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Germany's NetzDG: Template for Dealing with Fake News?

By Shashi Jayakumar

Synopsis

The German Netzwerkdurchsetzungsgesetz, also known as the NetzDG or Network Enforcement Act (NEA), came into effect last October, with actual enforcement commencing in January 2018. Is this the Fake News silver bullet that Singapore and other nations should be considering?

Commentary

GERMANY'S CLOSELY-WATCHED Network Enforcement Act (NEA), popularly known as the "Facebook Law", has of January 2018 come into full effect. It is aimed specifically at a certain class of content – notably hate speech or forms of incitement - deemed especially dangerous to public discourse and the public peace (e.g. false online reports of mass rapes by asylum seekers). Networks have 24 hours to act (longer in complex cases) after being notified about illegal content. Failure to comply can lead to a fine of up to €50 million for a large company, or €5 million for an individual.

The law is aimed at major social networks that are opinion makers, with networks having fewer than two million users excluded. Messenger networks (such as WhatsApp) are excluded, as are journalistic platforms such as online newspapers. The status of other platforms with mass reach but which are not clearly social networks (Snapchat for example) has not at the time of writing been clarified by the authorities.

What Is New?

The NEA does not radically alter existing German law. It is a restatement; specifying and clarifying existing provisions of the German penal code dealing with the obligation to remove illegal content. What is clearly implied in the NEA, however, is that large

social networks need to conform to German law. The large social media companies' apparent willingness to accept the premise that they must respect national legislation (and not simply the networks' own community standards) should be counted a major concession.

The German authorities appear to have secured the agreements of large social network companies to work with them to some degree, with the Big 3 social media companies - Facebook, Twitter, and YouTube – now setting up legal compliance offices specifically for the NEA. (Separately, Facebook in Germany has hired over one thousand content moderators to ensure timely removal of illegal content reported to it.) These concessions will be watched very closely by other governments contemplating legislation.

It needs to be seen, however, how many other countries will be prepared to follow the German approach: largely eschewing strong-arm tactics, and instead preferring painstaking behind the scenes work to engage the large social network companies in getting them to cooperate.

A key provision in the NEA relates to the reporting path for people to report illegal content. This pathway has been kept simple. Checks by the network must be expeditious, with the network also having to keep the complainant informed about the outcome. The public prosecutor has the power to hold hearings and invite the network in question for interviews, as well as to ascertain facts prior to issuing fines.

Critics & Limitations

The takedown clauses of the NEA have limitations. German authorities appear to have originally envisaged that all copies of punishable content need to be deleted, but this appears to have run foul of EU regulations. At present, the networks are not under an obligation to delete every copy of an offending item.

German authorities have through the NEA taken a stand against plain outright lies that can disturb the public peace, but not conspiracies, nor rents to the social fabric. Care has been taken to avoid the appearance of the NEA being an ideological tool for the ruling class, with the authorities mindful of the criticism in some quarters that the NEA contravenes the principle of freedom of expression, and mindful also of the memory of Germany's past.

The most vocal of the parties in Parliament criticising the law are those from the right wing, especially the Alternative für Deutschland, (AfD), which is strongly against the law and wants it to be abolished. In Germany, use of social media as a primary source of news is much higher with rightwing groups and the AfD.

Areas in Germany controlled by the AfD also show much lower trust in mainstream media compared to other areas, according to surveys. Separately, it also appears that individuals from the extreme right, as well as the AfD, are leveraging on the NEA to simply flag and report content they disagree with.

Limited Impact on Disinformation?

The NEA is over the longer-term unlikely to have much of an effect on state-sponsored disinformation or other issues affecting German society such as the rise of intolerance. On the face of it, these might not seem to matter.

There appears to be some feeling in German government circles, as well as informed observers, that the historically high trust in public broadcasters (unlike in the United States, for example) has blunted the fake news and disinformation threat in Germany. Most expert assessments conclude that the actual nature and scale of Russian disinformation in the September 2017 German federal election was limited in scale.

Limited, but likely not entirely absent. Slant and selective interpretation when deployed in an organised fashion by a skillful actor have an effect on society – and deployment of these subtle methods can shape society over the long-term while evading the ambit of the legal mechanisms NEA.

Some social media networks, as well as Kremlin-linked broadcast media, have an AfD bias as well as reach within the sizable Russian-German audience in Germany. These networks frequently played up certain issues (negative sentiments around refugees, for example) during the election campaign.

Distraction From Other Battles?

Another danger is that focus on enforcing the NEA and bringing large social media companies to heel will distract the authorities from key aspects of the fake news/disinformation conundrum. In Germany, an important role has been played by small fact-checking and rumour-debunking organisations (which some of the big networks such as Facebook have used.) Representatives from some of these organisations privately note that a sustainable approach to fact-checking in Germany has failed to materialise, with the already sporadic funding in danger of drying up entirely.

These organisations themselves operate independently, without cooperating with other likeminded organisations. On the other hand, right wing and extreme groups responsible for spreading fake news increasingly share notes and methods transnationally. Considerable catching up needs to be done.

The bold moves in Germany to underline to major social media companies and the people alike that the constitutional right to freedom of speech is not absolute are noteworthy, and on some levels commendable. The authorities there have drawn a line in the sand : one that they think fits the German context and circumstances. It remains to be seen whether this will have the long-term effect of dampening the fake news problem, whether the means used in Germany are transplantable elsewhere, and whether for that matter the big social media companies will consent to deal with other governments in the same manner that Facebook did with the German authorities.

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