



The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship

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“The regulatory free ride of the Internet could not last forever. What’s interesting with the NetzDG, is that it is a test-case law for a western democracy, which wants to regulate the Internet in a society that values free speech. Furthermore, who should be held accountable for content once it is deemed illegal by national law?”

William Echikson, head of the CEPS Digital Forum, and former Google employeeⁱ

Introduction

For nine consecutive years, global Internet freedom has been in decline.² The digital age was supposed to usher in a new era of free-flowing information and robust global debate. Instead, authoritarian states have reverse-engineered the Internet to serve their own ends. Surveillance, propaganda, and censorship have been reinforced rather than weakened. China's Great Firewall is only the most prominent example. But liberal democracies have also limited Internet freedom to counter disinformation, hate speech, and terrorist content spread on private platforms with little transparency or accountability for user-generated content.

Germany's Network Enforcement Act (or *NetzDG*) is perhaps the most widely debated and controversial initiative enacted by a liberal democracy to counter illegal online content. The NetzDG was adopted after the German government considered unsuccessful its attempts to persuade Facebook to enforce its own community standards in a more rigorous manner, and to remove hate speech violating German law.³ Hate was spread and possibly led to violence - following the 2015 refugee and migration crisis, in which German Chancellor Angela Merkel decided to welcome upwards of one million asylum seekers.⁴ In 2015, tech companies agreed to a voluntary Code of Conduct to fight the scourge. However, the efforts of the companies pursuant to the agreement failed to satisfy the German government; and the government therefore decided that legally binding measures were necessary.⁵

The NetzDG imposes intermediary liability for social media networks with over two million registered users. These platforms are required to take down illegal content, including hate speech and "defamation of religions", flagged by individuals. Any content, which is "manifestly unlawful" must be removed in a time frame of 24 hours. For all other "unlawful content"⁶, the deadline is seven days. Failure to remove illegal content is punishable by fines of up to 50 million euros. The scope and nature of NetzDG has been widely debated, and the law has been criticized for being vague and over-inclusive, "privatizing" online censorship with little transparency or due process, and encouraging "over-implementation" by providing an incentive to err on the side of caution rather than free expression.⁷ Moreover, the categories of illegal content include criminal defamation and insults as well as "defamation of religion" that violates international human rights standards.⁸

The most important legally binding human rights norm is Article 19 of the International Covenant on Civil and Civil Political Rights (ICCPR), which guarantees freedom of expression including the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers". While the ICCPR predates the Internet, in 2018 the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression presented a report dealing with the moderation of user-generated online content. The report recommends a human rights-based approach requiring states to, inter alia, avoid "heavy-handed viewpoint-based regulation", restricting content solely "pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy", refraining from "imposing disproportionate sanctions" on Internet intermediaries, refrain from requiring the "proactive"

monitoring or filtering of content”, refrain from making government agencies, rather than judicial authorities “the arbiters of lawful expression”, and avoid delegating authority to corporate entities as “adjudicators of content”.⁹

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“The obligations placed upon private companies to regulate and take down content raises concern with respect to freedom of expression. A prohibition on the dissemination of information based on vague and ambiguous criteria, such as “insult” or “defamation”, is incompatible with article 19 of the ICCPR. The list of violations is broad, and includes violations that do not demand the same level of protection. Moreover, many of the violations covered by the bill are highly dependent on context, context which platforms are in no position to assess.”

David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” in his letter to the German government in June 2017

While there have been prominent examples of journalistic, satirical, and political content removed pursuant to the NetzDG, it is not clear that the act has resulted in a dramatic shift in German online freedom.¹⁰ According to Google’s latest transparency report on YouTube, covering January – June 2019, Google received 304,425 complaints (almost a third relating to hate speech or political extremism) of which less than 25% were followed up by removal or blocking.¹¹

Google followed 10,544 requests to remove content specifically violating the NetzDG (many more were removed for violating YouTube’s Community Standards) due to “defamation and insult” (2,723), “terrorist or unconstitutional content” (2,100) and “hate speech or political extremism” (5,721); the three categories most likely to raise freedom of expression issues.

According to Facebook’s latest transparency report covering January 1, 2019 to June 30, 2019, there were 674 NetzDG reports identifying a total of 1,050 pieces of content (down from 884 and 1,704, respectively, in the same period of 2018). Interestingly, the categories with most complaints are “insult” (370), “defamation” (212) and “intentional defamation” (180) with “incitement to hatred” a distant fourth (160). Out of the 1,050 pieces of flagged content, a total of 349 were deleted or blocked.¹²

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“You may be surprised but the most commonly reported issues on the NetzDG pages are in fact defamation of a person or insult. The law aimed to fight hate and violence, but you mostly get complaints, for example, of someone reported for commenting about dirty towels in a gym club. The owner would define that as defamation of his fitness club.”

Claire Rush, Legal Counsel, Facebook

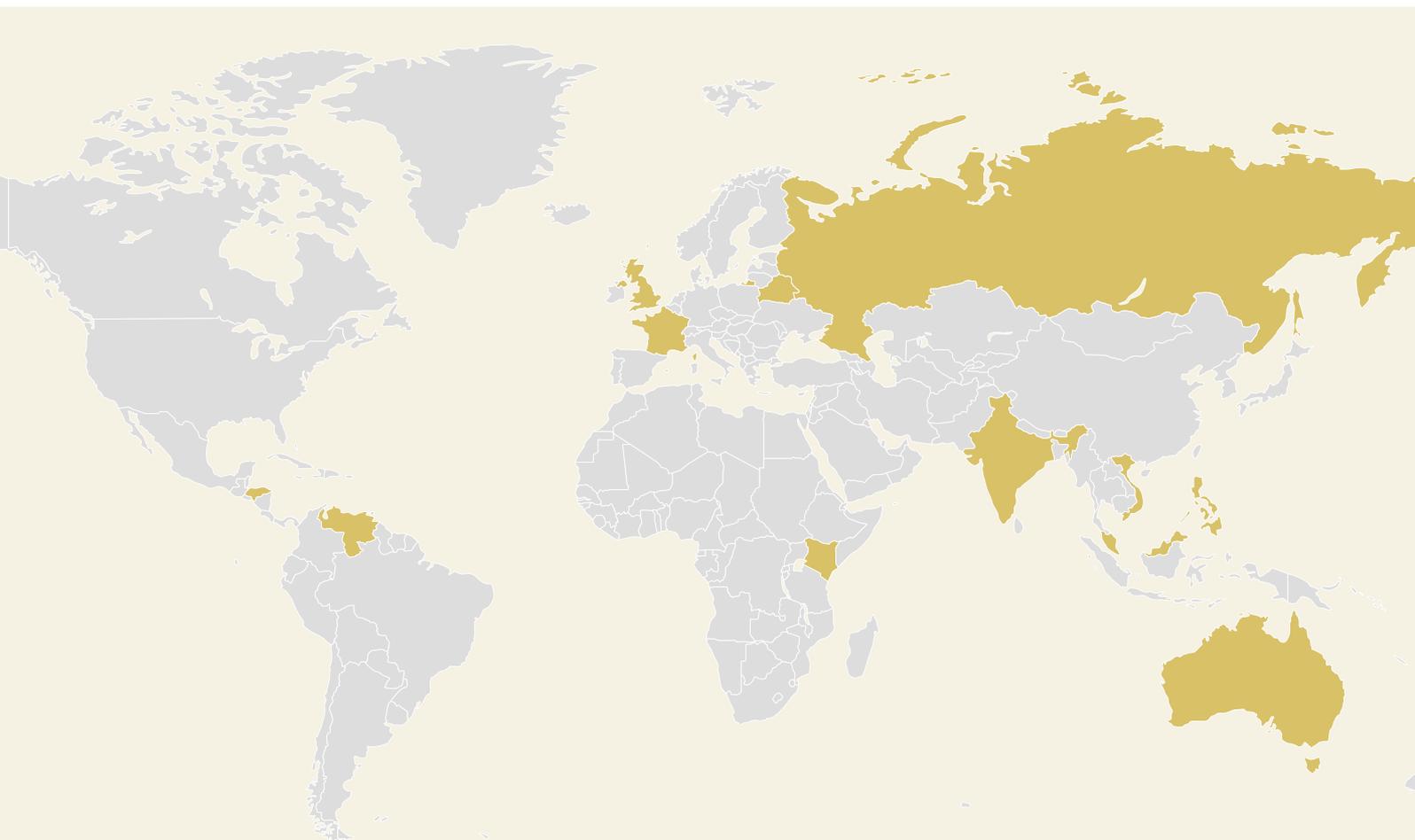
In the period from July to December 2018, Twitter took action on 9% of 256,462 complaints.¹³ In the period from January to June 2019, the number of received complaints had almost doubled to 499,346, of which 46,700 were deleted or blocked maintaining a deletion rate of around 9%.¹⁴ With 11,682 deletions, incitement to hatred was the category that gave rise to most deletions or blockings.

However, without access to the specific content and individual decisions, it is not possible to determine whether such removals were in line with international human rights standards for the protection of freedom of expression, nor whether the relevant platforms were consistent in their assessment and deletion policies. However, a recent study of the NetzDG highlights that the law may have impacted enforcement of community standards more significantly than the enforcement of the legally binding rules of the NetzDG.¹⁵ This in turn may result in “over-implementation”, at least if measured against Article 19 ICCPR, which provides significantly stronger speech protections than the Community Standards of the largest social media platforms.

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“The study of intermediary liability tells us more about what to expect when we delegate interpretation and enforcement of speech laws to private companies. Intermediary liability laws establish platforms’ legal responsibilities for content posted by users. Twenty years of experience with these laws in the United States and elsewhere tells us that when platforms face legal risk for user speech, they routinely err on the side of caution and take it down. This pattern of over-removal becomes more consequential as private platforms increasingly constitute the ‘public square’ for important speech.”

Daphne Keller, Director of Intermediary Liability at Stanford's Center for Internet and Society.



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While experts have paid close attention to the consequences of NetzDG on online freedom in Germany, less focus has been paid to global cross-fertilization of censorship norms by the NetzDG matrix. Yet less than two years after the NetzDG law went into effect, several states have been directly or indirectly inspired by the German efforts to tighten intermediary liability. Several of these states are flawed democracies or authoritarian states that, unlike Germany, do not have the same robust protection of the rule of law, lacking for example independent courts enforcing constitutional and human rights protections of freedom of expression. It should be emphasized that several of these countries had already adopted draconian restrictions of online freedom of expression and information, and could have tightened laws and regulations irrespective of the NetzDG. Yet, the NetzDG seems to have provided several states with both the justification and the basic model for swift and decisive action. This raises the question of whether Europe's most influential democracy has contributed to the further erosion of global Internet freedom by developing and legitimizing a prototype of online censorship by proxy that can readily be adapted to serve the ends of authoritarian states. What follows are examples of such laws and bills, built on the NetzDG matrix of stricter intermediary liability from a number of countries around the world.



Africa

Kenya

In June 2017, shortly after the NetzDG bill was first presented in Germany, the "Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Electronic Communications Networks" was issued by the Kenyan

National Cohesion and Integration Commission and the Communications Authority. The Guidelines entered into force in July 2017 and require social media service providers to "*pull down accounts used in disseminating undesirable political contents on their platforms*" within 24 hours. Administrators of social media platforms are required to moderate and control the content and discussions generated on their platform.¹⁶ The guidelines specifically target political speech, setting standards for the tone and content of political messaging and requiring pre-approval, which strikes at the heart of the protection of freedom of expression.¹⁷ While the NetzDG has not been cited publicly as an inspiration for these guidelines, it is still notable that these rules were issued so close in time and share some of the same tools to regulate social media platforms.

Asia

The Philippines



In June 2017, the Philippines' Anti-Fake News Act¹⁸ was filed as a Senate bill. It explicitly mentions the NetzDG in its preface, although it only pertains to false news or misinformation, which is not within the scope of the *NetzDG*. On July 9 2019, a new bill was introduced: "Anti-False Content Act",¹⁹ which authorizes the Philippine Department of Justice to order "online intermediaries" (including, but not limited to: social networks, search engines and video sharing sites) to rectify, take down or block access to information "known" or "reasonably" believed to be "false or that would tend to mislead the public", under penalty of fines or up to 20 years of imprisonment. Neither the definition of false information, nor the prescribed penalty is in accordance with international human rights standards. Article 19 ICCPR prohibits "General prohibitions on the dissemination" of vague and broad categories of information such as "false information".²⁰ Permissible grounds for restrictions of free speech must conform to the strict tests of necessity and proportionality, and must be formulated with sufficient precision so as to avoid arbitrariness in their application.²¹ The Philippines' Act could be interpreted to cover mere opinions or contested information that could be interpreted differently depending on outlook. This is a worrying development in a country where the president frequently attacks the²² media for spreading "fake news"; where the Senate president has requested²³ an online newspaper to remove critical articles; and where shut-downs of cell-phone networks and criminal charges against journalists and social media users for libel has increased, resulting in Internet freedom being downgraded from "free" to "partly free" in 2018.²⁴ A downward trajectory that continues in 2019.²⁵

Malaysia



On April 3, 2018 Malaysia passed the Anti Fake News Act. The Act defines fake news as including *any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas*'. This definition would likely include opinions and value judgements protected by free speech norms under international human rights law. Moreover, the Act establishes a duty for any person in possession, custody or control of publications containing fake news to "immediately remove" such publication. Failure to comply with this duty is punishable with fines of up to 100,000 ringgit (approximately 24,000 USD).

Upon adoption, the Malaysian Communications and Multimedia Minister explicitly referenced the NetzDG:



“Germany has implemented its own anti-fake news law [...] The trend is clear – countries that wish to promote healthy debate and a democratic process based on the facts are realising that they must act against the scourge of fake news”.

Contrary to the minister’s statement, the *NetzDG* does not specifically encompass fake news, yet the Malaysian Anti Fake News Act is based on the same matrix, it includes multiple offences and uses fines to punish social media companies who fail to remove fake news in their possession, custody, or control, immediately after knowing or having reasonable grounds to believe the content constituted fake news.²⁶

In April 2018, a man was convicted for uploading a Youtube video in which he claimed that the police took 50 minutes to respond to a shooting, while the police claimed that they responded in 8 minutes.²⁷ Following criticism and a change of government, a number of unsuccessful attempts were made to repeal the act.²⁸ On October 9, 2019 a second repeal was passed, meaning the opposition led senate will not be able to block the repeal.²⁹

Vietnam



Vietnam has long since been trying to control negative content on social media, primarily by harshly punishing online users and creators of content. Since 2017, several bloggers have been charged and punished for their online content, receiving sentences upwards of 20 years of imprisonment.³⁰

In June 2018, Vietnam passed the comprehensive “Law on Cybersecurity”.³¹ The law is far-reaching, and prohibits numerous extremely broad and vaguely defined categories of content, including *“propaganda against Vietnam”, “distortion or defamation of the people’s administrative authorities”, “psychological warfare, inciting an invasive war; causing division or hatred between [Vietnamese] ethnic groups, religions and people of all countries”, “insulting the [Vietnamese] people, the national flag, the national emblem, the national anthem, great men, leaders, famous people, or national heroes”, “incitement to riots, disruption of security, causing public disorder, embarrassing or slanderous information, information which violates economic management order, and invented or untruthful information which causes confusion amongst citizens”.*

Most of these categories do not conform to the permissible limits on freedom of expression under international human rights law and can be abused to target political speech and dissent critical of the government and state institutions. Parts of the law share similarities with the *NetzDG*. Any Internet service provider can be penalized for failing to remove flagged content within 24 hours of receiving a request to do so. The penalty is not explicitly stated in the law but will be specified at a later point;³² however, failure to comply could result in fines and criminal liability.³³ In January 2019, the Vietnamese government accused Facebook of violating the law by refusing to remove anti-government comments from its platform.³⁴ The Cybersecurity Law is a significant step in further tightening the Vietnamese government’s control of online content and information, by expanding

its existing focus on punishing individual users, bloggers, and others to obliging intermediaries to serve the government’s objectives.

India



On December 24, 2018, the Indian Ministry of Information Technology published a new draft amendment to the existing Intermediaries Guidelines of 2011.³⁵ The draft introduces, among other elements, the responsibility of intermediaries to remove access to illegal content within 24 hours of receiving a court order or a notification from the government.³⁶ The draft rules also includes an obligation for intermediaries to use “technology based automated tools” to “proactively” identify and remove or disable “*public access to unlawful information or content*”. This may encourage the use of

upload filters to identify and remove prohibited categories which include “blasphemous”, “grossly harmful”, “ethnically objectionable”, “disparaging” information as well as information that “*threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order*”. Several of these categories raise serious questions in relation to international human rights standards. While the *NetzDG* is not referenced in the draft, the proposed amendments nonetheless share similarities in their approach to intermediary liability. Several Indian civil society organizations and experts critical of the proposed amendment have highlighted the problems pertaining to the *NetzDG*, warning the Indian government against copying this approach too closely.³⁷ India is considered by Freedom House to have partial freedom on the Internet;³⁸ and the proposed amendments should be seen in conjunction with other practices that limit online freedom, including the wide spread use of Internet black-outs in many Indian states.³⁹

Singapore



In May 2019, Singapore adopted the wide-ranging “Protection from Online Falsehoods and Manipulation Bill”.⁴⁰ The Act includes a vague definition of “false statement of facts” and sanctions individuals guilty of spreading false statements of facts. It also authorizes a minister to issue “correction directions” and “disabling directions” to Internet intermediaries. Failure to comply with such directions to either issue corrections or remove content from accessibility of end-users is punishable by fines. The scope of the act thus allows considerable discretionary executive power compared to the *NetzDG* regime.⁴¹

Prior to the proposal, the Ministry of Communications and Information and the Ministry of Law published a Green Paper on fake news presented to Parliament by the Minister of Law.⁴² The green paper references the *NetzDG* alongside legislation in other countries. Concerns about the extent and nature of the Act were heightened due to a written representation by PPF (the policy forum of the ruling party). The presentation included a Human Rights Watch report critical of Singapore’s limitations on freedom of expression as an example of deliberately spreading falsehoods. This attempt to label critical scrutiny of governmental laws and policies as false statement of facts might

give a sense of the content which the government considers to be harmful and untrue, and that are thus covered by the act.⁴³

Latin-America

Venezuela



At the end of 2017, a bill called Law Against Hatred, for Tolerance and Peaceful Coexistence⁴⁴ was passed in Venezuela. It aims to tackle hate speech by imposing fines on social networks who fail to remove such content within six hours of publication by a user. The law also targets users directly, penalizing anyone who publicly promotes or incites hatred, discrimination, or violence based on social, ethnic, religious, political, sexual, or gender identity with 10 to 20 years imprisonment. Prior to the law's adoption, the then Vice-president of the National Constitutional Assembly, Elvis Amoroso, referred

explicitly to the NetzDG law:



"Germany passed a law that requires companies such as Twitter or Facebook to delete messages that are reported as offensive by users, and will have penalties of up to 50 million euros if they do not rectify in 24 hours or less. Likewise, YouTube and other social networks apply these severe sanctions and have had positive results: they have lowered the promotion of hate in electronic networks."⁴⁵

However, the Venezuelan law has a much broader scope and a considerably shorter take-down deadline than the *NetzDG*; and its vague language provides a flexible tool for the government to suppress dissent and unwelcome criticism. Consequently, self-censorship is widespread among Venezuelan journalists and media, with one newspaper prohibiting its journalists to "*disseminate political content via social networks, unless previously approved*". Moreover, several citizens, amongst them teenagers and journalists, have been imprisoned or detained for spreading online "hate".⁴⁶ Accordingly, it is arguable that the NetzDG matrix has contributed to further eroding Venezuela's already perilous state of Internet freedom, although the two laws have very different consequences.

Honduras



Venezuela is not the only Latin-American country to adopt a NetzDG style approach to online content. In February 2018, the bill called Cybersecurity and Protection Against Acts of Hatred and Discrimination on the Internet and Social Networks was proposed in Honduras.⁴⁷ The law imposes large fines upon social media platforms which fail to remove content within 24 hours. The list of offences is broad and encompasses (notably): incitement to hatred and discrimination, slander, cyberterrorism, child pornography, identity theft, and threats. The Honduran National Congress referred to both

the *NetzDG* and the Venezuelan Law against Hatred in a statement, which was released when the bill was first proposed.⁴⁸

Europe

France



In July 2019, France's lower house of Parliament adopted a bill requiring social media companies to remove "obviously hateful content" within 24 hours or risk fines of more than a million dollars.⁴⁹ The preface of the original bill tabled in March 2019 refers explicitly to the NetzDG.⁵⁰ The bill is currently pending approval by the Senate and is part of President Emmanuel Macron's ambitious agenda to rid the Internet of hate speech and illegal content. At the 2018 Internet Governance Forum, president Macron announced a bold new arrangement in which Facebook works closely together with French

regulators to "*jointly develop specific and concrete proposals to fight offensive and hate content*".⁵¹ Emmanuel Macron even persuaded Mark Zuckerberg to share data on persons suspected of hate speech with French courts.⁵²



*"Today, when I look at our democracies, the Internet is much better used by those on the extremes[...]We cannot simply say: we are the defenders of absolute freedom everywhere, because the content is necessarily good and the services recognized by all. That is no longer true. Our governments, our populations will not tolerate much longer the torrents of hate coming over the Internet"*⁵³

French President Emmanuel Macron, 2018 Internet Governance Forum

The French Senate also referenced the NetzDG prior to the adoption in November 2018 of a law against “manipulation of information”, prohibiting the sharing of disinformation during election periods.⁵⁴

Following the terrorist attack against a mosque in New Zealand in March 2019, French President Macron announced that France and New Zealand would head up the “Christchurch Call”, a (non-binding) initiative to urge countries internationally to pledge to adopt laws to hinder the dissemination of terrorist and extremist material online.⁵⁵

The United Kingdom



The problem of fake news and social media responsibility has been raised and discussed several times in the United Kingdom. In February 2019, a report on the topic, citing the *NetzDG*, was published in the House of Commons.⁵⁶ A white paper on Online Harm was then published in April, stating the government’s intention of imposing new regulatory framework to protect online safety.⁵⁷ As the proposal stands at the time of writing, the British government seems intent on imposing a statutory “duty of care” on social media companies in relation to categories including: disinformation, violent

content, hate crimes, terrorist content, child sexual exploitation and abuse, harassment and cyberstalking. According to the white paper, this duty of care will be enforced by a regulator with “a suite of powers to take effective enforcement action against companies that have breached their statutory duty of care. This may include the powers to issue substantial fines and to impose liability on individual members of senior management”. The exact nature of the legal obligations entailed by the duty of care will be defined by the regulator in codes of practice. While the paper does not outline specific actions, steps would be taken to ensure harmful content is “dealt with rapidly”: a term to be specified at a later stage.⁵⁸ The paper also suggests fines for non-compliance. Further, the white paper expects relevant intermediaries concerned to establish complaint functions, which will be overseen by the regulator. “Companies will need to respond to users’ complaints within an appropriate timeframe and to take action consistent with the expectations set out in the regulatory framework.” Moreover, the white paper mentions a project aimed at developing AI tools to “to detect and address harmful and undesirable content”, including hate speech.

The white paper has been criticized for potentially resulting in heavy-handed censorship of social media companies,⁵⁹ and for encouraging removal of legal content that might be encompassed by the broad definition of “harmful content” such as “disinformation”.⁶⁰ The white paper references the *NetzDG* and shares a similar approach in expanding intermediary liability. However, the two systems differ in that the German law regulates the companies’ responsibility of removal of *specified* content, whereas the UK proposal set forth in the white paper concerns a *non-exhaustive list of harmful content*, which the company must “deal with rapidly” or risk fines. This may suggest a more proactive and preventive duty than NetzDG’s notification and take-down scheme.

Russia



On July 12, 2017 (less than two weeks after the adoption of the NetzDG), a bill was submitted to the Russian Duma by members of Vladimir Putin's United Russia party, intending to force social media networks to remove unlawful content within 24 hours of notification. The bill referred to the German precedent, and Reporters Without Borders labelled it a "*copy-and-paste*" of Germany's *NetzDG*.⁶¹

On March 18, 2019, two laws were signed by President Putin, providing fines for knowingly spreading "unreliable information" and exhibiting "*blatant disrespect for the society, the Government, official government symbols, the Constitution or governmental bodies of Russia*" online. The laws also authorize an official watchdog and censorship agency to notify online publications of illegal content that must be removed from its website. If the illegal content is not removed, the official watchdog may order the relevant Internet service provider to immediately block access to the sites containing illegal content.

The definition of false information is extremely broad and includes:

"Socially significant false information distributed under the guise of truthful messages, if they create a threat that endangers people's lives, health, or property; create possibilities for mass violations of public order or public security; or possibly hinder the work of transportation and social infrastructure, credit institutions, lines of communications, industry, and energy enterprises."

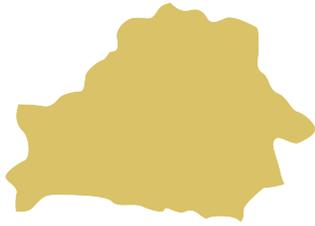
The explanatory report of the Russian bill explicitly referred to the NetzDG.⁶² The legislation has received public criticism for being too vague and amounting to censorship of social media in an online environment already subject to severe restrictions and harsh punishments.^{63 64} Responding to criticism, Kremlin representatives compared the law to European laws against fake news saying that it: "*is regulated fairly harshly in many countries of the world including Europe. It is therefore of course necessary to do it in our country too.*"⁶⁵



"Our worst fears have been realized. The German law on online hate speech is now serving as a model for non-democratic states to limit Internet debate."

Christian Mihr, executive director, Reporters Without Borders, Germany

Belarus



In 2017, Belarus' President Aleksander Lukashenko (dubbed the last dictator in Europe) reportedly referred to then German minister of Justice, Heiko Maas, and the NetzDG bill in order to justify his systematic suppression of online dissent and opposition.⁶⁶ In June 2018, the Belarussian Parliament followed up by passing a law against fake news which includes fines and orders social media companies to moderate comments, or else to face the option of being blocked.⁶⁷ The independent U.N. Rapporteur on the situation of human rights in Belarus warned that the law "*would bring about*

the serious, systemic deterioration of the already grave situation of freedom of expression online".⁶⁸

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The European Union



As a region-wide entity, the European Union is also working on introducing legislation which penalizes Internet intermediaries that fail to remove illegal content. On September 12, 2018, the European Commission proposed a regulation on dissemination of terrorist content, which would require EU member states to fine social media platforms that fail to remove terrorist content within one hour of receiving an order of removal.⁷⁰ In an impact assessment accompanying the Commission's proposal, the *NetzDG* is mentioned several times.⁷¹ While the regulation is limited to terrorist content –

unlike the NetzDG which includes a wide range of offences – it has nonetheless been criticized for being too vague and jeopardizing freedom of expression by relying on privatized enforcement and a duty of care obligation to implement proactive measures aimed at preventing terrorist content to be made available.⁷² In April 2019, the European Parliament voted in favor of the proposed regulation, but only after adding significant amendments aimed at narrowing the scope of the regulation and safeguarding freedom of expression and information.⁷³ The draft regulation now awaits negotiations between the European Parliament and the Council.

In addition to this proposed regulation on dissemination of terrorist content, the EU has adopted non-binding instruments in order to combat hate speech and disinformation. In May 2016, the European Commission and a number of global tech companies agreed on a "code of conduct on countering illegal hate speech online". Under the code of conduct, the tech companies "*agree to review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary*". According to a February 2019 assessment of the code of conduct, tech companies are "assessing 89 percent of flagged content within 24 hours, and promptly act to remove it when necessary". This is a marked increase from 2016.⁷⁴ Likewise in 2018, a number of tech companies agreed to the voluntary code of practice on disinformation aimed at tackling online disinformation.⁷⁵

Despite these initiatives, the European Commission has on several occasions aired the possibility of moving from a voluntary to legally binding instruments in order to combat hate speech and disinformation.⁷⁶ In August 2019, a leaked document was published setting out the proposed priorities of the new Commission.⁷⁷ According to the document, the Commission plans to “provide clear, updated, and binding rules to tackle problems such as illegal hate speech online”, including a revision of the E-Commerce Directive of 2000, which provides certain safe harbor protections for intermediaries. The document cites “*a regulatory disincentive for platforms and other intermediaries to tackle illegal content, or to address harmful content online*”, and notes the inadequacy of voluntary codes of conduct and the emerging patchwork of national laws, including the German and French laws mentioned above. Like the UK white paper, the Commission document mentions a proposed “duty of care” and mentions both “illegal” and “harmful” content which may suggest an obligation to remove even lawful content.

It should also be mentioned that the EU’s controversial 2019 Copyright Directive includes an obligation for online content sharing providers to prevent the availability of unauthorized material. Critics of the Directive argue that this obligation is a move towards requiring upload filters. U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, warned that the directive risked driving “*Internet platforms toward monitoring and restriction of user-generated content even at the point of upload*”, and that “*such sweeping pressure for pre-publication filtering is neither a necessary nor proportionate response*”.⁷⁸ The fear is that upload filters fueled by artificial intelligence will reintroduce a form of pre-publication censorship.

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“Once platforms build out technical capacity to do things like filter user speech, governments around the world will want to use them too, for anything from Saudi blasphemy laws to Russian antigay laws to Thai laws against insulting the king.”⁷⁹

Daphne Keller, Director of Intermediary Liability at Stanford's Center for Internet and Society

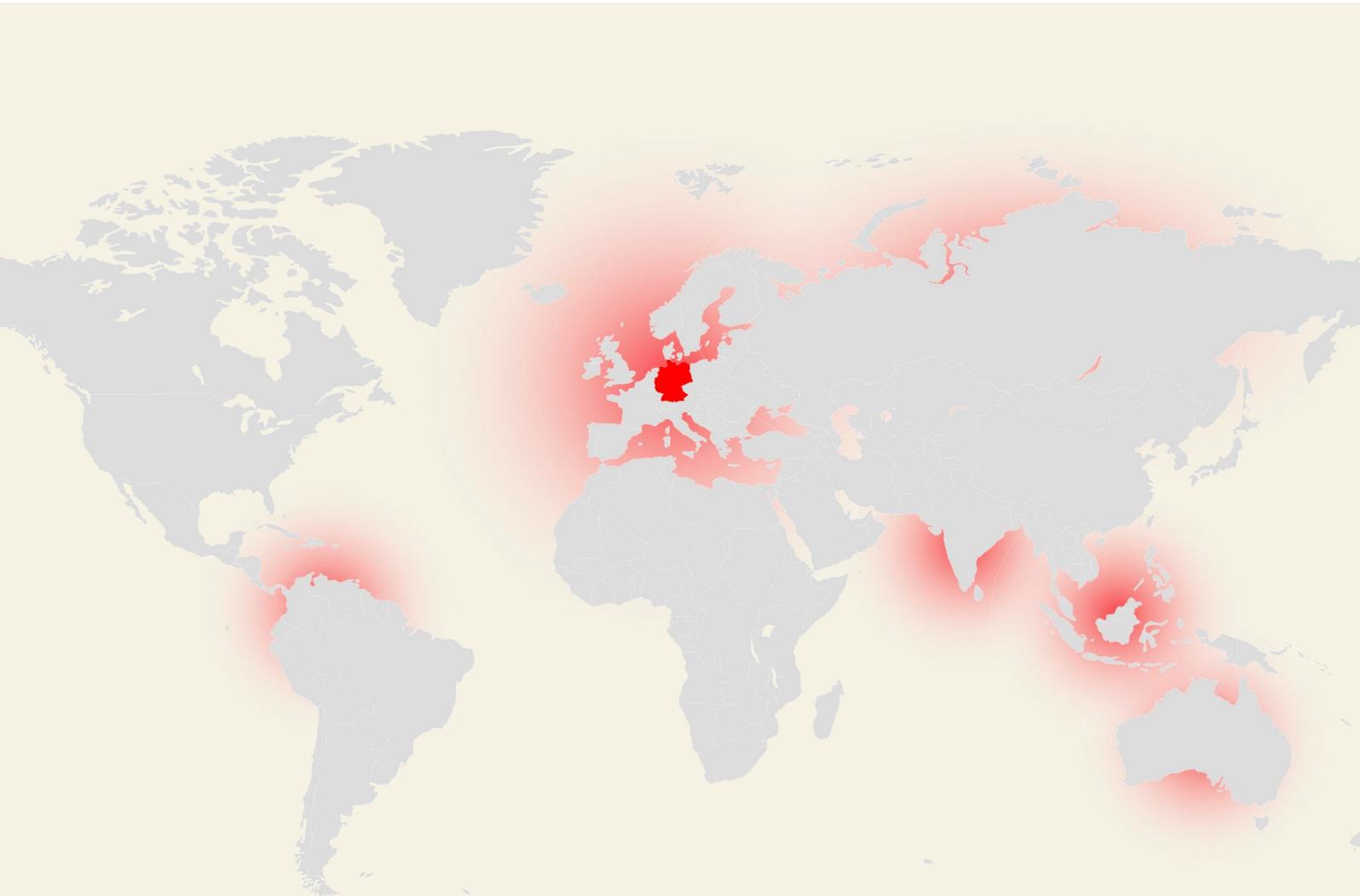
Oceania

Australia



In Australia, the issue of intermediary responsibility was raised following a devastating terrorist attack against two mosques in Christchurch, New Zealand carried out by an Australian white-nationalist. It culminated in the passing of a bill in 2019 that amended the Australian criminal code.⁸⁰ The amendments hold content service providers criminally liable for failure to remove “abhorrently violent” material expeditiously. The act has been compared to the NetzDG; however some key differences are the undefined take-down window and the different subject matter of the illegal content.⁸¹ The act was

criticized by media companies claiming it could lead to censorship of legitimate speech, by media platforms incentivized to over-censor.⁸² Others demanded legislation to address the actual problem – violence and anti-Muslim hatred – instead of making social media companies responsible for the manifestation of the problems.⁸³



Conclusion

Since the adoption of the NetzDG, at least 13 countries (as identified in this paper) in addition to the EU., have adopted or proposed models of intermediary liability broadly similar to the NetzDG matrix. According to Freedom House's assessment of freedom on the Internet (2019)⁸⁴, five of those countries are ranked as being "not free" (Honduras⁸⁵, Venezuela, Vietnam, Russia and Belarus), five are ranked "partly free" (Kenya, India, Singapore, Malaysia and Philippines), and only three ranked "free" (France, UK and Australia). With the exception of India, Kenya, Vietnam, and Australia all these countries – as well as the EU – have explicitly referred to the NetzDG as an inspiration or justification for their models of intermediary liability. Moreover, several of these countries, including Venezuela, Vietnam, India, Russia, Malaysia, and Kenya, require intermediaries to remove vague categories of content that include "fake news", "defamation of religions", "anti-government propaganda" and/or overly broad definitions of hate speech/incitement, extremism and defamation. Several of these categories exceed existing limits on free speech in relevant national criminal laws. It is also problematic that some states, including Russia and Vietnam, have established or propose to establish governmental regulators or authorities responsible for notifying and ordering intermediaries to remove illegal content, and that these decisions are not subject to independent reviewing or complaint mechanisms. Several models, including the one proposed in the UK and India, not merely rely on a notification and takedown regime, but establish a "duty of care" requiring intermediaries to actively police and preventively remove illegal or undesirable content, which may encourage automated moderation or filtering of user content.

All of these developments suggest that the NetzDG has provided important impetus for, and legitimacy to, models of intermediary liability that violate freedom of expression as set out in Article 19 ICCPR, and the human rights-based framework for the moderation of user-generated online content, proposed by the Special Rapporteur on Freedom of Expression and Opinion. This development contributes significantly to the weakening of the already perilous state of Internet freedom across the world.

These consequences were not intended by the German government, and the NetzDG provides rule of law safeguards and free speech protections absent from the most draconian laws identified in this report. Nonetheless, Germany's status as Europe's most influential democracy should prompt Germany as well as other democracies in the EU to reconsider the current approach to the policing of online content. In a world where both online and offline speech is under systematic global attack, democracies have a special obligation to err on the side of free speech, rather than succumbing to the ever-present temptation of fighting illiberal ideas with illiberal laws. Once democracies cede the high ground, authoritarians will rush in creating a regulatory race to the bottom. This entails severe and negative consequences for free speech, independent media, vibrant civil society and political pluralism, without which authoritarianism cannot be defeated, nor democracy protected.

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“As long as there are such things as printing and writing, there will be libels: It is an evil arising out of a much greater good. And as to those who are for locking up the press, because it produces monsters, they ought to consider that so do the sun and the Nile; and that it is something better for the world to bear some particular inconveniencies arising from general blessings, than to be wholly deprived of fire and water”.

Cato’s Letter No. 32, 1721

Appendix

Appendix 1: Overview of differences and similarities

Overview of differences and similarities

	Take-down window	Reasons for take-down	Who can order take-down	in force	NetzDG mention in proposal/debate	removal required without official notification
Australia	expeditiously	knowledge	-	yes	no	yes
Belarus	-	-	-	-	yes	-
EU	1 hour	order	competent authority	no	yes	no
France	24 hours	complaint	anyone	no	yes	no
Honduras	24 hours	complaint	anyone	no	yes	no
India	24 hours	order/knowledge	minister or court	no	no	yes
Kenya	24 hours	complaint	anyone	yes	no	no
Malaysia	unspecified	order/knowledge	court	yes	yes	yes
Philippines	unspecified	order	minister	no	yes	no
Russia	24 hours	complaint	anyone	yes	yes	no
Singapore	unspecified	order	minister	yes	yes	no
UK	-	-	-	-	yes	-
Venezuela	6 hours	publication	-	yes	yes	yes
Vietnam	24 hours	order	minister	yes	no	no

Appendix 2: Types of illegal content

Kenya	Undesirable political content. Including political content written in a language that constitutes hate speech, ethnic contempt, incitement to violence, political content which spreads rumors, misleads or cannot be supported by facts or political content which is not honest or accurate.
Philippines	Information that is false or that would tend to mislead the public.
Malaysia	Any news, information, data or reports, which is or are wholly or partly false.
Vietnam	Propaganda against the Socialist Republic of Vietnam, including insulting the Vietnamese people, flag, emblem, leaders, famous people or national heroes. Content which incites riots, disrupts security or causes public disorder. Content which causes embarrassment or is slanderous. Content which violate economic management order, including invented or untruthful information about products, goods, money, bonds, bills and other valuable papers. Invented or untruthful content causing loss and damage to socio-economic activities, causing difficulties for the activities of State agencies or people performing their public duties.
India	Content which is against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Additionally content that belongs to another person and to which the user does not have any right to is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever, harm minors in any way; violates any law for the time being in force, deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature, impersonates another person; threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation, threatens public health or safety.
Singapore	Material containing wholly or partially false or misleading statements of fact, which has been communicated in Singapore and the Minister finds it in the public interest to remove.

Venezuela	Propaganda in favour of war or condoning national, racial, religious, political or other hatred.
Honduras	Hate speech, incitement to hate speech, discrimination, slander, cyberterrorism, incitement to discrimination, child pornography,, threats and cyber bullying.
France	Content that clearly incites to hatred or discriminatory insults on the grounds of race, religion, gender, sexual orientation or disability.
UK	Agreed harmful and illegal content (not yet specified).
Russia	Content which clearly aims to promote war, incites national, racial or religious hate, is unreliable or defamatory.
Belarus	False information.
EU	Terrorist content. Including inciting or advocating the commission of terrorist offences, thereby causing a danger that such acts be committed, encouraging the contribution to terrorist offences, instructing on methods or techniques for the purpose of committing terrorist offences.
Australia	Abhorrent Violent Material. Including material with terrorist acts, murder, attempts to murder, torture, rape or kidnapping which is produced by the people responsible for the act or by people who aided, abetted or attempted to engage in the act.

Appendix 3: Timeline for implementation

- 27/3-2017:** Germany: [NetzDG is introduced.](#)
- 21/6-2017:** The Philippines: [Act penalizing the malicious distribution of false news and other related violations is proposed.](#)
- 1/7-2017:** Kenya: [Guidelines on prevention of dissemination of undesirable bulk and premium rate political messages enters into force.](#)
- 10/8-2017:** Venezuela: [Law against violent/hateful messages is proposed.](#)
- 1/10-2017:** Germany: [NetzDG enters into force \(with transitional period until 1 January\)](#)
- 8/11-2017:** Venezuela: [Law against violent/hateful messages is passed.](#)
- 1/1-2018:** Germany: [Transitional period ends.](#)
- 8/2-2018:** Honduras: [Law for Cybersecurity and Protection Acts of Hatred and Discrimination on the Internet and Social Networks is proposed.](#)
- 11/4-2018:** Malaysia: [Anti Fake News Act enters into force.](#)
- 12/6-2018:** Vietnam: [Law on Cybersecurity passed.](#)
- 14/7-2018:** Belarus: [Legislation against fake news passes.](#)
- 12/9-2018:** EU: [Regulation on preventing the dissemination of terrorist content online is proposed.](#)
- 12/12-2018:** Russia: [Fake news bills are tabled.](#)
- 24/12-2018:** India: [Draft of the Information Technology \[Intermediaries Guidelines \(Amendment\) Rules\] published.](#)
- 1/1-2019:** Vietnam: [Law on Cybersecurity enters into force.](#)
- 18/2-2019:** The United Kingdom: [Final report on Disinformation and 'fake news' is published.](#)
- 20/3-2019:** France: [Law against hate speech is tabled.](#)
- 7/3-2019:** Russia: [Fake news bills are adopted in the lower house.](#)
- 13/3-2019:** Russia: [Fake news bills are adopted in the upper house.](#)
- 18/3-2019:** Russia: [Fake news bills are signed into law.](#)
- 1/4-2019:** Singapore: [First read of Protections from online falsehood and manipulation bill.](#)
- 4/4-2019:** Australia: [Sharing of Abhorrent Violent Material Bill passed.](#)
- 8/4-2019:** The United Kingdom: [Online Harms White Paper is published.](#)
- 8/5-2019:** Singapore: [Protections from online falsehood and manipulation bill passed.](#)
- 1/7-2019:** The Philippines: [Anti-False Content Act is proposed.](#)
- 9/7-2019:** France: [Law against hate speech passes in the national assembly.](#)
- 9/10-2019:** Malaysia: [Vote to repeal Anti Fake News Act passes.](#)

Endnotes

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