[DE] Cologne Administrative Court: new Network Enforcement Act provisions breach EU law

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In a press release of 1 March 2022, concerning its decisions in cases brought by Google Ireland Ltd. and Meta Platforms Ireland Ltd, the *Verwaltungsgericht Köln* (Cologne Administrative Court – VG Köln) announced that the reporting obligations added to the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG) under Article 7 of the *Gesetz zur besseren Bekämpfung des Rechtsextremismus und der Hasskriminalität* (Act on improving the fight against right-wing extremism and hate crime), which entered into force on 1 February 2022, were inapplicable because they breached EU law. In particular, the social networks concerned did not need, for the time being, to meet the new requirement to transmit certain reported content and related user data to the *Bundeskriminalamt* (Federal Criminal Police Office – BKA) via an electronic interface provided by the BKA.

The relevant lawsuits, filed by Google and Meta (representing the Facebook and Instagram platforms) in summer 2021, mainly concerned doubts about the counter-argument mechanism (Article 3b NetzDG), the obligation to transmit reported content to the BKA as the central authority responsible for criminal prosecutions (Article 3a NetzDG) and the appointment of the *Bundesamt für Justiz* (Federal Office of Justice) as the responsible supervisory body pursuant to the NetzDG (Article 4a NetzDG).

The new rules apply to social networks with more than 2 million registered users, no matter where their headquarters are located. The aforementioned companies far exceed this threshold in Germany. They are required to transmit to the BKA any content that they have removed or to which they have blocked access at a user's request, and concerning that which there is concrete evidence that a criminal offence, defined in the NetzDG, has been committed. Under the current system, the providers themselves are initially responsible for checking and assessing whether there is "concrete evidence" that the listed offences have been committed (including threats to the democratic rule of law, child pornography and coercion). Whether a crime has actually been committed is often therefore not verified until after the content has been transmitted to the BKA for prosecution purposes. This involves processing the personal data (usernames, IP addresses including port numbers and the time of the most recent use of the social network concerned) of individuals who have not behaved in a criminal way and whose data

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should not therefore be stored by the BKA. This is at the heart of the complaints submitted by the social network providers, who claim that there are insufficient legal grounds for processing this data and that the system therefore breaches data protection rules. If users who publish lawful content run the risk of having their personal data stored in police databases, this not only undermines the relationship of trust between platform providers and users, but also poses a threat to freedom of expression through the resulting "chilling effects". The complainants also claim that the country-of-origin principle that applies to electronic commerce has been infringed. With regards to Article 4a NetzDG, they argue in particular that, under the fundamental right to freedom of expression, the supervisory body should be independent of the state authorities.

The VG Köln partially upheld the complaints. Firstly, it rejected as inadmissible the actions concerning the counter-argument mechanism that could be triggered regardless of concrete complaints (Article 3b(3) NetzDG) on the grounds that the providers had no interest in bringing proceedings since they should have waited for a concrete order from the supervisory body before bringing an action. On the other hand, the actions concerning the reporting obligation were considered admissible and well-founded. Article 3a NetzDG infringed the country-of-origin principle enshrined in the E-Commerce Directive, which stated that providers established in the EU could freely offer information society services (e.g. social networks) in other EU member states as long as they complied with the law in the country in which they were established. The NetzDG, which also laid down obligations for providers in Germany as the country of reception, contradicted this principle. It was true that the E-Commerce Directive provided for possible exceptions for member states. However, the VG Köln ruled that these did not apply because Germany had neither carried out the necessary consultation and information procedure nor presented grounds for an emergency procedure. With regard to the counter-argument mechanism triggered in connection with legal actions (Article 3b(1) NetzDG), on the other hand, the court decided that no rules had been broken with reference to Article 14(3) of the E-Commerce Directive, which governs the possibility for EU member states to establish procedures for the removal or disabling of access to information. The freedom to conduct a business, protected by the Charter of Fundamental Rights, and national constitutional law had also not been infringed.

Article 4a NetzDG, however, was incompatible with the Audiovisual Media Services Directive (AVMSD) which, since the 2018 reform, laid down the principle that media regulators, including those responsible for video-sharing platforms – which were also potentially subject to the NetzDG – should be legally and functionally independent of their respective governments (Article 30(1) AVMSD). The *Bundesamt für Justiz*, which was controlled by and took orders from the *Bundesministerium für Justiz und Verbraucherschutz* (Federal Ministry of Justice and Consumer Protection), did not meet this requirement.

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The VG Köln's decisions are only effective between the parties in the proceedings and are open to appeal. However, since the decisions are very clear, it seems unlikely that the rules that the VG Köln considers to be contrary to EU law would apply to other providers who were not involved in the proceedings, such as TikTok or Twitter, who, according to media reports, have also submitted similar complaints. However, a detailed analysis of the legal arguments cannot be carried out until the decisions are published in full. It also remains to be seen what impact the forthcoming Digital Services Act will have on the continuation of the proceedings.

Pressemitteilung des VG Köln

https://www.vg-koeln.nrw.de/behoerde/presse/Pressemitteilungen/05_01032022/index.php

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