

## GERMAN LAW NEWSFLASH – April 2017

Dear Reader,

Below please find our latest NewsFlash, this time dealing with a new draft legislation by the German Ministry of Justice on fake news and hate speeches, which represents an attempt to face the negative implications of global networking and interconnections on a personal and commercial level.

We hope that our NewsFlash meets your interest. Any remarks and feedback are always welcome.

Best regards,

Thomas & Team

### **New German draft law encountering the misuse of social networks**

#### **How it used to be**

Global networks, as in general the internet and, more specifically, social media, provide us with the capability to accelerate, intensify and emancipate our communication. Simultaneously, social media gives equal balance of power to every user, but this power can lead to severe misuses.

With over 1.8 billion users, Facebook is currently the leading social network. Meanwhile, this number includes an equally high rate of people using the opportunities that social media and the freedom of expression allows to contribute to public life in a dubious way. So-called hate speech and fake news has emerged within the last few years, significantly fueled by the American elections in 2016. Using inherent diffusion methods of social networks, such as commenting, liking or sharing, offensive content as well as intentionally wrong information are propagated every day. This type of conduct has had a severe social impact on emotionally charged subjects, whether personal or political opinions. The impact on both is demonstrated by the case of a Syrian refugee whose photo with Chancellor Merkel was used online to provoke resentments against fugitives and related politics.



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Consequently, lawyers are searching for remedies to handle this obviously unlawful conduct, taking place under the cloak of pseudonymity and anonymity on the internet.

### What is new

At this point, a recently published draft law of the German Ministry of Justice (*Netzwerkdurchsetzungsgesetz, NetzDG*) is meant to address those issues. After long discussions, but also approved on a multipartisan basis, the proposed law intends to oblige social networks with a certain number of users to give an account every three months about the number of reported unlawful postings as well as the number of postings deleted along with their deletion procedures. Short deadlines to delete non-complying comments have also been introduced. This creates a new responsibility for social media in the case that they don't comply with their duties. It is then private companies like Facebook who are held accountable in order to prevent and penalize offending fake news and hate speech.

Nevertheless, the regulation operates within the narrow frame of fundamental rights arising from the German *Grundgesetz*, hence the complexity among the subject. As in other countries, the German constitution provides broad protection for freedom of speech for alleged offenders as well as a consolidated and profound property and business guarantee for private companies hosting social networks.

Based on these considerations, further ideas for the draft law have already been rejected, like the implementation of a control authority, succinctly derailed as a "ministry of truth". Besides, there is also criticism towards the actual draft, denouncing it as a possibility to oppress lawfully expressed opinions. According to opponents, if social media companies had to comply with these duties, state-aided censorship and, thus an infringement of the hosting company's property guarantee, would be the consequence, as its own business would be disturbed.

Thus, a balancing act is required between the fundamental rights of potential victims within the scope of criminal law provisions, the fundamental rights of potential offenders – notably the freedom of speech – and the specific property right to "an established and operating business" of social networks.

Regarding the Syrian refugee's photo with the German Chancellor which has been misused on Facebook as alleged "evidence" for failed German refugee politics, the legal weighing of interests had a conciliatory outcome. The district court of Würzburg ruled that Facebook had to delete the reported "photomontages". This example shows that the obligation for social networks to delete offensive contents already exists under German law, but without prescribing a deletion deadline. In the meantime, the German court did not accept the victim's lawyers' proposal to oblige Facebook to search other copies of the picture available on the platform. According to the court, this would not be in the responsibility of a "neutral host-provider" like Facebook.

### What does it mean for the future

Facebook has already responded to this jurisdiction, even before the court had ruled, as a German research company has been charged to find, flag and report wrong or unlawful comments, produced in the network by German users. Consequently, social networks seem to already comply with the proposed requirements of the German Ministry of Justice. Nevertheless, the court decision reveals another fundamental problem which could affect the sustainability of the planned draft provisions in the future: As Facebook is designated a "neutral" host-provider, the status and the legal responsibility of social networks for unlawful behavior of their members is disputable. According to the district court, social networks are only neutral vehicles for their members; they can therefore not be "offenders" themselves. The Ministry has partially accepted this judgement as it has denied a duty to search for other copies of offensive postings on their network. Future practice will show if the remaining envisaged recourse to the responsibility of private hosting companies will be enough to prevent offensive speech on the internet. Also, it is questionable if short-term deadlines in conjunction with a challenging process to balance users', victims' and host's rights will lead to acceptable and reasonable results. It remains to be seen whether the new law as eventually enacted will sufficiently secure in the future that offensive speech and fake news are merely a tide which will ebb away.

### Recent Transaction

AcadeMedia, the north European market leader in educational services, acquired the German preschool company Step Kids Education GmbH (StepKe), running an expanding number of daycare facilities in North Rhine-Westphalia and Brandenburg. tkslegal Berlin LLP has advised StepKe in the transaction. For more information [click here.](#)



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