

Statement

on the proposals of the Broadcasting Commission of the Länder on the reform of the Interstate Treaty on the Protection of Minors in the Media (JMStV-E)

Status: 20 June 2022

**game - Association of the
German Games Industry**

Friedrichstraße 165
10117 Berlin

www.game.de

Contact

Dr. Christian-Henner Hentsch
Head of Legal &
Regulation

T +49 30 2408779-22
henner.hentsch@game.de

Maren Raabe Head
of Political
Communication

T +49 30 2408779-15
maren.raabe@game.de

Statement on the Proposals of the Broadcasting Commission of the Länder on the Reform of the Interstate Treaty on the Protection of Minors in the Media (JMStV-E)

On 15 March 2022, the Broadcasting Commission of the Länder adopted concrete proposals for a reform of the Interstate Treaty on the Protection of Minors in the Media (JMStV) and put them up for discussion. We thank you for the opportunity to comment and welcome the synchronisation of the federal and state regulations on the protection of minors in order to continue to ensure the uniform protection of children and young people in Games. We see this hearing as an important step in the political process towards a new JMStV and combine this with the express expectation that further oral hearings will follow and that adjustments will be made against the backdrop of the Suggestions are possible and desired.

We are the association of the German games industry. Our members are developers, publishers and many other players in the games industry such as esports organisers, educational institutions and service providers. As co-organisers of gamescom, we are responsible for the world's largest event for computer and video games. We are the central point of contact for the media, politics and society and answer questions on issues such as market development, games culture and media competence and, of course, the protection of minors. Our mission is to make Germany the best games location. A safe and good upbringing of children with media, a high level of youth protection and the promotion of media competence have always been part of our DNA as a games industry. Numerous innovative and exemplary content-related and technical solutions for the protection of minors originate from our industry. Many of these best practices are adopted and used by other industries. For this reason, we as an industry have been calling for many years for a modern, convergent and internationally compatible legal protection of minors that does not fall short of our modern standards, as has been the case up to now.

We expressly welcome the aim of the Broadcasting Commission to optimise the already existing systems for the protection of minors and to link them in such a way that they can develop their effectiveness in the best possible way. However, there is still considerable need for improvement in many of the proposed regulations, which is explained below. The

However, we consider the approach chosen for the operating systems not only to be outdated, but also, in the proposed form, not suitable for achieving the desired goals for content-related, technical and legal reasons, as well as not internationally compatible and even inhibiting innovation.

We comment on the specific proposals as follows:

I. General preliminary remarks on the proposals

The Corona pandemic has led to a digitalisation push and also to an increased use of games in all age groups. Today more than ever, young people have their own mobile devices, which they can set up and adapt to their own needs.

individual needs. However, this requires a law for the protection of minors that also works across devices and interlocks in such a way that there are no breaks or even different levels of protection. In practice, this is already achieved by ensures various youth protection devices that enable age-appropriate access to content and can also eliminate possible risks. Such solutions should be promoted and supported because they are in the interest of the users. are thought out and made fit for the future. In particular, internationally established systems such as IARC should be strengthened, but also technical solutions such as JusProg. These goals cannot be achieved with the draft now presented.

II. Additional notes for age indicators (descriptors)

In the interest of the protection of minors, we welcome transparency efforts with regard to age ratings, which create clarity and thus also support educators in promoting a responsible approach to media. In addition to the voluntary efforts of the providers of games and games platforms, we would like to point out that, in connection with games programmes, extensive statutory labelling regulations exist (for example, Section 12 (2) sentence 2 JuSchG and in particular Section 14a (1) sentence 2 JuSchG as well as currently Section 12 JMStV). In the interest of legal clarity, we would like to see no multiple regulations arise in the course of the amendment of the JMStV-E through the changes to §§ 5 para. 1 p. 3, 5 para. 5 and 10 JMStV-E and, in the context of further development, to aim for a consistent regulatory system - also in interaction with the Federal Youth Protection Act.

Specifically with regard to the presentation of the required grounds for age ratings pursuant to § Section 5 (1) sentence 3 JMStV-E, it must be pointed out that the reasons for the labelling are often not sufficiently known to third party providers. In the case of games, which in the past had an age rating as carrier media within the framework of the tried and tested procedure according to § 14 JuSchG, the reasons were explained in the youth decision, but not in a form that could be displayed online and was practicable for parents and users. Therefore, this regulation should only apply to future labels. Also for systematic reasons, we suggest integrating the regulation into the labelling obligations for telemedia, which are essentially identical in content to films and games on image media, within the framework of Article 10 JMStV-E.

In principle, with regard to the proposed obligations to provide information in the context of the It should be noted that for minors of the age groups concerned, measures must already be taken to impede perception, so that they are not even able to access these offers - and accordingly to perceive the notices.

III. Interaction with the JuSchG

As an industry association, it is important to us that the amendment maintains the proven synchronisation of the age ratings of the JMStV and the JuSchG. It is detrimental to clarity with regard to age ratings if, in addition to age ratings according to the JuSchG - which are issued in the proven manner of the supreme state youth authorities as an administrative act - now, in the area of application of the JMStV, deviating age ratings are also issued, if necessary.

classifications are to be taken into account. According to Section 5 (3) sentence 1 JMStV-E, the legal presumption of developmental impairment is to be abandoned to the effect that this should no longer apply if "a deviating release" already exists according to the JMStV.

Dogmatically, this provision also ignores the fact that the JMStV is not a *approval procedure*, but provides for an *evaluation procedure* for tenders.

IV. Youth protection programmes for closed systems

Pursuant to Article 11 (2) sentence 2 JMStV-E, programmes for the protection of minors shall be suitable for closed systems if, in addition to the requirements of Article 11 (1) JMStV-E, they take precautions to counter risks within the meaning of Article 5 (2) JMStV-E, which may arise from the use of an offer, in an age-appropriate manner. As a result, youth protection programmes for closed systems are to be subject to stricter requirements than before. This lowers the incentive for providers to provide corresponding innovative systems, without the level of protection for closed systems being reduced.

would be substantially increased. It is not clear why the proposal differentiates between closed and open systems. Unfortunately, it also remains unclear what specifically meant by precautions that "counteract risks in an age-appropriate manner".

V. Parental control device in operating systems

The Broadcasting Commission of the Länder proposes a mandatory youth protection device in operating systems, Section 12 JMStV-E in conjunction with. § Section 3 p. 1 no. 5, 6 JMStV-E. For many years already, operating systems have provided numerous mechanisms to protect parents and other

to give parents and guardians possibilities to support minors in conscious media consumption and at the same time to fulfil their supervisory role. These existing *parental control* functionalities on the system side make it possible to provide for regulations on the usage behaviour of minors across devices and to impose restrictions on unsuitable content. The systems are not only easy to use, they also go considerably beyond the solution now proposed by the Länder in terms of their range of functions. In addition to the filtering options, they offer numerous functions to help minors learn how to use media in a controlled and competent manner. Since the existing systems for

operating systems are integrated into the systems regularly distributed worldwide, it is also ensured that they are available on every device. Youth protection programmes including the numerous solutions for closed systems offer further possibilities for legal guardians to protect minors from impairments in media consumption. Therefore, there are considerable doubts that there is a corresponding need for regulation for the proposal under discussion.

Moreover, there is reason to be concerned that the new regulation is not compatible with the existing solutions and endangers the consistent protection system, effectively lowering the current level of protection for minors.

The proposal also raises many questions regarding scope, regulation content and practical feasibility. This results in particular from the fact that operating systems exist in many different forms - including numerous open source solutions such as Linux - and these are used on a variety of different end devices - from smart watches to televisions to digital voice assistants. Although the regulation is broadly defined, the Broadcasting Commission is obviously aiming at very specific constellations. It already remains

It is unclear who should be the addressee of the requirements for operating systems to be codified. Even with a change in the wording and an obligation of the

Operating system providers within the meaning of Article 3 sentence 1 no. 6 JMStV-E, i.e. persons who

provide" operating systems, the addressees would remain unclear. This is because the proposed legal definition rather raises the question of whether the Broadcasting Commission of the Länder now

"providers", which could be understood to mean, for example, developers or manufacturers, or even persons who "provide" operating systems. The latter could also include persons such as retailers, importers or even employers in the case of operating systems used for business purposes.

devices. The systems addressed also remain unclear, as Section 12 (1) JMStV-E refers to operating systems that are "*customarily used by children and young people*". The discussion draft leaves open exactly how "customary use" is determined and thus creates legal uncertainty both for the KJM, which is supposed to be responsible for the determination, and for the providers.

Significant concerns are raised about how the determination of the scope of these national regulation is supposed to work. It cannot be assumed that the Commission requires that all users of the operating system be located. However, this would be necessary for activation in the case of use in Germany. If it is intended that the regulation is based on the placing on the market of the corresponding systems, this would be a restriction of the free movement of goods that requires justification.

In terms of content, the provision apparently aims at a narrowly defined application scenario. The envisaged device for the protection of minors is intended to be used in the event of a device being handed over to minors, among other things, impose restrictions on use through a preset age level. This scenario already reaches its limits when used in a household with several children aged five, six and twelve, for example. The Another obstacle to the acceptance and thus effectiveness of the proposed solution is that constantly switching the proposed filter mode on and off, for example on a smart TV used by the whole family and a tablet, is more complex and expensive. is more cumbersome than the household-wide use of the accounts intended for children, as the existing solutions currently provide for. It remains unclear here how to deal with already existing different accounts, some of which are subject to "parental controls", should be dealt with. This would result in confusion among users, with the consequence that they would be less motivated to use technical systems.

With the discussion draft, the Broadcasting Commission seems to have focused primarily on the operating systems on smartphones. However, this leads to Implementation difficulties with systems on other devices. With regard to setting up, activating and deactivating in an "easily accessible manner", there are difficulties in particular for consoles and Smart TVs concerns about practicality and generally the feasibility of appropriate placement.

The focus on smartphones is also reflected in the term "apps" used. According to the proposed definition in Article 3 (7) JMStV-E, these are software-based applications that serve to directly control the offers of a programme or the content of telemedia. It is already unclear to what extent the this definition differs from that of the term browser - also used in the context of section 12(2).

Pursuant to Article 12 (2) No. 1 JMStV-E, it must be ensured that

"when using browsers that open access to the internet, the secured search function of the commonly used online search engines is activated; browsers where this is not possible are not made accessible".

In practice, it is simply not technically possible for operating system providers to activate a secure search function when browsers are used. This results under

The Commission also seems to assume that, with regard to browser use, a differentiation is made between so-called "search engines" and "browsers". The Commission also seems to assume that, with regard to browser use, a differentiation between so-called "search engines" and "search engines" is necessary.

system and non-system browsers is necessary - and legally permissible -, Article 12 (2) No. 4 JMStV-E. Incidentally, it remains open when a browser is to be foreign to the system.

Similar difficulties exist with regard to the implementability of Article 12 (2) no. 2 JMStV-

E, according to which it is to be ensured that "the installation of apps is only possible via the native distribution platform is possible". Neither does every operating system provider have such a native distribution platform, nor does the draft explain what exactly is meant by the term "installation". The draft also fails to recognise that

native distribution platforms are the common way to install software for only some of the operating systems. Basically, the orientation of the design towards very specific application scenarios leads to considerable problems in view of the wide Scope of application.

Basically, the proposal also shows in the details that the practical implementation has only been insufficiently thought through. For example, it is not clear why the setting up of the youth protection device should be carried out in a secured manner or why the option to activate the youth protection device should be waived when it is activated for the first time.

should be pointed out. The demand for regular notices also ignores the fact that the majority of the relevant devices are probably used outside of private households or in childless households is likely to be used.

As a result, many detailed questions arise that would subsequently have to be taken up in administrative practice. This concerns, for example, aspects such as the consequences that the requirements on operating systems have on such systems, which are currently recognised as closed youth protection programmes, the impending dangers of overblocking due to the far-reaching filtering obligations, the consequences of the obligation for operating systems, app providers to provide any age information that may be provided, the long-term handling of devices that cannot be updated and also the practically envisaged

procedural regulations. In view of this, not least the proposed implementation period of one year is illusory.

Despite the welcome efforts of the Länder to achieve a high level of youth protection there are also concerns about the legislative competence of the Länder with regard to the proposed regulation of operating systems: the protection of minors, including the media sector, is in principle part of the legislative competence of the Federation. Only insofar as it relates to broadcasting, is a legislative competence of the Länder adopted. As far as the Länder are granted competence for the area of broadcasting and telemedia, however, this does not cover the regulation of software (including operating systems). A corresponding regulation of operating systems is barred to the Länder, since the federal government is exempted from its legislative competence by law. has made use of.

It would be welcome if the Broadcasting Commission of the Länder would support the mechanisms already in place and their dynamic further development instead of relying on a rigid device-based approach with a small field of application and questionable The main reason for this is the lack of realisability and congruence with the educational practice of parents in everyday life.

VI. Requirements for app providers (Article 12a JMStV-E)

Providers of apps that can be accessed via the native distribution platform of an operating system shall label their apps with an age rating pursuant to Article 5 (1) JMStV. The aim We welcome the idea of labelling games content that is harmful to development. However, as far as films and game programmes are concerned, there is already a corresponding regulation according to § 14a JuSchG. It is neither apparent why there is a need for regulation here, nor on what competent basis the regulation should take place.

It is also regrettable that the regulation apparently only requires ratings from app providers themselves and does not explicitly address, for example, the automated rating systems or age classification systems that have proven themselves in global app stores. Currently, ratings of apps for smartphones are

usually on the basis of automated assessment systems such as IARC. It is not practicable to oblige the app providers themselves, because they are often based abroad, and it is also not expedient because they are not familiar with the practices and requirements of the German The authors are regularly not familiar enough with the rules of youth media protection to make a reliable assessment.

If the regulation is maintained, it should be ensured that in addition to a labelling by the app provider itself, the use of established systems such as IARC is also permitted, as is already the case in Section 14a (1) sentence 2 no. 3 JuSchG. Otherwise, the JMStV would deliberately treat systems operated by voluntary self-controls and thus provided with particularly high quality in a disadvantageous way and thus the Lowering the level of youth protection once again instead of raising it.

It is also desirable to clarify the relationship between the filtering obligation in Article 12 (2) no. 3 JMStV-E and the proposed requirements for app providers. The The age labelling obligation for app providers in Article 12a JMStV should only apply to apps that can be accessed via system-based distribution platforms. However, the filtering obligation goes beyond this, as it is generally aimed at installed apps. This would necessarily always mean filtering all apps (including pre-installed apps) that users have installed from other sources.