Statement by The Broadband Association ANGA (Germany) on the German draft Inter-State Treaty on modernising the media regulation (Medienstaatsvertrag – MStV) in Germany

(TRIS Notification 2020/26/D)

Note: The statement is similar to the joint paper of Digital Europe, Bitkom and ZVEI, it does show some more aspects regarding overlays though.

I. Introduction

In the framework of the notification procedure laid down in Directive (EU) 2015/1535 ("the Directive"), the German authorities notified the European Commission on 24 January 2020 of a draft law (Inter-State Treaty to be concluded among all Federal States of Germany) modernising the media regulation in Germany („Staatsvertrag zur Modernisierung der Medienordnung in Deutschland – Modernisierungsstaatsvertrag" (ModStV-E)).

The main part of this draft Treaty consists of amendments to the "Staatsvertrag über Rundfunk und Telemedien – Rundfunkstaatsvertrag (RStV)" which shall be renamed, following the intended substantial update and consolidation to "Medienstaatsvertrag" ("MStV").

This Inter-State Treaty on media inter alia introduces a large number of new obligations for a variety of service providers: "media platforms" aggregating TV channels or video-on-demand services, "user interfaces" intended for navigating and using essentially audio and/or audiovisual content (in the form of linear and non-linear services), and "media intermediaries" such as search engines, social media platforms or (other) platforms for user-generated content.

Essentially, the draft MStV notified concerns

- "rules on services" in the meaning of Article 1 para. 1 lit. e) i) of the Directive; more concretely on
- "electronic services" and "on-demand services" in the meaning of Article 1 para. 1 lit. b) ii) and iii) of the Directive.

ANGA believes that the notified draft would not only directly and negatively impact the freedom to provide services as well as the free circulation of goods but also unduly limit the freedom to provide "Information Society Services" as based on the country-of-origin principle and codified in the "eCommerce Directive" (Directive 2000/31/EC), and thus hinder the functioning of the Single Market.

II. Detailed comments

1. E-Commerce Directive

The new requirements of the draft MStV are incompatible with Article 3 of the eCommerce Directive which establishes the country-of-origin principle for rules on providers of Information Society services and according to which "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State" (Article 3 para. 2).

The draft MStV creates specific, excessive requirements for interfaces of Information Society services that are "intended for use in Germany" for which there seems to be no relevant justification. The draft MStV thereby establishes a country-of-reception principle and restricts the freedom to provide the services concerned from another Member States which clearly violates the country-of-origin principle, since those services would have to be adapted to those specific German requirements.

2. Free movement of goods and freedom to provide services

The rules on services in the new MStV concerned establish requirements for providers of Information Society services, such as media platforms and user interfaces, as well as device manufacturers that are "intended for use in Germany", which threatens to undermine the free movement of goods and services in the Single Market.

The following sets of rules are particularly concerning in this regard, since they establish new, excessive requirements for the design of user interfaces and media platforms intended for the German market:

a) Findability of (specific) content on user interfaces

The draft provisions in section 84 MStV determine which kind of content must be "more easily" found on the user interface/media platform than other content. This provision is open to interpretation and may thus lead to a regionalisation in Germany in order to meet the proposed findability requirements.

b) Overlays

The draft Interstate Treaty states in § 80 Para 2 that overlays or scaling are permitted without the consent of the respective broadcaster "for the purpose of using services of individual communication or if they are initiated by the user in individual cases". This is an overly restrictive implementation of the AVMSD. According to Recital 26 of the AVMSD Member States should ensure that overlays solely initiated or authorised by the recipient of the service for private use, such as overlays resulting from services for individual communications, do not require the consent of the media service provider. The EU legislator's intention here was to empower consumers, by allowing content distributors to provide functionality, which supports a personalised viewing experience, in response to consumer demand, without having to obtain broadcaster's explicit consent for this. For example, our understanding is that the EU legislator considered that users should also be allowed to authorise overlays on a permanent basis through pre-settings in the viewer's profile. As the draft Interstate Treaty fails to address this "authorisation" case, it departs significantly from the AVMSD. This view is also shared by Prof. Marc Cole in a recent study (https://www.bitkom.org/sites/default/files/2019-11/emr-gutachten_neuregelung-des-artikel-7b-avmd_11.2019.pdf) which finds: "The differentiation in the recital of the user action according to whether it has been "initiated or authorised"– both of which lead to an exception to the requirement of approval of by the media service provider for the modification or overlay – indicates that there are different ways of adapting the signal in the sense of an active or passive triggering." (Para 13 of English Executive Summary).

We also understand that the AVMSD seeks to set a new standard as to how to deal with overlays in the future. As current practice stands, existing commercial agreements between broadcasters and content distributors are not consistent with the new rules on overlays set out in the AVMSD. To ensure legal certainty, and also foster further innovation and empower consumers, it is crucial that national laws implementing the AVMSD regime on overlays clarify that the new rules will apply to both existing commercial agreements and any future agreements from the date the Interstate Treaty enters into force, unless the parties agree otherwise at a later stage, for example at the point of renewal of existing agreements. This clarification could be made in the reasoning of the draft Interstate Treaty which has not yet been finalised.

c) Technical obligations

Besides the above sets of rules, the draft MStV contains numerous other provisions that constitute a barrier for the cross-border provision of audiovisual media services and devices.

These range from the introduction of a mandatory search function for broadcasting and on-demand services (section 84, para 2) to the requirement to enable each individual end user to interfere with the overall structure (listings and arrangements) of the user interface (section 84, para 6).

For manufactures and providers of information society services, any kind of fragmentation within the Single Market, such as national or even regional specifications which are required in no other EU Member State, constitute a considerable disadvantage and barrier to the cross-border provision of services and goods.

Smaller and medium-sized European manufacturers as well as global players and providers of services would be discouraged to market their product and services in Germany. Less advanced and basic models of TV sets or set-top-boxes risk to become more expensive on the German market.

Furthermore, the draft would hinder innovation and cause delay of the market release of new products in Germany, which need to be adapted to the new regulations. Finally, any such regional fragmentation would negatively impact the end-user experience as it provides an obstacle for customer support – which requires a certain level of harmonisation – and hinders end-users from being able to use their devices and services in other EU Member States.

3. Audiovisual Media Services Directive

Furthermore, to the extent that the MStV is intended to transpose the "Audiovisual Media Services Directive" (Directive 2010/13/EU as amended by Directive (EU) 2018/1808, "the AVMS Directive", or "AVMSD"), the rules neglect the framework set by the AVMS Directive national transpositions, particularly by introducing additional rules beyond the area of harmonisation and also by exceeding the margin of interpretation afforded to Member States when transposing the relevant provisions of the AVMSD.

In these regards, the notified draft MStV introduces unjustified new barriers to trade and to the exercise of the Fundamental Freedoms in the Single Market, which will harm providers of services, manufacturers of goods and, ultimately, consumers.

The MStV takes a very restrictive approach to the design of user interfaces and the display of content on the screen thus overstepping the margin of interpretation afforded to Member States by the AVMSD. If the MStV was implemented it would lead to a situation in which media platforms integrated in goods such as smart TVs or set-top boxes and services like online video platforms would have to be specifically designed for the German market and therefore could not move freely within the Single Market.

III. Conclusion

The aim of the Single Market is to create an environment that is conducive to the competitiveness of undertakings. The draft MStV however establishes excessive rules for goods and services intended for the German market and is therefore detrimental to the competitiveness of undertakings. As many of the providers of Information Society services and manufacturers of devices operate on a pan-European level and rely on the consistent application of the rules of the Digital Single Market, any kind of fragmentation within the European Single Market is a considerable disadvantage.

Therefore, we urge the European Commission to carry out an in-depth review of the German draft rules, and require the German legislator to make the amendments that are required to bring the Interstate Treaty into conformity with the AVMSD as well as the Treaty rules on free movement of goods and services in the areas set out in this paper. We will remain available for further questions and a personal exchange at any time.

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About ANGA

ANGA The Broadband Association (Germany) represents more than 200 undertakings active in the German broadband market. The membership entails operators of different network topologies (hybrid fiber coax – HFC, fiber to the building or to the home – FTTB/H, mobile) but also vendors of network components. The network operators organized in ANGA provide more than 20 million households in Germany with TV and broadband internet.