

User interface regulation, including nondiscrimination, discoverability and other rules

Summary

Law	<ul style="list-style-type: none"> Sec. 84 Interstate Media Treaty ("MSTV") Sec. 10 of the Statute Specifying the Provisions of the MSTV on Media Platforms and User Interfaces ("Guidelines") Public Value Statute 				Effective date:	<ul style="list-style-type: none"> Law: 7 November 2020 Guidelines: 1 June 2021 and 1 September 2021 Public Value Statute: 1 September 2021 List with privileged services: October 2021 at the earliest 					
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	
Content of the regulation — quick overview											
<ul style="list-style-type: none"> The law introduces the service provider categories of "user interfaces," which in practice applies to EPGs or the user menus of many media compilation services and smart or connected devices that provide access to or sort third-party media services. In terms of discoverability, providers of user interfaces may not discriminate against media services (e.g., for payments). 				<ul style="list-style-type: none"> Implementing nondiscriminatory search features is mandatory. Users need to be able to customize user menus. Linear broadcasts as a whole must be prominently displayed/easily recognizable, e.g., by implementing a specific section. Certain linear broadcasts and on-demand media services need to be privileged in terms of accessibility. 				Applies to abroad companies?		Yes	
								EU/EEA country of origin principle respected?		No	

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I. Who is affected by this regulation?

- The regulation applies to providers of so-called **user interfaces**.
 - A user interface is any textual, visual or audible presentation of the media services (e.g., VoD services, broadcasts, music streaming services and online press services) or the content of an individual media platform or multiple **media platforms**, which serves as a means of orientation and allows the direct selection of the media services, content or apps that provide access to media services.
 - Put simply, user interfaces are typical menus that help users to navigate audio, audiovisual or online press content preselected by either the user interface operator or a third party. Interfaces for open platforms are not covered (e.g., social networks).
 - Examples:**
 - electronic program guides (EPG)

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- **interfaces of smart and connected devices** that provide access to preinstalled VoD apps, music streaming services, TV channel apps, radio apps or news/press apps, e.g., interfaces of smart TVs, TV sticks/boxes, connected cars, smartphones, tablets, smart receivers and e-readers
- the **acoustic navigation system of smart speakers and voice assistants** (it is sufficient if only individual program offers or content from an overall program offer can be navigated acoustically)
- User interfaces can constitute a **media platforms** as well. This applies in particular to smart devices and media compilation apps where the provider determines the default composition of the media services included in the service. The default composition as included in the user interface constitutes a media platform and falls under the media platform regulation. However, at the same time, an interface that helps users navigate preselected services constitutes a user interface and falls under the user interface regulation.
- However, user interfaces do not have to be part of a media platform. A stand-alone user interface (e.g., a website or app) providing navigation for media platforms or digital TV channels (provided by a digital cable network provider) will also fall under the regulation.

Exemptions:

- User interfaces with generally **fewer than 20,000 actual daily users on a monthly average** are exempted. This exemption does not apply to user interfaces of infrastructure-based media platforms such as digital cable network operators.
- Infrastructure-based **media platforms** (e.g., digital cable network operators), including their user interfaces, with fewer than 10,000 connected residential units are exempted.

Companies outside of Germany:

- With regard to the user interface regulation, the law establishes a marketplace principle.
- This means that the regulation applies to user interfaces 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, the European Commission has not imposed any obligation to change the regulation. Germany did not amend the law in the subsequent legislative 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 German regulators might sanction them, and that they will have to defend their position in court.

II. Requirements

- **General prohibition of discrimination in relation to discoverability**
 - **Without a verifiable and objectively justified reason**, the user interface operator may not treat similar media services (e.g., VoD services, TV and radio broadcasts, music streaming services and online press services) or similar content differently in terms of **discoverability**. Discoverability may not be unfairly impeded.
 - This means that similar services and similar content **may not be discriminated against with regard to the chances of finding them** (e.g., by making certain VoD services easier to find than others without an objectively justified reason).
 - The nondiscrimination rule applies in particular (but not exclusively) to **the sorting, arrangement and presentation** of the media services and content made accessible through the user interface. The Guidelines also mention the **textual, graphical and acoustic form of presentation** of the media services and content.
 - The **alphabet, genre and user reach** are **permitted criteria** to organize the discoverability of media services and content in a user interface.
 - User interface providers have to enable the state media regulators to review their discoverability criteria and to monitor their compliance with them. In particular, they must outline which criteria they employ and on what information they are based.
 - **Generally prohibited differentiation criteria** are the following, among other things:
 - making exceptions for certain services and thereby deviating from its own (otherwise lawful) discoverability criteria
 - arranging and sorting media services and content against payment or similar remuneration (i.e., a more prominent placing may not simply be purchased)
 - favoring media services operated by the provider of the user interface, unless the end customer pays for the privileged service (e.g., SVOD services)
- **Requirement to maintain a nondiscriminatory search feature**
 - User interface providers **have to maintain a search feature** that allows the search for specific services (e.g., if somebody searches for a specific broadcasting channel or VoD service).
 - **Search results must be free of discrimination**. For instance, privileged positioning in exchange for payments is prohibited.
 - This also applies to any **auto-complete feature** employed during the search process. For example, auto-complete suggestions based on payments are prohibited.
 - If the search feature allows individual content to be searched for (i.e., not just for media services), the aforementioned criteria apply accordingly.

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- **Customization requirement**
 - Irrespective of the default settings, users must be able to **easily and permanently customize the sorting and arrangement** of media services or content, e.g., via a favorites list.
 - Customization made by users may only be changed by the users themselves and not by third parties or the user interface operator (e.g., through **updates that reset the customization** or add new services not added by the user to the customization).
- **Requirement to make linear broadcasts as a whole easily accessible**
 - Linear broadcasts (radio and TV) as a whole must be **directly accessible and easily recognizable on the first selection level/screen** (e.g., on the main page of the user interface instead of just in a submenu).
 - According to the Guidelines, "easily recognizable" means easy and quick to locate, for example, by putting the section first or presenting it in a highlighted manner, e.g., with a separate button.
 - For instance, the requirement could be implemented by **establishing a broadcasting section that is prominently displayed** in the main menu or selection screen.
 - In general, the broadcasting section needs to be accessible by only one action.
 - The purpose of the provision is that linear broadcasts should not be difficult to find compared to, for instance, VoD services or other apps.
- **Requirement to make certain linear broadcasts easily accessible**
 - **Within the selection menu/section for linear broadcasts** (radio and TV), certain channels have to be **easily recognizable/accessible** or they must be **prominently displayed** (e.g., some state-financed channels and some private channels that are particularly relevant for the public process of opinion forming).
 - The law directly determines some of the privileged channels; some will be determined by the regulator every three years (mainly the private channels).
 - The state media regulators will publish a list that will include at least all the privileged channels determined by the regulator ("**List**"). It is currently unclear whether the List will also include the channels that are determined by law to give service providers a complete overview for the purposes of legal certainty.
 - The state media regulators will create the List according to the Public Value Statute:
 - There will be a tender process for private channels to apply to become privileged channels.
 - The tender process is scheduled for September 2021. The process will take at least one month, depending on the number of applications received by the state media regulators.
 - Once the determination procedure has been completed, the state media regulators will publish one List for video offerings and one List for audio offerings. The List will be renewed every three years.
- **Requirement to make certain on-demand media services easily accessible**
 - **Within the selection menu/section for on-demand services**, certain services have to be **easily recognizable/accessible** (e.g., on-demand services from public broadcasters or media services from private broadcasters that are particularly relevant for the public process of opinion forming).
 - Again, the law directly determines some of the privileged services; some will be determined by the regulator every three years (mainly the private channels).

- The List published by the regulator (see the previous bullet point) will include all privileged on-demand services.

- **Exemptions**

- Compliance with the following requirements is not required if the provider is able to prove that compliance is technically not possible or that it requires unreasonable effort:
 - requirement to maintain a nondiscriminatory search feature
 - requirement to enable users to customize the sorting and arrangement
 - requirement to make linear broadcasts as a whole easily accessible
 - requirement to make certain linear broadcasts easily accessible
 - requirement to make certain on-demand media services easily accessible
- Whether the exemption is met is subject to a case-by-case decision. However, the requirements are generally high and they are further set out in the Guidelines for the law. An example could be updating older devices where this is technically not possible.

III. Enactment

- The MStV came into force on 7 November 2020.
- The Guidelines, as agreed on by the state media authorities, came into force on 1 June 2021. They do not include the following guidelines, which will come into force on 1 September 2021:
 - guidelines on enabling users to customize the sorting and arrangement
 - guidelines on making linear broadcasts as a whole easily accessible
 - guidelines on making certain linear broadcasts easily accessible
 - guidelines on making certain on-demand media services easily accessible
- The List will be published in October 2021 at the earliest.
- It is unlikely that the regulator will enforce any of the regulations prior to the additional guidelines or the List having entered into force.

IV. Sanctions and enforcement

- The competent state media authority has the right to request a variety of information from service providers.
- Services included in a user interface have the right to access information on the sorting, order and display of content and the use of their metadata.
- 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.

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