



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

**Legal Review of the Draft Law on
BetterLaw Enforcement in Social Networks (NEA)**

*Prepared by Prof. Dr. Bernd Holznagel, LL.M.
Commissioned by the Office of the OSCE Representative on Freedom of the Media*

Executive Summary

The Draft Law on Better Law Enforcement in Social networks (NEA) has been developed amidst an energetic discussion in society concerning the spread of hate speech and fake news in social networks. The issue has broad implications, *inter alia* for the future of journalism. Fearing a backlash on their social networks' profiles, many journalists already feel compelled to tone down controversial stories which they are covering. Another compelling problem is online harassment of journalists as much as media users, which also has a clear anti-minority and gender bias. Articles written by female reporters attracted more abuse than those written by their male counterparts. In Germany, previous, self-regulatory measures to curb these developments online were not particularly successful.

Internationally, various models (the Act on Responsibility for Electronic Bulletin Boards in Sweden, the procedural approach of the German Federal Court of Justice (BGH) or the Art. 512 of the Digital Millennium Copyright Act, DMCA, in the USA) have been developed to resolve these issues. The regulatory approach taken by the NEA does not follow either of the existing regulatory models.

The German Government introduces an innovative compliance system instead. Such an approach has led to recent successes in the enforcement of legal standards when applied to economic enterprises and financial markets. In such a system, social networks are to be encouraged to speed up the processing of complaints, especially those lodged by their users. The blocking and deleting obligations referred to in the draft do *not* result from the NEA itself. *These had been stipulated elsewhere before the draft was compiled and they are anchored in the general laws* in accordance with the jurisprudence of the BGH. In addition to an effective complaint management system, a statutory reporting obligation in dealing with hate speech and other criminal content as well as the appointment of a domestic representative by social networks are envisaged by the draft. Breach of these obligations may be punished with fines against the company and its supervisors.

In general, this innovative approach is to be welcomed. If states have a positive obligation to promote a free, independent and diverse communications environment, they cannot refrain from any intervention in the communication process, but have to protect the communication processes from violence as well as from all forms of formal censorship. Having acknowledged this, this review considers the following drawbacks in the draft law:

- The definition of the term "social network" is too vague.
- The NEA refers to a large number of possible infringements which, in the case of "manifest unlawfulness", are to be deleted within 24 hours without an in-depth investigation. However what most of these offenses have in common is that they can only be comprehended and interpreted from the perspective of freedom of expression.

Whether or not a degrading statement must be accepted in public discourse always depends on its *context*. Therefore, an obligation to immediately remove content from the public discourse can only be justified if the unlawfulness of that content results *directly from the statement itself*.

- In addition to *clear cases of violations of human dignity or straightforward threats to a person*, a breach comes into question when offenses against public order entail a risk of further infringement, because the statement is perceived to have a real threat of further breach of law, incitement of hatred or the reduction of inhibitions towards violence against others. In all cases referring to *the protection of State and its institutions* such a risk can be excluded. Also, in such cases neither the context nor the history of a critical statement can be reliably determined by a network operator, let alone in 24 hours. State institutions, unlike private individuals, are not dependent on a legal guarantee of a non-violent communication space in which they can exercise their freedom of expression. In the case of offenses against constitutional bodies, the law enforcement authorities are in a position to intervene *ex officio*.
- Due to the NEA, the decision regarding unlawful and illegitimate behavior in social networks remains in the hand of the operators of these networks. In contrast to the German Federal Court of Justice's (BGH) model, there are no concrete guidelines on how the social network has to balance the interests of the author of the reported content and the claimant (user) involved. No guidelines are provided, on what to decide when the persons concerned do not answer to a request or comply with necessary and reasonable formal requirements.
- With the risk of high fines in mind, the networks will probably be *more inclined to delete* a post than to expose themselves to the risk of a penalty. However, an *overblocking* will most likely lead to an *undermining of the freedom of expression*.
- The projected jurisdiction of the Bonn District Court is *no convincing remedy*. The decision to grant a fine is, in principle, a decision made by the administrative authorities. It does not correspond to the traditional principles of German administrative law that the competent authority should be obliged to consult the district court in advance.
- Furthermore, the competent authority shall be the Federal Agency for Justice (Bundesamt für Justiz) based in Bonn. This means that the competent court in *all* cases is the Bonn District Court. This could easily lead to an overload or excessive burden on the Bonn District Court.