

TRIS NOTIFICATION PROCEDURE

German State Treaty on Youth Media Protection (JMStV)

June 2023

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the notification of the German State Treaty on the Protection of Human Dignity and the Youth Media Protection in Broadcasting and Telemedia under procedure [TRIS 2024/0188/DE](#) (draft State Treaty on the Protection of Minors in the Media, or otherwise draft JMStV).

The draft State Treaty on the Protection of Minors in the Media¹ aims to amend the current JMStV with the purpose of ensuring the uniform protection of children and young people as regards online media offers that may impair their development or pose risks to their personal integrity. While recognising the importance of the objectives pursued and sharing the commitment towards the protection of minors online. CCIA Europe considers that draft JMStV contravenes EU law, in particular by proposing national legislation that:

1. Overlaps with the EU's Digital Services Act (DSA)², thereby undermining the direct applicability and full harmonisation effect of this Regulation.
2. Imposes further obligations on service providers irrespective of their place of establishment, which breaches the country-of-origin principle as set out in the e-Commerce Directive, the Audiovisual Media Services Directive and the DSA.
3. Introduces barriers to the free movement of goods within the internal market.

In light of the above, CCIA Europe would like to call on the European Commission to issue a detailed opinion requesting the German legislator to revise the draft JMStV in a way that the proposed amendments are aligned with already applicable EU legislation.

I. Overlaps with the Digital Services Act

Given the direct applicability of the DSA, Member States should avoid any additional requirements relating to matters falling within its scope, unless the possibility for additional national measures is explicitly provided for in the Regulation.

The DSA recognises that diverging national laws imposed on providers of intermediary services negatively affect the EU internal market. It explicitly states that conditions for the

¹ We note that the previous 2020 JMStV revision was not notified under the TRIS procedure and the German legislator did not file a synopsis indicating which parts of the JMStV are already in force under German law and which are new. For this reason, in our response we will refer to the "draft JMStV" when new provisions are concerned and talk about "JMStV" when referring to currently enforced provisions. For reference, a current text translated into English can be consulted [here](#).

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available [here](#).

provision of intermediary services across the EU internal market should be fully harmonised. To this end, it introduces a number of requirements at EU level with the goal of ensuring a safe, predictable and trusted online environment, while effectively protecting fundamental rights enshrined in the Charter of Fundamental Rights³ and facilitating innovation. Following this full harmonisation of EU rules, Member States should not adopt or maintain additional national requirements that relate to matters regulated under the DSA.

In particular, Article 28 of the DSA establishes the legal framework for the online protection of minors. This is then complemented by Articles 34 and 35, which call for the identification of systemic risks, including actual or foreseeable negative effects for the rights of the child and the protection of minors; and mention age verification and parental control tools as one of the potential targeted measures that could be taken to address any such identified systemic risks on specific services.

In parallel to this, the European Commission adopted in 2022 its revised Better Internet for Kids (BIK+) [strategy](#) which aims at complementing existing measures and ensuring that digital services are age-appropriate and minors are protected, empowered and respected online. The European Commission set up a special group to establish an EU code of conduct on age-appropriate design within the framework of the BIK+ Strategy, as well as a task force to establish guidelines on age verification, both initiatives that are currently underway.

Other ongoing initiatives at EU level include the Age Verification Task Force, including national Digital Services Coordinators, the European Regulators Group for Audiovisual Media Services (ERGA) as well as the European Data Protection Board (EDPB), which is working to develop an EU-wide approach to age assurance, including age verification and age estimation technologies.

Against this backdrop, key concepts of the JMStV need to be revisited as they interfere with the scope of the full harmonisation character of the DSA, notably as regards Article 28 of the DSA.

On a general note, CCIA Europe observes that the JMStV lists as inadmissible certain categories of content in a way that is inconsistent with the DSA. The illegality in this case is not with the content itself or the making available as such, but the making this content available to an age group that is considered inappropriate under German law. CCIA Europe questions the compatibility of this approach with the definition of illegal content as set out in Article 3(h) of the DSA. According to the logic of the DSA, the making available of content that is not illegal in itself to users for whom it may not be appropriate should rather be covered by the obligations included in Article 28 DSA on the protection of minors.

Further, Article 5a JMStV still provides for specific obligations on Video Sharing Platforms that overlap with Article 28 of the DSA, including the obligation to take measures to protect

³ Charter of Fundamental Rights of the European Union, available [here](#).

children and adolescents through age assurance systems and parental controls (paragraph 2). The JMStV also maintains in Article 5b a residual provision on notice-and-action mechanisms that should be repealed in the light of Article 16 of the DSA. In this context, CCIA Europe would like to recall that the Audiovisual Media Services Directive (AVMSD)⁴ does not qualify inherently as a *lex specialis* but, in accordance with Article 2(4)(a) of the DSA, it only takes precedence in cases where it regulates other aspects of the provision of intermediary services or specifies and complements the DSA.

Article 21 paragraph 2 of the JMStV continues to require service providers to name an authorised domestic recipient, which overlaps with Articles 11 and 13 DSA and should be repealed as well.

As CCIA Europe already warned in our contributions to the TRIS notification on the French law to secure and regulate the digital space ([here](#) and [here](#)), the adoption of diverging initiatives at Member State level undermines such efforts by the European Commission and creates a patchwork of different initiatives across the European Union, increasing the risk of inconsistencies as well as legal and business uncertainty.

Taking into consideration the cross-border nature of the Internet, Member States should actively support and participate in the initiatives fostered by the European Commission, instead of introducing and applying conflicting legislative actions, which may jeopardise the collective goal of safeguarding minors online in a uniform manner.

The protection of minors is a priority for legislators and the industry, but only through agreed-upon industry-wide solutions that share the same consistent standards across the EU will there be a consistent approach to youth and minor protection.

II. Breach of the country-of-origin principle

Member States should avoid deviations from the country-of-origin principle that is at the core of the e-Commerce Directive and the DSA to guarantee a truly unified EU internal market.

Consistent with the e-Commerce Directive⁵, the recently adopted DSA reiterates the country-of-origin principle as a cornerstone of EU law. Under this principle, EU Member States should not subject service providers which are not established in and regulated by another EU Member State to additional and potentially onerous obligations under their national law.

⁴ Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, available [here](#).

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), available [here](#).

The notified draft JMStV and the current JMStV violate this country-of-origin principle by imposing additional requirements under German law to service providers in other EU Member States.

According to Article 3(4) of the e-Commerce Directive, an exception from the country-of-origin principle would only be warranted for measures taken against a specific service, taking into account the prejudice - or serious and grave risk of prejudice - of the service to the objectives invoked to justify the restrictive measures. Making use of this exception would also require abiding by a number of procedural prerequisites, such as addressing a prior request to the Member State of establishment and notifying the measures to the European Commission.

In spite of claiming the contrary in its Article 2(1) JMStV on the scope, the draft JMStV cannot be considered as falling under such exception from the country-of-origin principle provided by the e-Commerce Directive. The draft JMStV suggests introducing general and abstract obligations for service providers, irrespective of their place of establishment, rather than targeted measures against a specific service provider following the necessary procedures.

In particular, the proposed requirements for service providers when it comes to the distribution of content under Article 5 of the JMStV risk affecting how online platforms carry out their activities within the internal market. Article 5 paragraph 1 of the JMStV sets out an obligation to ensure that content has to be classified in certain age groups - that are specific to Germany - and shall not be made available to minors and youths.

These obligations are applied indiscriminately to service providers established in Member States other than Germany. Article 5 paragraphs 3, 4 and 5 of the JMStV complement paragraph 1 and prescribe certain means of complying with the obligations that again are specific to Germany. CCIA Europe would like to point out that already today there is German jurisprudence declaring this provision to be incompatible with the country-of-origin principle as laid down in the e-Commerce Directive.⁶

Article 5c paragraph 3 draft of the JMStV (previously Article 12 of the JMStV) requires providers of “telemedia services” to indicate an age rating in accordance with Article 5 paragraph 1, i.e. German standards, when providing access to films, movies and games. Once again, this constitutes a general obligation that does not seem justified in an internal market context under the e-Commerce Directive.

In addition, the newly proposed concept of a “*Jugendschutzvorrichtung*” (translated both as “Protection of Young Persons tool” and “child protection system” in different instances of the text) in Article 12 of the draft JMStV contains several general requirements on digital

⁶ Judgement of Verwaltungsgericht Düsseldorf of 04.04.2023 – 27 K 3905/20, ECLI:DE:VGD:2023:0404.27K3905.20.00, available [here](#), point 439 and further.

services such as browsers, search engines, apps and app stores that disregard the country-of-origin-principle.

Aside from this, the formal requirements to comply with information requests by the German “*Landesmedienanstalten*”, i.e. state-level media regulators, and to establish a national authorised recipient (Article 21 of the JMStV) and a “Jugendschutzbeauftragter” (“Young Persons Officer”) in Article 7 of the draft JMStV, equally infringe the country-of-origin principle insofar as they are applicable to service providers that are established in another Member State.⁷

The Court of Justice of the EU (CJEU) recently confirmed that a similar national approach was contrary to EU law “which ensures the free movement of information society services through the principle of control in the Member State of origin of the service concerned”.⁸ Member States should therefore refrain from adopting “measures of a general and abstract nature which apply without distinction to any provider of a category of information society services”, as this would undermine mutual trust between Member States and conflict with the principle of mutual recognition under the e-Commerce Directive.

III. Barriers to the free movement of goods

The fragmentation of the Internal Market should always be avoided, as well as contradictory approaches when it comes to the protection of minors.

Insofar as operating systems may be qualified as goods, the imposed “child protection system” integrated in article 12 of the draft JMStV and its accompanying obligations (e.g. registering a self-declaration) would constitute barriers to the free movement of goods within the internal market. While there are several existing solutions in this space that would provide for a high standard of child protection, the notified draft JMStV lacks justifications in this regard, and risks further fragmenting the Digital Single Market. CCIA Europe warns against the fragmentation of the Internal Market, which is aggravated by the fact that other Member States have recently adopted differing approaches to parental controls (e.g. France) and others are planning on deploying similar approaches.

Taking the above into account, CCIA Europe nevertheless positively notes that the definition of “child protection tool” in Article 3 paragraph 8 of the JMStV does not prohibit the parental control systems that already exist in the market.

To avoid fragmentation, CCIA Europe favours an approach at EU level, including initiatives in the space of parental controls in operating systems. However, due consideration should be

⁷ On the infringement of the country-of-origin-principle by the obligation to appoint a “Jugendschutzbeauftragter”, see also Judgement of Verwaltungsgericht Düsseldorf of 04.04.2023 – 27 K 3905/20, ECLI:DE:VGD:2023:0404.27K3905.20.00, available [here](#), point 455 and further.

⁸ CJEU, Press Release No 167/23, Luxembourg, 9 November 2023, Judgment of the Court in Case C-376/22 | Google Ireland and Others, Combating illegal content on the Internet: a Member State may not subject a communication platform provider established in another Member State to general and abstract obligations, available [here](#).

given to an approach that tries to reconcile existing solutions instead of out ruling them, in any event with the ultimate objective of creating tools for parents that guarantee a high standard of child protection.

Conclusion

CCIA Europe asks the European Commission to issue a detailed opinion asking the German government to make the necessary changes to ensure that the draft JMStV does not contravene EU law nor conflict with the full harmonisation effect of the DSA. If Member States believe that additional legislation is necessary, national laws and treaties should respect and uphold the country-of-origin principle.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

For more information, visit: twitter.com/CCIAEurope or www.ccianet.org

CCIA is registered in the EU Transparency Register with number 281864052407-46.

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