁴ 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')

²⁵ Code of Conduct on countering illegal hate speech online. 30 June 2016, https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985. Accessed 5 October, 2020.

Instagram, Snapchat and Dailymotion, Jeuxvideo.com and TikTok also joined. The Commission regularly monitors the application of the self-regulation²⁶ and found a constant increase in the ratio of removed materials. However, according to critiques,²⁷ this does not say much about the real effectiveness of the Code of Conduct, among others about the rate of false positives, which would be important for the protection of freedom of expression, and the Code does not provide for procedural or other safeguards to protect freedom of expression. The Code of Conduct relies on a network of ‘trusted flaggers’ which report to the signatory companies that remove the content in higher ratios when flagged by these NGOs, as when flagged by ordinary users. The improvement tendency shows merely a learning curve and the improving cooperation between these NGOs and the platform companies.

Based on the lessons learned from the German Network Enforcement Act (NetzDG), it should be noted that the Proposed Act duplicates the regime of self-regulation that has already been established by most platform providers, and in particular, by those which signed the European Commission's induced self-regulation document, the *Code of Conduct countering illegal hate speech online*. The Code of Conduct prescribes fewer obligations, whereas the Proposed Act's scope of removable illegal content is narrower. The Proposed Act's main additions, compared to the Code of Conduct, are the transparency requirement on companies, as well as the review and complaint mechanism.

Theoretically, the other meaningful difference should be the Proposed Act's compulsory nature. However in Germany, companies used the duplicated regime to evade their obligations: they removed flagged content on the basis of their self-regulation, and not on the basis of the NetzDG, leading to an overwhelming part of the removals going unreported to the authority. This anomaly may have been solved by the recent amendment to the German law,²⁸ which ordered that companies must include all removals into their transparency report whether based on their self-regulation, or on the basis of the NetzDG (see below in Part 2. Chapter 7).

In 2017, the European Commission issued a Communication against illegal content on online platforms.²⁹ This document comes closest to a common standard in the European market. It aims to create a balance between conflicting human rights and democratic interests, but still, its primary purpose has been to call for action against hate speech online with the human rights safeguards coming only as obligatory afterthoughts. In this Communication, it has been suggested that "*online platforms should also be able to take swift decisions as regards possible actions with respect to illegal content online without being required to do so on the basis of a court order or administrative decision.*" At the same time, they should have adequate safeguards to guarantee users' right to effective remedy. Among others, it also advises that online platforms should establish an easily accessible and user-friendly mechanism that allows their users to notify content hosted by the platform considered to be illegal, and provide robust safeguards to limit the risk of removal of legal content. A set of meaningful transparency obligations is required to increase accountability of the removal processes.

²⁶ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en. Accessed 5 October, 2020.

²⁷ Heldt, A (2019) Reading between the lines and the numbers: an analysis of the first NetzDG reports. *Internet Policy Review*, *ume 8*(Issue 2). <https://doi.org/10.14763/2019.2.1398>, and Bayer, Judit - Bárd, Petra: [Hate speech and hate crime in the EU and the evaluation of online content regulation approaches](#). Study for the European Parliament, Policy Department C: Citizens' Rights And Constitutional Affairs. 2020. ISBN 978-92-846-6902-8 | doi:10.2861/28047

²⁸ Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Netzwerkdurchsetzungsgesetzes, https://www.bmjbv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Aenderung_NetzDG.pdf?__blob=publicationFile&v=2, page 4.

²⁹ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms, Brussels, 28.9.2017 COM(2017) 555 final

The Council of Europe's Committee of Ministers has issued a Recommendation on the roles and responsibilities of internet intermediaries. In this, the Council of Europe reminded its member states that the "rule of law is a prerequisite for the protection and promotion of the exercise of human rights and for pluralistic and participatory democracy", and that

*"Member States have the obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment. They also have a positive obligation to protect human rights and to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb State officials or any sector of the population."*³⁰

Importantly, it called on the **horizontal effects** of human rights, which oblige private companies to take effective measurements to ensure compliance with the human rights framework (at 6 and 11). The responsibility of business enterprises towards the respect and protection of human rights has also been emphasised by the UN Guiding principles on Business and Human Rights.³¹

The Recommendation also pointed out the necessity of the **due process guarantees** and **access to effective remedies** which should be facilitated vis-à-vis both States and intermediaries (at 6. and 1.1.3.).

These effective remedies shall consist of prompt, transparent and effective reviews, and result in the restoration of content, apology, rectification or compensation for damages. **Judicial review should remain available**, when internal and alternative dispute settlement mechanisms prove insufficient or when the affected parties opt for judicial redress or appeal (at 1.5.2.).

The Recommendation sets out the requirement that any interference with human rights by authorities shall be prescribed by law; that such law should be enacted in a transparent and inclusive process, with a human rights impact-assessment (at 1.1.1., 1.1.4.). and be in compliance with Article 10 of the European Convention on Human Rights (ECHR), meaning that it should pursue one of the legitimate aims foreseen in Article 10 of the Convention, be necessary in a democratic society and be proportionate to the aim pursued (1.3.1.).

Further, it recommends states to demand intermediaries to restrict access to content only on the basis of a judicial decision or the decision of an independent administrative authority whose decisions are subject to judicial review. **Exceptions** from this principle can only involve content that is illegal irrespective of context, such as content involving child sexual abuse material, or in cases where expedited measures are required in accordance with the conditions prescribed in Article 10 of the Convention. Thus, the scope of those criminal provisions that make content removable should be carefully examined (see below).

3. Summary of the human rights standards and the state of the art

The international human rights background, including commitments by the OSCE participating States, requires a careful balancing between freedom of expression and the protection of minorities and public order against hate speech and other serious crimes. This balancing exercise has been complicated in the past, and is even more complex when social media companies play a dominant role in the facilitation of public and private discussion. Their duties and responsibilities have not been legally defined yet, and the scope of their activities is constantly changing and growing. Given the increasingly transborder nature of this industry as

³⁰ Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries.

³¹ "Business enterprises should respect human rights.", UN Guiding principles on Business and Human Rights, 2011, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, at 11.

well as of human communication – which, amidst the COVID-19 related border restrictions, is not declining, but instead, replacing physical travel and face-to-face communication – an international level regulation would better serve the interests of consumers, citizens and the industry.

Some states have passed national laws to enforce some of their national rules, such as Germany and France. The Proposed Act is another one in this line. As the German legal experiences can provide insight on the applicability of this method, as well as its pitfalls, this analysis provides a separate chapter on these experiences (see Chapter 6).

Austria made a legislative attempt in 2019 (Austrian Federal Act for Diligence and Responsibility Online), which was found deeply problematic by the OSCE.³²

National regulatory attempts like the Proposed Act are likely to be taken as an example by other states and European legislation as well.

Part 2 Analysis of the Proposed Act

1. General observations

In principle, removal of content should be subject to a decision by a judicial authority or another competent authority whose decision is subject to judicial review. On the other hand, private entities do not have the obligation to represent any kind of content – and at this point, this legal analysis struggles with a lack of official clarification on the roles and functions of platform providers. The legal argumentation is just developing in this field. Platforms claim not to be responsible for the content they transmit, as third parties provide the content. However, under the logic of the notice-and-takedown regime, they can be made liable if they have knowledge about the material.

At the same time, they are allowed to have their own terms of services, on the basis of which they consider themselves entitled to remove even lawful content. This can also be the case when the legality of content cannot be judged without doubts – platforms reserve the right to remove content if it is deemed to violate their terms, without going into the examination of its lawfulness. It is yet unclear what the limits of their voluntary removals of lawful content are: would that not be considered as a violation of the freedom of expression of users? In particular, it should be ensured that platforms do not pursue their particular ideological agenda when removing content, and do not discriminate between users and posts on the basis of their protected characteristics, including race, religion or political opinion.³³ This safeguard is missing from most legal documents and acts that have been drafted in this field, including the Proposed Act.

The Council of Europe's Committee of Ministers' *Recommendation*³⁴ on the roles and responsibilities of internet intermediaries pointed at the **horizontal effects** of human rights – which is also clearly cited by German authors³⁵ – obliges private companies to respect human

³² Legal Reivew of the Austrian Federal Act for Diligence and Responsibility Online, by N. Forgó, E. Johnson and K. Polychronopoulos, 2019. <https://www.osce.org/files/f/documents/4/e/421745.pdf>

³³ Bayer, J (2019) [Between Anarchy and Censorship](#). Research Paper under the ENGAGE Fellowship, Center for European Policy Studies. Kalbhenn, J/ Hemmert-Halswick M, Der Regierungsentwurf zur Änderung des NetzDG, MMR 2020, 518, 519. Also *LG Frankfurt/M.* MMR 2018, 545 (547) m. Anm. *Müller-Riemenschneider/Specht*; *OLG Dresden* MMR 2018, 756.

³⁴ Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries.

³⁵ E.g. *Reinhardt/Yazicioglu* in: DSRI (Hrsg.) Den Wandel Regeln, 2020, 823 ff; *Adelberg*, Rechtspflichten und -grenzen der Betreiber sozialer Netzwerke, 2019, 165 m.w.N.

rights (Recommendation, at 6 and 11). It recommends that platforms are only allowed to remove content through their own decisions on an exceptional basis: in the case that the content is illegal irrespective of its context, and therefore easily identified as such, for example child pornography, or which, in the light of the ECHR, would qualify as abuse of the right to freedom of expression, such as obvious cases of incitement to hatred.

2. Scope of the Proposed Act: object

The Proposed Act lists among its definitions the types of illegal content that are to be removed by the platforms. Most of these fall within the realm of those criminal actions which are also mentioned by OSCE commitments and other international standards as the ones against which public order and public discourse should be protected, and which are illegal irrespective of their context: child pornography, terrorism, incitement to hatred.³⁶ There are some others that are not explicitly required by the international standards to be prohibited, but which threaten the security of persons, and are still illegal irrespective of their context, such as coercion, persistent persecution, and blackmailing.³⁷

There are some others, which are more controversial: insult (Beleidigung, §115 StGB), blasphemy (Herabwürdigung religiöser Lehren, §188 StGB), glorification and praise of the NSDAP and its political goals, as well as denying, downplaying, approving or justifying the national socialist genocide or other national socialist crimes against humanity (§3d, 3g, 3h Verbotsgesetzes, StGBI. Nr. 13/1945). Below, it will be set out in detail why this is the case.

2.1. Insult

Whether an expression amounts to insult or not depends largely on the context, on the speaker, and the audience. It is unlikely that a platform provider could take decisions on this, carrying out a balancing of the conflicting human rights, which ought to be carried out by a judicial authority. AI and other automated tools are especially inadequate to make this judgement, which platform companies regularly use in order to find and remove illegal content, in particular given the short timeframes set out by the Proposed Act. Courts have the time and resources to carefully consider all circumstances and yet, various levels of the justice system often come to different conclusions, which shows that the establishment of ‘insult’ is everything but straightforward. Even the practice of the ECtHR varies on this issue.³⁸ Some international documents call for the decriminalization, or at least "deprisonisation" of insult.³⁹ Even though insult is primarily problematic when it criminalizes criticism of public officials,⁴⁰ this possibility is not exempt from the Austrian criminal code. As a positive aspect of the Proposed

³⁶ §2. 6. " Pornographische Darstellungen Minderjähriger (§ 207a StGB), Anbahnung von Sexualkontakten zu Unmündigen (§208a StGB), Terroristische Vereinigung (§278b StGB), Anleitung zur Begehung einer terroristischen Straftat (§ 278f StGB), Aufforderung zu terroristischen Straftaten und Gutheißung terroristischer Straftaten (§ 282a StGB), Verbotsgesetzes, StGBI. Nr. 13/1945".

³⁷ Nötigung (§ 105 StGB, BGBl. Nr. 60/1974), Gefährliche Drohung (§ 107 StGB), Beharrliche Verfolgung (§ 107a StGB), Fortdauernde Belästigung im Wege einer Telekommunikation (§107c StGB), Vorwurf einer schon abgetanen gerichtlich strafbaren Handlung (§ 113 StGB), Erpressung (§ 144 StGB).

³⁸ See on the one hand Oberschlick (No. 2), 20834/92, judgment of 1 July 1997, but also Tammer v. Estonia, No. 41205/98, judgment of 6 February 2001, and Thoma v. Luxembourg, No. 38432/97, judgment of 29 March 2001.

³⁹ OSCE RFOM (2017) Defamation and Insult Laws in the OSCE Region: A Comparative Study, <https://www.osce.org/files/f/documents/b/8/303181.pdf>, and OSCE RFOM (2003) Ending the Chilling Effect, Working to Repeal Criminal Libel and Insult Laws, <https://www.osce.org/files/f/documents/2/3/13573.pdf>

⁴⁰ Criminal Defamation and "Insult" Laws: A Summary Of Free Speech Developments In Romania, Friday, May 24, 2002, and Criminal Defamation and "Insult" Laws: A Summary Of Free Speech Developments In The Czech Republic, *January 09, 2002*, <https://www.csce.gov/international-impact/criminal-defamation-and-insult-laws-summary-free-speech-developments-czech?page=11>.

Act, defamation⁴¹ is not under its scope.

2.2. Blasphemy

Somewhat similarly, blasphemy, which is defined by the StGB as the degrading or mocking of a person,⁴² an object, a teaching, a habit or an institution, which is the object of religious worship, falls within the realm of international standards of freedom of expression and therefore should not be prohibited. It is crucial to distinguish between incitement to religious hatred, and criticism of religious teachings. The latter – however offensive believers of the effected religion may find it – should be allowed, if it addresses not people, but the content or concept of the religion. UN Human Rights Council Resolution 16/18 intended to solve this contradiction, and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence was designed as a tool to guide its implementation.⁴³ The Council of Europe also separated religious freedom, blasphemy and hate speech, and advised to prohibit incitement on the basis of religion, but to protect religious freedom and freedom of expression.⁴⁴ The Venice Commission (European Commission for Democracy through Law) found that intentional or reckless incitement to religious hatred should be subject to criminal sanctions, however, offence to religious feelings without the element of incitement should not be penalised. It further recommended that the offence of blasphemy be abolished.⁴⁵ However, if religious intolerance is expressed as incitement against persons belonging to a certain religion, then incitement may be prohibited according to the international standards of ICCPR Articles 19. and 20., as it is the case in Austria: incitement to violence against a church or a religious community is included in the offence of incitement (Verhetzung, §283 StGB).

2.3. Denial of Holocaust

The criminal prohibition of the glorification and praise of the NSDAP and its political goals, as well as denying (etc.) the Holocaust and other national socialist crimes against humanity, without the element of incitement to violence, is also controversially judged in international legal human rights standards. While its prohibition would not be supported by the ICCPR Article 20, and it is consequently judged accordingly by the UN organs and freedom of expression NGOs such as Article 19,⁴⁶ the ECtHR systematically denies protection from claims in this subject, referring to Article 17, the abuse of rights section of the ECHR.⁴⁷ In some cases,

⁴¹ §111 StGB (Üble Nachrede).

⁴² To clarify, a person as an object of worship is protected by this criminal rule, such as the Dalai Lama, and not a person as a believer.

⁴³ A/HRC/RES/16/18, at https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf, and A/HRC/22/17/Add.4, at https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf, see also <https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx>.

⁴⁴ Council of Europe Parliamentary Assembly Recommendation 1805 (2007).

⁴⁵ Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, CDL- AD(2008)026, 23 October 2008.

⁴⁶ UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/3, at para. 49; the UN Committee on Elimination of Racial Discrimination, General Recommendation No. 35, *op. cit.*, para. 14; or Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para 55., Article 19 (2016) European Commission's Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision. Available at <https://www.article19.org/data/files/medialibrary/38430/EU-Code-of-conduct-analysis-FINAL.pdf>, p. 9.

⁴⁷ ECtHR, *Garaudy v. France*, Application no. 65831/01, 25 March 2003. ECtHR, *Honsik v. Austria*, Application no. 25062/94, 22 April 1998. ECtHR, *Marais v. France*, Application no.: 31159/96, 24 June, 1996. ECtHR, *Williamson v. Germany*, Application no. 64496/17, 8 January 2019. ECtHR, *Pastörs v. Germany*, Application no.: 55225/14, 3 October 2019. See also: Cf. Pech, L., 'The Law of Holocaust Denial in Europe. Toward a (qualified) EU-wide Criminal Prohibition' In: L. Hennebel, T. Hochmann (eds.), *Genocide Denials and the Law*, Oxford University Press, Oxford, 2011, pp. 185-234.

it has even declared that Germany's historical past justifies a wider latitude for restrictions on free speech (no reference to the allied states were made).⁴⁸ Still, in one case the ECtHR has ruled that the penalization of statements denying certain historic events (in that case the Armenian genocide) was an undue restriction of Article 10 of the ECHR.⁴⁹ In its relevant opinion, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) recommended that the denial of Holocaust not be criminalized, unless the statements are likely to incite violence.⁵⁰

3. Scope of the Proposed Act: subject

The Proposed Act applies to communication platforms that had more than 100,000 users in Austria in average in the previous quarter, *or* whose turnover in the previous year exceeded 500,000 EUR.⁵¹ With this relatively low limit, sites with a low annual turnover are still subjected to the law, even if they are non-profit sites, such as e-learning platforms, etc. On the one hand, this could be an unnecessary burden on these sites, and their users. In order to promote the industry and start-ups, some commentators may prefer a higher threshold, but that limitation would protect the enterprises and not the users. On the other hand, as the main change that the Proposed Act would cause for end-users is a more calculable platform environment, due to the transparent framework to which platforms are subjected, and that platforms are obligated to respect user rights. Besides, smaller communication platforms have been known for being a haven for extremist, terroristic or violent content.⁵²

The Proposed Act defines as communication platforms those information society services, whose main purpose or function is to enable, by means of mass dissemination, the exchange of messages or performances containing intellectual content, whether spoken, written, audio or visual, between users with a larger group of other users. (Note that video-platform providers are exempt, probably because they are regulated among the media services, according to the Audiovisual Media Services Directive 28b). Also exempt are those communication platforms that offer only the sale of goods or services, or non-profit online encyclopedia, and media companies when they provide platforms for journalistic content, which is in line with the purpose of the Proposed Act.

It is not entirely clear whether search engines are subject to the Proposed Act, but a careful consideration of the definition suggests not. For the sake of clarity and to foster the rule of law, it would be **recommended to further clarify the definition**, to avoid ambiguities. The Proposed Act provides the supervisory authority with the possibility to issue a statement whether a company falls within the scope of the law. This can become useful when, with the

⁴⁸ *Peta Deutschland v. Germany*, Appl. no. 43481/09, Judgment of 8 November 2012, § 49 and ECtHR, *Hoffer and Annen v. Germany*, Appl. nos 397/07 and 2322/07, Judgment of 13 January 2011, § 48.

⁴⁹ ECtHR, *Perinçek v. Switzerland*, Application no. 27510/08, 15 October 2015. But see authors' critical evaluation in: Bayer, Judit - Bárd, Petra: [Hate speech and hate crime in the EU and the evaluation of online content regulation approaches](#). Study for the European Parliament, Policy Department C: Citizens' Rights And Constitutional Affairs. 2020. ISBN 978-92-846-6902-8 | doi:10.2861/28047, pages 38-40.

⁵⁰ OSCE-ODIHR Opinion On The Draft Law "Hate Crimes And Holocaust Denial – Amending And Supplementing Certain Acts" Of The Republic Of Moldova. <https://www.osce.org/files/f/documents/4/0/434861.pdf>.

⁵¹ The explanatory notes, however, seems to suggest that the Proposed Act should apply to platforms which fulfil both conditions of more than 100,000 users *and* a turnover exceeding 500,000 EUR. Hence, the scope of application should be clarified to avoid any misunderstanding. See: https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00049/imfname_819535.pdf.

⁵² Dewey, C., This is what happens when you create an online community without any rules, 13 January 2015, <https://www.washingtonpost.com/news/the-intersect/wp/2015/01/13/this-is-what-happens-when-you-create-an-online-community-without-any-rules/>. See more in: Bayer et al: [Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#). Study for the European Parliament, Policy Department C: Citizens' Rights And Constitutional Affairs. 2019.

rapid change of technology, new services emerge. It does not substitute, however, **a precise definition of the personal scope of the subjects to the act in the present.**

4. Removal obligations of platform providers

One of the main obligations of platform providers in the Proposed Act is to remove the reported illegal content within 24 hours if its illegality is obvious also for lay persons, or to block access to it. If the illegality of the content can be established only after a detailed examination, then the platform has seven days to proceed.

It is not set out if there is any procedure that the platform provider should follow when examining material: whether it should be done by a qualified lawyer, or whether it should follow certain legal principles, e.g. the four-step-test of the ECtHR, or whether it should consider the context, speaker and other circumstances, or to give an opportunity to the content-provider to provide further necessary information in his or her defence, etc. This gap leaves a considerable insecurity, as it cannot be known on what basis the platform provider would finally remove the content. On a positive note, the platform provider is obliged to share its reasons for the decision, together with the criteria for deleting or blocking content (§4(2)2).

Subsection (5) orders the removal of personal data within a set deadline, which is in accordance with international standards on privacy. Subsection (6) limits the possibility of acquiring personal data about the user who reports the content; only the user can provide such data. The data protection obligations are limited to cases related to removal procedures, although the Proposed Act – which carries in its title the words “protection of users ...” – could impose a general and detailed set of obligations to oblige platforms to respect and protect the personal data of its clients (see more below on this).

5. Transparency obligations

One of the most important aspects of the Proposed Act is the obligation for platforms to provide transparency reports to the authority about their activity relating to illegal content. They have to publish this report on their website, which satisfies freedom of information expectations.

Such report should also address those efforts made by the platform to prevent illegal content (§4 (2) 1). It is not further elaborated what exactly is meant by this, but in common practice it could mean filtering or algorithmic monitoring as well as de-prioritizing certain content. While this practice is becoming generally accepted, it is important to note that its theoretical background has not yet been elaborated. The human rights of freedom of expression and of privacy are conflicting with the right to reputation, security and safety, and the protection of public order. The latter interests correlate with the practical interests of the platforms. As a minimum requirement, platforms should be transparent about their activity. §4 (2)1. of the Proposed Act prescribes transparency but does not precisely set out what information is required: it is recommended to include the principles and criteria of the algorithmic regulation that is used by the platform.

Besides, it would be important to add that platforms should maintain neutrality towards opinions and refrain from discrimination between users and their opinions.⁵³

⁵³ See among others: Bayer, J (2019) [Between Anarchy and Censorship](#). Research Paper under the ENGAGE Fellowship, Center for European Policy Studies; *LG Frankfurt M.* MMR 2018, 545 (547) m. Anm. *Müller-Riemenschneider/Specht*; *OLG Dresden* MMR 2018, 756.

6. Rights of users

Platforms are obliged to develop an effective and transparent procedure to process the reports from users. Users should have easily and constantly accessible reporting tools at their disposal, and are entitled to information on how the platform will proceed with their report. They need to be informed about the result of the procedure, including the essential factors for the decision-making, the time of the removal or blocking. This information should be provided to users on both sides: the reporting user and the content provider.

Users should also be informed about the possibility to initiate a review (Überprüfungsverfahren, §3(4)) and a complaint procedure (Beschwerdeverfahren, §7) to the authority. The review procedure should be started within two weeks, and closed within two weeks, which is regarded as sufficiently prompt. The complaint procedure may be initiated only after the review procedure has been exhausted.

The deadline for initiating the review procedure could be **longer** than the two weeks **unilaterally for the content-provider**, in case he or she did not receive the information about the removal in due time. His or her right to freedom of expression does not cease within two weeks. At the same time, the online environment enables for easy re-publication of content, which might lessen the harm to that in the traditional media environment. Even though the issue has been prominent for some time now, and several legal instruments have been issued, the theoretical clarification on the background and justification of the new media regulation is still largely missing.

Complaints against the decision of the platform provider can be initiated at a so-called Complaints Office (Beschwerdestelle, §8) whose function shall be carried out by the Rundfunk und Telekom Regulierungs GmbH, which is the backbone organisation of the Austrian Broadcasting Authority. This Authority is subordinated to the Federal Chancellery (Bundeskanzleramt), its members are appointed by the President of Austria, upon recommendation of the government, in agreement with a committee of the Parliament. The Authority has been reported to be “fully independent of the government”.⁵⁴ It is an administrative body, whose decisions are normally subject to judicial review. However, in the procedure outlined by the Proposed Act, neither the Complaints Office, nor the Authority would pass an administrative decision which can be attacked in court.

The Complaints Office (Beschwerdestelle) would merely develop a proposal for a friendly solution between the user and the platform provider, or it will give its opinion to both parties (§7.(1)). The Complaints Office appears to lack the power to impose a compulsory decision.

On the one hand, it can be regarded as a positive aspect of the Proposed Act that platform providers are not immediately threatened with a fine, but instead are given advice (amicable solution, opinion) or guidelines (notification). This reduces the chilling effect and helps the development of norms in this new field.

On the other hand, without an administrative decision, it is not clear how a user, who is not satisfied with the outcome of the complaint procedure, could get his or her rights enforced. The Proposed Act does not set out a possibility for court review. In principle, a court review should be possible against any administrative decision, and this is the case against the decisions of the Broadcasting Authority: appeal against the Administrative Court is generally possible. However, there appears to be no administrative decision, because the complaints procedure

⁵⁴ Media Pluralism Monitor 2020 Country Report Austria, by Josef Seethaler, Maren Beaufort, EUI Florence.

only includes a mediation or an opinion-delivery by the Complaints Office. **Should, on the basis of this complaints procedure, a new decision be taken by the platform provider? And could this new decision be challenged in a court procedure?** The Proposed Act does not answer these questions, which leaves legal insecurity for the users. Consequently, platform providers can take decisions about third party content without judicial supervision. Apparently, neither the Complaints Commission (which is part of the Broadcasting Authority) nor the Authority in its own role will take a compulsory decision on the content, only give guidance, and in certain cases levy a fine on the platform provider. Importantly, the Council of Europe Recommendation explicitly requires that judicial review should always remain available besides internal and alternative dispute settlement mechanisms.

If there are more than five (justified) complaints in a month, then the Broadcasting Authority should start a procedure to supervise the adequacy of the measurements by the platform provider. If the Authority finds the measurements inadequate, or otherwise finds that the platform has violated its obligations under the Proposed Act, then it should notify the platform provider to restore the lawful situation and take adequate measures to avoid future violations. As a next step, the Authority has the possibility to levy a fine, up to ten million EUR. The setup and membership of the Complaints Office is not defined by the Proposed Act. Who will be the members, and on what basis will they decide?

It is not explicitly stated, but it appears from the Proposed Act that all users can initiate a complaint procedure (after the exhaustion of the internal review), including those content providers whose content was removed and who found this removal to be unjust. Thus, the provider has to count with a fine in both cases, but only if a set of inadequate measurements – and the following complaints – accumulate. This method eliminates those fears that the provider would incline to remove content in order to avoid fines and thereby increase the chilling effect of the regulation.

If the provider responds to the review requests of users in a way that leaves the users satisfied, then no complaint procedures would be initiated, meaning that the provider can avoid being fined entirely. However, this could also lead to a practice where (illegal) content is removed and then put back upon the request of the complainant, to avoid complaint procedures. The Proposed Act **does not provide a solution** to the situation when the provider is **stuck between contradicting requests for review**: after removal, the content provider might ask for put-back, after put-back other users may ask for removal, and so forth.

Importantly, the Authority, when deciding on the adequacy of the measures of the platform provider, needs to make sure that the measures should not result in a general monitoring (prior control, *Vorabkontrolle*) of the content. The title of the Proposed Act refers to the protection of users. The Proposed Act limits its scope to the protection of users' procedural rights in the content-removal procedure. However, there could be more rights listed than that: such as **respect for freedom of expression, privacy rights, transparency of algorithms, prohibition of discrimination**, etc. Even though there are no current legal standards that would require this, **a circumscribing of the platforms duties and responsibilities to respect the rights of users would be a progressive legislative example**. In this respect, an important reference point would be the Council of Europe Recommendation, Chapter 2, which is devoted entirely to the rights of users of platforms, with due process guarantees and access to effective remedies being just two of many other rights (at 6. and 1.1.3).

7. Lessons learned from the practice of the German Network Enforcement Act

During the legislative process of the German Network Enforcement Act (NetzDG), the danger of over-blocking was the main topic of discussion. It was feared that the short deadlines for deleting illegal content and the threat of fines for non-compliance would incentivise platform providers to delete content in the case of doubt, in order to escape liability, thereby impairing the freedom of speech. This fear is now also expressed in the evaluation procedure for the Proposed Act, with the notification and review procedure (§3 of the Proposed Act) in combination with the threat of fines in case of infringement (§ 10) being identified as an incentive to overblock.⁵⁵ A recently issued evaluation of the first three years of the NetzDG in practice⁵⁶ concludes that **the NetzDG has not led to systematic overblocking**, with no proof of overblocking found during the evaluation.⁵⁷ Based on the three year's experiences of the NetzDG, it has become clear that overblocking does not automatically flow from the mechanisms, which are similar in the NetzDG and the Proposed Act. However, the picture can be distorted by the fact that many deletions were applied on the basis of their terms of services, rather than on the basis of the NetzDG.

Rather, a different deficit has become apparent in the German practice. The NetzDG has established rules to safeguard the rights of users and ensure procedural fairness and transparency. There are obligations to inform both parties, to give reasoning for decisions and to install an appeal right for seeking a new decision. Platform providers also have their own terms of services, on the basis of which – as required by the European Code of Conduct on countering illegal hate speech online – they remove content that is reported as illegal. However, the terms of services do not always provide the same level of protection for the users. The higher the difference between the level of safeguards are, the greater the incentive for the networks to delete reported content according to their own rules (terms of services), and thereby evade the NetzDG requirements, depriving users of the safeguards established by law for procedural fairness and transparency, thereby violating their freedom of expression.⁵⁸ Instead of taking avail of the NetzDG complaint procedure,⁵⁹ the user is then referred to court proceedings associated with cost risks, in which the legality of a deletion and, if necessary, claims for restoration are examined on the scale of general contract law. As a response to some platforms' inclination to apply their terms of service for removal of content and thereby evade their duties (e.g. reporting duties) under the NetzDG, the German legislator extended the reporting obligations (transparency report) also to deletions in accordance with terms of service⁶⁰, as well as to the use of autonomous systems.⁶¹

⁵⁵ Amnesty International (2020) “KoPI-G: Maßnahmen gegen Hass im Netz dürfen nicht zu Lasten der Meinungsäußerungsfreiheit gehen” at <https://www.amnesty.at/presse/kopl-g-massnahmen-gegen-hass-im-netz-duerfen-nicht-zu-lasten-der-meinungsauesserungsfreiheit-gehen/>, accessed 13 October 2020.

⁵⁶ Eifert, Evaluation des NetzDG, 2020, 17. The study was mandated by the Federal Ministry of Justice. Another upcoming study announced to come to different results, see <https://community.beck.de/2020/10/06/verfassungsrecht-vor-fahrlaessiger-rechtspolitik-zur-novellierung-und-evaluation-des-netzdg>.

⁵⁷ Eifert, Evaluation des NetzDG, 2020, 54.

⁵⁸ Eifert, Evaluation des NetzDG, 2020, 29.

⁵⁹ Which in § 3 sec 2 NetzDG includes procedural rules for reviewing unlawful content including the parties involved must be informed, decisions must be reasoned.

⁶⁰ § 2 Abs. 2 Nr. 2 NetzDG-E obliges the platforms in their report to include a description of the mechanisms for the transmission of complaints about illegal contents, a description of the decision criteria for the removal and blocking of illegal contents and a description of the examination procedure including the order of examination - NetzDG and Community Standards.

⁶¹ § 2 Abs. 2 Nr. 2 NetzDG-E; see also Kalbhenn, J/ Hemmert-Halswick M, Der Regierungsentwurf zur Änderung des NetzDG, MMR 2020, 518, 521.

Another deficit to human rights in the German practice is caused by the automated deletions, or deprioritizing, of content carried out by the platforms' filter systems. Users are exposed to these non-transparent measures that affect freedom of speech and equal chances of communion without ensuring procedural rights for users.⁶² The new German media law (*Medienstaatsvertrag*)⁶³, aiming to further media pluralism, tries to tackle the issue of automated deprioritizing with transparency obligations. Media intermediaries (i.e. social media platform providers) are obliged to keep certain information easily and permanently available: (1) the criteria that determine the accessibility of content at a platform, and (2) the central criteria of aggregation, selection and presentation of content and their recommendation system, including information on the functioning of the algorithms used. These criteria are linked to a **non-discrimination obligation, but only regarding journalistic-editorial content.**⁶⁴

Both pitfalls, which have emerged during the practical application of the NetzDG, are also contained in the Proposed Act. During its legislative process, there is still room to address these issues, based on the lessons learned from the German practice, and on the basis of the new German amendment to the NetzDG and to the *Medienstaatsvertrag*.

⁶² Reinharft/Yazicioglu in: DSRI (Hrsg.) *Den Wandel Regeln*, 2020, 828.

⁶³ English version: <https://ec.europa.eu/growth/tools-databases/tris/de/search/?trisaction=search.detail&year=2020&num=26>.

⁶⁴ See Kalbhenn, *New Diversity Rules for Social Media in Germany* at https://cmpf.eui.eu/new-diversity-rules-for-social-media-in-germany/?utm_source=rss&utm_medium=rss&utm_campaign=new-diversity-rules-for-social-media-in-germany.