Statement

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

Status: 7 December 2023

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On 8 November 2023, the Broadcasting Commission of the federal states released a revised draft for the reform of the Interstate Treaty on the Protection of Minors in the Media (6. MÄStV) for public consultation. The draft builds upon the proposals put forth by the Broadcasting Commission on March 15, 2022. In response to the current draft, we express our views and continue to welcome the synchronization of federal and state legal provisions on youth protection, as well as the incorporation of new EU regulations on Digital Services and Platforms. This alignment aims to ensure consistent protection for children and minors in games.

We represent the German games industry. Our members include developers, publishers, and various other stakeholders in the gaming industry, such as esports organizers, educational institutions, and service providers. As co-organizers of gamescom, the world's largest event for computer and video games, we serve as a central point of contact for media, politics, and society. We address inquiries related to market development, gaming culture, media literacy, and, of course, youth protection. Our mission is to make Germany the best location for the gaming industry. Safeguarding a secure and positive media environment for children, maintaining high standards of youth protection, and promoting media literacy have always been integral to our identity as the gaming industry. Many innovative and exemplary content as well as technical youth protection solutions originate from our industry, with numerous best practices adopted by other sectors.
For many years, we, as an industry, have advocated for a modern, convergent, and internationally adaptable legal framework for youth protection that aligns with our contemporary standards.

We expressly support the Broadcasting Commission's goal to optimize existing youth protection systems and interconnect them to maximize their effectiveness. However, there is considerable room for improvement in many regulatory proposals, particularly to further strengthen self-regulatory bodies. We maintain that the approach taken with operating systems remains outdated and, for substantive, technical, and legal reasons, is unsuitable for

achieving the stated objectives. Moreover, it lacks international compatibility and may even impede innovation.

We are irritated that the Broadcasting Commission is only now presenting proposals to align the Interstate Treaty on the Protection of Minors in the Media (JMStV) with Regulation (EU) 2022/2065 ("DSA"), which will be applicable from February 17, 2024, despite the awareness of European standards and resulting action requirements for over two years. This creates significant legal uncertainty for all telemedia providers who will be directly regulated by the DSA in the future. Given the protracted and seemingly outdated "legislative process" for a treaty, with ratification by all state parliaments, it is expected that a new treaty will not come into force until after the upcoming state elections in the fall of 2023. Following the mandatory notification to the EU Commission and the subsequent one-year transitional phase, it is likely that the new treaty will not be in effect until 2026. This implies more than two years of legal uncertainty for "telemedia" providers in Germany. Consequently, game companies will need to independently devise solutions in the coming months and, given the legal uncertainty in Germany, likely shift their focus to European solutions. As a result, we observe a gradual erosion of the legitimacy of the federal states as legislators for youth protection laws and the diminishing significance of state supervision in the field of games.

Regarding the specific proposals, we provide the following comments:

I. General Remarks on the Proposals

The Broadcasting Commission finally addresses the task of adapting the Interstate Treaty on the Protection of Minors in the Media (JMStV) to the changes in the Youth Protection Act (JuSchG) in 2021 and clarifying its relationship with the Digital Services Act (DSA). Additionally, the Commission aims to continue pursuing the operating system approach, a similar formulation of which is currently facing legal challenges in France. The following are our comments on these three thematic areas:

II. Relation to the DSA

As of February 17, 2024, the Digital Services Act (DSA) applies directly to all digital services, including games, without the need for implementation through national legislation. This results in the abolition—or at least the inapplicability—of the Telemedia Act (TMG), to be replaced by a new Digital Services Act. Consequently, the federal definition of telemedia ceases to apply. The DSA introduces new uniform rules for youth protection, particularly regarding the formulation of terms and conditions (AGB) and transparency obligations (with exceptions for SMEs), which many B2C-oriented gaming companies will need to comply with. The relationship between the Interstate Treaty on the Protection of Minors in the Media (JMStV) and the DSA remains unclear. Furthermore, various considerations and articles within the regulation introduce provisions in the realm of child and youth protection.

1. Relation to the DSA

In this context, particularly problematic is the provision in § 2 para. 2 JMStV-E, as anticipated in the 5th Amendment to the Interstate Treaty on the Protection of Minors in the Media (5. MÄStV-E), which, according to the Broadcasting Commission, aims to address overlaps with Regulation (EU) 2022/2065 ("DSA"). The DSA Regulation aims for full harmonization, and the regulations contained therein are exhaustive. Supplementary national regulations on the same subject matter are therefore not permissible. Even a merely repetitive or recurring definition is not allowed. It is therefore to be expected that this norm is simply incompatible with European law.

2. Consideration of the Country of Origin Principle

Furthermore, the draft does not adequately consider the importance of the principles of the free movement of services and goods as cornerstones of the European single market. This includes, among other things, the country of origin principle, which stipulates that European Union member states may not restrict the free movement of services of the information society from other member states for reasons falling within the coordinated field of Directive 2000/31/EC. The proposed amendment continues to disregard that the state treaty drafters are prohibited from enacting generally abstract measures that are intended to apply to information society services established in other member states. Imposing direct obligations on providers from other EU member states is incompatible with Union law. This is also evident from the recent judgment of the European Court of Justice (ECJ) dated November 9, 2023. In practice, the Interstate Treaty on the Protection of Minors in the Media (JMStV) is unlikely to apply to digital services with EU headquarters outside Germany.

3. Domestic Discrimination

In principle, domestic discrimination, i.e., restricting the scope of application to providers established in Germany and third countries, is possible. However, it must be considered that such a measure, especially in the case of games that are always internationally distributed, may result in an disproportionate disadvantage for providers based in Germany. This could also lead to providers deliberately seeking the "European way out" to evade the legally uncertain German youth protection system in favor of a reliable and uniform youth protection regime throughout Europe.

III. Interaction with the Youth Protection Act (JuSchG)

As the industry association, it is our concern that the amendment maintains the proven alignment of age classifications between the Interstate Treaty on the Protection of Minors in the Media (JMStV) and the Youth Protection Act (JuSchG). Clarity regarding age classifications is compromised when, in the scope of the JMStV, potentially divergent classifications must be considered alongside age ratings according to the JuSchG, which are traditionally issued as administrative acts by the supreme youth authorities of the individual federal states.

According to § 5 para. 2 sentence 1 JMStV-E, the legal presumption of impairment of development is to be abandoned, no longer applying when "an age rating by a recognized voluntary self-regulation institution is already available." The provision aims to achieve equal treatment between assessments under the JuSchG and the JMStV, avoiding double assessments. However, it introduces significant legal uncertainty in cases where content initially receives an age rating under the JMStV, but a later classification of an identical carrier medium reaches a different outcome. Such divergence leads to considerable uncertainty for consumers and should be urgently avoided.

1. Strengthening the Role of Self-Regulatory Bodies

We appreciate the reinforcement of the role of voluntary self-regulation institutions. It is in the interest of legal certainty for providers that, according to § 19a para. 2 JMStV-E, they will now have the opportunity to assess and verify the suitability of technical or other means according to § 5 para. 3 sentence 1 no. 1 JMStV-E.

2. Additional Information on Age Ratings (Descriptors)

In the interest of youth protection, we welcome efforts to increase transparency regarding age classifications, providing clarity and supporting guardians in promoting responsible media usage. While acknowledging the voluntary efforts of game and game platform providers, we emphasize the existence of extensive legal labeling regulations for game programs (e.g., § 12 para. 2 sentence 2 JuSchG, especially § 14a para. 1 sentence 2 JuSchG, and currently § 12 JMStV). For legal clarity, we suggest avoiding duplicative regulations in the course of amending the JMStV-E with the introduction of §5c paras. 3 and 4 JMStV-E, and ensuring a consistent regulatory system—also in conjunction with federal youth protection laws.

Specifically, concerning the presentation of reasons for age classifications under § 5c para. 3 sentence 2 JMStV-E, it should be noted that reasons for labeling are often not adequately known to third-party providers. In the past, games that received an age rating as carrier media under the established procedure of § 14 JuSchG explained the reasons in the youth decision but not in a format easily accessible and comprehensible for parents and users. We see a risk of information overload with the proposed regulation, potentially weakening youth

protection. Contrary to the justification, even content that does not impair development may require labeling, especially if it has received a corresponding label under § 14 para. 2 no. 1 JuSchG.

For offerings bundling numerous different contents, providing information for all elements is impractical, particularly in the mobile sector. Generally, concerning the proposed disclosure requirements, it should be noted that measures to hinder perception are already taken for minors in the affected age groups, making access to these offerings—and consequently, the perception of the information—not possible for them.

3. Requirements for App Providers (§ 12a JMStV-E)

App providers are expected to label their apps with an age category according to § 5 para. 1 JMStV. While we appreciate the goal of labeling content that impairs development, existing regulations under § 14a JuSchG already cover films and game programs. It is not clear why there is a regulatory need here or on what competence basis the regulation should occur.

It is regrettable that the regulation apparently exclusively demands assessments from app providers themselves, not explicitly mentioning established systems like automated rating systems or age classification systems widely used in global app stores. Currently, app evaluations for smartphones are typically done using automated rating systems such as IARC. A requirement for app providers is impractical since they often operate abroad and are not sufficiently familiar with the practices and requirements of German youth media protection for a reliable assessment.

If the regulation is maintained, it should ensure that, alongside labeling by the app provider, the use of established systems like IARC is permitted, as is the case in § 14a para. 1 sentence 2 no. 3 JuSchG. Otherwise, the JMStV would deliberately disadvantage systems operated by voluntary self-regulation bodies, known for their high quality, and thereby reduce rather than enhance the level of youth protection.

4. Youth Protection Programs

It is positive that the current draft no longer differentiates between youth protection programs for open and closed systems. The previous distinction and the associated inhibition of innovation have been appropriately removed.

However, we view critically that the new youth protection device in the operating system is likely to weaken the dissemination of youth protection programs such as JusProg. After activating the age category in the operating system, parents may incorrectly assume that their child's device has been age-appropriately configured and may not realize that additional installation of youth protection programs, e.g., for protecting minors from particularly developmentally hazardous content accessible via browsers, is necessary.

Furthermore, the JMStV-E does not envisage a collaboration between youth protection devices in operating systems and existing youth protection applications such as youth protection programs or family functions, which may confuse parents and likely lead to less rather than more use of youth protection applications in practice.

5. Changed Composition of the KJM (§ 14 para. 3 JMStV-E)

Noteworthy and simultaneously regrettable in the latest discussion draft is that the supreme federal authority responsible for youth protection is now only supposed to nominate an advisory member for the Commission for the Protection of Minors in the Media (KJM). It remains to be seen how the new coordination processes between the KJM, supreme state youth protection authorities, and federal authorities will function in light of the new composition of the KJM. The change can be interpreted as a sign of the exclusion of federal legislators and federal authorities.

IV. Operating System Approach

Children and adolescents today often have their own mobile devices, which they configure and adapt to their individual needs largely independently. However, this requires a youth protection law that also operates across devices and interacts in such a way that there are no breaks or even different levels of protection. In practice, this is already ensured by various youth protection devices that enable age-appropriate access to content and can exclude potential risks. Such solutions should be encouraged and supported because they are

forward-thinking and user-oriented. Particularly, internationally established systems like IARC should be strengthened, as well as technical solutions like JusProg. Even with the now revised draft and the slightly modified operating system approach from 2020, these goals cannot be achieved.

1. Youth Protection Devices in Operating Systems

For many years, operating systems have incorporated numerous mechanisms to support parents and legal guardians in guiding minors towards conscious media consumption while fulfilling their supervisory role. The existing built-in *parental control* functionalities allow for cross-device regulations of minors' usage behavior and restrictions on inappropriate content. These systems are not only user-friendly but also significantly exceed the proposed solution by the federal states in terms of functionality. In addition to filtering options, they provide various features to assist minors in acquiring controlled and competent media usage skills. As these existing operating system systems are integrated into regularly distributed systems worldwide, their availability on any device is ensured. Youth protection programs, including numerous solutions for closed systems, offer additional means for guardians to shield minors from media-related harm. Consequently, there are substantial concerns regarding the need for regulation proposed for discussion. There is also apprehension that the new regulation may be incompatible with existing solutions, jeopardizing the consistent protective system and effectively lowering the current level of youth protection.

The proposal raises numerous questions regarding scope, content, and practical feasibility. This is particularly evident as operating systems manifest in various forms, including numerous open-source solutions like Linux, and are employed across a diverse range of devices, from smartwatches and televisions to digital voice assistants. Although the regulation is broadly formulated, the Broadcasting Commission appears to target very specific scenarios. It remains unclear who the regulatory addressee for the codified requirements for operating systems should be. Even with a change in wording and an obligation for operating system providers in the spirit of § 3 sentence 1 No. 7 JMStV-E, i.e., individuals providing operating systems, the addressees would remain unclear. The proposed legal definition can be understood to consider developers or manufacturers as providers, as well as other individuals providing operating systems, such as retailers, importers, or

employers using devices for business purposes. Both situations can be construed as "providing" an operating system. This unclear definition leads to significant legal uncertainty regarding responsibility for compliance with the provisions of the interstate treaty. The addressed systems also remain unclear because § 12 para. 1 JMStV-E refers to operating systems "*commonly used by children and adolescents.*" The draft leaves it open how "common usage" is precisely determined, creating legal uncertainty for both the Broadcasting Commission, tasked with determining this, and the providers.

2. Scope of Application

Serious concerns arise regarding how the determination of the scope of application of this national regulation is intended to function. It is unlikely that the Commission is requesting the identification of all operating system users. However, such identification would be necessary for activation in the case of use in Germany. If the regulation aims to focus on the introduction of the corresponding systems, this would constitute a justified restriction of the free movement of goods.

3. Content of the Regulation

In terms of content, the provision appears to target a narrowly defined application scenario. The envisaged youth protection device is supposed to impose restrictions on the use of a device by minors when the device is provided to them, including preset age-related limitations. This scenario reaches its limits when used in a household with multiple children aged, for example, five, six, and twelve years old. The acceptance and effectiveness of the proposed solution are also hindered by the fact that constantly toggling the proposed filter mode, such as on a Smart TV and a tablet used by the entire family, is more complex and cumbersome than the household-wide use of accounts designated for children, as currently provided by existing solutions. It remains unclear how existing different accounts, some of which are subject to "childproofing," will be handled. This confusion could lead to a decreased motivation among users to utilize technical systems.

The draft proposal seems to primarily focus on operating systems on smartphones. However, this poses implementation challenges for systems on other devices. Concerns arise, especially for consoles and smart TVs, regarding the practicability and general feasibility of setting up,

activating, and deactivating in an "easily accessible manner." The orientation towards smartphones is also evident in the term "Apps" used in the draft. According to the proposed definition in § 3 No. 8 JMStV-E, these are understood to be software-based applications directly controlling offerings of a program or the content of telemedia.

4. Feasibility

The requirements of the draft are practically unworkable concerning the use of browsers. According to § 12 para. 2 No. 1 JMStV-E, it must be ensured that

> *"for browsers that provide open access to the Internet, use is only possible if they have activated a secure search function of the commonly used online search engines or their insecure access has been individually and securely enabled."*

The suitability requirements for this secure search are determined by the KJM according to § 12 para. 5 JMStV-E. In practice, it is technically impossible for operating system providers to ensure, when using browsers, that a secure search function is activated. This is due, among other things, to the fact that the activation of these search functions depends not on the browser but on the respective search engine.

Similar difficulties exist concerning the feasibility of § 12 para. 2 No. 2 JMStV-E, which aims to ensure that "the installation of apps is only possible through distribution platforms that consider the age level and maintain an automated rating system according to paragraph 3." The draft does not explain what is precisely meant by the term "installation." The draft also overlooks that distribution platforms represent the common way to install software only for a subset of operating systems. In principle, the focus of the draft on very specific application scenarios poses significant problems considering the broad scope of application.
In general, the proposal reveals inadequately considered practical implementation details. For example, it is not clear why the establishment of the youth protection device should be done in a secure manner. The demand for regular notices also overlooks that the majority of relevant devices are likely used outside of private households or in households without children. These can be devices with operating systems that are generally used by children and adolescents, such as computers and smartphones, falling within the scope of the norm.

Regular notifications about youth protection devices on, for example, work computers and smartphones may lead to significant disruptions in use.

Subsequently, many detailed questions arise, which would need to be addressed in administrative practice. This includes aspects such as the consequences of the requirements for operating systems on systems currently recognized as closed youth protection programs, the impending dangers of overblocking due to extensive filtering obligations, the consequences of the obligation for operating systems to transmit age information provided by app providers, and the practically envisaged procedural regulations. It is also unclear what due diligence obligations providers have within the framework of the planned self-declaration according to § 12 para. 4 JMStV-E and what legal effect such a self-declaration should have.

Regarding the long-term handling of non-updatable devices, the current draft represents an improvement over the initial draft. Nevertheless, the limitation of § 25 para. 3 JMStV-E to already introduced end devices means that, before the new regulation comes into force, already produced but not yet introduced end devices with non-updatable software may no longer be sold if they do not comply with the requirements of §§ 12, 12a JMStV. This constitutes a significant intervention under the aspects of legal certainty, investment protection, and sustainable resource management.

5. Incompatibility with Existing Youth Protection Mechanisms at the Operating System and Service Level

In principle, the idea underlying § 12b para. 1 JMStV-E is positive. It is commendable if efforts by providers in the interest of youth protection are taken into account. However, we see the risk of incompatibility with existing youth protection mechanisms at the operating system and service level. This also poses the risk of undermining the trust of guardians in systems they have set up. Technically, the regulation presupposes the introduction of an interface for the exchange of data between app providers and operating systems, the feasibility of which is likely to present considerable challenges for providers on both sides. Moreover, the approach is also questionable in terms of data protection, as it requires all app providers (even if only providers of apps according to §12b para. 1 are recognized as providers of apps with an approved youth protection program or a suitable technical or other means) to be

informed by operating systems that a child is using the corresponding end device. Unlike with youth protection programs, which require this information but are presumably not covered by the wording, this is not necessary for other app providers and contradicts the principle of data minimization.

6. Definition of the Term "Youth Protection Device"

If the Broadcasting Commission nevertheless wishes to adhere to the proposal, it would be advisable to clearly define the central term "youth protection device" to specify the concept pursued by the regulation and reduce the risk of possible misunderstandings in the discussion about the amendment. This could be designed by supplementing § 3 JMStV-E with another paragraph:

> *"13. Youth Protection Device - a system for making youth protection settings for end devices, especially through settings in the operating system, profile- and user account-based systems, or combinations of these approaches."*

We also see the risk that overly specific technical requirements may hinder the continuous development of built-in parental control functionalities. Given the continuously changing system requirements, user expectations, and interoperability requirements, we suggest, as an alternative to the proposed ex-post regulation, considering a structured dialogue between the KJM, voluntary self-regulation bodies, and providers of digital content on built-in youth media protection and the developments in this area as part of the amendment of the JMStV. Within this framework, individuals involved in the development of built-in *parental control* functionalities could have the opportunity to inform the KJM about existing possibilities and advancements.

7. Legislative Competence of the Federal States?

Despite the laudable efforts of the federal states to achieve a high level of youth protection, concerns arise regarding the proposed regulation of operating systems, particularly regarding the legislative competence of the federal states. Youth protection, including in the media sector, is fundamentally part of the legislative competence of the federal government. Only insofar as it relates to broadcasting is legislative competence of the federal states

assumed. While the federal states have competence for the field of broadcasting and telemedia, this does not cover the regulation of software (including operating systems). Such regulation of operating systems is closed to the federal states, as the federal government has exercised its legislative competence through legislation.

It would be welcome if the Broadcasting Commission of the federal states would support existing mechanisms and their dynamic development, rather than, in opposition to federal legislators, opting for a rigid and outdated device-based approach with limited applicability, questionable feasibility, and lacking congruence with the everyday educational practices of parents.