opinion

on the public consultation on the implementation of the EU Directives on copyright (DSM Directive (EU) 2019/790 and Online SatCab Directive (EU) 2019/789)

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Opinion on the implementation of the EU Directives on copyright (DSM Directive and Online SatCab Directive)

The Federal Ministry of Justice and Consumer Protection (BMJV) gave the opportunity to comment on the implementation of the following measures within the scope of a public consultation of the EU Directives on Copyright (DSM Directive and Online SatCab Directive). The game - Verband der deutschen Games-Branche advocates a quick implementation of the Directive into German law and wishes for a harmonization as far as possible and accordingly a one-to-one implementation of the European requirements without national solo attempts and in particular without further burdens in copyright contract law.

We are the association of the German games industry. Our members are developers, publishers and many other players in the games industry such as eSports organizers, educational institutions and service providers. As co-organizer of gamescom, we are responsible for the world's largest event for computer and video games. We are the central contact for media, politics and society and answer questions about market development, game culture and media competence. Our mission is to make Germany the best games location.

In the last budget act, the Bundestag provided 50 million euros for the nationwide games funding agreed in the coalition agreement. The Federal Government has already received more than 200 expressions of interest for federal funding and submitted the funding guidelines for notification in Brussels. Many games publishers are considering investing in Germany, opening new studios and hiring employees because of this support. In addition to funding and skilled personnel, the legal framework and protection of creative works is a decisive investment criterion. A weakening of the exclusive rights of publishers and developers can therefore destroy the efforts of the Federal Government to strengthen Germany as a games location.

Our position on the new provisions of the DSM Directive is as follows:

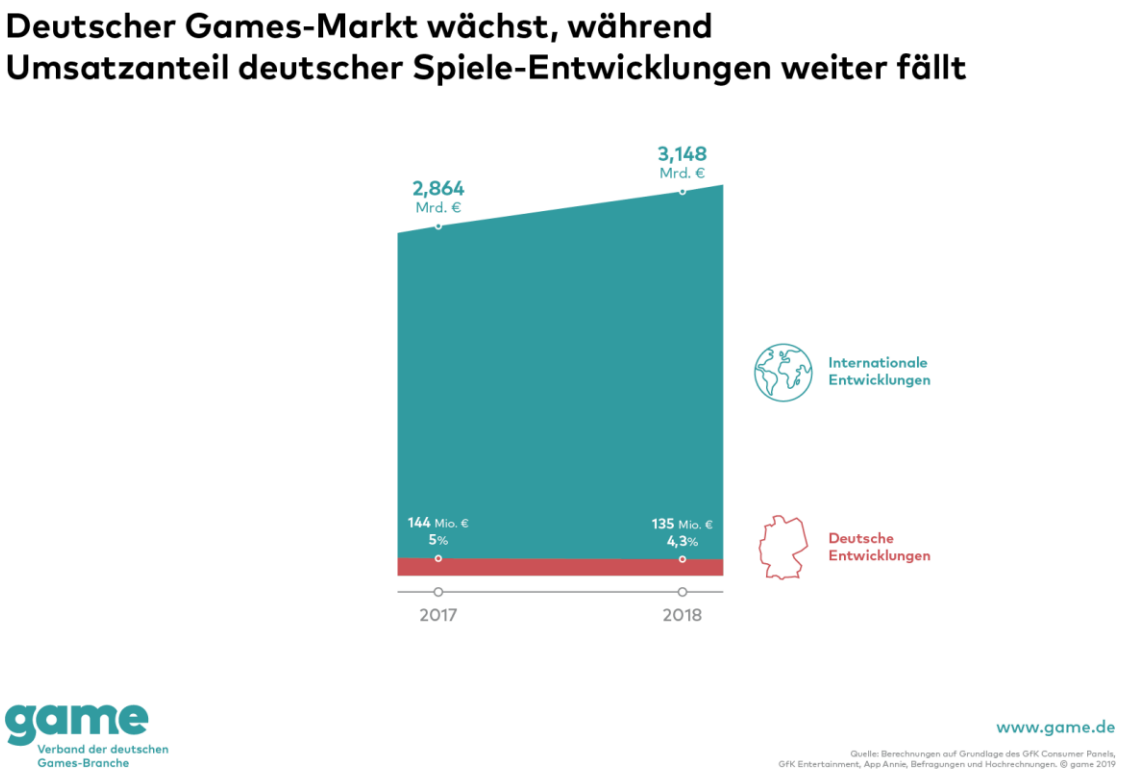
I. General Preliminary Comments on the Directive

The computer games industry is a rapidly growing media industry with highly innovative business models. In 2018, sales of games and gaming hardware in Germany rose by 9 percent to more than 4.4 billion euros. [1] Less than a quarter of the turnover is still generated from the sale of games. Many games are now offered as free-to-play downloads and refinanced through additional services in the game (in-game purchases). The further development of a once purchased game through add-ons and expansion sets also makes the growing importance of "Games as a Service" clear. Flat rate offers with monthly fees are a particularly strongly growing area. Such business models can only be found to a limited extent in other media industries and definitely not to this extent.[2] The games industry is often pioneering here and Freemium models, add-ons and gamification approaches are successfully transferred to other media offerings. In this respect, there are considerable differences in the evaluation of games compared to other creative industries.

For the business models of the games industry, copyright law is the decisive basis on which a complex work is created with in part several thousand creatives from almost all discilplines of copyright law and then exploited on different platforms and differentiated monetization models. Marketing is often supported by Let's Plays, live streaming and communities as well as eSports tournaments. The collective management of rights does not play a role and has so far been avoided by the international games publishers. For many new regulatory aspects of the DSM Directive, the industry has often already found practicable and globally functioning solutions. In this respect, any change in copyright law can have a considerable impact on business models and also on Germany and Europe as a location for investment.
Germany is of great importance as a sales market worldwide. However, the production of computer games largely takes place abroad. In 2018, the share of German game developments in the total local market fell to only 4.3 percent. In 2017 this share was still 5 percent. Accordingly, games developments from Germany were only able to achieve a turnover of 135 million euros on the domestic market, which is about 6 percent less than last

[1] Cf. turnover figures of the industry association game at https://www.game.de/marktdaten/.
[2] In contrast to the flat rates in the film and music sector, other services such as multiplayer modes, add-ons and further developments are recorded here in addition to the use of a specific catalogue.

year. For PC and console games, the share of productions from Germany was only 1.1 percent. There is currently not a single AAA title produced in Germany.



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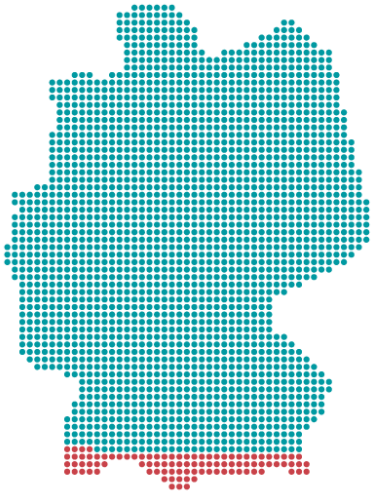
Verband der deutschen Games-Branche

Umsatzanteil deutscher Spieleentwicklungen fällt auf 4,3 Prozent im heimischen Markt



Gesamtmarkt

Deutsche Entwicklungen 2018

4,3%

= **135** Mio. €

von **3.148** Mio. € insgesamt

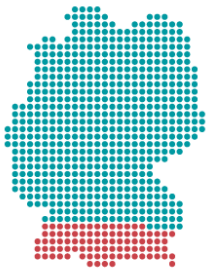
2017*
5% = 144 Mio. €
von 2.864 Mio. € insgesamt

PC- & Konsolenspiele (Datenträger & Download)

2018
1,1% = **11,6** Mio. €
von **1.066** Mio. € insgesamt

2017
0,97% = 11,5 Mio. €
von 1,183 Mrd. € insgesamt

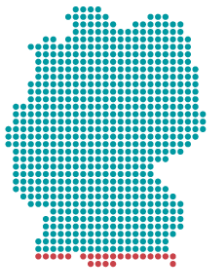
Online-/Browser-Games



2018
13% = **74,4** Mio. €
von **575** Mio. € insgesamt

2017
17% = 90 Mio. €
von 529 Mio. € insgesamt

Mobile Games



2018
3,2% = **48,6** Mio. €
von **1.507** Mio. € insgesamt

2017*
3,7% = 42,6 Mio. €
von 1.152 Mio. € insgesamt

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*Methodikwechsel zu 2018 bei der Datenerhebung von Mobile Games
Quelle: Berechnungen auf Grundlage des GfK Consumer Panels, GfK Entertainment, App Annie, Befragungen und Hochrechnungen. © game 2019

These developments make it clear how urgently the framework conditions for the games industry in Germany must be improved so that it can finally compete internationally. The introduction of nationwide games funding is the central step with which the Federal Government wants to ensure financial planning security. But at least as important are not only the skilled workers but also the legal framework and in particular copyright law.

From a German perspective, the implementation of the copyright directives is therefore a great opportunity to create a level playing field, at least at the European level. Until now, German copyright law with its many legal exceptions - in European comparison - and the mandatory provisions of copyright contract law has been a special case. In this respect, we welcome any harmonisation, including the transfer of proven German regulations to the European level. This can at least reduce the disadvantage of the German production location in international competition, so that other location conditions can reappear and the funding can take effect.

However, the implementation must ensure that the German legislator does not go beyond the requirements of the Directives to the detriment of the German video games industry. Especially for copyright contract law, the games industry is clearly in favour of leaving the existing German regulations as they are currently in force. In particular, the provisions in the DSM Directive on the transparency obligation and the appropriate and proportionate remuneration are already reflected in German law. There is no need for further implementation, since the interests of authors and contributors are already protected by the rules of German copyright law. This applies in particular to Art. 18 and 19 of the DSM Directive, which are already sufficiently taken into account in national law by Sections 32 (1) and (2) and 32 of the German Copyright Act (UrhG). Any change in the balance is now being closely monitored at the international level and can ultimately be the deciding factor against an investment decision in Germany.

II. Legally permitted uses (Articles 3 to 7)

1. Text and data mining for the purpose of scientific research (Art. 2 Nos. 1 and 2, Art. 3, 7)

German law already provides legal exemptions (limitations) for text and data mining for the purpose of - non-commercial - scientific research on the basis of the Copyright Knowledge Society Act (Urheberrechts-Wissensgesellschafts-Gesetz - UrhWissG) (§ 60 a UrhG). Against this background, there is no need for implementation according to the assessment made here. The mandatory remuneration claim for text and data mining (§§ 60d, 60g UrhG) should also be maintained.

3. Cross-border teaching and learning (Articles 5, 7)

The new regulations on limitations in German law for instruction and teaching (§ 60a UrhG) under the UrhWissG can be retained unchanged, there is no need for further changes in our view.

4. Conservation of cultural heritage (Art. 2 No. 3, Art. 6, 7)

Against the background of the existing provision in Section 60e (1) UrhG, there is no need for implementation from the game's point of view. The games industry - supported by the Federal Government - is currently working with the Stiftung Digitale Spielekultur on the establishment of the International Games Collection with the aim of documenting and archiving cultural development in the field of computer games. The project is part of the merger of the collections of the German Age Rating body USK, the games collections of the Zentrum für Computerspielforschung der Universität Potsdam (DIGAREC) and the Zentral- und Landesbibliothek Berlin. For this purpose, the content of the physical collection is recorded and archived in the form of a digital catalogue. In addition to the general catalogue information such as title, year of publication, developer, platform etc., so-called pack shots, photos of the packaging of the respective games, possibly together with one or more screen shots of the game, will also be part of this catalogue. The catalogue is made available to the public on the Internet via the website of the International Games Collection and the portals of the German Digital Library and the Europeana for non-commercial purposes, in particular for scientific, cultural, educational or further training purposes. As an association of the

German games industry, we expressly support this project as an important step in the preservation of this cultural heritage and have issued a declaration to this effect. In addition, we have provided our members with templates for the corresponding grants of rights and have promoted the grants of rights and tolerations. This underlines the fact that there is no need for legal regulation and that the industry can find fast, tailor-made and sustainable solutions here.

III. Out of commerce (Articles 8 to 11)

There is currently no collecting society for rights holders in the games industry and the industry is not aiming for this for the time being. In this respect, the provisions on out-of-commerce works for computer and video games do not apply. It should also be noted that games are so-called "complex works" which, according to the case law of the European Court of Justice (ECJ),[3] include not only computer programs but also graphic and sound components. They therefore fall under both the provisions of the Software Directive 2009/24 and those of the InfoSoc Directive 2001/29. For this reason, the provisions of the DSM Directive are only partially applicable to games in accordance with Art. 23 Para. 2.

IV. Extended Collective Licensing (Article 12)

Extended Collective Licensing (ECL) may be appropriate for certain industries and may be an effective tool, particularly with regard to the implementation of Art. 17 of the DSM Directive. For the games industry, an ECL is neither necessary nor useful. For the exploitation of computer and video games, the comprehensive granting of rights to a publisher and the exclusive use of the rights are essential and this forms the basis for effective and efficient evaluations and new business models. The permitted use of game content in the context of Let's Plays and Walkthroughs on the Internet is made through numerous permissions and tolerations by publishers. Also because these uses are seen as an important communication and marketing channel as an integral part of the games industry, collective licensing of games is not necessary. The possible introduction of this mechanism must therefore urgently take account of the specific characteristics of each repertoire (categories of works). As long as rightholders in the games industry have not granted their rights to a collecting society,

[3] ECJ GRUR 2014, 255.

there can be no collecting society considered representative. In this respect, it must be clear that it will not be possible for the games industry to exercise rights for outsiders on the basis of extended collective licences.

VIII. Publisher participation (Article 16)

game welcomes the long overdue regulation on publisher participation. Games publishers are also publishers in this meaning and can therefore in principle be addressees of this regulation. Recital 60 refers to all publishers who publish, inter alia, press releases, books, scientific publications or music. However, the list of sectors mentioned is only an exemplary one and is not exhaustive. The European term "publisher" is thus broader than the term "publisher" in § 1 of the Verlagsgesetz (VerlG), which only covers literary or musical works. Moreover, recital 60 justifies the scheme on the basis of the publishers' investments in the exploitation of the works contained in their publications. Games publishers in particular invest heavily in the exploitation of the works created by their creative staff, most of whom are salaried employees, and should therefore clearly fall within the scope of application. Both grammatically and teleologically, Art. 16 of the Directive would also be applicable to the collective management of games rights. Only because an industry is currently not exercising its statutory rights must it not suffer any disadvantages as a result. This must also be taken into account during implementation. It must therefore be ensured that the national regulation does not fall short of the European, non-exhaustive concept of publisher.

IX. Responsibility of Upload Platforms (Article 2(6), Article 17 and Declaration by Germany of 15 April 2019)

1. Covered platforms, act of communication to the public (Art. 2 para. 6, Art. 17 para. 1 UA 1, para. 3)

Games industry platforms do not fall under the definition of online content-sharing service providers. Consoles and distribution platforms such as Steam, the Google Play Store or the App Store make games from games companies available to the public, organise the content and advertise it. However, it is questionable whether these are users within the meaning of the Directive or whether users should mean consumers. In addition, in all these cases without exception, a license agreement will exist, so that even in a wide area of application there is at least no liability risk. Also chats in-game or online forums for the communities, partly on the same platforms, partly elsewhere, do not fall within the scope, as the main purpose is not to store and share large amounts of copyrighted content uploaded by users. In addition, there is a regular lack of operation or advertising for the purpose of making a profit. With regard to recital 62, the Directive targets platforms such as YouTube, Twitch, Facebook or Instagram. Of course, the "copyrighted works" referred to in Article 2(6) of the DSM Directive can only refer to the infringing works of third parties and not to the authorised and therefore non-infringing works of the uploaders themselves. This applies regardless of whether it is a gaming company or an individual user.

In addition, the concept of 'online content-sharing service provider' should also include 'sharehosters'. Precisely because such services are used to store and organise large quantities of copyrighted works in order to make them illegally accessible to third parties, it should be ensured that such piracy tools cannot invoke the liability privileges of § 10 TMG. It should therefore be ensured when defining the scope that it is not covered by the negative definition. Accordingly, we propose the following wording for service providers for sharing online services:

> "Online content-sharing service provider are service providers whose principal purpose or one of their principal purposes is to store and make available to the public a large quantity of works uploaded by their users, which that service provider organises and advertises for the purpose of making a profit. Such service providers are also cloud

services which favour the illegal distribution of works or other objects of protection in large numbers. Non-profit online encyclopaedias, non-profit educational and scientific repositories, development and distribution platforms for open source computer programs, telecommunications services, online marketplaces, cloud services provided between enterprises and cloud services enabling users to upload content for their own use shall not be deemed to be service providers for sharing online content within the meaning of this Act".

2. Licensing (Art. 17 para. 1 UA 2, para. 2)

Online content-sharing service provider should be defined in Section 19a (2) sentence 1 as public accessibility within the meaning of Section 19a (1). This would not create a new exploitation right but would extend the existing right of making available to online content-sharing service providers. This would mean that existing contracts on the granting of rights of usage would not have to be adapted at great expense. By extending § 19a UrhG, all newly protected usages would continue to be granted, which should also correspond to the will of the previous contracting parties.

Suggestion:

We advocate that § 19a UrhG be amended to include the following paragraph 2:

> "(2) Making available is also the provision of access by online content-sharing service providers. "

3. Elimination of responsibility (Art. 17 paras. 4 and 5)

The previous case law of the Federal Court of Justice (BGH) on stay-down obligations has proved its worth and should in principle be retained. An implementation in the Telemedia Act (TMG) would therefore make systematic sense, also to clarify that these are not traffic obligations, but rather a further development of provider liability.

5. Permitted uses (Art. 17 para. 7)

From our point of view, Art. 17 (7) of the DSM Directive contains the regulatory mandate to create a new limitation for uploaders on services for sharing online content for quotations, criticism, reviews, caricatures, parodies or pastiche. Accordingly, the legislator should introduce a specific limitation for user-generated content (UGC)that allows not only the creation and upload of own UGC, but also its sharing and redistribution. In the games sector, UGC, unlike in other sectors such as music or film, is already generally permitted by the rights holders. Almost all games publishers have published guidelines on game content on Internet portals for the publication of images and videos and grant "licenses", the above-mentioned permissions or tolerations.[4] The idea behind this, of course, is that such images and videos increase the popularity of their games and thus represent free and wide-ranging advertising. In order to achieve this advertising character, these usages are usually subject to reservations. Sometimes the commercial use or a use in the environment of pornography, hate crime, discrimination or glorification of violence is prohibited. Advertising revenues from YouTube or Twitch videos are partially explicitly approved. Brands, logos and music may not be used in most cases. In addition, the permission can be revoked or updated at any time without giving reasons. With these regulations, the underlying problem of the directive's underlying problem of the often illegal use of films and music for the games industry has been solved sustainably and to the satisfaction of all parties involved for many years. In this respect, it is essential that a new limitation should allow right holders to continue to defend themselves against a violation of their legitimate interests. It must continue to be possible to prohibit the use of works which are likely to damage the reputation of the author or to permanently impair his exploitation interests. Also § 14 UrhG should remain unaffected by the regulation.

8. Other Questions of Responsibility of Upload Platforms

Precisely because the permitted use of game content in the context of Let's Plays and Walkthroughs on the Internet is an important communication and marketing channel and thus an integral part of the games industry, it should be ensured that no overblocking takes place. In this respect, in addition to the information duties and the complaints mechanism, a

[4] Toleration by EA: https://www.ea.com/de-de/service/youtube-duldungserklaerung; "License" from Microsoft: https://www.xbox.com/de-de/developers/rules.

proportionality check must also be anchored in the text of the law. With regard to the possible filters and the different approaches for the different categories of works, attention should be paid to a technology-neutral regulation, which may have to be sector-specific. Moreover, the German Government should also consult the games industry in the dialogue referred to in recital 71.

X. Copyright contract law (Articles 18 to 23)

1. Appropriate remuneration (Article 18)

Paragraph 2 leaves Member States free to establish different mechanisms and to take into account the principle of contractual freedom and the fair balance of rights and interests. For the games industry, we would like to urge that the German provisions of Section 32 UrhG be retained in this form. This regulation is already seen as a major disadvantage in the investment decision of a foreign developer or publisher. Because § 32 UrhG cannot be waived, investors decide according to our experiences in particular therefore not to conclude at all still contracts with German authors. This is one of the reasons for Germany's poor position in the production of computer and video games in a global and European comparison, as mentioned above.

On the other hand, with regard to Germany's competitiveness, it is advantageous that regulations such as the right to appropriate remuneration are understood at the European level and thus exported, in particular, to the Anglo-Saxon countries which do not follow the continental copyright approach (Urheberrecht/droit d'auteur). As a result, German authors are no longer better (or worse) in a European comparison. From a German perspective, this may be seen as helpful harmonisation and the creation of a level playing field. But from an international perspective it is more likely to be seen as a weakening of the European location in global competition. Particularly in the development of video games, it is crucial for the publisher as the central rights user that he holds as many rights - the IP - as possible for exploitation. Here, the work-made-for-hire doctrine in Anglo-Saxon jurisdictions is a clear advantage over continental European copyright systems. Copyright contract law is a product of the author's personal right and, for predominantly socio-political reasons, in some cases considerably restricts the freedom of contract of exploiters. For this reason, the new regulations on copyright contract law, which did not yet exist in this form in many other

European member states, were most clearly criticized by the games industry and its European federations ISFE and EGDF in the consultations on the new directive. It would therefore be important not to go beyond the existing rules on appropriate remuneration, also with a view to creating a digital single market in copyright.

2. Right to information (Art. 19, 23 para. 1)

German regulations were also the model for the transparency obligation of Art. 19 of the DSM Directive. However, § 32d and § 32e UrhG only provide for a right to information and no obligation to provide information. In our view, however, the German legislator has a duty to take account of the principle of proportionality in its implementation. Article 3 allows Member States to limit the transparency obligation to certain types and scope of use in duly justified cases where the administrative burden would be disproportionate in relation to the revenue generated by the exploitation of the work. Moreover, the obligation may be waived if the contribution of an author is not significant for the body of work. In particular, the second opening clause can already be found in Section 32d (2) No. 1 UrhG. In view of the complex works in the games sector, it would be desirable for national implementation to make use of this also in view of the administrative burden and the resulting costs. In particular, it should be noted that video games are "complex works". Therefore under German the right to information is excluded for software, and even under European law Art. 23 Para. 2 DSM Directive excludes the right to information due to the software directive as lex specialis. Furthermore it should also be taken into account that thousands of employees are often involved in the development of computer games, providing contributions of very different levels of creation and quality. Often the development is extremely based on the division of labour, so that the exploitation chains are often designed in several stages. A transparency obligation for games companies vis-à-vis all creatives involved could therefore be disproportionate in relation to the exploitation of the work. A right to information, as provided for by German law, would in any case be just as suitable to protect the information interest of the authors - and therefore probably also more appropriate. In the forthcoming adaptation of § 32d UrhG, the legislator should definitely observe the requirement of recital 77, according to which the particularities of the contents of different sectors, such as audiovisual media, must be taken into account. The definition of sector-specific information obligations should even explicitly involve all interested parties.

3. Further participation (Art. 20, 23 para. 1)

The fairness clause for bestsellers in § 32a UrhG is also exported to Europe and can be found in Art. 20 of the Directive. Here, too, the Directive does not go beyond German law, so that no amendment of Section 32a UrhG is required for the implementation of the Directive. This would also be desirable, because at least in Germany a jurisdiction has developed in recent years which makes the existing regulation increasingly predictable. Any change would lead to new legal uncertainty, as the new standard would then have to be interpreted again by the courts. However, German case law must also be interpreted by the ECJ in future.

4. Alternative dispute resolution (Art. 21, 23 para. 1)

From the point of view of the games industry, there is no need for implementation here either, because the conciliation procedure under § 36a UrhG already provides a voluntary, alternative dispute resolution procedure for disputes in connection with the establishment of common remuneration rules.

5. Right of revocation (Art. 22)

The right of revocation under Article 22 of the Directive is found in German copyright law in § 41 UrhG. In principle, the German regulations with their differentiations such as the weighing of interests, a grace period has proved their worth. The EU regulations on the right of revocation provide for the grace period and the extension period in para. 3 and refer in para. 2 to further optional national exceptions, which (a) take into account the particularities of the different sectors and different types of works and (b) in the case of co-authors take into account the significance of the individual contributions and the legitimate interests. Some of these possible exceptions to the right of revocation even go considerably further than § 41 UrhG. Here, the German legislator should also compare and coordinate the same competitive conditions in terms of a functioning digital single market as the other Member States have for the right of revocation. If necessary, the possible exceptions of Art. 22 should then also be introduced into German law. Otherwise, the targeted level playing field in Europe would not be achieved.