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Comments on the draft Statute of the German State media authorities specifying the provisions of the State Media Treaty on media platforms and user interfaces

Introduction

With this paper, DIGITALEUROPE, Bitkom and ZVEI would like to provide their comments on the proposed statute of the German Media Authorities specifying the provisions of the State Media Treaty on media platforms and user interfaces (TRIS Notification 2020/813/D).¹

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 platforms and user interfaces. In addition to procedural provisions regarding measures by the competent authority, the draft includes specifications on provisions concerning the presentation of content and services, privileged findability of content, overlays, and the notification and disclosure of documents.

This draft statute was consequently notified in accordance with Directive 2015/1535 as it concerns a technical regulation with impact on ‘rules on services’ in the meaning of art. 1(1) lit. e, i) of aforementioned Directive; more concretely pertaining rules on ‘electronic services’ and ‘on-demand services’ in the meaning of art. 1(1) lit. b, ii and iii), as well as ‘technical specifications’ (art. 1(1) lit. c) and ‘products’ (art. 1(1) lit. a).

DIGITALEUROPE, Bitkom and ZVEI believe 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”)², and thus hinder the functioning of the Single Market.

¹ <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=813>

² <https://eur-lex.europa.eu/eli/dir/2000/31/oj>

Additionally, the draft statute neglects the framework set by the Audiovisual Media Services Directive (hereafter: AVMSD)³ by introducing additional rules beyond the area of harmonisation and also by exceeding the margin of interpretation afforded to Member States for the transposition.

Finally, 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)⁴ proposal.

In the context of these Directives and the proposed Regulation, and as will be elaborated below, the freedom to provide services as well as the free circulation of goods are likely to be negatively impacted by the draft statute in several ways:

- ▶ Firstly, because the rules would apply to providers of user interfaces established in another Member State and lay down further restrictions for providing their services and products to customers in Germany.
- ▶ Secondly, because providers of user interfaces established in Germany would encounter further restrictions when offering their services to providers of (video) on-demand, broadcasting, or other services, such as access to apps or the purchase and selling of advertising space, complicating access to the German market.

Already in April 2020 during the notification of the State Media Treaty, DIGITALEUROPE, Bitkom and ZVEI provided their 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.⁵ The varying interpretation of these comments lead to a significant lack of legal certainty.

However, the German Media Authorities instead expanded the provisions of the State Media Treaty in a way that renders the previously communicated concerns even more severe and damaging.

3 <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

4 <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>

5 <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=26>



Compatibility with the eCommerce Directive

Applicability of the eCommerce Directive

In the notification message, the German Media Authorities lay out the scope of the draft statute as follows:

“In the State Media Treaty, the term ‘media platform’ (§ 2(2)(14) MStV) addresses telemedia that, for example, combine broadcasting programmes or ‘online press’ into a single overall offer. This covers, in particular, TV cable network providers and OTT live streaming portals. The term ‘user interface’ (§ 2(2)(15) MStV) also covers display and control levels of or for media platforms, insofar as they aid in orientation and directly enable the selection of offers. In particular, the visual user interfaces of cable network platforms and smart TVs are covered.”

Likewise, the new rules directly affect providers of user interfaces for television sets, set-top boxes and video sticks as well as offers that bundle audiovisual content, such as network-based or OTT TV and video services and pay-TV platforms.

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 Commission clarified in its comments on the State Media Treaty that this does not entirely exclude the provisions of the Directive and that Member States must, when adopting such measures, comply with wider EU law, which includes the provisions of the eCD.

Compatibility with the eCommerce Directive

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 platform providers and user interface providers insofar as their respective services are intended for use in Germany, regardless of whether they are established in another Member State.

The notified draft statute therefore imposes obligations on cross-border service providers and further restricts their freedom to provide information society services across borders. This would be in breach of art. 3(2) eCD, as they would apply to providers established in other Member States and providing their services to customers established in Germany.

The following sets of rules are particularly concerning since they establish new, especially burdensome requirements such as on the presentation of content and services, on overlays, and on the notification and disclosure of documents.

Presentation of content and services

▶ **Prohibition of marketing of audiovisual content on user interfaces and of preferential treatment of the interface provider's own offers and content**

The provisions in section 10 of the draft statute entail (a) a prohibition of sorting or arrangement of offers influenced by remuneration or a similar consideration (section 10 (3) s 7 no 2), as well as (b) a prohibition of preferential treatment of the user interface provider's own offers and own content unless users are (dedicatedly) paying for their use (section 10 (3) s 7 no 1).

The former must be considered equivalent to a complete ban on the marketing of audiovisual content and related apps on user interfaces. The latter is not compatible with legitimate user expectations. While some basic rules on findability of certain content (in addition to the general prohibition of discrimination) could be justified to ensure diversity, these prohibitions go far beyond what is needed and appropriate.

(a) The proposed marketing ban is neither adequate nor appropriate to the objectives it pursues. The notification broadly claims that the provisions of the draft statute "serve to ensure diversity of opinion on media platforms and user interfaces". But it does not specify which of the various measures shall serve that purpose and how.

This ban does not take into account the central role user interfaces play with respect to making media content available to European customers. User interfaces (UI) make content offerings visible and thereby accessible to customers. Prohibiting any form of marketing of audiovisual content on user interfaces – even if it is transparent and non-discriminatory – deprives UI providers from essential possibilities of refinancing their service.

The ban also deprives the UI providers of a central marketing instrument for their devices and services and thereby manifests an intensive restriction on the freedom to provide services in the relationship between UI providers, on the one hand, and content or app providers who would like to be highlighted on the UI, on the other hand. Existing as well as future business models of the providers of user interfaces are thus prohibited. Moreover, through provisions like the marketing ban, UI providers are restricted in their entrepreneurial freedom protected under art. 16 of the EU Charter of Fundamental Rights.

(b) The proposed prohibition of preferential treatment of the UI provider's own offers and content (barring dedicated payment by the user) negatively impacts UI providers that offer their service free-of-charge. This ban risks that they lose the possibility (and necessity) to monetize their service, likely forcing them to change this business model to (for example) a common ad-based model, possibly to the disadvantage of the user.

These provisions would not only require the adaptation of the user interfaces of devices such as smart TVs sold throughout the EU for the German market, but also prevent audiovisual content providers from marketing their content to end users on user interfaces, such as those of TVs, or of set-top boxes or of video sticks, in Germany.

Given how such an adaptation of the user interface for the German (or any country-specific) market would be technically difficult to implement, this obligation would significantly hinder the free trade of smart TVs and other devices or services. Thus, device manufacturers and content providers from other Member States, will find it especially difficult to access the German market and may even renounce providing their service to German users, which would ultimately harm the diversity of content.

►► **Easy findability of content on user interfaces**

The provisions of section 10 of the draft statute lay down that German public service media content (broadcasting programmes or services like apps), and the private programmes or services, which make a particular contribution to the diversity of opinions and offers in the federal territory of Germany, should be listed ahead and easier to find than other content offers.

Thus, audiovisual media service providers from other Member States are being directly discriminated against, because (1) only German contribution-financed programmes are qualified, as public value offers, and (2) private programmes from other Member States are not eligible for qualification as making a “particular contribution to the diversity of opinions and offers” in accordance with the respective procedure laid down in the State Media Treaty and also to be specified by a further statute of the German Media Authorities.

The procedure to qualify as a ‘public value’ provider is also not easily accessible, on a fair, non-discriminatory basis, for service providers from other Member States, which renders the provision incompatible with the freedom to provide services.⁶ Accordingly, the related rule on providing ‘easy findability’, based on such provisions, cannot be regarded compatible with EU law.

Overlays

According to section 3 of the draft statute, acoustic or visual overlays that occur immediately after the user’s selection and before the start of the broadcasting programme (pre-roll) shall only be allowed if approved by the broadcaster or initiated by the user on a case-by-case basis. Also here, the statute goes beyond the regulation in the State Media Treaty and introduces new, burdensome obligations for providers of user interfaces by extending the prohibition of overlays to the time sequence before the broadcasting programme even started.

This prohibition deprives user interfaces or media platforms of another way of refinancing their service without creating any benefit in view of the goals of media diversity and pluralism. It is especially burdensome for providers across the EU that would like to market their services across borders to German customers.

The prohibition is also not compatible with art. 7b AVMSD which foresees such restrictions only in the case of simultaneous overlays over audiovisual media services. As long as audiovisual media services have not been started, the display of a commercial communication cannot be seen as an overlay.

Notification, Disclosure of documents

The draft statute further intensifies the bureaucratic and legal burdens already set in the State Media Treaty for providers, also for those providers established outside of Germany.

As generally applicable rules, irrespective of the place of establishment, the UI provider or media platform service provider for example has to notify the competent State media authority one month in advance of its (upcoming) service

⁶ See here ECJ, C-244/06, *Dynamic Medien*, judgement of 14 February 2008.

launch. In addition, according to section 2 of the draft statute, the representative of the media platform or UI provider shall submit a legal certificate of good conduct or a comparable foreign document. Furthermore, according to section 9 of the draft statute, the providers of media platforms shall disclose to the State media authority on request all technical parameters and technical framework conditions; the fees and tariffs charged by media platform providers, together with the data and business assumptions underlying the calculation thereof; and a description of the remuneration system used.

These legal requirements to provide an UI and a media platform in Germany are as such an unjustifiable barrier to trade and will hinder European businesses to provide their services in Germany. These obligations incurred by the affected providers amount to requirements which clearly have an effect equivalent to prior authorization, especially when seen together with the administrative fines to be imposed, which is obviously incompatible with art. 4 eCD.

For the sake of brevity and clarity we pointed out those new obligations set by the statute that are especially burdensome for providers of user interfaces and media platforms. However, there are additional regulations introduced by the statute that are problematic. One of them is the obligation to ensure that users are at any point of time able to rearrange all offers and content on the user interface. Another one is the requirement, with regard to the contractual relationship between media platforms and content providers, that any differentiation made there will be vetted “in light of the diversity principle”.



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. As many of the providers of information society services and device manufacturers 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 with regard to its compatibility with the eCommerce Directive, the rules of the Internal Market as well as the fundamental freedoms.

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 elaboration at any time.

FOR MORE INFORMATION, PLEASE CONTACT:



Jochen Mistiaen

Senior Policy Manager (DIGITALEUROPE)

jochen.mistiaen@digitaleurope.org / +32 496 20 54 11

Katrin Heyeckhaus

Head of Media Policy (ZVEI)

katrin.heyekhaus@zvei.org / +49 174 9414 173

Marie Nietan

Head of Media Policy (Bitkom)

m.nietan@bitkom.org / +49 175 5848 818
