Dear Mr. Lamb,

Thank you very much for your inquiry about my committee’s findings on the implementation of the Network Enforcement Act (NetzDG). I very much hope that the following information is helpful for your evaluation. It is also of particular personal concern to me that the British and German members of parliament continue to exchange views in a spirit of partnership and trust.

In July 2018, the first transparency reports on complaints about and cancellations of user-generated content by large social media platforms, which had become compulsory with the NetzDG, were published. On that occasion, we decided to discuss the ongoing implementation of the NetzDG in the Committee on the Digital Agenda on 17 October 2018 and invited representatives from the Federal Ministry of Justice and Consumer Protection as well as Google (also reporting for YouTube), Facebook, and Twitter.

With regard to the introduction of NetzDG, first, it should be said that a legislative framework for the deletion of illegal or punishable content on the Internet had already existed for more than 10 years. According to the European E-Commerce Directive 2000/31/EC and the German Telemedia Act (TMG), providers of online platforms are obliged to delete content after they have been informed that it violates the law (notice-and-take-down procedure). However, many users and politicians complained that online platforms have not met this obligation in a manner that seemed firmly enough.

The NetzDG was introduced to accelerate the content deletion process. The bill emerged on short notice at the behest of the then German Minister of Justice Heiko Maas and was passed by the German Bundestag in June 2017, just three months before the general elections in September 2017, and came into force on 1 January 2018.

The NetzDG obliges operators of social media platforms with more than two million registered users to delete all content that is
obviously illegal within 24 hours of its reporting. Other illegal content must be deleted from the platforms within seven days. Operators of the platforms are also required to publish a biannual report (“Transparency Report”) on how they have dealt with NetzDG complaints. If the operators fail to comply with the NetzDG, they face severe penalties of up to 50 million Euros. The law defines illegal content (22 different criminal offences) such as the use of prohibited symbols, incitement of the people, insult, threat or falsification of evidence.

Further, social networks are now obliged to appoint an authorised recipient („Zustellungsbevollmächtigter“). This person is responsible for accepting deliveries in proceedings in accordance with NetzDG or court proceedings concerning the dissemination of illegal content.

The operators of the social media platforms have implemented the requirements of the NetzDG in quite different ways. Google (YouTube), for example, has added the NetzDG reporting procedure as a new category in their standard flagging process and has also grouped the 22 offences listed in NetzDG such that the complainant may easily understand.

Facebook, on the other hand, has introduced a separate NetzDG reporting procedure, which requires the complainants not only to identify which of the 22 offences is eligible, but also to give further reasons for the complaint.

Similar to Google, Twitter has decided to integrate the NetzDG report into their standard flagging process, but like Facebook, Twitter requires a range of additional information for the complaint.

All three platforms first evaluate incoming reports according to their own community guidelines. Only if these are not applicable, they check for violations according to NetzDG. Content that violates the community guidelines is deleted globally from the platforms. If a content violates the NetzDG, but not the community guidelines, it will only be blocked locally, i.e. for retrieval through a German IP address.

According to the transparency reports, Facebook deleted 21% of the content reported in accordance with NetzDG, YouTube 27% and Twitter less than 10% from 1 January 2018 to 30 June 2018. It is noticeable that the number of reported content on Facebook (approx. 1,700) is significantly lower than on YouTube (approx. 215,000) and Twitter (approx. 265,000). According to the
platforms’ representatives, this is very probably due to the comparatively cumbersome reporting process on Facebook.

Overall, the German Federal Ministry of Justice and Consumer Protection (BMJV) took a positive stock of the NetzDG at our committee meeting in October, but announced that the law would be revised by 2020.

Although the BMJV was still evaluating the transparency reports at the time of the meeting and could not anticipate the outcome, the BMJV representatives were sure that they could not find any signs of so-called overblocking, i.e. frequent blocking of legal content. The deletion periods (24 hours or 7 days) were also generally observed. Unfortunately, the BMJV has not yet been able to submit a comprehensive report on complaints regarding failure to delete illegal content received by the German Federal Office of Justice (BfJ), which is responsible for monitoring the implementation of the NetzDG. The BfJ expected 25,000 complaints per year. However, only 526 complaints were received in the first half of 2018.

Both Facebook and Google criticised the NetzDG. Although both were certain that the necessary precautions had been taken on their platforms to prevent overblocking, they argued that this danger could not be averted completely. The NetzDG raised the companies to the status of judges and incentivized them to block content rather than risk high fines. Additionally, if the NetzDG were used as a model, there would be a danger that countries taking freedom of expression less seriously might try to disguise state censorship this way.

Personally, I also do not consider the NetzDG to be an appropriate measure to combat illegal content on social media. On the contrary, it threatens the freedom of expression in digital space, forcing online platforms to act as censors and transfers the task of law enforcement to private companies. On the one hand, the risk of very high fines, in the event of a violation of the NetzDG, puts enormous pressure on the operators of social networks. Only a few days after the NetzDG came into force, it became clear that the operators - understandably - were not prepared to risk the high fines and, when in doubt, would rather opt for deletion. This so-called overblocking has the potential to lead to a kind of censorship in the network. This assumption is reinforced by the - contrary to expectations - low number of complaints about unsuccessful deletions to the BMJV.

On the other hand, the NetzDG leaves the decision as to whether a content is illegal or not to the interpretation of private, mostly
foreign companies, although this should be the responsibility of
the judiciary. This was also criticised by a broad alliance of
politicians, associations and NGOs within the framework of the
"Declaration for Freedom of Opinion". Signatories include inter
alia IT-association BITKOM, the Chaos Computer Club, Europe's
largest association of hackers, the Association for Liberal Digital
Policy LOAD e.V., The German Association for the Digital
Economy (BVDW) or Reporters without Borders. You can find the
declaration here (in English): https://deklaration-fuer-
meinungsfreiheit.de/en/

For this reason, in June 2018, together with my colleague Manuel
Höferlin MP, I filed a private lawsuit before the Administrative
Court of Cologne.

In my personal opinion, the transparency reports also give rise to
the following problems:

- According to German law, insult (§§ 185 ff StGB) is an offense on
complaint, i.e. only the person affected is allowed to apply for
prosecution of the act of insult. The NetzDG also prosecutes and
possibly blocks/deletes reports of insults by people who are not
affected. This undermines our long-established criminal law
principles in digital space.

- In the evaluation of personality rights violations or other content
requiring interpretation, the context of a statement plays a
particularly important role. According to the NetzDG, networks are
obliged to decide without an adequate factual basis. In our normal
constitutional procedures, we have a cognitive process and factual
instances, which deal almost exclusively with the circumstances
of an act. This meets the needs of the individual case. An
assessment by the deletion team of a network in a few hours or
days, on the other hand, does not. Even criminal offences such as
the falsification of evidence-relevant data (§ 269 StGB) are difficult
to evaluate with limited information available.

- In Germany, for example, there is unbelievably broad and
differentiated jurisdiction on offences involving statements. The
figures show that in the case of offences involving statements or
offences of insult, longer periods of time are most frequently used
for evaluation purposes. Here, in many cases, 24 hours are not
sufficient, and it can be assumed that, under time pressure, many
decisions are made prematurely.

- Context is key: The same content can be legal or illegal depending
on the intention/context (e.g. historical anti-Semitic speech on
YouTube: If the broadcast is for information and warning
purposes, it is legal, whereas it is illegal for propaganda purposes under German law.)

I hope the information given above is useful for your evaluation of the NetzDG. Please do not hesitate to contact me if you have any further questions.

Yours sincerely,

[Signature]

Jimmy Schulz MdB