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RECENT DEVELOPMENTS AND POLICY RECOMMENDATIONS ON COMBATING ONLINE HATE SPEECH

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During the past decade, we have witnessed a steep rise in online hate speech. Devoid of physical territorial constraints, regulating hate speech in the digital sphere has raised many legal questions, and has necessitated creating new tools, legal and technological.

In this paper, we will outline some recent developments in combating online hate speech, including the Code of Conduct, a new German law, and provide some policy recommendations.

Recent Developments

Nine signatories to the Code of Conduct. The Code of Conduct on Countering Illegal Hate Speech was published in 2016 by the European Commission, in partnership with Facebook, Twitter, YouTube and Microsoft.

Since 2019, nine IT companies in all are signatories to the Code of Conduct, and represent 96% of the market share of online platforms in the E.U. susceptible to hate speech. The Code of Conduct specifies “public commitments” undertaken by the IT companies, including, among other things: (1) review the majority of content which was flagged as illegal hate speech, and either remove or disable access to it within 24 hours, (2) to act with more transparency with respect to data related to the handling of hate speech and its removal statistics, and publish bi-annual “transparency reports”, and (3) publish terms of service or community standards which prohibit users from posting content inciting violence or hatred against protected groups. It is important to stress that while the measures outlined in the Code of Conduct are indeed beneficial for first-response removal efforts and enhanced transparency, they do not include civil or criminal liabilities for non-compliance, or measures for penalizing perpetrators of hate speech.

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Landmark Law in Germany. The German Law on Network Enforcement of 2018¹, was adopted on 30 June 2017 by the *Bundestag* and on 7 July 2017 by the *Bundesrat*. It came into force on 1 January 2018.² The law sets legal requirements on social media platforms, including transparency and filing bi-annual reports on their handling of hate speech content and its removal, a 24-hour timeframe for removing unlawful materials and high penalties on companies that violate the law of 5M (may reach up to 50M in certain cases of criminal acts). Pursuant to the new law, in July 2019 the German Ministry of Justice fined Facebook with 5M euros, for its alleged underreporting of complaints related to hate speech.

Inspired by the German law, a draft bill was passed in the French lower chamber on 9 July 2019 and the amended text was last discussed in the senate on 22 January 2020.³ The draft French law is indeed similar to the German law in requiring a 24-hour timeframe for removal, adding bi-annual reporting requirements, but broadens the scope of the law to include establishing a monitoring agency and setting obligations on educational institutions to empower people to prevent and combat online hate speech as part of a broader obligation to educate against discrimination.

Note that the Code of Conduct and the German and French laws differ in one major aspect: while the Code of Conduct establishes “public commitments” for the IT companies, the German law provides for legal penalties for non-compliance.

EU court ruling broadening jurisdictional reach: In a landmark ruling, on 3 October 2019 the European Court of Justice declared that individual countries may order Facebook to remove materials – not only in that country but also in other countries as well. This ruling significantly broadens the territorial jurisdiction of a country’s internet laws beyond its territory. The Court further stated that a national court in one of the 28 EU member states could require Facebook to remove content worldwide, after deciding that the content was illegal.

¹ The law is known as NetzDG (acronym of the German name of the law, *Netzwerkdurchsetzungsgesetz*, Law on Network Enforcement).

² The law is the result of the working group established in 2015 by the then Minister of Justice Miko Hass for combating online hate speech, following a considerable increase in online manifestation of hatred and fake news during that year. The law was advanced by a bipartisan coalition of centre-left and -right, which largely voted in favour, with contrary votes of the left camp and the Alliance90/The Greens group.

³ http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_haine_internet.

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Policy Recommendations

Broad application of jurisdiction: Note that Germany applies its jurisdiction on all cases when the content is accessible by German citizens or within the territory of Germany, regardless of the place of the server. Moreover, France applies its jurisdiction if the information is available in the territory of France.

A quick and timely removal of hate speech is critical for stopping the further dissemination of hate speech. Both the German and French laws specify the same 24-hour time-frame. As a policy recommendation, specifying an allotted time is important. Moreover, the 24-hour time limit would lessen the harmful impact of longer periods when the inciting speech would still be disseminated.

Establishing higher penalties for non-compliance: The German law stipulates a penalty of 5 M euros for non-compliance, and the French draft law would set a fine 250,000 euros. Higher penalties act as deterrents and better incentivize the IT companies to adhere to the national laws' provisions. In July 2019, the German Ministry of Justice fined Facebook with 5M euros, for its alleged underreporting of complaints related to hate speech.

Defining hate speech: Despite inconsistent approach to defining unlawful hate speech, companies must adhere to the definition of the European Council Framework Decision of 2008 and to the specific definition in the country's legislation where they operate (or whose citizens have access to the content, etc., depending on the jurisdiction provisions of the specific country).

Freedom of expression debate: Most of the criticisms levelled at online hate speech laws are that they ostensibly infringe upon an individual's right to freedom of expression. It is therefore crucial to form a policy position in this respect when discussing the combating of online hate. It should be noted that the right to freedom of expression is not an absolute right and is always drafted with limitations, including, as is the case in the European Convention of Human Rights, those necessary in a democratic society, in the interests of, among other things, prevention of disorder or crime and for protecting the reputation or rights of others. Accordingly, the European Court of Human Rights has consistently ruled that expressions that amount to hate speech are not afforded the protection of the right to freedom of expression.

Building and training networks: Given that IT Companies are not under any pro-active monitoring obligations (that is, they are obliged to act only after receiving a complaint

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initiated by a user), it is crucial to build and train civil society and non-governmental networks to monitor, report and flag online hate speech.