The digital "militant democracy": An analysis of platform regulation in Germany and at EU level

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Abstract

Germany introduced with the Network Enforcement Act in 2017 and the Interstate Media Treaty in 2021 a novel approach to platform regulation which goes further than in many other jurisdictions that have few or no or comparable measures in place. The new provisions could be seen as either ambitious or as going too far in meddling with the workings of private online actors. This paper examines the relevant measures in light of the notion of a "militant democracy". Germany has been classified as a militant, democratic state given how its constitution and regulatory frameworks respond to anti-democratic threats. A link can be made between the objective of militant democracy and the German approach to hate speech. The foundation for both is the protection of human dignity, which constitutes an absolute value under the German constitutional law and may not be balanced with other fun-

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UFITA 1/2022, DOI: 10.5771/2568-9185-2022-1-149

damental rights. Examining the Network Enforcement Act and the Interstate Media Treaty, this paper finds that the classification of Germany as a militant democracy holds true in an online context. These measures are direct responses to novel threats to a fruitful public discourse, to the human dignity of individuals and ultimately to the democratic system at large. In its response to these threats, the German legislator adopts a divided approach towards online platforms, regarding the latter both as a potential 'breeding ground' for online hate, as well as potential allies when it comes to actions against infringements by individuals. This paper will discuss the nuances and challenges of the German approach and draw a comparison with the relevant provisions of current and future EU law, such as the E-Commerce Directive and the Digital Services Act. Despite sharing many of the same objectives, points of (potential) collision between the German and EU approaches are identified. Ultimately, both legislators have identified the need to act against online hate and online threats to a democracy, including a need to provide a stricter framework for platforms. The legislative measures discussed in this paper are some of the first instruments which pursue these goals in the field of platform regulation and oftentimes precision is still lacking in the formulation of relevant provisions.

Deutschland hat mit dem Netzwerkdurchsetzungsgesetz im Jahr 2017 und dem Medienstaatsvertrag im Jahr 2021 eine neue Herangehensweise an die Plattformregulierung eingeführt, die weiter geht als in vielen Rechtsordnungen, in welchen keine oder nur wenige vergleichbare Maßnahmen vorhanden sind. Die neuen Vorschriften können entweder als ehrgeizig oder als zu weit gehende Einmischung in die Arbeitsweise privater Online-Akteure angesehen werden. Dieser Beitrag untersucht die entsprechenden Maßnahmen unter dem Gesichtspunkt der „wehrhaften Demokratie". Deutschland wurde, auf Grund der verfassungsrechtlichen und gesetzlichen Bestimmungen zu verfassungsfeindlichen Bedrohungen, als ein solcher wehrhafter, demokratischer Staat bezeichnet. Hier kann ein Zusammenhang zwischen dem Ziel der wehrhaften Demokratie und Vorgehen gegen Hassreden nach deutschem Recht hergestellt werden. Die Grundlage ist jeweils der Schutz der Menschenwürde, welche einen absoluten Wert im deutschen Grundgesetz darstellt und nicht mit anderen Grundrechten abgewogen werden darf. Die Untersuchung des Netzwerkdurchsetzungsgesetzes und des Medienstaatsvertrags zeigt, dass die Bezeichnung Deutschlands als wehrhafte Demokratie auch im Online-Kontext zutrifft. Diese Maßnahmen sind unmittelbare Reaktionen auf neuartige Bedrohungen für einen fruchtbaren öffentlichen Diskurs, für die Menschenwürde des Einzelnen und letztlich für das demokratische System als Ganzes. In seiner Reaktion auf diese Bedrohungen verfolgt der deutsche Gesetzgeber einen geteilten Ansatz gegenüber Online-Plattformen, indem er diese sowohl als potenziellen „Nährboden" für Online-Hass, als auch als potenzielle Verbündete bei Maßnahmen gegen einzelne Verstöße, ansieht. In diesem Beitrag werden die Nuancen und Herausforderungen des deutschen Ansatzes erörtert und ein Vergleich mit den einschlägigen Bestimmungen des derzeitigen und künftigen EU-Rechts, wie der Richtlinie über den elektronischen Geschäftsverkehr und dem Gesetz über digitale Dienste (DSA), gezogen. Trotz einiger gemeinsamer Ziele werden (po-

tenzielle) Konflikte zwischen den deutschen und den EU-Vorschriften aufgezeigt. Letztendlich haben beide Gesetzgeber die Notwendigkeit erkannt, gegen Hass im Netz und antidemokratische Online-Elemente vorzugehen, einschließlich der Notwendigkeit, einen strengeren Rechtsrahmen für Online-Plattformen zu schaffen. Die in diesem Beitrag erörterten gesetzgeberischen Maßnahmen sind einige der ersten Instrumente, welche diese Ziele im Bereich der Plattformregulierung verfolgen, und oft fehlt es den einschlägigen Bestimmungen noch an der notwendigen Präzision.

I. Introduction

"Whoever controls the media, controls the mind."[1]
Jim Morrison

Amongst all the possible objectives a legislator in a democracy can have in mind when introducing new laws, the will to defend the democracy appears to be the most basic and important. The reasoning that a democratic system must be able and allowed to defend itself against its 'enemies' is at the core of the concept of a "militant democracy".[2] Of course, this raises the question of who the enemy of democracy is, and what the measures are that should be employed against it/them. This paper aims at investigating these questions with regards to online platform and novel German and EU regulatory approaches.

In doing so, the notion of a militant democracy, originating from political sciences, will be used as a starting point, before going into the legal details of online content regulation in Germany. Germany's system has been labelled a militant democracy based on its use of legal measures against threats to the constitutional democracy, such as anti-democratic political parties or speech. Below, the origins of the militant democracy idea and its current form in German law, including in the German Basic Law, will be outlined. The age of the internet has brought forward new challenges and the legislator must decide how democracy should be actively protected in the new online environment.[3]

When the question is posed who should be blamed for what is perceived to be an increasingly polarised and hostile political landscape in many Western democracies, fingers are quick to point to social media platforms, such as *Facebook*/*Meta*, *Twitter* and other, and

1 *Rafael Polcaro*, 'The 10 best Jim Morrison (The Doors) quotes about life' (Rock And Roll Garage, 4 January 2021) <http://rockandrollgarage.com/the-10-best-jim-morrison-the-doors-quotes-about-life/> accessed 13 July 2022.

2 *Guy Beaucamp*, 'Eine Demokratie, die sich wehren kann' (2021) Juristische Arbeitsblätter 1; *Andreas Voßkuhle* and *Anna-Bettina Kaiser*, 'Grundwissen – Öffentliches Recht: Wehrhafte Demokratie' (2019) Juristische Schulung 1154.

3 The various challenges for democracy posed by social media are also discussed in *Jörg Ukrow*, 'Wehrhafte Demokratie 4.0 – Grundwerte, Grundrechte und Social Media- Exzesse' (2021) 24 ZEuS 65.

the relatively new role they play in providing information and facilitating public discourse.[4] This scapegoating of platforms is expressed in headlines such as "Social Media Are Ruining Political Discourse".[5]

One of the arguments advanced is that platforms value user engagement, and that content that is likely to stir negative emotions may be prioritised to increase this engagement. Recommended content can also lead to a general polarisation, as the users are confronted with information confirming their views. This may over time lead to a radicalisation of certain users. Former employees of *Twitter* and *Facebook*, speaking out against the strategies of their former employers in the Documentary *The Social Dilemma*, have stressed these points.[6] Also *Frances Haugen*, labelled as the "Facebook-whistleblower", alleged that *Facebook*/*Meta* was aware, through internal studies, of societal dangers caused by its service, which were largely ignored for financial gain.[7]

To what extent such platform policies have influenced real-life events, such as the January 6th, 2021, Capitol riots in Washington, or the politically motivated murders of politicians *Joe Cox* in England and *Walter Lübcke* in Germany, remains unclear. However, it is apparent that large tech companies, and particularly social media platforms, have had a significant impact, both on where and how the (political) public discourse is taking place, as well as on the manner news and information are accessed. Concerning the latter, it has been noted that the media was traditionally consumed, whether through television, radio, or newspaper, directly from its source. The gatekeepers to public access to information were thus journalists, editors, and publishers.[8] These media forms still exist today. However, media content is increasingly accessed through what can be described as intermediaries, such as social media platforms and search engines, which have moved in between the original content provider and the consumer and play a role in selecting and presenting the content in question. As a result, these media intermediaries have gained a significant amount of the

4 *Paul Barrett*, *Justin Hendrix* and *Grant Sims*, 'How tech platforms fuel U.S. political polarization and what government can do about It' (Brookings, 27 September 2021) <https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/> accessed 16 March 2022; *Sounman Hong* and *Sun Hyoung Kim*, 'Political Polarization on Twitter: Implications for the Use of Social Media in Digital Governments' (2016) 33 Government Information Quarterly 777.

5 *Jay David Bolter*, 'Social Media Are Ruining Political Discourse' (The Atlantic, 19 May 2019) <https://www.theatlantic.com/technology/archive/2019/05/why-social-media-ruining-political-discourse/589108/> accessed 29 March 2022.

6 *The Social Dilemma*, 'The Social Dilemma – A Netflix Original documentary' <https://www.thesocialdilemma.com/> accessed 5 June 2021.

7 *Karen Hao*, 'The Facebook whistleblower says its algorithms are dangerous. Here's why.' (MIT Technology Review, 5 October 2021) <https://www.technologyreview.com/2021/10/05/1036519/facebook-whistleblower-frances-haugen-algorithms/> accessed 7 April 2022.

8 *Stephan Ory*, 'Medienintermediäre, Medienplattformen, Benutzeroberflächen?' (2021) ZUM 472, 473.

power to shape public opinion, succinctly described as *Meinungsmacht* in German.[9] When *Jim Morrison* noted that "whoever controls the media, controls the mind", he was likely thinking of powerful media moguls such as *Rupert Murdoch*, while not imagining figures such as *Mark Zuckerberg* & co, which may in fact have gained a fair share of control over our minds.

With an increase of platform power, there is also an increase of potential abuse, such as in the form of disinformation campaigns, potentially funded from abroad.[10] The current war in Ukraine is only the latest example in which ever-evolving disinformation campaigns and conflicts of narrative play an important role.[11] These concerns have already arisen in the Covid-19 pandemic. This paper will examine certain responses by the German legislator to the new role of platforms and the risks they may pose. The also paper seeks to determine the rationale behind the novel legislative measures and to understand how these fit in the framework of the militant democracy.

After having outlined the background to the notion of "militant democracy" (section II.), this paper will focus on how traditional laws against hate speech are being enforced in the online environment (section III.). In Germany, this is primarily done, as of 2017, on the basis of the Network Enforcement Act (NetzDG), which provides for a greater role for the platform itself in removing (and potentially reporting) such content. This approach is highly controversial and its challenges and effects will be examined. Furthermore, the paper will briefly examine parallel (and potentially conflicting) instruments on EU level, namely the E-Commerce Directive[12] and the Digital Services Act (DSA).[13]

Consequently, this paper will go beyond the traditional notice and takedown approach when addressing platform content (section IV.). It will discuss the alternative, media-specific approaches of the German Interstate Media Treaty, introduced in 2020. Two such measures can be identified, namely journalistic due-diligence requirements for news providers[14]

9 *Tobias Schmid*, *Laura Braam* and *Julia Mischke*, 'Gegen Meinungsmacht – Reformbedürfnisse aus Sicht eines Regulierers' (2020) MMR 19.

10 *Nima Mafi-Gudarzi*, 'Desinformation: Herausforderung für die wehrhafte Demokratie' (2019) Zeitschrift für Rechtspolitik 65.

11 *Mark Scott*, 'As war in Ukraine evolves, so do disinformation tactics' (Politico, 10 March 2022) <https://www.politico.eu/article/ukraine-russia-disinformation-propaganda/> accessed 18 July 2022.

12 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

13 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act). The text of the provisional agreement between the European Parliament and the Council, published by the European Parliament on 15 June 2022, will be used as a basis for the analyses in this paper. See *European Parliament,* 'Internal Market Committee endorses agreement on Digital Services Act' (16 June 2022) <https://www.europarl.europa.eu/news/en/press-room/20220613IPR32814/internal-market-committee-endorses-agreement-on-digital-services-act> accessed 18 July 2022.

14 News providers are to be interpreted in a broad manner (see section IV. below).

and non-discrimination and transparency (including algorithmic transparency) obligations for media intermediaries. In doing so, it is the aim of this paper to describe and assess certain measures taken to protect a fruitful online political discourse in Germany against the threats of online hate and disinformation. Here also, the DSA will be examined with the aim of identifying comparable approaches. The paper will end with a discussion of the actions taken by the regulator and the platforms, and how these are related (section V.)

The term 'platform' is frequently used in this paper and refers in particular to social media networks such as *Facebook*, micro-blogging sites such as *Twitter* and video-sharing platforms such as *YouTube*. Specific provisions of German law may address a wider range of online actors. For instance, rules on transparency and non-discrimination in the Interstate Media Treaty (MStV) address the category of 'media intermediaries' which includes the platforms above but also search engines such as *Google*.

When discussing the threat to democracy posed by social media, the *Cambridge Analytica* scandal comes to mind. This concerned the micro-targeting of political ads enabled through the abuse of personal data.[15] A discussion of the cases' data protection dimension will be outside the scope of this paper, although a discussion on the nature of platform algorithms, which of course are often based on personal data, will feature in section IV. Furthermore, a general point can be raised on whether political advertisement should be allowed on social media at all, but again, this question will not be addressed.

II. The Militant Democracy and the German Basic Law

To begin, one may note that the term 'militant democracy' appears somewhat contradictory. 'Authoritarian democracy', another term used, appears even more as an oxymoron.[16] The German notion *wehrhafte Demokratie*, however, could also be translated as 'robust' or 'resilient' democracy. Whatever the exact wording used, one should rather look at the practical manifestation of this concept, which in the case of this paper concerns the regulation of online speech in Germany.

The idea of a militant democracy was developed already before the outbreak of the Second World War by philosopher and political scientist *Karl Loewenstein*, having fled from Germany after the takeover of power by the Nazis.[17] In essence, *Loewenstein* and others argued that democracies should act decisively against anti-democratic threats, so as to limit

15 *Julia Carrie Wong*, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook' (The Guardian, 18 March 2019) <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook> accessed 26 March 2022.

16 *Graham Maddox*, 'Karl Loewenstein, Max Lerner, and Militant Democracy: An Appeal to "Strong Democracy"' (2019) 54 Australian Journal of Political Science 490.

17 *Ben Plache*, 'Soldiers for Democracy: Karl Loewenstein, John H. Herz, Militant Democracy and the Defense of the Democratic State' (Virginia Commonwealth University 2013) 17 <https://scholarscompass.vcu.edu/etd/2995>.

the risk of being overthrown from within. Here, *Loewenstein* pointed at the German example, where *Hitler* first came to power by taking advantage of weaknesses in the democratic system and institutions.[18] *Loewenstein* therefore noted in 1937 that "democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city".[19] Already at the time, Loewenstein commented on the growing awareness in other European countries to take measures against fascism:

> "It took years to break through the democratic misconception that the principal obstacle to defense against fascism is democratic fundamentalism itself. Democracy stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without destroying the very basis of its existence and justification? At last, however, legalistic self-complacency and suicidal lethargy gave way to a better grasp of realities. A closer study of fascist technique led to discovery of the vulnerable spots in the democratic system, and of how to protect them. An elaborate body of anti-fascist legislation was enacted in all democratic countries. The provisions were drafted precisely for checking the particular emotional tactics of fascism."[20]

This quote shows that *Loewenstein* believed that the law should and could address the threat posed by anti-democratic movements. After the war, his theories on democratic resilience can be seen reflected in the new German Basic Law.[21] An important aspect of it entails the banning of political parties which are deemed to work actively against the democratic system.[22] This idea is reflected in Article 21(2) of the German Basic Law which provides that parties which seek to undermine the democratic basic order shall be declared unconstitutional, albeit by a specific and rarely used procedure and by authority of the German Federal Constitutional Court only.

Going beyond the banning of political parties, the idea of a militant democracy is also reflected more generally in Article 1 of the Basic Law, providing for the absolute right and respect to human dignity. The state is called to protect this right and a robust approach towards hate speech can be seen as following from this objective. The German approach towards hate speech can also be considered a response to the hateful and racist propaganda employed by the Nazi regime, which had constituted an important element in the rise of authoritarianism.[23] Consequently, this rhetoric is prohibited under German criminal law.

18 *Maddox* (n 16).

19 *Karl Loewenstein*, 'Militant Democracy and Fundamental Rights, I' (1937) 31 The American Political Science Review 417, 424.

20 ibid 430-431.

21 *Robert A Monson*, 'Political Toleration versus Militant Democracy: The Case of West Germany' (1984) 7 German Studies Review 301.

22 *Carlo Invernizzi Accetti* and *Ian Zuckermann*, 'What's Wrong with Militant Democracy?' (2017) 65 Political Studies 182, 183.

23 *Janosch Delcker*, 'Germany's Balancing Act: Fighting Online Hate While Protecting Free Speech' (Politico, 10 January 2020) <https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation/> accessed 25 March 2022.

For instance, supporting or negating the actions of the Nazi regime, or denying the occurrence of the Holocaust, are prohibited under Article 130 of the German Penal Code on the incitement of masses. The same Article prohibits the incitement of hatred against a specific societal group.

Limiting hate speech makes sense from this perspective for several reasons. Firstly, speech can be used to share anti-democratic ideas, such as support for Nazi ideologies. Also, the prohibition of incitement of hatred protects minority groups from being attacked and scapegoated, which is the way the Jewish population was treated under the Third Reich.[24] Ideally, this also prevents groups and individuals from being excluded from the public discourse through hateful comments. As this discourse today also takes place on online platforms, the question of addressing this new public forum has gained significance.[25]

While Article 5 of the German Basic Law provides for the right to freedom of expression, this right is not absolute and limited by considerations of protecting democracy and human dignity. In regulating hateful and anti-democratic speech, the approach of a militant democracy can be contrasted to the model, prominently advocated in the United States, according to which harmful speech should be met with more speech on the marketplace of ideas.[26] The German approach has therefore been described by a US scholar as representing "a fundamental and radical break with the marketplace of ideas metaphor."[27] From a German perspective, prioritising, when in doubt, human dignity and the protection of democracy over the freedom of expression is a choice which follows naturally when taking the idea of the militant democracy as a starting point.

This process is ever evolving, especially in the digital age.[28] In May 2021, the German government presented on its website key points for a future law explicitly aimed at strengthening the militant democracy.[29] One of the goals listed constituted stronger actions against online hate and the promotion of political education, media competence and social

24 *Maddox* (n 16) 2.

25 Beyond the specific German context, recommendations for states to safeguard this new public forum are also included on the level of the Council of Europe in the *MSI-REF Committee of Experts on Media Environment and Reform*, 'Draft Recommendation of the Committee of Ministers to Member States on Principles for Media and Communication Governance' (2021).

26 *Candida Harris*, *Judith Rowbotham* and *Kim Stevenson*, 'Truth, law and hate in the virtual marketplace of ideas: Perspectives on the regulation of Internet content' (2009) 18 Information & Communications Technology Law 155, 165.

27 *Ronald Krotoszynski*, 'A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany' (2003) 78 Tulane Law Review 1549, 1564.

28 Digitalization and its threat for democracy is further elaborated in *Stephan Russ-Mohl*, 'Die Informierte Gesellschaft und ihre Feinde: Warum die Digitalisierung unsere Demokratie gefährdet' (Herbert von Halem Verlag 2017).

29 *Bundesregierung – Federal Government,* 'Rechtsextremismus bekämpfen, die wehrhafte Demokratie stärken' (12 May 2021) <https://www.bundesregierung.de/breg-de/service/gesetzesvorhaben/ausschuss-rechtsextremismus-1913496> accessed 18 July 2022.

work online.[30] While future laws may thus be currently in the making with the specific aim of strengthening the militant democracy, the same objectives can already be identified in legislation. The existing laws in that context encompass especially the Network Enforcement Act and the Interstate Media Treaty, which will be discussed in this paper from the perspective of a militant democracy.

It has been noted that a purely national approach for protecting the militant democracy online is insufficient, and that complementary actions are required on EU level.[31] The paper will therefore also include a brief discussion of the corresponding EU framework, namely the E-Commerce Directive and the DSA.[32] Lastly, the notice and takedown strategy as a means to improve the online public discourse will be assessed.

III. Notice and takedown requirements

A notice and takedown approach, also referred to as notice and action, has been described as the "most popular internet enforcement mechanism".[33] The general idea is that content should be removed by a platform after receiving a valid notice about an infringement. The notice is usually issued by a regular platform user but can also come from other actors. In some cases, trusted flagger systems are used, in which the notices from a particular issuer, such as a state authority, recognised expert or non-governmental organisation, are prioritised in the way the platforms respond to them. The notice can be based on different grounds, such as defamation or copyright infringement. In this paper, the focus is placed on unlawful hate speech, although actions against defamatory speech or threats against individuals, particularly against politicians and other public figures, certainly are also relevant in the context of protecting a fruitful public discourse online.

With regards to the content moderation by platforms, calls for stricter action have come from civil society actors.[34] At the same time, requiring platforms to determine the illegality of a specific content item is also being criticised. It is argued that this constitutes law enforcement activity by private intermediaries which should be carried out by state authorities instead.[35] These arguments have also been raised concerning the NetzDG, which will be examined below.

30 ibid.

31 *Ukrow* (n 3) 69.

32 As already mentioned, this paper will use the text of the provisional agreement published by the European Parliament on 15 June 2022 as a basis for the analyses.

33 *Jaani Riordan*, 'The Liability of Internet Intermediaries' (Oxford University Press 2016) 63.

34 *Hate Aid*, 'Grenzenloser Hass im Internet – Dramatische Lage in ganz Europa' (3 November 2021) <https://hateaid.org/eu-umfrage/> accessed 25 March 2022.

35 *Judit Bayer*, 'Between Anarchy and Censorship: Public Discourse and the Duties of Social Media' (2019) Centre for European Policy Studies 14.

1. German Network Enforcement Act

a) Background and debate

When a draft law for the NetzDG was issued in May 2017, *Facebook* issued a strong reaction: "The constitutional state must not pass on its own shortcomings and responsibility to private companies. Preventing and combating hate speech and false reports is a public task from which the state must not escape."[36] These sharp words nicely set the stage for the controversial discussion on the NetzDG. Before looking at the substantial provisions and their practical effects, one must start with the background and debate surrounding this piece of legislation.

In July and August 2016, the German Federal Ministry of Justice financed a first study by *jugendschutz.net*,[37] investigating to what extent illegal hate speech is removed by a specific platform following a complaint made by a user.[38] The categories of hate speech examined concerned violations of Articles 130 and 86a of the German Penal Code. Article 130 prohibits the incitement of masses, which includes amongst other the incitement of hatred against a national, racial, or religious group or a group defined by their ethnic origin. Paragraph 3 also provides for the criminal offence of Holocaust denial. Article 86a, on the use of symbols of unconstitutional organisations, prohibits for instance the dissemination of symbols such as the swastika. For this test study, *jugendschutz.de* found 622 infringements of said articles on *Facebook*, *Twitter* and *YouTube* and notified these to the respective platform as a "regular user". After one week, *Facebook* had removed 46%, *Twitter* 1% and *YouTube* 10% of the items. Almost all content was removed, however, after *jugendschutz.net* directly contacted the platforms.[39]

A second study was conducted in the same fashion in January and February 2017.[40] Here, out of 540 infringements, *Facebook* removed 39%, *Twitter* again 1% and *YouTube* 90% of the content within one week after receiving the notification, again notified by a reg-

36 *Facebook Germany GmbH*, 'Stellungnahme zum Entwurf des Netzwerkdurchsetzungsgesetzes BR-Drucksache 315/17; BT-Drucksache 18/12356'.

37 A joint organisation of all German states for the protection of minors, established by the state youth authorities. *jugendschutz.net* also plays a role in the oversight of the regulatory activity, as foreseen by the Youth Interstate Media Treaty.

38 *jugendschutz.net*, 'Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter: Ergebnisse des Monitorings von Beschwerdemechanismen jugendaffiner Dienste' (2016).

39 After the notification by a "regular user", a trusted flagger notification was made (possible only on *YouTube* and *Twitter*). Following this, the platforms were contacted directly by *jugendschutz.net* via email. After all measures were taken, *Facebook* had removed 91%, *YouTube* 98%, and *Twitter* 82% of the items.

40 *jugendschutz.net*, 'Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter: Ergebnisse des Monitorings von Beschwerdemechanismen jugendaffiner Dienste' (2017).

ular user account.[41] Here, then Federal Minister for Youth, *Manuela Schwesig*, pointed to *YouTube* as a positive example for other platforms, stressing that "more can be done".[42] This study was also referred to by the then Minister of Justice and Consumer Protection, *Heiko Maas*, as a reason for increasing pressure on platforms to act against such illegal content.[43]

Shortly after, a first draft for the NetzDG was introduced, seeking to require platforms to bear the principal responsibility for the effective removal of illegal content. The NetzDG initiative was also referred to as the "Facebook-Law" and was controversial from the moment of its inception.[44] It was not only criticised by *Facebook* itself, but also by civil society actors. The free speech NGO *Article 19* raised the concern that "the Act will severely undermine freedom of expression in Germany and is already setting a dangerous example to other countries that more vigorously apply criminal provisions to quash dissent and criticism, including against journalists and human rights defenders."[45] The act was also described as an "experiment", in which "the state outsourced censorship to social media platforms".[46] On the other side, there was also a great deal of hope connected with this piece of legislation, with its enactment being described as "the beginning of the clean-up on the internet".[47]

Whether from an optimistic or pessimistic perspective, the NetzDG, which came into force in October 2017, stirred emotions. Before examining whether these were justified, the main substantial provisions of the NetzDG will be laid out below.

41 After all measures were taken, including trusted flagger notification (on *YouTube* and *Twitter*) and email contact, *Facebook* had removed 93%, and both *Twitter* and *YouTube* 100% of the items in question.

42 *BMFSFJ*, 'Löschung von strafbaren Hasskommentaren durch soziale Netzwerke weiterhin nicht ausreichend' (Bundesministerium für Familie, Senioren, Frauen und Jugend – Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 14 March 2017) <https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/loeschung-von-strafbaren-hasskommentaren-durch-soziale-netzwerke-weiterhin-nicht-ausreichend-115300> accessed 26 March 2022.

43 ibid.

44 *Kay-Alexander Scholz*, 'Bundestag beschließt umstrittenes Facebook-Gesetz' (DW.COM, 30 June 2017) <https://www.dw.com/de/bundestag-beschlie%C3%9Ft-umstrittenes-facebook-gesetz/a-39454331> accessed 25 March 2022.

45 *Article 19* (non-governmental organisation), 'Germany: The Act to Improve Enforcement of the Law in Social Networks' (2017) 2.

46 *Bayer* (n 35) 5.

47 *Jefferson Chase*, 'Kommentar: Der Beginn des Aufräumens im Internet' (DW.COM, 30 June 2017) <https://www.dw.com/de/kommentar-der-beginn-des-aufr%C3%A4umens-im-internet/a-39488599> accessed 25 March 2022.

b) Content

Firstly, it should be noted that the NetzDG only applies to large social media platforms, with at least 2 million registered users in Germany.[48] These platforms must provide transparent and user-friendly procedures for the handling of user complaints on illegal content. Most significantly, 'evidently illegal' content must be removed or disabled within 24 hours, while any illegal content must be removed or disabled within seven days of notification.[49] Both the user issuing the complaint, as well as the user having provided the content, shall be informed immediately of this decision.[50] The content shall be saved by the platform for 10 weeks for evidentiary purposes in case of a criminal proceeding.[51] In case of non-compliance by a platform, the NetzDG foresees administrative fines for up to 5 million euros.[52] The platforms are to issue reports every 6 months on the complaints received and the actions taken.[53]

c) Effects

Whether the NetzDG had a significant impact on platform activity against illegal content is debated. A study on the effects of the NetzDG conducted in March 2021 showed that nearly all contested content items are checked and removed based on the community standards of platforms, as opposed to under the NetzDG.[54] Furthermore, 90% of content removals by *Facebook* and *Twitter* are done proactively through automated means, before any user complaint has been made and thus even before the NetzDG provisions could kick in.[55] As an example, the study points to statistics on the second half of 2020, in which *Facebook* had removed 48 million content items in the area of hate speech based on violations of its community standards, while only 154 content items were removed as a result of user complaints against violations of the German Penal Code.[56] This has led to the conclusion in the study that, in reality, the NetzDG had "close to no effect".[57] One should however be careful with such a rushed conclusion. The study also indicated that there was evidence for over-blocking measures because of the NetzDG, wherein platforms 'fled' from the NetzDG into overly broad community standard rules.[58] If this is true, one could argue that the NetzDG did

48 Article 1 NetzDG.
49 Article 3 NetzDG.
50 ibid.
51 ibid.
52 Article 4 NetzDG.
53 Article 3 NetzDG.
54 *idw – Informationsdienst Wissenschaft*, 'HTWK-Studie: „NetzDG hat nahezu keinen Effekt"' (24 March 2021) <https://idw-online.de/de/news765555> accessed 26 March 2022.
55 ibid.
56 ibid.
57 ibid.
58 ibid.

have an effect, namely on the content and enforcement of community standards, even when actions are not formally based on the NetzDG.

Ultimately, the practical discussion shows that two competing frameworks for actions against online hate exist, namely the German (criminal) law, as well as the internal policy standards of platforms. The NetzDG aimed at a stronger enforcement of the former and seems to have ended up increasing the application of the latter. One may argue that if it was the original objective to remove online hate, the basis for removal does not necessarily matter. If all (potentially) problematic content is removed, the threats of online harm and extremism are indeed lessened (at least on those platforms where these internal policies are pursued).

Concerning the enforcement of the reporting obligations, *Facebook* was the first platform to be fined (2 million euros) in July 2019 for incomplete reports. Another fine of 3 million euros against the same platform was issued in July 2021. These sanctions were not imposed for errors in the handling of individual complaints against items of hate speech, but rather for systemic failures of underreporting content-removal and for not having the right procedures in place. Following the second fine, a *Facebook* spokesperson stated that the complaint procedure of *Facebook* and *Instagram*, mandated by the NetzDG, had been adjusted in early 2021.[59] Again, this indicates that the German legislator had succeeded in affecting the actions of platforms.

d) Reform and legality

Following the adoption of the NetzDG in 2017, the question on how to regulate online extremism has remained a central one in German politics, particularly in the wake of politically motivated terrorist attacks.[60] In June 2019, the politician *Walter Lübcke* was murdered based on his stand on Germany's immigration policies, with links being found between the perpetrator and neo-Nazi networks.[61] In October 2019, a right-wing terrorist failed to enter a synagogue in Halle and ended up shooting two persons.[62] The terrorist was found to be have been active on online forums where far-right content was shared.[63] As a result of these cases, the German government decided to strengthen the NetzDG framework.[64] The then Minister of Justice, *Christine Lambrecht*, stated that "we must dry up the breeding ground

59 *Der Tagesspiegel*, 'Hass im Netz: Facebook zahlte fünf Millionen Euro Strafe' (*presseportal.de*, 9 March 2021) <https://www.presseportal.de/pm/2790/5010339> accessed 26 March 2022.

60 *Delcker* (n 23).

61 *BBC News*, 'Walter Lübcke: Man on trial admits to killing German politician' (5 August 2020) <https://www.bbc.com/news/world-europe-53662899> accessed 14 July 2022.

62 *Delcker* (n 23).

63 ibid.

64 *Der Tagesspiegel Online*, 'Meldepflicht für Hass-Postings: Bundesregierung beschließt Maßnahmen gegen Hetze im Internet' (19 February 2020) <https://www.tagesspiegel.de/politik/meldepflicht-fuer-hass-postings-bundesregierung-beschliesst-massnahmen-gegen-hetze-im-internet/25561864.html> accessed 26 March 2022.

on which this extremism thrives".[65] This statement illustrates the rationale for strengthening the NetzDG framework and the threats identified by the legislator. Not only do individual extremists constitute a threat, but their danger is amplified by the possibility for them to exchange their ideas online. Having seen the potential real-life consequences of online extremism, the legislator sought to go beyond a mere notice and takedown procedure. It was therefore decided that platforms, having identified illegal content, should notify the federal police, so as to facilitate the criminal enforcement process. The reform of the NetzDG, which came into force in March 2021, thus added an important reporting obligation. As of February 1, 2022, the platforms were obliged to report the violation of certain provisions of the German Penal Code (including hate speech under Articles 130 and 86a) to the German Federal Criminal Office.

However, already in June 2021, *Google Ireland*, on behalf of its daughter company *YouTube*, challenged the new provision and requested emergency interim legal protection before the Administrative Court of Cologne, with *TikTok*, *Meta* and *Twitter* later joining this claim.[66] The Administrative Court partially granted the interim legal protection on March 1, 2022.[67] In its decision, the court found that the reporting obligation under the NetzDG constitutes a violation of the country-of-origin principle as found in the E-Commerce Directive under EU law. According to this principle, the legal requirements applicable to an internet service provider are those of the Member State in which the provider is established. The exceptions to this principle could not be invoked in the present case, as the legislature had neither carried out the consultation and information procedure foreseen for such exceptions nor had the requirements for an emergency procedure been met.[68]

Furthermore, the court found that the Federal Criminal Office, to which notifications are to be made under the NetzDG reform, does not fulfil the independence-requirement for

65 ibid.

66 *Anna Biselli*, 'Netzwerkdurchsetzungsgesetz: Ab Februar gilt die Meldepflicht. Eigentlich.' (netzpolitik.org, 31 Janunary 2022) <https://netzpolitik.org/2022/netzwerkdurchsetzungsgesetz-ab-februar-gilt-die-meldepflicht-eigentlich/> accessed 26 March 2022; *Pauline Dietrich*, 'VG Köln: Google geht gegen das NetzDG vor' (Legal Tribune Online, 30 July 2021) <https://www.lto.de/recht/nachrichten/n/vg-koeln-6l127721-6k376921-google-youtube-3a-netzdg-meldepflicht-bka-datenschutz-verfassungswidrig-europarechtswidrig/> accessed 26 March 2022.

67 VG Köln, Beschluss v. 1.3.2022 – 6 L 1277/21. See press release of the court *Verwaltungsgericht Köln*, 'Gericht entscheidet über Eilanträge von Google und Meta: Netzwerkdurchsetzungsgesetz verstößt teilweise gegen Unionsrecht' (1 March 2022) <https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/05_01032022/index.php> accessed 26 March 2022.

68 *Verwaltungsgericht Köln* (n 67).

supervising obligations of audiovisual media services providers as found in the Audiovisual Media Services Directive[69].[70]

While this decision only concerned interim protection, the reasoning of the court already indicates that a decision in the principal proceeding will also find the NetzDG reporting framework to be in violation of EU law. The above ruling can therefore be seen as a setback to the government's intention of using the NetzDG to cooperate with platforms when pursuing illegal hate speech in criminal proceedings. The future of the entire NetzDG-framework is currently uncertain, as it remains unclear how the concerns raised by the Administrative Court of Cologne can be met. This uncertainty could lead to a reference to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

e) Actions by media authorities

The reform of the NetzDG should be seen in the broader context of online content supervision in Germany. As discussed above, platforms are required to react to content complaints by users. In parallel, the 14 different State Media Authorities also monitor for illegal content, including content on platforms found to be provided by users from Germany. As of early 2021, the Media Authority of North-Rhine Westphalia started monitoring online content through automated means with the help of an AI-software.[71] Under the project "pursue, not just delete", the media authority is cooperating with the police and public prosecutors.[72] If illegal content is identified, it is first forwarded to the criminal enforcement agencies. In case the content is indeed deemed to violate the Penal Code, criminal proceedings will be initiated against the publisher of the content. In the case of a conviction, the media authority will be notified of this result, and it will consequently approach the platform in question and request the removal of the content. Media authorities may be granted the status of a

69 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

70 *Legal Tribune Online*, 'VG Köln: Zentrale Vorschriften des NetzDG unanwendbar' (1 March 2022) <https://www.lto.de/recht/nachrichten/n/vg-koeln-6l127721-6l135421-netzdg-verstoss-unionsrecht-google-meta-meldepflichten/> accessed 26 March 2022.

71 *Landesmedienanstalt NRW*, 'Viel mehr als nur Löschen' <https://www.medienanstalt-nrw.de/imagebroschuere/viel-mehr-als-nur-loeschen.html> accessed 7 April 2022.

72 *Landesmedienanstalt NRW*, 'Verfolgen statt nur Löschen – Rechtsdurchsetzung im Netz' <https://www.medienanstalt-nrw.de/themen/hass/verfolgen-statt-nur-loeschen-rechtsdurchsetzung-im-netz.html> accessed 26 March 2022.

trusted flagger by platforms, meaning that their request will be prioritised.[73] As of April 2022, the detection software is now used by media authorities on a national level.[74]

Both this project, as well as the reform of the NetzDG, show that simple notice and takedown measures are deemed insufficient by the legislator and the competent supervisory authorities in Germany. Instead, an effective criminal enforcement is considered to better provide a general preventive effect.[75] It is worth noting that the media authorities constitute independent supervisory media authorities, unlike the Federal Criminal Office, which is subject to the control of the Federal Ministry of Justice and Consumer Protection. It is therefore possible that a different enforcement scheme, providing a larger role for the media authorities as an intermediary actor between the platforms and the police, could prove a viable solution when re-structuring the NetzDG in light of the interim ruling by the Administrative Court of Cologne.

f) From a militant democracy perspective

The debate surrounding the enactment of the Network Enforcement Act and its reform show that this act can be seen as a response by the legislator to online hate and extremism. It is thus a good example of a measure taken by a militant democracy in order to protect the democratic system and the dignity of affected individuals. It does not increase the scope of criminal hate speech, but rather seeks to increase the effective enforcement of existing legislation online. When confronted with the volume of online hate speech, it is not surprising that the state turns to the platforms for help in this enforcement process. Having regard to the importance granted to human dignity in the German Basic Law, it follows that a significant effort is made to combat hate speech.

As discussed at the beginning of this paper, a militant democracy seeks to defend itself against its enemies and it is worth considering who is the perceived enemy to democracy in the rationale behind the Network Enforcement Act. Firstly, the enemy in this case is each individual who provides or shares anti-democratic or hateful speech online. These actions weaken the online public discourse, by discouraging participation from all societal groups, and may even encourage extremists to act out their hatred in real life. The enemy is there-

73 See for example for the Media Authority Bremen and *Facebook*: *Landesmedienanstalt Bremen*, 'Gemeinsam Stark Gegen Hass Und Hetze: Medienanstalten Setzen Auf Kooperation Zur Bekämpfung von Hasskriminalität Im Internet' < https://www.bremische-landesmedienanstalt.de/media-news/gemeinsam-stark-gegen-hass-und-hetze-medienanstalten-setzen-auf-kooperation-zur> accessed 7 April 2022.

74 *Deutsche Presse-Agentur*, 'Informationstechnologie: Medienanstalten setzen bundesweit auf Künstliche Intelligenz' (Die Zeit, 7 April 2022) <https://www.zeit.de/news/2022-04/07/medienanstalten-setzen-bundesweit-auf-kuenstliche-intelligenz?utm_referrer=https%3A%2F%2Fwww.google.com%2F> accessed 7 April 2022.

75 *Landesmedienanstalt NRW* (n 72).

fore both represented in the terrorist of Halle, as well as in individuals who may have communicated with him in the same online network.

At the same time, politicians referred to the online 'breeding ground' for hate, which can be understood as referring to the platform which enabled the hateful communication to take place. In this sense, the platform itself can be regarded as another enemy of democracy, targeted by the NetzDG. The following section will discuss the approach under EU law towards notice and takedown requirements, in order to determine if a similar underlying rationale can be identified on this level.

2. Brief look at EU law

Having examined the German approach towards content moderation (and its connection to criminal enforcement), this paper will briefly examine the corresponding EU framework. From the outset, it should be noted that the EU is not competent to harmonise the substantive criminal law of its Member States.[76] Concerning minimum rules, the EU legislator may require Member States under Article 83 TFEU[77] to criminalise serious crimes which have a cross-border dimension. In the context of hate speech, Framework Decision 2008/913/JHA[78] on combating certain forms and expressions of racism and xenophobia by means of criminal law provides for the criminalisation of hate speech on the grounds of race, colour, religion, descent or national or ethnic origin. There is currently a discussion to expand these grounds to include for instance sexual orientation.[79]

Apart from these minimum rules in the national criminal law of the Member States, EU law does not prescribe which exact content is to be considered illegal and should be removed by platforms. Instead, in an effort to simplify the provision of digital services across the Union, EU law seeks to harmonise the liability of platforms for illegal content, wherein the illegality is to be determined according to the applicable national law. Consequently, both the E-Commerce Directive, as well as the DSA, are based on the harmonisation of the (digital) internal market. National approaches, such as the German legislation discussed in this paper, may come into conflict with the EU-wide rules on platform regulation.

a) E-Commerce Directive

More than twenty years after its introduction in 2000, the E-Commerce Directive remains at the core of EU-regulation of 'internet service providers', a broad category of online actors.

76 *Peter Csonka* and *Oliver Landwehr*, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) Eucrim 261.

77 Treaty on the Functioning of the European Union.

78 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

79 *Nina Peršak*, 'Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes under Article 83(1) TFEU' (2022) 33 Criminal Law Forum 85.

At the time of its adoption, *Google* had just been created in 1999 and its influence was still a far cry from what it is today.[80] In the following years, *Facebook* and *Twitter* were created (in 2004 and 2006 respectively), leading to what was termed as the 'web 2.0'.[81] This development was not yet foreseeable when the E-Commerce Directive was introduced and the prominent and complex role of platforms today is therefore not reflected in its provisions.[82]

For the purpose of the platforms relevant for this paper, Article 14, on providers hosting third party content, is the most relevant. Today's social media platforms do indeed host third party content, however their role can no longer be described as neutral. They take decisions regarding the selection and presentation of this content. Furthermore, it has been noted that a key activity of all major platforms has become the moderation of content.[83] While these platform activities are considered in the DSA discussed below, they are not yet addressed in the E-Commerce Directive. Here, the principal rule adopted is that the hosting providers are not to be held liable for illegal content hosted by third parties if the provider had no knowledge of this infringement. This principle can be described as 'knowledge-based liability'.[84] As a minimum harmonisation measure, it has been noted that the E-Commerce Directive does not set out when and how platforms are to be held liable, but instead merely provides when platforms are *not* liable.[85] In short, Article 14 provides for the exemption from liability for content that is hosted for a third party, if there is no actual knowledge of the illegal content, or if the provider acts expeditiously to remove the content upon obtaining such knowledge. Article 15 emphasises that Member States shall not provide general monitoring obligations on providers.

In the context of (political) defamation, the extent to which these rules allow for placing content moderation obligations on platforms is illustrated in the case *Glawischnig-Piesczek v. Facebook* before the CJEU.[86] *Eva Glawischnig-Piesczek* was an Austrian politician who was, for political reasons, insulted by an anonymous *Facebook* user. The CJEU decided that an Austrian court could demand the removal of identical and equivalent content by *Facebook*. The Court found that such an obligation did not constitute a violation of Articles 14

80 *Mark D Cole*, *Christina Etteldorf* and *Carsten Ullrich*, 'Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive' (Nomos 2020) 43.

81 *Christian Fuchs*, 'Web 2.0, Prosumption, and Surveillance' (2010) 8 Surveillance & Society 288.

82 *Cole*, *Etteldorf* and *Ullrich* (n 80) 44.

83 *Tarleton Gillespie*, 'Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media' (Yale University Press 2018) 21.

84 *Folkert Wilman*, 'The EU's system of knowledge-based liability for hosting service providers in respect of illegal user content – between the e-Commerce Directive and the Digital Services Act' (2021) 12 JIPITEC.

85 *Sophie Stalla-Bourdillon*, 'Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well' in Mariarosaria Taddeo and Luciano Floridi (eds), 'The Responsibilities of Online Service Providers' (Springer International Publishing 2017).

86 CJEU, C-18/18 Glawischnig-Piesczek v Facebook Ireland Limited, ECLI:EU:C:2019:821.

and 15 of the E-Commerce Directive, as it concerned a specific case, and thus did not constitute a general monitoring requirement.

b) Digital Services Act

As already mentioned above, the role of platforms has changed over the years, leading to calls for a reform of the applicable legal framework.[87] In December 2020, the European Commission introduced the much-awaited proposal for a Digital Services Act, aimed at modernising the E-Commerce Directive and "making Europe fit for the digital age"[88].[89] Subsequently, as the legislative process advanced, the Council of the European Union published proposed amendments in November 2021,[90] while the European Parliament did likewise in January 2022[91] and in April 2022, a political agreement was reached following the trilogue negotiations.[92] On 15 June 2022, the European Parliament published the text of a provisional agreement reached with the Council.[93] This text will serve as the basis for the analysis in this paper, while reference will be made to the positions of Council or Parliament where applicable.

Unlike the E-Commerce Directive, the DSA includes a definition of an online platform, defining it as a 'provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information'.[94] Crucially, Articles 14 and 15 of the E-Commerce Directive were retained and are now found in Articles 5 and 7 of the DSA. As such, the basic approach of the knowledge-based liability is kept in place, but certain additions and clarifications can indeed be identified in the DSA. Article 14 on notice and action mechanisms provides that platforms shall put in place user-friendly procedures for the notification of potentially illegal content. According to Article 19, notifications by trust-

87 *Stalla-Bourdillon* (n 85).

88 *European Parliament*, 'Legislative Train Schedule: A Europe Fit for the Digital Age' <https://www.europarl.europa.eu/legislative-train> accessed 17 March 2022.

89 For an in-depth analysis of the Commission proposal of the DSA see *Mark D Cole*, C*hristina Etteldorf* and *Carsten Ullrich*, 'Updating the Rules for Online Content Dissemination – Legislative Options of the European Union and the Digital Services Act Proposal' (Nomos 2021).

90 *Council of the EU*, 'What is illegal offline should be illegal online: Council agrees position on the Digital Services Act' (25 November 2021) <https://www.consilium.europa.eu/en/press/press-releases/2021/11/25/what-is-illegal-offline-should-be-illegal-online-council-agrees-on-position-on-the-digital-services-act/> accessed 18 July 2022.

91 Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act).

92 For a discussion of the results of the trilogue negotiations see *Mark D Cole* and *Christina Etteldorf*, 'Paket mit vielen Einzelteilen: Der Digital Services Act und der Mediensektor' (epd, 13 May 2022) <https://www.epd.de/fachdienst/epd-medien/schwerpunkt/debatte/paket-mit-vielen-einzelteilen> accessed 1 August 2022.

93 *European Parliament* (n 13).

94 Article 2(h) DSA.

ed flaggers (which are determined by the national Digital Services Coordinators) shall be given priority.

Also, under Article 14, users shall be informed of decisions taken with regards to the content, if contact information is provided with the notice. Where decisions are taken through automated means, this information shall be included. Decisions shall be taken in a 'timely, diligent, non-arbitrary and objective manner'. The European Parliament had added in its position paragraph 3a, which provided that content shall remain visible while the legality assessment is ongoing. This effort to protect the interest of the content provider was not retained in the text of the provisional agreement. According to Article 15, if a decision to remove, disable or demote content is taken, the user who provided this content shall be informed and given a 'clear and specific statement of reasons to any affected recipients of the service'.

Article 12 of the DSA provides that information on terms on conditions shall be provided by the platform. This shall include 'information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making, and human review as well as rules of procedure of their internal complaint handling system and human review'. As was stated above in relation to a study conducted on the result of the NetzDG, platforms often remove content through an ex-ante (automated) control, showing the importance of this proposed rule in the DSA. The Parliament, in its proposed amendments to Article 12 of the original proposal by the Commission, provided that the terms of conditions shall respect fundamental rights as enshrined in the EU Charter. This proposal was retained in the text of the provisional agreement, which foresees that platforms 'shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions'. They shall do so in accordance with 'the applicable fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter'. This provision can be seen as steps to protect platform users against over-blocking measures.

The discussion on the German enforcement also highlighted the importance of clarifying how platforms and state authorities should work together. An effort in this direction can be noted in Article 8, on 'orders to act against illegal content', and Article 9, on 'orders to provide information'. Under Article 8, platform providers shall, upon receiving an order by a national authority to act against an individual content item, inform the authority of 'any follow-up given to the orders, without undue delay, specifying if and when the order was applied'. Additionally, Article 9 foresees that national authorities can issue orders to provide information on a specific individual recipient (user) of the service. Platforms shall confirm the receipt of such an order and specify the effects given to it. Both Articles can be described as somewhat vague and are lacking any enforcement procedure in case a platform refuses to act in accordance with an order received.

In discussing the relationship between platform providers and law enforcement authorities, Article 15a should also be noted, which provides that when providers become aware of information concerning a 'serious criminal offence involving a threat to the life or safety of

a person or persons', it shall provide this information to the authorities of the Member State concerned (the Member State of the location of the offence/perpetrator).

c) Terrorist Content Online Regulation

While the DSA requires for platforms to take decisions when notices are made, for instance by their users, it does not provide a list of infringements which must be removed, as is done under the NetzDG. It does therefore seem that individual hate speech is not considered as significant a threat as under the German system. As to that matter, the paper discussed that the reform of the NetzDG was a response to (right-wing) terrorist attacks.

In this area, the EU passed a specific piece of legislation in May 2021 in form of Regulation 2021/784 on addressing the dissemination of terrorist content online, which entered into force in June 2022.[95] An in-depth discussion of this regulation goes beyond the scope of this paper, but this instrument should be mentioned to illustrate that the DSA cannot solely be viewed in isolation. In short, the Terrorist Content Online Regulation considers that terrorist content is most harmful immediately after dissemination and therefore provides for platforms to remove such content within one hour.[96] Content is classified as terrorist content if it encourages or glorifies the committal of terrorist acts or provides instruction on how to conduct such attacks.[97] In response to the introduction of this Regulation, *Margaritis Schinas*, Commissioner for Promoting our European Way of Life, stated that "from now on, online platforms will have one hour to get terrorist content off the web, ensuring attacks like the one in Christchurch cannot be used to pollute screens and minds. This is a huge milestone in Europe's counter-terrorism and anti-radicalization response."[98]

This rhetoric, and the reference to the 2019 terrorist attack in Christchurch, New Zealand, is not unlike the political context and reasoning behind the NetzDG in Germany. It can be noted that the Terrorist Content Online Regulation, while being strict in the time-limits provided, is more limited in scope compared to the NetzDG, which goes beyond terrorist content.

95 Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

96 *Thomas Wahl*, 'Regulation Addressing the Dissemination of Terrorist Content Passed' (Eucrim, 7 July 2021) <https://eucrim.eu/news/regulation-addressing-the-dissemination-of-terrorist-content-passed/> accessed 10 August 2022.

97 Article 2(5) Terrorist Content Online Regulation.

98 *EU Reporter*, 'Security Union: EU Rules on Removing Terrorist Content Online Enter into Force' (8 June 2021) <https://www.eureporter.co/world/terrorism-world/2021/06/08/security-union-eu-rules-on-removing-terrorist-content-online-enter-into-force/> accessed 10 August 2022.

3. Assessment of the notice and takedown approach

Having considered the German and (current and future) EU provisions related to notice and takedown obligations, an overall assessment of the *status quo* of this approach can be made.

The NetzDG takes the notice and takedown obligations for platforms to the next level, especially in view of the time limits it provides. 24 hours for the removal of 'evidently illegal' content appears to be a challenge even to those platforms most eager to monitor hosted content. Seven days for illegal content in general appears more reasonable, but this of course depends on the number of complaints received. No time limits at all are provided in the DSA, which may constitute a source for future uncertainty.

From the start, the NetzDG has been heavily criticised for requiring platforms to determine whether content is in conformity with criminal law, a task usually reserved for state actors. In view of this criticism, it is interesting to note the lack of safeguards against over-blocking measures by the platforms in the NetzDG. The DSA shows more awareness of such concerns and includes provisions aimed at also protecting the platform user who provided the contested content.

Both the DSA and the NetzDG address the notice and takedown mechanism of platforms and provide certain transparency requirements. Under the NetzDG, platforms shall provide public reports of the content removed, while Article 13 of the DSA also foresees yearly reports on monitoring actions. On the level of an individual user, the DSA also provides for the issuance of a statement of reason to affected platform users. Furthermore, the NetzDG foresees strict deadlines for platform action, while no equivalent provision can be found in the DSA. This shows that the German approach towards take down action prioritises actions by the platforms, while the DSA seeks to ensure that these actions are done in a manner which also protects the user behind the content in question and thus seeks to prevent over-blocking measures by the platforms.

Despite its apparent rigidness, the NetzDG was reformed in 2021, providing even more demanding rules on platforms, with the aim of facilitating criminal enforcement. This already shows that the notice and takedown approach, however strict, may be considered insufficient by the legislator when faced with the challenge of online extremism. Ultimately, the reform was (temporarily) halted by a national court just when platforms were supposed to start implementing the new rules. The DSA also provides that platform providers shall inform national authorities in case of serious criminal conduct, but this is limited to cases in which there is a danger to a person or persons.

In general, the limits of the notice and takedown approach should be considered. If successfully implemented, platforms would be generally free of illegal content, including illegal hate speech. If an effective cooperation with law enforcement agencies would be established, posting such content would additionally lead to an effective criminal persecution. These actions are only addressing the most serious cases of online speech. More subtle problems, such as disinformation or a gradual polarisation and radicalisation cannot be addressed through the application of criminal law. As such, it has been noted that "removing

criminally illegal content solves only a minor share of the problems in the public discourse."[99] A rigid notice and takedown approach, as pursued under the NetzDG, is thus inadequate for a holistic protection of democracy online. Both the German and EU legislator have developed further tools to strengthen its response to the threats posed by platforms, and the use thereof. The following section will identify and discuss measures going beyond the tried and tested notice and takedown approach.

IV. Beyond notice and takedown measures

The NetzDG reform of 2021 was, as discussed above, introduced as a response to the pressure on the legislator to take measures in the wake of right-wing terrorist attacks. Parallelly to this initiative, the German media law as a whole was reformed. As will be discussed below, the changes introduced aimed, amongst other, at protecting the discourse in an online environment. Here, the background and political context should first be considered. In Germany, 2021 was referred to as a *Superwahljahr* (super election year), due to the number of elections taking place at various levels, including the federal elections in September 2021. In anticipation of this, warnings of the danger of the increasing politicisation of online platforms were raised in media, academia, and by the media regulators.[100] Information today is often mediated through a pre-selection of content by an intermediary, such as a social media platform or a search engine. The user cannot necessarily know why a certain content item is shown on the platform. An issue, already mentioned in the introduction to this paper, is the potential creation of an echo-chamber, in which platforms, in an effort to keep a user engaged, may show only one side of a debate. In such an echo-chamber, those users participating could reinforce and potentially radicalise each other.[101]

At this time, there was also a growing awareness of the danger of disinformation as a manner of eroding the public confidence in the democratic process and there was in particu-

99 *Bayer* (n 35) 5.

100 *Martin Gerecke* and *Gabriele Stark*, 'Ein neues Medienrecht für Deutschland' (2021) GRUR 816; *Rayna Breuer*, 'Like or dislike: Der Wahlkampf auf Social Media' (DW.COM, 12 September 2021) <https://www.dw.com/de/wahlkampf-social-media-bundestagswahl/a-59076633> accessed 7 April 2022; *Vanessa Fatho*, 'Wahlkampf auf Social Media: Wie Algorithmen die Bundestagswahl beeinflussen' (SWR, 24 September 2021) <https://www.swr.de/swr2/leben-und-gesellschaft/wahlkampf-auf-social-media-wie-algorithmen-die-bundestagswahl-beeinflussen-100.html> accessed 7 April 2022; *Kommission für Jugendmedienschutz*, 'Social Media wird politischer – Branche diskutiert Lösungen für mehr Transparenz' (1 December 2020) <https://www.kjm-online.de/service/pressemitteilungen/meldung?tx_news_pi1%5Bnews%5D=4877&cHash=d5ad70f4a534d4907896272bf482aa65> accessed 14 July 2022.

101 *Matteo Cinelli* and others, 'The echo chamber effect on social media' (2021) 118 Proceedings of the National Academy of Sciences.

lar a fear of a potential Russian interference in the elections.[102] These concerns were further increased during the Covid-19 pandemic, which saw a range of false information being spread on social media, raising the question whether platforms should be required to take action against the spread of such disinformation.[103] In August 2020, protests against Covid-19 measures led to an (unsuccessful) assault on the German Reichstag in Berlin, not unlike the Capitol riot in Washington, D.C., in January 2021.[104]

These events coincided with the long-prepared overhaul of the German media law by the state media authorities in the form of the introduction of the Interstate Media Treaty, which entered into force in November 2020. The MStV addresses traditional media, such as radio and television broadcasters, internet media providers, and, unlike its predecessor, intermediaries which are not themselves editorially responsible for the content they provide. The paper will discuss two ways in which the MStV seeks to protect the online discourse and the public access to information against the broad threats of radicalisation, polarisation, and disinformation. Firstly, this concerns journalistic due diligence requirements for (broadly defined) online news providers and secondly, transparency and non-discrimination obligations for intermediaries when providing media content. Lastly, the paper will briefly discuss to what extent similar rules can be found in the DSA.[105]

The MStV, and particularly the novel approach of addressing intermediaries, has received widespread academic attention in Germany.[106] As the same cannot be said from an

102 *Markus Becker*, 'Darum ist Deutschland das Topziel für russische Fake News' (Der Spiegel, 8 March 2021) <https://www.spiegel.de/politik/deutschland/darum-ist-deutschland-das-top-ziel-fuer-russische-fake-news-a-fab21190-979d-496a-93b4-c0b7d7446bca> accessed 29 March 2022.

103 *Christoph Sterz*, 'Kampf gegen Corona-Fakes – Soziale Netzwerke noch mehr in der Pflicht?' (Deutschlandfunk, 14 May 2020) <https://www.deutschlandfunk.de/kampf-gegen-corona-fakes-soziale-netzwerke-noch-mehr-in-der-100.html> accessed 29 March 2022.

104 *Gerhard Matzig*, 'Sturm auf US-Kapitol und Reichstag – Politische Architektur' (Süddeutsche.de, 8 January 2021) <https://www.sueddeutsche.de/kultur/us-kapitol-reichstag-sturm-architektur-mob-1.5167373> accessed 29 March 2022.

105 It can be noted that the European Commission has voiced its disagreement with the approach taken by the German legislator, both in the MStV and the Statute on Media Intermediaries (based on the MStV), referring to a potential conflict with future EU legislation. However, this has not prevented the entering into force of these measures, nor has an infringement proceeding been opened by the Commission.

106 In detail on the provisions of the MStV cf. *Reinhard Hartstein*, *Wolf-Dieter Ring* and *Johannes Kreile* (eds), 'Medienstaatsvertrag, Jugendmedienschutz-Staatsvertrag (HK-MStV)' (91st edn, CF Müller 2020); see also *Florian Flamme*, 'Schutz der Meinungsvielfalt im digitalen Raum' (2021) Multimedia und Recht 770; *Christoph Enaux* and *Lucas Wüsthof*, 'Der neue Medienstaatsvertrag – Was gilt für Medienplattformen, Benutzeroberflächen und Medienintermediäre?' (2020) K&R 469; *Kerstin Liesem*, 'Pionierleistung mit Signalwirkung: Die regulative Einhegung von Medienintermediären im Medienstaatsvertrag' (2020) AfP 277; *Boris P Paal* and *Aron Heidtke*, 'Vielfaltssichernde Regulierung der Medienintermediäre nach den Vorschriften des Medienstaatsvertrags der Länder' (2020) ZUM 230; *Stephan Ory*, 'Der Medienstaatsvertrag – Neuer Wein in neuen Schläuchen?' (2019) ZUM 139; *Carsten Siara*, 'Der Medienstaatsvertrag und die „neuen" Medien' (2020) MMR 523.

international perspective, this paper aims to provide an insight into those elements of the MStV which are of particular interest in the context of this paper.

1. Journalistic due diligence requirements

"The real opposition is the media.
And the way to deal with them is to flood the zone with shit."[107]
Steve Bannon

This statement by the former executive chairman of the notorious *Breitbart News* and later chief strategist of the *Trump* administration[108] encapsulates the essence of disinformation campaigns. Public trust in the information of traditional media is undermined through the dissemination of an abundance of alternative information and narratives.

In view of the war in Ukraine, the question of how to deal with disinformation has reached a new dimension, calling for potentially stricter responses by platforms and regulators. For instance, it has been noted that in the case of 'propaganda for war', prohibited under Article 20 of the International Covenant on Civil and Political Rights (ICCPR), stricter obligations for restricting content may apply.[109] This paper will not address the specific disinformation related to the Ukraine war context. However, the pre-war conduct by *RT DE,* the German language version of *RT* (formerly *Russia Today*), will be used as an example to illustrate the potential application of the new German legislation.

Aside from the specific and serious case of war-time propaganda, one can note that disinformation poses a general threat to the trust in the democratic structure of a society.[110] At the same time, this content is not illegal as such and can therefore not be addressed through conventional notice and takedown obligations for platforms. Other measures must therefore be used against the systematic spreading of disinformation. One of these is the insistence on journalistic due diligence requirements for all media providers, including for non-traditional online news sources. Journalistic due diligence requirements are the rules for the journalistic profession in Germany. Most professional news publishers subscribe to the press codex, which is enforced by the independent Press Council, the organ of self-regulation for the German print media (and its online versions).[111] The standards for journalists include,

107 *Michael Lewis*, 'Has Anyone Seen the President?' (Bloomberg, 9 February 2018) <https://www.bloomberg.com/opinion/articles/2018-02-09/has-anyone-seen-the-president> accessed 26 March 2022.

108 *Tom McCarthy*, 'A Year in Trump's Orbit: A Timeline of Steve Bannon's Political Career' (The Guardian, 18 August 2017) <https://www.theguardian.com/us-news/2017/aug/18/a-year-in-trumps-orbit-a-timeline-of-steve-bannons-political-career> accessed 6 April 2022.

109 *Björnstjern Baade*, 'The EU's "Ban" of RT and Sputnik' (Verfassungsblog, 8 March 2022) <https://verfassungsblog.de/the-eus-ban-of-rt-and-sputnik/> accessed 7 April 2022.

110 *Spencer McKay* and *Chris Tenove*, 'Disinformation as a Threat to Deliberative Democracy' (2021) 74 Political Research Quarterly 703.

111 *Presserat*, 'Aufgaben & Organisation' <https://www.presserat.de/aufgaben-organisation.html> accessed 29 March 2022.

amongst other, the obligation 'to respect truth and human dignity, to separate advertising and editorial content, not to report one-sidedly, to respect individual rights, to protect against discrimination and to separate reporting and commentary'.[112]

The question, prior to the introduction of the MStV, was whether online amateur journalists, or so-called influencers, were also subject to these due diligence requirements. There was a general consensus amongst scholars that this was indeed the case, although it was noted that no enforcement system was in place to supervise these actors.[113] Under the MStV, this question has been clarified. According to Article 19 MStV, online providers which 'regularly provide news or political information' are to adhere to the recognised journalistic standards. In particular, the 'content, origin and truth' of the information provided is to be verified prior to dissemination. What constitutes news under this provision should be interpreted in a broad manner and includes for instance information provided by a 'news-youtuber', even when the topics discussed are not the same as those typically found in traditional media sources.[114]

In enforcing this rule, *Tobias Schmid*, the director of the State Media Authority of North-Rhine Westphalia, assured that "we do not look at the question of whether we like the content or not".[115] Instead, the focus lies on "whether there are technical errors, so to speak: sources are not clearly marked, whether quotes are not marked as such, whether research obligations have not been fulfilled and whether this may create an impression that can be manipulative in the public perception, whether intentional or accidental".[116] The reference to manipulation shows that false information capable of affecting public opinion is targeted by the media authority. The director of the different media authorities, *Wolfgang Kreißig*, also noted that providers must adhere to the "journalistic rules of the game and apply the applicable tools of the trade".[117] Ignoring these would lead to a destabilisation of democratic communication processes. Ultimately, he stressed that "constraining disinformation on the Internet" constituted a "high priority for the media authorities in the super election year 2021".[118]

112 *Landesmedienanstalt Saarland*, 'Journalistische Sorgfaltspflichten' <https://www.lmsaar.de/journalistische-sorgfaltspflichten/> accessed 29 March 2022.

113 *Stefanie Lefeldt* and *Markus Heins*, 'Medienstaatsvertrag: Journalistische Sorgfaltspflichten für Influencer*innen' (2021) Multimedia und Recht 126; *Laura Dereje*, 'Sorgfaltspflichten auch für Laien im Netz!' (Verfassungsblog, 5 June 2019) <https://verfassungsblog.de/sorgfaltspflichten-auch-fuer-laien-im-netz/> accessed 29 March 2022.

114 *Lefeldt* and *Heins* (n 113) 129.

115 *Christoph Sterz*, 'Initiative der Landesmedienanstalten – Medien-Aufseher gehen gegen rechte Online-Medien vor' (Deutschlandfunk, 16 February 2021) <https://www.deutschlandfunk.de/initiative-der-landesmedienanstalten-medien-aufseher-gehen-100.html> accessed 30 March 2022.

116 ibid.

117 *Anja Zimmer*, 'Landesmedienanstalten prüfen: Warum Ken Jebsen ein Mahnschreiben bekommt' (FAZ.NET, 17 February 2021) <https://www.faz.net/aktuell/feuilleton/medien/fake-news-im-internet-medienstaatsvertrag-kuemmert-sich-17201173.html> accessed 17 March 2022.

118 ibid.

It should be noted that the main aim of the journalistic due diligence obligations is not necessarily to achieve a high standard of journalism but rather to protect individual rights which could be infringed by a publication.[119] The statements by *Schmid* and *Kreißig* show that there is additionally the objective to use these rules to focus on the emerging threat of disinformation. This incentive can also be noted in practice. By February 2022, the media authorities had sent 13 notices to social media accounts and web pages of news-providers, amongst them the *Facebook* page of the populist-right publication *Deutschland-Kurier*,[120] the right-wing youth portal *Fritzfeed*[121] and the website *KenFM*, run by conspiracy theorist *Ken Jebsen*.[122] Amongst the infringements found in these cases was the lack of sources provided for factual claims.[123] The case of *Ken Jebsen* will be examined in more detail in the following to illustrate this application.

a) The case of Ken Jebsen

The case of *KenFM* constitutes a prominent example for the application of journalistic due diligence requirements for an alternative online media source. Already prior to the Covid-19 pandemic, *Ken Jebsen* was known as "probably Germany's most successful conspiracy theorist", focusing on topics such as the terrorist attack on the World Trade Center in 2001 and gradually gaining a significant *YouTube*-audience.[124] From the start of the pandemic, *Jebsen* actively shared conspiracies relating to Covid-19 and the alleged control and role of *Bill Gates*.[125] In early 2021, *YouTube* decided to permanently delete *Jepsen*'s *KenFM* channel (an action referred to as 'deplatforming'), with the explication that videos on the channel breached the Covid-19 guidelines of the platform.[126] At this point, however,

119 *Lefeldt* and *Heins* (n 113) 128.

120 *Deutschlandfunk*, 'Neue Wochenzeitung – Der "Deutschland-Kurier" als Sprachrohr der AfD?' (12 July 2017) <https://www.deutschlandfunk.de/neue-wochenzeitung-der-deutschland-kurier-als-sprachrohr-100.html> accessed 30 March 2022.

121 *Daniel Laufer* and *Jan Petter*, 'Fritzfeed: Virale Propaganda' (Netzpolitik.org, 12 April 2020) <https://netzpolitik.org/2020/fritzfeed-virale-propaganda-afd/> accessed 30 March 2022.

122 *Sterz* (n 115).

123 *Süddeutsche.de*, 'Medienaufsicht geht gegen Online-Medien vor' (16 February 2021) <https://www.sueddeutsche.de/medien/kenfm-landesmedienanstalt-1.5208177> accessed 30 March 2022.

124 *Tagesschau.de*, 'Wie wurde Ken Jebsen Verschwörungsideologe?' (17 June 2021) <https://www.tagesschau.de/faktenfinder/ken-jebsen-podcast-101.html> accessed 29 March 2022.

125 *Kira Urschinger*, '„Gates kapert Deutschland!": Was ist dran am KenFM-Video?' (SWR3.de, 21 May 2020) <https://www.swr3.de/aktuell/fake-news-check/faktencheck-ken-jebsen-kenfm-bill-gates-corona-100.html> accessed 7 April 2022.

126 *Joachim Huber*, '„KenFM" war einmal, Ken Jebsen nicht' (Der Tagesspiegel Online, 28 October 2021) <https://www.tagesspiegel.de/gesellschaft/medien/online-angebot-existiert-nicht-mehr-kenfm-war-einmal-ken-jebsen-nicht/27740686.html> accessed 29 March 2022.

Jebsen had already stopped providing new content on *YouTube* for several months, instead presenting his *KenFM*-broadcast on a dedicated website.[127]

Additionally, *Jebsen* was, as mentioned above, amongst those receiving a notice regarding the adherence to journalistic due diligence, requesting in particular the inclusion of sources when factual claims were made.[128] In the case of *Jebsen*, the Media Authority of Berlin-Brandenburg (Mabb) was the competent media authority issuing the notice. In reaction to this letter, *Jebsen* posted a video titled "Mabb – Ministry of truth distributes muzzles".[129] In the video statement, he lamented that the media authority was preventing him from carrying out his profession as journalist. Furthermore, he argued that he had made an effort to adhere to the requirements. However, the sources he provided were not recognised as valid by the media authority (*Jebsen* had cited the known Covid-sceptic physician *Wolfgang Wodarg* as a source).[130] Finally, he informed his viewers that he would be leaving Germany to avoid future censorship.[131] Whether he indeed ended up leaving the country is unclear. He did, however, take down his website *KenFM*, which resulted in the competent media authority deciding to stop proceedings.[132]

It should be noted that the decision to take down *KenFM* was taken by the provider himself and was not prescribed by the media authority. Previously, the media authority had stated that all measures must abide by the principle of proportionality and that a shutdown of a whole channel would only be considered as an ultima ratio measure in the case of repeated and systematic violations, with less severe measures having proven without effect.[133] Today, users trying to access *Ken Jebsen*'s former website are re-directed to a new website on which it is stated that *Jebsen* is holding an advisory role and which is providing similar content. Old *KenFM*-content is still available there. A Berlin address is provided in the website's imprint, and the Media Authority Berlin-Brandenburg has stated that it is currently determining its handling of this new provider.[134]

The case of *Ken Jebsen* shows that requiring certain journalistic standards, particularly with regards to the provision of legitimate sources, can prove an effective tool against on-

127 *Deutschlandfunk Kultur*, 'Verschwörungserzähler Ken Jebsen – YouTube sperrt KenFM' (22 January 2021) <https://www.deutschlandfunkkultur.de/verschwoerungserzaehler-ken-jebsen-youtube-sperrt-kenfm-100.html> accessed 29 March 2022.

128 *Süddeutsche.de* (n 123).

129 *Samantha Günther*, 'Neues Video von Verschwörungstheoretiker Ken Jebsen: "KenFM verlässt Deutschland"' (Volksstimme, 5 June 2021) <https://www.volksstimme.de/deutschland-und-welt/deutschland/neues-video-von-verschwoerungstheoretiker-ken-jebsen-kenfm-verlaesst-deutschland--3167020> accessed 30 March 2022.

130 ibid.

131 *Kurt Sagatz*, 'Sperrung von Ken Jebsens Kanal nur als Ultima Ratio' (Der Tagesspiegel Online, 7 May 2021) <https://www.tagesspiegel.de/gesellschaft/medien/verfahren-gegen-kenfm-sperrung-von-ken-jebsens-kanal-nur-als-ultima-ratio/27169532.html> accessed 30 March 2022.

132 *Huber* (n 126).

133 *Sagatz* (n 131).

134 *Huber* (n 126).

line news-providers specialised in the dissemination of disinformation and conspiracy theories. It also highlights the difficulty, begging the questions of how far a media authority should go in determining what type of sources can be considered legitimate. The ultimate outcome, leading to the creation of a new website, shows that the notice did not have a long-term deterrent effect on this particular provider.

b) The case of RT

Having regarded an actual application of the new MStV rule, this paper will briefly examine the hypothetical case of *RT DE*, the German language version of *RT* (formerly *Russia Today*). The case is hypothetical, as other measures have since been introduced against this provider, making a journalistic due diligence examination obsolete.

The invasion of Ukraine on February 24, 2022, made actions against Russian state-controlled media outlets a priority for the European Union. On February 27, Commission President *von der Leyen* announced that "Russia Today and Sputnik, as well as their subsidiaries, will no longer be able to spread their lies to justify Putin's war and to sow division in our Union. So, we are developing tools to ban their toxic and harmful disinformation in Europe."[135] On March 1, these media outlets were indeed banned as part of the EU sanctions regime against Russia.[136] This paper will not examine the basis of this EU measure, which is exceptional in nature and not based on media law.

It should be noted that the handling of *RT DE* has been on the radar of German media regulators long before the invasion of Ukraine. Firstly, *RT DE* was unable to obtain a broadcast licence for its German programme, as such a licence can only be granted to providers which are independent from state influence.[137] This condition applies to both domestic as well as foreign providers, making *RT* ineligible for a licence based on its close association with the Kremlin.[138] The dissemination by *RT DE* of linear broadcasting on the internet was denied on the same basis by the media authorities.[139]

However, non-linear content, such as videos provided by a *YouTube* channel, do not fall under this provision. As a result, *RT DE* was able to operate a popular *YouTube* channel where it provided news and entertainment. It received millions of views, particularly on

135 *Patrick Wintour*, *Jennifer Rankin* and *Kate Connolly*, 'EU to ban Russian state-backed channels RT and Sputnik' (The Guardian, 27 February 2022) <https://www.theguardian.com/media/2022/feb/27/eu-ban-russian-state-backed-channels-rt-sputnik> accessed 31 March 2022.

136 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

137 Article 53(3) MStV.

138 *Frederik Ferreau*, '"RT DE" verboten: Nutzt der Sender eine Hintertür?' (LTO, 2 May 2022) <https://www.lto.de/recht/hintergruende/h/medienanstalt-untersagt-rundfunksender-rt-deutsch-in-deutschland-medienstaatsvertrag-keine-lizenz-staatsferne-rundfunk/> accessed 31 March 2022.

139 ibid.

content related to Covid-19.[140] This channel was eventually deplatformed by *YouTube* in September 2021, based, just as in the case of *KenFM*, on the violation of the Covid-19 community guidelines of the platform.[141] This ban by *YouTube* was seen by *RT* editor-in-chief *Margarita Simonjan* as proof for a "media war" from Germany's side.[142] In response, the spokesperson of the German government emphasised that this decision was not made by the German government and that claiming a German involvement meant "constructing a conspiracy theory".[143]

It is conceivable, however, that under the current legal framework, state media authorities may have taken actions on journalistic due diligence grounds against the *YouTube* channel of *RT DE*, had it not been removed altogether by the platform. Just as in the case of other online news-providers, this would have started with a simple notice. The action taken by *YouTube* to take down the channel is a more drastic step than would have initially been taken by the media authority.

c) Assessment

The above section shows that media authorities are motivated to use journalistic due diligence requirements as a new tool against disinformation provided by alternative online news providers. These providers, and the potentially false and harmful content distributed by them, have been identified as a threat prior to the introduction of MStV. Before the media law reform, no supervision for such providers was foreseen, while traditional media, both in print and online, was self-regulated by the Press Council. The MStV closes this gap and provides for the media authorities to monitor non-traditional internet news providers.[144] Media authorities have, as discussed above, taken advantage of this new competence and issued warnings against a range of such actors.

Platforms may, completely independently of the MStV rules, take decisions against disinformation based on their own community guidelines. In the two examples discussed, *Ken Jebsen* and *RT DE* originally had *YouTube* channels as their principal means of disseminating content. In both cases, *YouTube* removed the channels as a result of Covid-19-related

140 *Mickey Manakas*, 'Russia Today: Deutschsprachiger Ableger Sprachrohr für Covid-19-Verschwörungserzähler' (Der Standard, 7 November 2021) <https://www.derstandard.de/story/2000130958925/russia-today-deutschsprachiger-ableger-sprachrohr-fuer-covid-19-verschwoerungserzaehler> accessed 7 April 2022.

141 *Patrick Gensing* and *Silvia Stöber*, 'YouTube sperrt Kanäle von RT Deutsch' (Tagesschau.de, 28 September 2021) <https://www.tagesschau.de/faktenfinder/rtde-youtube-101.html> accessed 31 March 2022.

142 *Michael Borgers*, 'Russischer Staatssender – Youtube-Sperre gegen RT wirft Grundsatzfragen auf' (Deutschlandfunk, 29 September 2021) <https://www.deutschlandfunk.de/russischer-staatssender-youtube-sperre-gegen-rt-wirft-100.html> accessed 31 March 2022.

143 ibid.

144 It should be noted that such providers can also apply to fall under the self-regulation procedure of the Press Council.

content. This shows that platforms, in this case *YouTube*, may act significantly faster and in a stricter manner than the German media authorities. The argument has been raised that "no matter how sensible a ban on Covid-19 misinformation may be: YouTube's rules are currently shaping the online discourse for many millions of German users – without any form of democratic legitimacy".[145] This criticism reminds us of the discussion surrounding the NetzDG and the content removal on the basis of community guidelines of platforms. From the standpoint of a militant democracy, it can be seen as a positive step when platforms are removing content which has already been identified as problematic by the state, such as Covid-19 conspiracies. However, these actions also highlight the powers of platforms.

Pointing to the lack of democratic legitimacy of these measures is not to say that stricter actions by media authorities, pre-empting platform actions, would not come without a cost. Here, it should be recalled that the aim of the militant democracy is to defend itself against its enemies, which in the present case have been identified to constitute online news conspiracists, with the aim of increasing the resilience of the democracy. In the case of traditional and alternative media sources, the effect of these measures must be scrutinized carefully. As it is in the interest of the democracy to preserve and rebuild trust in traditional media sources,[146] one must ask to what extent measures against alternative news providers, based on due diligence obligations, will help to gain the trust of those who have turned to these alternative sources. In Germany, the term *Lügenpresse* (lying press) was already chanted prior to the pandemic at anti-immigration demonstrations all over the country.[147] Indeed, the term became so widely used that it was voted 'non-word' of the year in 2014.[148] It is those who have lost trust in the traditional press, which they claim to only represent the elite, who are attracted by voices such as that of *Ken Jebsen* and who might be targeted by channels such as *RT DE*. If the media authorities start proceedings against these providers, this may be seen as a confirmation by those claiming that the media is controlled by the government. Of course, one can point to the independent role of the German media authorities, which is a pillar of the supervisory structure of the MStV, but such an argument will hardly suffice to convince those trapped in a conspiracy rabbit hole.

From the perspective of a militant democracy, a dilemma becomes apparent concerning the handling of providers of disinformation. A militant democracy has a clear interest in taking actions against this type of content which erodes trust in tradition media and the

145 *Borgers* (n 142).

146 *Peter Dahlgren*, 'Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy' (2018) 25 Javnost – The Public 20.

147 *Knut Cordsen*, 'Lügenpresse: das Wort und seine Geschichte' (BR24, 4 January 2022) <https://www.br.de/nachrichten/kultur/luegenpresse-das-wort-und-seine-geschichte,StXoiKF> accessed 30 March 2022.

148 *Süddeutsche.de*, '"Lügenpresse" ist Unwort des Jahres 2014' (13 January 2015) <https://www.sueddeutsche.de/kultur/sprache-luegenpresse-ist-unwort-des-jahres-2014-1.2295042> accessed 6 April 2022.

democratic process. However, any decisive action has the potential to widen the societal gap and increase distrust.

As the above section already addressed the power of platforms with regards to actions of deplatforming, this theme will be continued in the next section with regards to the power of platforms over the selection of content shown to users.

2. Transparency and platform content selection

Previously in this paper, responses to illegal content and disinformation were examined. Beyond this question, the MStV addresses a broader (albeit related) concern, namely the manner platforms select and present media content. It introduces transparency and non-discrimination requirements in order to address the opaque nature of content recommendation and to protect the diversity of opinion amongst platform users.[149]

The MStV contains a specific sub-section on media intermediaries, which are defined as any platform which aggregates, selects and makes available third-party media content (amongst other content), without providing a closed offer.[150] Closed offers, for instance streaming platforms such as *Netflix* and *Amazon Prime*, are addressed separately in the MStV under the category of 'media platforms'.[151] Social media platforms such as *Facebook* and search engines such as *Google* have been noted as prominent examples of media intermediaries under the MStV.[152] It should be noted that the obligations discussed below only apply to large media intermediaries, with on average more than one million users per month in Germany.[153]

a) Transparency and non-discrimination obligations

The MStV provides that media intermediaries must keep two types of information "easily perceptible, immediately accessible and constantly available".[154] Firstly, this concerns the criteria which determines the access to (and continual storage on) the platform. Secondly, information on the central criteria for the aggregation, selection, and presentation of a content item, and on how these criteria are being weighed, is required. This expressly includes information, in easily understandable language, on the functioning of an algorithm (if used).[155] If any changes are made to the criteria applied, these shall also be made avail-

149 *Flamme* (n 106) 772.
150 Article 2(2)16 MStV.
151 See sub-section 2 MStV.
152 *Ory* (n 8).
153 Article 91(2) MStV.
154 Article 93(1) MStV.
155 ibid.

able.[156] Additionally, providers of media intermediaries in the form of social networks shall ensure that contributions produced by so-called 'social bots' are marked as such.[157] This could concern comments made by fake profiles, wrongly posing as real users, with the effect of such comments being an incorrect depicture of public opinion.[158]

It has been noted that from the wording of the transparency provisions, it is not clear how much detail is required from the media intermediary, since the nature of the 'central criteria' remains somewhat unclear.[159] Specifications are therefore provided by the media authorities in the form of the Statute on Media Intermediaries.[160] According to this statute, the information provided shall include 'technical, economic, provider-related, user-related, and content-related conditions' determining whether content is shown by the platform.[161] It goes on stating that if content is downgraded or upgraded in terms of its visibility, particularly through algorithms, the intermediary shall indicate the 'category of content concerned and the objectives pursued' by this grading.[162] Information on how such a grading can be influenced through payments shall also be made available.[163]

Unsurprisingly, platforms were not particularly happy when confronted with these far-reaching transparency obligations. *Jan Kottmann*, director of media policy at *Google Germany*, has criticised this approach, stating that "too much transparency will lead to a lack of transparency".[164] *Kottmann* points to the difficulty of informing users of the constant changes made to the algorithms, claiming that users could be lost in the quantity of information. Furthermore, given the complexity of the algorithms, which operate based on a range of factors, it is not possible to identify the 'central criteria' based on which the content is shown to the user. Lastly, *Kottmann* stressed that information on the algorithm could be misused by those seeking to manipulate it.[165]

In addition to transparency obligations, the MStV also provides that intermediaries shall not discriminate in the way they handle content from media providers.[166] A media intermediary would be deemed to discriminate, if the criteria for the aggregation, selection and presentation 'systematically deviated in favour of or at the expense of a certain offer (news

156 Article 93(3) MStV.

157 Article 93(4) MStV.

158 *Gerecke* and *Stark* (n 100) 819.

159 *Liesem* (n 106) 282.

160 Satzung zur Regulierung von Medienintermediären gemäß § 96 Medienstaatsvertrag (Statute on Media Intermediaries).

161 Article 6(1) Statute on Media Intermediaries.

162 ibid.

163 ibid.

164 *Jan Kottmann*, 'Intermediäre im Fokus der Rundfunkregulierung – Stellungnahme zum Entwurf des »Medienstaatsvertrags« aus Sicht der Praxis (Google)' (2019) ZUM 119, 119.

165 ibid 120.

166 Article 94 (1) MStV.

provider), or if these criteria systematically hamper offers directly or indirectly.'[167] In order to determine whether such a discrimination had taken place, the information provided in accordance with the transparency obligation is key.[168] Transparency is therefore not only a goal in itself, but also necessary for media authorities to ensure the adherence to the non-discrimination obligation.

b) Effects so far

In the transparency report for the year 2021, the media authorities discussed the first effects and implementation of the obligations described above.[169] Concerning the transparency obligation, the media authorities noted that according to first investigations, most intermediaries are providing information, albeit in differing quality and understandability.[170] As an example, the report refers to the possibility on *Facebook* to verify why a certain content item has been shown on one's newsfeed and the report reiterates that the aim of the MStV provision is to have such information readily available in a form that is easily understandable.[171]

The aim of the provisions is to prevent that a certain genre, news company, or newspaper is being favourably treated by the intermediary.[172] The media authorities noted that more time will be needed to determine how the supervision of the transparency and non-discrimination obligations will look in practice. Here, the media authorities referred to the difficulty of verifying algorithmic decisions by media intermediaries. Pointing to limitations posed by business secrets, the media authorities questioned to what extent *Google* and *Facebook* can be asked to explain the exact functioning of their algorithms.[173]

A first case that has been identified by a media authority concerned a collaboration between *Google* and the German Federal Ministry of Health. These agreed on a prioritisation of content coming from the national health portal *gesund.bund.de* in relation to health-related searches on the German version of the *Google* search engine.[174] The competent media authority found that this arrangement constituted a discrimination of other media providers.[175]

167 Article 94 (2) MStV.

168 *Liesem* (n 106) 283.

169 *Die Medienanstalten – ALM GbR*, 'Vielfaltsbericht 2021 Der Medienanstalten' (2021).

170 ibid 48.

171 ibid.

172 ibid 49.

173 ibid.

174 *Die Medienanstalten*, 'Neue Vorschriften zur Diskriminierungsfreiheit: ZAK entscheidet die ersten Fälle' (16 June 2021) <https://www.die-medienanstalten.de/service/pressemitteilungen/meldung?tx_news_pi1%5Bnews%5D=4930&cHash=77f0456c06ba423e9e05f3ed47b2ab29> accessed 21 March 2022.

175 *Die Medienanstalten – ALM GbR* (n 169) 50.

c) Brief look at EU law

Having examined the transparency and non-discrimination rules for the treatment of media content by platforms under German law, one can firstly note that no comparable provisions can be found in the E-Commerce Directive, currently in force on EU level. The role of platforms as intermediaries between media providers and consumers was not a concern in the year 2000. However, transparency has been recognised as an important objective in both EU primary and secondary law.[176] In 2019, the Platform-to-Business Regulation[177] was introduced, which aims at promoting fairness and transparency on the side of the platforms in their relationships with business users.[178]

Provisions on platform transparency towards users can be found in the DSA. Article 26a on recommender system transparency provides that platforms shall include in their terms and conditions information on the 'main parameters used' when recommending content and options for users to modify these parameters.[179] While not expressly referring to algorithmic transparency, the reference to parameters, and their possible adjustment, appears to refer to the workings of an algorithmic system. Article 29, which applies to very large online platforms (VLOPs), foresees that these platforms 'shall provide at least one option for each of their recommender systems which is not based on profiling'.[180] By making such an option mandatory, this provision aims at granting more control for the user on the functioning of the recommender system.

With regards to individual platform users or items of content, Article 15 provides for transparency for restrictive actions by platforms, by mandating the issuance of a statement of reason to the affected platform users. As mentioned already in the section on notice and takedown measures, the article provides for such information with regards to the restriction of the visibility through the 'removal of content, disabling access to content, or demoting content'. Furthermore, a statement of reason shall be provided when the possibility to monetise content is restricted, and also in case a user's account is suspended or terminated.

In case visibility is restricted in the ways mentioned above, the affected user may use the internal complaint-handling system prescribed by Article 17 to challenge this action. While a removal of a piece of content constitutes a measure which is clearly noticeable for the user, the demotion of content is more subtle. The term shadow-banning comes to mind, a concept which is a source for a great deal of speculation, as users may not know when

176 See, for instance, transparency in relationship to media ownership in *Maja Cappello* (ed), 'Transparency of Media Ownership, IRIS Special' (European Audiovisual Observatory 2021).

177 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

178 *Cole*, *Etteldorf* and *Ullrich* (n 80) 148.

179 This requirement was originally only foreseen for very large online platforms but was expanded to all platforms following the proposed amendments of the European Parliament. See *Cole* and *Etteldorf* (n 92).

180 For the meaning of profiling, Article 29 is referring to Article 4(4) of Regulation (EU) 2016/679 (General Data Protection Regulation).

they are affected by such a measure.[181] The DSA in this Article aims at clarifying such platform functions, as users should be informed that such an action had taken place and on which ground it was taken.

With regards to transparency, the reporting obligation under Article 13 should also be considered, under which platforms must, at least once a year, make available data concerning their content moderation measures. Beyond these provisions on transparency, Articles 26, 27 and 27a of the DSA also refer to a more general risk-handling system to be employed by the VLOPs. Under Article 26, VLOPs shall 'diligently identify, analyse and assess any systemic risks stemming from the design, including algorithmic systems, functioning and use made of their services in the Union'. This assessment shall include among others an examination of the systemic risk of disseminating illegal content, risks to fundamental rights, and 'and actual or foreseeable negative effects on civic discourse and electoral processes, and public security'. Concerning the risk factors that should be considered, the functioning of the recommender system is explicitly mentioned. If a risk is indeed identified, measures to mitigate this systemic risk shall be taken pursuant to Article 27. These shall include where applicable adaptions to the terms and conditions, the content moderation processes, and algorithmic systems, including the recommender system. In the provisional agreement, Article 27a was added on crisis response mechanisms, which allows for the Commission to require VLOPs to assess their contribution to a serious threat and take measures such as those listed in Article 27.

This risk-based approach in the DSA is sufficiently broad to include a range of risks of operating such a large platform, including possible future risks not yet identified. The reference to manipulation may refer to targeted disinformation campaigns. The risks of recommender systems could also encompass the creation of an echo-chamber with extremist political content. However, the choice of adopting such a broad approach could potentially weaken in the practical impact of these provisions, as platform providers are not given concrete action plans and are instead asked to look out for undefined general risks. Overall, the DSA approach has therefore been described as not going "much beyond lukewarm risk assessments and minimal transparency obligations for platforms' recommender systems".[182]

Having discussed certain substantial provisions of the DSA, one can also note that it provides for a new supervisory structure, in which each Member State is to appoint a Digital Services Coordinator (DSC) responsible for the implementation of these rules.[183] Furthermore, the Commission is given a prominent role in the supervision and enforcement process, particularly with regards to VLOPs.[184] A discussion of the benefits and challenges

181 *Laura Savolainen*, 'The shadow banning controversy: perceived governance and algorithmic folklore' (2022) Media, Culture & Society.

182 *Jennifer Cobbe* and *Jat Singh*, 'Regulating Recommending: Legal and Policy Directions for Governing Platforms' (Verfassungsblog, 29 March 2022) <https://verfassungsblog.de/roa-regulating-recommending/> accessed 31 March 2022.

183 Article 38 DSA.

184 Article 50 DSA.

of this new structure is beyond the scope of this paper. It can be noted that already prior to the introduction of the DSA, the Commission raised doubts concerning the scope and supervisory structure of the MStV and of the Statue on Media Intermediaries, referring to a potential conflict with future EU law.[185] This is again a question which might eventually require a decision by the Court of Justice of the European Union.

d) Assessment

Both the MStV and the DSA provisions show a new awareness of the importance of transparency, as to the operation of platforms and the recommendation of content. With regards to the aim of such an approach, the MStV expressly states that the obligation to provide the required information serves the aim of 'protecting the diversity of opinion'.[186] The aim is thus to achieve a diversity of opinion also on social media and limit the danger that harmful content, potentially leading to extremism, could have on the (political) opinion of users. Here, a link can be made to the objective of protecting media pluralism in Germany, which in turn leads to a diversity of opinion.[187]

One must ask whether this diversity of opinion can be achieved through transparency rules, assuring that a social media user has the opportunity to verify why certain content is shown on the platform's newsfeed? A person deeply entangled in conspiracy theories will not necessarily find the way out of the rabbit hole simply by having access to more information on why a certain type of content is reappearing on the platform's feed. Maybe one could hope, however, that this type of information could prevent other users from falling into the rabbit hole in the first place. Research has shown that especially older users can be prone to believing in disinformation when exposed to such content on social media.[188] Further research on whether more information, empowering these vulnerable users, could serve as a solution to this danger should be conducted and will be possible in the future now that there are the obligations to provide more transparency on these aspects.

185 *Michael Hanfeld*, 'Brüssel sorgt für Unruhe: Killt die EU die Medienpolitik?' (FAZ.NET, 24 April 2020) <https://www.faz.net/aktuell/feuilleton/medien/die-eu-kommission-koennte-den-medienstaatsvertrag-kippen-16738781.html> accessed 7 April 2022; *Alexander Fanta*, 'Medienstaatsvertrag: Ein böser Brief aus Brüssel' (netzpolitik.org, 7 December 2021) <https://netzpolitik.org/2021/medienstaatsvertrag-ein-boeser-brief-aus-bruessel/> accessed 7 April 2022.

186 Article 93(1) MStV.

187 For a detailed discussed on the approach of protecting media pluralism in Germany see *Mark D Cole*, *Jörg Ukrow* and *Christina Etteldorf*, 'On the Allocation of Competences between the European Union and its Member States in the Media Sector' (Nomos 2021).

188 *Alex Hern*, 'Older people more likely to share fake news on Facebook, study finds' (The Guardian, 10 January 2019) <https://www.theguardian.com/technology/2019/jan/10/older-people-more-likely-to-share-fake-news-on-facebook> accessed 30 March 2022.

Furthermore, overly focusing on the workings and the transparency of algorithms has been criticised as 'algorithm-centrism'.[189] Here, it has been noted that the interaction between an algorithm and a user is not one-sided, but in fact both mutually influence each other: "user behavior serves as an input for the machine-learning models to learn and adapt to, and users are in term shaped in their habits, routines, and networks by the algorithm's offerings".[190] This complexity makes it difficult to determine to what extent platforms and their algorithms contribute to the polarisation and radicalisation of the political climate.

Lastly, time will tell how the provisions above will be enforced and what effect they may practically have. The question has been raised to what extent it is even "technically, legally, commercially feasible to peer inside the black box, and understand the algorithms that govern us".[191] Seeing that platform transparency is given a central role in both MStV and DSA shows that the legislators have determined such measures as important in the future of platform regulation.

From the perspective of a militant democracy, platforms, and their functioning, have been identified as potential dangers to the public discourse. Their manner of selecting content for its users, for instance through automated recommender systems, is considered as problematic. The key solution by the legislators identified is increased transparency. Neither the MStV nor the DSA go as far as mandating specific content, or even mandating that a pluralism of content must be shown on the platforms, although this can be said to be one of the indirect aims of the non-discrimination rules in the MStV. Instead, users shall be empowered through requiring platforms to be more transparent on the reasons for providing a certain content.

V. Platforms and state in a militant democracy

1. Challenges in the relationship between platforms and regulator

The relationship between platforms and state actors (legislators and supervisory authorities) can be identified as a central theme in the complexity of regulating online content. Measures may run in parallel, with platforms basing their decisions on internet "community" guidelines while the regulator follows the applicable law. Furthermore, platform action and cooperation may be mandated by the legislator, threatening with hefty fines in case of non-compliance.

This is indeed the case with regards to the NetzDG, which mandates platform actions against illegal content by the platforms. Such measures have been criticised for 'outsourc-

189 *Paddy Leerssen*, 'Algorithm Centrism in the DSA's Regulation of Recommender Systems' (Verfassungsblog, 29 March 2022) <https://verfassungsblog.de/roa-algorithm-centrism-in-the-dsa/> accessed 29 March 2022.

190 ibid.

191 ibid.

ing' the decision on the legality of online speech. It can be noted that the NetzDG provides for platform actions only against illegal (instead of simply harmful) content.

Furthermore, it is interesting to note that major platforms *Twitter*, *Facebook*, and *YouTube* have been found to only remove a small number of content items explicitly based on the NetzDG provision.[192] Instead, internal guidelines are used and it remains difficult to determine the influence of the NetzDG on these guidelines. As these internal guidelines are wider than the German Penal Code, more content is removed than required based on German law.[193] While one can argue that under the freedom to conduct business, platforms are free to enforce their own community guidelines (however strict they may be), this also raises concerns with regards to the freedom of expression. In view of the new power platforms have to shape and regulate online discourse, questions can be raised to what extent private companies should indeed be granted extensive liberties when setting their internal rules.

With regards to journalistic due diligence requirements, the picture is similar. It can be noted that the German media authorities are now competent to act against news providers, including channels and accounts on social media. The media authorities may only go against specific content items and they base their decisions on recognised standards of journalistic work, such as the correct citation of sources. Unlike illegal content under the NetzDG, the law does not require the platforms themselves to act in this regard. Nevertheless, the examples of *Ken Jebsen* and *RT DE* show that platforms, such as *YouTube*, may act resolutely against content that is deemed to violate community disinformation standards, particularly in the context of the Covid-19 pandemic. When platforms remove accounts or channels, this raises the same freedom of expression concerns as discussed above.

If mainstream platforms, such as *Twitter*, *Facebook*, and *YouTube* tighten their community guidelines and remove figures such as *Trump*, *Bannon*, and *Jebsen*, users may opt to move to platforms which take fewer (or no) actions against unlawful content and disinformation. This development can already be noted in relation to the growing popularity of the *Telegram* app amongst German users. The media authorities have experienced issues contacting *Telegram* in order to have unlawful content removed.[194] This highlights an inherit difficulty of platform content moderation. If platforms remove no content, they will receive complaints for not doing enough against hate speech. If they take actions based on the German law, the outsourcing of legal decisions is criticised. If actions are based on their community standards, the private regulation of the freedom of speech will be declared an issue.

192 *idw – Informationsdienst Wissenschaft* (n 54).

193 *Borgers* (n 142).

194 *Landesmedienanstalt NRW*, 'Täter weichen auf Messengerdienst Telegram aus' (11 May 2020) <https://www.medienanstalt-nrw.de/presse/pressemitteilungen/pressemitteilungen-2020/2020/november/taeter-weichen-auf-messengerdienst-telegram-aus.html> accessed 1 April 2022.

2. From a militant democracy perspective

Challenges for the legislator are plenty when it comes to platform regulation. This adds to the already difficult task of defining the limits to the freedom of expression. According to *Karl Loewenstein*, the democratic state must be prepared to limit freedoms and address various forms of anti-democratic threats:

> "Perhaps the thorniest problem of democratic states still upholding fundamental rights is that of curbing the freedom of public opinion, speech, and press in order to check the unlawful use thereof by revolutionary and subversive propaganda, when attack presents itself in the guise of lawful political criticism of existing institutions. Overt acts of incitement to armed sedition can easily be squashed, but the vast armory of fascist technique includes the more subtle weapons of vilifying, defaming, slandering, and last but not least, ridiculing, the democratic state itself, its political institutions and leading personalities."[195]

Loewenstein's distinction between overt and subtle threats can be recognised also with regards to online content today. Hate speech and expressed support for anti-democratic causes can be said to fall in the category of overt acts. As discussed in this paper, Germany is seeking to enforce the applicable laws through notice and takedown measures, which has led to the effect that at least certain platforms have started removing such content more effectively. *Loewenstein* notes that it is more difficult for a democratic state to address subtle and subversive threats. In terms of platform regulation, this paper discussed certain subtle dangers, such as disinformation and polarisation. For example, a conspiracist active on *YouTube* may not overtly animate his viewers to commit crimes and overthrow the government. Instead, content can be disseminated which undermines the trust in the democratic process. Disinformation, by definition, seeks to disinform its recipient, making a fruitful public discourse ever more difficult.

It has been noted that technology itself can become a threat to democratic processes and that a militant democracy must therefore be able and willing to regulate such technological uses by platforms.[196] The discussion in this paper shows that the German legislator has recognised these broad issues and has started addressing them in legislation such as the NetzDG and the MStV. These measures are influenced by concrete events, such as terrorist attacks and the Covid-19 pandemic. The fact that measures were taken in the wake of a federal election shows that there is a real concern that platforms' functions and online communication can affect the democratic processes. The DSA seeks to address many of the same concerns on an EU-wide level.

195 *Karl Loewenstein*, 'Militant Democracy and Fundamental Rights, II' (1937) 31 The American Political Science Review 638, 652.

196 *Ukrow* (n 3) 75.

VI. Conclusion

Both in Berlin and Brussels, legislators have been taking on the task of regulating online speech and the functioning of platforms. Important initiatives have been introduced, or (as in the case of the DSA) are in the process of being adopted. In the broad scheme, this process is still in its infancy and a discussion on the practical effects of these new measures remains largely speculative.

In Germany, we have seen a trend towards a stricter regulation of the online environment. As laid out in the beginning of this paper, Germany may be classified as an example of a militant democracy with regards to its regulation of speech deemed dangerous to democratic values. The discussion of the NetzDG and the MStV largely confirms this categorisation in an online context. One can point here to the 24-hour time limit for platforms to remove evidently illegal content as an example. However, it should be noted that doubts as to the conformity of the German acts with EU law have been raised. If EU law will end up (using the wording of a German newspaper) "killing"[197] the German media law approach, adequate alternatives must be introduced on EU level.

In relation to notice and takedown obligations for platforms, the DSA is less demanding when compared with the NetzDG. Furthermore, no journalistic due diligence standards (equivalent to those in the MStV) can be found in EU law. Both the MStV and the DSA include provisions on transparency for the functioning of platforms; yet, both approaches are lacking clarity as to their practical application.

Legislation in this area must address the different, albeit often interrelated, roles of platforms and regulators. As seen above, each route taken will open the gate for potential criticism. Coming back to the concept of a militant democracy, one must ask against whom democracy should be protected: against users spreading hate speech and news providers disseminating disinformation, or against platforms restricting the online freedom of expression? The German legislator appears to focus on the former threat, although new obligations for platforms can be found in the MStV, aimed at restricting their powers as intermediaries for media content. However, with regards to protecting users, whose rights to the freedom of expression might be infringed, the DSA sets out safeguards which are lacking in the German NetzDG and MStV. The insistence on the adherence to fundamental rights, including the EU Charter, found in the text of the provisional agreement of the DSA, may prove an important provision for the protection of online users against platforms and therefore appears well-suited for a militant democracy, despite its absence in German law.

In his article "Military Democracy and Fundamental Rights", *Karl Loewenstein* ends with his appeal for a militant democracy with the following lines: "If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it,

197 *Hanfeld* (n 185).

even at the risk of violating fundamental rights."[198] *Loewenstein* writes this in 1937 and the threat of fascism was real. Threats today are more subtle and more diverse. Extremists and terrorists may want to see the system fail, but they are not at the verge of taking over. However, emotions, including anti-democratic and racist sentiments, can be expressed, stirred, and shared online in new and effective manners. Platforms may play a role in making this dissemination possible and potentially even amplifying it. Automated content recommendation, though ideologically neutral, may select this content based on the engagement it is calculated to provoke. *Loewenstein* warns that democracy and fundamental rights, such as the freedom of expression, should not be abused by their enemies to appeal to hateful emotions.[199] It follows that the democratic state should take up the challenges posed by online content and the role of platforms. Despite the many criticisms that can be raised against the German approach, one can acknowledge the objective of defending democratic values and human dignity and, ultimately, the willingness to learn from history.

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198 *Loewenstein* (n 18) 432.

199 ibid 423. *Loewenstein* refers to the use of propaganda to stir public discontent against vulnerable groups.

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