

Diversity, equal opportunity, nondiscrimination and notification rules

Summary

Law	<ul style="list-style-type: none"> Sec. 82, 83 Interstate Media Treaty ("MSTV") Sec. 5-8 of the of the Statute Specifying the Provisions of the MSTV on Media Platforms and User Interfaces ("Guidelines") 				Effective date:		<ul style="list-style-type: none"> Law: 7 November 2020 Guidelines: 1 June 2021 				
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 category of "media platform," which in practice applies in particular to media compilation services and smart or connected devices that provide access to third-party media services. 				<ul style="list-style-type: none"> In order to ensure diversity of opinion and diversity of services, the operators of media platforms have to comply with different general and specific diversity, equal opportunity and nondiscrimination rules. The use of conditional access systems and APIs as well as the access terms for third parties, including fees, need to be notified/disclosed to the regulator. 				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 platforms**" are affected by the regulation.
 - Media platforms are online services that compile the following into an overall offering determined by the provider:
 - broadcasts (e.g., regular TV channels, radio channels or live streams if they qualify as broadcasts)
 - online services similar to broadcast (e.g., VoD services and music streaming services)
 - online press services (e.g., news and press websites)
 - apps that provide access to the aforementioned services
 - Compiled services have to be **third-party services**.
 - Media platforms that compile services from only one of the categories above will also be affected by the regulation.

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- The key requirement is that the included services have to be **determined/selected by the media platform provider**, i.e., open platforms/services are not caught by the regulation (e.g., app stores, search engines or social networks).
- However, **mixed services** fall under the regulation to the extent individual parts of the service meet the aforementioned requirements (e.g., if a generally open platform includes by default preselected services/apps determined by the platform provider or if an otherwise open platform has a section of services/apps selected by the platform).
- The requirements also apply to **infrastructure-based platforms/services that conduit** the above-mentioned services.
- **Examples of media platforms:**
 - **smart and connected devices** that provide a typical app-based **user interface**, where the service provider **preselects** certain apps, which often include preinstalled VoD apps, music streaming services, TV channel apps, radio apps or news/press apps, e.g., smartphones, tablets, connected cars, smart TVs, smart receivers, e-readers, TV sticks/boxes and other media players
 - **smart speakers/voice assistants**, which often provide access to music streaming and news services that were preselected by the device operator
 - **media compilation apps and services** that compile, for instance, different preselected third-party VoD services, music streaming services, TV channel apps, radio channels, news and press services. Operators of media compilation apps and services often (but not necessarily) compile third-party services and their own services together, which does not affect the applicability of the regulation (see mixed services above). Examples include various **digital media players** and **news tab services**.
 - **digital cable network operators** (infrastructure-based media platforms, see above), which conduit TV and radio channels and determine which channels are passed through to the end consumer

Exemptions:

- Media platforms with generally **fewer than 20,000 actual daily users on a monthly average** are exempted. This exemption does not apply to infrastructure-based media platforms such as digital cable network operators.
- **Platform providers that only compile their own services** (i.e., services they have editorial control over) or services that are operated by other companies within the same group of companies are exempted, e.g., media libraries of broadcasters (*Mediatheken*). However, the exemption does not apply if third-party services are compiled in addition to their own services/content (see mixed services above).
- **Analog cable network operators** are exempted.
- 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 media platform regulation, the law establishes a marketplace principle.
- This means the regulation applies to media platforms that are intended for use in Germany.
- A service is deemed to be intended for use in Germany if:

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- 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 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 they might be sanctioned by German regulators and will have to defend their position in court.

II. Requirements

- **Diversity rules**
 - Providers of media platforms must ensure that the technology used enables a diverse range of program offerings.
 - The requirement involves providers having to actively pursue the goal of enabling a diverse range of program offerings, including considering this during contractual negotiations with third parties.
 - Both the deployed technique and access terms for the platform must enable a diverse range of program offerings.
- **General equal opportunities rules**
 - Media services (e.g., broadcasts, VoD services, etc. see list above under I.) may not — whether directly or indirectly — be unfairly impeded in their access to media platforms.
 - Whether an impediment is unfair is determined by comprehensively weighing the interests of the parties concerned, as well as the objective to safeguard diversity of opinion and diversity of services.
 - An unfair impediment takes place, for instance, if media platforms do not offer a realistic chance of access within the scope of what is technically possible and economically reasonable, or if the conditions of access lead to a structural disadvantage for media services.
 - It is currently unclear how strictly these requirements will be interpreted, in particular in relation to preinstalled default apps of smart and connected devices.
- **General nondiscrimination rules**
 - Media services (e.g., broadcasts, VoD services, etc. see list above under I.) may not — whether directly or indirectly — be treated differently from similar services without an objectively justified reason.

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- For example, providing different conditions to companies associated with the provider than those for third-party companies may be unjustified discrimination (unless there is an objectively justified reason).
- Whether a reason for unequal treatment is objectively justified must be assessed in light of the objective to ensure diversity of opinion.
- **Specific equal opportunity and nondiscrimination rules**
 - The aforementioned equal opportunity and nondiscrimination rules apply in particular to:
 1. **conditional access systems** (technical and authorization systems that allow unencrypted access to a radio or TV broadcast only after a subscription, etc.)
 2. application program interfaces (API, i.e. software used by the end customer to receive the content)
 3. other technical specifications relating to no. 1 and 2
 4. access terms and conditions, especially fees and tariffs
 - **Examples of discrimination:**
 - Typical cases of discrimination with regard to conditional access systems are not allowing certain media services the use of programs/services required for use of the conditional access systems or not providing sufficient information for the use in a discriminatory manner.
 - A typical case of discrimination with regard to APIs could be not providing sufficient information to selected media services on how to work with the employed APIs or not providing selected services with updates or additional required features, etc. APIs need to be configured and disclosed in such a way that all the applications of a service provider can be used by the end customer on regular devices that are designed for this purpose.
 - An example of discrimination in terms of other technical specifications relating to no. 1 and 2 would be a requirement of the media platform provider for hardware or software manufacturers to meet other specifications/conditions to use the employed conditional access systems and/or API, e.g., a certification requirement that could result in the discrimination of competition.
 - Designing access terms, conditions, fees or tariffs in a manner that discriminates against certain media services.
- **Notification requirements**
 - The competent state media authority must be notified of the use of a conditional access system or an API and related fees and tariffs without undue delay. The same applies to changes.
 - The access terms and conditions, in particular charges and tariffs, have to be disclosed to the competent state media authority.

III. Enactment

- The MStV came into force on 7 November 2020.
- The Guidelines, as agreed by the state media authorities, came into force on 1 June 2021.

IV. Sanctions and enforcement

- If the media platform provider and the media services (e.g., broadcasters or VoD services) cannot agree on the inclusion of a service in the media platform or on the conditions for the inclusion, any of the parties involved may call upon the competent state media authority, which will work toward an appropriate solution among the parties involved.
- Services included in a media platform and user interface have the right to access information on the sorting, order and display of content and the use of their meta data.
- The competent state media authority has the right to request a variety of information.
- 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.

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



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