

Comments on the draft Sixth State Treaty on the amendment of state treaties on media law (TRIS 2024/0188/DE)

31 May 2024

Introduction

On 4 April 2024, the German Federal Ministry for Economic Affairs and Climate Protection and the State Chancellery of the State of Rhineland-Palatinate, notified the European Commission about the amendment of the Youth Media Protection State Treaty (Jugendmedienschutzstaatsvertrag - JMStV), initiating the TRIS Notification procedure (TRIS Notification 2024/0188/DE). As representatives of the digital industry in Germany and across Europe, Bitkom and ZVEI take the opportunity to comment on the latest initiative.

Bitkom and ZVEI believe that the notified draft creates greater fragmentation within the European digital single market.

The regulation negatively affects the free movement of goods and unduly restricts the freedom to provide information society services and audiovisual media services. The national obligations resulting from the draft law undermine acknowledged international standards of youth media protection and European law by systematically neglecting the 'country-of-origin principle' established by the eCommerce Directive (eCD) and Audiovisual Media Services Directive (AVMSD). The draft law creates further incoherences with provisions of the Digital Services Act (DSA). Next to general concerns of compatibility with European law, the draft law creates technical barriers by establishing a diverging age classification system and by imposing country-specific technical obligations on all types of operating system providers, such as mobile OS, PC operating systems, TV's and other electronic devices, that might be used by minors.

The introduction of new country-specific requirements will lead to a patchwork of regulations and different youth media protection approaches, disregarding the objective to raise standards of greater youth media protection across Europe. We urge the European Commission to take notice of the countervailing impact that such a law poses towards the objective of protecting children and minors across Europe.

General concerns of compatibility with European law

The notification must be viewed against the background of the notifications of the Media State Treaty (TRIS Notification 2020/26/D), of the Statute of the German Media Authorities for Media Platforms and User Interfaces (TRIS Notification 2020/813/D) and of the German Statute of the German Media Authorities on public value (TRIS Notification 2021/204/DE). Bitkom and ZVEI submitted comments to the European Commission, which in response already adopted the view that the notified draft provisions constituted a disproportionate restriction of the freedom to provide services, in particular information society services, across borders. The draft law of the JMStV raises similar issues to those identified in previous notification procedures. We would like to emphasise that the most recent amendments to the JMStV from 2020, which extended its scope to service providers established in other EU Member States, were in fact not notified to the Commission.¹

Neglect of the country-of-origin principle

The provisions of the JMStV contradict the ‘country-of-origin principle’, which entrusts the country of establishment with the supervision of the regulations (Article 3 (1) and (2) eCD eCommerce/ Article 3, 4 AVMSD). Pursuant to § 2 (1) JMStV, „the provisions of this State Treaty shall also apply to providers under § 3, points 2 and 7, who are not established in Germany under the provisions of the Digital Services Act (DSA) and the Media State Treaty, insofar as the offers are intended for use in Germany”. Since the law applies to providers of operating systems established in other Member States when providing their services to Germany (§ 2 (1) JMStV), the freedom to provide information society services across borders is restricted.

The Commission recently confirmed this opinion (TRIS Notification 2023/0205/I) in response to the notification procedure issued by the Italian authorities on the implementation of appropriate visibility requirements. The European Commission recalled the principle of the free movement of cross-border services enshrined in Article 56 of the Treaty on the Functioning of the European Union (TFEU) as well as in Article 3 of the eCD, according to which information society services are only subject to the law of the Member State in which the service provider is established (country-of-origin principle).

Accordingly, a Member State other than the Member State of establishment may not derogate from the freedom to provide information society services guaranteed by the eCD. This reasoning was again confirmed by the Court of Justice of the European Union (CJEU) in the "Google Ireland" case (No C-376/22) of 9 November 2023 and a decision of the European Court of Justice (ECJ) on the Austrian platform regulation. In the latter decision, the ECJ has

¹ See Art. 3 MedMoG, e.g. here: BayGVBl. 2020 p. 450, 505 et seq. available here: <https://www.verkuendung-bayern.de/files/gvbl/2020/23/gvbl-2020-23.pdf#page=2>

explicitly stated that abstract general regulations, which should also apply to EU providers, violate the country-of-origin principle. The ECJ clarified that exceptions to the country-of-origin principle laid down in Article 3 (2) of the eCD are not possible by abstract general law, but only in individual cases. According to Article 3 (4) (a) of the eCD, this applies particularly to the protection of minors.

The decisions are of fundamental importance since the JMStV also regulates service providers located in other EU countries pursuant to Article 2 (1) JMStV. In that respect, particularly Article 12 et seq. JMStV does not appear to have been fully thought through. As mentioned above the country-of-origin principle is further enshrined in the AVMSD. In this regard, the JMStV raises similar concerns with regards to the provision of audiovisual media services across Europe, as it requires media services from other member states to comply with the specific German youth protection regulation. This risks to lead to a fragmentation of media markets, which the AVMSD seeks to avoid.

Incoherence with the Digital Services Act

We would also like to point out inconsistencies with the objectives of the DSA. Given the direct applicability of the DSA as an EU Regulation, Member States should avoid regulating matters falling within its scope.

Article 28 of the DSA establishes the legal framework for the online protection of minors. It requires providers of online platforms that are accessible to minors to put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security for minors on their service. In addition, it also requires providers not to display advertising based on the profiling and use of minors' personal data. We understand the European Commission is currently drafting guidelines on the application of Article 28 of the DSA to support the implementation of this provision by providers of online platforms.

Article 28 of the DSA is complemented by Articles 34 and 35 of the DSA, which call for the identification of systemic risks, including actual or foreseeable negative effects on the rights of the child and the protection of minors; and mentions age verification and parental control tools as potential mitigation measures to address identified systemic risks on specific services. Against this background, key concepts of the JMStV need to be reconsidered, as they interfere with the idea of greater harmonization of the protection of minors under the DSA, in particular regarding Article 28 DSA.

Firstly, the JMStV works with different categories of illegality. This concerns content, which is not illegal as such, but the provision of content which is considered inappropriate for a certain age group is prohibited under certain conditions.

This includes in particular:

- § 4 (2) JMStV (pornographic content that is made available to persons that are not adults) and
- § 5 (1) JMStV (read also in conjunction with para 3 and 4), i.e. content that is “detrimental to the development” of children and teens of certain age groups as defined by German law.

We would question if the approach is compatible with the definition of illegal content set out in Article 3 lit. h DSA.

In addition, § 5a JMStV imposes specific obligations on video-sharing platforms that overlap with Article 28 (1) DSA, as explained above, namely the obligation to take measures to protect children and adolescents through age verification systems and parental controls (para 2) and a specific definition of ‘illegal content’ that includes ‘relatively illegal content’ as explained above (para 3). We also note that the JMStV retains a residual provision in § 5b a on notice-and-action mechanisms that should be repealed in the light of Article 16 DSA.

Further, § 5c (3) JMStV requires providers of ‘telemmedia services’ to indicate an age rating following German standards, when providing access to films, movies and games. This provision interferes with the field harmonized by Article 28 (1) DSA, as explained above, and should therefore be repealed. Insofar as the new § 12 JMStV presupposes an obligation on video-sharing platforms, app-stores and browsers to identify items of content that have been labelled as age-appropriate or age-inappropriate, it seems to require a form of general monitoring that is incompatible with the prohibition of such an obligation under Article 8 DSA.

Lastly, § 21 (2) JMStV requires service providers to name an authorized domestic recipient, which overlaps with Articles 11 and 13 DSA. These articles lay down a harmonized framework asking only service providers with no establishment in the EU/EEA to name an authorized recipient, which in turn shows that service providers established in the EU/EEA should be served documents in their Member State of establishment. § 21 (2) JMStV and therefore should be repealed.²

Barriers to the free movement of goods

Obligations of providers of operating systems for installing a parental control system - § 12 (1) JMStV

According to the draft law providers of operating systems shall ensure that the operating systems enable a system for the protection of minors.

² The provision also infringes the country-of-origin principle as laid down in Article 3 of Directive 2000/31/EC.

According to the proposed regulation, it must be possible to activate, deactivate and adapt such a solution in a simple, easily accessible, and secure manner (§ 12 (2) JMStV).

These provisions would require the operating systems of devices that are usually used by children (such as smart TVs, mobile phones or computers) sold throughout the EU to be adapted for the German market.

Given the technical complexities of adapting the operating system for a national market only, this obligation would significantly impede the free movement of devices, such as smart TVs, mobile phones and PCs, and constitute a barrier to the free movement of goods within the internal market. We note that the fragmentation of the internal market is aggravated by the fact that other Member States have recently adopted diverging approaches on parental controls. This is most notably the case for France, where strict on-device controls were mandated and existing master-client solutions have been banned with similar plans underway in Spain.

We note that the Commission has not issued comments in the recent TRIS notification procedure on the French Parental Control Law³ that obligated device manufactures, i.e. directly interfered with the free movement of goods, and would like to call on the Commission to now make its views known as regards the fragmentation resulting from diverging approaches in this field at the present opportunity.

Provisions producing technical barriers

Age Classification - § 5 JMStV

Existing legislation, such as the AVMSD, the DSA and the GDPR, require organizations to take appropriate measures to verify the age of users. The application of the German age rating system poses a particular challenge for international providers of telemedia, broadcasting, operating systems, and apps as they would have to adapt their services specifically to the German rating system (§ 5 (1) JMStV). This initiative runs counter to the goal of incentivizing the implementation of a more user-friendly and compliant age verification mechanism. This goal of preventing greater fragmentation in this regard is also pursued by the "Better Internet for Kids - Working Group" and the new "Task Force on Age Verification" set out by the DSA⁴.

³ Cf. TRIS 2022/0694/F available here: <https://technical-regulation-information-system.ec.europa.eu/en/notification/17602>

⁴ A European strategy for a better internet for kids (BIK+) | Shaping Europe's digital future (europa.eu)

Requirements for operating system providers create greater technical fragmentation - § 12 (3) JMStV

Obligations of operating systems providers on browsers:

§ 12 (3) No. 1 JMStV requires that with regards to child protection systems, operating system providers shall ensure that browsers should only be used if they make use of online search engines that have a secured search function.

The regulatory implication of this provision would be to limit the access to web browsers on any given device. This applies to browsers, which ensure that the user can only access search engines, that provide a safe search function. This has far-reaching implications for the European digital single market, as it implicitly asks operating system providers to restrict access to a range of browsers or search engines for the German market, solely. It remains unclear how the operating system provider shall implement this obligation. It certainly does not align with the goal of a unified single market as it creates legal uncertainties and technical barriers across different member states.

Obligations for apps on distribution platforms:

§ 12 (3) No. 2 JMStV requires that the operating system ensures „the installation of apps is only possible via distribution platforms that take into account the age indication and provide for an automated evaluation system in accordance with paragraph 4.”

Since the term "app" is interpreted broadly as „a software-based application” (§ 3 (9) JMStV), the corresponding legal requirements established under § 12 (3) No. 2 - 4 JMStV result in serious flaws: The obligation to prevent the accessibility of apps that are not age-restricted according to § 12 (3) No. 3 JMStV would apply to system-critical applications in the PC ecosystem. Further, the passage clearly fails to reflect the market landscape for apps and distribution platforms, if the "app store" typically forms the central or even only intended installation path for software. In these environments, age ratings in apps are the rule.

First, the notified draft raises the fundamental question of how operating systems that do not have a native distribution platform, or for which this is not the main procurement channel for software, should deal with the corresponding requirement. This creates greater uncertainties within the digital single market.

Second, preventing the installation of any software - regardless of its relevance to the protection of minors in individual cases - raises questions from a competition policy perspective and should be examined for its compatibility with the single market with a view to the Digital Markets Act (DMA). The provision conflicts the idea that „the gatekeeper shall allow and technically enable the installation and effective use of third-party software

applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper" (Art. 6 (4) DMA).

Obligations with regards to apps:

§ 12 (3) No. 3 JMStV stipulates that "only apps that correspond to the age indication or that have been individually and securely unlocked are usable." The problem arising from this approach are similar to the above outlined issues under § 12 (3) No. 2 JMStV:

According to § 3 No 9 "app" is a software-based application that serves to directly control a broadcast or the content of a telemedia service. Since it is technically difficult to distinguish between individual applications as to whether they contain a broadcast or a telemedia service - there is no signalling - this would mean that all applications would have to be assessed as applications within the scope of the draft law. Consequently, the provision would require the blocking of apps that are not age restricted. Again, this would also include numerous applications (i.e. "apps") that are essential for the daily use of the PC or even system-critical and therefore completely unproblematic from the perspective of the protection of minors from harmful media. Since most programs that are not age-restricted are not problematic in terms of youth protection law, the blockade effected in § 12 (3) No. 3 JMStV overshoots the mark by far, which undermines the acceptance of the device. Therefore, certain apps would face disproportionate restrictions within the single market, requiring again a specific procedure to be adapted for the German market solely.

Automated rating system - § 12 (4) JMStV

§ 12 (4) requires the provision of an automated age-rating system formally recognized by the Joint Commission of the Youth Protection Authorities (Kommission für Jugendmedienschutz - KJM). Based on the dialog so far, we assume that, in addition to the existing regulations in the general German youth protection law (Jugendschutzgesetz – JuSchG), the federal states want to create a legal reference framework for the successfully established IARC (International Age Rating Coalition) system in the JMStV.

IARC has established itself on the market as a globally standardized solution and is administered locally in Germany by the USK as a recognized self-regulatory body. However, the explanatory notes to § 12 (4) JMStV-E do not contain any explicit reference to IARC, which means that it remains unclear whether IARC fulfills the requirement of an "automated assessment system" from the perspective of the federal states. As IARC is based on a classification process by means of a questionnaire, the question arises as to whether this should be sufficient with regard to the "automated" requirement. In this

regard, we note that a fully automated procedure in the sense of a completely automated valuation does not exist and is not technically in prospect.

The draft requires formal recognition by the KJM. In the absence of such recognition this implies that IARC does not currently meet the requirements of § 12 (4) JMStV but must first go through an - yet to be established - recognition process at the national German level. It is not clear from the draft why the federal states consider a formal recognition of the KJM to be necessary. The example of IARC as an internationally standardized approach with local anchoring via the USK shows that there is no market failure. IARC is constantly being further developed and has proven to be sufficiently flexible in recent years to react to market developments. We suggest reconsidering the requirement for formal recognition by the KJM and instead strengthening the role of the recognized self-regulatory bodies in this area.

Self-declaration according to § 12 (5)

The proposed draft law further increases the bureaucratic and legal burden for providers, including those established abroad. Irrespective of the place of establishment, the provider of the operating system must submit a self-declaration to the competent state media authority in which he declares that the parental control system complies with the requirements of the draft law. These legal requirements for the provision of an operating system in Germany are in themselves an unjustifiable barrier to trade and will prevent European companies from offering their services in Germany.

New Dangers Instead of Better Protection - Dilution of the Protection of Minors and Incompatibility with European Law - § 12a (2) JMStV

§ 12a JMStV contains special, supplemental provisions for providers of applications that have implemented a recognized program for the protection of minors pursuant to § 11 (2) JMStV or a suitable technical means pursuant to § 5 (3) sentence 1 JMStV.

According to Article 12a (2) of the draft, providers with approved systems for the protection of minors or suitable technical means shall "take into account" the age rating specified in the JMStV. What is meant by "take into account" and how this should be done without further technical effort remains unclear, **creating additional and technically unclear to impossible burdens upon app providers and OSP and thereby "sanctioning" those who – as of today – have taken extraordinary measures to protect minors.**

In addition, § 12a only addresses - insufficiently - the interaction of proprietary youth protection schemes of AV media services with the newly required youth protection schemes on OS level, if these service specific

schemes have been formally approved by German authorities under German law. This discriminates AV media services from other member states that provide for similarly effective schemes in compliance with their respective country-of-origin regulation. In consequence such services could be at risk that OS and app store providers are forced under the planned new German law to restrict access to these services, which would either lead to a de facto applicability of German law also for the AV media services from other member states, thus violating the country-of-origin principle, as laid out in Art. 3, 4 AVMS, or to a significant barrier to the internal market for AV media services.

Concluding Remarks

Following the single market logic, the arguments presented above underlined the obvious discrepancy between the intention of the JMStV to create greater youth media protection and the apparent negative implications of certain provisions on the level of youth protection across Europe. We urge the European Commission to carefully assess the notified draft regarding its compatibility with the eCommerce Directive as well as the AVMSD, Single Market rules and fundamental freedoms. We urge the European Commission to use the full range of measures at its disposal to prevent further fragmentation within the Digital Single Market. We hope that our submission will be considered and we remain available for further questions and elaborations.

We would like to emphasize that some of the aspects within the scope of the notified draft statute could be addressed in pan-European initiatives on the protection of minors in the media, as announced in the Louvain-La-Neuve Declaration of the EU Telecom Ministers of April 12, 2002. The European Telecoms Ministers declared that European action is needed to address the risks and dangers faced by young people in this sector. The goal is to further complete the Digital Single Market. This initiative would address the need for clear and harmonized rules on the liability of providers, while avoiding the regulatory fragmentation of the Single Market caused by national initiatives. The proposed Media State Treaty on Youth Media Protection is precisely such national initiatives that lead to fragmentation and are counterproductive to harmonization. As many Information Society service providers and device manufacturers operate on a pan-European basis and rely on the consistent application of Internal Market rules, any fragmentation within the EU is a significant disadvantage.

Bitkom e.V.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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ZVEI: Electro and Digital Industry Association

The ZVEI represents the common interests of the electrical and digital industry and the associated service companies in Germany and at international level. The association has more than 1,100 member companies, and 170 employees work in the ZVEI Group.

The industry employs 900,000 workers in Germany (as of April 2024). In 2023, its turnover was around 238,1 billion euros.

The electrical and digital industry is one of the most innovative economic sectors in Germany. One fifth of the industry's turnover is accounted for by product innovations. Every third innovation in the manufacturing industry as a whole gets its original impetus here. Almost a quarter of all R&D expenditure in the manufacturing sector in Germany comes from the electrical and digital industry. Every year, the sector spends around 20 billion euros on R&D and more than seven billion euros on investments.

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