

## 8/2020 supplement

### HERAUSGEBER

RAin **Dr. Astrid Auer-Reinsdorff**, FA IT-Recht, Berlin/Lissabon/Vorstand Deutscher Anwaltverein – RA **Prof. Dr. Oliver Castendyk**, MSc. (LSE), Direktor Allianz Deutscher Produzenten – Film & Fernsehen e.V., Berlin – **Prof. Dr. Nikolaus Forgó**, Professor für Technologie- und Immaterialgüterrecht und Vorstand des Instituts für Innovation und Digitalisierung im Recht, Universität Wien – RAin **Prof. Dr. Sibylle Gierschmann**, LL.M. (Duke University), FA Urheber- und Medienrecht, Hamburg – RA **Prof. Dr. Christian-Henner Hentsch**, M.A., LL.M., Leiter Recht und Regulierung beim game – Verband der deutschen Games-Branche e.V. in Berlin/Professor für Urheber- und Medienrecht an der Kölner Forschungsstelle für Medienrecht der TH Köln – **Prof. Dr. Reto M. Hilty**, Direktor am Max-Planck-Institut für Innovation und Wettbewerb, München/Ordinarius an der Universität Zürich – **Prof. Dr. Thomas Hoeren**, Direktor der Zivilrechtlichen Abteilung des Instituts für Informations-, Telekommunikations- und Medienrecht, Universität Münster – **Prof. Dr. Bernd Holznapel**, Direktor der Öffentlich-rechtlichen Abteilung des Instituts für Informations-, Telekommunikations- und Medienrecht, Universität Münster – **Wolfgang Kopf**, LL.M., Leiter Zentralbereich Politik und Regulierung, Deutsche Telekom AG, Bonn – **Prof. Dr. Marc Liesching**, Professor für Medienrecht und Medientheorie, HTWK Leipzig/München – RA **Prof. Dr. Peter Raue**, Raue LLP, Berlin – **Prof. Dr. Alexander Roßnagel**, Universität Kassel/Leiter der Projektgruppe verfassungsverträgliche Technikgestaltung (provet) – RA **Prof. Dr. Joachim Scherer**, LL.M., Baker & McKenzie, Frankfurt a.M. – RA **Dr. Raimund Schütz**, Loschelder Rechtsanwälte, Köln – **Prof. Dr. Ulrich Sieber**, Direktor und Leiter der strafrechtlichen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht, Freiburg/Honoraryprofessor und Leiter des Rechtsinformatikzentrums an der Ludwig-Maximilians-Universität, München – **Prof. Dr. Louisa Specht-Riemenschneider**, Inhaberin des Lehrstuhls für Bürgerliches Recht, Informations- und Datenrecht, Rheinische Friedrich-Wilhelms-Universität Bonn – RA **Dr. Axel Spies**, Morgan, Lewis & Bockius LLP, Washington DC – **Prof. Dr. Gerald Spindler**, Universität Göttingen

### WISSENSCHAFTLICHER BEIRAT

**Daniela Beaujean**, Mitglied der Geschäftsleitung Recht und Regulierung/Justiziarin, Verband Privater Medien (VAUNET), Berlin – **Dietrich Beese**, Hamburg – **Prof. Dr. Herbert Burkert**, Forschungsstelle für Informationsrecht, Universität St. Gallen – RAin **Susanne Dehmel**, Mitglied der Geschäftsleitung BITKOM e.V., Berlin – **Jürgen Doetz**, Koordinator der Deutschen Content Allianz, Berlin – **Dr. Andrea Huber**, LL.M. (USA), Geschäftsführerin, ANGA Verband Deutscher Kabelnetzbetreiber e.V., Berlin – **Dr. Christine Kahlen**, Leiterin Öffentlichkeitsarbeit, Bundesministerium für Wirtschaft und Technologie, Berlin – **Dr. Christopher Kuner**, J.D., LL.M., Senior of Counsel, Wilson Sonsini Goodrich & Rosati, LLP, Brüssel – **Prof. Dr. Wernhard Möschel**, Vorsitzender des Wissenschaftlichen Beirats beim BMWi/Lehrstuhl für Bürgerliches Recht, Handels- und Wirtschaftsrecht, Universität Tübingen – **Robert Queck**, Maître de Conférences, Centre de Recherches Informatique et Droit (CRID), Université Namur, Belgien – **Prof. Dr. Eike Ullmann**, Vors. Richter des I. Zivilsenats am BGH a.D., Karlsruhe

### REDAKTION

**Anke Zimmer-Helfrich**, Chefredakteurin – **Jan Niklas Buri**, Redakteur – **Ruth Schrödl**, Redakteurin – **Eva Wanderer**, Redaktionsassistentin – Wilhelmstr. 9, 80801 München

## EDITORIAL Protection of Minors in the Games Industry

reading time: 11 minutes

For a long time now, digital games have been a big part of the play and leisure pursuits of children and minors and have obviously also become a part of their daily routine. According to the 2019 JIM-Study, 87 percent of all 12- to 19-year-olds at least sometimes play games via digital platforms. In the 6- to 13-year-old age group, two-thirds regularly play digital games. The great excitement for the media games among children and young people is also to some extent evidenced by the annual trade fair for digital games known as „gamescom“ held in Cologne each year. In past years, hundreds of thousands of guests, including many minors, have convened at the trade fair to learn about the newest fads and gaming trends, even before such products even hit the market. To allow children and adolescents to happily participate in games, it is essential that there is a good policy in place for the protection of minors. As the youth protection official (*Jugendschutzbeauftragter*) at gamescom, the self-regulating organisation known as the *USK (Unterhaltungssoftware Selbstkontrolle)* each year reviews a significant volume of content, issues age ratings and ensures that access to content is granted via the use of age wristbands only to those trade fair visitors for whom the content is suitable. Due to the Corona Virus crisis, the gamescom will take place this year on digital basis only, which means that in 2020, compliance with the rules for protecting minors will merit increasing attention for all online publications, streaming content, trailers and Let's-Plays. In this area as well, the *USK* will review content, issue age ratings and provide support to ensure that offerings conform to the rules on protecting minors.



Elisabeth Secker

These examples should make it clear that computer games are obviously converging in their use and that the distribution method through which content is seen and heard makes no difference to children. Games can now be played either at stationary location on a PC or console or on-the-go via smartphones or tablets. In addition, new trends such as cloud gaming have emerged. Even if games can be played on different devices, the content shown on all of these devices is ultimately the same. Accordingly, any contemporary system for protecting minors must be constructed on a convergent basis in order to confront these realities. The fact that online content exhibits a completely different dynamic than analogue content underscores the notion that the same tools and instruments that are used in the analogue world will not necessarily succeed in the digital world. For this reason, innovative solutions and new tools are required for use to protect minors in media.

For over 25 years, the *USK* has served as a so-called „voluntary self-regulating body“ (self-regulation) not only for purposes of complying with the statutory rules on the protection of minors, but also for developing industry-wide standards that go beyond the statutory requirements. Although the statutory requirements have not yet been combined and united, the *USK* has created under one roof a system offering comprehensive protection of minors.

Since its formation in 1994, the *USK* has still had to face industry transformation. Whereas at the beginning it examined only physical data carriers, the organisation has been active since 2011 as a certified self-regulating body under the Interstate Treaty on the Protection of Minors in the Media (the „JMStV“) for the online sector as well. Since 2015, the *USK*, as a co-founder of the *International Age Rating Coalition (IARC)*, together with its global partners issues age-rating labels for online games and apps. In 2016, the statutory certification process was expanded to include broadcasting in an effort to ensure that „Lets-Plays“ are also covered by its conformity reviews with respect to the protection of minors. In its over 25-year history, more than 47,000 reviews have been performed thereby establishing a comprehensive and reliable decision-making practice for the games industry which – just as the association itself – continues to improve and develop with time.

The age ratings have always stood for reliability in assessing potential harmful content and have therefore given parents some orientation when selecting media content. The purpose behind this system is to protect children and adolescents from having their development impaired by unsuitable media content. Nevertheless, a corresponding age rating does not necessarily mean that the content is also pedagogically suitable for any specific age group. Almost all parents have understood this message, which has emerged as one of the most important mechanisms for protecting minors in the general population. According to a parent questionnaire conducted by the *USK*, 8 out of 10 parents rely on the age-rating system. Specifically because the ratings have earned such a high degree of recognition, often a fallacy prevails which suggests that current challenges and risks, which arise for children and adolescents in the context of a dynamic online world, can be met and resolved only under the system of age ratings. For example, there are now legislative bills pending both at the federal and federal state level that seek to aggregate and incorporate into the youth protection assessment and therefore the age rating labels such factors as interaction and usage risks (such as chats), new purchasing opportunities (ads) and aspects of data protection. Such an approach not only dilutes the probative strength of age-rating, but also poses significant challenges for examining institutions such as the *USK*. A prerequisite for a valid youth protection assessment and therefore a risk assessment is a review of content that is static or at least relatively constant. As soon as such dynamic content becomes continuously subject to change and is therefore no longer controllable, a valid risk assessment can no longer be made at a given point in time. A continuous monitoring of dynamic risks such as those arising in chatrooms and those that in many cases are created by third parties (and not by the content providers) would create for the *USK* a Sisyphean task that destined for failure. This does not mean, in other words, that the task of minimising risk for children and adolescents in this field should be abandoned – on the contrary. Nevertheless, the unsophisticated solution of using an age rating is an overly simplified approach that would give parents a false sense of security and offer less transparency. More goal-oriented approaches are those that transparently reveal what dynamic risks for a given field of content should be monitored. In connection with the international *IARC*-system, the *USK* has been successful in providing additional information as to how this could work.

Dovetailing age ratings with the legal requirements under data protection, which in most cases makes parental consent for children under 16 years of age per se necessary anyway, renders the orientation function in the protection of minors rather absurd. This approach leads to different labels on different platforms. It causes confusion and reduces the significance of the age ratings. The long-awaited Corona virus warning app provides a particularly vivid example here of how unhelpful it is to link compliance requirements under data protection with an assessment about the protection of minors. Although the App in the Google-Play-Store received a low rating because there was little or no impairment for children and adolescents, the Apple-Store still issued the highest possible rating (17+) due to the data protection requirements. Since 2015 and within the framework of the *IARC*-system, the *USK* has been endeavouring with other rating institutions to simplify and converge the systems. This effort makes German standards internationally compatible, which has great significance in a media world that includes global players. A special challenge posed here is the country

of origin principle under European law, according to which an offer made in Germany from another EU state no longer needs a review. The German federal and state governments are seeking by way of legislation – such as the German Network Enforcement Act (NetzDG) and treaties such as the Interstate Media Treaty (MStV) and the JMStV – to deliberately break through this principle. The most recent draft for a new German Protection of Minors Act (JuSchG) has explicitly enshrined the country of origin principle yet also raises the issue of whether these rules should apply to suppliers having their registered place of business in Ireland. As a voluntary self-regulating body, the *USK* is also always touting and promoting the compliance with the German standard for youth protection among international vendors and suppliers and has learned from experience that these endeavours often work better when using incentives for an early integration of youth protection in the development process.

A key role in overcoming in practical terms the new challenges in the online sector will certainly be the technical mechanisms for protecting minors through the use of filters and closed systems. A variety of platforms and operating systems already have individual technical configuration options for protecting minors. A good example here is the Nintendo Switch system that is certified by the *USK* and offers the parents and guardians the opportunity to activate content for each age group. Overall, technical systems for protecting minors also offer considerable potential in handling interaction and usage risks. Thus, for example, technical systems could, among other things, provide configuration options for parents to prevent any unauthorised or undesired purchases, set cost limits or allow chats only if they are okay with such communication. These tools could avoid having to renounce per se certain elements of content that are otherwise unobjectionable. The option of reading available age classification codes in combination with the opportunity of limiting or restricting online functions could become a future model for both optimizing protection functionality online and managing interaction and usage risks. Certified age verifications for operating systems, like those considered in the draft for a new JMStV, will ultimately come up short and already subvert existing recognized models.

The objective must continue to be the creation of a statutory framework that is coherently and transparently designed to tackle current challenges, specifically with respect to online offerings, without thereby taking over, one-to-one, obsolete structures from the analogue world. In light of the rapidly evolving technical improvements, adopting detailed regulations or strict requirements runs the risk that such rules will be antiquated in only a few short years. Above all in the context of international companies, solutions must be designed flexibly and applied globally to maximise the effect. Practice has shown that it is considerably more productive to create incentives for companies to implement standards in protecting minors than to enact a fragmented and overly detailed system of rules that engender implementation difficulties and legal uncertainty.

The regulated self-regulation approach is a tried-and-tested strategy, and the certified institutions for voluntary self-regulation have shown that they are positioned to work with companies to find solutions to the modern challenges of protecting minors. To meet such challenges, these institutions also continue to need tailwind from lawmakers to provide the requisite leeway. In order to protect minors effectively, it is essential that the responsibilities and counterparts on the regulatory side do not become overly complicated.

All parties share the goal of advancing the protection of minors in the media so that this protection can actually impact children and adolescents. It would be desirable here if federal and state governments could get together and blend or combine their respective – at times contradictory – legislative proposals (for a JuSchG and a new JMStV) to finally create the necessary preconditions for a modern, convergent and internationally applicable system for protecting minors.

Berlin, August 2020

**Elisabeth Secker**

is the Managing Director of the Unterhaltungssoftware Selbstkontrolle (*USK*) in Berlin.

CHRISTIAN-HENNER HENTSCH / LORENZO VON PETERSDORFF

# Statutory Protection of Minors in the Games Industry

## The USK as a One-Stop-Shop for all Video Games Providers

### Self-regulatory body for the protection of minors

The statutory rules on protecting minors in media as they relate to video games in Germany reveal an area of tension between federal and state laws as well as international age-rating systems. The article provides an overview of the statutory and regulatory foundations of self-regulation institutions (Selbstkontrollinrichtungen), the procedures for age rating and selected legal issues in the age-rating precedents (Spruchpraxis). At the

same time, this article will serve as a guide for exploring the more in-depth articles found in this supplement. The article will also provide some clarity about the central role that the industry organization, the USK, plays as a voluntary self-regulatory body for the protection of minors in connection with games.

reading time: 21 minutes

## I. Introduction: the USK as one-stop-shop for the games industry

The statutory rules on protecting minors in the media in Germany constitute not only one of the strictest, but also one of the most complicated systems of law for protecting children and minors from media offers that could harm or impair their safety and development. In recent years, games have seen significant technical innovations and are therefore a driver and pioneer in the continued development of systems for protecting minors from harmful media. Tools such as entry controls and airtime (broadcasting time) restrictions do not work here. Instead, many new options have emerged involving a „technical system of protecting minors in the media“, above all in closed systems. A good example here is the certified youth protection program for Nintendo Switch. Using these consoles, parents can control access to the Internet, the games being downloaded and the actual usage time and can verify what their children are actually playing. New standards are being created here that the relevant German federal and state laws and regulations – such as the German Youth Protection Act (Jugendschutzgesetz – JuSchG) and the Interstate Treaty on Youth Protection in the Media (Jugendmedienschutzstaatsvertrag der Länder – JMStV) – have not yet taken into account.

At the same time, discussions are currently underway to reform the JuSchG<sup>1</sup> and the JMStV<sup>2</sup> in an effort to update the law on child and youth protection for the new digital age.<sup>3</sup> It is true that statutory provisions should be adjusted to meet the new challenges. The key here will be to create convergent rules and regulations for increasingly convergent media. The norms and standards under the JuSchG and the JMStV should be interwoven and cross-reference each other to assure a common legal framework without overlapping scopes of administrative and regulatory jurisdiction. In light of the global sale and distribution of games and other media, the federal and state governments must also face the challenge of crafting internationally compatible rules while complying with the country of origin principle.

Otherwise, there will be a risk that Germany could create its own German „island solution“, the implementation and enforcement of which will be difficult and consequently lead to less actual protection of children and minors. Technical tools for protecting minors should be up-to-date, but also technologically neutral and resilient to future developments (future-proof).

In the efforts to implement the myriad of regulations promulgated by the German federal and state governments, to seize upon new developments and to create innovative solutions for technical systems to protect minors in media, to face down the imminent challenges and to track the regulatory work, the providers of games have at their disposal a kind-of „one-stop-shop“ in the form of the *Selbstkontrolle Unterhaltungssoftware GmbH (USK)*. This organization of voluntary self-regulation will be introduced in this article, not only to share some legal and practical insight into its inner workings and the age-rating procedure, but also to establish the importance of the system known as „regulated self-regulation“ for the protection of minors in the games industry. The additional articles in this supplement will delve more deeply into and further explain the various individual aspects, so that collectively all articles in this supplement will comprehensively and definitively review and evaluate the system for protecting minors with respect to games.

## II. Introduction of the USK and its statutory foundation

For over 25 years, the *USK* (which stands for *Unterhaltungssoftware Selbstkontrolle*, a name that has been translated as the „Entertainment Software Self-Regulatory Body“) has served as the self-regulating organization for the games industry and is therefore the responsible institution in Germany for reviewing and age rating games to protect minors. Its only office is located in Berlin where 14 full-time employees and eight volunteer game testers work. The *USK* is organized as a German limited liability company. The shareholder of the nonprofit limited liability company is the association for the German industry that develops, produces and distributes the games in Germany (*game – Verband der deutschen Games-Branche e.V.*). Although the shareholder bears the economic risk of the GmbH, it does not bear the responsibility for the age ratings. The *USK* acts to ensure that the technology and content of the games can be reviewed on the greatest variety of current gaming platforms. Thus, the *USK* is responsible for ensuring a seamless rating review process, with respect to which all criteria and agreed dead-

<sup>1</sup> Consolidated version dated 10.2.2020: <https://spielerecht.de/wp-content/uploads/RefE-JuSchG-Stand-10-Feb-2020-konsolidierte-Fassung.pdf>.

<sup>2</sup> Initial working draft of the Federal States: [https://spielerecht.de/wp-content/uploads/01\\_Anlage-1-2020-04-21\\_-JMStV-mit-neuem-Pflichtenregime\\_2.pdf](https://spielerecht.de/wp-content/uploads/01_Anlage-1-2020-04-21_-JMStV-mit-neuem-Pflichtenregime_2.pdf).

<sup>3</sup> Regarding the draft of a new JuSchG, see e.g., *Hilgert/Sümmerrmann*, MMR 2020, 301 or *Liesching*, in Beck-Blog: <https://community.beck.de/2020/02/14/ohn-e-gurt-im-oldtimer-die-novellierung-des-jugendschutzgesetzes>; regarding the states' draft for a new JMStV, see *Liesching*, in Beck-Blog: <https://community.beck.de/2020/05/24/fehler-im-betriebssystem-der-neue-jmstv-eilentwurf-der-laender>.

lines will be observed. The tasks here range from organizing the rating procedure itself to training all professional staff members who participate in the rating procedure. The *USK* is also a permanent youth protection partner (Jugendschutzpartner) for gamescom and at other games trade fairs, conventions or organized public events at which games are presented.

The *USK* is advised by an advisory council. This council appoints the persons who play key roles in the age-rating procedure. Such persons include the game testers who present the games to the rating committee and the youth protection experts who recommend an age-rating to the Permanent Representatives of the Supreme Youth Protection Authorities of the Federal States (*Ständige Vertreter der Obersten Landesjugendbehörden - OLiB*). The chairpersons presiding over the different appeal procedures are also appointed by the advisory council. The 15 members of the advisory council include, inter alia, representatives from the churches, from media education, from the *Federal Ministry for Family*, from *German Federal State youth ministries*, from the *Federal Review Board for Media Harmful to Minors (BPjM)*, from youth organizations, from the *Commission for the Protection of Minors in the Media (KJM)*, from the games industry, as well as other youth protection experts. This advisory council also sets the *USK* General Policy Statement and Guiding Criteria, thereby creating a regulatory basis for the rating review, which is, however, still indirectly subject to regulatory oversight (see item 4 below).

Which set of statutory rules are applied in the review of a game depends on the manner in which this game will be made available to the users – on data carriers or through strictly digital transmission. Games that can be purchased in retail stores on „carrier media“, such as discs or game modules fall within the scope of the JuSchG. Games and apps that are offered only on the Internet – i.e., available perhaps directly in the browser or in a digital shop via a sales platform (such as Steam or Google-Play-Store) – are governed by the German Federal States' JMStV. The *USK* is officially recognized as a self-regulating organization under the JuSchG and under the JMStV for the online sector. In the scope governed by the JuSchG (see item 3 below), government representatives are those who issue the age-rating at the end of a *USK* procedure. With respect to the procedures under the JMStV for telemedia and broadcasting (see item 4 below), a separate division of *Freiwillige Selbstkontrolle Unterhaltungssoftware GmbH* – namely *USK.online* – performs the rating review. In addition, the *USK* also issues age ratings within the international *IARC*-system for online games and apps (see item 5 below). Numerous companies have joined the *USK* as members in an effort to cooperate very closely and on an ongoing basis concerning the issue of protecting children and minors.

### III. The *USK* in the domain of the JuSchG

Since April 2003, the JuSchG prescribes binding rules in Germany on the issuance of age ratings for games that are published on data carriers. Pursuant to § 12 (1) of the JuSchG, such materials may be provided to children and minors only if the programs are approved and rated for the appropriate age group by the *OLiB* or by a voluntary self-regulating organization in accordance with the procedures set forth in § 14 (6) JuSchG (rating obligation). Applications to obtain a rating are filed with the *USK*. German retailers are obligated to comply with the age rating at the time of delivery. Violations are subject to fines of up to 50,000 EUR pursuant to § 28 JuSchG and to a criminal investigation if there is evidence of intent. The procedure for issuing age ratings under the JuSchG will be described below, and thereafter selected computer games will be singled out to illustrate the decision-making practices for the age-rating classification for

games. Finally, additional legal issues related to age ratings will be addressed.

#### 1. The procedure

The JuSchG delegates the task of age rating computer games stored on carrier media to the youth ministries of the 16 German Federal States (the Bundesländer). These government authorities have agreed that the competent Ministry for the German Federal State of North-Rhine Westphalia will take the lead in the task for age ratings for all Federal State ministries. For purposes of implementing the age rating pursuant to §§ 12 (1) and 14 (6) JuSchG, the *USK* and the lead government authority entered into an agreement. Under the terms of that agreement, the Federal State of North Rhine Westphalia makes available employees who serve as Permanent Representatives of the Supreme Youth Protection Authorities of the Federal States (*OLiB*) and work directly on each rating review proceeding. The age-rating approval under the JuSchG is therefore always performed by the *OLiB* Permanent Representative and is therefore considered a sovereign administrative act (hoheitlicher Verwaltungsakt).

The procedure for reviewing computer and video games under the JuSchG is based on the General Policy Statement of the *USK*<sup>4</sup>. The *USK* advisory council decides on and enacts the policies. The policies are supplemented by the Guiding Criteria for the Evaluation of Computer and Video Games<sup>5</sup>, on which the advisory council also decides. With respect to games and apps that are available online, the JMStV – instead of JuSchG – governs (see items 4 and 5 below).

The review (Classification) is performed, after an initial introduction by a game tester, in a committee of four youth protection experts, who are appointed by the *USK* for the relevant meeting, and by one of the two *OLiB* Permanent Representatives. A rating procedure may be interrupted by a decision made by a classification committee (in case of uncertainty) to obtain an expert opinion from *BPjM*. The *USK* reinstates the procedure as soon as the *BPjM* opinion is submitted. The *Permanent Representative of the OLiB* may adopt the recommendation made by a Classification Committee in its Age Classification (Jugendscheid). The age classification is substantiated in writing.<sup>6</sup> An appeal against the decision may be taken by the applicant or the *OLiB* (see *USK* General Policy Statement, §§ 13, 14). A further petition for an appeal (Appellation) may be filed only by the *OLiB* or the games industry association for purposes of safeguarding the coherence of *USK*'s decision-making practices (ratings precedents). Once all the deadlines for appeals have expired, a sovereign administrative act will have taken place, against which legal action may in turn be taken. Legal actions to annul certain acts or compel performance are typically permissible for adjudication before the *Administrative Court of Berlin*.

The rating reviews result in the following age groups: *USK*-approved for children 0 years or older (“no age limit”); *USK*-approved for children up to 6 years of age; *USK*-approved for children up to 12 years of age; *USK*-approved for children up to 18 years of age, and „no rating“. The applicant will be informed about these decisions through a *USK* notification. Upon publication, the issued

<sup>4</sup> Policy statements of the *USK*: [https://usk.de/?smd\\_process\\_download=1&download\\_id=1018457](https://usk.de/?smd_process_download=1&download_id=1018457).

<sup>5</sup> Guiding Criteria of the *USK* for the evaluation of computer and video games: [https://usk.de/?smd\\_process\\_download=1&download\\_id=1018522](https://usk.de/?smd_process_download=1&download_id=1018522).

<sup>6</sup> Pursuant to § 20 (4) *USK* General Policy Statement, the reasoning is not published because the review takes place most often prior to publication of the game and therefore must take into account the legitimate confidentiality interests of the supplier; accordingly, the demand for more transparency is also unjustified; also see *Marinitsch*, MMR 2018, 517.

age rating must be identified both on the cover artwork and on the data carrier in accordance with § 14 JuSchG. The age classification „no rating pursuant to § 14 JuSchG“ reveals that the product cannot be distributed in Germany in a manner considered legally certain. Such a game can also be published without any rating (for adults only), but indexation (Indizierung) or confiscation may threaten planned trading operations.

## 2. Precedents: violence, zombies, poses, swastika

The age-rating approval does not constitute a pedagogical recommendation or aesthetic evaluation. There can be no static list of criteria for determining potential effects, but there are benchmarks or standards that require professional interpretation. To this end, the *USK advisory council* approved comprehensive guidelines for rating computer and video games.<sup>7</sup> As a rule during each rating review, the best interests of the youngest members of a certain age group must be taken into account. Likewise, under § 19 (2) of the *USK General Policy Statement*, the review should factor in not only the average minor but all those who are particularly susceptible to endangerment; extreme cases should be excluded, however. Nevertheless, consideration should be given to all impairments tied to the overall effect of the content of the game (presumption of effect). Impairments could arise both from the content of the game as a whole and from its detailed features. The key is to ultimately include the entire game offer in the age rating.

During the rating evaluation, special emphasis is placed on the so-called „aspects of content pertinent to the evaluation (Aspekte der Wirkungsmacht), i.e. the visual and acoustic implementation of the game concept, the gameplay, the atmosphere, the realism, the authenticity, the human likeness and the associated identification potential, the youth affinity, the pressure to act in the game and, of course, any violence, war, fear and threat as well as sexuality, discrimination, vulgar language and also drugs. These are the typical potential dangers in games to which minors could be exposed. The guidelines also provide information on the framing skills that minors are expected to have in the cognitive and emotional-moral classification of media content and presentation. In this respect, disburdening aspects such as explanations, contexts and the players' experience in life and media are also taken into account.

In recent years, a certain trend has materialized in the *USK's* precedents, according to which violence and war are more likely to be permissible for a certain age group, whereas in the case of sexuality, an opposite trend has emerged. For example, minors are now considered more capable of framing violence against human-like opponents with regard to genre-typical zombie shooters such as *Killing Floor 2*, *Dead Space 2* and *Dead Rising 4*. Moreover, the age limit has also fallen for shooter-team games like *Fortnite*, where the focus is on the „game's conventions“ (i.e. a contest under pre-agreed rules rather than a free-for-all of violence). Such games are now part of the life and media experience and, with appropriate framing, are now better understood

by the new generation of minors. There is still a hard limit with respect to executions, dismemberment and violence against civilians without consequences. In the case of sexual or at least „salacious“ offers, such as the „ecchi“ genre which is popular in Japan and is characterized by the over-sexualization of the mostly female actors, the age limits have tended to rise. The ecchi shooter *Gal\*Gun 2* was initially denied<sup>8</sup> an age rating, whereas its predecessor had been previously approved for minors 16 years and older. The main problem here was that the characters could be seen as partly underage and were portrayed in supposedly „unnatural poses emphasizing sexuality“. Nevertheless, the *BPjM* decided not to index the game, since the depictions had no sexual presentation inherent in them<sup>9</sup>; thus, the game subsequently received an approval and rating of 18 years and older. These games, mostly found in the manga/anime genre, are part of Japanese culture and are considered a form of art there. Nevertheless, some of these games in Germany meet the factual elements of immorality (Unsittlichkeit) under § 18 (1) sentence 2 JuSchG. Among other things, the educational goal of sexual self-determination in accordance with the codification of the „no-means-no“ principle under criminal law can also become the focus of a discussion. *Andreas Lober's* and *Florian Jäkel-Gottmann's* article<sup>10</sup> provides a more in-depth overview of the current cases.

A new feature has been added to the *USK Guiding Criteria* and should now also allow characteristics of certain unconstitutional organizations – such as swastikas – to be taken into account in the rating review. This development goes back to the *BPjM* decision on *Wolfenstein II: The New Colossus*.<sup>11</sup> According to this ruling, any decisions about the granting of an age rating must balance the interests of artistic freedom against the interests of protecting minors, whereby the social adequacy clause (Sozialadäquanzklausel) under § 86a (3) of the German Criminal Code applies. For the assessment of the impairment potential for minors, the framing is primarily based on whether there is a nuanced-critical approach to historical events, purely fictional material with dystopian scenarios or satire that exposes the ideology<sup>12</sup>. For a background on the law and the decision-making practices heretofore applied, please refer to *Andreas Lober's* and *Florian Jäkel-Gottmann's* article in this supplement.

## 3. Other legal issues: purchase exhortations, Coin Master, loot boxes, usage risks

Gambling elements in games can also be harmful to minors. In March 2020, for example, the *BPjM* examined the games „Coin Master“, „Coin Trip“ and „Coin Kingdom“ to assess their potential harmful effect on minors within the meaning of the JuSchG. The decision was based not on so-called „interaction risks“, such as potentially excessive use of or damage to financial interests, but solely on content-related confrontation risks. Essentially, the issue requiring clarification was whether the games were suitable to influence and create favorable attitudes on gambling, to desensitize players to losses, or to promote unrealistic profit expectations. However, since the visualization of the slot machines also contained elements that differed from those of real slot machines, the flow of the game was repeatedly interrupted by other gaming activities, and other alternatives relevant to the game could be won in addition to winning coins, the aforementioned impact risks were not considered relevant. In these cases, it could not be assumed that the games encourage corresponding behavior in the real world, so that there was no danger to young people.<sup>13</sup> Nevertheless, in the case of games, the overall content of which is based centrally on simulated gambling mechanics in a casino-like design, a *USK* age restriction is obviously warranted due to the threat of youth impairment.

<sup>7</sup> Guiding Criteria of the *USK* for the evaluation of computer and video games (see footnote 5 above).

<sup>8</sup> Also in the case of *Criminal Girls 2* and *Valkyrie Drive*: no age rating was assigned to *Bhikkhuni*.

<sup>9</sup> Cf. <https://www.bundespruefstelle.de/blob/133978/8ae9afd882876ffb912567a43f4a08ac20191-entscheidungen-und-verfahren-2018-data.pdf>.

<sup>10</sup> *Lober/Jäkel-Gottmann*, *MMR* supplement 8/2020, 38.

<sup>11</sup> Cf. <https://www.bundespruefstelle.de/bpjm/service/alle-meldungen/-wolfenstein-ii--the-new-colossus---us-version--nicht-indiziert-/131234>.

<sup>12</sup> *USK-Guiding Criteria*, p. 21.

<sup>13</sup> Cf. <https://www.bundespruefstelle.de/bpjm/service/alle-meldungen/die-spiele-apps--coin-master---coin-trip--und--coin-kingdom--haben-keine-jugendgefaehrende-wirkung-im-sinne-des-jugendschutzgesetzes/148760>.

Interaction risks, such as with chats or loot boxes<sup>14</sup>, have not yet been part of the USK's age rating examination. Legislation has also not heretofore addressed these risks. In terms of loot boxes, the main relevant aspects under the law protecting minors in a media environment relate to unlawful advertising pursuant to § 6 JMStV.<sup>15</sup> Nevertheless, the inclusion of interaction risks in the context of age rating also does not appear to make sense. Typically, games and apps, for example, are highly dynamic media that are subject to continuous change even after their market launch, particularly in the area of interaction possibilities. These interaction possibilities can be individually configured or switched off and are also very much influenced by the respective platform through which the game is provided. The resulting high degree of dynamics means that the risks contained in games and apps cannot be definitively and validly verified at any given time. If such elements are taken into account in the age-rating labels, then the same game might have different ratings, which would thereby dilute the tried-and-tested USK age rating labels that parents and children had come to recognize and understand.<sup>16</sup> If, on the other hand, interaction risks are identified merely by means of additional information and descriptors, then such a problem would not arise.

The IARC-system has been successfully putting this approach into practice for years. This approach also seems appropriate in light of the wide variety of risks that can arise in the network. For example, the most diverse risks arise when interaction possibilities are being offered, so that a uniform warning sign (age rating), which is supposed to combine all risks, does not do justice to the complexity of the situation and the dynamics of the media and could even lead to confusion. In his article<sup>17</sup>, Kai Bodensiek offers some greater insight into the risks of use in the structure of the law concerning the protection of minors.

#### IV. The USK operating under the JMStV

The JMStV of the German Federal States (the Bundesländer) consolidates broadcasting and telemedia regulation under a single supervisory authority and follows the principle of regulated self-regulation. According to this principle, providers of content potentially harmful to minors are obliged to evaluate such content themselves and to take protective measures so that children or adolescents of the relevant age group „typically do not see or hear“ such content as required under Art. 5 (1) JMStV. Contrary to the JuSchG, there is no obligation to label such content, but the principle of the independent provider (eigenverantwortlicher Anbieter) does apply. The current draft of the amendment to the JuSchG however breaches this independent provider principle, since § 14a JuSchG-E introduces a labelling obligation for online platforms.<sup>18</sup>

The assessment of whether an offer is relevant in terms of protecting minors can be performed by a youth protection officer, a voluntary self-regulation institution or by an automated age classification system (e.g., *International Age Rating Coalition – IARC*). The youth protection officer can be appointed internally or his role outsourced to a voluntary self-regulation institution. Various measures for restricting access are available to ensure that this level of protection is maintained. These measures include broadcasting time (airtime) restrictions (§ 5 (4) JMStV), technical or other means, as well as programming an offer for recognized youth protection programs (§ 5 (3) no. 1 JMStV). In extreme cases, violations of the law can be punished with fines of up to 500,000 EUR.

#### 1. USK.online – Structure, procedure and activity

As an independent division of the USK, *USK.online* constitutes an institution of voluntary self-regulation in accordance with the

JMStV; it has established itself over many years and has received official recognition without a time limit in 2019.<sup>19</sup> Accordingly, the charter and bylaws of *USK.online*,<sup>20</sup> which also regulate the procedures of the *USK.online*, apply in this area. Pursuant to § 19 (3) of the JMStV, the competent state media authority the *Medienanstalt Berlin-Brandenburg (mabb)* decides on the recognition or certification of a self-regulation body under the JMStV through the *KJM*, which may also revoke the certification under subsection (4). The *USK.online* currently has 45 member companies.

According to the JMStV, providers are responsible for making their offers available in a way that complies with the law protecting minors, regardless of whether they are game providers, streamers, retailers or operators of news portals. For companies, it is sometimes not easy to distinguish between necessary legal protection, reasonable protection of minors and superfluous or unnecessary measures. *USK.online* helps them to do this. As its activities mainly relate to online offers, the JMStV serves as the most important regulatory basis. The USK Guiding Criteria for the evaluation of computer and video games (for purposes of protecting minors) and the USK Additional Criteria<sup>21</sup> likewise apply to the subject area covered by JMStV. Moreover, charters, bylaws and guidelines that are issued in connection with the JMStV also apply, whereby particular attention should be drawn to the Youth Protection Guidelines of the State Media Authorities.<sup>22</sup> These must be distinguished from policies and guidelines such as those used by *Google* or *Apple* for their platforms. Although they cover, among other legal areas, the protection of minors, they are individual, platform-specific rules that can go far beyond the legal regulations. In his article<sup>23</sup>, *Christian Rauda* provides a deeper insight into the competition between the protection of minors under the JMStV and the Google and Apple guidelines for app publishers.

A central component of regulated self-regulation under the JMStV – and thus of the *USK.online* – is the privileged effect that membership in a certified self-regulatory body affords the provider. In this way, membership<sup>24</sup> creates a „safe harbor“ via the so-called „enforcement priority“ (Vorbefassungsschutz). Accord-

<sup>14</sup> With respect to classifying loot boxes, see *Nickell/Feuerhake/Schelinski*, MMR 2018, 586.

<sup>15</sup> Cf. [https://www.kjm-online.de/fileadmin/user\\_upload/KJM/Ueber\\_uns/Positionen/Stellungnahme\\_KJM\\_2018\\_Online-Spiele\\_Lootboxen.pdf](https://www.kjm-online.de/fileadmin/user_upload/KJM/Ueber_uns/Positionen/Stellungnahme_KJM_2018_Online-Spiele_Lootboxen.pdf).

<sup>16</sup> For details regarding this set of problems, see the opinion of game regarding the draft amendment to the JuSchG, p. 7: <https://www.game.de/wp-content/uploads/2020/02/2020-02-28-game-Stellungnahme-zum-JuSchG-final.pdf>; likewise, see the *USK* opinion regarding the draft amendment to the JuSchG, pp. 6 et seq.: <https://usk.de/stellungnahme-zum-entwurf-eines-zweiten-gesetzes-zur-aenderung-g-des-jugendschutzgesetzes/>.

<sup>17</sup> *Bodensiek*, MMR supplement 8/2020, 53.

<sup>18</sup> For details regarding this set of problems, see the opinion of game regarding the draft amendment to the JuSchG, pp. 9 et seq.: <https://usk.de/stellungnahme-zum-entwurf-eines-zweiten-gesetzes-zur-aenderung-des-jugendschutzgesetzes/>; for details regarding this set of problems, see the opinion of game regarding the draft amendment to the JuSchG, pp. 10 et seq.: <https://www.game.de/wp-content/uploads/2020/02/2020-02-28-game-Stellungnahme-zum-JuSchG-final.pdf>.

<sup>19</sup> <https://usk.de/usk-online-erhaelt-unbefristete-verlaengerung-der-erkennung/#:~:text=online%20erh%C3%A4lt%20unbefristete%20verl%C3%A4ngerung%20der%20Anerkennung,Rundfunk%20und%20Telemedien%20staatlich%20anerkannt.&text=Seit%20dem%20Jahre%202011%20konnte%20der%20Bereich%20USK.>

<sup>20</sup> USK charter or bylaws for the area covered by the JMStV: [https://usk.de/?smd\\_process\\_download=1&download\\_id=1018517](https://usk.de/?smd_process_download=1&download_id=1018517).

<sup>21</sup> USK Additional Criteria regarding the area covered by the JMStV: [https://usk.de/?smd\\_process\\_download=1&download\\_id=1018531](https://usk.de/?smd_process_download=1&download_id=1018531).

<sup>22</sup> See [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Rechtsgrundlagen/Richtlinien\\_Leitfaeden/JuschRiLi\\_der\\_Landesmedienanstalten\\_ab\\_15.10.2019.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/JuschRiLi_der_Landesmedienanstalten_ab_15.10.2019.pdf).

<sup>23</sup> *Rauda*, MMR supplement 8/2020, 43.

<sup>24</sup> For more details regarding membership in *USK.online* and the services included therewith, see: <https://usk.de/fuer-unternehmen/service-angebot-der-usk/mitgliedschaft-und-rechtsschutz/>.

dingly, if a telemedia provider<sup>25</sup> under § 20 (5) JMStV is a member of a self-regulated body certified under the JMStV or submits to charter or bylaws, then in the event that there are alleged violations against rules on the protection of minors, the Commission for the Protection of Minors in the Media (*KJM*) will first address the alleged violations with the self-regulation body (supervisory procedure). Measures taken by the *KJM* against the provider are permissible only if the decision, or failure to take a decision, by the certified self-regulation body exceeded the legal limits of its scope of assessment discretion. This protection is important and useful for providers, since the vagueness of legal terms in youth protection law sometimes gives rise to considerable latitude in interpretation. The evaluation of technical systems, which likewise falls within the scope of assessment discretion, is also of particular importance here. Under the membership, there is also a contractual obligation owed to the self-regulation body to comply with the statutory requirements for protecting minors. Such an obligation ensures that the protection of minors in the media is sustainable.

In contrast to committee classifications made under the JuSchG, in the review procedures of *USK.online* classifications are made without any governmental involvement (no administrative act). Nevertheless, providers enjoy certain legal protections because the assessment discretion of a self-regulation institution also encompasses the decision itself (§ 20 (5) sentence 2 JMStV). In practice, however, the issuance of age ratings by JuSchG committees is much more important. On the one hand, because the *USK.online* checks offers in connection with the *IARC* by using an automated classification system (see 5. below). On the other hand, applicants are given an age rating under the JuSchG, which can be used regularly both for carrier media and online (see presumption rule under § 5 (2) sentence 1 JMStV and the notification duty under § 12 JuSchG). In practice, therefore, the „prolongation regulation“ (Durchwirkungsregelung) for the labelling of games – as stipulated in § 5 (2) JMStV – is irrelevant.

In addition to reviewing classic content, *USK.online* committees can also assess other aspects of JMStV conformity. This assessment can cover, above all, issues in the field of advertising under § 6 JMStV (e.g., direct purchase exhortations), which are routinely the focus of regulatory oversight, or the assessment of technical systems under § 11 of the JMStV. However, examination or review activities represent only part of the *USK.online*'s field of work. Its activities also include advising member companies on the relevance of content for the protection of minors during the development phase (e.g., on games, trailers or journalistic reports) as well as advising and implementing technical measures for the protection of minors. In addition, *USK.online* also makes the external youth protection officer available to companies and operates a complaints center for parents and users. In the event of a dispute, complaint procedures could eventually involve the *USK.online* committees.

## 2. Technical systems for the protection of minors in the media

Technical solutions for protecting minors are an essential component of media education and are capable of containing not only content risks but also usage risks. Institutions or organizations of voluntary self-regulation are responsible for the recognition of technical solutions that protect minors, such as youth pro-

tection programs pursuant to § 11 (1) sentence 2 JMStV. These solutions include software programs that work as a filter by reading age-rating coding and identifying offers that could impair the development of children and young people. Youth protection programs must satisfy defined criteria. They must facilitate access to telemedia that is differentiated according to age groups, have a certification feature that is state of the art, have a user-friendly design and allow for autonomous usage (§ 11 (1) sentence 3). These requirements for such filter systems are defined in more detail in the *KJM*'s „Criteria for the Suitability Requirements under § 11 (3) of the JMStV for Youth Protection Programs“. <sup>26</sup> The only youth protection program for the „open“ Internet (JusProg) that was certified by the organization, *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (FSM)*, was declared invalid by the *KJM* in 2019 because the legal scope of assessment discretion had been exceeded, and in addition, this decision was declared immediately enforceable. In the meantime, *mabb* and the *FSM* have agreed on a settlement in summary proceedings before the *Higher Administrative Court of Berlin-Brandenburg*. *Felix Hilgert's* and *Philipp Sümmermann's* article<sup>27</sup> yields more detailed insight into this topic.

However, in order to assess suitability, programs that are designed for individual age groups only or that permit access to telemedia within closed systems may also be presented for submission (§ 11 (2) JMStV). Such certification is conceivable especially for game consoles, but also for other closed systems, such as game clients or game platforms. Accordingly, *USK.online* has issued a certification for the Nintendo Switch youth protection system. Other technical solutions, such as lock-out or age-verification systems, can also be submitted for examination to a self-regulation body.

It is noteworthy that the games industry provides youth protection settings almost without exception. Therefore, it is particularly important not to pursue unnecessarily strict or rigid approaches, but to give vendors and providers the opportunity to design and have certified their own systems for the protection of minors that are suitable for their offerings, as long as the protection of minors is actually enhanced.

## V. The International Age Rating Coalition (IARC)

*The International Age Rating Coalition* is an international association of institutions that provides youth protection ratings for online games and apps within a single global system. Founded in 2013, this system is integrated by platforms and mobile app stores to generate cross-platform, automated age ratings in accordance with the applicable regional regulations. The vendor or provider fills out a questionnaire only once and receives the appropriate age rating for each region (e.g., *USK* for Germany, *ESRB* for USA, etc.). The generated age-rating labels merely provide information about potential impairment to minors. Visually, the labels differ from those issued in the context of an examination according to the JuSchG. Nevertheless, a visual similarity has been deliberately chosen due to its recognition value, since the meaning of the *USK* age rating labels is already known and understood. Nevertheless, the transfer of the *IARC* labels to carrier media for onsite retail trade is prohibited.

In addition to the labels, the *IARC*-system provides additional information about content that is relevant to the protection of minors and that plays a role in the game or app in question (e.g., violence, war, sexual content, controlled substances). Additional descriptors may be specified for information about interactive elements (e.g., user interaction, location sharing, in-game purchases). In the future, the possibility of purchasing randomly generated items („loot boxes“) will also be indicated. This segrega-

<sup>25</sup> Under § 20 (3) JMStV, a similar construct applies to broadcasters.

<sup>26</sup> *KJM* criteria for the suitability requirements for youth protection programs: [https://www.kjm-online.de/fileadmin/user\\_upload/KJM/Aufsicht/Technischer\\_Jugendmedienschutz/Kriterien\\_fu\\_r\\_die\\_Eignungsanforderungen\\_fu\\_r\\_Jugendschutzprogramme\\_12.10.2016.pdf](https://www.kjm-online.de/fileadmin/user_upload/KJM/Aufsicht/Technischer_Jugendmedienschutz/Kriterien_fu_r_die_Eignungsanforderungen_fu_r_Jugendschutzprogramme_12.10.2016.pdf).

<sup>27</sup> *Hilgert/Sümmermann*, MMR supplement 8/2020, 56.

tion of labels and descriptors (identification of interaction risks by means of additional information; identification of content risks by means of the age rating) allows the different areas of risk to be identified and understood without diluting the age rating.

The following platforms have so far joined IARC: Google-Play-Store, Nintendo eShop, Microsoft Windows Store, Xbox Store and the Oculus Store.

It is a welcome development that automated assessment systems such as IARC are at least being taken up in the context of the new draft legislation (JuSchG-E). Furthermore, such systems are being used as a solution for a labelling obligation on gaming platforms. It remains questionable as to what extent such a labelling obligation makes sense in an international context due to the country of origin principle. In his article, *Marc Liesching* sheds more light on national games regulation in the EU area in view of the country of origin principle.

## VI. Bottom Line

The German system for protecting minors from harmful media continues to be a hot topic of discussion. In this context, media-convergent solutions are being sought that try to do justice not only to the international situations, but also to the dynamism and interconnectivity of our currently networked world. Despite all the debates, one thing can be said: The system of regulated self-regulation is a recipe for success. Solutions such as the IARC-system or a media convergence that have been practiced internally by the USK for many years now prove that self-regulatory bodies are capable of reacting quickly and flexibly to real challenges and of finding innovative solutions. The protection of minors will continue to improve and benefit from incentives that encourage providers to become members of a self-regulation body and to commit themselves contractually to implementing

high standards of protection for minors. Voluntary self-regulation institutions are a permanent link between the state and industry. They work on the basis of non-bureaucratic procedures and are therefore particularly effective – both nationally and internationally. They also relieve the state of many costs.

### For a quick read ...

- The USK is the one-stop-shop for compliance with the statutory rules on protecting minors.
- The system of regulated self-regulation is a recipe for success.
- A fully differentiated body of precedents (decision-making practice) has developed under the JuSchG.
- In the games sector, innovative technical protection strategies exist for online media, some of which go beyond the provisions of the JMStV.
- The IARC is a unique institution for worldwide age-rating and for the internationalization of the decision-making practice.



**Professor Dr Christian-Henner Hentsch**

is Professor for copyright and media law at the Cologne University of Applied Sciences and Head of Legal and Regulatory Affairs at game – association of the German games industry and Co-Editor of MMR.



**Lorenzo von Petersdorff**

is Deputy Managing Director & Legal Counsel of the USK (Unterhaltungssoftware Selbstkontrolle) as a voluntary self-regulatory body for the protection of minors in connection with games and apps.

ANDREAS LOBER / FLORIAN JÄKEL-GOTTMANN

# Anti-Constitutional Symbols, Green Blood, Zombies and Poses

Overview of the Ruling Practice on Age Rating in Germany

Ruling Practice in Youth Protection

For decades the German laws for the protection of minors have been among the strictest in the world. In the 1980s they led to green blood to the games, in the 1990s they became the universal gold standard. In recent years, a liberalization of the assessments in the ruling practice could be observed. Legal regulations and ruling practice provide a framework that is both reliable and flexible. The German federal government has now presented a new draft of the German Youth Protection Act (Jugendschutzgesetz – JuSchG). Should it be adopted, it will –

once again – be a „game changer“. The following article outlines the legal situation regarding age rating and provides an overview of the ruling practice of the German Entertainment Software Self-Regulation Body (Unterhaltungssoftware Selbstkontrolle – USK) and the Federal Review Board for Media Harmful to Minors (Bundesprüfstelle für jugendgefährdende Medien – BPjM) to date. It will also take a look at what might change under the new JuSchG with regard to age rating.

reading time: 19 minutes

## I. Legal Basis for Age Rating and Age Rating Labels

### 1. Data Storage Media or Telemedia?

For video games sold on physical storage media (so-called data storage media), the German Youth Protection Act (Jugendschutzgesetz – JuSchG) provides for regulations on age rating

and age rating labels, Sec. 1 para. 2, Sec. 12 et seq. JuSchG. In the past, this applied to games on floppy disks and CD-ROMs; today, it is mainly games on DVD but also, for instance, memory cards and sticks.<sup>1</sup> These games must be intended to be played

<sup>1</sup> Liesching, in: Nomos-BR JuSchG, 1st ed. 2018, Sec. 12 marginal no. 2.



on a „screen“ – i.e. the screen of a PC, television or smartphone, but VR glasses<sup>2</sup> may also be included.

In contrast, games which are not provided on data storage media (e.g. games distributed solely online) are not subject to the provisions of the JuSchG, but to those of the Interstate Treaty on the Protection of Minors in the Media (Jugendmedienschutzstaatsvertrag – JMStV). According to Sec. 12 sentence 1 JMStV, online services<sup>3</sup> and even games are covered by the term telemedia.

In contrast to the JuSchG, the JMStV does not provide for an original obligation to provide for age rating labels. Rather, providers are solely required to refer to the respective age rating (label) which was issued according to the JuSchG – which in turn only applies to (online) games the content of which is identical to rated games that are provided on data storage media, Sec. 12 sentence 1 JMStV. Hence, this is only an information obligation but not an obligation to provide an age rating label.<sup>4</sup> Instead, the JMStV obliges providers only to ensure a rating of their content (self-assessment or through a third party) and – if necessary – to take appropriate measures for youth protection. In this respect the USK can also be of assistance via its *USK.online* business division. With age ratings and age rating labels on platforms, the so-called IARC-system is applied, in the establishment of which the USK was also involved.

In addition, online games, in case they are as eligible for presentation as games provided on data storage media, can be optionally labeled according to the provisions of the JuSchG, Sec. 12 sentence 2 JMStV. This provision is, of course, only declaratory<sup>5</sup> and does not trigger an obligation to provide an age rating label either.

## 2. Age Rating and Age Rating Labels: A Matter for Voluntary Self-Regulation

Games provided on data storage media may only be made available to minors in public if they have been approved and rated for their age group by the Supreme State Authority (*Oberste Landesbehörde*) or an organization of voluntary self-regulation, Sec. 12 para. 1 sentence 1 JuSchG. „Making available“ includes any behavior that enables the content of the data storage media to be taken note of,<sup>6</sup> for instance public presentation and sale. How and where the age rating labels are to be affixed is specified in detail in Sec. 12 para. 2 JuSchG.

The actual age rating is regulated by Sec. 14 JuSchG. Content that is suitable for impairing the personality development of children and minors of a certain age group may not be released for this age group, Sec. 14 para. 1 JuSchG. For this purpose, the law provides for five age groups, from „Approved without age restriction“ to „No Youth Approval“, Sec. 14 para. 2 JuSchG. The latter, however, is the colloquial „18+“ but does not refer to content which cannot be rated at all (which would

therefore be subject to extensive restrictions, could be classified by the *BPjM* as harmful to minors and can thus be „indexed“, see sec. 1.3.).

The question which institution may issue age ratings and assign age rating labels is regulated by Sec. 14 para. 6 JuSchG: According to this provision, the Supreme Youth Protection Authorities (*Oberste Landesbehörden*, i.e. the German federal states' Ministries in charge of youth protection) can agree that „ratings and labels issued by an organization of voluntary self-regulation are ratings and labels issued by the Supreme Youth Protection Authorities of all federal states“. Practically, this means that for video games, decisions of the USK are de facto considered decisions of the competent *Supreme Youth Protection Authorities of the German federal states*, based on an agreement of the federal states in this respect (Ländervereinbarung).<sup>7</sup>

This approach has a value that can hardly be underestimated. It entrusts an expert, non-governmental institution with the assessment of the content of the age rating and at the same time adds a largely binding effect to this assessment. This is also with good reason, as the involvement of organizations such as the USK (or the *German Self-Regulatory Body of the Movie Industry, Freiwillige Selbstkontrolle der Filmwirtschaft - FSK*) has been a tried and tested practice for many years.<sup>8</sup> This successful concept has been put on legal ground with Sec. 14 para. 6 JuSchG. Moreover, the decisions of the self-regulation organizations are not only binding on the German federal states: The respective decision becomes an administrative act by means of a notice of acceptance from the *Supreme State Authority*.<sup>9</sup> Thereby, the decision is given also a general external impact.

The USK's ruling practice is thus decisive for the question as to which age rating and corresponding label a game bears. The JuSchG defines a comparatively broad legal framework (when is a particular age group „impaired“ in its development by what content?) which is substantiated by the USK guiding criteria and a continuously developing ruling practice, particularly in appeal proceedings (Appellationsverfahren). At the same time, however, this framework also has the flexibility which is absolutely essential in view of the constantly evolving media content and society.

## 3. Indexing: Task of the Federal Review Board for Media Harmful to Minors

If a medium is suitable for not only impairing but even endangering the personality development of children and adolescents, the Federal Review Board for Media Harmful to Minors (*Bundesprüfstelle für jugendgefährdende Medien - BPjM*) must include it in the so-called „List of Media Harmful to Minors“, Sec. 18 para. 1 sentence 1 JuSchG. This colloquial „indexing“ is flanked by advertising and sales bans, Sec. 15 para. 1 JuSchG, which may also apply without indexing in the case of particularly harmful content, Sec. 15 para. 2 JuSchG.

Although the circumstances which can lead to indexing are generally defined, they leave room for manoeuvre in the particular assessment: When is a „act of slaughter self-purposeful and presented in detail“, Sec. 18 para. 1 sentence 1 no. 1 JuSchG? When does a medium „serve“ the „art or science, research or teaching“ and is therefore not to be included in the List, Sec. 18 para. 3 no. 2 JuSchG? Accordingly, it is these leeways for assessment which, on the one hand, make a „ruling practice“ possible at all and, on the other hand, are at the same time filled and further developed by the ruling practice. In the course of time, this ruling practice has become quite „reliable“ to a certain extent – and yet flexible for current and future developments.

<sup>2</sup> Liesching (footnote 1 above).

<sup>3</sup> Liesching, in: BeckOK JMStV, 18th ed., 1.1.2020, Sec. 2 marginal no. 1. In detail on the relationship between the provisions of JMStV and JuSchG Schulz, in: Binder/Vesting, Beck'scher Kommentar zum Rundfunkrecht, 4th ed. 2018, JMStV Sec. 2 marginal no. 2.

<sup>4</sup> Correctly Erdemir, in: Spindler/Schuster, Recht der elektronischen Medien, 4th ed. 2019, JMStV Sec. 12 marginal no. 4; cf. the official explanatory memorandum to the JMStV in the (insofar unamended) version dated 1.4.2003, p. 16.

<sup>5</sup> Erdemir (footnote 5 above) marginal no. 7; Liesching (footnote 4 above) marginal no. 4.

<sup>6</sup> Liesching, in: Erbs/Kohlhaas, 228th supplement January 2020, JuSchG Sec. 12 marginal no. 4 with further references.

<sup>7</sup> Liesching (footnote 2 above), Sec. 14 marginal no. 7.

<sup>8</sup> Cf. BT-Drs. 14/9013, 23 (Bundestag printed paper).

<sup>9</sup> Administrative Court Mainz Ruling of 29.9.2016 – 1 K 710/15, BeckRS 2016, 118317.

## II. Development of the Ruling Practice

As described above, the regulatory framework allows for the continuous development of a reliable and flexible ruling practice. In that light, an overview of the development of this practice is given below.

### 1. Blood Was Not Always Red

The probably most „infamous“ era in the eyes of many players was the 1980s. Youth protection laws were applied to games, even though they were hardly designed for the games' specific requirements. Correspondingly, the former Federal Review Board for Publications Harmful to Minors (*Bundesprüfstelle für jugendgefährdende Schriften*) issued a large number of indexings. As a result, the indexed games disappeared from the shelves but often only became even more attractive as pirate copies. These games included classics such as „Operation Wolf“, „Green Beret“, „Who dares wins“ but also more provocative titles such as „Raid over Moscow“ or „Friday the 13th“ and completely absurd titles like „Hitler Dictator“.

Wherever possible, the publishers looked for ways to adapt the games so that they could be released in Germany – replacing red blood with green blood was one of the most widely used measures. For instance, „Space Invasion“ was basically a slightly revised version of „Commandos“ in which the player fought aliens instead of humans and in which the cries of pain were removed.

### 2. Swastikas and Nazi Propaganda

Courts even considered the distribution of „Wolfenstein 3D“ a criminal offence, partly because of the many swastikas.<sup>10</sup> However, Wolfenstein 3D's indexing by the *BPjM* was not initially based on the swastikas but on the depiction of violence.<sup>11</sup> After 25 years of indexing, the *BPjM* indexed the game subsequently because of the courts' still existing seizure warrants from the 1990s<sup>12</sup> (contrary to Sec. 18 para. 7 sentence 2 JuSchG) – and thus, at last, because of the swastikas. However, after the cancellation of the seizure warrants by the courts in 2019, „Wolfenstein 3D“ was finally removed from the list by the *BPjM*.<sup>13</sup>

The actions of the judiciary and *BPjM* led to the debate in the 1990s: Can it be illegal to kill Nazis in a game? In 1998, the *Higher Regional Court (Oberlandesgericht – OLG) of Frankfurt/M.* said: Yes. It should not be considered normal or entertaining to see Nazi symbols, even if Nazis were clearly presented as the enemy. The confrontation of children and adolescents with Nazi symbolism would rather bear the danger of customization.<sup>14</sup> What seems grotesque here is that the person who, in this case, distributed a game in which the hero killed Nazis was himself a „supporter of the nationalist scene“.<sup>15</sup>

### 3. Further Developments in Regulation and Ruling Practice

In the 1990s, violence in games became more realistic and German laws became something like the universal gold standard. The *USK* was founded in 1994 as a result of the amendment to the former German „Law on the Distribution of Publications and Media Content Harmful to Minors“ (Gesetz zur Verbreitung jugendgefährdender Schriften und Medieninhalte). In order to be able to distribute games freely, a *USK* rating soon became mandatory and became even obligatory with the introduction of the JuSchG in 2003. This ensured that a large number of games were rated by the *USK* – by the time the *USK* celebrated its 25th anniversary in 2019, the number had reached about 47,000.<sup>16</sup>

Regulatory developments led to extensive ruling practice which in turn helped to define the evaluation criteria. Age ratings became less random as a result. High frequency killings or extreme

violence against humans became the main reasons why the *USK* rejected age rating and the *BPjM* classified games as being harmful to minors. With the development of graphics and physics engines, Ragdoll effects<sup>17</sup> and dismemberment effects became important factors that led the *USK* to reject age rating and the *BPjM* to put games on the index.<sup>18</sup>

It is true that violence against humans was generally regarded as more problematic than violence against non-humans. But „humanoid“ creatures such as zombies were treated in the same way as humans – „Dead Rising“ (I, II and III) or „Killing Floor I“ were not rated by the *USK* and were indexed by the *BPjM*.<sup>19</sup>

The industry reacted and launched „German versions“ for one of the largest markets in the world: In games such as „Command & Conquer: Red Alert 2“ or „Half Life“, enemies were turned into robots. In some games the color of human blood was changed for Germany or the blood was completely removed.

Step by step, attempts were made to design games in a way that they could be given an age rating in Germany from the start and could be advertised as „uncut“. To a certain extent, the German ruling practice also had a global impact on gameplay: non-violent game elements favored age rating by the *USK*. Some shooter games were enriched with puzzle elements, game profiles became more complex. The plot of a game, non-violent game elements and cooperative action in multiplayer modes were also given more and more consideration and made it easier for the *USK* to issue an age rating in cases of doubt. Some of the most controversial titles at the time, such as „Wolfenstein“, „Doom“ and „Quake“ are still well-known brands today.

### 4. Exaggerated Violence is Exaggerated Violence, Zombies Are Not Humans

With regard to the assessment criteria, ruling practice has become increasingly liberal in recent years. The de facto bans imposed by the *BPjM*'s respective indexing have been lifted for many game versions, including „Doom“ (I and II<sup>20</sup>), „Quake“ (I and II<sup>21</sup>), „Fallout 3“<sup>22</sup>, „Gears of War“<sup>23</sup>, „Gears of War II“<sup>24</sup> several GTA games<sup>25</sup> and „Max Payne“.<sup>26</sup>

<sup>10</sup> For example, *Local Court Tiergarten* Decision of 7.12.1994 – 351 Gs 5906/94.

<sup>11</sup> *BPjM*, Decision No. 4601 (V) of 12.1.1994.

<sup>12</sup> *BPjM*, Decision No. G 4/18 of 29.11.2018.

<sup>13</sup> *BPjM*, Decisions No. A 148/19 and No. A 149/19 of 26.9.2019.

<sup>14</sup> *Higher Regional Court Frankfurt/M.* NStZ 1999, 356 (357).

<sup>15</sup> *Higher Regional Court Frankfurt/M.* NStZ 1999, 356 (357).

<sup>16</sup> See <https://usk.de/usk-feiert-25-jahriges-bestehen>.

<sup>17</sup> „Ragdoll“ describes a behavior that is spontaneously calculated by algorithms based on physical principles and that simulates the movements of an injured or dying body.

<sup>18</sup> For example, the single player demo version of „Far Cry“ was indexed in 2004 because of Ragdoll effects. The German full version, unlike the indexed English version, did not contain any Ragdoll effects and was not indexed separately. However, these Ragdoll effects could be reactivated by simple changes to the code. Therefore, the *BPjM* initially explained that the indexing consequences of the UK version (at first) also applied to the German full version, as it made the UK version accessible due to the possible changes. Upon this, the possibilities of manipulation were removed in the German version which could be freely sold afterwards; available at: <https://www.gamestar.de/artikel/far-cry-englische-version-wird-indiziert,1345331.html> and <https://www.schnittberichte.com/schnittbericht.php?ID=3160>.

<sup>19</sup> Cf. for instance *BPjM*, Decision No. VA 3/13 of 27.11.2013 on Dead Rising 3.

<sup>20</sup> *BPjM*, Decision No. 5847 of 4.8.2011 on Doom and Doom II (without American version of Doom II).

<sup>21</sup> *BPjM*, Decision No. 13990 (V) of 23.7.2019.

<sup>22</sup> *BPjM*, Decisions No. A 31 – 34/16 and No. 6100, each of 11.2.2016.

<sup>23</sup> *BPjM*, Decision No. 6112 of 7.7.2016.

<sup>24</sup> *BPjM*, Decision No. 6134 of 1.12.2016.

<sup>25</sup> Inter alia, *BPjM*, Decision No. 11611 (V) of 1.10.2014 (GTA: Vice City); Decision No. 12113 (V) of 9.9.2015 (GTA: Liberty City Stories); Decisions No. 6077 (GTA: San Andreas) and No. 6076 of 3.9.2015 (GTA: Vice City Stories).

<sup>26</sup> *BPjM*, Decision No. 5887 of 2.2.2012.

The cancellation of the indexing was partly due to the fact that graphics which were deemed to look realistic in the past appeared years later only as „technically outdated representations“.<sup>27</sup>

In some cases, gameplay features and visual effects received a new assessment as well: While the so-called „Bullet Time“ visualization<sup>28</sup> was initially a reason for indexing „Max Payne“, this was later assessed as clearly unrealistic and thus not particularly (realistically) violent.<sup>29</sup> „Mortal Kombat X“ was not indexed, contrary to its predecessors. The presentation of violence in this game is so extreme and exaggerated that it can hardly be considered realistic.<sup>30</sup> The so-called dismemberment effects, originally considered highly problematic, have more recently been recognized as a typical feature of the horror genre.<sup>31</sup>

The long-standing principle that zombies are „humanoid“ has also been relativized – first for the film „Dance of the Devils“,<sup>32</sup> then for games. For instance, „Dead Rising 4“<sup>33</sup> and „State of Decay II“<sup>34</sup> received the rating „No Youth Approval“ from the USK and can therefore, unlike earlier zombie games, be offered publicly.

The revision of the USK guiding criteria with regard to Nazi symbols was widely noticed by the public. Whereas the USK traditionally refused to provide an age rating for any Nazi symbols contained in a game, its evaluation is now based on each specific individual case. Similar to Sec. 86a para. 3 in conjunction with Sec. 86 para. 3 German Criminal Code (Strafgesetzbuch – StGB), it is now decisive whether the content is socially appropriate. In this respect, the USK pays attention to whether the symbols are used responsibly and in the context of a critical approach. Games which take a clear position against National Socialism may use these symbols under certain conditions. Such responsible and critical engagement was first acknowledged in „Through the Darkest of Times“<sup>35</sup> and „Attentat 1942“. Later

on it was confirmed by the BPjM<sup>36</sup> and the USK<sup>37</sup> for „Wolfenstein II“. Games that do not take such a clear position, however, are still not permitted to use Nazi symbols.<sup>38</sup>

## 5. Current Limitations

Despite all the liberalization of the ruling practice, there are still limitations: Today, USK and BPjM often regard sexual poses in anime games as problematic, such as in „Omega Labyrinth Z“ (no age rating by the USK), „Criminal Girls 2: Party Favors“ (indexed)<sup>39</sup> or „Gal Gun 2“ (rated USK 18)<sup>40</sup>. There are also still games whose level of violence is too high for a USK rating.<sup>41</sup> Moreover, the ruling practice has recently also dealt with gaming mechanisms, such as simulated gambling in „Coin Master“ for example. Here the BPjM decided that the JuSchG does not cover the glorification or trivialization of gambling and that the law currently focuses strictly on media content. Therefore, a possible glorification or trivialization of gambling should not be taken into account in the indexing process.<sup>42</sup>

The ruling practice has thus matured and become more liberal but by no means toothless. Due to the necessary yet given flexibility, it is rather able to deal with the challenges of the time.

## 6. Online Games, Loopholes and Technical Solutions

A gap in the youth protection regime became apparent in the 2000s: The obligation to provide an age rating label according to the JuSchG only applied (and still applies) to games provided on data storage media, but not to online games (see above I.1.). Many publishers nevertheless had their games labeled in order to be „safe“ in terms of youth protection law or to offer their customers better guidance. But even then, the follow-up question arises: How can age restrictions be effectively implemented in an online environment?

By means of the JMStV, which entered into force for the first time on 1.4.2003, the German federal states, which are responsible for the content of telemedia<sup>43</sup>, proposed to limit the „broadcasting times“ for content with age ratings of 16+ and 18+ to the night-time hours, Sec. 5 para. 4 JMStV. However, this works much better for television than for games. A more adequate solution was found in this respect from 2016 onwards in the 19th Interstate Treaty on Amending the Law on Broadcasting (19. Rundfunkänderungsstaatsvertrag) which also amended the JMStV: A provider can now also use a formally recognized youth protection program, i.e. a filter software, to fulfil its youth protection obligations, Sec. 5 para. 3 sentence 1 no. 1, Sec. 11 JMStV. The only third-party software currently designed as an open system for games and recognized under the JMStV is „JusProg“.<sup>44</sup> By means of an .xml file, integrated into their games, providers can „communicate“ the age rating of their games to this software. If parents use JusProg and have configured the program accordingly, content that does not meet the age criteria defined by the parents should be blocked.

But the approval for JusProg was declared illegal by the Commission for the Protection of Minors in the Media (*Kommission für Jugendmedienschutz – KJM*) with the decision having been issued by the State Media Authority of Berlin-Brandenburg (*Medienanstalt Berlin-Brandenburg – mabb*).<sup>45</sup> Thus, JusProg's operating license as a program for the protection of minors was revoked.<sup>46</sup> The KJM held that JusProg only works when certain operating systems are used and that, when accessing the Internet via mobile devices, corresponding age ratings cannot be identified. Hence, it held that „essential parts of the use of media contents by minors were not considered at all“ and the acknowledgement of JusProg by the FSM was based on a faulty assessment.<sup>47</sup>

<sup>27</sup> BPjM, Decision No. 5847 of 4.8.2011.

<sup>28</sup> „Bullet Time“ allows certain characters to slow down everything around them while aiming and firing their weapons; this gives them a considerable advantage over enemies.

<sup>29</sup> BPjM, Decision No. 5887 of 2.2.2012.

<sup>30</sup> BPjM, Decision No. 6069 of 2.7.2015.

<sup>31</sup> USK Ruling 40402/15.

<sup>32</sup> BPjM, Decision No. 6126 of 6.10.2016.

<sup>33</sup> USK Ruling 42432/16.

<sup>34</sup> USK Ruling 44238/17.

<sup>35</sup> USK Ruling 45516/18.

<sup>36</sup> BPjM, Decision No. 6252 of 6.10.2018.

<sup>37</sup> USK Ruling 46101/19.

<sup>38</sup> So for instance presumably the uncut version of „Post Scriptum: The Bloody Seventh“ (2018).

<sup>39</sup> BPjM, Decision No. 13349 (V) of 13.3.2018.

<sup>40</sup> USK Ruling 46311/19.

<sup>41</sup> So probably „Dying Light“.

<sup>42</sup> Cf. BPjM, Decision No. 6305 of 4.3.2020.

<sup>43</sup> The content regulation of (tele)media is part of the cultural sovereignty and therefore competence of the German federal states according to Art. 70 GG, cf. appropriately BT-Drs. 16/3078, 14 (Bundestag printed paper; Uhle, in: Maunz/Dürig, German Constitution (GG), 89th Supplement October 2019, Art. 70 marginal no. 113; Gersdorf, MMR 2017, 439 (441); on telemedia under the constitutional broadcasting concept cf. Held, in: Binder/Vesting (footnote 3 above), RStV Sec. 54 marginal no. 12.

<sup>44</sup> Jugendschutzprogramm of the JusProg e.V., approved by the Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM) as version 8.1.9 on 2.3.2017, extended as version 8.3.1 on 1.3.2019.

<sup>45</sup> The mabb is responsible for the Berlin-based FSM, Sec. 19 para. 4 sentence 2 JMStV. The respective state media authority, here the mabb, makes its decisions „via the KJM“, Sec. 19 para. 4 sentence 1 JMStV. This means that the KJM is responsible for the content of the decision but that the mabb formally acts as the issuing authority.

<sup>46</sup> Notification of the mabb of 16.5.2019 – 87/2019.

<sup>47</sup> Notification of the mabb of 16.5.2019 – 87/2019, p. 3 et seq. as well as regarding the JusProg-procedure see in this supplement the article by Hilgert/Sümmermann, supplement 8/2020, 56.

The *Berlin Administrative Court (Verwaltungsgericht – VG)* in turn, considered the *KJM's* evaluation in summary proceedings to be unlawful and restored the suspensive effect of the *FSM's* appeal against the *KJM's* decision.<sup>48</sup> Until a final judgement is issued, it is likely that there have been considerable further developments in this regard; an updated version of JusProg was already published at the end of September 2019 which is intended to respond to the *KJM's* criticism.<sup>49</sup>

In addition to third-party systems such as JusProg, the JMStV also stipulates that providers can meet youth protection law requirements by using their own systems, Sec. 11 para. alt. 2 JMStV.<sup>50</sup> This applies both to providers of hardware products and to online gaming platforms. One example of this is the acknowledgement of the youth protection software of Nintendo Switch by the *USK.online*.

### III. The Uncertain Future of the Age Rating System

One of the problems of the German youth protection regime that urgently needs to be solved remains the distinction between games provided on data storage media and online games. Undoubtedly, this is no easy task given the structure of competences between the German federal government and the federal states.<sup>51</sup> The division of competences is dogmatically clean but leads to practical discrepancies which are less and less suitable for a modern and convergent youth protection regime. With regard to age ratings and age rating labels, this also leads to differences that are hardly comprehensible – although age ratings and age rating labels should be a basis for decision-making which is easy to understand.

#### 1. JuSchG 2020: So far no Convincing Draft

With the draft of a Second Youth Protection Amendment Act (2. JuSchGÄndG)<sup>52</sup>, the *Federal Ministry for Family Affairs, Senior Citizens, Women and Youth* tried to bring about harmonization in this area. This draft has been critically assessed by the industry<sup>53</sup>, as well as by the *USK*<sup>54</sup>, the State Media Authorities<sup>55</sup> and other bodies.<sup>56</sup>

The draft initially attempts to establish a uniform concept of media: „Media within the meaning of this Act are data storage media and telemedia“, Sec. 1 para. 1a Draft JuSchG. However, the regulatory harmony is immediately and considerably disturbed when, in some provisions, media „as telemedia“ or „as data storage media“ are subject to different regulations. Also with regard to legislative competence, content regulation of telemedia by the German federal government is hard to justify.<sup>57</sup> The fact that the German federal government allows the federal states to introduce further laws for telemedia beyond the scope of the JuSchG (Sec. 16 Draft JuSchG) is at best declaratory given the federal states' rights arising from Art. 30, 70 German Constitution (Grundgesetz – GG) which already allow them to do so.

#### 2. Criticism with Respect to the Age Rating and Labeling System

Apart from other critical aspects, the draft is not thoroughly elaborated, especially with regard to age rating: „Circumstances outside the media content“ are now supposed to be a factor in the assessment of developmental impairments, as well as risks to the „personal integrity of children and adolescents“ (which is not further defined by the draft), Sec. 10b sentence 2 and 3 Draft JuSchG.

This intends to transform (amongst others) age rating into a regulatory bell jar which is put over a thematic variety of potential risks – ranging from data protection and the purchase of

games by minors to addiction, cyberbullying and cybergrooming – without serving the actual purpose of age rating and labeling.

This creates a cloak of (pretended) legislative coherence under which the problems persist and are tackled with the wrong measures. Addiction, cyberbullying and cybergrooming are undoubtedly relevant and require action. They are, however, wrongly addressed in the draft when they are taken into account in age ratings. There are also far better tools for fighting uncontrolled gaming than giving attractive games a high age rating. In particular, technical control systems could enable a modern and focused protection of minors. The draft also completely lacks attention to systems that already exist outside Germany, such as the US-American COPPA.<sup>58</sup> The adaptation of an established system would certainly be smarter than the complete devaluation of existing age rating systems.

For instance, communication risks<sup>59</sup>, which the draft seeks to cover, are not a suitable criterion for age rating as they do not allow for a statement about the risks of a game's content. Even the pretended protection against purchase risks for minors lacks any necessity: Purchases by minors are clearly and extensively regulated by the German Civil Code (Bürgerliches Gesetzbuch – BGB) in favor of minors. There is no need to make them a subject of age rating but to general civil law which also provides tried and tested mechanisms (flanked by the German Act on Unfair Competition, Gesetz gegen den unlauteren Wettbewerb – UWG).

Data protection is subject of the sufficiently complex GDPR and the various requirements resulting of its provisions (which are particularly strict when the persons concerned are minors) but not a question of the age rating of a video game.

The assessment of a game based on the characteristics of the distribution platform, which the draft also seeks to include, could even lead to a situation where an identical game could be given different age ratings on different platforms, even though there are no differences in the game content. The function of age ratings and age rating labels as a means of orientation would be taken completely ad absurdum.

Not to forget: The primacy of parental education and care still prevails over all legislative youth protection measures. The legislator cannot transfer this to third parties without reflection – and

<sup>48</sup> *Administrative Court Berlin* Decision of 28.8.2019 – VG 27 L 164.19.

<sup>49</sup> JusProg is now said to include mobile operating systems like Google Android and Apple iOS, available at: <https://www.jugendschutzprogramm.de/2019/10/09/jusprog-fuer-android-ios-und-fuer-netzwerkbetreiber/>; furthermore JusProg is to have the so-called “BPjM module” now which enables the filtering of the telemedia indexed by the BPjM (list parts C and D).

<sup>50</sup> In detail *Schwidessen*, CR 2016, 548 (554).

<sup>51</sup> The German federal government is only responsible for the economic regulation of the information and communication sector (TMG/TKG), cf. *Martini*, in: *Gersdorf/Paal, BeckOK InfoMedienR*, 27th ed. from 1.8.2019, TMG Sec. 1 marginal no. 1; accordingly, Sec. 1 para. 4 TMG stipulates that the TMG does not regulate the content of telemedia.

<sup>52</sup> Instructively *Hilgert/Sümmerrmann*, MMR 2020, 301.

<sup>53</sup> Statement of the *game – Association of the German Games Industry* dated 28.2.2020.

<sup>54</sup> *USK* statement of 28.2.2020.

<sup>55</sup> Statement of the State Media Authorities of 6.3.2020, cf. also the resolution of the *Conference of Committee Chairmen of the State Media Authorities* (GVK) of 17.3.2020.

<sup>56</sup> Cf. statement of *eco – Association of the German Internet Industry* of 2.3.2020, statement of *bitkom – Association for Information Technology, Telecommunications and New Media* of 28.2.2020, position paper of *VAUNET – Association of Private Media* of 28.2.2020.

<sup>57</sup> Accordingly, statement of the State Media Authorities of 6.3.2020, p. 2 et seq.  
<sup>58</sup> Children's Online Privacy Protection Act, 15 U.S.C. Sec. 6501-6506 of 21.10.1998.

<sup>59</sup> See *Bodensiek*, supplement 8/2020, 53 – in this supplement.

at the same time confront the guardians with labels referring to age ratings which upstage the content dimension of the games and blur it beyond recognition with irrelevant considerations.

On the other hand, it could be much more purposeful to label games with symbols indicating „the main reasons for the age rating“ and the „potential impairment“ of minors („descriptive symbols“ or „descriptors“), as provided for in Sec. 14 para. 2a Draft JuSchG. These may be supplemented by additional information on possible interaction risks. However, the content-related assessment, which is indicated by the age rating and the corresponding label, must not be distorted by additional aspects which are unrelated to the content. The *IARC*-system, which was co-founded by the *USK*, has already been implementing this approach at international level for years.

All in all, the planned changes for age rating and the corresponding labeling – apart from the descriptors – would have no advantages: The ruling practice would neither become more appropriate if it had to refer to third, non-contentual circumstances. Neither would such age rating and labeling provide better guidance if it included a large number of aspects which disguise the risks or benefits that are originally (i.e. in terms of content) included in the respective game. If a chat function in a football simulation led to an age rating of „16+“ and in-game purchases then made the game appear so „dangerous“ overall that it would have to be rated „18+“, this would do a disservice to effective and comprehensible youth protection.

#### IV. Conclusion

The ruling practice of the *USK* and *BPjM* has developed continuously over many years and many decisions. It has become more liberal in some ways but has always been able to dynamically take up new phenomena. The applicable laws for the protection of minors provide a reliable framework which allows the ruling practice for the adaptation to media and social developments at the same time. Age ratings and the corresponding labels have thus become a reliable indicator for the respective gaming reality. They enable to easily and reliably assess the content-related

risks of games. The legislator is thus called upon not to ignore these proven mechanisms in its amendments to the JuSchG. The function of age ratings and age rating labels as a means of orientation must be designed to be future-proof – and should not be devaluated.

#### For a quick read ...

- The applicable legal framework for age rating is specified in the *USK*'s and *BPjM*'s ruling practice.
- The ruling practice and the legal framework provide a strict but reliable framework which also provides flexibility for further developments. After some initial errors and confusion, the German ruling practice has in many respects become the universal gold standard.
- The *USK*'s and *BPjM*'s ruling practice has become more differentiated in recent years, taking into account the changing media landscape and new phenomena.
- The well-known age rating labels are tried and tested, easy to understand and provide a simple, reliable orientation for the assessment of game content.
- The additional, rather diffuse criteria for age rating which the draft JuSchG provides for threaten to dilute and ultimately devalue the age ratings' and age rating labels' function as a source of orientation.



**Dr. Andreas Lober**  
is Attorney and Partner at Beiten Burkhardt in Frankfurt/M., Germany.



**Dr. Florian Jäkel-Gottmann**  
is Attorney at Beiten Burkhardt in Frankfurt/M., Germany.

CHRISTIAN RAUDA

# Government Protection for Minors Using Apps and Parallel App-Stores Rules

Protection of minors under the German Interstate Agreement on the Protection of Minors in the Media versus the Google and Apple Policies for App Publishers

Self-Regulation

In the absence of „international laws for the protection of minors“, developers and publishers of apps are obligated to comply with the laws for the protection of minors in all countries in which their apps are available. In addition to national laws for the protection of minors, however, parallel sets of rules have been developed by operators of App-Stores, in particular the Apple-App-Store and the Google-Play-Store (hereinafter „the Stores“). The Stores autonomously decide whether or not to include apps in their portfolios and whether or not to distribute

those apps. App developers have no right to be included in the catalog of a Store.

This article compares the laws for the protection of minors currently in effect in Germany (see sec. I.), including the draft bill amending the Act on the Protection of Minors that is currently under discussion (see sec. II.), with the policies and guidelines that the Stores have established (see sec. III.).

reading time: 18 minutes

## I. Relevant Laws for the Protection of Minors

The protection of minors is regulated at the federal level by the German Act on the Protection of Minors (Jugendschutzgesetz – JuSchG). The JuSchG regulates the handling of physical media (§ 1 para. 2 JuSchG) as well as of games distributed online that are simultaneously available on physical media (§ 1 para. 2 sentence 2 JuSchG). In its current version the JuSchG includes no provisions on apps. For it is a characteristic feature of apps that they are not physically available for purchase, but rather are distributed exclusively in digital form on online platforms, e.g. by the Stores. While the JuSchG is not relevant to apps, the German Interstate Treaty on the Protection of Minors in the Media (Jugendmedienschutz-Staatsvertrag – JMStV) includes provisions regulating mobile apps.

### 1. Statutory provisions and practices for the protection of minors

The JMStV was created by the German states. § 5 (1) JMStV stipulates that providers must ensure that, normally, children and adolescents will not use content that may impair their development. Access does not have to be rendered completely impossible. Rather, as the word „normally“ indicates, it is sufficient if safeguards generally prevent access.<sup>1</sup> This provision is aimed at providers of telemedia within the meaning of § 3 no. 2 JMStV. According to the broad definition of providers, this includes content providers, i.e., developers and publishers of apps, but also App-Stores functioning as distribution platforms. Due to their influence on content offered on their platforms, App-Stores are on the borderline between host and content provider.<sup>2</sup> According to § 5 (3) No. 2 JMStV, a provider can comply with the obligation under § 5 (1) in particular by making content available only at times when children or adolescents of the relevant age group normally won't use that content. However, this is not a practical measure in the case of apps or other telemedia content that are available for retrieval on demand, since these are available around the clock, for example in the Stores.

Possible safeguards however include technical or other means within the meaning of § 5 (3) no. 1 JMStV that make it impossible or considerably more difficult for children or adolescents of the relevant age group to access content. A provider can also label content with an age rating that can be read by suitable software program for the protection of minors within the meaning of § 11 JMStV. Such an age rating label should be interpreted as an instance of technical or other means<sup>3</sup> and not as official, pre-release approval that content is appropriate for a particular age group as is the case for physical media under § 14 JMStV. The JMStV in the Media rather requires that providers evaluate their content on their own responsibility and label content with an age rating within the meaning of § 5 (3) no. 1 JMStV, which, in conjunction with a recognized software program for the protection of minors, will establish the required safeguards. Under these requirements providers thus regulate themselves (regulated self-regulation). Providers may label content with their own age ratings, use the services of a self-regulatory organization, or use the self-classification system of a recognized self-regulatory organization.<sup>4</sup>

*Freiwillige Selbstkontrolle Unterhaltungssoftware GmbH (USK)* is such a self-regulatory organization. The USK is not only responsible for issuing age ratings for physical media in accordance with the JuSchG, but also maintains a business division that is recognized as a self-regulatory organization for broadcasting and telemedia within the meaning of § 19 JMStV (*USK.online*). *USK.online* has been recognized by the *Commis-*

*sion for the Protection of Minors in the Media (Kommission für Jugendschutz – KJM)*.<sup>5</sup> Today, 45 companies, including *Ubisoft*, *InnoGames*, *Activision Blizzard*, and *Electronic Arts*, are members of *USK.online*,<sup>6</sup> and its membership is growing. As a member of a self-regulatory organization, a company benefits not only from various services, but also, and in particular, from so-called „protection through prior recourse against the self-regulatory organization“ (Vorbefassungsschutz einer Selbstkontroll-einrichtung – § 20 (5) JMStV), which protects the company from regulatory actions.

*USK.online* assigns age ratings as a member of the *International Age Rating Coalition (IARC)*, an association of international institutions for the protection of minors assigning worldwide age ratings. To this end, providers fill out questionnaires to determine the appropriate age ratings for their content. On all platforms that have joined the *IARC*-system *USK*, *USK* age rating labels (0, 6, 12, 16, or 18 years and above, the visual design of which is based on the known labels), which can also be found on traditional physical media, are thus available in Germany.<sup>7</sup> This is due to the fact that for each country the *IARC*-system issues those age rating labels that comply with local laws and regulations for the protection of minors. The *USK* regularly reviews these ratings and, as a self-regulatory organization within the meaning of § 19 JMStV, therefore also monitors compliance with the Interstate Agreement on the Protection of Minors in the Media.

One advantage of the *IARC*-system is that it is standardized. It uses the age rating labels applicable in various countries around the world and thus also the known *USK* ratings for physical media in Germany.

However, the *USK* age ratings for physical media are „static“ ratings that are issued in advance on the basis of a test procedure by committees and with government participation (administrative act). The *IARC* ratings for the online sector, on the other hand, are based solely on questionnaires and thus on self-assessments by developers and are reviewed by the *USK* only ex post facto as part of ongoing quality assurance or following a complaint. The *USK* ratings that can, for example, be found in the *Google-Play-Store* are therefore not comparable to fixed *USK* age ratings for physical media, in terms of their issuance or legal nature. However, the content of *IARC* questionnaires is based on the longstanding practice of issuing age ratings for physical media. Thus, provided that the questionnaire is completed correctly, there are no significant differences in terms of the outcome. The similarity in design of the *USK/IARC* ratings is therefore also useful here, because parents and users understand what different age rating labels mean. A particular advantage of the *IARC*-system is that even subsequent changes to *IARC* ratings by the system, e.g. as a result of a review following a complaint or as part of ongoing quality assurance (testing by the *USK*), are possible without any problems.<sup>8</sup> This makes it possible to react promptly to any errors of or dynamic changes to offered content.

<sup>1</sup> Liesching, in: BeckOK JMStV, § 5 marginal no. 4.

<sup>2</sup> Hilgert/Sümmermann, K&R 2015, 543 (544).

<sup>3</sup> Geidner, in: Binder/Vesting, Beck'scher Komm. zum Rundfunkrecht, 4th ed., JMStV § 5 marginal no. 18.

<sup>4</sup> Geidner (see footnote 3 above).

<sup>5</sup> <https://usk.de/usk-online-erhaelt-unbefristete-verlaengerung-der-erkennung/>.

<sup>6</sup> <https://usk.de/fuer-unternehmen/service-angebot-der-usk/mitglieder/>.

<sup>7</sup> <https://usk.de/die-usk/arbeit-der-usk/kennzeichen-online/>.

<sup>8</sup> <https://www.bpb.de/apuz/294442/jugendmedienschutz-und-digitale-spiele?p=all>.

It should also be noted that platforms are not obligated to use the IARC-system. For example, the Google-Play-Store uses the IARC-system, whereas the Apple-App-Store does not.

As a result, apps in the Google-Play-Store bear the well-known USK ratings, but the same apps in the Apple-App-Store [feature] their own criteria and ratings chosen by *Apple*, which may differ from the USK ratings. For example, the WhatsApp Messenger app in the Google-Play-Store is classified by the IARC-system as „USK 0 years and above“.<sup>9</sup> *Apple* uses the label „12+“ for the same app.<sup>10</sup> What is more, according to its own terms of use, WhatsApp may only be used by users aged 16 or older in the EU and by users aged 13 or older outside the EU.<sup>11</sup> However, this is done for reasons of data privacy, not to protect against content that may impair development. There are therefore four different age ratings for the same app. Another example is the Netflix app, which *Apple* also labels with the „12+“ rating.<sup>12</sup> In contrast, the IARC-system has assigned the age rating „USK 16+“ to the app, which is also the rating used by the Google-Play-Store.<sup>13</sup> The Netflix terms of use, for their part, provide that you must be at least 18 years old to subscribe to the Netflix service.<sup>14</sup> However, the purpose of age limits is not only to protect minors, but also to safeguard data privacy.

Neither the IARC-system nor the system used by *Apple* is recognized as a software program for the protection of minors within the meaning of § 11 JMStV. The *KJM*, which verifies the suitability of software for the protection of minors, has so far only recognized the software programs for the protection of minors used by Nintendo and Netflix,<sup>15</sup> respectively, but not yet a system applicable to App-Stores.

However, despite the lack of recognition, both systems do in fact provide the required safeguards and give parents an opportunity to recognize content in App-Stores that may impair development and to prevent access to questionable content for the relevant age group by using tools provided by the Store operators, such as parental control software. As such, the systems qualify as suitable technical means within the meaning of § 5 (3) no. 1 JMStV, even though there is no recognized software program for the protection of minors.<sup>16</sup>

Compliance with § 5 para. 1 JMStV can also be ensured by means of proprietary, non-recognized software program for the protection of minors that provides the required safeguards. All that is required are technical or other means that satisfy the substantive requirements for recognition under § 11 para. 3 JMStV as well as or better than a recognized software program for the protection of minors.<sup>17</sup> By law, recognition requires, above all, that a software program for the protection of minors allows access to telemedia differentiated by age group and offers state-of-the-art recognition performance (reading of age ratings). In addition, its design must be user-friendly and it must be usable autonomously by users (§ 11 para. 1 JMStV). Since both *Apple* and *Google* provide parents with technical tools to hide apps that are unsuitable for their children by selecting the appropriate

settings on mobile devices, the recognition criteria in connection with the age rating systems are satisfied. In addition, these filter settings are factory-installed by the Stores, which are closed distribution platforms, contributing to a high level of protection.<sup>18</sup>

This is also demonstrated by a comparison with *Nintendo's* system for the protection of minors that has been recognized by *USK.online*. The system enables parents to select age-appropriate access to games and block games and console features that may impair development. Thanks to the labelling systems and parental control settings for mobile devices, the level of protection offered by *Google* and *Apple* is no less than that offered by *Nintendo*.

While the measures taken by the Stores are lawful and sufficient, they entail that the various age rating labels are not standardized. Since the installation and configuration of software programs for the protection of minor is the responsibility of legal guardians,<sup>19</sup> the providers are in compliance with the requirements of the JMStV thanks to their self-labelling of apps, whether the IARC-system or the *Apple* system is used. It is the responsibility of parents to program devices on which their children use the apps in such a way that they can only see and/or hear content suitable for their age group. The JMStV does not require any more than that and thus falls short of the requirements set out in the JuSchG for physical media.

## 2. Effects of the new draft bill amending the Act on the Protection of Minors

In order to ensure that apps, too, will be covered by the JuSchG in the future, a draft bill amending the JuSchG was published in 2020 (JuSchG-E; hereinafter the „Draft Bill“). The Draft Bill introduces new regulations on age ratings and labelling obligations, particularly in the new §§ 10b and 14a. Under the new provisions, the JuSchG would no longer apply only to physical media, but, in alignment with the digital age, would also set forth binding rules for online content (beyond the scenario of the online version of a game that is otherwise distributed on physical media) and thus also, and in particular, for apps.

The Draft Bill also aims to regulate not only known risks for the protection of minors related to the content of apps, but also risks arising in connection with the opportunities of young users to interact with apps. This could result in stricter rules protecting minors from apps that are harmless in terms of their content, but contain other, interaction-related risks, e.g. cost risks or the potential for addiction.

### a) Obligation to label and substantiate age ratings also for apps

As noted above, the JuSchG does not yet provide for an obligation to label apps that are exclusively downloadable and cannot be purchased on data carriers with age ratings.

This would change under the new Draft Bill, as the new § 14a Draft Bill extends the obligation to label physical media to digital film and game platforms and thus also includes platforms such as the Apple-App-Store and the Google-Play-Store. In addition, § 14 para. 2a Draft Bill would require the reasons supporting age ratings to be stated. According to the legislative rationale, special reference must be made, in particular, to the circumstances to be considered under § 10b Draft Bill.<sup>20</sup> In the case of apps, it would therefore be necessary to point out circumstances unrelated to their content, such as the promotion of excessive use and the availability of unlimited purchase opportunities for digital products. In some cases this is already being implemented today, for example, when the Apple-App-Store indicates whether an app allows for in-app purchases. In-App purchases of digi-

<sup>9</sup> <https://play.google.com/store/apps/details?id=com.whatsapp&hl=de>.

<sup>10</sup> <https://apps.apple.com/de/app/whatsapp-messenger/id310633997>.

<sup>11</sup> <https://www.whatsapp.com/legal?eea=1&lang=de#terms-of-service>.

<sup>12</sup> <https://apps.apple.com/de/app/netflix/id363590051>.

<sup>13</sup> <https://play.google.com/store/apps/details?id=com.netflix.mediaclient&hl=de>.

.

<sup>14</sup> <https://help.netflix.com/legal/termsofuse>.

<sup>15</sup> <https://www.kjm-online.de/aufsicht/technischer-jugendmedienschutz/entwicklungsberechtigende-angebote/jugendschutzprogramm/>.

<sup>16</sup> Concurring, *Hilgert/Sümmermann*, K&R 2015, 543 (548).

<sup>17</sup> *Hilgert/Sümmermann*, K&R 2015, 543 (545).

<sup>18</sup> *Hilgert/Sümmermann*, K&R 2015, 543 (548).

<sup>19</sup> *Hilgert/Sümmermann*, K&R 2015, 543 (545).

<sup>20</sup> Draft Bill, p. 46.

tal products often account for a large portion of the total sales of a gaming app.

### b) Apps that may impair development require age ratings

In addition to extending the labelling obligation, the Draft Bill focuses primarily on explaining the term „developmental impairment“, which is now controlling for age ratings and is also found in § 5 JMStV. Sec. 14 (1) Draft Bill provides that films and games may not be rated as appropriate for children and adolescents if they may impair development of the respective age group. The term „developmental impairment“ is explained in more detail in § 10b Draft Bill.

For mobile apps, § 10b sentence 2 Draft Bill is particularly significant in this regard because it provides that when assessing developmental impairment, circumstances unrelated to the content of media must also be taken into account if they are a permanent feature of such media.

According to the legislative rationale for the Draft Bill, various criteria must be taken into account, such as the promotion of excessive use, the availability of unlimited purchase opportunities for digital products, or the inappropriate transfer of personal data to third parties during use.<sup>21</sup>

It remains to be seen at what point usage is considered excessive and whether the availability of unlimited purchase opportunities is present for every app that offers repeatable in-app purchases. In the opinion of the author, the mere possibility of repeated purchases, in and of itself, cannot be sufficient for promoting excessive use.

The legislative rationale expressly states that the criteria are designed to take into account for age ratings simulated gambling, quasi-gambling elements such as „loot boxes,“ or inducements to disclose personal data. According to the Draft Bill, gaming apps that satisfy these criteria would in the future increasingly be considered to impair development and would therefore require age ratings even if their content were otherwise unobjectionable. Quasi-gambling elements are essential components of some mobile games. In some gaming apps, for example, so-called „loot boxes“<sup>22</sup>, i.e. virtual boxes, can not only be freely collected in the game, but also purchased. As a general rule, these boxes contain virtual items of varying degrees of rarity, and their content ultimately depends on chance and is only revealed after the purchase. In order to obtain a particularly rare and therefore valuable item, a player must therefore be lucky. As a result, gaming apps with loot boxes include elements that are, in some cases, classified as quasi-gambling.<sup>23</sup> If a mobile app allows unrestricted in-app purchases of loot boxes, this may have to be taken into account for purposes of assessing the risk of developmental impairment in accordance with § 10b sentence 2 Draft Bill. This would probably be different if at least the value of the content were known before a loot box is purchased.

Some apps can only be used after opening an account or providing an email address. This entails the disclosure of personal data, which is another circumstance that must be taken into account when assessing the risk of impaired development. Finally, the Draft Bill amending the JMStV provides that, in addition to content-related risks, communication-related and contact-related risks, mechanisms promoting excessive media use, and economic risks must also be taken into consideration when assessing the risk of developmental impairment.

The example of the app „Candy Crush Saga“ aptly illustrates the effects of § 10b sentence 2 Draft Bill. The app allows a wheel of fortune to be turned once a day free of charge. Con-

ceivably, this simulates gambling. It is true that users are rewarded by the wheel of fortune function for using the app on a daily basis. For the promotion of excessive use, however, which must be taken into account when assessing the risk developmental impairment, this is not sufficient (at least not on by itself). If one took the opposite view, a risk of developmental impairment could be found to exist according to the new criteria, in particular when considering the numerous options for in-app purchases offered by the app. If so, a higher age rating would be required for this puzzle app, which is harmless in terms of its content. For comparison: The app is currently rated „USK 0 years and above“ in the Google-Play-Store<sup>24</sup> and „4+“ in the Apple-App-Store<sup>25</sup>, i.e., it carries the lowest age rating in each case.

## II. Relevant Policies of Google and Apple

*Google* and *Apple* are the two largest operators of platforms for apps, with the Google-Play-Store and Apple-App-Store, respectively. They have fixed sets of rules for developers who want to publish apps on their platforms, and they verify compliance. For example, *Google* has policies on various topics, such as intellectual property, data privacy, monetization, and advertising.<sup>26</sup> For the protection of minors, *Google* has policies for family-friendly content and the Designed for Families program.<sup>27</sup> *Apple*, for its part, provides the so-called App-Store Review Policies, which must be followed by developers.<sup>28</sup> These include requirements for the security, performance, and design of apps, as well as commercial and legal requirements. *Apple* does not have its own policy for the protection of minors.

### 1. Google

When it comes to the question of what requirements an app must meet in terms of protecting minors, *Google* differentiates by target group. Developers make this decision independently by specifying the target age group. *Google* offers six possible target age groups: up to five years, six to eight years, nine to twelve years, 13 to 15 years, 16 to 17 years, and 18 years and older.<sup>29</sup>

Apps designed primarily for children under the age of 13 must participate in the Designed for Families program and comply with the Google Play policies for family-friendly content. The policies for family-friendly content impose a number of requirements on developers, and failure to satisfy them may result in removal or suspension of an app. First and foremost, the content of an app must be suitable for children, which is not the case for glorified alcohol consumption, depiction of violence, or dating apps, for example. Apps featuring real or simulated gambling also are not suitable for children. This includes casino or online poker apps, but loot boxes are problematic, as well, because of their quasi-gambling features. Furthermore, the display of advertising is strictly regulated. For example, advertising may only be displayed via Google-Play-certified advertising networks and may neither be interest-based nor include remarketing. The content of advertising, too, must be suitable for children. These

<sup>21</sup> Draft Bill, p. 45.

<sup>22</sup> For further details, see *Nickel/Feuerhake/Schelinski*, MMR 2018, 586.

<sup>23</sup> For a legal analysis of loot boxes, see *Nickel/Feuerhake/Schelinski*, MMR 2018, 586, and *Schwiddessen*, CR 2019, 444 et seq. and CR 2018, 512 et seq.

<sup>24</sup> <https://play.google.com/store/apps/details?id=com.king.candycrushsaga&hl=de>.

<sup>25</sup> <https://apps.apple.com/de/app/candy-crush-saga/id553834731>.

<sup>26</sup> Policy overview available at: <https://play.google.com/intl/de/about/developer-content-policy/>.

<sup>27</sup> <https://play.google.com/about/families/>.

<sup>28</sup> <https://developer.apple.com/app-store/review/policies/>.

<sup>29</sup> <https://support.google.com/googleplay/android-developer/answer/9285070?hl=de>.



rules impose considerable economic restraints on app developers.

The Designed for Families program imposes additional suitability requirements. To participate in the program, apps must be rated „suitable for age 6 or 10 and up“ by the *Entertainment Software Rating Board (ESRB)* in the U.S. In addition, interactive elements in the app must be disclosed in detail, and no permissions for location tracking may be requested.

While the policies for family-friendly content must be followed if children are among the target groups, the Designed for Families program applies to apps that are designed specifically for children, such as educational games. Apps participating in this program appear in their own family category<sup>30</sup> in the Google-Play-Store. Apps that are suitable for all users, including children, „only“ have to comply with the policies for family-friendly content. A special case is the situation where an app is not intended for children, i.e., it is intended to appeal to an adult target group, yet unintentionally does appeal to children. This is the case, for example, if the app's store entry contains animated characters or other features that appeal to children and may therefore attract children. Such apps are flagged in the store with a banner reading „Not designed for children“, which must be confirmed by the developer. This is not a binding age rating, but only indicates the target group for which an app is intended by the developer.

Overall, *Google* thus relies on self-regulation by app developers, requiring them to specify the target age group for each app. However, *Google* also verifies – at least randomly – whether the specified target group is correct and whether the app is in compliance with all Google Play policies.

To prevent children from viewing apps that are not intended for their age group, an age limit can be set in the parental control panel of the Google-Play-Store, which allows parents to choose the minimum USK age rating at which apps can be viewed and downloaded.

## 2. Apple

*Apple's* App-Store features an app category called „KIDS“ where apps suitable for children can be found. The KIDS category divides apps into three categories (up to five years old, six to eight years old, and nine to eleven years old), and developers decide for which of these age groups their apps are suitable. In addition, an age rating appears on the product page of each app, which is however not based on the USK age groups.

*Apple* has no separate policy on the protection of minors. But in this case too, every app is reviewed before it is released. *Apple* provides developers with guidelines based upon which apps are reviewed. These are the so-called „Apple-Store Review Guidelines“, which, however, are less detailed than *Google's* policies.

According to the Apple Guidelines, apps in the KIDS category may not contain links that take children out of the app, provide them with purchase opportunities, or feature other distractions. Exceptions apply if an app contains so-called „parental gates“. <sup>31</sup> These are barriers that prevent continued use of an app without parental action (e.g. answering a question). However, the policies expressly state that this does not replace parental consent, e.g. to data processing under the General Data Protection Regulation (GDPR). <sup>32</sup>

<sup>30</sup> <https://play.google.com/store/apps/category/FAMILY>.

<sup>31</sup> <https://developer.apple.com/app-store/parental-gates/>.

<sup>32</sup> For further details, see *Rauda*, MMR 2017, 15.

<sup>33</sup> <https://support.apple.com/de-de/HT201304#prevent-purchases>.

The policies also specify that metadata, such as the description or screenshots of an app, must be appropriate for all age groups, even if the app itself has a higher age rating. Furthermore, metadata may only contain descriptions such as „for children“ if the app is actually approved for the app category KIDS.

With regard to data privacy, the Guidelines state that apps for children may not send personal data such as name, address, location, photos, videos, drawings, or chats to third parties. In addition, apps in the KIDS category should use no advertising or analytics tools from third parties. However, *Apple* may allow exceptions in limited cases where analytics services do not collect or transfer information revealing the identity of children. Contextual advertising from third parties is also permitted to a limited extent, if it has been reviewed by humans to determine its suitability.

*Apple* provides parents with a variety of tools for the protection of minors that allow them to control and limit their children's use of apps. In addition to limiting screen time, parents can prevent purchases from the App-Store and block content with certain age ratings. <sup>33</sup>

## 3. Consequences of laws, policies, and guidelines for developers

For developers who want to publish their apps the policies and guidelines of *Google* and *Apple* are of threshold importance. They must be followed, as the release of their apps depends on them. In contrast, the provisions of the JMStV and the JuSchG are generally less restrictive for developers.

This is illustrated by the example of *Google*, where a failure to satisfy requirements of the policies for family-friendly content may result in the removal or blocking of an app. *Google* also reserves the right to reject or remove apps for the Designed for Families program at its sole discretion. In contrast, the abstract approval model of the JMStV and the Draft Bill is primarily not directed at developers, but rather at platform operators, i.e. *Apple* and *Google*. However, since these global companies must comply not only with German laws and regulations, they have, for the sake of uniformity, established their own policies and systems for the protection of minors. This raises the question of how effective national laws and regulations for the protection of minors are. If the Draft Bill amending the JuSchG became law, this would be a departure from the self-assessment by developers. However, the strict rules of *Google* and *Apple* show just how well the system of self-regulation works. Even if apps were only allowed to be sold with age ratings, it would ultimately be up to parents again to prevent access. Parents are already able to do so today by choosing appropriate settings on devices that prevent children from viewing age-inappropriate content.

### For a quick read ...

- Neither the IARC-system nor the system used by Apple is a recognized software program for the protection of minors within the meaning of § 11 JMStV. Nevertheless, despite the lack of recognition, both systems do in fact provide the required safeguards. As such, they constitute suitable technical means within the meaning of § 5 para. 3 no. 1 JMStV.
- The policies and guidelines for the protection of minors issued by Google and Apple, respectively, do not coincide with the legal framework for the protection of minors.
- The abstract approval model of the JMStV and the Draft Bill is primarily aimed not at developers, but at platform operators, such as Apple and Google. For the sake of uniformity, these globally operating companies have established their own policies, guidelines, and systems to protect minors.

■ For developers, the policies and guidelines of Google and Apple are just as relevant as laws and regulations, as the former determine whether an app will be offered in the Stores in the first place. In contrast, the provisions of the JMStV and the JuSchG are generally less restrictive for developers.



**Dr Christian Rauda**

is board-certified specialist for information technology law, board-certified specialist for copyright and media law, board-certified specialist for intellectual property and partner of the media law firm GRAEF Rechtsanwälte (Hamburg/Berlin). He lectures at Hamburg Media School, Bucerius Law School and HTW Berlin.

The author thanks Mr. Adrian Jungblut (trainee lawyer) and Mr. Lorenzo von Petersdorff (Deputy Managing Director & Legal Counsel of Unterhaltungssoftware Selbstkontroller) for their helpful comments.

MARC LIESCHING

# National games regulation for the EU area

## Observance of the country-of-origin principle of the E-Commerce Directive within the framework of German regulation of online games

Country of Origin Principle

In the wake of the regulation of social networks by the Network Enforcement Act (NetzDG), new legislative initiatives are increasingly making a prominent claim to be an internationally comprehensive media regulation, which is intended in particular to cover providers in other EU member states. In addition to the NetzDG, this concerns above all the new provisions of the Interstate Media Treaty (MStV), the amended Interstate Treaty on the Protection of Minors from harmful Media (JMStV) and

the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ), draft amendment to the Youth Protection Act (JuSchG). The regulation also affects the games sector in a special way. The article provides an overview of restrictions and practical requirements, in particular on the basis of the country of origin principle, while also delimiting the areas of application of the E-Commerce Directive and the AVMS Directive with regard to online games.

reading time: 19 minutes

## I. Introduction

The distribution and use of games today takes place largely via telemedia on a variety of different distribution platforms and streaming services.<sup>1</sup> Due to the global nature of Internet technology, media regulation at national level is therefore increasingly becoming a challenge in the games sector as well. This is because the acceptance of standards that only apply in Germany dwindles the more market-relevant competitors based in other (EU) states appear to enjoy market advantages due to more liberal regulations or less strict supervisory practice. Against this background, the current efforts of German federal and state legislators to include, if possible, providers abroad in the scope of standardization and executive supervisory practice are understandable at first glance.

However, as a rule, such national regulatory appetites hardly take into account the global economic and social perspective. The extension of the scope of application of national standards to internationally oriented games providers inevitably leads to an accumulation of legal and liability risks, if as a consequence in the EU alone more than two dozen different media laws in the individual receiving states had to be observed. The compliance effort for online games providers with players all over Europe would grow gigantically and would probably also have an impact on the (economically and tax-politically significant) choice of location of many companies.

It was precisely against this background that the *EU Commission* decided early on with the E-Commerce Directive (ECD)<sup>2</sup> to adopt binding rules for „services in the information society“ in general for the application of only one national legal system, namely that of the country in which the company has its registered of-

fice.<sup>3</sup> Despite the outdated legal construction, this country of origin principle was largely adopted or similarly structured in the more modern – or at least more recent – Audiovisual Media Services Directive (AVMSD)<sup>4</sup> from the tradition of television regulation. And also in view of the current discussions in connection with the updating of the EU internet regulation in a Digital Services Act (DSA), it<sup>5</sup> is not necessarily to be expected that a legally secure country of origin principle for the EU business location will be recklessly abandoned in the post-Corona era in favour of national states under media regulatory law with 27 media supervisory authorities and a multitude of uncoordinated restrictive measures against games providers.

Due to their special significance for the online games market as well, the requirements of the country of origin principle under the ECD and the AVMSD, which have already been described in

<sup>1</sup> Cf. also *Ewald*, supplement MMR 8/2019, 1.

<sup>2</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8.6.2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), hereinafter referred to as ECD (OJ 2000 L 178, p. 1).

<sup>3</sup> See also *ECJ* judgment of 25.10.2011 – C-509/09 and C-161/10, marginal no. 66: “As regards the regulation of Art. 3 of the Directive, it must be noted that the subjection of electronic commerce services to the law of the Member State in which their provider is established under Art. 3(1) would not make it possible to fully ensure the free movement of these services if the service providers in the host Member State were ultimately required to comply with stricter requirements than those in their Member State of establishment”.

<sup>4</sup> Audiovisual Media Services Directive – AVMSD of 10.3.2010, OJ L 95, p. 1, ber. OJ L 263, p. 15.

<sup>5</sup> See *Madiega*, Reform of the EU liability regime for online intermediaries – Background on the forthcoming digital services act, EPRS (European Parliamentary Research Service), PE 649.404 – May 2020.

more detail,<sup>6</sup> will be illustrated once again in the following (see sec. II. below), before the concrete application of the country of origin principle in the games sector, especially with regard to the media regulatory law currently undergoing reform – NetzDG, MStV, JMStV, JuSchG – will be considered (see sec. III. below).

## II. Country of origin principle according to ECD and AVMSD

### 1. Overview

For the reasons already described in the introduction, media regulation in the EU generally concentrates substantive law on only one Member State, namely the country of establishment of the media provider. This principle does not differ in the ECD and the AVMSD, so that it can be generally stated for the area coordinated by the Directives: In principle, the law of the distributing state applies, not the receiving state. Measures by the supervisory authorities of the receiving state are also excluded in principle. Exceptions are only possible under very strict material and procedural conditions. In the two relevant EU standards of the ECD and the AVMSD, this is set out in detail as follows.

### 2. Specifications according to Art. 3 ECD

#### a) Prohibition of receiving State restrictions

Art. 3 (2) ECD prohibits EU Member States from restricting the free movement of „information society services“ from another Member State for reasons falling within the coordinated field of the Directive. The *European Court of Justice (ECJ)* has confirmed that the country of origin principle enshrined therein does not

allow, subject to narrow exceptions,<sup>7</sup> „the provider of an electronic commerce service to be subject to stricter requirements than those laid down by the substantive law applicable in the Member State in which that provider is established“.<sup>8</sup>

#### b) Exceptions

##### Material derogation requirements

Measures by EU receiving states are only possible within the framework of the very narrow exceptions under Art. 3 (4) to (6) ECD only „with regard to a specific information society service“ and only for the pursuit of specific protection objectives such as „public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors“. In this context, the „specific information society service“ affected by the measures must „affect“ one of the protection objectives or present „a serious and grave risk of affecting these objectives“. Furthermore, the measures must also be proportionate to the protection objectives.<sup>9</sup>

In view of the wording, the prevailing opinion is initially based on the assumption that the exception provision only allows measures to be taken on a case-by-case basis, but not abstract general (legal) measures for a large number of services.<sup>10</sup> The *EU Commission* has also emphasised that the term „specific“ service is intended to make it clear that the member states may not take „general measures“ within the framework of Art. 3 (4) ECD, but only options are available to take measures against „one“ service provider „in individual cases“.<sup>11</sup>

The *ECJ* has also stated the case-by-case nature of possible receiving State measures against „a specific Information Society service“ by clarifying that „the restrictive measure in question“ must be specifically „necessary“ „in order to ensure the protection of public policy, public health or consumers“.<sup>12</sup> In addition, the specific service must „actually“ affect „the aims of the protection or present a serious and grave risk of affecting those aims“.<sup>13</sup> It hardly seems compatible with this case-law to justify abstract-generic measures such as legal restrictions against a large number of service providers and without considering the specific circumstances of the individual case under Art. 3 para. 4 ECD.<sup>14</sup>

##### Formal notification obligations

If, exceptionally, a receiving state wishes to take measures, e.g. against a games provider domiciled in another EU Member State, it must also observe consultation obligations. As a matter of principle, the EU member state in question must be requested to take measures itself in advance. Only if the country of domicile does not take any or only inadequate measures in response to this can the receiving country take action against the service in question. However, the *EU Commission* and the affected EU Member State must first be informed of the „intention“ to take such measures. According to Art. 3 para. 5, deviations from the consultations are possible in „urgent cases“, but in this case the *Commission* must be notified „as soon as possible“ and the reasons for the urgency must be stated, and the *Commission* must immediately carry out an examination of conformity with Union law (para. 6).

In its ruling of 19.12.2019, the *ECJ* confirmed the strict application of the aforementioned notification obligations.<sup>15</sup> In line with its case law on compliance with the notification procedure under Directive 2015/1535,<sup>16</sup> the *Court* emphasises that a breach of the formal (notification) requirements of Art. 3 (4) b) ECD leads to the inapplicability of the relevant receiving state regulations with regard to providers affected by measures in individual cases.<sup>17</sup>

<sup>6</sup> Liesching, Das Herkunftslandprinzip der E-Commerce-Richtlinie und seine Auswirkung auf die aktuelle Mediengesetzgebung in Deutschland, in: Schriftenreihe Medienrecht & Medientheorie, Bd. 1, 2020; ders., supplement MMR 6/2020.

<sup>7</sup> See also sec. II.2.b).

<sup>8</sup> ECJ judgment of 25.10.2011 – C-509/09 and C-161/10, marginal no. 67; with Note Brand, NJW 2012, 127 et seq.; in the legal literature it is pointed out that the ECJ has confirmed in this respect the restriction of national substantive law brought about by Art. 3 (1) and (2) ECD; see Weber, MMR 2012, 45 (49) et seq.

<sup>9</sup> With regard to the deviations within the framework of the German implementation in Sec. 3 TMG, cf. Liesching, in: Schriftenreihe Medienrecht & Medientheorie, Bd. 1 (see above footnote 6), p. 50 ff.

<sup>10</sup> Cf. Altenhain, in: MüKoStGB, 3rd ed. 2019, § 3 TMG marginal no. 52; Böse, in: Kindhäuser/Neumann/Paeffgen, StGB – Commentary, 5th ed. 2017, Before § 3 ff. StGB marginal no. 39; Eifert, in: Eifert/Gostomzyk, Netzwerkrecht, 2018, p. 9, 24; Feldmann, K&R 2017, 292 (296); Hain/Ferreau/Brings-Wiesen, K&R 2017, 433 f.; Handel, MMR 2017, 227 (230); Heckmann, Internetrecht, 5th ed. 2017, ch. 1 marginal no. 207; Hoven/Gersdorf, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 27th ed. 2019, § 1 NetzDG marginal no. 9; Liesching, MMR 2018, 26 (29 f.); see Spindler/Schmitz, TMG – Commentary, 2nd ed. 2019, § 1 NetzDG marginal no. 13 ff.; Marly, in: Grabitz/Hilf, Das Recht der Europäischen Union, 20th ed. 2009, Art. 3 ECD marginal no. 21 ff.; Müller-Broich, TMG – Commentary, 2012, § 3 marginal no. 21; Naskret, Das Verhältnis zwischen Herkunftslandprinzip und Internationalem Privatrecht in der Richtlinie zum elektronischen Geschäftsverkehr, 2003, p. 40; Nordmeier, in: Spindler/Schuster, Recht der elektronischen Medien, 4th ed. 2019, part 12 § 3 marginal no. 27 f.; Ohly, WRP 2006, 1401 (1405); Spindler, in: Spindler/Schmitz, TMG – Commentary, 2nd ed. 2019, Sec. 3 TMG marginal no. 55 ff.; ders., ZUM 2017, 473 (474 ff.); ders., K&R 2017, 533 (535 f.); Weller, in: Gersdorf/Paal, BeckOK InfoMedienR, 26th ed. 2019, § 3 TMG marginal no. 32; Wimmers/Heymann, AfP 2017, 93 (96 f.); see also VG Neustadt judgment of 16.12.2009 – 4 K 694/09 = BeckRS 2010, 45399 marginal no. 53.

<sup>11</sup> See Communication from the Commission to the Council, the European Parliament and the European Central Bank of 14.5.2003 on „The application of Article 3 (4) to (6) of the Directive on electronic commerce to financial services“, COM(2003) 259 final of 14.5.2003, p. 2 f.

<sup>12</sup> ECJ MMR 2020, 171 (174) marginal no. 84 – Airbnb Ireland.

<sup>13</sup> ECJ MMR 2020, 171 (174) marginal no. 84 – Airbnb Ireland.

<sup>14</sup> However, see e.g. below for NetzDG sec. III.2.a).

<sup>15</sup> ECJ MMR 2020, 171 (174) marginal no. 85 – Airbnb Ireland.

<sup>16</sup> Cf. ECJ judgment of 30.4.1996 – C-194/94, marginal no. 54 – CIA Security International.

<sup>17</sup> ECJ MMR 2020, 171 (174) marginal no. 88 et seq. – Airbnb Ireland.

### 3. Requirements according to Art. 3 AVMSD

#### a) Guarantee of free reception

The Union law rules for audiovisual media services<sup>18</sup> in Art. 3 AVMSD essentially follow the regulatory system of the country of origin principle according to Art. 3 ECD,<sup>19</sup> although the recitals and legal literature sometimes use the independent diction „broadcasting state“ or „broadcasting state principle“, which was originally limited to linear broadcasting.<sup>20</sup> According to Art. 3 (1) AVMSD, Member States shall „ensure freedom of reception and shall not restrict retransmission on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive“. The standard is the counterpart to the requirement in Art. 2 (1), according to which each Member State „shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the legal system applicable to audiovisual media services intended for the public in that Member State“.<sup>21</sup>

In addition, Art. 28a AVMSD contains special jurisdictional provisions for video sharing platform providers<sup>22</sup>, which of course also largely depend on the place of establishment of the provider in an EU Member State.

#### b) Exceptions

##### Temporary derogating measures (Art. 3 (2) to (6) AVMSD)

The exceptions to the country of origin principle, with some deviations, basically follow the system of the country of origin principle of the ECD already described, namely that (1.) measures of the receiving state are only possible in the case of certain enumerated violations and impairments of protected goods by the service provider and (2.) consultation obligations vis-à-vis the sending member state and the *EU Commission* must be observed.<sup>23</sup> Art. 3 (2) sentence 1 and (3) sentence 1 AVMSD grants the exceptional breach of the principle of the transmitting State by measures of the receiving State only „temporarily“, whereby Recital 37 explicitly refers to the corresponding terms and conditions of Art. 3 ECD with regard to possible exceptions.<sup>24</sup> Recital 43 reaffirms in this context that, without prejudice to the country of origin principle, the AVMSD allows Member States to take measures that restrict the freedom to provide television broadcasting services „only under the conditions and procedures laid down in this Directive“.

##### (Abusive) destination country orientation (Art. 4 paras. 2 to 5 AVMSD)

Under Art. 4 (3) 1 AVMSD, the receiving Member State may take appropriate measures against the media service provider established in another EU Member State only if it „(a) concludes that the results achieved through the application of paragraph 2 are not satisfactory and has submitted evidence that the media service provider concerned has established itself in the Member State under whose jurisdiction it is established in order to circumvent the stricter rules applicable in the fields coordinated by this Directive to which it would be subject if it were established in that Member State; the evidence must permit a reasonable identification of such circumvention and does not require proof of the media service provider’s intention to circumvent these stricter rules“. Furthermore, strict rules of consultation and cooperation between the member states (sending and receiving state concerned) with the involvement of the *EU Commission* must be observed, while respecting the „rights of defence of the media service provider concerned“.

The *EU Commission* has already dealt with the application of the narrow exceptions to the breakthrough of the broadcasting

state principle pursuant to Art. 4 (5) AVMSD on the occasion of regulatory bans on alcohol advertising imposed by Swedish authorities on two British broadcasters.<sup>25</sup> In the decision of 31.1.2018, the high requirements with regard to proof of abuse are emphasised in the sense that the establishment was precisely „for the purpose of circumventing stricter provisions in the notifying Member State“.

Furthermore, the *EU Commission* states that the Member State claiming the application of Art. 4 (4) AVMSD must „prove that the television broadcasters concerned have established themselves in the United Kingdom in order to circumvent the stricter Swedish provisions“. Conversely, „broadcasters should not be obliged to justify their choice of another Member State for establishment, at least in the absence of other compelling indications of such circumvention on their part“.<sup>26</sup> Only general or imprecise arguments of the Member State invoking the exception in Art. 4 (4) AVMSD cannot be used as evidence according to the decision of the *EU Commission*.<sup>27</sup>

### 4. Definition of the areas of application

Provisions on competition, particularly with regard to the country of origin principle regulated under Art. 3 ECD and the broadcasting state principle regulated under Art. 3 UCPD, are found in Art. 4 para. 7 AVMSD. According to its first sentence, the ECD applies first of all, unless the AVMSD „provides otherwise“. This applies in particular in cases where there is no conflict of application. This means, for example, that for information society services which do not constitute audiovisual media services within the meaning of Art. 1 (1) a) i) AVMSD (e.g. websites without a defined programme catalogue), only the provisions of the country of origin principle of Art. 3 ECD apply.

In the event of a conflict between provisions of the ECD on the one hand and the AVMSD on the other, Art. 4 (7) sentence 2 AVMSD states that the AVMSD is „authoritative“ unless otherwise provided for in the provisions of the ECD. This means in particular that for on-demand audiovisual media services within the meaning of Art. 1 (1) g) AVMSD which are also information society services within the meaning of Art. 2 a) ECD, the provisions of

<sup>18</sup> Cf. the definition of the legal term „audiovisual media service“ in Art. 1 (1) (a) (i) AVMSD; see also sec. III.1. below and *Jäger*, ZUM 2019, 477 (478 ff.).

<sup>19</sup> Cf. also *Gundel*, ZUM 2019, 131 (134): „based on the idea of the country of origin principle“.

<sup>20</sup> Cf. EC 36 AVMSD and *Gundel*, ZUM 2019, 121 (134).

<sup>21</sup> See also *Book/Assion*, in: *Binder/Vesting*, Beck’scher Kommentar zum Rundfunkrecht, 4th ed. 2018, § 51b marginal no. 20e ff.; furthermore *Bornemann*, ZUM 2018, 401 (403).

<sup>22</sup> Cf. the definition of „video-sharing platform service“ in Art. 1 (1) 1 aa) of the Services Directive, according to which the term includes „a service within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union where the principal purpose of the service, or a separable part thereof, or an essential function of the service is to provide broadcasts or user-generated video for which the video-sharing platform provider has no editorial responsibility, to be made available to the general public over electronic communications networks within the meaning of Art. 2 (a) of Directive 2002/21/EC for information, entertainment or education purposes, and the organisation of which is determined by the video sharing platform provider, including by automatic means or algorithms, in particular by display, tagging and sequencing“.

<sup>23</sup> Execution *Liesching*, in: *Schriftenreihe Medienrecht & Medientheorie*, Bd. 1 (see above footnote 6), p. 31 ff.

<sup>24</sup> EC 37: „Restrictions on the free provision of on-demand audiovisual media services should only be possible under conditions and procedures which are equivalent to those already established by Art. 3 (4), 5 and 6 of Directive 2000/31/EC“.

<sup>25</sup> European Commission Decision of 31.1.2018 on the incompatibility of measures notified by the Kingdom of Sweden pursuant to Art. 4 (5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services; COM(2018) 532 final of 31.1.2018.

<sup>26</sup> COM(2018) 532 final of 31.1.2018, para. 24.

<sup>27</sup> See COM(2018) 532 final of 31.1.2018, para. 26.

the broadcasting state principle pursuant to Art. 2 and 3 AVMSD are applicable and Art. 3 ECD is not applicable in this respect.

However, for video sharing platform services within the meaning of Art. 1 aa AVMSD, the country of origin principle pursuant to Art. 3 ECD applies due to the special application provision of Art. 28a (5) AVMSD. According to Art. 4 (7) AVMSD, this results in the following differentiation for the service-related application of the country of origin or country of transmission principle for telemedia under ECD and AVMSD:

Audiovisual media services (on demand)	Video sharing platform services	(Other) information society services
Art. 3 and 4 AVMSD	Article 3 ECD	Article 3 ECD

### III. Concrete application in the games sector

#### 1. ECD or AVMD-RL?

Due to the large number of different forms of distribution and games-related media content, both the country of origin principle of the ECD and the AVMSD can be applied in the games sector. However, it is always a prerequisite that the provider against whom national measures are directed under German law is domiciled in another EU member state.

Games offered for download or streaming via Internet distribution platforms are generally subject to the ECD as an „information society service“. On the other hand, they are unlikely to qualify as „audiovisual media services“ within the meaning of the legal definition in Art. 1 (1) (a) (ii) AVMSD. This is because only the provision of „programmes“ (for information, entertainment or education) is covered, which in turn are defined as „a sequence of moving images with or without sound which, irrespective of its length, forms an individual item in a schedule or catalogue established by a media service provider, including feature films, video clips, sports reports, sitcoms, documentaries, children’s programmes and original productions“.<sup>28</sup>

Let’s-Play-Videos<sup>29</sup> – also as live streams of gaming video content<sup>30</sup> – and the cinematic illustration of game cinematics or

footage (walk through) are to be differentiated according to the respective addressee of the measure. In this case, the uploader or operator of a channel (e.g. on the platforms YouTube or Twitch) is usually qualified as a provider of an audiovisual media service, with the consequence that Art. 3 and 4 AVMSD apply. In contrast, measures taken against the video sharing platform service lead to the application of Art. 3 ECD (in connection with Art. 28a (5) AVMSD).

## 2. National media law provisions

### a) Network Enforcement Act

Since the Network Enforcement Act<sup>31</sup> pursuant to § 1 NetzDG basically covers all providers of social networks with a number of 2 million registered users or more, its provisions in the games sector are relevant above all for Let’s-Play-Videos and generally gaming video content that is distributed via corresponding platforms and could be deleted by these due to the compliance requirements of Sec. 3 NetzDG. Online game platforms or game console networks, on the other hand, are not covered – due to their content-specific orientation – nor are individual communications, for example in messaging services while playing.<sup>32</sup>

As has already been explained, the legislator invokes the exception to the country of origin principle under Art. 3 (4) a) no. (i) ECD, both with regard to the current version of the NetzDG and within the framework of the GBRH draft.<sup>33</sup> This ignores the fact that the exception only allows measures to be taken in individual cases against a „specific information society service“, but does not permit abstract general legal provisions against a large number of providers. According to the official justification, a semantic circumvention is nevertheless attempted in the interpretation in such a way that the „regulated compliance obligations of social networks concern „special services of the information society and serve to prevent objectively punishable acts“. In this respect, however, the prevailing opinion rightly doubts that the exception in Art. 3 (4) ECD or Sec. 3 (5) German Telemedia Act (TMG) can legitimise measures against entire classes or groups of service providers – such as „social networks“ within the meaning of Sec. 1 (1) NetzDG.<sup>34</sup>

The fact that, contrary to the legislator’s assumption, Art. 3 para. 4 a) no. i ECD only allows measures to be taken against a specific service provider in individual cases also corresponds – as explained above<sup>35</sup> – to the explicit interpretation of the *EU Commission*<sup>36</sup> as well as to the more recent case law of the *ECJ*.<sup>37</sup> There are also doubts as to whether the assumption of an exception under Art. 3 (4) and (5) ECD has been sufficiently communicated to the *EU Commission*.<sup>38</sup> The provisions of the NetzDG in the current version and in the new versions proposed following draft amendments are therefore not compatible with the country of origin principle under Art. 3 ECD and Sec. 3 TMG, insofar as these provisions also apply to social networks with a branch in another EU Member State (1.) pursuant to Sec. 2 and 3 NetzDG and in future possibly also Sec. 3a NetzDG-E are to be<sup>39</sup> obliged generally and independently of the individual case, (2.) moreover have to appoint an authorised person for service pursuant to Sec. 5 NetzDG and (3.) are to be subject to the threat of a fine pursuant to Sec. 4 NetzDG via sanctioning by the Federal Office of Justice (*BfJ*). Social networks with a branch office in another EU Member State can invoke the fundamental non-application of the NetzDG.<sup>40</sup>

### b) Media State Treaty

In the version adopted by the *Conference of Minister Presidents of the federal states* on 5.12.2019, which is the subject of the notification procedure,<sup>41</sup> the scope of the MStV also includes tele-

<sup>28</sup> Cf. Art. 1 para. 1 b) AVMSD.

<sup>29</sup> See already *Beyvers/Beyvers*, MMR 2015, 794 ff.

<sup>30</sup> Cf. in particular with regard to the classification as broadcasting: *Bodensiek/Walker*, MMR 2018, 136 ff.; *Leeb/Seiter*, ZUM 2017, 573; see also *VG Berlin* MMR 2020, 267 with Note *Schmid*.

<sup>31</sup> Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken, (Netzwerkdurchsetzungsgesetz – NetzDG) v. 1.9.2017, BGBl. I 3352; the law is currently undergoing a comprehensive parliamentary amendment process due to drafts proposed by the federal government for a “Law to Combat Right-wing Extremism and Hate Crime” and a “Law to Amend the Network Enforcement Law” (BT-Drs. 19/18792 – (Bundestag printed paper)).

<sup>32</sup> Cf. Sec. 1 (1) sentence 3 NetzDG; BT-Drs. 18/13013, 20; *Hoven/Gersdorf* (see above footnote 10), Sec. 1 NetzDG marginal no. 27 f.; *Liesching* (see above footnote 10), Sec. 1 NetzDG marginal no. 62; see also *Spindler*, K&R 2017, 533 (534).

<sup>33</sup> Cf. BT-Drs. 18/12356, 14.

<sup>34</sup> See above sec. II.2.b) as well as *Eifert* (see above footnote 10), p. 9, 24; *Feldmann*, K&R 2017, 292 (296); *Hain/Ferreaul/Brings-Wiesen*, K&R 2017, 433 f.; *Liesching*, MMR 2018, 26 (29 f.); *ders.* (see above footnote 10), § 1 NetzDG, marginal no. 13 ff.; *Spindler*, ZUM 2017, 473 (474 ff.); *ders.*, K&R 2017, 533 (535 f.); *Wimmers/Heymann*, AfP 2017, 93 (96 f.).

<sup>35</sup> See above sec. II.2.b).

<sup>36</sup> See COM(2003) 259 final of 14.5.2003, p. 2 f.

<sup>37</sup> *ECJ* MMR 2020, 171 (174) marginal no. 84 – *Airbnb Ireland*, and above II.2.b).

<sup>38</sup> Execution *Liesching* (see above footnote 6), p. 70 ff.

<sup>39</sup> In this respect, an obligation to report to the Federal Criminal Police Office is provided for; cf. BT-Drs. 19/17741 and BT-Drs. 19/18470 (Bundestag printed paper) – both not proofread and *Liesching* (see above footnote 6), p. 59 f.

<sup>40</sup> Execution *Liesching* (see above footnote 6), p. 64 ff.

<sup>41</sup> Notification according to Directive 2015/1535, No. 2020/26/D (Germany)

media<sup>42</sup>. Thus the Interstate Treaty is relevant to the entire online games sector, e.g. with regard to information duties (Sec. 18), provisions on advertising, sponsoring and lotteries (Sec. 22) as well as special provisions for broadcast-like telemedia (in particular Sec. 74), media platforms (Sec. 78 et seq.), media intermediaries (Sec. 91 et seq.) and video-sharing services (Sec. 97 et seq.).

In derogation of the country of origin principle, Sec. 1 (8) MStV now extends the scope of application to media intermediaries<sup>43</sup>, media platforms and user interfaces based in another EU Member State „insofar as they are intended for use in Germany“ (sentence 1). The decisive factor here is whether the services, in particular „through the language used, the content offered or marketing activities, are directed at users in the Federal Republic of Germany or achieve a not insignificant part of their refinancing in the Federal Republic of Germany“.

The *Commission* has already stated in the context of the notification of the MStV on 27.4.2020 in „Remarks“ within the meaning of Art. 5 para. 2 of Directive 2015/1535<sup>44</sup> that the State Treaty would violate the country of origin principle of the ECD in case of a regulatory orientation towards media platforms and media intermediaries in other EU Member States. In my opinion, this assessment is also and especially correct with regard to Sec. 1 (8) MStV. This is because the provision disregards the provisions of the Directive on the country-of-origin principle pursuant to Art. 3 (2) ECD by ignoring the exception requirements of Art. 3 (4) and (5) ECD (or Sec. 3 (5) TMG) as well as the European law requirements of the individual case exception of an abusive choice of domicile in accordance with the requirements of the *EU Commission* and the *ECJ*.<sup>45</sup>

### c) Interstate Treaty on the Protection of Minors in the Media

The amendment to the JMStV, which was also adopted at the Minister-Presidents' Conference on 5.12.2019, originally had a similarly broad scope of application that was contrary to EU law and extended to providers in other EU Member States, provided that a provision for use (also) in Germany existed. However, the version of Art. 2 (1) sentence 2 JMStV was amended after the resolution of the *Conference of Minister Presidents of the federal states* in the drafts for approval in the state parliaments.<sup>46</sup> Now the „compliance with the requirements“ of Art. 3 ECD and Art. 3 AVMSD have been explicitly added to the scope of application of Art. 2 (1) sentence 2 JMStV. The draft explanatory memorandum to Art. 2 (1) sentence 2 JMStV does not provide any indications as to why an appropriate adjustment was only made subsequently.<sup>47</sup>

Thus the JMStV, which is of practical importance in the field of online games, especially with regard to the inadmissibility of Article 4 and the provider obligations in the case of content that impairs development (Art. 5, 11 JMStV), is in conformity with EU law, at least in this respect. However, in contrast to the last amendment to the JMStV under the 19th Amendment to the Interstate Treaty on Broadcasting,<sup>48</sup> the current draft amendment to the JMStV has not been notified<sup>49</sup> under Directive 2015/1535, neither in the version adopted by the *Conference of Minister Presidents of the federal states* nor in the version subsequently amended. In particular, the planned amendments to the JMStV were not included in the draft transmitted in the notification procedure of the MStV.<sup>50</sup> Also in this respect, affected providers could invoke the inapplicability of the amended JMStV.<sup>51</sup>

### d) Youth Protection Act

The current draft of the *BMFSFJ* for the amendment of the Youth Protection Act also<sup>52</sup> contains new regulations which are likely

to be of considerable practical importance, especially in the games sector. This applies above all to the newly proposed labelling obligation for film and games platforms under Sec. 14a 2. JuSchGÄndG-E.<sup>53</sup> However, as far as can be seen, the provisions on the scope of application – unlike, for example, the MStV – do not provide for any explicit deviations from Art. 3 ECD/AVMSD or even the establishment of a marketplace principle. Rather, within the framework of a revision of the draft bill as of 13.5.2020, Sec. 14a (3) sentence 2 2. JuSchGÄndG-E now clarifies that Sec. 2a and 3 TMG, which implement the country of origin principle nationally, remain „unaffected“.

In view of the strict exemption requirements under Sec. 3 TMG, it is unlikely to be possible to justify a labelling obligation for providers based in other EU Member States. For audiovisual media services, this already results from the fact that only „temporary“ deviations from the broadcasting state principle are permissible anyway, but no permanent labelling obligation according to Sec. 14a 2. JuSchGÄndG. However, even within the framework of the ECD, a sufficient impairment of protection goals pursuant to Art. 3 para. 4 ECD seems to be justifiable for content „merely“ impairing development (age groups 6/12/16/18), at best in extreme special constellations.

## IV. Conclusion

The current media legislation in the game-relevant areas of the NetzDG, MStV, JMStV and JuSchG only partially complies with the Union's provisions on the country of origin principle. To the extent that this is the case above all with the provisions of the law for the protection of minors, however, measures against online game providers domiciled in other EU member states can only be taken by the German media supervisory authority under very strict exceptional conditions for individual cases. In contrast, the NetzDG and the MStV are contrary to European law and are not applicable, at least to the extent that Art. 3 ECD and Art. 3 AVMSD are violated. Providers of game-specific content based in other EU Member States may invoke the inapplicability.

<sup>42</sup> Cf. § 1 para. 1 MStV: „This Interstate Treaty applies to the organisation and provision, distribution and making available of broadcasting and telemedia in Germany“; cf. LT-Drs. 18/7640, 6.

<sup>43</sup> According to Art. 2 para. 2 no. 16 MStV, „media intermediary“ is „any telemedium which also aggregates, selects and presents journalistic and editorial offers of third parties in a generally accessible manner without combining them into a complete offer“. As a rule, this also includes search engines and social networks; cf. also *Hönig d'Orville*, ZUM 2019, 104 (108); *Ory*, ZUM 2019, 139 (145); also *Weber*, ZUM 2019, 111 (114).

<sup>44</sup> See Communication of the *EU Commission* of 27.4.2020 (MSG 303 IND – 2020/0026/D); reprinted in the wording at *Liesching* (see above footnote 6), p. 120 ff.

<sup>45</sup> Execution *Liesching* (see above footnote 6), p. 82 ff.

<sup>46</sup> Cf. the version in Bayer. LT-Drs. 18/7640, 70.

<sup>47</sup> Cf. Bayer. LT-Drs. 18/7640, 117; moreover, the view expressed there that „action against foreign providers had already been possible „previously“ via § 20 (6) sentence 2“ is unclear, since the referenced norm merely represents a norm for the assignment of jurisdiction, but does not standardise the validity of the JMStV in (EU) foreign countries.

<sup>48</sup> See notification number 2015/719/D (Germany).

<sup>49</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9.9.2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (OJ L 241, 17.9.2015, p. 1).

<sup>50</sup> See notification number 2020/26/D (Germany).

<sup>51</sup> Cf. *ECJ* MMR 2019, 740 (742) marginal no. 39 – *VG Media./Google LLC = ZUM* 2019, 838 (843) with Note *Heinze*; with reference to *ECJ* judgment of 27.10.2016 – C-613/14 marginal no. 64 – *James Elliott Construction*, and the case law cited there; *ECJ* judgment of 30.4.1996 – C-194/94 marginal no. 54 – *CIA Security International*; see also clearly: *ECJ* MMR 2020, 171 (174) marginal no. 88 et seq. – *Airbnb Ireland*: „Inapplicability of the provision in question to individuals“.

<sup>52</sup> BMFSFJ consultant draft of a second law to amend the Youth Protection Act (JuSchGÄndG), stated processing status: 10.2.2020.

<sup>53</sup> Criterion on this *Hilgert/Sümmerrmann*, MMR 2020, 301 (303 f.).



**Dr Marc Liesching**  
is Professor of Media Law and Media Theory at the University of Applied Sciences (HTWK) in Leipzig and co-editor of the journal MMR.

### For a quick read ...

■ The current media legislation in the game-relevant areas of the NetzDG, MStV, JMStV and JuSchG only partially complies with the Union's provisions on the country of origin principle.

■ However, insofar as this is the case, especially with regard to the provisions of the Youth Protection Act, measures against online game providers based in other EU Member States can only be taken by the German media supervisory authority under very strict exceptional conditions for individual cases.

■ In contrast, the NetzDG and the JMStV are contrary to European law and are not applicable, at least to the extent that Art. 3 ECD and Art. 3 AVMSD are violated. Providers of game-specific content based in other EU Member States may invoke the inapplicability.

KAI BODENSIEK

# Usage risks in the structure of the German Youth Protection Act („Jugendschutzgesetz“)

How the planned reform of the JuSchG jeopardizes the traditional age rating system

Age Rating

The draft of the new German Youth Protection Act („JuSchG-E“) provides for the so-called usage risks of computer games with online connection to be taken into account for the age classification. These risks include cyber-grooming, i.e. the targeted approach to initiate sexual contacts or the use of gambling-like monetization strategies. Up to now, only content risks have been considered in the allocation of age ratings, i.e.

whether the actual plot and gameplay could be dangerous to the development of certain age groups. This would render the age rating labels practically useless as an assistance for parents, because the usage risks alone would lead to significantly higher age ratings for a large number of games, although such risks can be directly influenced by the parents themselves. But there are alternative solutions. **reading time: 15 minutes**

## I. Criteria for age rating

According to the current legal situation, the *Supreme Youth Protection Authorities of the Federal States*, in cooperation with the Entertainment Software Self-Regulation Body (*Unterhaltungssoftware Selbstkontrolle – USK*) as an organization of self-regulation, issue age rating labels for computer games distributed on storage media according to § 14 JuSchG.<sup>1</sup> The age rating labels are based on the criteria laid down by the *USK* and the *Supreme Youth Protection Authorities of the Federal States* for the testing of computer and video games.<sup>2</sup> These include the effect of violence and sexual acts depicted in the game, but also the depiction of fear. The guiding criteria are based on an evaluation of the specific content of the computer game and its effect on children and young people.<sup>3</sup> All in all, one speaks here of the so-called „content risks“.

The process of labelling is based on a review and summary of the game and has proven its worth over many years.<sup>4</sup> The game is tested as provided by the manufacturer. Since according to § 14 JuSchG it is a matter of evaluating computer games on storage media – the online sector is subject to national law and the Interstate Treaty on the Protection of Minors in the Media (Jugend-

medienschutz-Staatsvertrag – JMStV) – it is of course only possible to examine what is contained as content on the respective storage medium. This also corresponds to the current understanding of the regulations of the JuSchG. This makes it possible to give parents and legal guardians a clear recommendation as to whether the content of the game is suitable or not for the age group in question. Changes e.g. due to contents from the internet or other external influences cannot be taken into account, since the labelling process precedes the publication.<sup>5</sup> Naturally, it is not possible to assess any concrete risks arising from use at this point in time as these online functions are not yet available at the time of the review or as the game would be used solely by the *USK* reviewers.

## II. Not really a new frontier: Online games

Hardly any computer game today can do without an Internet connection; chats, multiplayer and downloadable content are now part of the good tone in the development of games, whether on PC, console or mobile phone. Basically, an online connection of games is definitely in the customer's interest. Thus, the online connection enables the simple integration of new content, playing together with other players and the communicative exchange with like-minded people. The online connection of games promotes playing within a social structure and counteracts isolated playing.

Nevertheless, this development has a flip side, especially from the point of view of the protection of minors. „Usage risks“, „communication risks“, „interaction risks“: Many terms are used to describe what happens when computer games no lon-

<sup>1</sup> Liesching, in: Nomos-BR, JuSchG, 1<sup>st</sup> Edition, 2018, JuSchG § 14 para. 1; also by Hentsch/von Petersdorff, MMR supplement 8/2020, 33.

<sup>2</sup> Available at: [https://usk.de/?smd\\_process\\_download=1&download\\_id=1018522](https://usk.de/?smd_process_download=1&download_id=1018522).

<sup>3</sup> Liesching (see footnote 1), para. 2.

<sup>4</sup> See in the article by Lober/Jäckel-Gottmann, MMR supplement 8/2020, 38 with the overview on the development of the judicial practice.

<sup>5</sup> Baumann/Hofmann, ZUM 2010, 863 (866).

ger take place in the closed environment of the child's home, but instead provide access to additional content and other players via the Internet.

In the explanatory memorandum to the JuSchG-E<sup>6</sup>, the most important risks cited in this context are impairment through so-called cyber-grooming, a sexualized address in the context of communication with other users<sup>7</sup>, cyber-mobbing and cyber-bullying<sup>8</sup>, politically extremist content disseminated by other users, but also through excessive commercialization, e.g. through the use of gambling elements or a sales pitch that is inappropriate for children, and enticing excessive gambling.<sup>9</sup> The Federal Review Board for Media Harmful to Minors (*Bundesprüfstelle für jugendgefährdende Medien – BPjM*) has detailed all of these and a large number of other concrete risks of use in detail in the „Endangerment Atlas: Digital Growing Up. Thinking from a child's point of view, acting with a guaranteed future“ on more than 170 pages.<sup>10</sup> The catalogue of guiding criteria for the assessment of content risks by the *USK* currently comprises 22 pages.<sup>11</sup> It is therefore clearly recognisable that the usage risks are by no means an „annex“ to the risk assessment carried out to date but rather an almost boundless and therefore also legally imprecise source of potential risks. All these risks have in common that they are not inherent in the original game on the carrier medium but are (or can be) only caused by external factors.

### III. Regulation within the framework of age rating plates

In the explanatory memorandum to the JuSchG-E, the Federal Government stated that the risks of content are already adequately covered by the existing regime for the protection of minors, but that the risks of use have not yet been taken into account.<sup>12</sup> This is also based on the Youth Protection Index of the *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (FSM)*, according to which the risks of use have gained considerably in importance in the perception of parents and adolescents.<sup>13</sup>

Against this background, the new Sec. 10b sentences 2 and 3 of the JuSchG-E provides that risks of use based on an endangerment prognosis should simply be included in the assessment when awarding age rating labels:

„In the assessment of developmental impairment, circumstances of the respective use of the medium that lie outside the media's content may also be taken into account if they are a permanent component of the medium and justify a different overall assessment.<sup>14</sup> In particular, risks to the personal integrity of children and adolescents which may arise in the context of the use of the medium and which are to be classified as significant according to a concrete endangerment prognosis shall be adequately taken into account.

It is initially astonishing that the concept of impairment of development is to be given a definition here. Within the framework of the JMStV, the term has been formed for years by the decision-making practice of the state media authorities and the competent courts. The relationship between case law and the term from the JMStV and the JuSchG-E is completely unclear and creates unnecessary legal uncertainty. It is already questionable whether the Federal Government has regulatory sovereignty for these risks at all, or whether, according to Articles 30, 70 (1), 72 (2) of the German Constitution (Grundgesetz – GG), the legislative competence lies with the states.<sup>15</sup>

In addition, the question of when a risk of use can be a „permanent component of the medium“ arises, if the risk does not lie in the medium itself, but in the subsequent interaction. Is a chat

a permanent component of the medium even if the server required for the chat is not active at all or is a function permanent if it can be changed at any time by an update from the Internet? Unfortunately, the attempt to define this in the JuSchG-E remains vague and would only lead to further legal uncertainty.

But even leaving aside the question of competence and the certainty of the regulation, the concept of the JuSchG-E, which at first glance looks like a charming solution to a new problem using familiar means, should in fact represent the end of an age rating system that is helpful for parents and of the previous rating system. Should this regulation be implemented, the *USK* and the *Supreme Youth Protection Authorities of the Federal States* will have to label carrier media containing computer games with an Internet connection with a blanket „No Rating“ (which means not suitable for minors).<sup>16</sup>

### IV. Result „No-Rating“?

As described above, the risks of use are manifold and are neither specified nor defined in any form by the draft law nor in its explanatory memorandum. Both for the publishers and the self-regulatory institutions, this result in a limitless scope of risk review. In addition, the question arises as to how far, for example, in the area of data protection, which is addressed several times in the JuSchG-E as an important criterion, there is a need for regulation and regulatory sovereignty in addition to the DS-GVO. There are also other European law concerns regarding the criteria for risks of use.<sup>17</sup> The *BPjM*'s „Endangerment atlas“ alone lists 35 different risks of use and should by no means be exhaustive. Risks range from the risk that children may spend money without their parents' consent – which would be subject to civil law in any case – to the danger to children's lives in the event of a threat from violence or sex offenders. Requiring a review of all potential risks that may arise from the potential use thus quickly proves to be an overwhelming examination task for the competent authorities.

The inspection of a computer game in order to award an age rating is necessarily carried out before the computer game is published, as the age rating must be affixed to the game's packaging in accordance with Sec. 12 (2) JuSchG. The JuSchG-E does not change this.

At this point in time, the manufacturer provides the *USK* with the finished computer game as it will be released for production. Online functions are not available at this point in time or are only available in a limited form. At best, these will be available in a test state, if at all, and are also subject to regular and

<sup>6</sup> Consolidated version available at: <https://spielrecht.de/wp-content/uploads/RefE-JuSchG-Stand-10-Feb-2020-konsolidierte-Fassung.pdf>.

<sup>7</sup> <https://de.wikipedia.org/wiki/Cyber-Grooming>.

<sup>8</sup> <https://de.wikipedia.org/wiki/Cyber-Mobbing>.

<sup>9</sup> Draft of the Federal Ministry for Family, Seniors, Women and Youth dated 10.2.2020, „Entwurf eines Zweiten Gesetzes zur Änderung des Jugendschutzgesetzes zum JuSchG“, S. 21-22.

<sup>10</sup> Available at: <https://www.bundespruefstelle.de/blob/142084/2c81e8af0ea7cf94d1b688f360ba1d2/gefahrdungsatlas-data.pdf>.

<sup>11</sup> *USK*: Leitkriterien der *USK* für die jugendschutzrechtliche Bewertung von Computer- und Videospiele (Guiding criteria of the *USK* for the youth protection assessment of computer and video games).

<sup>12</sup> Draft (see footnote 9), p. 20.

<sup>13</sup> *FSM*, Jugendmedienschutzindex: Der Umgang mit onlinebezogenen Risiken 2017, p. 8 (Index for the Protection of Youth in the Media).

<sup>14</sup> *Hopff/Braml*, ZUM 2020, 312 (317).

<sup>15</sup> *Hopff/Braml*, ZUM 2020, 312 (317) with further references; *Baumann/Hofmann*, ZUM 2010, 863 (866); *Liesching*, beck-blog dated 14.2.2020, available at: <https://community.beck.de/2020/02/14/ohne-gurt-im-oldtimer-die-novellierung-des-jugendschutzgesetzes>.

<sup>16</sup> With the same concerns: *Liesching* (see footnote 15).

<sup>17</sup> *Hilgert/Sümmermann*, MMR 2020, 301 (303).



significant adjustments in the course of release and follow-up. Even if these functions could already be reviewed, they would only be available in an „empty“ state without the user. In contrast to the content risks, which are directly perceptible when viewing the computer game, an assessment of the usage risks can therefore only be made in the form of an abstract forecast. The JuSchG-E therefore rightly speaks of an „endangerment forecast“ with regard to the risks of use and not of the assessment of concrete endangerments as is the case with content risks. In accordance with the ideas contained in the draft, it is therefore up to the USK and the *Supreme Youth Protection Authorities of the Federal States* to classify whether the existence of a chat function or a future monetization of the game could pose a threat to children and young people, always in the knowledge that the design of all functions can be adapted at any time, even retrospectively, by means of updates or changes to the service.

An institution that takes its duty of protection seriously can actually only come to the conclusion that, against the background of the legal interests threatened according to the Endangerment Atlas, one must always assume a „positive“ prognosis of danger when online functions are available.

The dangers come from three main sources, namely the possibility of communication with other customers, the mechanisms of monetization and the possibility of changing content after publication. Even if the publishers were to commit themselves to providing certain mechanisms to limit or minimize the risks, this would hardly be suitable to exclude the risks in an abstract prognosis, as the implementation cannot be checked at the moment.

An abstract prognosis instead of the examination of a concrete endangerment leads to a schematic preliminary assessment. Likewise, such a preliminary forecast cannot take into account any measures taken by the providers of the games in response to actually emerging risks in the context of or after the publication of the computer game. If the aim is to protect children and young people from the risks, the „safest“ age rating must therefore be chosen.

Even if only one of these sources of risk is present, then, in the absence of any concrete examination and because of the variability, the marking can only read „No-Rating“.

If one follows the JuSchG-E, the logical consequence is that computer games with online functions automatically receive „No-Rating“ due to the manifold risks of use. This applies both to the game in which pink ponies are cared for and to the bloody space slaughter. This means that the USK's age rating system, which has established itself over the years also as a guide for parents through the jungle of computer game offerings, is objectively losing its value.

This is not even changed by the provision in § 14 (2a) JuSchG-E, according to which the indicating authority is to represent the essential reasons for the marking by symbols. This is reminiscent

of the labelling pictograms used according to the PEGI system (Pan-European Game Information<sup>18</sup>), which is applicable in large parts of the rest of Europe, or the ESRB-system (*Entertainment Software Rating Board*), which originates from the USA.<sup>19</sup> Even if a blanket reference to online risks were to indicate that the age rating is based primarily on a prediction of online risks, parents would no longer be able to tell from the rating whether the game would otherwise be more suitable for 6-year-olds or 16-year-olds due to the content risks. The support of the age rating would be completely lost.

## V. Separate labels

Of course, this should not mean that risks of use should not be dealt with or taken into account. The basic need to provide information on the products to parents and guardians is justified and, against the background of actual media use, also necessary.

A look over the legal garden fence into the rest of Europe or America shows that this problem has already been recognized and solved in other countries in the past. Why the legislator in Germany is again trying to go its own way and invent a German regulation is therefore hardly comprehensible.

If you look at the PEGI system or the ESRB-system mentioned earlier, you quickly notice that these systems assign age rating on the basis of the assessment of content risks.<sup>20</sup> In addition, the PEGI system and the ESRB-system provide that the risks associated with the game are then pointed out separately by so-called descriptors or pictograms, similar to the construction of Sec. 14 (2a) JuSchG-E, with the difference that these descriptors refer to both content and use risks. This enables parents to quickly assess whether the content of the game is suitable for the children and the parents also receive information as to whether there are also risks of use, e.g. through user interaction, online purchases or variable content. Within the framework of such a descriptor system, gradations, e.g. according to traffic light systems or similar, are of course also conceivable.

The advantage of this system is that parents are left to decide, depending on their individual level of understanding of technology, whether they feel able to control these risks themselves or whether they want to prevent children and young people from using them because of the risks. Many content risks can already be prevented by device settings – e.g. deactivation of purchase options, selection of child protection functions to deactivate chats etc.<sup>21</sup> – while parents have no influence on content risks.

Another conceivable approach is the obligation of platform operators to create corresponding opportunities for parents to influence usage risks, as is rudimentarily provided for in Sec. 24a (2) JuSchG-E. Criticism of the current presentation of these measures in the JuSchG-E is certainly appropriate,<sup>22</sup> as they unfortunately try to break down complex situations to a few keywords (and the preparation of general terms and conditions in a language suitable for children will certainly lead to exciting discussions regarding the certainty requirements of the *Federal Court of Justice* – just think of the case law on term „cardinal obligations“ alone<sup>23</sup>). Nevertheless, such an approach is likely to be effective. The JMStV thus already provides for the certification of youth protection programmes for closed systems, which has already been successfully granted for Netflix and Nintendo (for the Nintendo Switch), for example.<sup>24</sup> Within the framework of such system certifications, it is precisely the risks of use that can be contained by structural measures.

The legislator would do well not to try to create concrete requirement by the obviously too slow means of legislation, especially in a rapidly developing area such as that of usage risks.

<sup>18</sup> See [www.pegi.info](http://www.pegi.info).

<sup>19</sup> <https://www.esrb.org/>.

<sup>20</sup> <https://pegi.info/page/pegi-age-ratings>; <https://www.esrb.org/ratings-guide/>.

<sup>21</sup> For *Apple* devices, the parental control settings: <https://support.apple.com/de-de/HT201304> or on devices with the *Android* operating system: <https://support.google.com/googleplay/answer/1075738?hl=de>.

<sup>22</sup> Hopf, ZUM 2020, 312 (328); Hilgert/Sümmerrmann, MMR 2020, 301 (303); Press release of game dated 11.2.2020, available at: <https://www.game.de/game-verband-kritisiert-entwurf-fuer-neues-jugendschutzgesetz>; Liesching (see footnote 15).

<sup>23</sup> BGH NJW-RR 2005, 1496.

<sup>24</sup> Hopf, ZUM 2019, 8 (11); Henrich, MMR-Aktuell 2018, 411956.

Rather, also with regard to the draft of descriptors or possible precautionary measures, cooperation with the institutions of self-regulation appears to be the more pragmatic and, above all, safer way for children and young people in the short and medium term. Here, standards should be established jointly in cooperation between the *Supreme Youth Protection Authorities of the Federal States* and the institutions of self-regulation. A JuSchG-E should create the framework for this and not lead existing systems ad absurdum.

Should the legislator therefore be interested in seriously addressing the risks of use, the JuSchG-E should be fundamentally reconsidered, especially with regard to the integration of the risks of use into the age rating regime, and modernised together with the regulations of the Länder in the JMStV.<sup>25</sup>

**25** Hopf/Braml, ZUM 2020, 312 (318); Hilgert/Sümmerrmann, MMR 2020, 301 (303).

### For a quick read ...

- Usage risks represent a considerable challenge for the existing system for the protection of minors.
- The approach of the JuSchG-E to include risks of use in age rating leads age rating ad absurdum.
- Content risks and risks of use must be treated separately.
- International systems for the protection of minors are already much more advanced in this respect and can provide useful suggestions.



**Kai Bodensiek**

is a partner in the Berlin office of Brehm & v. Moers Rechtsanwälte Partnerschaftsgesellschaft mbB.

FELIX HILGERT / PHILIPP SÜMMERMANN

# Youth Protection Compliance by Technical Means

Protection of Minors in Broadcasting and Online Services

Youth Protection

The keyword „youth protection in the media“ is often associated with content ratings – what content may be shown to which age groups and how may it be advertised? But just as important for providers is the question of how to keep content away from audiences for which it is neither intended nor suitable. Broadcasters and online service providers in particular must implement technical and organisational measures to ad-

equately shield minors from unsuitable content. Online retailers selling movies and video games on DVD or other physical media are also subject to such regulations. This article provides an overview of the technical requirements and how to implement them, followed by an outlook on the growing importance of technical youth protection measures for user-generated content.

reading time: 17 minutes

## I. Background

Germany has two separate levels of youth protection regulations. The (federal) Youth Protection Act (Jugenschutzgesetz – JuSchG) regulates content distributed on physical media (e.g. DVDs) as well as cinema screenings and includes severe restrictions for media considered harmful to minors. So-called „Telemidia“ as well as broadcasts are primarily subject to state regulation under the Interstate Treaty on the Protection of Minors in the Media (Jugendmedienschutz-Staatsvertrag – JMStV). Telemidia are all electronic information and communication services except for telecommunication services, a category that essentially covers all online services.

The Interstate Treaty on the Protection of Minors in the Media distinguishes – just like the Youth Protection Act – between three categories of content:

- Content harmful to minors is generally banned from broadcasting and telemidia (Sec. 4 JMStV) with some exceptions, including certain content „blacklisted“ by the government and so-called „simple pornography“, which may be made available in telemidia within specific closed user groups.
- Content that may impair the sound development of minors of a certain age group (so-called „unsuitable content“) may be distributed. Content that would be rated 6+, 12+, 16+ or 18+ under German youth protection law falls within this category. Providers must however take appropriate steps so that minors of

the affected age groups are not confronted with such content under normal circumstances.

- No restrictions apply to content considered suitable for all ages.

In principle, these obligations also apply to foreign services that can be accessed from Germany<sup>1</sup>. German authorities are increasingly taking action against foreign providers. For example, the *State Media Authority of North Rhine-Westphalia* conducted proceedings against an Israeli app publisher.<sup>2</sup> The *Commission for the Protection of Minors in the Media (KJM)* just recently issued formal complaints against three providers of pornographic content based in Cyprus, as well as a prohibition notice ordering a ban on the distribution of their offerings in Germany.<sup>3</sup> For services established within the EU, the country of origin principle must however be respected.<sup>4</sup>

**1** BGH MMR 2008, 400 with comments from Liesching and Waldenberger – ueber18.de.

**2** Media Authority of North Rhine-Westphalia (LfM NRW), press release dated 6.4.2020, available at: <https://www.medienanstalt-nrw.de/presse/pressemitteilungen/pressemitteilungen-2020/2020/april/coin-master-an-deutschen-jugendschutz-angepasst.html>

**3** KJM, press release 08/2020 dated 8.6.2020, available at: <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/vorgehen-gegen-anbieter-mit-sitz-im-ausland/>

**4** Cf. Liesching, MMR supplement 8/2020, 48; *idem*, MMR supplement 6/2020, 3 ff.

## II. Technical Compliance Measures for Broadcasting and Telemedia

In order to be allowed to advertise or make accessible content in telemedia that may harm minors, providers must set up closed user groups pursuant to Sec. 4 (2) sentence 2 JMStV, which require robust age verification.

However, providers have greater flexibility if their offers are merely unsuitable for certain age groups („impairment“). In this case, they are not required to prevent access by younger children and adolescents completely, but only to make it more difficult. Providers can comply with the requirements by labelling their offer for youth protection programmes, setting up time limits or implementing other technical means. In some cases, there is also the possibility to partition an offer so that content for children is not displayed alongside content for older audiences.

### 1. Closed user groups

Closed user groups offer the highest level of protection. Access must be screened by so-called Age Verification Systems (AVS)<sup>5</sup> that provide personal face to face identification.

While the JMStV does not provide for a formal approval of age verification systems, concepts for AVS are evaluated by *KJM* on the basis of a catalogue of criteria.<sup>6</sup> The concepts with a positive rating by *KJM* mainly rely on identification via video chat or existing identity checks, e.g. carried out by a bank when opening an account. These modern concepts have eliminated the need to switch media types, and work without major time delays. Users no longer have to physically go to a retail store to show their ID in person. The first systems that rely on artificial intelligence to check the age of users with the help of videos have also been introduced on the market.<sup>7</sup>

All systems must reliably ensure that the user has reached the age of majority. Simple „ID checks“, which ask users for their ID number and postcode, are not considered sufficient.<sup>8</sup> However, providers can use such methods as a technical means (see sec. II.2. below).

### 2. Other Technical Means

Providers may also comply with the youth protection requirements by other technical or similarly effective means. While this includes age verification, the requirements for technical means set out in Sec. 5 (3) sentence 1 no. 1 JMStV are significantly lower.<sup>9</sup> Contrary to what is required for the distribution of content considered harmful to minors, it is sufficient in this case if the us-

er's age is verified on the basis of prima facie evidence.

For broadcasting, technical means include in particular encryption of programmes with conditional access requiring a PIN pursuant to Sec. 9 (2) JMStV. In the online sector, ID checks may be used for access to content rated 16+.<sup>10</sup>

Age gates that merely ask users for their age, or a confirmation that they are above a certain age, are not sufficient. Such systems are easy to circumvent and thus do not reliably ensure that younger users will not usually access the content.<sup>11</sup> However, some regulatory authorities seem to attribute a certain significance to such age gates, at least in combination with accompanying measures. For example, asking users for their age and subsequently blocking any access to users that provided an age below the applicable rating can at least make it clear that an offer is not directed at (those) minors.<sup>12</sup>

Within offers for very young users, queries that a child cannot usually solve without assistance can help with youth protection by preventing children from inadvertently accessing features for which parental guidance is advised.<sup>13</sup>

### 3. Labelling for Youth Protection Programmes (Filter Software)

The most commonly used compliance measure by telemedia providers is to label content for a suitable youth protection programme pursuant to Sec. 5 (3) sentence 1 no. 1 JMStV.

#### a) Labelling Procedure

From the technical point of view, labelling is a relatively simple method. Unlike other technical means, it does not create any access barriers for users, as the labelling itself remains invisible. The service merely has to host a file containing the required information on its server that can be read by approved youth protection programmes pursuant to Sec. 11 JMStV. The so-called „age-de.xml“ file format has established itself as the industry standard<sup>14</sup>, a format that *KJM* also refers to in their criteria for suitable youth protection programmes.<sup>15</sup> Content remains freely accessible to users unless a youth protection programme set up for the respective age group blocks their access.

#### b) Requirements for Youth Protection Programmes

Youth protection programmes are filter solutions that users – or usually their legal guardians – install as software on the devices they use or that they insert between the end device and the online service by other means. They continuously run in the background and protect minors during their entire use of the Internet.

In order to achieve this goal, youth protection programmes are required to provide access to telemedia with differentiated filtering for the respective age groups (Sec. 11 (1) sentence 3 JMStV). They must have a state-of-the-art recognition performance, a user-friendly design and the possibility to be used autonomously. This means that youth protection programmes must not only read existing labels, but also have to be able to handle unlabelled content appropriately, e.g. by relying on filter lists and real-time scanning of page contents.

It is not necessary that youth protection programmes have a certain level of market coverage<sup>16</sup> or are available „across platforms and systems“, i.e. can be used on any operating system. Aside from the fact that this would be technically impossible (as software is usually only designed to run on one operating system at a time), such a requirement has no base in applicable law.<sup>17</sup>

#### c) Evaluation Procedure

The responsibility for the evaluation of youth protection programmes lies with the formally recognized organisations of vol-

<sup>5</sup> The term has quickly become established with regards to Sec. 4 (2) sentence 2 JMStV; cf. *Liesching*, K&R 2006, 394.

<sup>6</sup> Cf. *KJM*, Kriterien zur Bewertung von Konzepten für Alterverifikationssysteme dated 11.12.2019, available at: [https://www.kjm-online.de/fileadmin/user\\_upload/KJM/Aufsicht/Technischer\\_Jugendmedienschutz/KJM-AVS-Raster.pdf](https://www.kjm-online.de/fileadmin/user_upload/KJM/Aufsicht/Technischer_Jugendmedienschutz/KJM-AVS-Raster.pdf)

<sup>7</sup> Cf. MMR-Aktuell 2020, 425566; *F5M*, press release dated 29.5.2020, available at: <https://www.f5m.de/de/f5m.de/yoti>.

<sup>8</sup> *BGH* MMR 2008, 400 (403) with comments. *Liesching* and *Waldenberger* – ueber18.de

<sup>9</sup> *Liesching*, BeckOK JMStV, 18. Ed., 1.1.2020, Sec. 5 para. 9 with further references.

<sup>10</sup> *Erdemir*, in: Bornemann/Erdemir, Jugendmedienschutz-Staatsvertrag, 2017, Sec. 5 para. 64.

<sup>11</sup> *VG Berlin* MMR 2011, 851.

<sup>12</sup> Cf. *LfM NRW* (see above footnote 2).

<sup>13</sup> See examples for apps in Apple's "Kids" category, available at: <https://developer.apple.com/app-store/kids-apps/>.

<sup>14</sup> Further information is available at: <http://age-label.de/>.

<sup>15</sup> *KJM*, Kriterien für die Eignungsanforderungen nach § 11 Abs. 3 JMStV für Jugendschutzprogramme, p. 1, available at: [https://www.kjm-online.de/fileadmin/user\\_upload/KJM/Aufsicht/Technischer\\_Jugendmedienschutz/Kriterien\\_fu\\_\\_r\\_die\\_Eignungsanforderungen\\_fu\\_\\_r\\_Jugendschutzprogramme\\_12.10.2016.pdf](https://www.kjm-online.de/fileadmin/user_upload/KJM/Aufsicht/Technischer_Jugendmedienschutz/Kriterien_fu__r_die_Eignungsanforderungen_fu__r_Jugendschutzprogramme_12.10.2016.pdf)

<sup>16</sup> *VG Neustadt a.d.W.* MMR 2013, 408; *Liesching*, MMR 2013, 368 (370).

<sup>17</sup> *VG Berlin* MMR 2019, 771, with comments *Liesching*.

untary self-regulation, the organizations that are also in charge of age ratings, and must be carried out at least every three years. However, this assessment may be reviewed by *KJM*. If *KJM* finds that a self-regulatory body overstepped its margin of discretion for the evaluation, it may revoke the positive evaluation as set out in Sec. 19b (2) sentence 1 JMStV or require changes to the youth protection programme.

Of the handful of general youth protection programmes that were formally approved or received a positive evaluation, only the programme „JusProg“, published by a non-profit association of the same name, is currently still available (for the special case of youth protection programmes for closed systems, see sec. II.3.e) below).<sup>18</sup>

#### d) The JusProg Case

This is probably the only disadvantage for providers that rely on labelling for a youth protection programme to ensure compliance: If the program loses its positive evaluation, as a worst case scenario authorities might consider offers illegal overnight. Unfortunately, this risk is not merely theoretical, but materialised in exactly this manner last year:

In its beginnings, JusProg was only a solution for the Windows operating system. In 2012, *KJM* gave its formal approval according to the legislation of that time. In 2019, the *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter (FSM)* – to which responsibility had been transferred in the meantime – renewed the positive evaluation of JusProg according to schedule. However, *KJM* overturned this decision and ordered immediate enforcement of its verdict. The reason given was that a youth protection programme could only be considered „suitable“ within the meaning of Sec. 11 (1) JMStV if it could run on all relevant operating systems and thus offer a „protection across platforms and systems“. Ordering immediate enforcement was deemed necessary due to the importance of the protection of minors, set down within the constitution. According to *KJM*, all offers that had previously relied on labelling for a youth protection program were suddenly in breach of the law.<sup>19</sup>

In the subsequent (summary) court proceedings, the *Berlin Administrative Court* reinstated the suspensive effect of the proceeding against this decision, not only expressing reservations with regard to the special interest required for immediate enforcement, but also explaining in detail that Sec. 11 (1) JMStV does not make the „cross-platform and cross-system protection“ requested by *KJM* a prerequisite for the suitability of youth protection programmes.<sup>20</sup>

For the moment, JusProg thus retains its positive evaluation. While the proceedings on the merits have not yet been concluded, the JusProg association has since submitted additional youth protection programmes for evaluation to *FSM* (for the mobile operating systems iOS and Android as well as a DNS-based solution that operates independently from any OS).<sup>21</sup> If they receive positive evaluations, *KJM*'s main point of criticism will be resolved, so that in the future by JusProg should continue to be the most user-friendly way for providers to implement Sec. 5 (1) JMStV.

#### e) Special Case: Youth Protection Programmes for Closed Systems

Besides „general purpose solutions“, providers can also use and submit to evaluation youth protection programmes that are designed for specific age groups only or that allow access to telemedia within closed systems (Sec. 5 (2) JMStV). This solution is especially suitable for proprietary systems or closed platforms. At the moment, the streaming services Netflix and Amazon Prime Video<sup>22</sup> as well as Nintendo<sup>23</sup> use such systems to ensure the protection of minors on their services.

All three systems include account-related protection that requires the entry of a PIN for certain functions. The Nintendo Switch also permits to adjust settings via the system settings of the device. Parents are often familiar with similar parental control functions provided by most operating systems. Even though they do not have any official approval, these functions also allow devices to be configured in a more child-proof manner.<sup>24</sup>

#### 4. Time Limits

For the sake of completeness, another possibility to shield minors that should be mentioned are time limits, Sec. 5 (3) no. 2 JMStV. In practice, this method is mainly used for broadcasting, however it can also be used for telemedia. German public broadcaster *ARD*, for example, uses this method for its video on demand service.

Where youth protection is only realized via time limits, Sec. 5 (4) JMStV stipulates that content rated 18+ may only be broadcasted or made accessible between 11 PM and 6 AM. 16+ content may be made available from 10 PM on. The statutory presumption that minors do not usually consume broadcasting and telemedia at the respective times is irrefutable.<sup>25</sup>

The JMStV does not include specific time frames for the dissemination of content unsuitable for younger age groups, but the choice of broadcasting time should „take into account the well-being of younger children“. In practice, 12+ content may be made accessible after 8 PM; in individual cases, distribution may also be possible during the day.<sup>26</sup> Content rated 6+ may be made accessible throughout the day.

#### 5. Telemedia for Children

Telemedia providers can also meet the requirements of Sec. 5 (1) JMStV by partitioning content that is only unsuitable for children (i.e. minors under the age of 14) from content intended for children.

The determination whether an offer is intended for children takes into consideration the content and form of the respective telemedia service.<sup>27</sup> Usually offers for children are already recognisable by their design and visual appearance. The criteria developed for Sec. 6 (3) JMStV and Sec. 3 (3) German Act against Unfair Competition (UWG) cannot be applied without further ado, as they are aimed at the wider circle of services for minors. In any case, a simply using the informal German address „Du“ towards users will not suffice as a criterion.

Separate offers for children are used by streaming providers, often described as offers for „kids“ or with similar names. The partitioning is considered effective if the offers are clearly separated

<sup>18</sup> Further information is available at: <https://www.jugendschutzprogramm.de/>.  
<sup>19</sup> *KJM*, press release 05/2019 dated 15.5.2019, available at: <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/kjm-stellt-fest-beurteilungsder-fsm-zur-eignung-von-jusprog-als-jugendschutzprogramm-ist-unwirksam/>.  
<sup>20</sup> *VG Berlin* MMR 2019, 771 (772 et seqq.)  
<sup>21</sup> *KJM*, press release 01/2020 dated 7.1.2020, available at: <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/vergleich-im-eilverfahren-zum-jugendschutzprogramm-jusprog/>  
<sup>22</sup> *KJM*, press release 07/2020 dated 5.6.2020, available at: <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/fuehrende-streamingdienste-in-deutschland-nutzen-geeignete-jugendschutzprogramme/>.  
<sup>23</sup> *KJM*, press release 02/2018 dated 3.5.2018, available at: <https://www.kjm-online.de/service/pressemitteilungen/meldung/news/meilenstein-im-technischen-jugendmedienschutz/>.  
<sup>24</sup> An extensive overview is provided by *Bleich*, c't Magazin 2/2020, p. 20 et seqq.  
<sup>25</sup> *Erdemir* (see above footnote 10), para. 68.  
<sup>26</sup> Cf. Pro-FSF dated 14.2.2014, 31; *Roll/Spürck*, in: Nikles et al., *Jugendschutzrecht*, 3<sup>rd</sup> ed. 2011, Sec. 5 JMStV para. 11.  
<sup>27</sup> *Hartstein/Ring*, in: *Hartstein/Ring/Kreile/Dörr/Stettner/Cole/Wagner*, *Rundfunkstaatsvertrag*, 82<sup>nd</sup> ed. 2019, Sec. 5 JMStV para. 22.

and children have no directly access to unsuitable content.<sup>28</sup> Links to other offers should therefore be avoided. Particularly when using automated recommendation algorithms, attention must be paid to the separation.

## 6. Excluded Offers

Content that does not impair the development of minors can be distributed without any restrictions. While Sec. 5 (3) sentence 2 JMStV, which was amended during the 19th RÄndStV, now stipulates that services that do not impair the development of minors can be labelled as „without any age restriction“, this provision has no legal relevance.

Pursuant to Sec. 5 (6) JMStV, news broadcasts, shows on political events in broadcasting and similar offers in telemedia that contain content unsuitable for minors are also exempt from regulation if there is a legitimate interest in the form of presentation or reporting.

Offers that reproduce the contents of newspapers, magazines or other printed periodicals in text and images are also privileged under Sec. 5 (7) JMStV. The obligation to implement youth protection measures only applies once *KJM* has formally notified the provider that it considers the offer as unsuitable for minors. However, the meaning of this provision is unclear.<sup>29</sup>

## III. Specifics of App Distribution

When distributing content via external (closed) distribution platforms, the provider has no control over the implementation of youth protection mechanisms. Especially the large providers of app stores for mobile devices have implemented their own parental controls in their ecosystems, which rely on parents configuring their children's accounts via appropriate parental controls.<sup>30</sup> In order for this to work, the stores demand age ratings from app providers or that they provide information about the content.<sup>31</sup>

### 1. IARC within Google Play

The Google-Play-Store uses the *International Age Rating Coalition's (IARC)* self-classification system.<sup>32</sup> The world's leading institutions in the field of age classification of computer games have jointly developed a global rating system under this label. The system uses a dynamic questionnaire that providers must complete when publishing content. If a provider affirms the existence of content of a subject area within the content (e.g. violence, sexuality or vulgar language), more detailed queries follow. These take into account among other things presentation, realism, presentation and context. Based on the respective answers, the system automatically generates age ratings. Not only the presentation, but also the relevance accorded to the individ-

ual criteria and thus the resulting age classifications differ according to the respective regions.<sup>33</sup>

## 2. Independent Ratings for Apple

*Apple* takes a different approach, providers assign an age rating to their apps under their own responsibility. If an identical app is also published in the Google-Play-Store, the *IARC* classification can serve as a point of reference. However, the age groups of the store do not correspond to those in Sec. 5 (1) sentence 2 JMStV. In cases of doubt, it is recommended to use the next higher level, e.g. content with a 16+ USK or *IARC* classification should be classified as „17+“ in the *Apple* ecosystem. However, this is also the highest available level, which, in the absence of an alternative, must also be used for content that is unsuitable for all minors.

## IV. Technical Means in Online Retail

By including technical means to ensure the protection of minors, the JMStV is in some ways ahead of the federal JuSchG. However, this triggers a series of inconsistencies that are hard to explain and which are further aggravated by a particularly strict interpretation of the JuSchG by regulatory authorities and courts.

For example, movies or games on DVDs or other physical media without an age rating may not be sold by mail order pursuant to Sec. 12 (3) no. 2 JuSchG. According to the somewhat tortuous definition of the term in Sec. 1 (4) JuSchG, mail orders however fall out of the regulatory scope (only) if it is ensured by technical or other precautions that orders are not shipped to minors.

The *Higher Regional Court of Munich* clarified early on that „shipping“ in this context covers both the dispatch and the delivery and, referring to the legislative purpose, stated that it must always be ensured that the goods are not handed over to a minor.<sup>34</sup> For this purpose, special shipment forms have been established in the industry, where the parcel service verifies the identity and age of the recipient before handing over the order. This means that deliveries not addressed to a natural person (e.g. „to XY Ltd.“), to third parties such as neighbours or to self-service kiosks (e.g. DHL Packstation or Amazon Locker) are not possible.

However, according to a legal opinion published by the Supreme Youth Protection Authorities of the Länder (*OLJB*), even this form of shipping is considered insufficient; it additionally requires an „age verification“ before the order is triggered.<sup>35</sup> This opinion is based on the decision of the *Munich Court* on the one part as well as on a decision of the *Higher Regional Court of Frankfurt/M.*, a case where the parcel carrier had inadvertently delivered an order in violation of the provisions on identity and age verification.<sup>36</sup>

This interpretation is likely to overstretch the requirements of the *JuSchG*, especially since it is clear from the legislative materials that the legislator did not have in mind the strict requirements for AVS (see sec. II.1), but rather technical means in the sense of Sec. 5 (3) no. 1 JMStV (such as ID checks).<sup>37</sup> Even without any verification during the ordering process, the shipment method can prevent any chance of a delivery to minors. While technical compliance measures that can be easily circumvented by minors might be considered ineffective, it would not be appropriate to consider them insufficient because in individual cases human error on the part of a third party may occur.<sup>38</sup>

Most importantly, the example shows a discrepancy between the youth protection requirements in the case of different means of distribution of one and the same content, which is hardly sensible and constitutionally questionable.<sup>39</sup> Content rated 18+, which according to the opinion of the *OLJB* must be shielded by „age verification“ prior to ordering as well as addi-

<sup>28</sup> Erdemir, in: Spindler/Schuster, *Recht der elektronischen Medien*, 4th ed. 2019, Sec. 5 JMStV para. 80.

<sup>29</sup> Cf. Sümmermann, *AFB* 2016, 388 (389 et seqq.).

<sup>30</sup> For *Apple* devices, see e.g. the instructions at <https://support.apple.com/de-de/HT201304>; cf. Baumgartner/Ewald, *Apps und Recht*, 2015, p. 124 et seqq.

<sup>31</sup> Cf. in this supplement the article by Rauda, *MMR* supplement 8/2020, 43.

<sup>32</sup> Cf. in this supplement the article by Hentsch/von Petersdorff, *MMR* supplement 8/2020, 33 on the *IARC*-system.

<sup>33</sup> Hilgert/Sümmermann, *K&R* 2015, 543 (546); Schwidessen, *CR* 2015, 515.

<sup>34</sup> *OLG Munich MMR* 2004, 755 (757).

<sup>35</sup> Rechtsauffassung und Praxishinweise der *OLJB* zum (Online-)Versandhandel gemäß dem JuSchG v. 2.9.2017, available at: [https://www.mkffi.nrw/sites/default/files/asset/document/20170209\\_rechtsauffassung\\_oljb\\_versandhandel.pdf](https://www.mkffi.nrw/sites/default/files/asset/document/20170209_rechtsauffassung_oljb_versandhandel.pdf)

<sup>36</sup> *OLG Frankfurt/M.* BeckRS 2014, 18080; cf. criticism from Hilgert, in: *Spielrecht.de* dated 13.11.2014, available at: <https://spielrecht.de/?p=4048>.

<sup>37</sup> Cf. Liesching, *JuschG*, 2018, Sec. 1 para. 12 et seq.

<sup>38</sup> Detailed criticism of the legal opinion of the *OLJB* by Hilgert, in: *Spielrecht.de* dated 11.7.2017, available at: <https://spielrecht.de/?p=4048>.

<sup>39</sup> Liesching (see above footnote 37) para. 12.

tional precautions on delivery, can be made freely accessible under the *JMStV* provided technical means below the threshold of age verification are in place, e.g. labelling for a youth protection programme. It would be desirable to clarify by law that at least no higher level of protection ought to be required for triggering a mail order than for making a content accessible by download or streaming. Unfortunately the current draft *JuSchG* reform act failed to seize this opportunity.<sup>40</sup>

## V. Outlook and conclusion: Implementation of the AVMS Directive

Technical solutions for the protection of minors will become increasingly important in the future, especially because age rating mechanisms that rely on individual providers quickly reach their limits when it comes to dynamic and user-generated content.

The amended EU Directive on Audiovisual Media Services (Directive (EU) 2018/1808, „AVMS Directive“, AVMSD) includes youth protection requirements for providers of audiovisual media services in Art. 6a (1) that are clearly inspired by Sec. 5 (1) sentence 1, (3) sentence 1 *JMStV*. In particular, „selecting the time of the broadcast, age verification tools or other technical measures“ are mentioned as possible measures when implementing this obligation.

Even more detailed are the requirements of the Directive when it comes to technical measures for the special case of video-sharing platforms. For this purpose, Art. 28b (3) AVMSD stipulates in particular that platforms shall enable their users to report or flag content as unsuitable for minors and provide appropriate parental control systems that enable parents to keep such content out of their children's accounts. The AVMSD also requires „establishing and operating age verification systems „.

These requirements are taken up and implemented very broadly in the new *JMStV*<sup>41</sup>, which has already been signed by the heads of state, the *JuSchG-E*<sup>42</sup> as well as in an additional working draft for a further reform of the *JMStV*<sup>43</sup>, recently published by the Länder. It is unfortunate that the German legislator uncritically adopts the term „age verification“ from the AVMS Directive, the particularly strict provisions of Sec. 4 (2) sentence 2 *JMStV* cannot be meant.<sup>44</sup>

All of this should not obscure the fact that youth protection in the media only works if parents or legal guardians take their responsibility seriously and combine sensible attitudes towards technology with teachings in media literacy. Completely shield-

ing unsuitable content especially from teenagers is not feasible and would entail the risk of severe overblocking, which would also pose questions with regards to the information and participation rights guaranteed under Art. 5 (1) sentence 1 German constitution and Art. 13 UN Convention on the Rights of the Child. The idea proposed by the Länder of a mandatory age verification process at operating system level as a prerequisite for access to any content not marked as harmless must therefore be viewed highly critically.<sup>45</sup>

### For a quick read ...

- Broadcasting and telemedia providers have numerous possibilities to adequately protect minors from unsuitable content. Best practice in the online sector is the labelling of content for a youth protection programme.
- App providers are in most parts dependant on the technical possibilities of the respective sales platforms. In particular, the IARC-system of the Google-Play-Store offers a reliable system for app developers to perform age classifications.
- Mail order for content that is unsuitable for minors causes problems in practice. An improvement is not in sight despite the current reform discussions.



**Felix Hilgert, LL.M. (Cologne/Paris I)**, is a partner in the Cologne office of Osborne Clarke. He represented JusProg e.V. in the described aforementioned proceedings.



**Philipp Sümmermann, LL.M. (Cologne/Paris I)**, is an associate in the Cologne office of Osborne Clarke.

<sup>40</sup> Cf. *Hilgert/Sümmermann*, MMR 2020, 301 (304).

<sup>41</sup> Consolidated version in German available at: <https://spielerecht.de/?p=4293>.

<sup>42</sup> Cf. regarding the new Youth Protection Act *Hilgert/Sümmermann*, MMR 2020, 301.

<sup>43</sup> Erster Arbeitsentwurf *JMStV* für Fachgespräche (21.4.2020), available at: [https://spielerecht.de/wp-content/uploads/01\\_Anlage-1-2020-04-21\\_-JMStV-mit-neuem-Pflichtenregime\\_2.pdf](https://spielerecht.de/wp-content/uploads/01_Anlage-1-2020-04-21_-JMStV-mit-neuem-Pflichtenregime_2.pdf)

<sup>44</sup> *Hopff/Braml*, ZUM 2020, 312 (314 with additional references); *Hilgert/Sümmermann*, MMR 2020, 301 (304).

<sup>45</sup> Cf. Sec. 12 (2) and (4) *JMStV-E* as amended by the Working Draft of the Länder (see above footnote 43).