

Network Enforcement Act Regulatory Fining Guidelines

Guidelines on setting regulatory fines
within the scope of the Network Enforcement Act
(*Netzwerkdurchsetzungsgesetz - NetzDG*)
of 22 March 2018

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A. Principles

I. Concept and purpose of the Network Enforcement Act Regulatory Fining Guidelines

The Network Enforcement Act Regulatory Fining Guidelines are general administrative principles for the exercise of discretion by the regulatory fine authority in initiating regulatory fine proceedings and calculating the amount of the regulatory fine. They are based on the discretion of the Federal Office of Justice (*Bundesamt für Justiz*) concerning the decision and the legal consequences pursuant to section 47 (1) first sentence of the Act on Regulatory Offences, section 4 (2) of the Network Enforcement Act.

The Network Enforcement Act Regulatory Fining Guidelines serve to specify the conditions for initiating regulatory fine proceedings within the scope of the Network Enforcement Act and to determine the amount of the fine to be imposed within the statutory fine framework. They specify in concrete terms the relevant provision for assessing the regulatory fine of section 17 of the Act on Regulatory Offences. The Network Enforcement Act Regulatory Fining Guidelines contain circumstances and consequences typically arising in the case of violations of the Network Enforcement Act (so-called normal cases), and also exceptional cases characterised by considerably increased unlawfulness justifying special deterrence. In the Network Enforcement Act Regulatory Fining Guidelines, the general method for calculating the fine is presented, but special circumstances of an individual case may justify deviation from this method or from the specified basic amounts.

The Network Enforcement Act Regulatory Fining Guidelines support the principle of equal treatment to which the administration is duty-bound. Without giving up the assessment of circumstances relevant to the offence and its perpetrator in the individual case, which is central to the fine decision, they guarantee that for the most part, the same regulatory offences are treated comparably. Finally, the Network Enforcement Act Regulatory Fining Guidelines promote the transparency of the decision to initiate regulatory fine proceedings and the fine decision of the Federal Office of Justice vis-à-vis the parties to the proceedings and the public.

II. Scope of the Network Enforcement Act Regulatory Fining Guidelines

The Network Enforcement Act Regulatory Fining Guidelines apply to the assessment of regulatory fines under section 4 (2) of the Network Enforcement Act incurred by natural and legal persons who have violated obligations of the Network Enforcement Act that are punishable by such a fine. Assessment of regulatory fines incurred by legal persons is an enterprise-related assessment of regulatory fines under section 30 of the Act on Regulatory Offences. Assessment of the Network Enforcement Act Regulatory Fining Guidelines for legal persons applies to associations of persons, *mutatis mutandis*.

The Network Enforcement Act Regulatory Fining Guidelines are applicable to violations of various regulations. The violations addressed are violations of obligations to provide an effective procedure for handling complaints about unlawful content (complaint management), and violations of obligations to name a responsible contact person authorised to receive service in the Federal Republic of Germany and a person in the Federal Republic of Germany who is authorised to receive such requests for information.

Effective complaint management:

- section 2 (1) first sentence of the Network Enforcement Act (reporting obligation)
- section 3 (1) first sentence of the Network Enforcement Act (procedure for handling complaints about unlawful content)
- section 3 (1) second sentence of the Network Enforcement Act (procedure for submitting complaints about unlawful content)
- section 3 (4) first sentence of the Network Enforcement Act (monitoring the handling of complaints)
- section 3 (4) second sentence of the Network Enforcement Act (rectification of organisational deficiencies)
- section 3 (4) third sentence of the Network Enforcement Act (training courses and support programmes)

Responsible contact persons in the Federal Republic of Germany:

- section 5 of the Network Enforcement Act (naming of a person authorised to receive service in the Federal Republic of Germany and a person in the Federal Republic of Germany who is authorised to receive requests for information)
- section 5 (2) second sentence of the Network Enforcement Act (obligation to reply)

The Network Enforcement Act Regulatory Fining Guidelines are applied both to joint and independent proceedings (cf. section 30 (4) of the Act on Regulatory Offences).

B. Initiation of regulatory fine proceedings

Pursuant to section 47 (1) of the Act on Regulatory Offences, it is at the duty-bound discretion of the administrative authority, in this case the Federal Office of Justice, whether and to what extent regulatory offences are prosecuted. Accordingly, unlike in criminal proceedings, where the mandatory prosecution principle applies, the Federal Office of Justice has no obligation to initiate regulatory offence proceedings.

A possible reason for considering not to prosecute individual violations of requirements for effective complaint management is when minor violations are concerned (e.g. only slightly exceeding the time limits of section 3 (2) (2) and section (2) (3) of the Network Enforcement Act or exceeding the time limits in only a small number of cases) or when the complaint management was subsequently credibly revised in order to be able to meet the statutory requirements in the future. Another reason for considering not to prosecute individual violations can be when a charge of only minor negligence can be made against the social network or its responsible staff.

Another possible reason for considering not to prosecute individual violations of requirements is when there could be a threat of undue hardship if more than one regulatory fine is imposed as applicable under section 20 of the Act on Regulatory Offences. If a fine has already been imposed on a social network with headquarters abroad for violation of a compliance standard in the country of its headquarters, this may be a possible reason for considering not to prosecute individual violations under the Network Enforcement Act.

I. Scope of application under section 1 (1) of the Network Enforcement Act

Under section 1 (1) first sentence of the Network Enforcement Act, said Act shall apply to telemedia service providers which, for profit-making purposes, operate internet platforms that enable users to exchange and share any content with other users or to make such content available to the public (social networks).

For telemedia service providers, the focus must be on electronic provision of information. Users are natural or legal persons who use the platform's infrastructure, particularly to access content and obtain information. The Network Enforcement Act's scope of application includes platforms intended to enable users to share any content, such as pictures, videos or texts. The platforms facilitate communication space where the communication is typically addressed to a number of addressees or takes place between them. Services offering such communication space only as an ancillary function are not "intended for" sharing or making available content within the meaning of section 1 (1) first sentence of the Network Enforcement Act. Thus, sales platforms or online games, for example, which have the secondary function of enabling users to share content (such as evaluations of sales platforms' forums or

communication forums as a sub-function of online games) do not fall under the scope of application.

Social networks offering journalistic or editorial content (section 1 (1) second sentence of the Network Enforcement Act), platforms for the dissemination of specific content or intended for individual communication (section 1 (1) third sentence of the Network Enforcement Act) are not covered by the Act's scope of application. Thus, vocational networks, specialist portals or email or messenger services do not fall within the scope of application.

II. Registered users

Under section 1 (2) of the Network Enforcement Act, the provider of a social network shall be exempt from the obligations stipulated in sections 2 and 3 of the Act if the social network has fewer than two million registered users in the Federal Republic of Germany. The relevant number is the number of registered users in the Federal Republic of Germany.

The characteristic "registered" requires the relevant users to have actively undergone a certain registration procedure, generally including the allocation of a user name and acceptance of certain social network rules in the form of terms and conditions.

Through registration, the social network provider usually obtains more detailed information about the user, while the user may obtain a password giving him access to the platform and use of the platform's services which are subject to registration. It does not require the user to actively add contents. The key factor is the possibility to consume the content offered by a social network. Thus, anyone who simply visits a website, for example, and uses its information without previously disclosing detailed personal information is not deemed to be registered. Users whose usage relationship with the social network has ended are deemed to be no longer registered.

The relevant number is the number of registered users over the entire period on which the Federal Office of Justice bases its charge. The requirements of section 1 (2) of the Network Enforcement Act must have been fulfilled during this period.

In order to determine the number of users, the Federal Office of Justice can use publically accessible sources and inform the network of the result. The network can then make a statement on the number of users determined by the Federal Office of Justice. The social network's statement is to be taken into account by the Federal Office of Justice in forming its opinion. On the basis of relevant data (for example the network's statement, reliable information from the networks on their own reach and registered users – for example vis-à-vis advertising clients – and similar information), the Federal Office of Justice may also estimate the minimum number of users (registered users in Germany). Sufficient safety margin deductions are to be made to the networks' benefit. In case of doubt, the Federal Office of Justice can have the number of registered users in Germany further clarified by means of an expert report.

III. Applicability abroad

Regulatory offences under the Network Enforcement Act are sanctioned irrespective of whether they are committed in the Federal Republic of Germany or abroad (section 4 (3) of the Network Enforcement Act).

A limitation of the scope of application of the Network Enforcement Act applies to the requirements of the regulatory offences described in section 4 (1) (2) of the Network Enforcement Act. This limitation means that non-fulfilment of the obligation deriving from section 3 (1) first sentence of the Network Enforcement Act to maintain a procedure for handling complaints by complaint bodies or users is subject to a regulatory fine only when these complaint bodies' or users' seat or place of residence is located in the Federal Republic of Germany. Whether or not the content of a complaint is in German is irrelevant, however. Contents that are not in German may be the subject of a complaint in the Federal Republic of Germany.

Contents that have no connection to the Federal Republic of Germany or to domestic users, such as communication within closed groups without any members in Germany or without any domestic participation, cannot be the subject of a complaint under the Network Enforcement Act.

IV. Personal responsibility

1. Normal addressees

The normal addressees of the requirements of the regulatory offences specified in the Network Enforcement Act that are subject to a regulatory fine are primarily the providers of social networks. Since these are legal persons that do not themselves have legal capacity and thus cannot be the perpetrator of a regulatory offence, accountability for the act constituting a regulatory offence is required within the corporate structure.

Providers of social networks are subject to the following obligations:

- The reporting obligation deriving from section 2 (1) first sentence in conjunction with section 4 (1) (1) of the Network Enforcement Act;
- The obligation deriving from section 3 (1) first sentence of the Network Enforcement Act in conjunction with section 4 (1) (2) of the Network Enforcement Act
- The obligation deriving from section 3 (1) second sentence of the Network Enforcement Act in conjunction with section 4 (1) (3) of the Network Enforcement Act
- The obligation deriving from section 5 (1) and section 5 (2) first sentence in conjunction with section 4 (1) (7) of the Network Enforcement Act

The management of a social network is subject to the following obligations:

- The obligation deriving from section 3 (4) first sentence of the Network Enforcement Act in conjunction with section 4 (1) (4) of the Network Enforcement Act
- The obligation deriving from section 3 (4) second sentence of the Network Enforcement Act in conjunction with section 4 (1) (5) of the Network Enforcement Act
- The obligation deriving from section 3 (4) third sentence of the Network Enforcement Act in conjunction with section 4 (1) (6) of the Network Enforcement Act

The obligation deriving from section 5 (2) second sentence in conjunction with section 4 (1) (8) of the Network Enforcement Act is addressed to the person authorised to receive service referred to in section 5 (2) second sentence of the Network Enforcement Act. The provisions on acting for another pursuant to section 9 of the Act on Regulatory Offences are excluded. The sole addressee of a regulatory fine order can therefore only be the person authorised to receive service referred to in section 5 (2) second sentence of the Network Enforcement Act. This may be a natural or a legal person.

2. Transfer of the obligations under section 2 or section 3 of the Network Enforcement Act through assignment

The provider of a social network (owner of a business within the meaning of section 9 of the Act on Regulatory Offences) may also transfer obligations under section 2 or section 3 of the Network Enforcement Act to authorised representatives, however. Under the conditions of section 9 (2) of the Act on Regulatory Offences, regulatory fines may then also be imposed on the representative. Pursuant to section 9 (2) first sentence of the Act on Regulatory Offences, this is subject to the requirement that a person authorised by the owner of a business or otherwise so authorised is commissioned to manage the business, in whole or in part, or is expressly commissioned to perform on his own responsibility duties which are incumbent on the owner of the business. If this person acts on the basis of this commission, it is also possible to sanction this person commissioned by means of a regulatory fine (for example in the case of outsourcing complaint management through commissioning an external service provider) insofar as the other requirements of the offence have been fulfilled. A commission to manage the business in whole or in part also exists if the transfer of obligations arises from the circumstances; express entrustment with the obligations that are subject to a regulatory fine is not required. Effective delegation always requires the task to be transferred to staff selected on the basis of objective criteria, who have sufficient specialist qualifications and who are required to have sufficient workload capacities to be able to actually fulfil the task transferred to them. Only then can delegating managers be confident that the task is fulfilled carefully and lawfully.

Under section 9 (2) first sentence number 2 of the Act on Regulatory Offences, other representatives are only deemed to be the normal addressees of the obligations

affecting the owner of a business if they have been expressly commissioned to perform tasks incumbent on the owner on their own responsibility. No particular form has been specified for commissioning. The representative must be able to act autonomously and have genuine decision-making competence. Delegation means assuming responsibility for operational tasks on behalf of the owner but only insofar as the area of responsibility has been sufficiently defined.

The owner's responsibility does not completely cease to exist with the naming of a representative, however. Rather, the owner is required to take all the organisational measures to prevent violations. If an owner becomes, or it is possible for him to become, aware that the representative is ignoring or possibly violating certain obligations, he must take action himself. If he fails to do so, the owner bears full responsibility as the normal addressee.

V. Procedure on handling complaints about unlawful content under section 3 (1) first sentence of the Network Enforcement Act

1. Complaints that may be taken into account

First of all, it is to be taken into account that an obligation of a provider of a social network to handle complaints correctly within the meaning of section 3 (1) of the Network Enforcement Act is only triggered when a user submits a substantiated complaint to the social network. The complaint by the party concerned must be put in such specific terms that a qualified examination of the violation can be made on the basis of the assertions by the party concerned.

2. Systemic failure

In its section 3 (1) first sentence, the Network Enforcement Act contains an organisational obligation to maintain an effective and transparent procedure for handling complaints about unlawful content. Violation of this organisational obligation is subject to a regulatory fine (section 4 (1) (2) of the Network Enforcement Act); the individual deadline requirements in handling complaints (section 3 (2) (2) and section 3 (2) (3) of the Network Enforcement Act) only indicate that this organisational obligation has been fulfilled and are not themselves subject to a regulatory fine. Placing the focus of the offence subject to a regulatory fine on organisational obligations emphasises the objective of the law to establish effective complaints proceedings that enable the social network to carry out an unbiased and swift examination of the individual case. The social network is not threatened with a regulatory fine if it takes an incorrect decision in an individual case. This imperative systemic view prevents contents being deleted or blocked for fear of the possible threat of a fine ("overblocking"). Thus, in principle, non-fulfilment of an obligation deriving from section 3 (1) of the Network Enforcement Act does not in itself result from one single violation of the requirements deriving from section 3 (2) (2) and section 3 (2) (3) of the Network Enforcement Act (removal/blocking access to content that is manifestly unlawful within 24 hours; in all other cases, as a rule, within seven days or transfer of the decision to a recognised Regulated Self-regulation body within

this period). That also applies to individual violations of the other requirements of section 3 (2) of the Network Enforcement Act.

As a rule, it cannot be presumed in the case of a single violation of individual requirements under section 3 (2) of the Network Enforcement Act that no effective procedure for handling complaints about unlawful content is maintained. Accordingly, violation of the obligation to remove or block manifestly unlawful content within 24 hours of receipt of a complaint, or other unlawful content without delay, generally within seven days, can only lead to the imposition of a regulatory fine if it is not an individual case, but a systemic failure arising from persistent violations deriving from section 3 (2) of the Network Enforcement Act, i.e. relevant misconduct repeated within a short period.

If, however, a social network lays down organisational requirements for assessing situations in individual cases that regularly lead to a failure to block or delete certain unlawful contents, the scope of application of section 4 (1) (2) of the Network Enforcement Act is opened on account of systemic failure. In addition, there may be systemic failure when there is a systematic failure to delete or block unlawful content in a certain subject area characterised by a consistent feature (e.g. unlawful content directed against a certain population group). That applies regardless of whether relevant requirements of the social network can be established in this respect.

In addition, frequent wrong decisions within a limited period may indicate that the requirements of section 3 (2) of the Network Enforcement Act are not being properly implemented and the requirements of the offence of section 4 (1) (2) of the Network Enforcement Act could be fulfilled.

In some cases, however, exceeding the time limit for removing or blocking (section 3 (2) (2) and section 3 (2) (3) of the Network Enforcement Act) a priori cannot contribute to an indicative effect of this kind:

Thus, in cases where a decision on the unlawfulness of content depends on the truth or falsity of a factual claim in the complaint, the seven-day period pursuant to section 3 (2) (3) (a) of the Network Enforcement Act may be exceeded. In all cases where the unlawfulness of content is not manifest, the social network can transfer the decision on unlawfulness to a recognised Regulated Self-regulation body within seven days and can submit itself to its decision. If the Regulated Self-regulation body takes an incorrect decision, it is not to the detriment of the social network.

Also, only culpable violations of the organisational requirement to maintain a procedure within the meaning of section 3 (1) first sentence of the Network Enforcement Act (Handling of complaints) can lead to a regulatory fine (section 4 (1) of the Network Enforcement Act). If, despite reasonable efforts by the complaint management, the legal assessment of particular contents is questionable in an individual case, it cannot be subsequently alleged that the network is to blame for incorrectly handling the content concerned. This includes cases where contradictory decisions have been taken by lower-instance courts and there has thus been no

clarification by a court of last instance. It also includes cases where it is difficult to assess the legal situation for other reasons, for example in the case of strong statements in a political battle of opinions or satirical articles that verge on being a criminal offence.

VI. Person authorised to receive service and person authorised to receive information requests

1. Person authorised to receive service

Under section 4 (1) (7) variant 1 of the Network Enforcement Act, a person who, in contravention of section 5 (1) of the Network Enforcement Act, fails to name a person authorised to receive service is subject to a regulatory fine. Under section 5 (1) first sentence of the Network Enforcement Act, this includes publication of such an appointment. The provision serves to avoid delays in proceedings or the initiation of the proceedings specified in section 5 (1) of the Network Enforcement Act that arise from the fact that the provider has its headquarters abroad. It is for this reason that the requirement under section 5 (1) of the Network Enforcement Act is already fulfilled by providers that have their headquarters in the Federal Republic of Germany when they publish their German postal address accordingly. The provision of contact details, for example pursuant to section 5 of the Telemedia Act (*Telemediengesetz* - TMG) is then sufficient. Providers without a postal address in Germany are required to name a person in Germany. This may be a natural or a legal person. This is the only way to ensure that the effect of delivery to the provider is already caused by delivery to the authorised person as the delivery addressee (cf. for example section 171 first sentence of the Code of Civil Procedure (*Zivilprozessordnung* - ZPO).

2. Person authorised to receive information requests

Section 5 (2) of the Network Enforcement Act contains a number of facts constituting an offence subject to a regulatory fine.

A regulatory fine may be imposed under section 4 (1) (7) variant 2 of the Network Enforcement Act if, contrary to section 5 (2) first sentence of the Network Enforcement Act, a person in the Federal Republic of Germany authorised to receive requests is not named. No explicit provision is made as to whom or to which body the person authorised to receive requests is to be named. In contrast to the person authorised to receive service, there is no obligation for general publication because the communication channels under section 5 (2) of the Network Enforcement Act are only intended to be used by legitimised agencies so that their functioning is not impaired, for example, by spam messages. Thus, it is sufficient if the person authorised to receive requests is named to the individual prosecution authorities or the judicial administration concerned.

A natural or a legal person can be named as a person authorised to receive requests. The provider of a social network with its headquarters in Germany can also name itself as a person authorised to receive requests since in that case, the

purpose of section 5 (2) of the Network Enforcement Act does not require another person to be named. Providers whose headquarters are abroad must name a (natural or legal) person in Germany.

The Act does not explicitly regulate the specific form in which requests for information are to be received by this person. The intent and purpose of section 5 (2) of the Network Enforcement Act is to open up to the prosecution authorities a reliable and effective channel of communication to the networks (cf. in this respect the substantiation of the provision of the person authorised to receive requests in the parliamentary group draft of the Network Enforcement Act, Bundestag document 18/12356, page 27). It is not necessary for the named person authorised to receive requests to receive them personally or in a particular form. It is sufficient if an effective channel of communication that is easy to use is sufficiently clearly named. Thus, the receipt of requests for information may be organised in such a way that the prosecution authorities can make their requests via secure online forms or special portals provided for prosecution authorities by the networks in a sufficiently transparent way. However, the person authorised to receive requests does not serve to replace any necessary formal service or (like section 5 (1) of the Network Enforcement Act) to simplify it since the person authorised to receive requests is not a person authorised to receive service within the meaning of section 132 of the Code of Criminal Procedure (*Strafprozessordnung* - StPO) (Bundestag document 18/12356, page 27).

In all other respects, the material requirements for the obligation to provide information remain unaffected by the provision (for example, the need for legal assistance requests); there is no basis for additional obligations to provide information (cf. Bundestag document 18/12356, page 27).

Failure of the person authorised to receive requests pursuant to section 4 (1) (8) of the Network Enforcement Act in contravention of section 5 (2) second sentence of the Network Enforcement Act is also subject to a regulatory fine. An offence meets the criteria for the imposition of a fine if no reply is given to a request for information within 48 hours of its receipt or if, when no exhaustive reply is given, no substantiation is given as to why no exhaustive reply has been given.

C. Determination of the relevant scope for setting regulatory fines

The provisions in section 4 (2) of the Network Enforcement Act in conjunction with section 30 of the Act on Regulatory Offences provide for two maximum amounts of regulatory fines in the case of natural persons and two maximum amounts of regulatory fines in the case of legal persons.

A distinction needs to be made between a violation of obligations deriving from section 5 of the Network Enforcement Act and a violation of the other obligations deriving from sections 2 and 3 of the Network Enforcement Act.

I. Legal persons

Section 4 (2) of the Network Enforcement Act refers to section 30 (2) third sentence of the Act on Regulatory Offences, which is why the maximum amount of the regulatory fine for the offences specified in the Act is multiplied by ten if the regulatory fine is imposed on a legal person or an association of persons.

A violation of section 2 or section 3 of the Network Enforcement Act therefore opens up a regulatory fine framework vis-à-vis legal persons of between five euro and fifty million euro (section 4 (1) (1) to (6) of the Network Enforcement Act in conjunction with section 4 (2) of the Network Enforcement Act).

In the case of violations of section 5 (1) first sentence, section 5 (2) first and second sentences of the Network Enforcement Act, this means that a regulatory fine framework of between five euro and five million euro applies to legal persons, section 4 (1) (7) to (8) of the Network Enforcement Act in conjunction with section 4 (2) of the Network Enforcement Act.

II. Natural persons

A violation of section 2 or section 3 of the Network Enforcement Act opens up a fine framework vis-à-vis natural persons of between five euro and five million euro, section 4 (1) (1) to (6) of the Network Enforcement Act in conjunction with section 4 (2) of the Network Enforcement Act.

In the case of violations of section 5 (1) first sentence, section 5 (2) first and second sentence of the Network Enforcement Act, this means that a regulatory fine framework of between five euro and five hundred thousand euro applies to natural persons, section 4 (1) (7) to (8) of the Network Enforcement Act in conjunction with section 4 (2) of the Network Enforcement Act.

III. Negligent violations (section 17 (2) of the Act on Regulatory Offences)

If the perpetrator negligently commits a finable violation of an obligation defined in the Network Enforcement Act, the maximum regulatory fine imposed for the negligent action may only be half of the threatened maximum amount of the regulatory fine.

D. Assessment of regulatory fines pursuant to section 17 of the Act on Regulatory Offences

When the regulatory fine framework relevant in the individual case has been calculated, a specific assessment of the regulatory fine is carried out. The provision

of section 17 of the Act on Regulatory Offences applies to this specific assessment, based on the maximum statutory amount under section 4 (2) of the Network Enforcement Act.

The Federal Office of Justice calculates the fine in a four-step procedure. The first step is to calculate the basic amount using offence-related eligibility criteria (I.). The second step is to adjust the basic amount to the specific guilt of the perpetrator using other eligibility criteria relating to the offence and in particular to the offender (II.). Step three involves taking the financial circumstances of the perpetrator into account (III.). In a fourth step, the Federal Office of Justice can order the perpetrator to disgorge the financial gain acquired from the offence (IV.) (cf. section 17 (4) of the Act on Regulatory Offences).

The basic amount reflects the significance of the regulatory offence to be sanctioned within the respective applicable financial framework (cf. section 17 (3) first sentence of the Act on Regulatory Offences). Adjusting (increasing or reducing) the basic amounts of the regulatory fine takes account in particular of the charge faced by the perpetrator (cf. section 17 (3) first sentence of the Act on Regulatory Offences). The perpetrator's financial circumstances are also to be taken into account in calculating the amount of the regulatory fine, except in cases involving negligible regulatory offences (section 17 (3) second sentence of the Act on Regulatory Offences), and the perpetrator shall be ordered to disgorge the financial gain acquired from commission of the regulatory offence (section 17 (4) of the Act on Regulatory Offences).

I. Step 1 – Calculating the basic amount

The basic amount evaluates the seriousness of the offence within the respective applicable regulatory fine framework. The basic amount is to be seen in the tables under section E. (p. 17 et seq.).

The basic amount is calculated using a combination of the offence-related eligibility criteria “size of the social network“ (1.) and “seriousness of the circumstances and effects of the offence“ (2.). The criteria take into account firstly the significance of the social network on the basis of its reach and associated opinion-making power and secondly the circumstances specific to the regulatory offence to be sanctioned.

The basic amounts in the tables under E. apply to intentional offences. In cases where the offender acted negligently, the respective maximum regulatory fine shall be halved (section 17 (2) of the Act on Regulatory Offences).

1. Categorising the social network

First, the social network is categorised using four defined group sizes, corresponding to its public significance. A key indicator here is the number of registered users in the Federal Republic of Germany at the time of the offence.

Social networks with fewer than two million registered users in the Federal Republic of Germany are not taken into account in assessing the basic amounts in the tables

under E. Social networks with fewer than a million registered users in the Federal Republic of Germany are only to be taken into account in establishing the basic amounts in the case of violations of section 5 of the Network Enforcement Act (cf. section 1 (2) of the Network Enforcement Act).

Categorisation of the social network on the basis of the number of its registered users in the Federal Republic of Germany				
Social network	A	B	C	D
Registered users in the Federal Republic of Germany	more than 20 million	between 4 million and 20 million	between 2 million and 4 million	less than 2 million

2. Categorising the circumstances and effects of the offence

The seriousness of the offence is evaluated on the basis of the specific circumstances and effects of the individual offence. The criteria are placed in the categories “extremely serious”, “very serious”, “serious”, “medium” or “slight”. Examples of circumstances and effects of offences that occur regularly and describe the typical circumstances of sanctionable regulatory offences are compiled in the basic amount tables under E. This list is not exhaustive. Specifically, they include the type and duration of the offence and its effects on legal transactions.

The categories “extremely serious” and “very serious” are fulfilled only in exceptional cases. In such cases, the type and duration of the offence and its effects on legal transactions are considerable. In addition, relevant offences may only be presumed to have been fulfilled if there are hardly any or no apparent efforts to comply with the respective requirements of the Network Enforcement Act and no improvements are likely.

Over time and through observing implemented proceedings, there is also likely to be further orientation as to how particular violations are to be categorised. In the long term, classification into five categories will force the prosecution authority to substantiate and differentiate precisely why an offence falls into a certain category. For social networks, this increases the predictability and transparency of the likely decisions and eases the verifiability of the actual decisions.

The basic amounts apply to one offence in each case.

II. Step 2 – Adjusting the basic amount

The second step in assessing the regulatory fine is to consider the significance of the regulatory offence and the charge faced by the perpetrator (section 17 (3) first sentence of the Act on Regulatory Offences). This can have an aggravating or mitigating effect on the amount of the regulatory fine. Mitigating reasons and/or aggravating circumstances may result in the basic amount calculated being undercut

or exceeded. If there are both mitigating and aggravating adjustment criteria, this is to be taken into account in categorising the circumstances and effects of the offence.

It is also to be taken into account that general sentencing criteria are not to be applied in every case. Section 17 (3) first sentence of the Act on Regulatory Offences refers to the charge faced by the perpetrator independently alongside the significance of the regulatory offence.

In principle, it may be assumed from this that the individual charge of guilt is meant and the sentencing criteria summarised in section 46 (1) and (2) of the German Criminal Code (*Strafgesetzbuch* - StGB) are applicable. The initial position of the Act on Regulatory Offences differs from that of criminal law, however. In the Act on Regulatory Offences, the law generally provides for a predetermined regulatory fine to sanction a violation, whereas in criminal law, the circumstances and effects of the offence in favour of and against the offender have to be weighed up against one another first in order to be able to establish the maximum and minimum penalties and to set the penalty. In this respect, judicial sentencing cannot be adopted unchanged in regulatory offences law. Section 17 (3) first sentence of the Act on Regulatory Offences is based primarily on objective criteria. That corresponds to the nature of regulatory offences, the prosecution of which serves to protect an existing ordered structure rather than to sanction personal guilt.

1. Mitigating adjustment criteria

a. Confession

A mitigating criterion meriting adjustment is a confession in which a perpetrator concerned admits carrying out the objective and subjective offence. The quality of the confession (for example, a full or only a partial confession) is to be taken into account here. Self-disclosure by the perpetrator is to be evaluated in the same way as a confession.

b. Cooperation in clarifying the facts

The extent to which the perpetrator cooperated through supporting a reconstruction of the offence is also to be taken into account as a mitigating circumstance

c. Promise and measures to improve

Credible promises to improve or specific measures to prevent further violations in the future have a mitigating effect. These have to be presented and substantiated in detail and evidence of them presented to the Federal Office of Justice.

d. Long duration of proceedings

Long proceedings are to be evaluated as having a mitigating effect on the regulatory fine. The delay may not be due to evident dilatory action on the part of the perpetrator.

2. Aggravating adjustment criteria

a. Repeat offence

An aggravating factor to be taken into account is when the offence is a repeat offence. If, previous to the offence in question, another offence against the Network Enforcement Act of the same kind has been sanctioned by a legally binding regulatory fine order or a legally binding court decision, this constitutes a repeat offence. Thus, as long as a legally binding regulatory fine order has not been imposed and a legally binding court decision has not been taken on the first offence, it shall not be deemed to constitute a repeat offence.

b. Special prevention on account of intransigence

Another aggravating factor is if the perpetrator expresses an antagonistic attitude to the law, states that he does not intend to comply with the legal order in the future either and refuses to comply with the provisions of the Network Enforcement Act in the future. The perpetrator must be of the opinion that he does not need to worry about statutory provisions. Merely being silent at a hearing or contesting the charge may not be deemed to be intransigence. It may also not be interpreted as intransigence if the social network concerned, following due examination of content, takes a different view to that of the Federal Office of Justice and no legally binding regulatory fine order has yet been imposed or legally binding court decision taken on this network concerning this or similar content.

III. Step 3 – Considering the financial situation

The third step can adapt the amount of the regulatory fine on the basis of the perpetrator's financial situation (estimated if necessary) (section 17 (3) second sentence of the Act on Regulatory Offences). If the person concerned, due to financial circumstances, cannot be expected to pay the regulatory fine immediately, he shall be granted a payment deadline or be allowed to pay in specified instalments (section 18 of the Act on Regulatory Offences).

IV. Step 4 – Disgorging the financial gain

In the final step, the financial gain the perpetrator has acquired from commission of the regulatory offence is to be exceeded by the regulatory fine (section 17 (4) first sentence of the Act on Regulatory Offences). To this end, the statutory maximum provided for in the respective regulatory fine framework may be exceeded (section 17 (4) second sentence of the Act on Regulatory Offences).

Within this regulatory fine framework, the financial gain to be disgorged is in principle the minimum fine to be imposed.

The net principle is to be used to determine the financial gain. The costs and other expenses accruing to the perpetrator are to be deducted from the gain acquired through the regulatory offence. The remaining difference constitutes the financial gain that is to be disgorged.

E. Basic amounts

I. Reporting obligation

Basic amounts for legal persons

Reporting obligation on handling unlawful contents on the platforms under section 2 (1) of the Network Enforcement Act				
Maximum regulatory fine: 50 million euro				
Section 4 (1) (1) in conjunction with section (2) of the Network Enforcement Act				
Amounts in euro		Social network (see D. I. 1)		
		A	B	C
Circumstances and effects of the offence	Extremely serious	20,000,000	10,000,000	7,500,000
	Very serious	10,000,000	5,000,000	4,000,000
	Serious	5,000,000	2,500,000	2,000,000
	Medium	2,500,000	1,250,000	1,000,000
	Slight	500,000	250,000	200,000

Diagram 1

Basic amounts for natural persons

Reporting obligation on handling unlawful contents on the platforms under section 2 (1) of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (1) in conjunction with section (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	200,000	100,000	750,000
	Very serious	100,000	50,000	40,000
	Serious	50,000	25,000	20,000
	Medium	25,000	12,500	10,000
	Slight	5,000	2,500	2,000

Diagram 2

Specific circumstances and effects of the offence

- Extent of delay in compiling or publishing the report
- Extent of incorrectness or incompleteness of the report
- Effect on the comprehensibility of the social networks' handling of complaints about unlawful content (transparency)

II. Handling complaints about unlawful content

1. Procedures for handling complaints about unlawful content

Basic amounts for legal persons

Effective and transparent procedure for handling complaints about unlawful content, section 3 (1) first sentence of the Network Enforcement Act				
Maximum regulatory fine: 50 million euro				
Section 4 (1) (2) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	40,000,000	25,000,000	15,000,000
	Very serious	20,000,000	15,000,000	10,000,000
	Serious	10,000,000	8,500,000	5,000,000
	Medium	5,000,000	2,500,000	1,000,000
	Slight	1,000,000	750,000	500,000

Diagram 3

Basic amounts for natural persons

Effective and transparent procedure for handling complaints about unlawful content, section 3 (1) first sentence of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (2) in conjunction with section 4 (2) of the Network Enforcement Act				
Amount in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	400,000	250,000	150,000
	Very serious	200,000	150,000	100,000
	Serious	100,000	85,000	50,000
	Medium	50,000	25,000	10,000
	Slight	10,000	7,500	5,000

Diagram 4

Specific circumstances and effects of the offence

- Duration of the failure to have in place a correct procedure for handling complaints
- Extent of the unlawfulness of the procedure for handling complaints
- Extent of the incompleteness of the procedure for handling complaints

- Seriousness of the legal violation associated with not blocking or removing unlawful contents correctly (e.g. limited or unlimited reach of unlawful content)
- Effect of not establishing a complaint management system, or not establishing such a system correctly or completely (perpetuation of unlawful content).

2. Procedures for submitting complaints about unlawful content

Basic amounts for legal persons

Easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content, section 3 (1) second sentence of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (3) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	40,000,000	25,000,000	15,000,000
	Very serious	20,000,000	15,000,000	10,000,000
	Serious	10,000,000	8,500,000	5,000,000
	Medium	5,000,000	2,500,000	1,000,000
	Slight	1,000,000	750,000	500,000

Diagram 5

Basic amounts for natural persons

Easily recognisable, directly accessible and permanently available procedure for submitting complaints about unlawful content, section 3 (1) second sentence of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (3) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	400,000	250,000	150,000
	Very serious	200,000	150,000	100,000
	Serious	100,000	85,000	50,000
	Medium	50,000	25,000	10,000
	Slight	10,000	7,500	5,000

Diagram 6

Specific circumstances and effects of the offence

- Duration of the failure to have in place a correct procedure for handling complaints
- Effects of the failure to provide a submission procedure at all or to provide a proper submission procedure on the user's possibilities for notification

III. Monitoring

1. Monitoring the handling of complaints

Basic amounts for legal persons

Monitoring the handling of complaints via monthly checks by the social network's management, section 3 (4) first sentence of the Network Enforcement Act				
Maximum regulatory fine: 50 million euro				
Section 4 (1) (4) in conjunction with section (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	40,000,000	25,000,000	15,000,000
	Very serious	20,000,000	15,000,000	10,000,000
	Serious	10,000,000	8,500,000	5,000,000
	Medium	5,000,000	2,500,000	1,000,000
	Slight	1,000,000	750,000	500,000

Diagram 7

Basic amounts for natural persons

Monitoring the handling of complaints via monthly checks by the social network's management, Section 3 (4) first sentence of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (4) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	400,000	250,000	150,000
	Very serious	200,000	150,000	100,000
	Serious	100,000	85,000	50,000
	Medium	50,000	25,000	10,000
	Slight	10,000	7,500	5,000

Diagram 8

Specific circumstances and effects of the offence

- Deviation from the legally standardised frequency of monitoring
- Extent of monitoring deficiency

2. Rectification of organisational deficiencies

Basic amounts for legal persons

Immediate rectification of organisational deficiencies in dealing with incoming complaints, section 3 (4) second sentence of the Network Enforcement Act				
Maximum regulatory fine: 50 million euro				
Section 4 (1) (5) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	40,000,000	25,000,000	15,000,000
	Very serious	20,000,000	15,000,000	10,000,000
	Serious	10,000,000	8,500,000	5,000,000
	Medium	5,000,000	2,500,000	1,000,000
	Slight	1,000,000	750,000	500,000

Diagram 9

Basic amounts for natural persons

Immediate rectification of organisational deficiencies in dealing with incoming complaints, section 3 (4) second sentence of the Network Enforcement Act				
Maximum regulatory fine: 5 million euro				
Section 4 (1) (5) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	400,000	250,000	150,000
	Very serious	200,000	150,000	100,000
	Serious	100,000	85,000	50,000
	Medium	50,000	25,000	10,000
	Slight	10,000	7,500	5,000

Diagram 10

Specific circumstances and effects of the offence

- Duration of the existence of organisational deficiencies in dealing with incoming complaints
- Effects of failing to rectify organisational deficiencies in dealing with incoming complaint

3. Training courses and support programmes

Basic amounts for legal persons

Training courses and support programmes delivered in the German language on a regular basis, this being no less than once every six months Section 3 (4) third sentence of the Network Enforcement Act Maximum regulatory fine: 50 million euro Section 4 (1) (6) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	25,000,000	15,000,000	7,500,000
	Very serious	15,000,000	10,000,000	5,000,000
	Serious	8,500,000	5,000,000	3,500,000
	Medium	2,500,000	1,000,000	750,000
	Slight	750,000	500,000	300,000

Diagram 11

Basic amounts for natural persons

Training courses and support programmes delivered in the German language that take place on a regular basis, this being no less than once every six months, Section 3 (4) third sentence of the Network Enforcement Act Maximum regulatory fine: 5 million euro Section 4 (1) (6) in conjunction with section 4 (2) of the Network Enforcement Act				
Amounts in euro		Social network		
		A	B	C
Circumstances and effects of the offence	Extremely serious	250,000	150,000	75,000
	Very serious	150,000	100,000	50,000
	Serious	85,000	50,000	25,000
	Medium	25,000	15,000	7,500
	Slight	7,500	5,000	3,000

Diagram 12

Specific circumstances and effects of the offence

- Duration of the lack of prescribed training courses and support programmes
- Deviation from the legally standardised frequency of the prescribed courses and programmes
- Effects on employees

IV. Person authorised to receive service and person authorised to receive requests for information

1. Appointment of a person authorised to receive service in the Federal Republic of Germany and a person in the Federal Republic of Germany authorised to receive requests for information

Basic amounts for legal persons

Appointment of a person authorised to receive service in the Federal Republic of Germany and a person in the Federal Republic of Germany authorised to receive requests for information, section 5 (1) and section 5 (2) first sentence of the Network Enforcement Act					
Maximum regulatory fine: 5 million euro					
Section 4 (1) (7) in conjunction with section 4 (2) of the Network Enforcement Act					
Amounts in euro		Social network			
		A	B	C	D
Circumstances and effects of the offence	Extremely serious	3,500,000	3,000,000	2,000,000	1,000,000
	Very serious	3,000,000	2,500,000	1,500,000	500,000
	Serious	2,000,000	1,750,000	1,000,000	250,000
	Medium	1,000,000	500,000	250,000	125,000
	Slight	500,000	250,000	50,000	10,000

Diagram 13

Basic amounts for natural persons

Appointment of a person authorised to receive service in the Federal Republic of Germany and a person in the Federal Republic of Germany authorised to receive requests for information, section 5 (1) and section 5 (2) first sentence of the Network Enforcement Act					
Maximum regulatory fine: € 500,000					
Section 4 (1) (7) in conjunction with section 4 (2) of the Network Enforcement Act					
Amounts in euro		Social network			
		A	B	C	D
Circumstances and effects of the offence	Extremely serious	35,000	30,000	20,000	10,000
	Very serious	30,000	25,000	15,000	5,000
	Serious	20,000	17,500	10,000	2,500
	Medium	10,000	5,000	2,500	1,250
	Slight	5,000	2,500	500	100

Diagram 14

Specific circumstances and effects of the offence

- Duration of the failure to name a person authorised to receive service in the Federal Republic of Germany and a person authorised to receive requests for information in violation of the obligation
- Extent of the lack or insufficient recognisability or accessibility of a person authorised to receive service on the social network platforms in the Federal Republic of Germany
- Effects of the violation on legal transactions

2. Obligation to react to requests for information

Basic amounts for legal persons

Failure to react to requests for information as a person authorised to receive such requests, section 5 (2) second sentence of the Network Enforcement Act					
Maximum regulatory fine: 5 million euro					
Section 4 (1) (8) in conjunction with section 4 (2) of the Network Enforcement Act					
Amounts in euro		Social network			
		A	B	C	D
Circumstances and effects of the offence	Extremely serious	3,500,000	3,000,000	2,000,000	1,000,000
	Very serious	3,000,000	2,500,000	1,500,000	500,000
	Serious	2,000,000	1,750,000	1,000,000	250,000
	Medium	1,000,000	500,000	250,000	125,000
	Slight	500,000	250,000	50,000	10,000

Diagram 15

Basic amounts for natural persons

Failure to react to requests for information as a person authorised to receive such requests, section 5 (2) second sentence of the Network Enforcement Act					
Maximum regulatory fine: 500,000 euro					
Section 4 (1) (8) in conjunction with section 4 (2) of the Network Enforcement Act					
Amounts in euro		Social network			
		A	B	C	D
Circumstances and effects of the offence	Extremely serious	35,000	30,000	20,000	10,000
	Very serious	30,000	25,000	15,000	5,000
	Serious	20,000	17,500	10,000	2,500
	Medium	10,000	5,000	2,500	1,250
	Slight	5,000	2,500	500	100

Diagram 16

Specific circumstances and effects of the offence

- Deviation from the legally standardised reaction period
- Effect on the work of the prosecution authorities in the Federal Republic of Germany