EUROPEAN COMMISSION

Brussels, 1.7.2024
C(2024) 4659 final

Her Excellency
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Subject: **Notification 2024/188/DE**

State Treaty on the Protection of Human Dignity and the Youth Media Protection in Broadcasting and Telemedia (Youth Media Protection State Treaty – JMStV)

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Excellency,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ([1]), the German authorities notified to the Commission on 4 April 2024 the draft "*Staatsvertrag über den Schutz der Menschenwürde und den Jugendmedienschutz in Rundfunk und Telemedien (Jugendmedienschutz-Staatsvertrag – JMStV)"* (hereinafter referred to as "the notified draft").

According to the notification message, the notified draft intends to amend the existing State Treaty on the Protection of Human Dignity and the Youth Media Protection in Broadcasting and Telemedia (Youth Media Protection State Treaty – JMStV) in order to increase the protection of minors from harmful content on telemedia services. The notification message further explains that the ultimate aim of the notified draft is to provide children and young people with age-appropriate access to the wide range of services offered by the Internet so that they be protected for content harmful to their development. I n the context of this notification, the German authorities have further explained that some of the provisions of the notified draft aim at transposing

[1]() Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services, OJ L 241 dated 17.9.2015, p. 1.

some provisions of Directive 2010/13/EU, as amended by Directive 2018/1808 (hereinafter the "AVMSD") ([2]), of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

In the context of the notified draft, the Commission addressed to the German authorities a request for supplementary information on 25 April 2024 to obtain clarifications on the measures of the notified draft. The answers provided by the German authorities on 6 May 2024 are taken into account in the following assessment.

The examination of the relevant notified provisions led the Commission to issue the following detailed opinion and comments.

1. Introduction

The Commission takes note of the notification message, according to which the notified draft pursues the objective of reinforcing the protection of minors on online services from content harmful to them.

The Commission shares the objective of the notified provisions to protect minors online, in particular against content that may be prejudicial to their development. Although such content may be legal in the Member States, minors should not have access to it when using online services. To ensure that minors can use online services safely, the providers of platforms that may be used by minors must play their part and assume their responsibilities.

The Commission also notes that the objectives of the notified provisions are clearly aligned with those of the European legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter "the DSA") ([3]) and Directive 2000/31/EC (Directive on Electronic Commerce) ([4]). The Commission would like to recall that the DSA provisions concerning the protection of minors on online intermediary services were further strengthened in the context of the legislative process, as a result precisely of the willingness of the European co-legislators, including the Council with the support of Germany.

The Commission would like to emphasize that, as a result, the DSA provides an effective Union-wide regulatory solution to some of the objectives pursued by the notified draft. The DSA provides for a common set of Union rules that impose a wide range of obligations on hosting service and online platforms providers to combat illegal and harmful content online, while strengthening the European single market. As a Union law Regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

[2]() Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), as amended by Directive 2018/1808

[3]() Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (DSA), OJ L 277, 27.10.2022, p. 1-102.

[4]() Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1-16.

2. Detailed opinion

2.1. Assessment in the light of the Directive on electronic commerce

a) Applicability of the Directive on electronic commerce

The notified draft falls within the scope of the Directive on electronic commerce.

Firstly, concerning the personal scope of application of the notified provisions, the notified draft applies to providers of so-called "telemedia services". Further, certain provisions of the notified draft also apply to providers of operating systems and providers of search engines.

All those services, fall under the definition of information society services ([5]) and therefore fall under the scope of the Directive on electronic commerce. As established in the past in the context of notification 2020/26/DE and as confirmed by the German authorities in their replies in the context of the present notification, telemedia services fall under the notion of information society services within the meaning of the Directive on electronic commerce.

Therefore, the providers subject to the notified draft include providers of information society services within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 and thus also within the meaning of Articles 1 and 2 of the Directive on electronic commerce, insofar as they fulfil the conditions set out therein.

Secondly, concerning the material scope of the notified provisions: the rules set out in the notified draft concern in particular the requirements on providers of information society services to take certain measures aimed at preventing access from minors to content harmful to them.

In particular and among other obligations, under the notified draft, providers of information society services would be required to:

- Fulfil the following detailed requirements in the way they distribute content (Sections 4 and 5 of the notified draft): (i) pursuant to section 4(2) last sentence, implement measures to make sure that content is only available to adults; (ii) as regards content liable to impair the development of children and adolescents into independent and socially competent personalities (a) use technical or other means to make it impossible or significantly more difficult for children or young people of the relevant age group to view the content, or (b) apply the content with an age marking that can be read by suitable youth protection programs in accordance with Section 11 (1) and (2) (Section 5 of the notified draft);
- Indicate the age rating of content in accordance with such age classification with a visible marking as well as the reasons for such classification (Section 5c of the notified draft);
- Indicate in its content the youth protection programme used, if the content is marked in accordance with Section 5(3) Number 2 (Section 5c of the notified draft);
- Make sure that each provider appoints an officer responsible for the protection of young persons with sufficient expertise, to act as contact point for users and advise the service provider on issues related to the protection of minors. The service provider must also

[5]() In particular, "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

make the contact information of this officer permanently available and directly accessible (Section 7 of the notified draft);

- In the case of operating systems, browsers, search engines, apps and app stores, adopt child protection systems according to the detailed requirements set out in the notified draft and submit a self-declaration of compliance with these detailed requirements to the German competent authority (Section 12 and 12a of the notified draft ([6]));
- In the case of service providers not established in Germany, designate a service representative for the implementation of the notified draft (Section 21 of the notified draft);
- Abide by requests for information submitted by the German authorities (Section 21 of the notified draft).

The notified draft also empowers the national regulatory authorities, at various levels of the landers and Federal State, to supervise and enforce its rules against service providers under its scope (parts IV and V of the notified draft), including the imposition of fines in cases of non compliance (part VI of the notified draft).

These obligations therefore fall within the coordinated field of the Directive on electronic commerce, as set out in Article 2(h) and (i) thereof, and have therefore been analysed in the light of this Directive.

b) Article 3(1), (2) and (4) of the Directive on electronic commerce

The Commission notes that the provisions of the notified draft apply to information society services offering their services on German territory and irrespective of their Member State of establishment. This aspect has been confirmed by the German authorities in their reply to the request for further information.

Pursuant to § 2(1) of the notified draft, the notified draft would apply to providers of information society services not established in Germany "in compliance with Article 3 of the Directive on electronic commerce".

In their replies to the request for further information addressed by the Commission, the German authorities state their intention to enforce the notified draft against providers established outside Germany on the basis of individual measures adopted by competent authorities. The Commission notes that this intention is not reflected in the text of the notified draft, in the version notified to the Commission. On the contrary, the notified draft would introduce general and abstract obligations for service providers, irrespective

[6]() Section 12 of the notified draft:
(2) The child protection system shall be able to be activated, deactivated and adapted in a simple, easily accessible and secure manner. In addition, on 1. first commissioning, 2. the preparation of the child protection system for the first time, and 3. changes in the function of the child protection system, reference must be made to the possibility of activating or adapting the child protection system and activation and adaptation must be made possible.
(3) In the child protection system, it shall be possible to set an age indication. If an age indication is set, the operating system shall ensure that: 1. in the case of browsers that open access to the internet, use is only possible if they make use of online search engines that have a secure search function or whose unsecured access has been activated individually and securely; 2. the installation of apps is only possible via distribution platforms that take into account the age indication and provide for an automated evaluation system in accordance with paragraph 4; 3. only apps that correspond to the age indication or that have been individually and securely unlocked are usable, 4. the use of browsers and apps can be excluded individually and securely.

of their place of establishment, rather than targeted measures against a given service provider following the procedures mandated by the Directive on electronic commerce.

In this regard, the Commission recalls that Article 3(1) and (2) of the Directive on electronic commerce establishes the "principle of control by the country of origin" according to which information society services must be regulated at the source of the activity. They are therefore, as a general rule, subject to the law of the Member State in which the providers of these services are established.

Article 3(4) of the Directive on electronic commerce defines the circumstances and procedures under which a Member State of destination may derogate from this principle in order to impose certain measures. The Commission draws the attention of the German authorities to the recent case law of the Court of Justice, which recalls the limits of the scope of Article 3(4) of the Directive. According to this case law, general and abstract measures such as the notified draft are not able to benefit from the exemption of Article 3(4) of Directive on electronic e-commerce.([7])

In the form notified to the Commission, the draft law constitutes such a general and abstract measure that would apply indistinctively to domestic and foreign providers of information society services. In any event, based on the information available to it at this stage, the Commission is not in the position to verify whether and how the German authorities intend to ensure that both the substantive and procedural requirements set out in Article 3(4) of the Directive on electronic commerce are fulfilled.

The Commission also recalls that, being a subcategory of information society services, video-sharing platform services also fall under the scope of the Directive on electronic commerce, including its Article 3 (as also clarified in Article 28a of the AVMSD). As stated in paragraph 5 of Article 28a, for the purposes of the AVMSD, Article 3 and Articles 12 to 15 of Directive 2000/31/EC shall apply to video-sharing platform providers deemed to be established in a Member State in accordance with paragraph 2 of the same Article.

As a separate argument, in their reply to the request for further information, the German authorities argue that the notified draft would fall within the scope of Article 1(6) of the Directive on electronic commerce. With the information available to the Commission in the context of the current notification, it seems unclear how the notified draft would be aimed at promoting cultural and linguistic diversity, as this is not an objective mentioned in the notification message. In any event, the Commission recalls that cultural and linguistic diversity is not an objective outside the scope of application of the rules of the e-Commerce Directive (contrary to Article 1(5)), but rather serves to underline the importance that the Union attaches to the defence of pluralism, as an element that Member States may wish to take into account when regulating the provision of information society services (see recital 63).

[7]() Judgment of 9 November 2023 in Case C-376/22, ECLI:EU:C:2023:835, paragraphs 59 and 60:
"*59. On the contrary, the consequence of such an interpretation is that Member States are not, as a matter of principle, authorised to adopt such measures, so that verification that those measures are necessary to satisfy overriding reasons in the general interest is not even required.*
60. Having regard to all the foregoing considerations, the answer to the first question must be that Article 3(4) of Directive 2000/31 must be interpreted as meaning that general and abstract measures aimed at a given category of information society services described in general terms and applying indiscriminately to any provider of that category of services do not fall within the concept of 'measures taken against a given information society service' within the meaning of that provision."
See also Judgment of 30 May 2024 in joint cases *Airbnb Ireland UC and Amazon Services Europe Sàrl v Autorità per le Garanzie nelle Comunicazioni*, C-662/22 and C-667/22, EU:C:2024:432, paragraph 70.

2.2. Assessment in light of the Digital Services Act

a) Applicability of the Digital Services Act

The notified draft falls within the scope of the DSA, for the reasons stated below.

Firstly, as regards the personal scope of the notified draft, the latter imposes obligations on telemedia services, some of which qualify as providers of online intermediary services pursuant to Article 3 of the DSA, as well as online platforms and search engines pursuant to the DSA. Some provisions of the notified draft also apply to services qualifying as video-sharing platforms, which would also fall under the scope of the DSA.

This aspect is reflected in Section 2 of the notified draft and has been confirmed by the German authorities in their replies to the questions sent by the Commission. ([8])

Secondly, as regards the material scope of the notified provisions, in the notification message and in their replies, the German authorities confirm that the objective of the notified draft is to enhance the security of the online space, in particular vis-à-vis the protection of minors against harmful content on telemedia services. This concern is one of the main policy objectives pursued by the DSA, as explained in recitals 40, 71 and 81 of that Regulation. The notified draft therefore aims to achieve the same objectives as those pursued by the DSA, which includes the protection of minors against harmful content, including pornographic content, throughout the Union.

b) Full harmonisation effect of the DSA

The DSA aims to contribute to the proper functioning of the internal market for intermediary services by establishing fully harmonised rules for a safe, predictable and reliable online environment. In particular, it establishes a fully harmonised regulatory framework concerning the accountability and responsibilities of intermediary service providers with regard to their obligations to combat illegal and harmful content on their services.

The Commission recalls that the protection of minors, a particularly vulnerable category of recipients of online intermediary services, is an essential aspect of the DSA. The DSA contains a provision devoted to the protection of minors online (Article 28), which was included in the co-legislation process following the support of, among others, Germany. In addition, the DSA also includes important additional obligations applicable to the providers of very large online platforms and very large online search engines with regard to the protection of minors. Those providers must (i) identify, analyse and assess and (ii) mitigate any systemic risk to the protection of minors and the rights of children (Articles 34 and 35). In particular, the DSA refers to age verification systems as an example of effective and targeted enforcement measures to protect children's rights (Article 35(1)(j)).

The Commission also recalls that, being a Regulation, the DSA does not allow for additional national requirements unless otherwise expressly provided. ([9]) This is because,

[8]() When asked to provide concrete examples of the services under the notion of telemedia in the context of notification 2020/26/DE, the German authorities clarified that they included services such as search engines, social networks, news aggregators and other intermediaries of media content.

[9]() Case 40/69, *Bollmann*, EU:C:1970:12, para 4; Case 74/69, *Krohn*, EU:C:1970:58, paras 4 and 6; and Joined Cases C-539/10 P & C-550/10 P, *Stichting Al-Aqsa*, EU:C:2012:711, para 87 (on the risk of divergent definitions under EU and national law).

pursuant to Article 288 TFEU, regulations are directly applicable throughout the Union. Unlike in the case of directives, national implementing measures are therefore not permitted in relation to regulations, unless the regulation itself leaves it to the Member States to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation ([10]).

The DSA neither requires nor permits the Member States to adopt additional national requirements, unless otherwise expressly provided, in relation to the subject matter covered by it. ([11]) The Commission points out that, in as much as the notified draft pursues the same objective as the DSA concerning protection of minors from content harmful to their development, it falls within the harmonised field of the DSA. In any case, any such national requirements would need to remain compliant with Union law, including Article 3 of the Directive on electronic commerce. This is emphasised in recital 9 of the DSA. ([12])

In this regard, the Commission notes that the provision on conflict of laws contained in section 2 of the notified draft would not be in line with the full harmonisation effect of the DSA. For telemedia and other services under the scope of the notified draft which constitute online intermediary services pursuant to Article 3 of the DSA, the DSA sets out a fully harmonised regulatory framework that cannot be replaced or supplemented by national rules.

In particular as regards the protection of minors online, the Commission services have started a cooperative exercise with Member States and their Digital Services Coordinators in the concrete area of age assurance systems for the implementation of the rules contained in the Digital Services Act. This network gathers national authorities with expertise in the matter to identify best practices and standards in the field of age assurance.

The work of this task force is building on the existing measures at national level and ongoing initiatives, such as the EU Digital Identity Wallet included in the recently adopted Regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity ([13]), as also taking into account the state of the art and the current market practices. The resulting best practices and standards should be part of an EU-wide solution that can be transmitted to the providers of online platforms for the application of their obligations under the Digital Services Act.

This dedicated task force is working intensively towards this EU-wide solution, and its work is progressing quickly. However, in the absence of an EU-wide solution to verify the age of users, the Commission understands Germany’s wish to introduce transitional measures within its jurisdiction and in compliance with Union law. In this context, national law could provide for a transitional solution but it should also envisage a

[10]() Case C-606/10, *ANAFE*, EU:C:2012:348, para 72.

[11]() The Commission draws the attention of the German authorities, for example, to Section 21 of the notified draft which overlaps with Articles 11 and 13 of the DSA.

[12]() Recital 9 of the DSA: “[…] This should not preclude the possibility of applying other national legislation applicable to providers of intermediary services, in compliance with Union law, including Directive 2000/31/EC, in particular its Article 3, where the provisions of national law pursue other legitimate public interest objectives than those pursued by this Regulation.”

[13]() Commission proposal adopted by the European Parliament on 29 February 2024 and by the Council on 26 March 2024.

mechanism to withdraw or repeal any national measures that become redundant once the European technical solution is implemented.

The Commission also takes note of the replies of the German authorities according to which certain provisions of the notified draft are aimed at transposing the AVMSD into German law. The Commission recalls that the interplay between the applicability of the DSA and the AVMSD is regulated in Article 2(4) and Recital 10 of the DSA. ([14]) In this regard, as described above, the DSA has fully harmonised the due diligence obligations and responsibilities of online intermediary services, including video-sharing platforms under the scope of the DSA, in several respects. As a result, Member States are prevented from adopting national measures that would overlap or contradict the fully harmonising framework of the DSA. Regarding the legality or harmfulness of certain content disseminated to users via video-sharing platforms, Member States may adopt legislative provisions determining what type of content is illegal or harmful, including in the implementation of Article 28b AVMSD, provided those provisions comply with Union law.

c) Monitoring and enforcement system

To ensure that the DSA is fully effective in the pursuit of our shared objectives, in particular the protection of minors, it is essential to preserve the harmonising effect of the DSA and also its supervision and enforcement system.

In accordance with Chapter IV of the DSA, the supervision and enforcement of the DSA are based on close cooperation, on the one hand, between the appointed national digital services coordinators (and other competent authorities) under the country-of-origin principle and, on the other hand, between these national authorities and the Commission (Articles 55 and 56 of the DSA).

In this respect, the Commission notes that the notified draft entrusts the supervision and enforcement of the notified draft, including the provisions falling within the fully harmonised field of the DSA, to the German media authorities (at various levels). This supervision and enforcement system under the notified draft would also apply with regard to service providers outside the jurisdiction of Germany and very large online platforms or very large online search engines in as much as they are covered by the scope of the notified draft. The Commission calls on the German authorities to ensure that the final law is aligned with the supervision and enforcement architecture of the DSA.

d) Absence of general monitoring obligations

The Commission takes notes of the information provided by the German authorities in their replies according to which Section 5c(3) and 6(7) of the notified draft are aimed at transposing Article 6a(3) and Article 9(4) of the AVMSD. Those provisions are hence considered to only apply as regards service providers under the scope of the AVMSD provisions they aim at transposing.

[14]() Article 2(4) DSA "This Regulation is without prejudice to the rules laid down by other Union legal acts regulating **other aspects** of the provision of intermediary services in the internal market or specifying and complementing this Regulation, in particular, the following: (a) Directive 2010/13/EU […]". Furthermore, Recital 10 also explains that "to the extent that those Union legal acts pursue the same objectives as those laid down in this Regulation, the rules of this Regulation should apply in respect of issues that are not addressed or not fully addressed by those other legal acts as well as issues on which those other legal acts leave Member States the possibility of adopting certain measures at national level".

The Commission recalls that, when it comes to the obligations for video-sharing platform services, the AVMSD is without prejudice to the application of Article 15 of the Directive on electronic commerce, which has now been replaced by Article 8 of the DSA. ([15])

On the basis of the information made available to the Commission, it is unclear how providers under the scope of the notified draft are to comply with the obligation under Section 5c and Section 6 of the notified draft. In particular, Section 5c requires providers of telemedia to include a visible marking to each piece of content covered under Section 4 displaying the age classification pursuant to Section 5, as well as the main reasons for that classification and any risks to personal integrity. This marking shall also be applied to other offers that are completely or substantially identical to the rated content. It is unclear how those providers are expected to determine the age classification applicable to each piece of content available in their services, and the underlying reasons, as well as the content completely or substantially identical to the rated content. To the extent that Section 5c of the notified draft applies to providers of telemedia other than media service providers under the scope of the AVMSD, this section seems to result in a requirement for those services providers to perform general fact-finding exercises and to monitor the content available on their services, which would be contrary to Article 8 of the DSA.

Concerning Section 6, the notified draft imposes very detailed conditions to be complied with when presenting advertising. Some of those provisions seem to reproduce Article 9 of the AVMSD. As regards Section 6, the Commission recalls that under the AVMSD video-sharing platform providers are only required to abide by the standards of Article 9(1) of the AVMSD for the audiovisual commercial communications “marketed, sold or arranged by the platform”. This is not reflected in the notified draft.

In addition, video-sharing platform providers have to “take appropriate measures” to comply with those standards with respect to audiovisual commercial communications that are not marketed, sold or arranged by them, taking into account the limited control exercised by those video-sharing platforms over such audiovisual commercial communications. According to Article 28b(3) AVMSD, however, those appropriate measures shall not lead to any general monitoring obligation in the sense of Article 8 DSA (formerly Article 15 of the Directive on electronic commerce). This is not reflected in the notified draft, which does not distinguish between the audiovisual commercial communications that is are marketed, sold or arranged by the video-sharing platform providers and those that are not. Therefore, to the extent that Section 6 of the notified draft applies to providers of telemedia that qualify as online intermediary services pursuant to the DSA, in particular video-sharing platform providers with respect to audiovisual commercial communications that are not marketed, sold or arranged by them, this section seems to result in a requirement for those services to perform general fact finding exercises and monitoring the content available on their services, contrary to Article 8 of the DSA.

For the reasons set out above, the Commission hereby issues a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535.

The Commission reminds the German authorities that, in accordance with this Article, the issuing of a detailed opinion entails that the Member State which is the author of the draft technical regulation concerned is required to postpone its adoption for 4 months from the date of its notification. This deadline therefore ends on 4 August 2024.

[15] ()See Article 28b and Recital 48 of the AVMSD; and Article 89 of the DSA.

Furthermore, the Commission draws the attention of the German authorities to the fact that, under this provision, the Member State to which a detailed opinion is addressed is required to inform the Commission of the action it intends to take on such an opinion.

If the German authorities fail to comply with the obligations laid down in Directive (EU) 2015/1535 or if the text of the draft technical regulation under consideration is adopted without taking account of the objections raised or is otherwise contrary to Union law, the Commission is ready to initiate proceedings against Germany in accordance with Article 258 of the TFEU.

3. Comments

With regard to § 12 of the notified draft concerning requirements for operating system vendors, the Commission notes that a requirement for a child protection system is envisaged for operating systems, presumably covering operating systems for smart TVs, mobile phones and PCs. It should be noted that operating systems are goods within the meaning of the TFEU and solutions for child protection are available outside such operating systems, for instance via on-device controls.

The Commission takes the opportunity to remind that non-discriminatory obstacles to the fundamental principle of the free movement of goods must be justified under one of the exemptions referred to in Article 36 TFEU or on the basis of mandatory requirements developed in the case law of the Court of Justice. For a national measure to be justified under Article 36 TFEU or on the basis of one of the mandatory requirements established in the case law of the Court of Justice, it must comply with the principle of proportionality (Judgment in Case C-390/99 *Canal Satélite Digital*). The measure in question must be necessary in order to achieve the desired aim and the aim must not be achievable by less extensive bans or restrictions or measures with a lesser impact on intra-Union trade. In other words, the means chosen by Member States must be confined to what is actually necessary to achieve the aim, and they must be proportional to the aim thus pursued (Judgment in Case C-319/05 *Commission v Germany*).

The German authorities are invited to take these comments into account.

The Commission furthermore invites the German authorities to communicate the definitive text to the Commission once it has been adopted, in accordance with Article 5(3) of Directive (EU) 2015/1535.

Yours faithfully,

For the Commission,

Thierry Breton
Member of the Commission