

Position paper

TRIS notification 2021/159/D (Statute on the Regulation of Media Intermediaries pursuant to § 96 of the State Media Treaty)

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Summary

With this paper, Bitkom wishes to provide its comments on the proposed statute of the German Media Authorities on the Regulation of Media Intermediaries now being reviewed by the European Commission under the framework of the notification procedure laid down in Directive (EU) 2015/1535. Essentially, the draft law notified concerns ‘rules on services’ in the meaning of Article 1(1) (e) (i) of the Directive.

The provisions of the notified draft statute serve to specify and elaborate on certain provisions of the State Media Treaty – the “Medienstaatsvertrag” (“MStV”) – on media intermediaries. In addition to procedural provisions regarding measures by the competent authority, the draft includes specifications on transparency obligations as well as the freedom from discrimination provided for in the MStV.

Bitkom believes that the notified draft statute would not only directly and negatively impact the free circulation of goods but also unduly limit the freedom to provide ‘information society services’ as based on the country-of-origin principle in the eCommerce Directive (hereafter: “eCD”), and thus hinder the functioning of the Single Market. Amongst Bitkom’s membership are many market players that offer their services EU-wide and therefore rely on the proper functioning of the common market and a regulatory level playing field. In addition, the draft statute is likely to negatively impact the harmonization of the regulatory framework for online platforms aimed at by the recently published Digital Services Act (hereafter: DSA) proposal.

Already in April 2020 during the notification of the State Media Treaty, Bitkom, together with DIGITALEUROPE and ZVEI, provided its comments to the Commission, which then had rightfully voiced concerns that these provisions constitute a disproportionate limitation of the freedom to provide information society services across borders. The varying interpretation of these comments lead to a significant lack of legal certainty. However, the German Media Authorities instead of accommodating the rightful criticism voiced by the

Commission, exacerbated the provisions of the State Media Treaty in a way that gives rise to even more severe concerns.

Compatibility with the e-Commerce Directive

The application of the e-Commerce Directive is established through the scope of the MStV which the statute aims to specify. In the notification message, the German Media Authorities lay out the scope of the draft statute as follows: “Regulatory addressees are (according to Article 2 para 2 No 16 MStV) primarily search engines and social networks as well as micro-blogging services” – however, the scope is not limited to those services. The German Media Authorities mention in the notification message that the draft statute concerns information society services in accordance with art. 2(a) eCD. The applicability of the eCD also derives from the substantive obligations relating to the start or pursuit of the activity of an information society service provider. These obligations would fall within the coordinated field of art. 2(h)(i) eCD and consequently need to be assessed in relation to this Directive.

And while it is true that art. 1(6) eCD provides that the Directive does not affect measures in order to promote cultural and linguistic diversity and to ensure the defence of pluralism, the German Media Authorities have failed to explain how the MStV or the draft statute contribute to these goals. What is more, any measure taken by member states to promote cultural diversity must be proportionate, taking into account the consequences these measures have for the economic freedoms provided for by EU law. In addition, the Commission has clarified in its comments on the State Media Treaty that, despite these goals, Member States must, when adopting such measures, comply with wider EU law, which includes the provisions of the eCD.

Art. 3(1) and (2) eCD establish provisions in secondary EU law that implement, in relation to information society services, the principle of freedom to provide cross-border services under Article 56 TFEU. Paragraph 1 requires each Member State to ensure that information society services provided by a service provider established on its territory comply with the national rules in force in that Member State which fall within the coordinated field. Paragraph 2 adds that Member States may not restrict the free movement of information society services from another Member State for reasons falling within the coordinated field. This internal market principle is also known as the country-of-origin principle or the country-of-control principle.

With regard to the draft statute’s territorial scope, it can be inferred from the definition of scope of the State Media Treaty (section 1 number 8) that it applies to media intermediary providers insofar as their respective services are intended for use in Germany, regardless of whether they are established in another Member State.

In Bitkom's view, the notified draft statute constitute an interference with the cross-border provision of information society services, questioning the reach of Article 3 (2) of the e-Commerce Directive, in as much as they apply to providers of media intermediaries established in other Member States. This is the case, in particular, for especially burdensome obligations such as the very detailed transparency obligations that even go beyond those established in the Media State Treaty.

Compatibility with the Platform to Business Regulation

The transparency obligations for media intermediaries set up in this draft statute overlap with the new EU rules on ranking transparency for companies, in particular with Regulation (EU) 2019/1150¹¹ on promoting fairness and transparency for business users of online intermediation services (Platforms-to-Business regulation) which applies since July 12, 2020, and therefore Member States are no longer empowered to regulate the same matters. The obligations of the notified draft deviate from the provision in Article 5 of the Platforms-to-Business Regulation not only with regard to the language used, but also with regard to the level of detail of the information that the online platforms concerned must disclose.

Interplay with the Digital Services Act

Finally, we would like to emphasize that some of the aspects within the scope of the notified draft statute will be addressed in the recently proposed Digital Services Act. The DSA aims to update the rules applicable to relevant providers of online intermediary services and complete the Digital Single Market. This initiative would address the need for clear and harmonised rules concerning the liability of these providers, while avoiding regulatory fragmentation in the Single Market that national initiatives can bring about.

The State Media Treaty and its statutes are exactly such national initiatives that lead to fragmentation, and they are counterproductive to the harmonisation targeted by the DSA. This is especially evident in the case of this statute since the DSA covers areas related to the conduct of online intermediary service providers, including the role and transparency of ranking and algorithms, and in fact proposes similar transparency obligations. As many of the providers of information society services operate on a pan-European level and rely on the consistent application of the rules of the Single Market, any kind of fragmentation within the EU is a considerable disadvantage.

Conclusion

Due to the concerns outlined above, we urge the European Commission to carefully assess the notified draft statute regarding its compatibility with the e-Commerce Directive, the Platform to Business Regulation, as well as the principles of the Internal Market.

We ask the European Commission to make use of the full range of measures at its disposal to prevent further fragmentation within the Digital Single Market.

We hope our submission is taken into consideration and will remain available for further questions and personal exchange any time.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.