

## Nondiscrimination rules for media intermediaries

### Summary

Law	<ul style="list-style-type: none"><li>■ Sec. 91, 94 Interstate Media Treaty ("MStV")</li><li>■ Sec. 7-9 of the Statute on the Regulation of Media Intermediaries ("<b>Guidelines</b>")</li></ul>				Effective date:		<ul style="list-style-type: none"><li>■ Law: 7 November 2020</li><li>■ Guidelines: 1 September 2021 (EU notification procedure currently at a standstill until 17 September 2021)</li></ul>					
Applies to:	Social networks	Search Engines	Game distribution platforms	VoD platforms	App stores	Video games	Movies and shows	Video-sharing platforms	Media compilation apps and services	Smart devices/connected devices	Messenger services	
	Yes	Yes			Depends			Yes	Depends	Depends		
Content of the regulation — quick overview												
<ul style="list-style-type: none"><li>■ The law introduces the service provider categories of "media intermediaries," which in practice especially applies to open platforms such as search engines, social networks, app stores, etc.</li><li>■ Media intermediaries may not discriminate against journalistic editorial content over which they have a particularly strong influence.</li></ul>					<ul style="list-style-type: none"><li>■ Discrimination can be conducted by systematically deviating from the criteria for access to the service or the criteria to be found on the service without justification, or if these criteria unfairly impede journalistic editorial offers.</li></ul>					Applies to abroad companies?		Yes
										EU/EEA country of origin principle respected?		No

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### I. Who is affected by this regulation?

- Providers that qualify as "**media intermediaries**" are affected by the regulation.
  - A media intermediary is any service that aggregates, selects and presents to the general public (among other things) journalistic editorial offerings of third parties, without combining them into an overall offering (i.e., unlike services where the provider determines the content that is added to the platform).
  - Intermediary regulation primarily serves the purpose of protecting diversity of opinion. This is why journalistic editorial content at least has to be part of the service. If only non-journalistic editorial content is aggregated, the regulation is not triggered.
  - Examples of media intermediaries:**
    - search engines
    - social networks
    - video-sharing platforms
    - other user-generated content portals, like image and audio-sharing platforms or discussion forums

- news aggregators (i.e., services that compile news in one overview, without the provider exercising editorial control on the content that is compiled)
- smart speaker/voice assistants (e.g., with regard to search features)
- app stores if they are open
- The rules also apply if the intermediary service is imbedded into a third-party service (e.g., a search engine that is integrated into a third-party website).

### Exemptions:

The provision does not apply to services that:

- reach an average of fewer than one million unique users per month in Germany over a six-month period or will not exceed this number according to their forecasted development
- specialize in the aggregation, selection and presentation of content related to goods or services (e.g., online shops and marketplaces, price comparison websites)
- serve exclusively private or family purposes

### Companies outside of Germany:

- With regard to the media intermediaries, the law establishes a marketplace principle.
- This means the regulation applies to media intermediaries that are intended for use in Germany.
- A service is deemed to be intended for use in Germany if:
  - users in Germany are targeted by the service, which is determined based on an overall assessment, considering, for instance, the service's language, the content offered or marketing activities
  - the service generates a significant portion of its revenue in Germany
- EU/EEA country of origin principle:
  - The regulation **applies regardless of the EU/EEA country of origin.**
  - Whether Germany's marketplace approach constitutes a violation of the EU/EEA country of origin principle is currently subject to debate.
    - The European Commission requested during the legislative process that Germany examine the compatibility of the law with regard to its compliance with the EU/EEA country of origin principle. However, no obligation has been imposed by the commission to change the regulation. Germany did not amend the law in the subsequent process.
    - Several German legal experts take the view that the regulation violates the EU country of origin principle.
    - As doubts about the compatibility with EU law remain, courts will have to decide whether the application to companies established in other EU/EEA countries is lawful. Until the question has been resolved by a court, robust arguments exist to take the position that the law violates EU laws. However, service providers that take this position have to factor in that they might be sanctioned by German regulators and will have to defend their position in court.

- **Recent update (June 2021):** As part of the mandatory notification procedure, the EU Commission has been notified of the Guidelines and they were initially at a standstill until 17 June 2021. However, the EU commission extended the standstill period until 17 September 2021, most likely because it continues to see a violation of the EU country of origin principle. Germany now has the opportunity to lodge additional arguments.

## II. Requirements

- Media intermediaries may not discriminate against journalistic editorial content for which they function as gatekeeper, allowing them to have a particularly strong influence on its visibility.
- Factors to determine whether a **strong influence** exists include:
  - the position of the media intermediary in the relevant markets
  - an overall view of the use of the service by consumers (e.g., based on range, user numbers, time spent and activity of users or number of views per user)
- Media intermediaries with a strong influence on the visibility of the content for which they function as gatekeeper may not:
  - without an objectively justified reason, systematically deviate in favor or to the detriment of a specific service or content provider from the **criteria (including their weighting), which must be published under transparency rules**
    - Justified reasons for deviating include, for example, prohibitions or obligations imposed by law, technical reasons for presentation on the user's side or requirements to protect the integrity of the service.
    - For example, taking down content in a deviation from the criteria on accessing and remaining on the service for the purpose of protecting personality rights or minors may not be discrimination.
    - Another example for justified reasons may be technical aspects, e.g., related to displaying a service on mobile devices, the protection against web spam or unavoidable errors due to the use of AI.
  - systematically impede services or content providers directly or indirectly in an unfair manner by employing discriminating access or discoverability criteria
    - For example, a service can be impeded if it is continuously displayed less prominently than other service offerings.
    - The unfairness of an impediment may result from individual criteria or from the cumulative interaction of several criteria and is assessed by weighing the interests of the parties involved.
    - For example, over- or under-representing certain journalistic editorial offerings compared to others due to their political orientation can be considered an unfair impediment.

## III. Enactment

- The MStV came into force on 7 November 2020.
- The Guidelines, as agreed on by the state media authorities, are scheduled to come into force on 1 September 2021. However, due to the EU notification procedure, there is a standstill period until 17 September 2021 — during which the Guidelines cannot be adopted.

## IV. Sanctions and enforcement (including recent enforcement example)

- Infringement may only be prosecuted by the competent state media authority if it is notified by an affected provider of journalistic editorial content or in obvious cases.

- The competent state media authority has the right to request a variety of information from service providers.
- To enforce the provision, the competent state media authority may impose necessary measures such as objections, prohibitions or blocking orders on the service.
- Fines of up to EUR 500,000 can be imposed for noncompliance.
- **Enforcement example:** In June 2021, the regulator decided on the first two (identical) cases concerning a cooperation agreement between a search engine provider and the German Ministry of Health. The proceedings were initiated both by a local media regulation authority and on the basis of a complaint from a press publisher. The case involved health information from the cooperating Ministry of Health that was presented in a prioritized manner by means of a prominently displayed information box. The media regulation authority decided that the cooperation had resulted in an unfair impediment to other providers of editorial journalistic health content. The regulator issued a formal complaint against the search engine provider. A prohibition order was not issued as the cooperation had already been terminated on the basis of a (parallel) decision under antitrust law.

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For further questions don't hesitate to contact our specialists:



Sebastian Schwiddessen LL.M.  
Senior Associate

[sebastian.schwiddessen@bakermckenzie.com](mailto:sebastian.schwiddessen@bakermckenzie.com)



Andreas Jagusch  
Associate

[andreas.jagusch@bakermckenzie.com](mailto:andreas.jagusch@bakermckenzie.com)

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**Baker & McKenzie - Partnerschaft von Rechtsanwälten und Steuerberatern mbB**

**Berlin**

Friedrichstraße 88/Unter den Linden  
10117 Berlin  
Tel.: +49 30 2 20 02 81 0  
Fax: +49 30 2 20 02 81 199

**Frankfurt am Main**

Bethmannstraße 50-54  
60311 Frankfurt am Main  
Tel.: +49 69 2 99 08 0  
Fax: +49 69 2 99 08 108

**Düsseldorf**

Neuer Zollhof 2  
40221 Düsseldorf  
Tel.: +49 211 3 11 16 0  
Fax: +49 211 3 11 16 199

**München**

Theatinerstraße 23  
80333 München  
Tel.: +49 89 5 52 38 0  
Fax: +49 89 5 52 38 199

[www.bakermckenzie.com](http://www.bakermckenzie.com)

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