[DE] Federal Supreme Court finds Facebook terms of use ineffective in relation to hate speech

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In rulings of 29 July 2021 (III ZR 179/20 and III ZR 192/20), the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided that Facebook's terms of business, governing the deletion of users' posts and the blocking of accounts when its internal standards had been breached, were ineffective. This was especially the case if Facebook did not agree to inform users about the removal of their posts, at least in retrospect, and about the intention to block their accounts in advance, indicate the reason for doing so, and grant them the opportunity to respond and request a new decision. Users whose posts have been deleted or whose accounts have been blocked in accordance with these terms of business are therefore entitled to have their accounts reactivated and, where appropriate, to injunctive relief against future blocking of their accounts and deletion of their posts.

The two similar cases concerned the deletion of posts and (partial) blocking of accounts on the grounds that Facebook considered its conditions of use had been violated in relation to hate speech. Facebook had deleted two posts containing hostile remarks about migrants and temporarily blocked the relevant user accounts. In the most recent court proceedings, an appeal court had dismissed actions disputing Facebook's behaviour and requesting the full reinstatement of the deleted posts. However, the BGH disagreed on the grounds that the court had failed to demonstrate that Facebook was entitled to delete posts and block accounts on the basis of its terms of use and community standards. Although these had been effectively included in the contractual relationship between the parties – a pop-up window with an "I agree" button was sufficient for this – they were ineffective because they unreasonably disadvantaged users under Article 307(1)(1) of the *Bürgerliches Gesetzbuch* (German Civil Code – BGB).

The BGH based this assessment on the notion that the current system failed to provide the necessary balance between conflicting constitutionally protected interests. It was necessary to balance users' freedom of expression on the one hand (Article 5(1)(1) of the *Grundgesetz* (Basic Law – GG)) and, in particular, Facebook's occupational freedom on the other (Article 12(1)(1) GG). In the weighing up process, the BGH concluded that Facebook, on the basis of its occupational freedom, was, in principle, entitled to require users to adhere to certain communication standards that extended beyond those laid down in criminal law (e.g. libel, slander, incitement of the people). However, the company

could not reserve an unlimited right to take down posts that breached its communication standards and block the user account responsible. Rather, the requirement for reasonable business terms enshrined in Article 307(1)(1) BGB meant that users' right to freedom of expression also needed protecting. In order for its terms of use to be effective, Facebook therefore needed to ensure that users were informed about the removal of their posts, at least in retrospect, and about the intention to block their accounts in advance, indicate the reason for doing so, and grant them the opportunity to respond and request a new decision.

With regard to social networks' practice of taking down individual posts, there has been discussion for some time now as to whether and to what extent companies can and/or should be obliged to take reasonable account of users' fundamental rights. Although the BGH ruling does not assume that a private company has a constitutional obligation in this respect, it addresses the issue from the angle of general German civil law provisions in which the imprecise definition of legal concepts means it is possible or even necessary to take fundamental rights into consideration. The BGH lays down concrete guidelines on the protection mechanisms that must be in place in order to sufficiently take into account freedom of expression, without unreasonably harming the interests of social network operators. The proposed information obligations and complaint mechanisms are not a new idea: such systems are already provided for in the German *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG), on the basis of which Facebook is required to take down criminally unlawful content within certain deadlines and, at the same time, take legally established precautions to protect freedom of expression. However, the NetzDG only concerns certain types of illegal content, which are not necessarily congruent with the definition of hate speech contained in Facebook's community standards. According to the BGH's decision, similar protection must, in future, also apply to content of this nature that does not exceed the threshold of libel or incitement of the people and that is therefore not covered by the NetzDG. This is consistent with developments at EU level, where the proposed Digital Services Act, for example, includes plans to introduce corresponding transparency and information obligations, as well as complaint mechanisms, for online platforms.

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https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021149.html

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