



EUROPEAN COMMISSION

Brussels

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Subject: Notification 2021/159/D

Statutes of the State media authorities on the Regulation of media intermediaries pursuant to Article 96 of the State Media Treaty

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535¹, the German authorities notified to the Commission on 16 March 2021 the draft “Statutes of the State media authorities on the Regulation of media intermediaries pursuant to Article 96 of State Media Treaty” (hereinafter the “notified draft”). The notified draft is based on the competence established by § 96 of the State Media Treaty² for state media authorities to regulate on the specifications of the provisions included in Section V.3. on “media intermediaries”.

The notified draft, as well as the notification message, indicate that the obligations would apply to “media intermediaries”, which are defined by the State Media Treaty as intermediaries of telemedia services that “*also aggregate, select and present third-party journalistic and editorial offers without making them available as a whole*”³. According to the German authorities, the regulatory addressees are primarily search engines, social networks as well as micro-blogging services. “Telemedia services” are defined in the Telemedia Act, which transposes the e-Commerce Directive into German law. Consequently and in line with the Commission’s earlier comments, media intermediaries under the State Media Treaty and the notified draft are to be considered information

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

² Staatsvertrag zur Modernisierung der Medienordnung in Deutschland (Medienstaatsvertrag or MStV)

³ § 2(2)16 of the State Media Treaty

society services within the meaning of Article 2(a) of the e-Commerce Directive and Article 1(b) of Directive (EU) 2015/1535.

Although the current notification does not refer to this expressly, in the earlier notification message of the underlying State Media Treaty (Notification 2020/26/D) the German authorities clarified that those measures were part of the transposition of Directive 2018/1808/EU⁴ (the Audiovisual Media Services Directive).

On 27 April 2020, the Commission issued comments pursuant to Article 5(2) of Directive (EU) 2015/1535 to the German authorities as a reaction to notification 2020/26/D.

An examination of the relevant provisions of the notified draft has prompted the Commission to issue the following detailed opinion and comments.

1. DETAILED OPINION

1.1. General remarks

In the notification message, the German authorities explain that the aim of the notified draft is to specify the provisions for the regulation of media intermediaries provided for in Articles 91-95 of the State Media Treaty. According to the German authorities, the specifications in the notified draft, as well as provisions of the underlying State Media Treaty, have the overall objective of ensuring diversity of opinion by guaranteeing transparency and non-discrimination.

As underlined in the Commission's comments on notification 2020/26/D, media pluralism is a foundational value of the European Union, as enshrined in Art 11(2) of the Charter of Fundamental Rights of the European Union. As such, the Commission acknowledges and shares the overall objective of the notified initiatives.

However, having examined the notified draft, also in the light of the State Media Treaty, the Commission considers that some of the measures included in that draft constitute an undue restriction to the freedom to provide information society services protected within the internal market and moreover are not justified and proportionate to the objective of protecting media pluralism.

In particular, the notified draft imposes numerous obligations on information society service providers, regardless of their place of establishment. These obligations include notably:

- a) The obligation to appoint an authorised agent (i.e. representative) that is resident or established in Germany (§ 3; and § 92 of the State Media Treaty)

The State Media Treaty requires providers of media intermediaries in Germany to nominate a person authorised to deliver and draw attention to their offer in an easily recognisable and immediately accessible manner. The notified draft specifies that these authorised agents must have their domicile or habitual

⁴ Directive (EU) 2018/1808 of the European Parliament and of the Council 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, OJ L 303, 28.11.2018, p. 69–92.

residence, or their registered office of their principal place of business in the Federal Republic of Germany.

- b) The detailed transparency obligations concerning criteria for the aggregation, selection and presentation of contents (§ 6; and § 93 of the State Media Treaty), including the obligation to make the information transparent in German language (§ 5)

The State Media Treaty requires media intermediaries to keep certain information easily perceptible, immediately accessible and constantly available, including information on the criteria that determine the access of a content to a media intermediary, information on the central criteria of aggregation, selection and presentation of content and their weighting, as well as information about the functioning of the algorithms used in understandable language.

The notified draft further specifies this obligation and requires the service provider to provide the following information:

- a description of the technical, economic, provider-related, user-related and content-related conditions determining whether content is made perceptible through a media intermediary;
- in the event that certain content is filtered or downgraded or upgraded in terms of perceptibility when accessing and remaining in the media intermediary, in particular also through the use of automatic systems, the category of content concerned and the objectives pursued by the filtering or grading;
- information on whether and, if so, how access to and retention of content in the media intermediary is or can be influenced by payments or other direct or indirect benefits in kind;
- a description of the central criteria for aggregation, selection and presentation used by the media intermediary provider;
- a description of the relative weighting of the central criteria in relation to each other and in relation to non-central criteria, without making the latter transparent;
- a description of the optimisation objectives pursued by the central criteria;
- information on whether and, if so, how the findability of content in the media intermediary is or can be influenced by payment of fees or other direct or indirect remuneration considerations;
- a description of the basic process steps underlying the aggregation, selection and presentation of content, including which personal and other data are included in the aggregation, selection and presentation;
- information on the type and extent of personalisation used and whether, and, if so, how content is assessed for relevance to the respective user;
- information on whether and, if so, in what way user behaviour in the media intermediary can influence the aggregation, selection and presentation of content, including indications of the possibilities of influence available to the user through settings and partial functions;
- information on whether and, if so, how the provider of a media intermediary treats its own content, content of an affiliated company or content of cooperation partners in a special way during aggregation, selection and/or presentation.

- c) Obligations to disclose amendments to the published information and to keep available an overview showing the significant changes made over time (§ 6(3))

The notified draft – pursuant to § 93(3) of the State Media Treaty – contains an obligation to keep available an overview showing the significant changes made to the above-mentioned information over time, and an obligation to disclose all other amendments to the information at least every four months from the entry into force of the notified draft.

- d) The disclosure obligations on request of the competent federal state media authority (§ 2(3)-(4) and § 13)

According to the notified draft, media intermediaries shall, at the request of the competent federal state media authority, present and substantiate – or make a forecast of the progression for – the number of their users within one month and submit the documents and information required for the examination. Moreover, the notified draft gives extensive powers to competent federal state media authorities to oblige the provider of a media intermediary to supply information and documents in order to verify a possible infringement.

The Commission notes that the abovementioned obligation can represent a particularly disproportionate burden for medium-, small- and micro-enterprises, given that the scope only excludes services with less than a million users per month on average and those that exclusively serve private or family purposes.

Finally, the Commission notes that the current notification is to be assessed not only in light of notification 2020/26/D, but also in light of other recent notifications related to the State Media Treaty and the Network Enforcement Act ('NetzDG'), namely notifications 2020/813/D, 2021/39/D, 2021/45/D, 2021/204/D, and 2021/38/D, all of which prompted the Commission to send comments to the German authorities expressing its reservations and concerns. The Commission is of the view that each individually, but also the combined effect of a high number of notified laws constituting some level of undue restriction to the provision of services across borders can lead to a serious interference with the freedom to provide information society services without being justified by the objective of pursuing media pluralism.

As the Commission has noted in its formal reactions to recent similar notifications from other Member States, the notified draft is presented in a context where the Commission has already taken a number of initiatives to address the responsibilities of online intermediaries⁵. As recently as last 15 December 2000 the Commission has presented a proposal for a Digital Services Act.

Various Member States have equally adopted or are preparing legislation to regulate online platforms' responsibilities. Therefore the current notification should be read in a political context where more and more Member States regulate or intend to regulate the same providers pursuing the same objectives, regardless of the existing single market principles and adding to the legal fragmentation. Increasing fragmentation represents a risk to the single market for digital services and for Europe's prosperity and makes it more difficult to ensure that all Europeans enjoy an equally effective level of protection online and that media pluralism is effectively protected.

⁵ In particular, the Regulation on preventing the dissemination of terrorist content online, the Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, and the Audiovisual Media Services Directive.

The Commission would like to point out that, pursuant to the general obligations of Article 4(3) TEU, Member States should defer implementation of envisaged measures that concern a matter covered by a proposal for a legislative act in order to prevent compromising the adoption of binding acts in the same field. A solution to the problems that the notified law intends to tackle should be jointly examined within the context of the legislative procedure at Union level. In that context, the Commission stresses the need for a common, EU-wide intervention in particular as regards the regulatory framework concerning the identified due diligence obligations for the providers of intermediary services. This is particularly the case considering the scope and legal implications of the notified draft, which covers operators of online platforms, regardless of whether or not they are established in the German territory.

The Commission would also like to remind the German authorities that once the Regulation on a Digital Services Act is adopted, Member States are obliged by Union law not to - and are in fact prevented from - legislating in the area and in relation to the objectives pursued by the harmonising rules of EU legislation. Member States therefore in general will not be allowed to adopt parallel national provisions on the matters falling within the scope and the areas addressed by the Digital Services Act, i.e. which are exhaustively regulated by its provisions, since this would affect the direct and uniform application of the Regulation.

1.2. Applicability of Directive 2000/31/EC

Directive 2000/31/EC (the “e-Commerce Directive”)⁶, which constitutes the horizontal framework for information society services, is applicable to the relevant provisions of the notified draft.

The Commission would like to reiterate that while the objective of ensuring diversity and pluralism of the media is recognised and promoted by the e-Commerce Directive, its Article 1(6) provides that measures adopted for the promotion of pluralism must nonetheless respect EU law, including the rules laid down in the e-Commerce Directive itself. Article 1(6) does not disapply the rules of the e-Commerce Directive (contrary to Article 1(5)) but rather serves to underline the importance that the EU attaches to the defense of pluralism, as an element that Member States may wish to take into account when regulating the provision of information society services. The Court of Justice of the European Union (CJEU) has consistently held that a restriction of a fundamental freedom guaranteed by the TFEU may be justified where it serves overriding requirements in the public interest, such as the maintenance of media pluralism, provided that it (1) is suitable for securing the attainment of this objective and (2) does not go beyond what is necessary in order to attain it.⁷

The applicability of the e-Commerce Directive to the notified draft also stems from the obligations included in the draft Statute, which concern the take up or pursuit of the activity of information society services. These obligations would thus fall within the coordinated field of the e-Commerce Directive as set out in its Article 2(h)(i) and, consequently, have been assessed against this Directive.

Compatibility with Article 3 of the e-Commerce Directive

⁶ 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, OJ L 178, 17.7.2000, p.1.

⁷ See e.g. CJEU Case C-87/19, paragraphs 35-38 and case law mentioned therein.

Article 3(1), (2) and (3) of the e-Commerce Directive

As already indicated in the reaction to Notification 2020/26/D, the State Media Treaty imposes certain obligations on providers of information society services that fall within the coordinated field of the e-Commerce Directive, as defined in its Article 2(h). As the obligations in the notified draft stem from the State Media Treaty, the same observation can be made in relation to that treaty. Moreover, given that the scope of the relevant provisions is the same, the notified draft would apply to certain media intermediaries established in other Member States than Germany (provided that they exceed the defined threshold of users).

Article 3(1) and (2) of the e-Commerce Directive set out that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. The CJEU has established that Article 3 of the e-Commerce Directive precludes, subject to derogations authorised in accordance with the conditions set out in Article 3(4), Member States from making information society service providers subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established (“the country of origin principle”).⁸

On the basis of the available information and subject to the assessment in the subsequent section, multiple obligations set out in the notified draft – notably, the obligation to appoint an authorised agent as well as the transparency and disclosure obligations, as represented above – constitute a restriction to the freedom of cross-border provision of information society services, insofar as they would apply to providers established in other Member States.

The Commission recalls that in the light of the Court’s case law Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services⁹. Also, the abovementioned obligations do not appear to be covered by any of the fields listed in the Annex to the e-Commerce Directive, which are exempted from the application of its Article 3(1)-(2), pursuant to its Article 3(3).

Moreover, while recital 57 of the e-Commerce Directive refers to the case law of the CJEU in the light of which a Member State retains the right to take measures against a service provider that is established in another Member State, but which directs all or most of his activity to the Member State’s territory, if the choice of establishment was made with the intention of evading applicable legislation, the hypothesis referred to in that case law does not apply in relation to the notified draft.

The scope of the State Media Treaty and the notified draft is not limited to a specific service provider, and covers media intermediaries that are active across the whole Union, not only those that direct all or most of their activity to Germany, having chosen a different place of establishment with a view to evading the applicable German

⁸ See CJEU Joined Cases C-509/09 and C-161/10, EU:C:2011:685, paragraph 67.

⁹ See, for instance, judgment of 25 April 2013, Jyske Bank Gibraltar (C-212/11, EU:C:2013:270, paragraphs 58-59).

legislation. Therefore, in the views of the Commission, the notified draft does not meet the standard required by the e-Commerce directive and the case law of the CJEU.

In particular as regards the obligation to appoint a legal representative (a tax representative *ad casu*), the CJEU has already established that “the mere assertion that the residence condition is the best way of ensuring that the tax obligations incumbent on the tax representative are performed effectively is irrelevant. It is true that the supervision of such a representative by the tax authorities of a Member State may prove to be more difficult where that representative is in another Member State. However, it is clear from the case-law of the Court that administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law (see, to that effect, judgments in *Commission v France*, C-334/02, EU:C:2004:129, paragraph 29; *Papillon*, C-418/07, EU:C:2008:659, paragraph 54; and *van Caster*, EU:C:2014:2269, paragraph 56).”¹⁰ For those reasons, the Court declared such requirement to be against Article 56 TFEU.

Furthermore, the requirement to comply with the very detailed transparency obligations in German language will result in a specific burden to those service providers which do not work in that language, which are normally those which are not established in Germany, hence liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.

The same can be argued, finally, with respect to the obligation to disclose amendments to the published information and to keep available an overview showing the significant changes made over time, since such an obligation can become particularly burdensome for those service providers established in a different Member State, as it will require a constant update and communication with authorities that these service providers would not have to regularly liaise with, as opposed to service providers established in Germany.

Moreover, account must be taken of the fact that providers may also be subject to specific requirements in their Member State of establishment, which may be sufficient to safeguard the public interest concerned.

Article 3(4) of the e-Commerce Directive

Article 3(4) of the e-Commerce Directive provides that Member States may take measures to derogate from Article 3(2) if certain conditions are fulfilled. The German authorities have not argued – neither in the case of notification 2020/26/D, nor in the present notification – that the restrictive measures imposed by the notified draft, which derogate from the country of origin principle, are justified in accordance with Article 3(4) of the e-Commerce Directive.

In order to benefit from the derogation in Article 3(4), measures must be justified by one of the objectives in the public interest exhaustively listed in Article 3(4)(a)(i) and they must be necessary and proportionate, as well as targeted at a given information society service which prejudices the objectives or which presents a serious and grave risk of

¹⁰ Judgement of 11 December 2014, *Commission vs Spain* (C- 678/11, EU:C:2014:2434).

prejudice to those objectives. In addition, before taking the measures in question, the Member State has to follow the procedure set out in Article 3(4)(b).

In this particular case, the German authorities have not provided any information indicating that the procedural conditions, laid down in Article 3(4)(b) of the e-Commerce Directive, have been met. That provision requires, notably, that the other Member State(s) in which the relevant service provider(s) is (are) established did not take (adequate) measures, despite having been asked to do so by the Member State intending to enact the restrictive measures derogating from Article 3(2). That provision also requires subsequent notification by that Member State to the other Member State(s) concerned and the Commission.

From the above considerations, it appears that the notified draft is likely to create restrictions to the free cross-border provision of information society services by providers established in other Member States than Germany. It further appears that the relevant conditions for derogating from the prohibition to enact such restrictive measures, in particular the procedural requirements under Article 3(4)(b), have not been met to ensure adequate action by the competent authorities of the home Member State(s) and to allow the Commission to fully assess the compatibility of the measure in question. Without prejudice to the substantive and comprehensive assessment as to whether it could be necessary and proportionate to address certain measures to media platforms and user interfaces to promote media pluralism, the German authorities are invited to consider the compatibility of the notified draft with the conditions established in Article 3 of the e-Commerce Directive.

Some of the service providers covered by the notified draft may qualify as a video-sharing platform service within the meaning of the Audiovisual Media Services Directive¹¹. While the Directive allows Member States to impose on video-sharing platform providers measures that are more detailed or stricter than the measures referred to in Article 28b(3), Member States still need to comply with the requirements set out by applicable Union law. This includes Article 3(1) of Directive 2000/31/EC, as referred to above.

1.3. Regulation (EU) 2019/1150¹²

The Commission recalls that in its comments on Notification 2020/26/D, it called the attention of the German authorities that certain obligations in the State Media Treaty overlap with Article 5 of Regulation (EU) 2019/1150, applicable as of 12 July 2020. Notably, Article 5 of this Regulation requires providers of online intermediation services and providers of online search engines to set out in their terms and conditions and on their online search engines, respectively, the main parameters determining ranking, whereas § 93 of the State Media Treaty requires providers of media intermediaries to keep the central criteria of aggregation, selection and presentation of content easily perceptible, immediately accessible and constantly available.

The transparency obligations in the notified draft (§ 4-6), which further specify the relevant transparency obligation in the State Media Treaty (concerning central criteria of an aggregation, selection and presentation of content and their weighting), also overlap

¹² Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance), OJ L 186, 11.7.2019, p. 57–79.

with this Regulation. Article 5 of the Regulation specifies the ranking transparency obligation by requiring the disclosure of (i) the reasons for the relative importance of those main parameters as opposed to other parameters; (ii) the possibility and effects of influencing ranking against any direct or indirect remuneration paid by business users or corporate website users; (iii) contents of the notification that lead to an alteration of reanking order or delisting; (iv) the characteristics of the goods and services offered to consumers through the online intermediation services or the online search engine, and their relevance for those consumers; (v) the design characteristics of the website used by corporate website users. The detailed obligations of the notified draft, listed under section 1.1.(b) above, partly coincide and partly go beyond the requirements of the Regulation.

However, Member States are no longer in a position to regulate the matters within the scope of the Regulation. The Commission adds that the transparency obligations of the notified draft differ from the rules laid down in Article 5 of this Regulation not only in terms of the language to be used, but also in terms of the level of detail that the relevant service providers will need to adhere to.

The Commission takes note of the views of the German authorities – supported by the expert opinion attached to the notification message – that the obligations of the notified draft can coexist with the Regulation. However, the Commission recalls that Member States are not allowed to adopt national provisions on the matters falling within the scope of, and exhaustively regulated by, the Regulation, since this would affect its direct and uniform application. In this regard, the direct and uniform application of the Regulation would not be ensured in practice, if a Member State could introduce national requirements on matters falling within the scope of Article 5 of the Regulation.¹³ The Commission notes further that the overlap between Union law and national law is not a matter of mere interpretation, which could be resolved through the use of recitals.

For the reasons stated above, the Commission delivers a detailed opinion provided for in Article 6(2) of Directive (EU) 2015/1535 to the effect that the notified draft would be in breach of Article 3 of the e-Commerce Directive and of Article 5 of Regulation (EU) 2019/1150 were it to be adopted without giving due consideration to the above remarks.

The Commission would remind the German Government that under the terms of article 6(2) of the above-mentioned Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State which has drawn up the draft technical regulation concerned to postpone its adoption for four months from the date of its notification.

This deadline therefore comes to an end on 17 July 2021.

The Commission further draws the attention of the German Government to the fact that under this provision the Member State which is the addressee of a detailed opinion is obliged to inform the Commission of the action which it intends to take as a result of the opinion.

The Commission furthermore invites the German Government to communicate to it on adoption the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

¹³ Moreover, the attached expert opinion itself states explicitly that, as regards search engines and the transparency of ranking, it is for the Commission to provide for clarity and operational guidelines to service providers in accordance with Article 5(7) of the Regulation. The Commission adopted and published these guidelines on 7 December 2020.

In line with the usual procedure under EU law, please be advised that should your Government not comply with the obligations foreseen in Directive (EU) 2015/1535 or should the text of the draft technical regulation under consideration be adopted without account being taken of the above-mentioned objections or be otherwise in breach of European Union law, the Commission may commence proceedings pursuant to Article 258 TFEU.

2. COMMENTS

2.1. Overlap of the notified rules with the Digital Services Act

The Commission would like to stress once more that most of the issues in scope of the notified draft are also covered by the recently adopted proposals of the Commission in the Digital Services Act package¹⁴.

The Commission is committed to working closely with Member States throughout the negotiation of the Digital Services Act package and invites the German authorities to actively participate in the process. An important objective and added value of the new Regulations will be to offer an EU wide solution to the identified problems. A solution to the problems that the notified law intends to tackle should be jointly examined within the context of the legislative procedure at Union level. The Commission would like to stress the need for a common, EU-wide intervention in particular as regards the regulatory framework concerning the identified due diligence obligations for the providers of respective intermediary services. Faced with the multinational business model of online intermediaries, only a common European framework is able to deliver a uniform level of protection for all Europeans and an effective framework to ensure media pluralism online regardless of where the intermediary is established. This becomes evident in assessing the scope and legal implications of the notified draft, which covers operators of online platforms, regardless of whether or not they are established in the German territory.

For the reasons stated above, the Commission invites the German authorities to take the above comments into account.

Yours faithfully,

For the Commission

Thierry Breton
Member

¹⁴ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 2020/0361(COD); and Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.