

Contribution

TRIS notification 2020/411/D (German Draft Second Act amending the Protection of Young Persons Act)

2020-August-13

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With this paper, Bitkom wishes to provide its comments on the proposed German Draft Second Act amending the Protection of Young Persons Act ('the notified draft Act' or 'the draft Act'), which is now being reviewed by the European Commission under the framework of the notification procedure laid down in Directive (EU) 2015/1535. Essentially, the draft Act concerns 'rules on services' in the meaning of Article 1(1) (e) (i) of the Directive.

The notified draft Act amends the Protection of Young Persons Act in Germany (Jugendschutzgesetz, JuSchG) and aims to promote transparency and orientation with regard to age labelling, adapt indexing practices to the digital age, create an effective response to interaction risks and promote further development in the protection of children and young persons in the media.

There is no disagreement that the notified draft pursues an important goal, namely that of protecting children and young people from harmful online content and providing them with age-appropriate access to digital services. We welcome the initiative of adapting the regulations of the Youth Protection Act to the convergence of media regulations and thus creating modern framework conditions for the protection of minors in Germany. However, we do see a risk of the notified draft limiting the free movement of services within the Union as well as the freedom to provide Information Society Services as based on the country-of-origin principle and codified in the e-Commerce and Audiovisual Media Services Directive.

Two provisions of the draft Act are especially concerning in this regard. §14a of the draft Act defines labelling obligations for movie and games platforms which they have to fulfil in order to be able to offer those games and movies. § 24a of the draft Act defines precautionary measures for 'service providers who store or provide third-party information for users with the intention of making a profit'. Services that are not usually used by children are exempt from these obligations. Both obligations are punishable by a fine.

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Compatibility with the e-Commerce (eCD) and Audiovisual Media Services Directive (AVMSD)

The service providers coming under the scope of the notified draft Act, as defined in § 14a and § 24a constitute information society services within the meaning of Article 1 and 2 of the e-Commerce Directive or audiovisual media services within the meaning of Article 1 of the Audiovisual Media Services Directive. The notified new obligations fall within the coordinated field of the e-Commerce Directive as defined in its Article 2 (h), as they concern the obligations for service providers, or the coordinated field of the AVMS Directive respectively. According to the draft Act (see § 14a (3), 1st sentence and § 24a (4) 1st sentence), both obligations would explicitly also apply to service providers whose country of establishment is not Germany, which means that service providers established in other Member States than Germany could be covered as well. Nevertheless, the draft Act refers to §§ 2a, 3 Telemedia Act (TMG) in § 14a (3) 2nd sentence and § 24a (4) 4th sentence. Therefore, it seems as the country-of-origin principle laid down in Article 3 (2) of the e-Commerce Directive and Article 3 (1) AVMSD shall come into full effect.

However, as the legislator refers to exceptions to derogate from the country-of-origin principle in Article 3 (4) to (6) of the e-Commerce Directive, it is not clear whether the draft shall be considered as an exception to the principle. If this were the case, according to Bitkom's view, the new obligations set out in the draft Act constituted an interference with the cross-border provision of information society services, questioning the reach of Article 3 (2) of the e-Commerce Directive as well as Article 3 (1) AVMSD, inasmuch as they apply to providers of services established in other Member States. This were the case, in particular, for especially burdensome obligations for service providers, such as § 14a providing for very specific procedures for age rating of movie and game platforms. These would imply that every European provider of movie or game platforms that also addresses German users would in future have to carry out its own age rating with a certification or self-regulatory body based in Germany. Moreover, as far as the design of the age rating is concerned, a separate design would then have to be chosen for Germany (and if that is the case, then possibly for each other member state that chooses to follow the same path), which would make uniformly-designed, cross-border services almost impossible (which in turn would be at the expense of smaller Member States due to the adaptation efforts becoming too burdensome for the smaller market size).

The German authorities argue in their justification for the draft Act that it is compatible with EU law, especially the AVMSD and eCD, because, under the provisions on the country-of-origin principle in Article 3 of the eCD, an extension is in principle possible in the material scope of the protection of minors, since Articles 3 (4) to (6) expressly provide for an exception and possibility of derogation for the protection of minors. The requirements for such derogation are implemented in Section 3 (5) of the German Telemedia Act, which are

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said to be maintained by the draft Act, as is made clear by references to the German Telemedia Act.

If the legislator referred to such an exception, it should be noted that Article 3 of the eCD contains several other requirements to be fulfilled to derogate from the prohibition to restrict the freedom to provide information society services, notably that any derogation has to be targeted as well as proportionate to the objective pursued. As regards the targeted nature of the measures, Bitkom is not convinced that this requirement is met since the notified draft applies to a broad range of service providers. A targeted measure which fulfils the requirement of the Directive could be a proceeding against a specific service provider (judicial or administrative), for example. As regards proportionality, Bitkom has doubts as well: it should be assessed whether less restrictive means to obtain a similar result could be envisaged.

Similar concerns hold true in respect of the conditions for derogation from the country-of-origin principle laid down in the AVMSD. According to its Article 3 (2), derogations from the country-of-origin principle are subject to several conditions, including that the media service provider has, on at least two prior occasions in the previous 12 months, already gravely infringed the obligation that it should prevent minors from consuming audiovisual media services which may impair their physical, mental or moral development. Another condition is that the Member State concerned has notified the media service provider, the Member State having jurisdiction over the provider and the Commission of the alleged infringements and the proportionate measures it intends to take should such infringement occur again and that it has given the service provider in question the opportunity to express its views on the alleged infringements.

From the above considerations, Bitkom concludes that the notified draft Act is likely to create additional restrictions to the free cross-border provision of information society services and thereby fragmentation of the digital single market which are not justifiable by the derogations provided for in the E-Commerce Directive.

Conclusion

In recent years, regulatory proposals have multiplied at both national and European level to address different types of content online, including terrorist content, copyright infringement, misinformation and illegal hate speech as well as youth protection. Each of these initiatives usually involves different obligations, sanctions, and reporting duties. Bitkom shares with the German authorities the policy objective of ensuring appropriate protection of minors online. However, we fear that this national special path is not com-

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patible with the country-of-origin principle enshrined in EU law and would therefore lead to fragmentation of the Single market.

Bitkom represents more than 2,700 companies of the digital economy, including 1,900 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.