

Transparency obligation for media intermediaries

Summary

Law	<ul style="list-style-type: none"> Sec. 91, 93 Interstate Media Treaty ("MStV") Sec. 4-6 of the Statute on the Regulation of Media Intermediaries ("Guidelines") 				Effective date:		<ul style="list-style-type: none"> Law: 7 November 2020 Guidelines: 1 September 2021 (EU notification procedure currently at a standstill until 17 September 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			Depends			Yes	Depends	Depends	
Content of the regulation — quick overview											
<ul style="list-style-type: none"> 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. Media intermediaries have to disclose the requirements for accessing the platform and remaining on it. 				<ul style="list-style-type: none"> Media intermediaries also have to disclose the criteria for the selection, aggregation and presentation of the content as well as their weighting, including the functioning of the deployed algorithms. Furthermore, an update history needs to be provided. The information needs to be provided in German in a manner that is easily perceivable, directly accessible and constantly available. 				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 offerings at least have 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

- **Which information needs to be made transparent?**
 - The criteria that determine the access of content to a media intermediary and its remaining on the service. This includes:
 - a description of the technical, economic, provider-related, user-related and content-related prerequisites that determine whether content is made perceivable via a media intermediary
 - in the event that certain content is filtered or downgraded or upgraded in terms of perceivability when it is accessed and remains in the media intermediary, in particular also through the use of automatic systems, information will be provided on which category of content this concerns and for the pursuit of which objectives the filtering or grading is carried out
 - 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 monetary benefits
 - The central criteria of the aggregation, selection and presentation of content and their weighting, including information on the functioning of the algorithms used, in comprehensible language. This includes:
 - a description of the central criteria used by the media intermediary provider for aggregation, selection and presentation
 - a description of the relative weighting of the central criteria in relation to each other and in relation to non-central criteria, without having to make the latter transparent
 - a description of the optimization goals pursued with the central criteria
 - information on whether and, if so, how the discoverability of content in the media intermediary is or can be influenced by payments or other direct or indirect considerations of monetary value
 - a description of the basic process steps underlying the aggregation, selection and presentation of content, including information on which personal and other data are included in the aggregation, selection and presentation
 - information on the type and extent of personalization used and on whether and, if so, how content is assessed for relevance to the respective user
 - information on whether and, if so, in what way user behavior in the media intermediary can have an influence on the aggregation, selection and presentation of content, together with indications of the influence options available to the user through settings and sub-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
 - Media intermediaries that specialize in a particular subject (e.g., news search engines, professional networks or specific ideological views) are required to make their specialization transparent by designing the service accordingly, e.g., by using a corresponding title for the service.

- Significant changes to the criteria outlined above also need to be made transparent without undue delay. Furthermore, an update history that includes all significant changes made over time has to be provided.
- Media intermediaries are not required to disclose trade secrets. However, they may still be required to disclose relevant information abstractly, e.g., if a contract requires that a provider favors certain content.
- In addition, social networks and video-sharing platforms also have to **take care that social bots are labeled**.
- **How must the information be made transparent?**
 - The information has to be made available to users in **German** in a manner that is **easily perceivable, directly accessible and constantly available**.
 - The information must be:
 - easy and quick to find, e.g., by highlighting and identifying it with an unambiguous term
 - accessible without larger effort
 - The information may not require more than two clicks to be accessed. If the user has to register or login to an account to get to the information, the accessibility requirement is not met.
 - If the use of the service is predominantly **voice-controlled**, the information should be given acoustically at the user's request. However, an acoustic indication of where the information is available is sufficient.

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

- 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.

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



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