

Federal Government Draft

Draft of an Act to Improve Enforcement of the Law in Social Networks

(Network Enforcement Act)¹

Of ...

The Bundestag has adopted the following Act:

Article 1

**Act to Improve Enforcement of the Law
in Social Networks
(Network Enforcement Act)**

Section 1

Scope

(1) This Act shall apply to telemedia service providers which, for profit-making purposes, operate internet platforms that enable users to exchange and share any content with other users or to make such content available to the public (social networks). Platforms offering journalistic or editorial content, the responsibility for which lies with the service provider itself, shall not constitute social networks within the meaning of this Act.

(2) The provider of a social network shall be exempt from the obligations stipulated in sections 2 and 3 if the social network has fewer than two million users in the Federal Republic of Germany.

(3) Unlawful content shall be content within the meaning of subsection (1) which fulfils the requirements of the offences described in sections 86, 86a, 89a, 90, 90a, 90b, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185 to 187, 241 or 269 of the Criminal Code.

¹ Notification provided pursuant to 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 (OJ L 204 of 17.9.2015, p.1).

Section 2

Reporting obligation

(1) Providers of social networks shall be obliged to produce quarterly German-language reports on the handling of complaints about unlawful content on their platforms, covering the points enumerated in subsection (2), and shall be obliged to publish these reports in the Federal Gazette and on their own website no later than one month after the quarter concerned has ended. The reports published on their own website shall be easily recognisable, directly accessible and permanently available.

(2) The reports shall cover at least the following points:

1. general observations outlining the efforts undertaken by the provider of the social network to eliminate criminally punishable activity on the platform,
2. description of the mechanisms for submitting complaints about unlawful content and the criteria applied in deciding whether to delete or block unlawful content,
3. number of incoming complaints about unlawful content in the reporting period, broken down according to whether the complaints were submitted by complaints bodies or by users, and according to the reason for the complaint,
4. organisation, personnel resources, specialist and linguistic expertise in the units responsible for processing complaints, as well as training and support of the persons responsible for processing complaints,
5. membership of industry associations with an indication as to whether these industry associations have a complaints service,
6. number of complaints for which an external body was consulted in preparation for making the decision,
7. number of complaints in the reporting period that resulted in the deletion or blocking of the content at issue, broken down according to whether the complaints were submitted by complaints bodies or by users, and according to the reason for the complaint,

8. time between complaints being received by the social network and the unlawful content being deleted or blocked, broken down according to whether the complaints were submitted by complaints bodies or by users, according to the reason for the complaint, and into the periods “within 24 hours”/“within 48 hours”/“within a week”/“at some later point”,
9. measures to inform the person who submitted the complaint, and the user for whom the content at issue was saved, about the decision on the complaint.

Section 3

Handling of complaints about unlawful content

(1) The provider of a social network shall maintain an effective and transparent procedure for handling complaints about unlawful content in accordance with subsections (2) and (3). The provider shall supply users with an easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content.

(2) The procedure shall ensure that the provider of the social network:

1. takes immediate note of the complaint and checks whether the content is unlawful and subject to removal or whether access to the content must be blocked,
2. removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint; this shall not apply if the social network has reached agreement with the competent law enforcement authority on a longer period for deleting or blocking any manifestly unlawful content,
3. removes or blocks access to all unlawful content within 7 days of receiving the complaint,
4. in the case of removal, retains the content as evidence and stores it for this purpose within the Federal Republic of Germany for a period of ten weeks,
5. immediately notifies the person submitting the complaint and the user about any decision, while also providing them with reasons for its decision, and

6. also immediately removes or blocks any copies of the unlawful content that are located on the platform.

(3) The procedure shall ensure that each complaint, along with the measure taken to redress the situation, is documented in the Federal Republic of Germany.

(4) The handling of complaints shall be monitored via monthly checks by the social network's management. Any organisational deficiencies in dealing with incoming complaints shall be immediately rectified. The social network's management shall offer the persons tasked with the processing of complaints training courses and support programmes delivered in the German language on a regular basis, this being no less than once every six months.

(5) The procedures in accordance with subsection (1) may be monitored by an agency tasked to do so by the administrative authority named in section 4.

Section 4

Provisions on regulatory fines

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

1. in contravention of section 2(1) sentence 1, fails to produce a report, to produce it correctly, to produce it completely or to produce it in due time, or fails to publish it, to publish it correctly, to publish it completely, to publish it in the prescribed form or to publish it in due time,
2. in contravention of section 3(1) sentence 1, fails to provide, to provide correctly or to provide completely, a procedure mentioned therein for dealing with complaints submitted by complaints bodies or by users whose place of residence or seat is located in the Federal Republic of Germany,
3. in contravention of section 3(1) sentence 2, fails to supply a procedure mentioned therein or to supply it correctly,
4. in contravention of section 3(4) sentence 1, fails to monitor the handling of complaints or to monitor it correctly,

5. in contravention of section 3(4) sentence 2, fails to rectify an organisational deficiency or to rectify it in due time,
6. in contravention of section 3(4) sentence 3, fails to offer training or support or to offer them in due time, or
7. in contravention of section 5, fails to name a person authorised to receive service in the Federal Republic of Germany or fails to name a person in the Federal Republic of Germany authorised to receive information requests from German law enforcement authorities, or to name such persons in due time.

(2) In cases under subsection (1) number 7, the regulatory offence may be sanctioned with a regulatory fine of up to five hundred thousand euros, and in other cases under subsection (1) with a regulatory fine of up to five million euros. Section 30(2) sentence 3 of the Act on Regulatory Offences shall apply.

(3) The regulatory offence may be sanctioned even if it is not committed in the Federal Republic of Germany.

(4) The administrative authority within the meaning of section 36(1) number 1 of the Act on Regulatory Offences shall be the Federal Office of Justice. The Federal Ministry of Justice and Consumer Protection, in agreement with the Federal Ministry of the Interior, the Federal Ministry for Economic Affairs and Energy and the Federal Ministry of Transport and Digital Infrastructure, shall issue general administrative principles on the exercise of discretion by the regulatory fine authority in initiating regulatory fine proceedings and in calculating the fine.

(5) If the administrative authority wishes to issue a decision relying on the fact that content which has not been removed or blocked is unlawful within the meaning of section 1(3), it shall first obtain a judicial decision establishing such unlawfulness. The court with jurisdiction over the matter shall be the court that rules on the objection to the regulatory fine order. The application for a preliminary ruling shall be submitted to the court together with the social network's statement. The application can be ruled upon without an oral hearing. The decision shall not be contestable and shall be binding on the administrative authority.

Section 5

Person authorised to receive service in the Federal Republic of Germany

To enable documents to be served in connection with regulatory fine proceedings under this Act, providers of social networks shall immediately supply the administrative authority, the public prosecution office and the competent court, as well as the competent court in civil proceedings, with the name of a person authorised to receive service in the Federal Republic of Germany. To enable the receipt of requests for information from German law enforcement authorities, a person in the Federal Republic of Germany shall be named who is authorised to receive such requests.

Section 6

Transitional provisions

(1) The first issue of the report pursuant to section 2 shall be due in respect of the second quarter following the entry into force of this Act.

(2) The procedures pursuant to section 3 shall be introduced within three months of the entry into force of this Act.

Article 2

Amendment of the Telemedia Act

In section 14(2) of the Telemedia Act, last amended by Article 1 of the Act of 21 July 2016 (Federal Law Gazette I p. 1766), the words "or other absolutely protected rights" ["oder anderer absolut geschützter Rechte"] shall be inserted after the word "property" ["Eigentum"].

Article 3

Entry into force

This Act shall enter into force on the day following its promulgation.

II. Main substance of the draft

In order to compel social networks to process complaints of hate crime and other content punishable under criminal law faster and more comprehensively, the draft legislation envisages the introduction of statutory compliance rules for social networks. By providing a legal definition of “social network”, the draft ensures that the reporting obligation is applicable only to the operators of large social networks with the power to influence opinion, rather than to the full range of service providers as defined in the Telemedia Act. Media platforms that create their own journalistic/editorial content are not affected by the draft. The definition of a social network incorporates the sharing of content with other users within a gated community as well as the dissemination of content to the general public. Envisaged in the draft is a *de minimis* limit for small companies (start-ups). The draft furthermore makes it clear that the legislation applies only to unlawful content falling within the scope of criminal law provisions whose purpose is to combat hate crime and other content punishable under criminal law which is disseminated on the internet, as well as other forms of disturbing the public peace.

Hate crime generally falls within the scope of criminal offences such as malicious gossip, defamation and incitement to hatred. Fake news is also covered by the legislation if it fulfils the requirements of one or more of the criminal offences enumerated in section 1(3), such as disturbing the public peace by providing misleading information about a criminal offence.

The draft obligates social networks to submit quarterly reports on their handling of complaints about criminally punishable content. These reports must contain statistical data on the volume of complaints and the decision-making practice of the networks, whilst also providing information about the teams involved in processing the complaints. The reports must be published in the electronic Federal Gazette and on the social network's own website in an easily locatable manner.

The draft stipulates legal standards for effective complaints management. These standards ensure that social networks generally delete any manifestly criminal content falling within the scope of one of the offences enumerated in section 1(3) within 24 hours of receiving the user complaint. Procedures for the immediate deletion of unlawful content must be effective and transparent, and must include user-friendly mechanisms for submitting complaints. The underlying basis for this compliance requirement is the liability regime for service providers laid down in section 10 of the Telemedia Act. If service providers become aware that they are storing unlawful content for a user, they are obliged to immediately remove or block access

to that content. The compliance obligations stipulated in the draft legislation build on this requirement and make it more specific.

To understand why there is a need for legislation on the handling of complaints about hate crime and other content punishable under criminal law, it is important to consider the unique nature of the internet as compared to “traditional media”. In traditional media, unlawful situations are not perpetuated in the same way as on the internet.

According to the draft, intentional or negligent failure to comply with the reporting obligation constitutes a regulatory offence that is punishable by a fine of up to 5 million euros. The same applies to violations of the obligation to maintain an effective complaints management system, as well as the obligation to name in due time a person who is authorised to receive service in the Federal Republic of Germany or a person in the Federal Republic of Germany authorised to receive information requests from German law enforcement authorities. Regulatory offences related to complaints management are linked to organisational obligations. A regulatory offence is committed by anyone who intentionally or negligently fails to set up a complaints management system or fails to set one up correctly, who fails to rectify organisational deficiencies, or who fails to meet the statutory requirements for complaints management over a not insignificant period. Pursuant to section 17(4) of the Regulatory Offences Act, the regulatory fine should exceed the financial benefit obtained from committing the offence.

Because section 130 of the Regulatory Offences Act is additionally applicable, it is also possible for the owner of the company operating the social network to be prosecuted in cases where violations of the obligation to maintain an effective complaints management system or violations of the reporting obligation could have been prevented or made much more difficult if there had been proper supervision.

According to section 30 of the Regulatory Offences Act, regulatory fines can also be imposed on legal persons and associations of persons. In such cases, the draft foresees increasing the maximum regulatory fine to 50 million euros (section 30(2) third sentence of the Regulatory Offences Act).

The draft designates the Federal Office of Justice as the competent administrative authority pursuant to section 36 of the Regulatory Offences Act. When investigating the regulatory offences specified in this draft, the Federal Office of Justice is also required to ascertain whether punishable content within the meaning of section 1(3) is involved. The Federal

Office of justice obtains a preliminary ruling on the lawfulness of the content from the competent court. These reviewing powers are comparable to the duties performed by the *Land* media authorities as the competent administrative authorities pursuant to section 24 of the Interstate Treaty on the Protection of Minors in the Media. The *Land* media authorities can impose regulatory fines on telemedia providers on account of impermissible content that incites hatred, encourages violence or offends human dignity. Furthermore, the amendment of the Telemedia Act in Article 2 of the draft allows victims of infringements of personality rights on the Internet to receive subscriber data on the infringer from service providers on the basis of a court order.