

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft law "Netzdurchführungsgesetz", presented by the Government on 14 March 2017, and expected to be voted on in Parliament before the national elections of September 2017. The law raises serious concerns about freedom of expression and the right to privacy online.

According to the information received:

The Netzdurchführungsgesetz (hereinafter "the bill") was proposed by the German Cabinet on 14 March 2017. The bill was introduced as a measure to protect network users against hate speech and misinformation online by putting pressure on social media companies to respond to user complaints and delete criminal content from their websites. The first reading of the bill took place in Parliament on 19 May 2017.

The bill would establish obligations and procedures for social media companies with regard to reporting and handling content complaints on social media platforms. Blatantly illegal content would have to be deleted within 24 hours, while other unlawful content would have to be taken down or blocked within seven days. The bill would impose fines up to 50 million EUR on social media companies that fail to remove undesirable content from their platforms.

The bill was approved by the Cabinet on 6 April 2017, and is expected to be voted on in Parliament before the national elections, scheduled to take place in September 2017. The bill reportedly reflects concerns in the political establishment about the role that internet misinformation could play in the upcoming election campaign. Some social media companies have reportedly stated that they are already testing fake news filtering tools in Germany.

Concerns at the bill's over-regulation of social media has been expressed by the European Commissioner for the Single Digital Market, who has encouraged self-regulation.

Before identifying the concerns raised by the bill, I want to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Germany on 17 December 1973, protects everyone's right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law", and necessary for "the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals". Under Article 20, States are obligated to prohibit by law "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", but such restrictions must meet the strict conditions of article 19(3) (CCPR/C//GC/34). Permissible restrictions on the internet are the same as those offline (A/HRC/17/27).

Under the article 19(3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). The requirement of necessity also implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons". The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion (A/HRC/29/32). Finally, the restrictions must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34). The prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20(2) of the ICCPR must be read in light of the strict requirements of article 19(3).

In addition, article 17(1) of the ICCPR provides for the rights of individuals to be protected, *inter alia*, against unlawful or arbitrary interference with their privacy and correspondence, and provides that everyone has the right to the protection of the law against such interference. "Unlawful" means that no interference may take place except in cases envisaged by the law which in itself must comply with provisions, aims and objectives of the ICCPR. Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood to be an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37, A/HRC/23/40, A/HRC/29/32).

While it is recognized that business enterprises also have a responsibility to respect human rights, censorship measures should not be delegated to private entities (A/HRC/17/31). States should not require the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies or extralegal means (A/HRC/32/38).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

In light of the above standards of international human rights law, I would like to present the following observations and concerns raised by sections 3 and 4 of the bill:

Section 3: Handling Complaints about Violating Content

Section 3(2) of the bill mandates that after receiving a user complaint, “social networks” must assess whether content is a violation of German law, and delete or block “violating content” within 7 days of receiving the complaint, or delete and block “violating content” within 24 hours when content is in “clear violation” of law. It also requires that “violating content” be stored in Germany for ten weeks.

Section 3(3) of the bill mandates that all complaints and measures in response be documented in Germany for an undisclosed amount of time.

The bill defines “social networks” as “tele-media providers who operate commercial platforms that allow users to exchange or share any kind of content with other users or make such content accessible to other users”, excluding “platforms with journalist content for which the platform operation takes full responsibility”.

The draft bill defines “violating content” as content under Sections 86 (dissemination of propaganda material of unconstitutional organizations), 86a (using symbols of unconstitutional organizations), 89a (preparation of a serious violent offence endangering the state) 90 (defamation of the president), 90a (defamation of the state and its symbols), 90b (anti-constitutional defamation of constitutional organs), 91 (encouraging the commission of a serious violent offence endangering the state), 100a (treasonous forgery), 111 (public incitement to crime), 126 (breach of the public peace by threatening to commit offences), 129 to 129b (forming criminal and terrorist organizations, domestically and abroad), 130 (incitement to hatred), 131 (dissemination of depictions of violence), 140 (rewarding and approving of offences), 166 (defamation of religions, religious and ideological associations), 184b (distribution, acquisition, and possession of child pornography), 184d (distribution of pornographic performances by broadcasting, media services, or telecommunications services), 185 to 187 (insult and defamation), 241 (causing the danger of criminal prosecution by informing on a person) and 269 (forging of data intended to provide proof) of the German Criminal Code.

The draft bill, section 7 would amend the Telemedia Act (Telemediengesetz) to expand the list of grounds for “service providers” to provide information on a user’s inventory data to include the enforcement of “rights that enjoy absolute protection” following a request from law enforcement. These data claims do not require prior court approval.

Section 4: Administrative Offense and Fines

Under section 4(2) of the bill, social networks that violate the bill may be subject to a fine between 50,000 EUR and 5 million EUR. Moreover, section 4(2), establishes that section 30(2) third sentence of the Ordnungswidrigkeitengesetz (Act on Regulatory Offences) applies, which means that the violation of the bill is classified as a regulatory offence that can justify a fine up to ten times the maximum fine. Under this provision,

social networks that violate the bill may therefore be subject to a maximum fine of 50 million EUR.

Concerns:

The State has a legitimate interest and responsibility to protect against terrorism, child pornography, and hate speech that constitutes incitement to discrimination, hostility or violence. The question that arises relates to the way in which the bill seeks to achieve legitimate objectives, in particular the responsibilities it places upon private companies to regulate the exercise of freedom of expression, and whether the measures proposed by the bill would be lawful under international human rights law.

The obligations placed upon private companies to regulate and take down content raises concern with respect to freedom of expression. A prohibition on the dissemination of information based on vague and ambiguous criteria, such as “insult” or “defamation”, is incompatible with article 19 of the ICCPR. The list of violations is broad, and includes violations that do not demand the same level of protection. Moreover, many of the violations covered by the bill are highly dependent on context, context which platforms are in no position to assess. In addition, the vague definition of “social network” raises questions as to the range of actors covered by the scope of the bill. According to the wording, it would cover all kinds of providers, including messaging services. At the same time, according to the explanatory notes to the bill, the law would not apply to email and messengers.

The provisions imposing high fines for non-compliance with the obligations set out in the bill raise concerns, as these obligations as mentioned above may represent undue interference with the right to freedom of expression and privacy. The high fines raise proportionality concerns, and may prompt social networks to remove content that may be lawful.

The risk appears even higher considering the strict time periods of 24 hours and 7 days according to which social networks must assess and remove content in violation of domestic law. The short deadlines, coupled with the afore-mentioned severe penalties, could lead social networks to over-regulate expression - in particular, to delete legitimate expression, not susceptible to restriction under human rights law, as a precaution to avoid penalties. Such pre-cautionary censorship, would interfere with the right to seek, receive and impart information of all kinds on the internet.

Further, I am concerned with the lack of judicial oversight with respect to the responsibility placed upon private social networks to remove and delete content. Any legislation restricting the right to freedom of expression and the right to privacy must be applied by a body which is independent of any political, commercial, or unwarranted influences in a manner that is neither arbitrary nor discriminatory (A/HRC/17/27). The liability placed upon private companies to remove third party content absent a judicial oversight is not compatible with international human rights law.

I am also concerned at the provisions that mandate the storage and documentation of data concerning violative content and user information related to such content, especially since the judiciary can order that data be revealed. This could undermine the right individuals enjoy to anonymous expression (A/HRC/29/32). Such restrictions on anonymity, in particular absent judicial oversight, facilitate State surveillance by simplifying the identification of individuals accessing or disseminating prohibited content. By requiring complaints and measures to be documented and stored for an undisclosed amount of time, without providing further protection mechanisms against the misuse of such data, individuals become more vulnerable to State surveillance. These provisions also allow for the collection and compilation of large amounts of data by the private sector, and place a significant burden and responsibility on corporate actors to protect the privacy and security of such data (A/HRC/23/40).

Finally, I am concerned at the possibility that users claiming a violation would be entitled to be given access to subscriber data without prior court approval. The protection of anonymity, including protection against unlawful and arbitrary interference by state or non-state actors, plays a critical role in securing the right to freedom of opinion and expression. The absence of a judicial warrant for the disclosure of individual information would represent a restriction that is neither targeted nor protecting of due process rights, and it would therefore not meet the strict test required for restrictions on privacy and expression (A/HRC/29/32).

In view of these observations, I would like to call on your Excellency's Government to take all steps necessary to conduct a comprehensive review of the bill to ensure its compliance with international human rights law.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for any additional information and comment you may have on the above.

I would appreciate receiving a response within 60 days.

I would like to inform you that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression:
<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression