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# The German Network Enforcement Act

## Personality Rights in the Internet

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# Basic Problems

- Manipulations by fake news (social bots) – use of platforms like WikiLeaks
- Mobbing und defamation campaigns
- „Echo Chambers“
- Online Archives that do not forget – neither search engines
- Enforcement problems (due to anonymity, defamers outside EU etc.)



# Legal Framework (EU)

- Fundamental Rights EU charter
- Beyond fundamental rights no directive or regulation covering (however, conflict of law rules)
- Indirect impact by safe harbour privileges in E-Commerce-Directive
  - Art. 12 Access-Provider
  - Art. 14 Host-Provider
  - Art. 15 no monitoring obligations

# Legal Framework (Germany)

- Long history of decisions of German Constitutional Court, framing personality rights in balance with freedom of speech and freedom of media
- Debated: fundamental right of anonymity?
- Three different categories:
  - Intime sphere (strong protection)
  - Public sphere (freedom of speech protected)
  - In-between : delicate balance needed



# Enforcement

- Host providers are obliged to block or to delete messages after receiving notice
- If not: usual legal framework applies, hence criminal and civil law sanctions (damages, defamation etc.)
- German High Federal Court developed injunctions and a notice-and-reaction procedure (Mallorca Blogger-case)
- Also, review platforms and portals are obliged to check facts in case of complaints
- However, in practice scarcely anything happens – Why?
  - Prosecutors lack man power
  - Vicitims are not informing police – fear of shit storms and becoming „prominent“ (Barbra Streisand-effect)
  - Risks in civil law procedures, balancing fundamental rights
  - Platform operators cannot assess complaints – want to stay netural
  - Balance of fundamental rights impedes automated enforcement (in contrast to copyright infringements etc.)

# Reaction of German legislator: The Network Enforcement Act

- 2014/2015 self-regulation (also on the EU-level)
- In fact self-regulation did not work
  - Complaints were not addressed by providers
  - If providers took care of them sometimes only after months
  - Or rejected or did not react without any reasons.
- End of 2016
  - Facebook: 30%
  - Twitter 6%
  - Youtube ca. 90%



# Network Enforcement Act

- Basic approach:
  - Organizational duties for platform providers to improve complaint management system
  - Sanctions up to 50 Mio Euro if management system are not implemented
- Publicity, obligation to publish semi-annual reports
- However, no general obligation to monitor
- For obvious illegal content: obligation to delete/block access within 24 hrs. After notice
- For any other „simple“ illegal content :
  - Blocking access or deletion within 7 days
  - Or deference to an acknowledged institution of self-regulation
- Further: allowance to disclose personal data of users in case of claims for defamation

# Problems

- Complex balance of interest has to be done by provider within short time (e.g.: famous Vietnam-Napalm-picture was erased by Facebook due to nudity of burning child)
- Platform providers do not have information about relationship between victim and defaming person or about facts
- Due to severe sanctions provider may be tempted to delete in case of doubts – danger for freedom of speech
- Contradiction to E-Commerce-Directive (country of origin principle)
- On the German level: federal state does not have competences to regulate media



# Details

- Scope of Application: 2 Mio „registered“ user in germany - when? What happens in case of change? What about fake users?
- What about cloud Provider?
- Not: journalistic content – what about grass-root journalism?

# Details

- Also protecting individuals? No, only criminal sanctions – hence, traditional civil claims still apply
- Concerning users whose content has been blocked: Claims to restore the content? Act does not provide anything – hence, contractual claims (however, modified by standard terms and conditions)
- Right to be heard?
  - Neither for blocked user nor for third parties!
- Relationship to GDPR arguable



# Details

- Institution of self-regulation
  - Legal status unclear (who is funding it, who are the shareholders etc. etc.)
  - Protection of third parties against decisions of this institution? Left unclear
  - Are courts bound by decisions of this institution? Probably not as no democratic legitimation
  - Relationship to civil claims totally unclear (contradiction decisions of courts and of this institution)

# Alternatives?

- Improvement of enforcement by courts
- Online dispute resolution: quicker and more effective
- Multipolarity has to be respected
- Obligations for platform providers to identify users
- No generic approach to safe harbours – better. Sector specific



# Conflict of Laws

- Rome Regulation leaves personality rights to national conflict of Law
- However, CJEU has developed criteria for assessing the place where defamation is „located“:
  - Mosaic theory and shevill doctrine: all damages only at the place where defamation has been published (here: publishers place)
  - Modified for Internet in eDate-decision: where the centre of the „personality“ is, where the person is known etc.
- Modified by country of origin principle (E-Commerce-Directive)