



5.7. DE – Germany – National legal summary¹³⁶

The provisions of the revised Audiovisual Media Services Directive (AVMSD) related to video-sharing platforms (VSPs) are transposed into the State Media Treaty (MStV), the German Telemedia Act (TMG) and the Network Enforcement Act (NetzDG).

5.7.1. Applicable regulatory framework

Relevant legislation includes the following:

Primary legislation:

- State Media Treaty (Medienstaatsvertrag, MStV).¹³⁷
- Telemedia Act (Telemediengesetz, TMG).¹³⁸
- Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG).¹³⁹

5.7.2. Definitions and scope

This section aims at identifying the relevant definitions related to VSPs stemming from the transposition of the revised AVMSD as well as elements of interpretation of the main concepts present in those definitions.

Table 27. Definition of the main concepts related to VSPs

Concept	Existence of a definition
VSP service	Yes.
VSP provider	Yes.
User-generated video	Yes.
“Principal purpose”	No.
“Dissociable section”	No.

¹³⁶ The factsheet on Germany incorporates feedback received from Peter Matzneller, Consultant on Legal and European Affairs at the Joint Management Office of the Media Authorities (die medienanstalten) during the 2021 and 2022 checking rounds with the national media regulatory authorities.

¹³⁷ <https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag.pdf>.

¹³⁸ https://www.bmwi.de/Redaktion/DE/Downloads/S-T/telemediengesetz.pdf?__blob=publicationFile&v=8.

¹³⁹ https://www.bmjuv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Aenderung_NetzDG.pdf.



“Essential functionality”	No.
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Source: German response to European Audiovisual Observatory standardised survey

5.7.2.1. VSP service

Article 2 (2) No. 22 MStV, Article 2 TMG and Article 3d No. 1 NetzDG define a VSP service by defining video-sharing services, without any reference to platforms, due, according to the explanatory memorandum, to the avoidance of unnecessary overlaps with the regulations on media platforms and user interfaces:

Video-sharing service means a telemedia service in which the main purpose of the service or a separable part of the service or an essential function of the service is to provide programmes to the general public with moving images or user-generated videos for which the service provider has no editorial responsibility, and where the service provider determines the organisation of the programmes or the user-generated videos, which can also mean by automatic means.

5.7.2.2. VSP provider

Article 2 (2) Nr. 23 MStV and Article 2 Nr. 11 TMG 4 define a VSP provider, without referring to a natural or legal person, as: “a video-sharing service provider, who operates a video-sharing service”.

5.7.2.3. User-generated video

Article 2 (2) Nr. 24 MStV, Article 2 Nr. 10 a) TMG and Article 3d Nr. 2 NetzDG define user-generated video, by transposing the text of the revised AVMSD verbatim, as follows:

User-generated video of a sequence of moving images with or without sound created by a user, which is an individual component regardless of its length and which is uploaded to a video-sharing service by this or another user.

5.7.2.4. “Principal purpose” or “dissociable section” of a VSP service

There are no details in the primary legislation or in other texts (secondary legislation, by-laws, recommendations, caselaw, etc.) on how to interpret these concepts.

5.7.2.5. “Essential functionality” of a VSP service

There are no details in the primary legislation or in other texts (secondary legislation, by-laws, recommendations, caselaw, etc.) on how to interpret these concepts.



5.7.3. Obligations and measures imposed on VSP providers

The revised AVMSD provides for the extension of its scope to cover VSPs. It introduces obligations on these players to take appropriate measures to protect minors from harmful content which may impair their physical, mental or moral development; to protect the general public from illegal content and content that incites violence or hatred; and to respect certain obligations around commercial communications (Article 28b (1) and (2) of the revised AVMSD). To fulfil these obligations, member states are required to ensure compliance with the measures listed in Article 28b (3) of the revised AVMSD.

This section aims at identifying the obligations and measures imposed on VSP providers under national legislation in order to ensure their compliance with those obligations.

When available, this section also provides for other additional relevant information about the measures and concepts at stake.

5.7.3.1. General provisions

The Interstate Treaty on the Protection of Minors in the Media (JMStV) provides for the list of prohibited content, such as content which

incites hatred against parts of the population or against a national, racial, religious or ethnic group, incites violence or arbitrary measures against them, or attacks the human dignity of others by insulting, maliciously disparaging or slandering parts of the population.

Other prohibited content includes content whose dissemination may constitute a criminal offence. A more concrete definition of the terms can be found in the Joint Guidelines of the State Media Authorities for the Protection of Human Dignity and the Protection of Minors (JuSchRiLi),¹⁴⁰ which were issued by the competent media supervisory authorities on the basis of the JMStV. According to Article 2.1.3.2, incitement to hatred is defined as targeted action "intended to create or increase hostility against sections of the population beyond mere rejection or aversion". Calls for violent and arbitrary measures are defined as "statements that go beyond mere advocacy of attitudes or actions".

The NetzDG, which establishes obligations for social networks, which may include VSPs, defines illegal content according to Articles 1 (3) as such content

¹⁴⁰https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/JuschRiLi_der_Landesmedienanstalten_ab_15.10.2019.pdf



which fulfils the elements of the offence of Articles 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in connection with 184d, 185 to 187, 201a, 241 or 269 of the Criminal Code and is not justified.

The new MStV and the amended JMStV do not provide for any changes to these existing definitions and references.

A draft amendment to the NetzDG does not provide for any changes to this definition either.

Content that falls within the list in Article 4 JMStV is generally considered to be prohibited content regardless of the means of payout and may not be disseminated except in the cases mentioned in Article 4 (2) 2 JMStV. Without prejudice to general criminal liability, distribution constitutes a criminal offence (Article 23 JMStV) or an administrative offence (Article 24 JMStV) in certain cases. Supervision is the responsibility of the respective competent state media authority (Article 20 JMStV). However, pursuant to Article 20 (4) JMStV, the regulations on liability under Articles 7 to 10 TMG must be observed. These regulations correspond to the liability privilege of the E-Commerce Directive. According to these regulations, service providers are not responsible for third-party information that they store for a user, unless they have knowledge or they have acted immediately to remove the information or block access to it as soon as they have gained knowledge of it.

Against so-called service providers of third-party content, which include video-sharing platforms, measures can, however, be ordered under Article 20 (4) JMStV in conjunction with Article 59 (4) RStV to block such content.

For certain social networks there is an additional reporting obligation pursuant to Article 2 NetzDG as well as obligations in dealing with complaints about illegal content pursuant to Article 3 NetzDG.

There are currently no special obligations for VSPs regarding the handling of illegal content.

Pursuant to Article 10a of the amendment to the TMG, in conjunction with Article 5b No. 1 of the amended JMStV, VSP providers are to be obliged to maintain a procedure by which users can electronically report complaints (user complaints) about illegal audiovisual content provided on the VSP service of the VSP provider.

5.7.3.2. Adapting terms and conditions of the VSP service to include those obligations – Article 28b (3) (a) AVMSD

Regarding the measure consisting in including and applying in the terms and conditions of the VSP services in respecting the obligations stemming from the aforementioned general requirements, Article 10c (1) TMG, VSP providers should be obliged to effectively agree with



their users that they are prohibited from distributing illegal audiovisual commercial communication.

5.7.3.3. Adapting terms and conditions to include obligations regarding commercial communications that are not marketed, sold or arranged by the VSP provider – Article 28b (3) (b) AVMSD

Regarding the measure consisting in including and applying in the terms and conditions of the VSP services the requirements set out for audiovisual commercial communications that are not marketed, sold or arranged by the VSP providers, Article 10c TMG, establishes that VSP providers are obliged to effectively agree with their users that they are prohibited from distributing illegal audiovisual commercial communications. This concerns audiovisual commercial communications for tobacco products, electronic cigarettes or refillable containers or for the benefit of companies whose main activity is the manufacture or sale of tobacco products, as well as for prescription drugs.

5.7.3.4. Having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications – Article 28b (3) (c) AVMSD

Regarding the measure consisting in having a functionality for users who upload user-generated videos to declare whether such videos contain audiovisual commercial communications as far as they know or can be reasonably expected to know, Article 98 MStV provides that the provider of a video-sharing service must take measures to ensure that advertising that is not marketed, sold or compiled by the provider itself complies with the general advertising principles and labelling requirements of German media law. The provider complies with this obligation if it includes provisions in its general terms and conditions of business that oblige it to comply with the requirements (Article 98 (3) No. 1 MStV) and if it provides a function for labelling advertising (Article 98 (3) No. 2 MStV). An obligation to provide a function for marking audiovisual commercial communication can also be found in the amended TMG. In addition, Article 6 (4) TMG obliges VSP providers to label audiovisual communication uploaded by users to the service as such in the future if they have obtained knowledge of it through such a labelling mechanism or otherwise.

5.7.3.5. Establishing and operating transparent and user-friendly mechanisms for users to report or flag content – Article 28b (3) (d) AVMSD

Regarding the measure consisting in establishing and operating transparent and user-friendly mechanisms for users of a VSP to report or flag to the VSP provider the content referred to in the general provisions, Article 3 NetzDG provides for obligations for social networks in dealing with complaints about illegal content. These obligations apply within



the limited scope of the NetzDG. Pursuant to Article 10a TMG, VSP providers are obliged to maintain a procedure by which users can electronically report complaints about illegal audiovisual content provided on the provider's VSP service.

Article 10b TMG will regulate the procedure for remedying user complaints, which must be effective and transparent. Illegal content in this sense is defined as content that is illegal under media law pursuant to Article 4 JMStV and content that impairs development pursuant to Article 5 JMStV, unless the provider meets its obligations to take appropriate protective measures in this respect.

5.7.3.6. Establishing and operating systems through which VSP providers explain to users what effect has been given to reporting and flagging – Article 28 (b) (3) (e) AVMSD

Regarding the measure consisting in establishing and operating systems through which VSP providers explain to users of VSPs what effect has been given to their reporting and flagging initiatives, the legislation provides no obligation for guidelines, but Article 10b TMG contains certain information obligations in the context of user complaints.

5.7.3.7. Establishing and operating age verification systems for users with respect to content which may impair the physical, mental or moral development of minors – Article 28b (3) (f) AVMSD

Regarding the measure consisting in establishing and operating age verification systems for users of VSPs with respect to content which may impair the physical, mental or moral development of minors, pursuant to Article 5 (3) JMStV, providers may, in order to fulfil their general obligations to protect children and adolescents, use technical means that make it impossible or considerably more difficult for them to take advantage of an offer, or provide the offer with an age rating that can be read by suitable youth protection programmes. The new Article 5a JMStV also requires providers of video-sharing services to take appropriate measures to protect children and adolescents from offerings that impair their development (Article 5a (1) JMStV). To this end, providers set up systems with which users can rate the content they upload and which can be read by age verification systems or parental control systems (Article 5a (2) JMStV).

5.7.3.8. Establishing and operating easy-to-use systems allowing users to rate the content – Article 28b (3) (g) AVMSD

Please see under 5.7.3.7.



- 5.7.3.9. Providing for parental control systems that are under the control of the end-user with respect to content which may impair the physical, mental or moral development of minors – Article 28b (3) (h) AVMSD

Please see under 5.7.3.7.

- 5.7.3.10. Establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints – Article 28b (3) (i) AVMSD

Regarding the measure consisting in establishing and operating transparent, easy-to-use and effective procedures for the handling and resolution of users' complaints to the VSP provider in relation to the implementation of the measures, Article 10b TMG provides for obligations for video-sharing service providers with regard to the handling of user complaints. This includes, for example, rules on how long after removal unlawful content must be stored for evidentiary purposes, how information must be provided to users and complainants and rules about the possibility of submitting a counter-notice. In addition, the new Article 99 MStV provides for the establishment of a joint body for the arbitration of disputes between the complainants or users affected by the complaint and the providers of video-sharing services. The NetzDG is also extended in its scope of application to include specific regulations for video-sharing services, for example, an official arbitration board for the out-of-court settlement of disputes is to be expanded.

- 5.7.3.11. Providing for effective media literacy measures and tools and raising users' awareness of those measures and tools – Article 28b (3) (j) AVMSD

N/A.

- 5.7.3.12. Forbidding the processing of personal data of minors for commercial purposes – Article 28b (3) AVMSD

Regarding the processing of personal data of minors collected or otherwise generated by VSP providers for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising, Article 14a TMG clarifies that service providers that have collected personal data from minors in order to protect minors, for example by means of age verification or other technical measures, may not process this data for commercial purposes.



5.7.3.13. Other relevant provisions related to the protection of minors

Article 19 JMStV provides for the possibility of forming recognised self-regulatory entities within the framework of regulated self-regulation under the supervision of the Commission for the Protection of Minors in the Media (KJM), an organ of the state media authorities responsible for compliance with the provisions for the protection of minors in the media.¹⁴¹

5.7.3.14. Other relevant provisions related to commercial communications which may impair the physical, mental or moral development of minors

Article 6 JMStV contains general provisions on the protection of minors in advertising. According to these provisions, advertising may not impair children and adolescents either physically or mentally; moreover, it may not contain direct appeals to children or adolescents to buy or rent goods or services that exploit their inexperience or credulity; it may not directly encourage children or adolescents to persuade their parents or third parties to buy the goods or services advertised; it may not exploit the special trust children or adolescents place in parents, teachers, and other persons they trust; or it may show children or adolescents in dangerous situations without legitimate reason (Article 6 (2) JMStV). Advertising whose content is likely to impair the development of children or adolescents into independent and communicative personalities must be broadcast separately from content directed at children or adolescents (Article 6 (3) JMStV). Apart from other provisions, Article 6 JMStV also contains the provision that advertising for alcoholic beverages must not be directed at children or adolescents.

Article 98 MStV provides for more detailed regulations, especially for providers of video-sharing services to ensure that advertising which is not marketed, sold or compiled by the provider himself complies with certain media law requirements. With regard to the protection of children and adolescents, the rules are listed according to the types of advertising that may harm children and adolescents either physically or mentally (Article 6 (2) JMStV) as well as the new Article 6 (7) JMStV on food not recommended for children. The provider fulfils this obligation if it includes provisions in its general terms and conditions that oblige it to comply with the regulations (Article 98 (3) No. 1 MStV) and if it provides a function for labelling advertising (Article 98 (3) No. 2 of MStV).

An obligation to provide users with a function for identifying audiovisual commercial communications can also be found in amended Article 6 (3), (4) TMG. In addition, Article 10c TMG obliges providers of VSPs to agree with their users within the framework of general terms and conditions of business that inadmissible audiovisual commercial communication is prohibited. Thus, such illegal advertising is defined as advertising for tobacco products and prescription drugs.

¹⁴¹ <https://www.kjm-online.de/aufsicht/telemedien/selbstkontrolle>.



5.7.3.15. Other relevant provisions related to minors' exposure to advertising for alcohol products and HFSS foods (high fat, sugar and salt foods) in commercial communications

The general advertising rules of Article 6 (7) JMStV stipulate that providers must take appropriate measures to effectively reduce the impact on children of advertising for foods containing nutrients and substances with a nutritional or physiological effect, in particular fat, trans-fatty acids, salt, sodium or sugar, the excessive consumption of which is not recommended as part of the overall diet. The explanatory memorandum to the law lists codes of conduct of a self-regulatory body to which the providers are affiliated as suitable measures in terms of the regulation.

The general provisions are applicable to commercial communications disseminated by video-sharing services. This is also clarified in the new Article 98 (2) MStV.

With regard to commercial communication for HFSS foods that is not marketed, sold or arranged by video-sharing platform providers, the platforms will in future have obligations to include provisions in the general terms and conditions and to provide a function for identifying advertising. Article 98 (3),(1) of MStV explicitly refers to the new Article 6 (7) JMStV on non-recommendable foods.

5.7.3.16. Other relevant information

N/A.

5.7.4. Practicability of the measures imposed on VSP providers

Article 28b (3) of the revised AVMS Directive does not only provide for the list of measures which are detailed under the previous section. Paying attention to the principle of proportionality, it also states that the measures imposed on VSP providers should be practicable and proportionate and take into account criteria such as the size of the VSP service and the nature of the service, as well as the nature of the content.

This section aims at identifying how this is implemented in the national legislation.

No specific provision of the laws deals with this issue, a threshold is only provided for with regard to certain obligations of the NetzDG, but not in the regulations implementing the AVMSD. These obligations only affect social networks with more than 2 million registered users in Germany (Article 1 NetzDG). VSP services with less than two million registered users in Germany but based in Germany are to remain within the scope



of application of the Act to a limited extent with regard to content that is subject to certain criminal law provisions.

5.7.5. Regulation and enforcement

This section aims at identifying which body is in charge of regulatory and enforcement powers with regards to VSPs, as well as the scope of its activities with regard to VSPs. These relate to registration/notification systems of VSPs with the relevant national regulatory bodies, as well as with the development of self- or co-regulatory codes and schemes (as encouraged by Article 4a of the AVMS Directive), provisions related to out-of-court redress mechanisms for the settlement of disputes between users and video-sharing platform providers (as envisaged by Article 28(b)7 of the AVMS Directive) and provisions related to how users can assert their rights before a court in relation to VSP providers (as required by Article 28(b)8 of the AVMS Directive).

5.7.5.1. Regulatory body

The competent regulatory body for VSPs is organised on a state level. Most German states have their own state media authority (LMA), while the states of Hamburg and Schleswig Holstein as well as the states of Berlin and Brandenburg respectively share one authority. The state media authorities form joint commissions for certain tasks. In the field of the protection of minors in the media, the KJM exists for this purpose and is responsible for the final evaluation of broadcasting and telemedia in the field of the protection of minors in the media. Cooperation takes place between the state media authorities within the framework of their joint institutions, for example the KJM, or the newly established joint arbitration board. Some co-operation is also planned between federal and state institutions.

5.7.5.2. Existence of a registration/notification system

Under Article 2b TMG, a list will be compiled of audiovisual media service providers and VSP providers whose country of location is Germany or for which Germany is considered the country of location.

5.7.5.3. Compliance, enforcement and sanctioning powers

If the respective state media authority determines that a violation of the provisions of the MStV has taken place, it shall take the necessary measures. According to Article 109 MStV, such measures are defined as complaint, prohibition, blocking, withdrawal and revocation. In the field of the protection of minors, the KJM shall take the necessary measures with



respect to providers of telemedia. Except in cases of serious violations of rules on illegal content, the establishment of self- and co-regulation shall be addressed first. The KJM's supervision is limited with respect to the decisions of recognised institutions of self- and co-regulation, as stipulated by Article 20 JMStV. Certain youth protection offences can constitute an administrative offence under Article 24 JMStV, which can be punished with a fine.

5.7.5.4. Development of self- or co-regulatory codes or schemes

According to Article 19 JMStV, voluntary self-regulatory bodies can be set up to monitor compliance with the provisions of the JMStV and the MStV. In order for their work to take precedence, these bodies have to be certified by the KJM. According to Article 19b JMStV, the KJM monitors these institutions of self- and co-regulation.

A large number of self- and co-regulatory organisations have been developed in Germany and are active in different areas of the media landscape. For example, the German Press Council, the German Advertising Standards Council, the Film Industry's Voluntary Self-Regulation Scheme, the Entertainment Software Rating Board, the Television Industry's Voluntary Self-Regulation Scheme and the Voluntary Self-Regulation of Multimedia Providers Scheme (FSM). In 2003, the system of regulated self-regulation in the area of the protection of minors was introduced. The FSM is an institution recognised under Article 19 (2) JMStV and responsible for telemedia providers, including VSPs. The organisation gives itself statutes and guidelines, as well as a code of conduct. It also provides review and complaint procedures with regard to the provisions for the protection of minors.

5.7.5.5. Out-of-court redress mechanisms for users

The regulatory authorities should in future set up a joint body pursuant to Article 99 MStV for the settlement of disputes between the complainants or users and providers of video-sharing services affected by any complaint concerning measures taken or omitted by providers of video-sharing services in the course of complaint procedures.

5.7.5.6. Rights before a court for users

No specific provision of the laws deals with this issue, but nothing prevents users from asserting their right before a court.



5.7.6. Studies, reports and research

The following reports have been prepared in relation to the transposition of the revised AVMSD:

- Self-and co-regulation in the new AVMSD, 2019¹⁴²
- First Public Consultation on the new State Media Treaty with submissions from academic institutes, associations and corporations, 2018¹⁴³
- Second Public Consultation on the new State Media Treaty with submissions from academic institutes, associations and corporations, 2019¹⁴⁴

5.7.7. Data compilation

This factsheet is based on data compiled by Jan Henrich, Research Associate and Christina Etteldorf, Research Assistant of the Institute of European Media Law.

¹⁴² <https://rm.coe.int/iris-special-2019-2-self-and-co-regulation-in-the-new-avmsd/1680992dc2>.

¹⁴³ <https://www.rlp.de/de/regierung/staatskanzlei/medienpolitik/medienstaatsvertrag/onlinebeteiligung-2018/>.

¹⁴⁴ <https://www.rlp.de/index.php?id=32713>.