

The Legal Framework of Online Parliamentary Election Campaigning - An Overview of the Legal Obligations of Parties and Platforms in Germany and the EU

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in: Matthias C. Kettemann (ed.), How Platforms Respond to Human Rights Conflicts Online. Best Practices in Weighing Rights and Obligations in Hybrid Online Orders (Hamburg: Verlag Hans-Bredow-Institut, 2022)

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Introduction

The election campaign for the 2021 German federal election has taken place to a particularly high degree on the internet, especially on the pages of large online platforms such as Facebook, Twitter, YouTube or Telegram, mainly due to the Corona pandemic. This online election campaign is regulated by norms from various legal sources, which define various rights and obligations for online platforms as well as for content creators in general and for political parties in particular.

On the side of the sources of law, a distinction must be made between norms of private and state orders. The latter regulate online communication on different legal levels: Under international law, the European Convention on Human Rights, among others, grants freedom of expression, which could be interfered with if content or profiles were deleted. According to the UN Guiding Principles on Business and Human Rights (Ruggie Principles), companies must also respect human rights. Under European law, a number of legislative projects have been launched with the aim of regulating large online platforms. The draft Digital Services Act provides for particularly extensive obligations.² The German Basic Law protects in Article 5 (1), as does the ECHR in Article 10 (1), the freedom of expression of content authors, but also property (Article 14 (1) of the Basic Law, Article 1 of the 1st Additional Protocol to the ECHR) and the entrepreneurial freedom (Article 12 (1) of the Basic Law; Article 16 ECHR) of the platforms. The German Penal Code, which makes insulting content or content inciting to criminal offences a punishable offence, the German State Media Treaty (MStV), which obliges platforms to maintain a diverse public debate, especially through transparency obligations, and the German Network Enforcement Act (NetzDG), which provides regulations for the consistent deletion of illegal content, are of importance for the online election campaign.

Alongside these norms of state orders are the norms of private orders. These are, in particular, the terms of use of the online platforms, but also self-commitments of the parties to conduct themselves in the online

¹ This article is a translated and updated version of Kettemann et al., Der rechtliche Rahmen des Online-Bundestagswahlkampfes. Ein Überblick über die rechtlichen Verpflichtungen von Parteien und Plattformen, Superwahljahr Paper 02/2021, <https://leibniz-hbi.de/de/blog/rechtlicher-rahmen-des-online-bundestagswahlkampfes>

² European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC", COM/2020/825 final.

election campaign. The terms of use of the major online platforms have become increasingly important for online election campaigns as the platforms have become more relevant for shaping public opinion. If, for example, a candidate or elected representative is deprived of the possibility to spread their views and goals through the social network because of violations of the terms of use, this can have serious consequences for the electoral success of the blocked person. Facebook and Twitter, among others, have recognised their responsibility in the context of elections and have set specific rules for political content.

This interplay of norms of state and private orders reveals both problems of democratic theory, for example in the deletion of profiles (keyword: Donald Trump) by social networks, as well as practical deficits, for example in the containment of false news.

National framework

Legal framework of online party communication in election campaigns

Communication through government agencies

Political communication through the channels of government agencies is severely restricted. In the past, it was even assumed that the public opinion-forming process was completely free of the state, in which the state and its representatives were not active participants in the discourse. The only intermediaries between the state and the people were the media, protected under Article 5(1) sentence 2 of the Basic Law, and the political parties, privileged under Article 21(1) of the Basic Law. In the meantime, the assumption has solidified that state communication is also an integral part of public discourse (in the form of public relations, press work, warnings, etc.) and is sometimes even explicitly provided for in public law norms. Communication conducted by state agencies, as sovereign representatives, enjoys both special reach and a heightened level of trust.³ State communication may therefore not be used for any purpose and is limited in questions concerning the "what" and "how" of communication: The statement of the governmental body must be related to the respective task assignment and responsibility, which, depending on the institution, can encompass a broad (e.g. government with state management authority) or narrow (e.g. specialised authority) field of topics and contents.

State communication must be factual, correct in content and disseminated with restraint (factuality and correctness requirement). In addition, state agencies must communicate clearly and completely, and the state must always be recognisable as the author of a statement (communicator clarity). These requirements are an expression of the principles of democracy and the rule of law. In the case of information provided by state authorities that interferes with fundamental rights (e.g. warnings about products such as e-cigarettes), the principle of proportionality must also be observed. Furthermore, the requirement of party-political neutrality applies to state information activities, which was elaborated in particular in the context of court proceedings regarding public criticism of the German parties AfD and NPD. However, state actors do not have to act in a completely neutral manner, as the respective office holders can also defend their office politically and stand up for free democratic basic values.⁴

³ Wissenschaftlicher Dienst des Deutschen Bundestages, "Politische Äußerungen von Hoheitsträgern", 19 March 2018, <https://www.bundestag.de/resource/blob/556768/776c7bb3e6cd1fd9ed85e539cca79b59/wd-3-074-18-pdf-data.pdf>, p. 3.

⁴ BVerfGE 44, 125.

These restrictions on communication only apply to state bodies if they also communicate as state bodies.⁵ Therefore, there are no clear legal restrictions for opposition parties with regard to the use of communication channels, as their statements are not state communication. For public officials, an assessment of the overall circumstances of the communication must be made to determine whether it is to be classified as a state or private statement. In particular, the content, location and context of the message are relevant. A private account of a public official on a platform is not sufficient. If it emerges from the consideration of the overall circumstances that the public official is expressing himself/herself in his/her party-political function, this is protected by the extensive freedom of Art. 5, Art. 21 GG. If, on the other hand, it emerges that the statement was made in a state function, the person is bound by the rule of law under Articles 20 (3) and 1 (3) of the Basic Law.

Overall, the communication of public officials through the channels of the office is very limited and therefore not very suitable for election campaign purposes.

Communication through parties

The legal framework for the conduct of online election campaigning results for the parties from different norms that establish both rights and obligations of the parties.

German Basic Law

The right to freedom of expression also applies to political parties under Article 5 (1) of the Basic Law. In principle, this protects both the parties' online presence and their election advertising. This protection is also derived from Article 21 of the Basic Law, which constitutes the right of parties to participate in the formation of political will. However, according to the current interpretation of Article 21 of the Basic Law, the right to place election advertisements, which is concretised in the State Media Treaty (§ 68 para. 2 MStV), only applies to broadcasting organisations.⁶ Other platforms are free in terms of content; here there is no entitlement of the parties to election advertising or presence.

The parties' freedom of expression under Article 5(1) of the Basic Law is limited, among other things, by the principles of electoral law under Article 38(1) of the Basic Law. All voters must be able to make their free choice of a political idea on an informed basis.⁷ This is not guaranteed if a party spreads false information. This behaviour is then, as a rule, no longer covered by the freedom of opinion under Article 5(1) of the Basic Law because of the collision with Article 38(1) of the Basic Law. The same could apply to the use of social bots, because here it is a matter of deception about the support regarding a political view, which could also disturb the informative basis of the voter in the case of an increased extent of the use of such social bots.⁸

⁵ Wissenschaftlicher Dienst des Deutschen Bundestages, "Politische Äußerungen von Hoheitsträgern", 19 March 2018, <https://www.bundestag.de/resource/blob/556768/776c7bb3e6cd1fd9ed85e539cca79b59/wd-3-074-18-pdf-data.pdf>, p. 3.

⁶ Cf. Wissenschaftlicher Dienst des Deutschen Bundestages, "Parteienwerbung in privaten Medien", <https://www.bundestag.de/resource/blob/651780/3fe16363e541588a2dcbdb3d8b851375/wd-10-044-19-pdf-data.pdf>, 5 July 2019, p. 7.

⁷ Klaas, Arne, "Demokratieprinzip im Spannungsfeld mit künstlicher Intelligenz", MMR 2019, 84, p. 88.

⁸ Ibid.

The dissemination of untrue content about other politicians is also regularly no longer covered by freedom of expression: Even in a political context, the freedom of expression of the person spreading the statement is secondary to the protection of the honour of the person concerned in the case of untrue content.⁹

Simple legal regulations

At the level of simple legal regulations (laws ranking below the constitution), the German Criminal Code sets limits to online election campaigning. In the context of online communication, criminal offences such as insult (§§ 185 ff. StGB) or incitement of the people (§ 130 StGB) are particularly relevant. Especially in online election campaigns, the offences of voter coercion (section 108 StGB) or voter deception could be fulfilled.

With regard to the financing of parties in general and of the election campaign in particular, the German Political Parties Act (PartG) prescribes certain transparency obligations, such as the filing of an accountability report (§ 23 PartG), which must also contain the expenses related to the election campaign (§ 24 para. 5 no. 2 lit. c PartG).

The European General Data Protection Regulation (GDPR) and the German Federal Data Protection Act (BDSG) limit the powers and duties related to the collection of data from users. For example, the processing (definition in Art. 4 No. 2 of the GDPR) of data containing political opinions of the person is only permitted in rare exceptional cases (Art. 9 of the GDPR). However, such an exception may already be the consent of the data subject. The creation of a political personality profile is also limited by said norms.¹⁰

Legal framework for platforms in online election campaigns

NetzDG

On 1 October 2017, the German Network Enforcement Act (NetzDG) came into force. The law is intended to improve law enforcement in social networks and lead to the consistent deletion of criminal content. The background was also the increasing spread of such content in the digital space and the experiences from the 2016 US election campaign.¹¹

The core element of the NetzDG is the obligation for operators of social networks to remove "obviously illegal content" within 24 hours after it has been reported by users and to remove illegal content from the platform after 7 days. Important for the moderation practice are the obligation to set up complaint possibilities and regular reporting on the deletion practice according to the NetzDG. However, this obligation only takes effect if the reported content fulfils the facts of a criminal norm mentioned in § 1 (3). § 1 (3) mentions, among other things, incitement to commit a criminal offence, insult or the dissemination of signs of anti-constitutional organisations. Disinformation in particular rarely meets the elements of such criminal offences.

In addition, the NetzDG is only applicable to platforms that are operated with the intention of making a profit (§ 1 (1) sentence 1 NetzDG) and, in principle, not to services that serve individual communication (§

⁹ BVerfG, NJW 2000, 3485.

¹⁰ Klaas, Arne, "Demokratieprinzip im Spannungsfeld mit künstlicher Intelligenz", MMR 2019, 84, p. 90.

¹¹ Cf. BT-Drs. 18/12356, p. 1, <http://dipbt.bundestag.de/dip21/btd/18/123/1812356.pdf>.

1 (1) sentence 3 alt. 1 NetzDG). With reference to these two exceptions, Telegram, for example, evades the rules of the NetzDG. Whether Telegram, with groups of up to 200,000 members and public channels with an unlimited number of possible subscribers¹², actually differs so much from other platforms such as Facebook that a non-application of the NetzDG is justified, seems questionable. Also, according to its own statements, Telegram does not aim to make a profit.¹³ On the other hand, the network also plans to monetise content according to its own statements, but without wanting to make a profit.¹⁴

State Media Treaty

The German Interstate Treaty on Broadcasting (RStV) was replaced by the German State Media Treaty (MStV) on 7 November 2020. This is intended to adapt the legal framework to the changed conditions in response to the progressive digitisation of the media landscape.¹⁵ To this end, the media concept of the RStV, which focuses on broadcasting, has been replaced by the term media platform (§ 2 No. 14 MStV), which includes all services that process media content into an overall offer, regardless of the technology used to distribute the content.

In addition, the MStV also includes so-called media intermediaries (§ 2 No. 16 MStV), which also sort journalistic-editorial content and present it in a generally accessible way without combining it into an overall offer. These include, for example, search engines or social networks, which, as described above, have a strongly growing influence on the formation of public opinion.¹⁶

One aim of the MStV is to ensure diversity of opinion and communicative equality of opportunity in the media landscape.¹⁷ This goal is to be achieved through comprehensive obligations for media intermediaries insofar as they have an influence on the formation of public opinion.¹⁸ In this case, they are obliged, among other things, to disclose the functioning of their algorithms and may not determine them in such a way that individual journalistic-editorial content is systematically and without justification disadvantaged (§§ 93(1), 94(1)). Social bots must also be labelled as such (§ 18(3)). The state media authorities can enact statutes to concretise the requirements for media intermediaries. These will be of great importance for the further development of the effectiveness of the MStV.

The responsibility for checking infringements also lies with the state media authorities. They can receive notifications of suspected violations from media providers. How many such notifications the state media authorities have received in the context of the 2021 federal election and how quickly they can process them will significantly determine the success of the MStV in securing diversity of opinion in social networks.

¹² Telegram, Q&A, "What is the difference between groups and channels?", <https://telegram.org/faq/de#f-was-ist-der-unterschied-zwischen-gruppen-und-kanalen>.

¹³ Telegram, Questions and Answers, "Why should I trust you?", <https://telegram.org/faq/de#f-warum-sollte-ich-euch-vertrauen>.

¹⁴ Telegram, Q&A, "How will Telegram make money?", <https://telegram.org/faq/de#f-wie-wird-telegram-geld-verdienen>.

¹⁵ Martini, BeckOK Informations- und Medienrecht, MStV Preamble, marginal no. 43.

¹⁶ Cf. Die Medienanstalten, "Intermediäre", <https://www.die-medienanstalten.de/themen/intermediaere>.

¹⁷ Cf. explanatory memorandum to the MStV, LT-Drs. N 18/6414, 89, https://www.landtag-niedersachsen.de/drucksachen/drucksachen_18_07500/06001-06500/18-06414.pdf.

¹⁸ Martini, BeckOK Informations- und Medienrecht, MStV Preamble, marginal no. 45.

European legislative projects

Digital Services Act (DSA)

On 15 December 2020, the EU Commission presented its draft Digital Services Act (DSA). As the successor to the E-Commerce Directive, the DSA is intended to contribute to secure and trustworthy online communication in the form of an EU regulation (Art. 1 para. 2 lit. b).¹⁹

According to the draft, intermediaries remain liable for illegal content as soon as they become aware of it. In order to enable such knowledge to be gained, an efficient complaints management system must ensure that reports of suspected illegal content are processed quickly and reliably. Similarities to the German NetzDG can be seen here.²⁰ The transparency obligations for intermediaries are also to be expanded: Among other things, they must make their guidelines for moderating and restricting content publicly available.

Art. 24 of the draft contains the obligation of online platforms to make information about the displayed online advertising transparent. For users, it should be clear, unambiguous and recognisable in real time for each individual advertisement whether and whose advertisement is being displayed. In addition, the most important parameters for determining the target group must be visible. This should make personalised advertising and especially the controversial microtargeting used for election campaigns more transparent.²¹

In addition, platform providers are obliged to submit annual transparency reports, which must include information on deleted content as well as on recommendation algorithms.

Another important regulatory subject of the DSA are the "Very Large Online Platforms" (VLOPs). These are "systemically relevant" platforms with at least 45 million monthly active users in Europe. The Commission considers such platforms to have a particular influence on public debates and sees them as important sources of information in the context of public opinion-forming. The Commission also sees risks in the reach of these platforms, such as the dissemination of illegal content, manipulation or restrictions on the exercise of fundamental rights, especially freedom of expression.²² The DSA provides for possible measures to minimise these risks, e.g. publicly accessible archiving of all advertisements placed (Art. 30), increased content moderation (Art. 27) and the obligation to conduct an annual independent audit to determine whether the requirements of the DSA have been met (Art. 28).²³

The topics of fake news and disinformation, on the other hand, if they do not fall under illegal content anyway, are hardly regulated in the DSA.²⁴

¹⁹ European Commission, 2020/0361 (COD), p. 49, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52020PC0825&from=de>.

²⁰ Berberich/Seip, "Der Entwurf des Digital Service Act", GRUR-Prax 2021, 4 (5), <https://beck-online.beck.de/Bcid/Y-300-Z-GRURPRAX-B-2021-S-4-N-1>.

²¹ Ibid., 4 (5), <https://beck-online.beck.de/Bcid/Y-300-Z-GRURPRAX-B-2021-S-4-N-1>.

²² Ibid.

²³ European Commission, 2020/0361 (COD), p. 68, <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52020PC0825&from=de>.

²⁴ Berberich/Seip, Der Entwurf des Digital Service Act, GRUR-Prax 2021, 4 (7), <https://beck-online.beck.de/Bcid/Y-300-Z-GRURPRAX-B-2021-S-4-N-1>.

Digital Markets Act (DMA)

The draft Digital Markets Act (DMA), which was presented at the same time as the DSA, is directed against the business practices of so-called gatekeepers. These are companies that bring together a large number of customers with a large number of companies and exert a significant influence on the EU internal market over a certain period of time (Art. 3 para. 1 DMA-E). This also includes the social networks that are particularly relevant in the context of opinion-forming on the Bundestag elections. The large networks enjoy their supremacy in particular through the enormous amounts of data of their users, which enable them to offer an optimal range of products. In order to dissolve this data-based supremacy, gatekeepers should be restricted in their use of data and obliged to pass on the data. For example, data obtained from commercial users may not be used in competition with these users. There is also an obligation to pass on data on the behaviour of customers and persons confronted with advertisements to the companies that have placed the advertisement or sold the product.

Data Governance Act (DGA)

In addition to its advantages for consumers, data protection, which has been strengthened by the General Data Protection Regulation (GDPR) since 2018, has also brought significant obstacles for companies. In 2020, for example, in a survey by the industry association Bitkom, a good half of the companies surveyed stated that their innovative strength was limited by the GDPR.²⁵ The difficulties associated with the GDPR are to be reduced by the Data Governance Act (DGA), the draft of which was presented on 25 November 2020, in the form of a European regulation. While maintaining the standards of the GDPR, it is intended in particular to strengthen the confidence of users in the security of the processing of personal data and thus increase the possibility of data use by companies and research institutions.²⁶

The core element of the draft is the requirement that personal data should not be anonymised and held in trust by the internet companies themselves, but by a neutral body. The supervision of this intermediary body is the responsibility of a supervisory authority created by the member state in the headquarters of the intermediary.²⁷

The DGA also creates the legal basis for so-called data altruism. Through a release valid for the entire EU, all users can voluntarily make their data available for purposes of general interest. Monitoring of data use is also the responsibility of the national supervisory authorities.²⁸ By balancing data protection on the one hand and the interest of research and industry in the use of data on the other, the DGA aims to make Europe the "most data empowered continent", as EU Commissioner Thierry Breton said at the presentation of the draft.²⁹

²⁵ Bitkom, "Every 2nd company forgoes innovation for data protection reasons", <https://www.bitkom.org/Presse/Presseinformation/Jedes-2-Unternehmen-verzichtet-aus-Datenschutzgruenden-auf-Innovationen>.

²⁶ European Commission, "Proposal for a Regulation on European Data Governance (Data Governance Act)", <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-european-data-governance-data-governance-act>.

²⁷ Rieke, EU Data Governance Act, [bvdw.org, https://www.bvdw.org/der-bvdw/news/detail/artikel/eu-data-governance-act/](https://www.bvdw.org/der-bvdw/news/detail/artikel/eu-data-governance-act/).

²⁸ Ibid.

²⁹ Ibid.

Private ordering

Facebook

The Facebook platform has formulated community standards to protect democratic and liberal values. These prohibit the manipulation of elections. Spreading support for violence around elections and voter registration are also prohibited.³⁰ Content glorifying and supporting violent or terrorist acts will be removed from Facebook.³¹ Furthermore, the misrepresentation of election data, especially regarding candidates, locations and eligibility to vote, is not permitted. Facebook also prohibits its users from influencing elections, especially in the form of intimidation and demonstrations of power.³² Facebook does not allow political exclusion that denies someone the right to political participation.³³ Facebook also does not allow political influence through coordinated, non-authentic behaviour on behalf of a foreign actor or government agency.³⁴

In addition, videos created or manipulated by artificial intelligence or deep learning technology (so-called "deep fakes") are inadmissible if they lead to a false assumption about what a person is saying. Parodies and satire are exempt from this.³⁵

In the help section for businesses, Facebook informs about the requirements for elective advertising. Advertisers must complete an advertising authorisation process and the ad must include a disclaimer stating who is paying for the ad. It should also be easier to see who owns a Facebook page and how certain media may be politically influenced by the state.³⁶ In addition, the ads will be stored in an ad library to create more transparency.³⁷

In general, advertisements must not contain lurid or discriminatory content. In addition, no misinformation should be displayed or controversial social and political issues used for commercial purposes.³⁸

Facebook itself creates the problem that users are primarily shown information that is close to their own interests due to recommendation logic. Facebook's terms of use state that all available data on Facebook products and outside will be used for personalisation.³⁹ Based on the belief that stronger connections create better communities, Facebook uses this data to show targeted people, events and other content that is

³⁰ Facebook (ed.), Community Standards, I.1., https://de-de.facebook.com/communitystandards/credible_violence.

³¹ Facebook, "Community Standards", I.2.

³² Facebook, "Community Standards", I.3.

³³ Facebook, "Community Standards", III.12.

³⁴ Facebook, "Community Standards", IV. 20.

³⁵ Facebook, "Community Standards", IV.22.

³⁶ Kühl, Eike, "Wie groß ist Facebooks Macht im Wahlkampf", 22.09.20, ZeitOnline, <https://www.zeit.de/digital/internet/2020-09/facebook-manipulation-waehler-us-wahl-regeln-soziale-medien>, p. 2.

³⁷ Facebook, "Info on election advertising or advertising on politically or socially relevant topics", <https://de-de.facebook.com/business/help/167836590566506?id=288762101909005>.

³⁸ Facebook, "Advertising Policy Prohibited Content," 3, 11, 13, 14, https://www.facebook.com/policies/ads/prohibited_content.

³⁹ Facebook, "Terms of Use", 1. Services We Offer. We provide you with a personalised experience, <https://de-de.facebook.com/terms>.

related to its own content and interests.⁴⁰ Advertisements for services and products of companies and organisations are controlled by matching personal data about users' interests and activities with the target audience specified by the company.⁴¹ By controlling the content presented in this way, the discourse can appear less diverse.⁴²

Twitter

Twitter has specifically issued a policy on the integrity of civic processes. It prohibits the manipulation and interference with elections. This includes, in particular, misleading information about how to vote and election results, as well as attempts to suppress and intimidate voters. In the run-up to elections in the respective country, Twitter activates a special reporting function through which tweets from all users with a suspicion of a violation of these special rules can be reported. Reported tweets can be flagged or deleted if violations are found. In the case of serious or repeated violations, the user's entire account can be blocked. Polarising or controversial points of view as well as inaccurate statements about parties, representatives or candidates are explicitly not a violation.⁴³

Accounts of governments or state-affiliated media companies are uniformly marked on Twitter by means of a small flag symbol in the status of the account. Twitter does not promote or recommend accounts or tweets marked in this way.⁴⁴ In addition, synthetic or manipulated content can be marked as such and its visibility restricted in order to avoid misleading users.⁴⁵

Regardless of elections, harassment and intimidation are prohibited on Twitter. In the event of violations, the platform can ask users to delete the content in question and temporarily put the account into read-only mode or block it permanently.⁴⁶ Twitter provides even stricter measures against the threat and glorification of violence. Potential violations can be reported not only by users, but by anyone. "Any account that posts threats of violence will be immediately and permanently banned."⁴⁷

YouTube

Similar to Facebook and Twitter, misinformation about elections and technically manipulated content that misleads users are prohibited on YouTube. YouTube also prohibits YouTube also prohibits inaccurate statements about the eligibility of political candidates or the legitimacy of incumbent government officials. Attempts to disrupt or obstruct an election are also prohibited.⁴⁸ To

⁴⁰ Facebook, "Terms of Use", 1. Services We Offer. We connect you with people and organisations you care about, <https://de-de.facebook.com/terms>.

⁴¹ Facebook, "Terms of Use", 1. Services we offer. We help you discover content, products and services that may be of interest to you and 2. How our services are funded, <https://de-de.facebook.com/terms>.

⁴² Bundestag Drucksache 19/24200, 11.11.2020, p. 58 f.; Schmidt, "Soziale Medien. Eine Gefahr für die Demokratie?", 11.05.2019, <https://www.bmbf.de/de/soziale-medien-eine-gefahr-fuer-die-demokratie-8606.html>.

⁴³ Twitter, "Civic Process Integrity Policy", as of 01.2021, <https://help.twitter.com/de/rules-and-policies/election-integrity-policy>.

⁴⁴ Twitter, "Information on labels on Twitter accounts of government officials and labels of state media", <https://help.twitter.com/de/rules-and-policies/state-affiliated>.

⁴⁵ Twitter, "Policy on Synthetic and Manipulated Media", <https://help.twitter.com/de/rules-and-policies/manipulated-media>.

⁴⁶ Twitter, "Abusive Behaviour", <https://help.twitter.com/de/rules-and-policies/abusive-behavior>.

⁴⁷ Twitter, "Threat of Violence Policy", <https://help.twitter.com/de/rules-and-policies/violent-threats-glorification>.

⁴⁸ YouTube, "Policy on Spam, Deceptive Practices and Fraud", <https://support.google.com/youtube/answer/2801973>.

prevent fraudulent interference in elections, YouTube works with Google's Threat Analysis Group, other technology companies and law enforcement agencies.⁴⁹ YouTube will remove film, image and audio material relating to the aftermath of terrorist attacks or other acts of violence.⁵⁰

To support politically serious sources, the platform shows priority trustworthy content for news and info topics under "Next Videos". In addition, journalistically high-quality content can be highlighted.⁵¹

Similar to Twitter and its flag icons, details of funding sources are displayed below videos of public or government-funded sites.⁵² For election ads, the funding of the ad must be disclosed in the public transparency report.⁵³ All rules set by YouTube explicitly apply regardless of the political orientation of the content or user.⁵⁴

Telegram

Telegram attaches great importance to the privacy of its users. The platform categorically refuses to process requests regarding (illegal) non-public content. The content of (group) chats is "a private matter for the respective users".⁵⁵ Only publicly accessible content can be reported by email or directly via the user's profile.⁵⁶ According to Telegram, group chats are intended for families, friends and small teams. However, the permitted group size of up to 200,000 members and the possibility of making groups public,⁵⁷ speaks in favour of a wide-ranging use. The platform makes it clear that it does not support political censorship and that statements critical of the government may therefore also be disseminated on Telegram. Although copyright-infringing, terrorist and pornographic content is to be blocked, the platform wants to give space for the dissemination of "alternative[r] opinions".⁵⁸

In order to make it more difficult to oblige the handover of data, Telegram uses different data centres around the world for its cloud chats. Due to the different jurisdictions, several court orders from different countries would be necessary to oblige Telegram to hand over data.⁵⁹

⁴⁹ YouTube, "Security and Election Policies, Foreign Influence", https://www.youtube.com/intl/ALL_de/howyoutubeworks/our-commitments/supporting-political-integrity/#foreign-interference.

⁵⁰ YouTube, "Violent or Cruel Content Policy", https://support.google.com/youtube/answer/2802008?hl=de&ref_topic=9282436.

⁵¹ YouTube, "Security and Election Policies, News and Information on Elections", https://www.youtube.com/intl/ALL_de/howyoutubeworks/our-commitments/supporting-political-integrity/#election-news-and-information.

⁵² Ibid.

⁵³ YouTube, "Security and Election Policies, Political Advertising", https://www.youtube.com/intl/ALL_de/howyoutubeworks/our-commitments/supporting-political-integrity/#political-advertising.

⁵⁴ YouTube, "Security and Election Policies, Remove Content", https://www.youtube.com/intl/ALL_de/howyoutubeworks/our-commitments/supporting-political-integrity/#removing-content.

⁵⁵ Telegram, "Questions and Answers, I found illegal content on Telegram. How can I have it deleted?", <https://telegram.org/faq/de#f-ich-habe-illegale-inhalte-auf-telegram-gefunden-wie-kann-ich-d>.

⁵⁶ Telegram, "Questions and Answers, I found illegal content on Telegram. How can I have it deleted?", <https://telegram.org/faq/de#f-ich-habe-illegale-inhalte-auf-telegram-gefunden-wie-kann-ich-d>.

⁵⁷ Telegram, "Q&A, What's the difference between groups and channels?", <https://telegram.org/faq/de#f-was-ist-der-unterschied-zwischen-gruppen-und-kanalen>.

⁵⁸ Telegram, "Questions and answers, wait a minute. O_o You delete something at the request of a third party?", <https://telegram.org/faq/de#f-ich-habe-illegale-inhalte-auf-telegram-gefunden-wie-kann-ich-d>.

⁵⁹ Telegram, "Q&A, Do you respond to data requests?", <https://telegram.org/faq/de#f-reagiert-ihr-auf-datenanfragen>.

In addition, the platform offers the possibility to communicate via so-called secret chats. Due to the end-to-end encryption used only in this area, Telegram itself has no access to the distributed content, according to its own information. In these chats, there is the option to set a so-called "self-destruct timer", after which the messages are deleted from the sender's and recipient's device.⁶⁰ Telegram recommends the additional protection of (not end-to-end encrypted) cloud chats by means of a password, if the user has reasons to "doubt your mobile carrier or government".⁶¹

Telegram does not take a position on dealing with discriminatory, defamatory or inflammatory content in its terms of use, privacy policy or FAQs. An exception to this is the propagation of violence, which is prohibited according to the published terms of use, but only for the public parts of the platform. However, consequences for violations are not threatened.⁶² If Telegram receives information about accounts of terror suspects, the IP address and telephone number can be passed on to the authorities.⁶³ However, Telegram does not impose an obligation to this effect - for example, on the grounds of protecting the general public. According to Telegram, no such measures have yet been taken.⁶⁴

Telegram also does not make any statements about possible false voting information.⁶⁵ In case of reported phishing, spam or other abuse, Telegram may block the responsible profiles or restrict their ability to contact strangers. Telegram also reserves the right to analyse cloud chat data for this purpose using algorithms.⁶⁶ Telegram's terms and conditions do not provide for a transparency report along the lines of the NetzDG.

Other orders

Parties can commit themselves to certain behaviour in online election campaigns in order to guarantee specific principles of conduct in addition to the legal regulations and conditions of the platforms.⁶⁷ This is what the Greens did in 2017, among others, committing not to use social bots and to publish more detailed information on party donations than required by the Political Parties Act. Disinformation campaigns were also prohibited in the self-imposed election campaign rules.⁶⁸

Overview and comparison

Most of the big platforms have terms of use that are intended to prevent election manipulation. Although they differ in details, their general approach is similar. Only Telegram falls off the grid and also allows

⁶⁰ Telegram, "Questions and Answers, Who is Telegram for?", <https://telegram.org/faq/de#f-fur-wen-ist-telegram-gedacht>; "How do secret chats differ?", <https://telegram.org/faq/de#geheime-chats>; Telegram, "Privacy Policy, 3.3.2. Secret Chat", <https://telegram.org/privacy>.

⁶¹ Telegram, "Questions and Answers, How does two-step confirmation work?", <https://telegram.org/faq/de#f-wie-funktioniert-die-zweistufige-bestatigung>.

⁶² Telegram, "Terms of Service", <https://telegram.org/tos?setln=de>.

⁶³ Telegram, "Privacy Policy, 8.3. Law Enforcement Authorities", <https://telegram.org/privacy#8-3-law-enforcement-authorities>.

⁶⁴ Ibid.

⁶⁵ Telegram, "Questions and Answers", <https://telegram.org/faq>; "Terms of Service", <https://telegram.org/tos?setln=de>; "Privacy Policy", <https://telegram.org/privacy>.

⁶⁶ Telegram, "Privacy Policy, 5.3. Spam and Abuse", <https://telegram.org/privacy?setln=de#5-3-spam-and-abuse>.

⁶⁷ Künast, Renate, "Rules for election campaigns in the digital age", ZRP 2019, 62, p. 65.

⁶⁸ Bündnis 90 / Die Grünen, "Grüne Selbstverpflichtung für einen fairen Bundestagswahlkampf 2017", 13.02.2017, https://cms.gruene.de/uploads/documents/20170213_Beschluss_Selbstverpflichtung_Fairer_Bundestagswahlkampf.pdf.

potentially illegal, or at least problematic, content in public channels. A summary of the election-related platform rules of Facebook, YouTube, Twitter and Telegram is shown in the following figure.

Election-related platform rules of Facebook, YouTube, Twitter and Telegram

Platform	Facebook	Twitter	Youtube	Telegram
Prohibition of false election data	✓	✓	✓	✗
Labelling and transparency of election advertising	✓	✓	✓	✗
Marking of governmental organisations	✗	✓	✓	✗
Prohibition/marketing/limitation of visibility of “social bots” or “deep fakes”	✓	✓	✓	✗
Prohibition of terrorist and violent content	✓	✓	✓	✓

Problem cases

In the run-up to the election, a number of problem areas were already identified which were to be observed during the election campaign. With regard to the State Media Treaty, the enactment, use and effectiveness of the statutes regulating media intermediaries by the state media authorities (§ 96 MStV) were of particular interest. If content or entire profiles are deleted, it must be analysed on the basis of which norm this is done. This could be both the private terms of use of the networks, state norms such as the NetzDG or an interplay of such norms. This goes hand in hand with the question of whether the networks also take the same measures such as deletion, commenting or profile blocking in comparable situations, or whether different decisions and measures are taken even in ideologically comparable groups. In this context, it could be of particular relevance whether the measure is directed against the profile of a candidate. Messenger services such as Telegram could be of particular importance for the dissemination of illegal content. The fact that these services started as private communication spaces and that a (large) part of their platform is also used for this purpose makes it more difficult to take action against illegal content on these services in view of the NetzDG and the draft DSA.

The sum of the measures against published content could also provide information on whether freedom of expression finds different, actual limits online than offline. The question also arises whether disinformation campaigns can be effectively prevented within the framework of existing legal regulations or whether new regulations are needed here.

Summary

The catalogue of norms for online election campaigns has expanded considerably. Not only have new norms of state order been enacted, which place particular responsibility on the operators of the large online platforms. Due to the enormous reach of these networks, their private norms in the form of terms of use, privacy settings or rules of conduct have also taken on a significance that could exceed the significance of state norms in terms of their actual impact. In the German super-election year 2021, all these norms regulate an essential part of the election campaign and thus an essential democratic process. Many of the norms discussed are still young (NetzDG of 2017, MStV of 2020) or awaiting adoption (DSA, DMA, DGA). The

novelty of the norms and the fact that communication on the internet has become enormously important for election campaigns in Corona times call for an analysis of the impact of said norms in order to be able to develop alternatives to the existing regulations on this basis. These effects on the democratic process of opinion-forming will become particularly evident in the German super-election year of 2021.