

The Regulatory Politics of Platform Content Governance: Institutional and Normative Constraints in the German NetzDG Process

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Abstract

What are the factors that allow actors to successfully supply new rules shaping how major user-generated content platforms moderate content? This paper provides an institutionally oriented conceptual framework to help address this question, going beyond existing legal studies of intermediary liability in an effort to help us better understand the regulatory politics of platform governance. It features a case study of two key moments in the regulatory episode that eventually culminated in the adoption of the German ‘NetzDG,’ drawing on a variety of qualitative data to show the importance of institutional constraints and ‘collaborative’ regulatory approaches in the successful creation of new types of rules.

1 — Introduction

Platform governance — how platform companies set and enforce standards around their platform’s use, and how others seek to influence or control that process (Gorwa, 2019b) — has in the past five years become a highly contentious global regulatory issue. Since 2015, there have been multiple overlapping efforts by various states to try and govern the content moderation practices of companies, taking on a wide variety of institutional forms that range from domestic statutory legislation to more flexible ‘co-regulatory’ initiatives and private industry-led organizations. However, it is still unclear what drives the successful emergence of these regimes — in Germany, Australia, Brazil, and Singapore, for instance, but not in France, New Zealand, or the United States — and why specific configurations of rules (binding laws, versus softer codes of conduct, for example) prevail in some cases but not in others.

A growing popular literature has highlighted (and oft hyperbolized) what it perceives to be the extraordinary political power of contemporary technology platforms, now frequently characterized as the most powerful corporate actors in human history (Vaidhyanathan, 2018; Zuboff, 2019). It frequently emphasizes the inherent difficulty of regulating technology companies and the inability of policymakers to grasp the basic technical features of this new domain. Although these accounts of firm dominance might shed some light into why specific efforts to implement rules governing private content moderation fail, they do not provide more systematic explanatory insights into the very real policy developments that have emerged to shape these rules both at the global and regional levels (Gorwa, 2019a).

More nuanced accounts might draw upon international political economy scholarship to point to market power as a dominant factor that can explain whether a state is able to impose rules onto a foreign multinational corporation (Drezner, 2008). In other words, if a country has a large

internal market, and thus many consumers that a company wants to reach, firms are more likely to agree to bear the compliance costs of new rules. This classic argument persists in some of the most influential multidisciplinary work on the role of platforms in contemporary politics (see e.g. Srnicek, 2016), and surely has some explanatory power. However, it fails to explain in-case variation (why, for example, did Germany fail to supply binding rules for firms in 2015, but succeeded in 2017) and closely-linked comparative incidents (such as the recent case of France, which sought, but failed, to replicate many components of the German NetzDG through its *Loi Avia*, despite having effectively the same amount of social media users as Germany).

Other yet-to-be-written accounts of this space could draw upon the regulatory politics literature to make a simple supply-and-demand argument. In many legal studies of regulation, the central driver of regulatory change is demand for that change, which should occur when policymakers and their constituents amass knowledge of market failures, such as negative externalities, information inadequacies, or other harms (Baldwin, Cave, & Lodge, 2012, p. 15). The demanded change can be successfully supplied if the regulatory body has the adequate regulatory competencies and capacity to do so — adequate staffing and resources, sufficient technical know-how, and a strong enough legal mandate (Saurwein, 2011). In this kind of story, growing attention to the potential harms posed by failures of firm’s private standards following events like the 2016 US election, and increased issue salience of content moderation, led policymakers in many jurisdictions to demand higher rules, and supply them if they had the regulatory capacity to do so. While this story also has some intuitive explanatory power, it does not explain why specific configurations of rules (ranging from softer codes of conduct to harder laws) are supplied or demanded; it also fails to explain the emergence of privately-led institutional arrangements and the apparent failure of some states with high levels of regulatory capacity to supply the rules that are being demanded.

The goal of this paper is to sketch out a theoretical approach that can help us better understand the conditions under which new rules for content moderation on major, politically salient user-generated content platforms emerge, and to briefly apply it by presenting one case study that forms part of a larger, multi-case doctoral project. The chapter begins by providing an abbreviated outline of the framework, which draws upon the ‘USE, SELECT, CHANGE, CREATE’ model of institutional change outlined by Jupille, Mattli, & Snidal (2013). It then turns to a key regulatory episode, examining two institutional choice points that eventually led to the ‘Network Enforcement Act’ (*Netzwerkdurchsetzungsgesetz*, or ‘NetzDG’) going into effect in Germany.

Drawing on more than thirty interviews conducted with German and European policymakers, including members of the Bundestag and their staff, civil servants in the European Commission, as well as the policy employees of the major platform companies and members of civil society groups active in the regulatory debates around NetzDG, as well as primary source documents obtained via freedom of information requests made to the German Ministry of Justice and to multiple European Commission Directorate Generals, I provide a more complete look into the NetzDG than existing legal analyses. I show that the negotiation of the law was shaped by multiple institutional constraints, including most importantly the TRIS framework for notifying new technical regulations to the European Commission, and highlight the important capacity and legitimacy-building role played by a little-known voluntary code of conduct that preceded the NetzDG. The chapter points to the importance of institutions and normative constraints in shaping regulatory outcomes in this domain, and hopes to contribute to a broader conversation

about the factors shaping the configurations of the content moderation rules that are increasingly having such a major impact on the rights of billions around the world.

2 — Theoretical Framework

Configurations of rules — which can be formalized and institutionalized through regulation and law, or left as informal agreements, voluntary arrangements, or loose norms — structure the behaviour of actors in world politics. In a political system marked by economic globalization — that is, increasing linkages across jurisdictions, driven by a brand of market-driven and financialised global capitalism characterized by high degrees of trade and transnational flows of capital, investment, and labour (Kahler & Lake, 2003) — governments foster specific conditions under which corporations can access their markets, setting what are often interchangeably called regulations, rules, or standards (Büthe & Mattli, 2011, p. 11). These rules are deployed through political institutions which are created to remedy cooperation and coordination problems in global affairs, which can run the gamut from highly formalized and contractualized international organizations to less formalized conventions, norms, and agreements (Snidal, 1985, p. 923).

Under what conditions do actors seek to change the institutional arrangements that are currently the status quo, and modify the rules that are currently part of the dominant regime? In some rational choice theories, such as classic power-driven realist accounts, actors will seek to shape the rules whenever the status quo does not align with their preferences — in other words, when demand from ‘great power’ states is sufficiently high (Drezner, 2008). Similarly, in legal studies of regulation, the central driver of regulation is demand for regulatory change (albeit at the sub-state level), which should occur when policymakers and their constituents amass knowledge of market failures, such as negative externalities, information inadequacies, or other harms (Baldwin et al., 2012, p. 15). However, the interest-based approach downplays the countervailing forces that often make change difficult, risky, and potentially undesirable, as emphasized by historical institutionalists who note the considerable influence and staying power of existing institutional bargains (Fioretos, 2011).

Jupille et al. (2013) outline a ‘USCC’ model, which combines the rationalist explanation of interests and agency with structuring institutional factors, in effect providing a way to operationalize a supply and demand based approach to understanding regime change within an institutional framework. They conceive actors as bounded in their rationality, rather than perfectly rational utility maximizers, meaning that they have imperfect information, they are uncertain about the potential unintended long-term impacts of change, and are not certain that changing the status quo will necessarily yield a better outcome for their preferences. Secondly, they outline a menu of options — the USE of existing arrangements, the SELECTION of another alternative institution if it exists (forum shifting), efforts to CHANGE the rules in the institution, and CREATING a brand new institution — that are increasingly costly and difficult for actors to achieve due to escalating transaction and institutional costs and a bigger impact on the overarching status quo (Jupille et al., 2013).

In other words, each decision point on the tree can be conceived as a site for contestation, or a regulatory bargaining point (Levy & Prakash, 2003). Moving down the ladder requires overcoming a set of institutional and agent-based constraints, such as the finite ability of actors to supply better and still appropriate alternatives, or countervailing pressure from other actors who have a vested interest in maintaining the status quo. Given the risks and costs of change

outlined above, Jupille, Mattli, & Snidal (2017, p. 119) assume that “most prevailing institutions are ‘good enough,’ or satisfactory, rather than perfect or optimal,” and actors only seek to make major changes to existing arrangements when the “status quo is badly inadequate.”

While the USCC framework is very helpful, it was designed to explain outcomes in the highly institutionalized context of global commerce and commercial arbitration, looking at the emergence of multilateral arrangements like the General Agreement on Tariffs and Trade and international organizations like the World Trade Organization. An acknowledged limitation of the approach is the frequent difficulty of distinguishing between episodes of institutional CHANGE or CREATION, which “cannot be strictly distinct” (Jupille et al., 2013, p. 18) and are often intertwined. In their telling, “what is thought of as CREATION occurs on a more modest scale through new institutional arrangements governing relatively small issues,” and thus may lead to CHANGE in the long term (Jupille et al., 2013, p. 38). The intuition underpinning the model is that CHANGING an existing arrangement, in global commerce, will be less costly than CREATING an alternative — and therefore, CHANGE comes before CREATE on the USCC decision tree.

However, the regulatory area of intermediary liability on major user-generated content platforms is far less institutionalized. As described in the previous chapter, this thesis addresses a relatively new and still developing domain that empirically is characterized by a number of important instances of institutional CREATION, with a few sticky domestic or regional legal agreements like the US Communications Decency Act and the EU’s E-Commerce Directive that have persisted, and CREATE is actually far more common than CHANGE, suggesting that it is a less costly and more frequent strategy than the USCC framework suggests. A major reason for this is that not all types of CREATE are equal: they can feature varying levels of obligation (ranging from relatively lax standards to high stringent rules), precision (ranging from vague commitments to highly specific provisions), and delegation (ranging from standards implemented by the regulatory target themselves, to those being implemented and overseen by a regulator or other body) (Abbott & Snidal, 2000). These tend to vary across different institutional configurations: “entrepreneurial” initiatives developed by private actors with little or no state involvement (Green, 2013, p. 6); what I call ‘collaborative’ initiatives, institutions that are created by some combination of state and private actors, ranging from directly delegated and state-led initiatives to looser codes of conduct undertaken with some government participation (Abbott & Snidal, 2009); and ‘public’ initiatives, which are classic forms of command-and-control rulemaking, like a statutory law (Black, 2008).

My adaptations to the USCC model (which, for space constraints, I cannot fully explore here), involves an incorporation of a typology of these three ‘ideal type’ configurations of rules. Following the USCC logic, I suggest that actors will seek to first implement the least costly option — so in the case of CREATING new rules, they will first undergo a ‘collaborative’ arrangement in an effort to fulfill their preferences if they are able to do so. I argue that ideational factors, in particular, the legitimacy of actors, is important in conditioning the availability of collaborative strategies; e.g. a firm that is highly concerned about its public reputation will not enter in a co-regulatory arrangement with an authoritarian state. Secondly, I argue that choices between collaborative and harder ‘public’ approaches are affected by normative constraints on the appropriateness of government intervention into the private ‘online speech’ sphere. A helpful way to conceive of this constraint is through employing some features of the constructivist concept of a ‘logic of appropriateness’ (March & Olsen, 2011), which has

been shown to be important in regulatory politics given the oft well-defined roles and identities of certain governmental actors, especially regulators, civil servants, and judges (Eberlein & Radaelli, 2010), and is contingent and frequently shaped historically, by the tradition of how an actor handles certain regulatory domains and certain problems. For instance, norms about how information services should be regulated vary greatly in Germany, France, and the United States, with different notions of the appropriate level of government involvement and the role of regulators to get involved in content and speech directly (Fukuyama & Grotto, 2020). Because public rules are binding, and thus involve direct government involvement in the arena of online speech regulation, my assumption is that collaborative approaches will be perceived as less costly in countries where the appropriate scope of government intervention into the sphere of free expression is contested.

3 — Regulatory Context

3.1 — Status Quo Legislation

In 1997, the European Commission published a communication on European commerce, which kicked off a regulatory process that eventually resulted in the E-Commerce Directive (2000/31; the ECD). The ECD sought to harmonize European rules for ‘information society services’ provided by a wide range of different online intermediaries, from network operators (e.g. telecommunications companies), search engines, web hosting providers, and social networks (Baistrocchi, 2002), with the goal to reduce diverging national standards for marketing and contracts, liability of intermediaries, and help remedy the question of jurisdictional conflict within the EU, where businesses may have faced legal uncertainty about which national rules should apply for cross-border services (Hellner, 2004).

Article 14 of the ECD establishes a safe harbour for intermediaries that host user-generated content from third-parties as long as they (a) do not have knowledge of the illegality of content and (b) act to remove or restrict access to content once they obtain knowledge of that content’s illegality (Angelopoulous, 2016). Article 14 established the conditions for what is commonly called a ‘notice-and-action’ scheme, with a high bar for intermediaries to be found criminally or civilly liable for the content of third-party users using their services: those intermediaries must receive notice of content they are hosting/transmitting from some other third party, and fail to act expeditiously on that notice (Kuczerawy, 2015). They receive so-called ‘safe harbour’ as long as they can show that they act upon notices in a reasonable manner, an important and generous provision that have often been identified as essential to the rapid economic growth of internet giants like Google, Facebook, and Amazon (Kosseff, 2019).

The EU has two main mechanisms through which it enacts law: directives, and regulations, each of which allow for different types of regulatory harmonization in the European Single Market. While regulations are immediately applicable for all member states (with member states able to derogate specific exceptions into their national law), directives *direct* member states to implement a law into their national legal frameworks within a certain period of time. The ECD is a directive, and thus was introduced, with subtle variations, into the law of each member state. The German iteration of the ECD is the Telemediengesetz (TMG, 2007), which was been amended in 2016 and 2019, enshrining the principles of the ECD into German law. Article 3 of the ECD is transposed as Section 3 of the TMG; the liability principles in Article 14 of the ECD are enshrined as § 8 of the TMG.

The regulatory status quo governing content in the mid-2015 for major platform companies operating in Germany was thus the laissez-faire system of notice and takedown that had been established under the EU Commerce Directive, and nationally enshrined in the German Telemediengesetz, part of a global regime complex of overlapping regulatory standards setting arrangements that was described in Chapter 2 of this thesis. Major platforms operating in Germany followed a transnational set of varying voluntary and binding commitments with overlapping jurisdictional scope, most notably including the Global Network Initiative, and commitments made under voluntary and co-regulatory initiatives coordinated through the European Commission, such as the CleanIT project and other efforts to combat harmful content that could endanger child safety (Gorwa, 2019a; Livingstone, Ólafsson, O’Neill, & Donoso, 2012; Marsden, 2011).

This was a loose framework that enshrined firms with considerable private authority in how they set their content standards (Klonick, 2017) within this system. Firms could implement the transparency standards set through entrepreneurial private initiatives like as they wished (Maclay, 2010), combining international efforts with specific codes of conduct or voluntary initiatives in various jurisdictions. Under the status quo, firms had considerable autonomy to pick and choose how (or if) they would implement those commitments, and where — if voluntary commitments made by firms in one jurisdiction in response to a code of conduct should be scaled to affect the global set of rules that the firms designed and enforced, or whether they would just be localized to a specific jurisdiction.

3.2 — Notable Institutional Constraints

Beyond information policy, all German legislation exists within the broader context of the European Union’s Single Market and its technical harmonization procedure. Under a series of measures designed to ensure harmonization that were codified into European law by Directive 1998/34, and most recently updated in the Single Market Transparency Directive 2015/1535, the EU has a procedure for notification of technical regulations and of rules on products and services, including ‘information society services’ (e-commerce, media, and internet services). The 2015/1535 Directive sets out a process through which member states must notify the European Commission of any changes to the rules they wish to impose upon certain products or services, including electronic ones, setting up a formalized mechanism through which member states must submit draft laws for review by the Commission and other member states before they are adopted. The procedure requires a three month ‘standstill’ period, in which the member state must wait to receive comments from the Commission and other member states; during this period, the Directorate General for the Internal Market (DG GROW) spearheads a consultation with other DGs, and conducts a legal analysis intended to “help Member States ascertain the degree of compatibility of notified drafts with EU law.”¹

This means that an individual member state cannot simply decide to regulate an issue tomorrow, whip up a draft law, and push it through parliament immediately; it must formally notify the Commission (where the draft law is placed in a publicly available database) and wait three months for the input of the Commission and other member states, navigating the pressure from

¹ <https://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/the-aim-of-the-20151535-procedure/>

the EU Institutions to maintain the current status quo. Additionally, through this notification and harmonization process, the Commission can veto proposed member state draft regulations on the grounds that it has its own concrete plans to regulate in that area. Through this process, the EU can maintain input into domestic legal developments and maintain regulatory harmonization, a vital element of what has turned the EU into a regulatory global power (Bradford, 2020).

At the domestic level, power in Germany is decentralized between the Federal States and National government. The composition of the government is decided following a hybrid proportional representation system. A party has never won an absolute majority of the Bundestag's 709 seats, so governments are ordinarily formed through coalitions between one of the country's two largest parties and one of the smaller parties as a so-called 'junior partner' (Lever, 2017). Following each election, negotiations begin between the parties to see who will be able to create the alliances necessary to form a government, and to form a government, a party needs to be able to achieve compromises with at least one other partner.

Institutionally, while the Executive has the broad agenda-setting power, comparative scholarship on legislative politics has shown that the parliamentary committees, which debate bills following their introduction into the Bundestag, have significant opportunity to affect legislation when compared to other political systems (Cross, Eising, Hermansson, & Spohr, 2019; Siaroff, 2016). The Rules of Procedure of the German Bundestag grandly refer to the committees as the "bodies responsible for preparing the decisions of the Bundestag;" the assigned lead committee and other relevant committees do a large amount of detailed policy work, call in experts and other stakeholders for consultation, and polish bills to the extent that they are ready to be adopted or rejected in their committee version.² These committees generally follow along the lines of the ministries (e.g. there is a legal committee, a labour committee, a defense committee, for each major corresponding ministry); an exception is the Digital Agenda committee which deals with technology policy issues and does not have a corresponding 'Digitalization' ministry. The makeup of each committee can vary, with between 13 and 41 members apportioned according to its share of Bundestag seats, and provide an important way through which opposition parties can negotiate to affect draft legislation. Additionally, an important domestic institutional constraint is the Bundestag's informal principle of discontinuation; even in the case of the same chancellor being re-elected (as Angela Merkel has been since 2005), each Bundestag is technically a completely separate entity and government (Van Schagen, 1997). This means that any bills introduced into the Bundestag that are not codified into law before the legislative period ends are discarded, making time an especially important institutional constraint in the German legislative context (Pierson, 2011).

4 — Case Study

4.1 — Choice Point 1: The Task Force

As the conflict in Syria intensified it caused the displacement of millions. In less than three years from the war's main onset in 2011, more than 10 million Syrians had either been internally or externally displaced, seeking shelter in neighbouring countries like Lebanon, Jordan, and Turkey (Ostrand, 2015). By early 2014, the impact of the conflict had reached Europe, as growing

² <https://www.bundestag.de/en/committees/function-245820>

numbers of asylum claims filed by refugees from Syria, Iraq, Eritrea, and Iran — increasingly taking dangerous and gruelling overland or sea journeys to the European continent — laid bare a global humanitarian crisis and pushed the limits of European refugee policy (Holmes & Castañeda, 2016). In the summer of 2015, Germany, economically and politically the most powerful state in the European Union, decided to break with the established EU resettlement approach under the Dublin Regulation, stating that they would accept asylum claims from Syrians even if their port of entry into Europe was another country (Dernbach, 2015; Hinger, 2016). This policy move was morally laudable but politically controversial, catalyzing far-right extremist groups opposing the re-settlement of refugees in Germany (Dostal, 2015), eventually manifesting in anti-refugee rallies and physical assaults upon immigrants. The number of reported criminal offences targeting refugee re-settlement facilities would skyrocket from only 24 in 2012 to several hundred in 2015 (Gathmann, 2015), prompting a heated national conversation on immigration, racism, and multiculturalism. German Federal Chancellor Angela Merkel, discussing the situation in August 2015 after visiting a refugee centre in the Eastern state of Saxon-Anhalt, where she had been booed and harassed by right-wing protestors, infamously quipped that despite the challenges, ‘we can do it’ (*wir schaffen das*) — that Germany was a strong country, had accommodated those fleeing war and persecution in large numbers before, and could do it again.

As the humanitarian crisis unfolded, so did the visibility of far-right extremism and Islamophobia on major social networks. Major figures in German politics, including Merkel herself, were being targeted by online harassment and threats, and commentaries in the country’s largest newspapers had begun to point the finger at the content standards on Facebook and Twitter. For example, an emblematic article published in *Der Spiegel*, the weekly news magazine with the largest such circulation in Germany, posed the question of “Why Facebook doesn’t delete Hate,” bringing up multiple anecdotal instances of public comments left on the Facebook pages of German news outlets not being removed despite being user reports (Reinbold, 2015). The article noted that Facebook was extremely opaque about its content moderation processes — what the exact rules against racist content were, and how those rules were enforced, and by whom — arguing that the company appeared to conduct moderation via a network of contractors in Dublin, India, and the US, but apparently had no actual content moderators in Germany itself.

Amidst these external political shocks, dissatisfaction with the status quo began to build amongst key German decision-makers. The most important of these was Heiko Maas, who became the SPD Minister of Justice and Consumer Protection in a CDU-led grand coalition government formed following the 2013 election. Maas was a vocal critic of right-wing extremism and anti-refugee sentiment, speaking out on numerous occasions against far-right and anti-immigration political movements in 2014 and 2015, and was an active social media user (Vasagar, 2014). In the summer of 2015, he wrote a letter to Richard Allan, Facebook’s head of public policy for Europe, in which he voiced his displeasure with how the company had been handling complaints around illegal or harmful speech, including slurs directed towards refugees and immigrants. Maas noted that “Facebook users are, in particular, complaining increasingly that your company is not effectively stopping racist ‘posts’ and comments despite their pointing out concrete examples” (Kirschbaum, 2015), in perhaps the first indication that there was significant dissatisfaction with the regulatory status quo at the executive level in the German government. The language of Maas’ letter was the public articulation of what some digitally oriented policymakers had been arguing for several years: that the status quo for how major platforms

conducted content moderation was shifting from ‘an imperfect but good enough’ situation towards one where the rules were wholly unacceptable.³

There was no obvious way through which to demand or supply new rules however, or for that matter, any clear consensus as to what exactly the higher standards that would remedy these perceived harms should look like. This provided the German executive with an important institutional choice point. As Maas began to push away from USING the status quo, there was no obvious forum that Germany could SELECT these issues into. The most natural choice would be to move the issue up into the European Union’s institutions, which had been active on the topic of both online policy and harmful speech for over a decade, with the publication of the European Council Framework Decision 2008/913/JHA, which sought to help harmonize European legal frameworks pertaining to racism and xenophobia. However, working through Europe also posed significant coordination problems, given not only the “huge disparity between legislations” (Rights, Equality and Citizenship Programme, 2016, p. 9) on the topic of hate speech and incitement to violence in Europe. Working to overcome these tensions and differing interests would make achieving German interests slow and difficult, and also posed contracting issues: there was only so much that Maas could do as German Justice Minister through the Council of Ministers, and the matter of rulemaking would eventually need to be delegated to the European Commission.

One way to proceed would be to try and CHANGE the status quo significantly, seeking to change the E-Commerce Directive so that online intermediaries would face greater legal obligations to governments and users in the Member States. However, this strategy was massively costly from an institutional standpoint, as the Juncker commission had publicly already stated it was not willing to negotiate or re-open for discussion. (As mentioned above, given the ECD’s horizontal framework, re-negotiating the ECD would open a huge can of worms on a number of issues that were outside of Maas’ key interest, such as copyright, which also fall under its scope). Other than working through the European institutions to achieve CHANGE domestically, Germany could change the German implementation of the ECD, the Telemediengesetz. However that also posed significant institutional costs, as any changes would trigger a fundamental rights assessment from the Commission, would have to be notified via the TRIS system, and negotiated with Commission officials and other member states seeking to minimize fragmentation.

The other way would be to try and CREATE a new arrangement that could help create some new standards in the specific area of online hate speech on platforms in Germany. This could be done via statutory legislation, or by trying to collaborate with the companies for a less costly option. To do so, the steering actors in Germany needed to entice the companies to the table, and be perceived as a sufficiently legitimate partner in a collaborative regulatory venture.

On the 14th of September 2015, Maas met with Facebook’s Richard Allan, and at a short press conference that followed, announced that the two had agreed to create a collaborative and voluntary regulatory initiative which would address standards around illegal online hate speech.

³ See e.g the writing of Konstantin von Notz and others in the Green Party:
<https://www.handelsblatt.com/politik/deutschland/hate-speech-bundesregierung-muss-gegen-internet-hetze-vorgehen/12724148.html>

Through this new ‘Task Force Against Illegal Online Hate Speech’, the Minister promised to engage both Facebook and civil society stakeholders in order to produce “concrete measures” for the companies to implement by the end of the year.⁴ In an interview that was published a few days later by the *Jüdische Allgemeine*, a newspaper serving the German-Jewish community, Maas delivered a simple message that would become the catch-phrase of the Ministry’s effort to regulate social networks. As he vowed to fight against online anti-semitism and other forms of platform-mediated hate, he stated simply the Task Force’s aim to bring the rule of law to the online sphere: *’was offline verboten ist, ist auch online nicht erlaubt’* (what is forbidden offline is also not allowed online) (Krauss, 2015).

The Task Force had its first meeting ten days later in Berlin. Following an opening by Gerd Billen, the most senior civil servant in the Ministry of Justice, who had been tapped by Maas to lead the Task Force, the meeting featured presentations from Facebook and Google and concluded with inputs from the handful of civil society and hybrid civil society/governmental organizations that attended.⁵ At the onset, very little public information was released about the project, and detailed meeting minutes were not kept⁶. The task force had 4 meetings in 2015: September 25, October 10, December 7, and December 15, with the participants including representatives from Facebook, YouTube, and Twitter; the industry associations eco and FSM; and four German organizations working on issues relating to child protection, racism and far-right extremism.⁷ Together, the participants in the working group began negotiating a possible set of commitments to CREATE, with Ministry officials pushing for content reported in Germany to be reviewed in Germany and for broader application of German law rather than company community standards.

On December 15, after a 4th meeting of the group, a 5-page ‘results paper’ (*ergebnispapier*) from the Task Force was published. This document sets out the “concrete measures” that Maas had promised by the end of the year when announcing the initiative, and in it, the companies make a number of commitments to improve their standards for complaints processing “by mid-2016.” This document does not explicitly refer to itself a code of conduct, but in interviews I

⁴ See BMJV press conference at: <https://www.youtube.com/watch?v=TZdWdrfDnug>

⁵ Partial agenda summaries are available on an archived Ministry webpage.

https://web.archive.org/web/20170930061101/http://www.fair-im-netz.de/WebS/NHS/DE/Home/home_node.html

⁶ In a freedom of information request to the Ministry, to obtain the meeting minutes for the Task Force, the ministry responded that they did not exist (Fraag den Staat, 2017)

It seems as if the BMJV created a website (no-longer online) which had more details about the task force, with brief summaries of the meetings and the main commitments made, but this was only archived in July 2017 (suggesting it was created during that key legislative moment and then later taken down. The last archive was in July 2019.) (https://web.archive.org/web/20170930061101/http://www.fair-im-netz.de/WebS/NHS/DE/Home/home_node.html)

⁷ These were jugendschutz.net, klicksafe.de, the Amadeu Antonio-Stiftung, and Gesicht Zeigen. While the Amadeu Antonio foundation and Gesicht Zeigen are independent civil society organizations, Jugendschutz and Klicksafe are probably better understood as governmental actors or quasi-governmental actors with close ties to the German state and federal governments. Klicksafe is a EU funded project of the state media regulators of Rhineland-Palatinate and North Rhine-Westphalia.)

conducted with individuals who attended the Task Force’s meetings, the interviewees repeatedly referred to a “code of conduct” as the central result of the Task Force.⁸ The main take-away of the document is its emphasis the companies will act against “all hate speech prohibited against German law” and “review and remove without delay upon notification.”⁹ To achieve that goal, the document outlines a few ‘best practices’ and other commitments that have varying levels of clarity and ambiguity. The three main parts of these commitments are published in an infographic that Maas shares on Twitter, which summarizes the code of conduct for the public as follows: companies (a) agree to respect German law (in other words, what is illegal offline should be illegal online), (b) agree to remove reported content in less than 24 hours, and to (c) improve their user-reporting tools.¹⁰

The companies agreed to implement the terms of the code of conduct in the next six months, but this was an informal agreement, and the publicly-released results paper was not undersigned by the companies or specific employees. However, the Ministry rapidly realized that it would have difficulties with implementation.¹¹ How to ensure whether the companies were actually implementing its (for the most part, flexible and general) commitments, and to measure whether these were actually having an effect?

4.1.1 — Capacity Issues and Measuring Implementation

On the 11th of April 2016, press releases from the German Ministry for Family Affairs and the Ministry of Justice announced that the two ministries would be working together to commission a monitoring exercise to evaluate the effects of the Task Force’s voluntary commitments (BMFSFJ, 2016). This informal evaluation would be performed by Jungenschutz.net, an organization that was established in 1997 with funding from the Ministry of Family Affairs and serves as a ‘centre of competence’ for the German states on child protection issues. Since 2008, Jungenschutz has been conducting research and advocacy into online child safety, with a legal mandate set out in the Interstate Treaty on the Protection of Minors (JMStV). Beyond actively searching out illegal content and reporting it to the platforms (in their 2008 annual report, for instance, they claim that they successfully were able to secure the removal of 1400 illegal videos from YouTube either in Germany or globally), they had from 2008 onwards conducted a number of simple audit studies, in which their employees would proactively attempt to find illegal content on search engines or social networks (Glaser, Günter, Schindler, & Steinle, 2008). Through a collaboration with the Ministry of Justice, Jungenschutz brought some research capacity and expertise when it came to content moderation standards, even though their thematic focus was on a different issue area (hate speech, and not child protection). As the BMJV’s Gerd Billen noted in a statement, the monitoring would be an “important component of the task force”:

⁸ Interviews w. Simone Rafael, Antonio Amadeu Stiftung; Lutz Mache, Google

⁹ Quotes from p. 1 of Ministry’s official English translation, obtained by EDRI and available here: <https://edri.org/eu-internet-forum-document-pool/>

The German version is archived here: <https://perma.cc/J35T-DGC6>

¹⁰ See <https://twitter.com/HeikoMaas/status/676739434239426561>

¹¹ Interview w/ Joern Pohl, Digital Adviser to MdB Konstantin von Notz (The Greens)

The monitoring provides us with important insights into how agreements with companies work in practice, how quickly they react to reports and whether they delete the reported illegal hate content. This will enable us to better assess how the agreed measures are taking effect and what further steps are necessary (BMFSFJ, 2016, np, author translation).

Jungenschutz employees conducted their first formal evaluation in July 2016, by which the firms were supposed to have implemented the code's commitments (Jungenschutz, 2016). The results were not in line with the Ministry's expectations. As Maas later summarized at a public event, the figures released by Jungenschutz, based on a small sample of content takedown requests, suggested that "of the illegal content reported by users, Twitter deletes about 1%, YouTube just 10%, and Facebook about 46%" (Reuters, 2016). Shortly following the evaluation, Maas wrote again to Richard Allan and to Facebook's head lobbyist in Berlin. In the letter, obtained by a freedom of information request, Maas wrote that "the results of your efforts thus far have fallen short of what we agreed on together in the Task Force" (Beckedahl, 2016, author translation). In full awareness that the Task Force commitments were voluntary, and thus there were no sanctioning mechanisms or enforcement capabilities built in, he threatened action at the European level if Facebook did not step up their game — writing that he had been discussing the issue with other Justice Ministers in the European Council and that they 'shared his concerns', suggesting that he would seek to influence his European counterparts towards pursuing harder and costlier forms of regulation at the European level. (Despite the even poorer performance displayed by Google and Twitter on those same metrics collated by Jungendshutz, it does not appear as if similar letters were sent to Google or Twitter representatives).

4.2 — Choice Point 2: The NetzDG

As Jungenschutz conducted their evaluations of the implementation of the Task Force's code of conduct, the issue of platform rules in Germany just continued to build. First, as Tworek (2020) and others have noted, domestic legal developments were leading lawmakers in the governing coalition to follow in Maas's footsteps and worry that "German law could no longer be enforced in Germany" due to jurisdictional issues:

Amongst several cases filed, one German lawyer, Chan-jo Jun, had filed a case against Facebook for not removing online content that was illegal under German law. In 2016, a regional court in Hamburg denied the complaint on the grounds that it did not have jurisdiction to adjudicate because Facebook's European operations are headquartered in Ireland. Jun called it "outlandish" that American companies could operate in Germany without being subject to its jurisdiction. (Tworek, 2020, p. 4)

In multiple interviews I undertook with lawmakers and their staff involved in the policy debate at the time, deep frustration was expressed about the opacity of the companies (especially Facebook) and their unwillingness and/or inability to speak candidly about how they enforced their global content moderation rules in the German context.¹² When firm representatives offered testimony to parliamentary committees or at public events, they refused to provide what was perceived to be basic detail about the number of German-speaking content moderators that they

¹² Interviews w/ CDU and SPD digital staffers who requested anonymity

employed and their specific capacities in Germany. (At the time, the firms were extremely cagey about who and how these processes functioned; as Gillespie (2018) has noted, and this served as a strategy to avoid scrutiny and de-emphasize the importance of their moderation practices). But this strategy appeared to backfire in the German context. As one staffer, the digital policy adviser to a Member of the Bundestag on the Digital Agenda committee noted, in effect “Facebook told [German lawmakers] to their faces that ‘yes, the issue is complicated, but we’re sorry, but we can’t accept your national laws.’”

Through the Task Force, the salience of these issues increased, and helped lawmakers in the governing coalition to specifically articulate what kinds of rules they wanted to improve transparency reporting and content enforcement standards. Despite the collaborative measures instituted voluntarily by the companies through the task force, in the executive, the perception was that the firms were merely doing “whatever they could to avoid regulation totally and limit their costs”, as one Member of the Bundestag in the governing coalition put it.¹³

The second major development that drove domestic demand for higher standards for platform content moderation practices was the election of Donald Trump to the US Presidency in November 2016, following a scandal-filled and salacious campaign where social media platforms, foreign interference, and the influence of ‘fake news’ were all said to have played an outsized role (Karpf, 2017). Following a strong performance by the far-right AfD party in a number of 2016 German state elections, where the AfD, in a number of cases, appeared to take votes from both the CDU and the SPD, concern was mounting in the governing coalition that digital trickery could have an adverse effect on their electoral outcome in the German Federal election that would be happening in Fall 2017. As Gollatz & Jenner (2018) have documented, the US election’s ‘fake news’ discourse rapidly entered the domestic debate on the NetzDG and helped significantly increase its salience as an issue in the German media.

The external shock of the US election, changes to the political landscape in Germany, and these increased in the salience of platform governance as a policy issue from 2015-2016 led domestic preferences to increasingly find the status quo, which now included the commitments established through the Task Force, to be unacceptable. Once again, German policymakers were faced with an important institutional choice point. The key steering actors once again could have sought to channel this demand into a number of different institutional arrangements, ranging from the USE of the existing status quo (now increasingly untenable), the SELECTION of an alternative fora through which to fulfil these demands, the CHANGE of existing frameworks, or the CREATION of a new arrangement.

Since the Task Force had gone into effect in late 2015, a few new collaborative efforts had been instigated at the European level, the most notable of which was the EU Code of Conduct on Illegal Online Hate Speech (Gorwa, 2019a). The Code had been a project of DG Justice in the Commission and was overseen by the senior German official Paul Nemitz, who had played an important role in the development of the European General Data Protection Regulation, and also had longstanding personal ties to the German SPD. While the EU Code remained largely insulated from the similar German collaborative efforts that were happening around the same time, and did not feature prominently in the domestic German debate, Maas and the executive

¹³ Interview w/ MdB Jens Zimmerman, SPD Digital Policy Spokesman

could have SELECTED the forum created through the Code of Conduct, trying to bring the German efforts to a broader and collaborative pan-European strategy through which to raise content moderation standards for platforms.

The Ministry could have also continued to work with the existing Task Force structure, CHANGING the code of conduct to incorporate more stringent standards or some kind of better industry auditing and monitoring, implementing some kind of data sharing or other monitoring mechanism. This would have been a relatively low cost option, given that the Task Force structure had already been created, and there were obvious ways to improve that mechanism's commitments and capabilities. For instance, the 'monitoring' that ended up being conducted by Jungenschutz was crude and unscientific, constrained by a lack of proper access to platform data and without a proper sampling strategy.¹⁴ Despite the lack of proper experimental design, that third-party monitoring was then used as the only data point to show that the Task Force efforts had failed (Liesching, 2017). The Ministry evidently had the option to continue to improve and refine the collaborative approach if it had wished, however, it appears that collaborative and non-binding rules were no longer satisfying the demand which had in the past year outgrown Maas and spread to the rest of the governing coalition. This made working within any voluntary approach no longer likely to sufficiently fulfill that domestic demand, whether that approach was pursued through SELECTION up to the EU level, or domestically through CHANGING the Task Force.

Nevertheless, seeking to exert this political power to secure CHANGES to the E-Commerce directive, was once again perceived to be too costly. Instead, on March 14th, the same day that the final Jungenschutz monitoring report about the Task Force code was published, Heiko Maas presented a new draft law. In the initial 29 page document that was released, the following obligations were set out for the regulatory targets:¹⁵ they would have to (a) publish a quarterly report on the handling of complaints about illegal content; (b) delete obviously illegal content within 24 hours, other illegal content within 7 days; (c) appoint a contact person to receive government queries and complaints in Germany; (d) inform users about content moderation procedures; (e) save deleted content for prosecutors to use as evidence, and (f) immediately delete copies of the relevant content on the platform. The ministry further outlined the estimated costs that would be an outcome of the regulation: approximately 28 million Euros in annual compliance costs for all firms, reflecting increased staffing costs and the cost of putting together

¹⁴ As German law professor Marc Liesching established through correspondence with the Ministry of Justice, the Jungenschutz team that conducted the monitoring was not composed of lawyers, and given the complex nature of some German criminal statutes, it is probable that "legal laypersons" were not actually able to identify precisely what exactly constituted illegal content under the German Criminal Code (Liesching, 2017). Likewise, the content was never archived before flagging by Jungenschutz, so it is unclear whether the flagged content was actually illegal in Germany or just removed or not removed under the platforms broader 'community standards.'

¹⁵ Defined broadly as 'service providers who operate platforms on the Internet with the intention of making a profit which enable users to exchange, share or make available to the public any content with other users (social networks)', with the exclusion of journalistically curated services where an editor is responsible for content under existing legal frameworks (e.g. newspapers, broadcasters).

The first draft is available at: https://cdn.netzpolitik.org/wp-upload/2017/03/1703014_NetzwerkDurchsetzungsG.pdf, author translation

the transparency reports, and an estimated 3.7 million Euros annually in terms of bureaucratic costs for the government in order to account for the additional personnel needed to implement and enforce the new law.

Most of these measures followed the agenda established in the Task Force, including the notion that there should be a contact person to handle official complaints, that content moderation standards and complaints procedures should be transparent enough to be clear to users, and that they should generally act on content within 24 hours of it being reported. However, there were also a number of new and quite aggressive provisions proposed in the draft, which corresponded for the new levels of demand in the governing coalition for standards higher than when the Task Force had been created. These provisions included an obligation for firms to delate duplicates of the content that was deemed manifestly illegal under the NetzDG across their broader platforms (in effect searching for copies of content found to be illegal that had not yet been reported), and a requirement that this deleted content would be archived for potential access by federal prosecutors seeking to bring charges against individuals.

4.2.1 — Institutional and Agent-Based Resistance

Upon the NetzDG's announcement, the backlash from digital civil society and human rights organizations was swift. A number of civil society organizations, including the German digital rights organization *Digitale Gesellschaft* and the global press freedom organization Reporters Without Borders likewise predicted that the law would have deleterious effects on freedom of expression. D64, a network of digital policy experts that is closely linked to the SPD, called the law (and specifically, its provision for the automatic deletion of matched content) "the first step in a creation of a censorship infrastructure" (Reuter, 2017b, author translation). Industry was unsurprisingly also strongly opposed to the proposal: Bitkom, a industry lobby group that counts Facebook, Twitter, and Google amongst its members, immediately issued a statement warning that the law would spur a "deletion orgy" (*Löschorgien*) as firms would be incentivized to over-remove content rather than face fines for acting too slowly (Reuter, 2017b).

In the days that followed the draft legislation's announcement, a range critiques were published that pertained to the deleterious potential impacts of the NetzDG being passed. Advocates for free expression, including the UN Special Rapporteur for freedom of opinion and expression, who would eventually write a letter to the German executive branch warning against implementing the NetzDG, noted that the law would incentivize the over-blocking of legitimate speech by users, as it was formulated around the main metrics of 'takedowns' and 'speed,' with no real mechanism for auditing the rates of false-positives made by the companies (Kaye, 2019). The second commonly made related argument complained that the NetzDG created a system of "privatised enforcement," where the firms would be placed in a position where they were making decisions about the scope and implementation of German law, thus in effect taking this function away from the judiciary, and its many checks and balances.¹⁶ As the advocacy journalism website Netzpolitik put it, under the NetzDG framework, the platforms would "suddenly become the investigator, judge, and executioner" (Reuter, 2017d). A third argument warned that the law, as perhaps the first in the world to regulate content moderation as done by platforms, and due to being proposed by such an internationally influential and democratically legitimate state like

¹⁶ Interview w/ Mathias Spielkamp, Reporters Without Borders Germany

Germany, would serve as a model for other less-democratic governments seeking to bring social media companies under closer state control (He, 2020; Schulz, 2018). The furor was intense and as the critiques in major media outlets circulated widely, Maas had to answer the critics in a number of interviews with major newspapers (Gathmann & Knaup, 2017).

Nevertheless, lawmakers in the governing coalition were supportive of the bill, downplaying the risks and emphasizing the importance of taking a strong position in fighting against illegal content online. The bill appeared to have significant support in the governing CDU/CDU coalition; the legal policy spokespersons for the Union parliamentary group went as far as to say that “The bill by Minister of Justice Maas is a first, small step in the right direction. But we must go much further,” suggesting that other types of criminal law enforcement could be also included (Reuter, 2017b, author translation). A few voices in the coalition expressed opposition — parliamentarians active on digital issues, who had ties to the digital civil society organizations and had above average knowledge on digital policy issues, tended to share at least some of the publicly articulated reservations¹⁷ — but these dissidents were not in major positions within the party and tended to not voice these concerns publicly.

As one senior German official put it in an interview, the events of 2016 — both domestically in Germany relating to the rise of the AfD, and overseas, in terms of the Trump election — provided a vital catalyst for policymakers who were on the fence about the normative desirability of actively intervening into the ‘private sphere’ of social media. More and more politicians, both in the CDU and the SPD, had slowly shifted to the extent that they no longer saw a law like the NetzDG as inappropriate, but actually desirable and necessary. Part of this was that the SPD’s managed to articulate an intuitive and simple two part argument that could be easily expressed to constituents that were not well versed in the nuances of digital policy debates: that (a) the NetzDG was simply applying German law to a sphere that was in effect un-regulated, but needed to be regulated, and (b) that the government had already done all it had could through a voluntary and collaborative approach, but the companies had refused to adequately get their act in order.¹⁸ As one policymaker put it even more bluntly, in internal party discussions, the debates came down to a “very banal issue: the question of who rules — the German government, or Facebook.” And there was growing acknowledgment inside the governing coalition that “the only way to change the behaviour of these companies [was] with brutal political power.”

While this debate was going on domestically within Germany, political actors in the European Union’s governing institutions were watching closely and deciding exactly what their position should be. On the 27th of March, the Ministry of Justice notified the proposed law to the European Commission, under the auspices of the Technical Regulation Information System mentioned earlier in this paper. The German notification was cutting it extremely close to the last possible date that they could notify: because of the layout of the parliamentary calendar in the election year, the parliament would adjourn for the summer break (and then the election) in July. Three months after March 27th was the week of June 26, the final session of the Bundestag for 2017.¹⁹

¹⁷ Interview w/ MdB Mario Brandenburg, FDP

¹⁸ Interview w/ senior SPD staffer

¹⁹ See the Bundestag Sitzungskalender 2017, archived at <https://perma.cc/8WKC-5VFT>

When the German Ministry of Justice and Consumer Protection notified the first draft of the NetzDG through the Technical Regulations Information System on March 27th, that notification was flagged as potentially politically sensitive, according to Commission emails obtained via freedom of information requests. An internal email from a staffer in the DG for the Internal Market (DG GROW) — the entity in-charge of managing the TRIS notification system — to other GROW staffers, including members in the office of Internal Market Commissioner Elżbieta Bieńkowska, summarized the main points of the NetzDG, the timeline for reactions from the Directorate Generals for Justice (JUST) and Communications, Content, and Technology (CNECT), and the legal deadline for the Commission or Member States to react. The summary of the notification discusses the political context, and notes that DG CNECT is keeping the option of vetoing the law on the table, which can be done if the Commission wishes to pursue a different regulatory strategy:

The German intention to regulate the matter has been recently discussed between CNECT's Cabinet and the German authorities. During these discussions, CNECT informed the German authorities of CNECT's *intention to regulate the same matter with a different approach than the one presented in the notified draft*. It seems that DG CNECT and DG JUST are in contact to discuss the notified draft and have contacts with the German Ministry of Justice (which prepared the notified draft)...²⁰
[Emphasis added]

Before the NetzDG had come onto the scene, the Commission had taken the position that no legal framework for raising content moderation standards for major social media platforms was necessary. DG JUST had negotiated a Code of Conduct on Hate Speech with the major internet companies in the Spring of 2016, and Vera Jourova, the EU Justice Commissioner, was publicly a major advocate for voluntary self-regulation and co-regulation in areas that would have a major impact on free expression and other fundamental rights. In an internal assessment prepared by DG CNECT and JUST which analyzed the NetzDG and contextualized it within previous Commission measures, Commission staff note that the spirit of the proposal was not totally out of line with their efforts to increase transparency for company content moderation systems and move their private law into a space that it more adequately reflected European legal frameworks:

While, unlike the [EU Hate Speech] Code of Conduct, the draft German law is a legal instrument, an analysis of its objectives against the objectives pursued in the Code of Conduct shows that the two are broadly coherent in terms of the overall objective. Both instruments aim at ensuring that notifications of illegal hate speech are assessed against the law and not only against the internal terms of service of the IT companies and that the assessment is made expeditiously. An important difference is that the scope of application of the German law goes beyond the Code of Conduct in so far that it includes also other offences, such as defamation.²¹

²⁰ Gorwa FOIA to DG GROW, 2020. Document received June 9, 2020; document dated April 3, 2017. https://www.asktheeu.org/en/request/7872/response/26398/attach/3/Document%205.pdf?cookie_passth_rough=1

²¹ Gorwa FOIA to DG JUST, 2020. Document received June 16, 2020, and dated June 8, 2017. https://www.asktheeu.org/en/request/member_state_comments_on_netzdg#incoming-26570, p. 5

Nevertheless, the analysis notes that the NetzDG threatens regulatory harmonization as outlined in the Juncker Commission’s Digital Single Market Strategy:

The Commission considers that national solutions at this respect can lead to unwanted legal fragmentation and have a negative effect on innovation.²²

It was clear to officials working in the Commission that the NetzDG was on shaky legal footing. It quite clearly ran against the country of origin principle established in Article 3 of the E-Commerce Directive (Spindler, 2017), which states that Member States may not “restrict the freedom to provide information society services from another Member State” (Hellner, 2004, p. 9),²³ and also clearly had issues on free expression grounds with European Human Rights law as set out under the European Convention on Human Rights and other measures. As a Commission official involved in the debates at the time discussed, “it was obvious to everyone who had been following the debates in Germany that NetzDG had major issues under European law.”²⁴ However, the situation was just ambiguous enough that what the Commission would do was a political, and not purely legal question. As the official explained, notifying a new law triggered an informal political and legal assessment, and not a fundamental rights compliance assessment, which would only be triggered in the case of the notified proposal transposing European Law (for example, in the case of an amendment to the Telemediengesetz, the German transposition of the E-Commerce Directive). The stakes were high: as one staffer for a Member of the European Parliament working on digital policy issues at the time put it, “the consensus was that early law made by a major member state could serve as a blueprint for eventual European wide legislation.”²⁵

In effect, the Commission had three formal options. It could issue a comment, a non-binding public response which would advise the German Ministry on changes that the Commission recommended; it could issue a so-called ‘detailed opinion’ similar to a comment, except one which mandated a reply from the German government and had the additional effect of extending the standstill period by at least a month; or it could try and negotiate these issues off the record via direct negotiations. Because of the timing of the German notification, a detailed opinion would extend the standstill into the Bundestag’s summer vacation, and thus past the last session of parliament, effectively killing the proposal.

Domestically, the debate was getting heated. On the 11th of April, a coalition of non-governmental actors had published an open letter in German against the NetzDG. This “unusually broad” group (Reuter, 2017e) of civil society organizations and industry associations, many of whom frequently clashed on digital policy issues, were joined by “journalists, lawyers, academics, and even one former minister of justice” in an alliance calling itself the “Alliance for Freedom of Opinion” (He, 2020, p. 31). This group included the party-affiliated digital policy think tanks for the SPD and CDU, as well as a number of other high-profile individuals, and

²² Ibid.

²³ Article 3 of the ECD is legally complex and has been interpreted slightly differently by various member states in their implementations of the ECD. See Hellner (2004) for a detailed discussion.

²⁴ Interview with DG CNECT staffer.

²⁵ Interview w/ Mathias Schindler, Office of MEP Julia Reda (The Greens/European Free Alliance)

called for a consultation around the NetzDG as they sought to build public support against the law.

Many of these signatories active in Germany wrote direct comments on the law to the European Commission through the TRIS portal, exerting voice through both formal and informal channels. Industry also lobbied the European Commission to intervene against the NetzDG. In a meeting with DG GROW's cabinet on June 12, Facebook's lead Brussels lobbyist argued that the NetzDG violated the E-Commerce Directive and sought for the Commission to engage in "a dialogue with the German authorities to change the law."²⁶ A scene-setter with talking points prepared for Commission official leading the meeting outlines DG GROW's position on the burning question that Facebook was guaranteed ask: "Does the EC intend to object to the notified German draft"? (The talking point demurs, noting that "The commission is still assessing the compatibility of the Draft Act notified by Germany with EU Law. The deadline for reaction expires...on 28 June 2017").

4.2.2 — Final Negotiations

On the floor of parliament, Maas defended his bill, arguing that it would not lead to privatized enforcement but rather simply to the more thorough existing implementation of German criminal law. Members of the opposition noted that the list of criminal code statutes covered in the NetzDG were extremely broad and went beyond just hate speech (more than 20, including not just incitement to violence and the promotion of unconstitutional organizations, but also defamation and some oddities like the disparagement of the ceremonial President of the Federal Republic), and that the definition of social networks provided in the bill would likely encompass many other online services, like blogs, third-party reviewing sites, and messaging services like Whatsapp or Telegram.²⁷ Multiple MdBs in both the governing coalition and the opposition complained about the very short time period in which the law was being debated. As Netzpolitik's Markus Reuter observed, "all of the CDU/CSU speakers complained about little time remaining until summer break" as they proposed their suggestions for changes, including a bigger role for some kind of self-regulatory body used in the media industry to adjudicate on complaints, rather than the platforms themselves (Reuter, 2017a, author translation). Similarly, MdB Petra Sitte of *die Linke* argued in her remarks that given the "broad alliance of organisations that had already formed against the draft law" the governing coalition should "engage in a broad discussion" and revisit the issue following the election to prepare a better proposal (Deutscher Bundestag, 2017b, author translation).

Nevertheless, the governing coalition was determined to push the measure through. The Commission recognized this, and on May 23, a high-level meeting about the NetzDG happened with members of the cabinet for Commissioners Ansip, Jourova, Juncker, and Timmermans. As an internal emailed summary of that meeting discusses, Vice President Ansip (who was also Commissioner for the Digital Single Market, and thus in charge of DG CNECT) "wished to send a political letter to DE on the main concerns [CNECT] have on the draft law," but Juncker,

²⁶ Gorwa FOIA to DG GROW, 2020. Document received June 9, 2020; document dated July 6, 2017.

https://www.asktheeu.org/en/request/member_state_comments_on_netzdg#incoming-26398

²⁷ See contributions from Petra Sitte (Die Linke) and Konstantin von Notz in Reuter (2017a)

Timmermans, and Jourova did not want to co-sign it.²⁸ While Ansip argued on the side of maintaining harmonization and getting Germany to stand down, the others were hesitant due to a number of political factors. The main one articulated in interviews with officials present at these discussions was that Germany was entering an election year, and there was a perception that if the Commission stepped in and deemed the NetzDG in violation of EU law it might be seen as a domestic political defeat for Maas and the SPD, potentially affecting the electoral outcome in some way. A second issue was the historical sensitivity of hate speech in Germany, and the significant pressure coming from German policymakers, including prominent German staffers in the European Commission, for this issue should be left aside as a domestic political matter. Finally, while the DGs may have wished to regulate the issue of harmful content in a different manner than Germany, the Commission had no viable alternative currently in the works that it could propose to Germany, other than the Commission's Hate Speech code of conduct, which followed a similar collaborative approach as the Task Force and was already seen as ineffectual by the German negotiating team.²⁹

In a turn from regular procedure and into the realm of informal governance (Kleine, 2013); rather than issuing public comments, the Commission raised concerns through informal letters and other backchannels that would minimize domestic fallback for a German government dead-set on passing the law before the election (this communication has still not been released, with multiple efforts to obtain it via freedom of information requests denied by the Commission). This back and forth negotiation, underpinned with the threat of a Commission detailed opinion successfully negotiated a softening of the new rules that Germany sought to CREATE.

On June 27 2016, the grand coalition introduced an amended version of the bill, "revised in consultation with the Commission in order to achieve the greatest degree of compatibility with EU law" into the Bundestag's Legal Affairs committee.³⁰ Firstly, the scope of the law was changed slightly, by narrowing the definition of social networks so that it excluded peer-to-peer messaging services, music services, blogs, and other platforms. Combined with a threshold of 2 million registered users in Germany, the law was crafted so that it would at its onset only apply to Twitter, Facebook, and Youtube. Secondly, the list of sections of the German Criminal Code that companies would need to check flagged content against was trimmed down, removing a few statutes that had been critiqued by civil society as being redundant and not pertaining to hate speech (e.g. the statues referring to defamation of the Federal President or the 'denigration of constitutional organs' like the courts). Additionally, the new version removed two of the major provisions that had been added post-Task Force: the provision that firms should have a 'stay down' filter by which they would algorithmically search for, and remove, duplicate content from their platforms when removing an image or video for violating one of the criminal statutes specified in NetzDG, and the provision that the companies would need to archive content deleted

²⁸ Gorwa FOIA to DG CNECT, 2020. Document received July 10, 2020, and dated May 24, 2017. https://www.asktheeu.org/en/request/member_state_comments_on_netzdg#incoming-27094

²⁹ Interview w/ Prabhat Agarwal, Head of DG CNECT unit F.2 - E-commerce & Online Platforms

³⁰ See Gorwa FOIA to DG GROW, 2020. Germany's Response to Sweden, received June 9, 2020; document dated July 28, 2017. https://www.asktheeu.org/en/request/7872/response/26398/attach/2/Document%203%20EN.pdf?cookie_passthrough=1

for federal prosecutors, which critics argued was especially problematic from a data protection point of view (Reuter, 2017c). Finally, the new version added a provision which allowed for the role of ‘regulated self-regulation’ to be involved in the reporting or assessment of cases of illegal content reported by users, a prospective safeguard that was being advocated for by the CDU faction.

The Legal Affairs committee agreed with this new version, and set a date for the second reading of the bill in the Bundestag three days later, June 30th, the last day the Bundestag was in session before the 2017 election. On the 30th of June, the NetzDG was debated for 45 minutes. The parties continued to express the positions that they had vocalized throughout the legislative process. Parliamentarians from the Greens and the Left noted that the bill remained problematic, despite the changes, as its core element, the 24 hour removal period backed by fines, was unchanged. Renate Künast, a member of the Greens who sat on the legal affairs committee and had chaired an expert hearing on the NetzDG, worried that through the NetzDG the Bundestag was setting a “fundamental course for the digital age...[and] Even undemocratic countries are looking at us.” She suggested that the NetzDG was just providing a surface level solution to a much deeper problem: as the Bundestag’s press office summarized, “instead of a rapid legislative process, [Kunast] would have liked to see a broader debate on what was going on in society that would lead to such [problematic] forms of expression on the Internet” (Deutscher Bundestag, 2017a, author translation).

Following the second reading, as no amendments were made, the Bundestag proceeded immediately to the third reading and final vote. The law passed through the votes of the majority coalition (CDU/CSU and SPD), with the AfD and Linke voting against, and the Greens abstaining.

5 — Conclusion

A few days after the vote, it was evident that many lawmakers, even within the grand coalition, were not thrilled with the law, but nevertheless maintained that it was the best of bad options, given the lack of time, and the institutional constraints in place. In an interview with the left-wing daily *Tagezeitung*, the SPD’s legal policy spokesperson Johannes Fechner argued that the NetzDG supplied imperfect rules to meet what was a crucially important demand, noting that while the SPD wished to have added more provisions that would have better protected the freedom of expression of users, > But if we had included a new obligation for companies in the law, we would have had to re-notify the law to the EU. We would then have had to wait another three months to find out whether there were concerns on the part of the EU Commission or other EU states. So the law could not have been passed in this legislative period. (Rath, 2017, author translation)

Fechner’s comment highlights the lock-in effects that were born as a result of the EU’s institutional framework and the time period (2 years) in which Germany sought to meaningfully change the regulatory status quo. By having a first-mover advantage, and being the first effort to move meaningfully on the issue of platform content rules before the major increase in domestic demand for new rules happened, the Task Force’s approach effectively became the only feasible option for PUBLIC CREATE. While lawmakers across all parties were initially dissatisfied with the NetzDG’s design, the EU’s notification procedure (and Germany’s informal discontinuity principle) in effect meant that no other alternative was on the table, and that major changes to the

law's structure could not be made, as any substantively new legal framework would have to have been re-notified to the Commission. Given these constraints, multiple interviewees across the governing coalition expressed the argument that the NetzDG was clearly imperfect, and did not fully succeed at remedying the issues it had been drawn up to achieve, but it was better than having done nothing, and that it was “the best of bad options” available at the time.

The Task Force helped to increase the regulatory capacity of domestic lawmakers, putting them in conversation with platform employees and giving them a forum through which they could discuss and negotiate proposed rules. It was also used by Maas and key SPD stakeholders to increase the appropriateness and resolve of lawmakers in the governing coalition, providing a strong argument that the Ministry had extended a voluntary olive branch to industry (and thus acted appropriately within the normative traditions of corporate regulation in Germany) and that the NetzDG was appropriate as it was simply enshrining into law commitments that had been developed collaboratively with industry. Together, these demand and supply factors joined together to help propel the NetzDG past domestic and regional opposition.

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