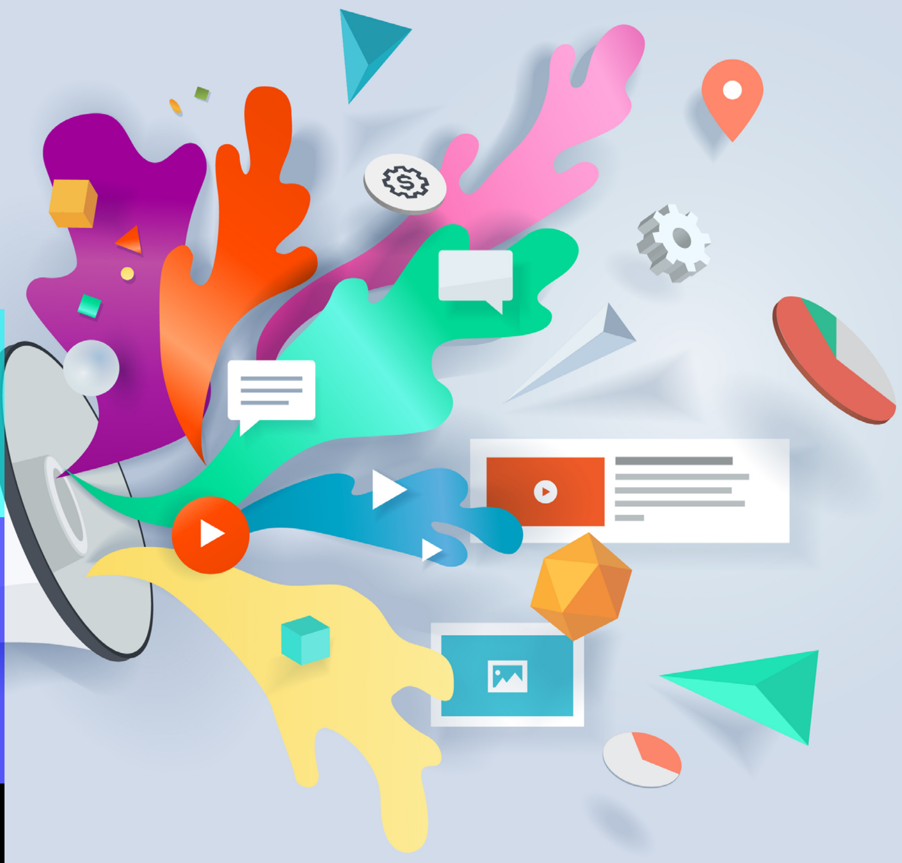
Whitepaper



SKW Schwarz

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Who am I?

Update on platform regulation under the DSA, AVMD Directive, Interstate Media Treaty, and UrhDaG

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Online platform, media platform, or something else entirely?

Regulatory provisions have long since ceased to apply only to traditional platforms such as social networks, online marketplaces, streaming providers, search engines, and news aggregators. Now, for example, the automotive industry also must deal with the regulation of its entertainment systems. This raises a decisive question for providers: how should my service be classified and which regulations apply to me?

This white paper shows how the DSA, AVMD Directive, State Media Treaty, and Copyright Service Provider Act (UrhDaG) interact, where overlaps and contradictions arise, and how these can open up scope in practice to avoid unnecessarily strict regulation.

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1. Regulation under the Digital Services Act

With the Digital Services Act (DSA), new legal requirements have been in place for many types of intermediary services since the beginning of 2024. In addition to liability privileges, the regulation focuses on extensive transparency, compliance, and accountability requirements. The central concern of the regulation is the fight against illegal online content.

Online platform or “just” a mere conduit, caching, or hosting service?

The intermediary services addressed in the DSA are divided into three main categories: **mere conduit services** (e.g., Internet exchange points, WAP, VPNs, certification authorities that issue digital certificates, Internet voice telephony (VoIP) or other interpersonal communication services), **caching services** (e.g., content delivery networks, reverse proxies, or proxies for content adaptation), and **hosting services**, which are essentially the most important category. Hosting services are those that store information provided by users — such as cloud computing, web hosting, or, more generally, services that enable the exchange or storage of online content.

If hosting services also publicly disseminate user information, i.e., make it accessible to other persons without any particular restrictions, the provider is categorized as an **online platform**. An exception is made if the function in question is merely a minor secondary function to the actual main service — such as a chat function within an online game. Email and instant messaging services are also not considered online platforms, as they are used for communication between a limited number of people determined by the sender. This distinction and differentiation is important because online platforms are subject to additional and more extensive compliance obligations. If an online platform reaches 45 million active monthly users, it is considered a “**very large online platform**” (VLOP), which triggers further obligations.

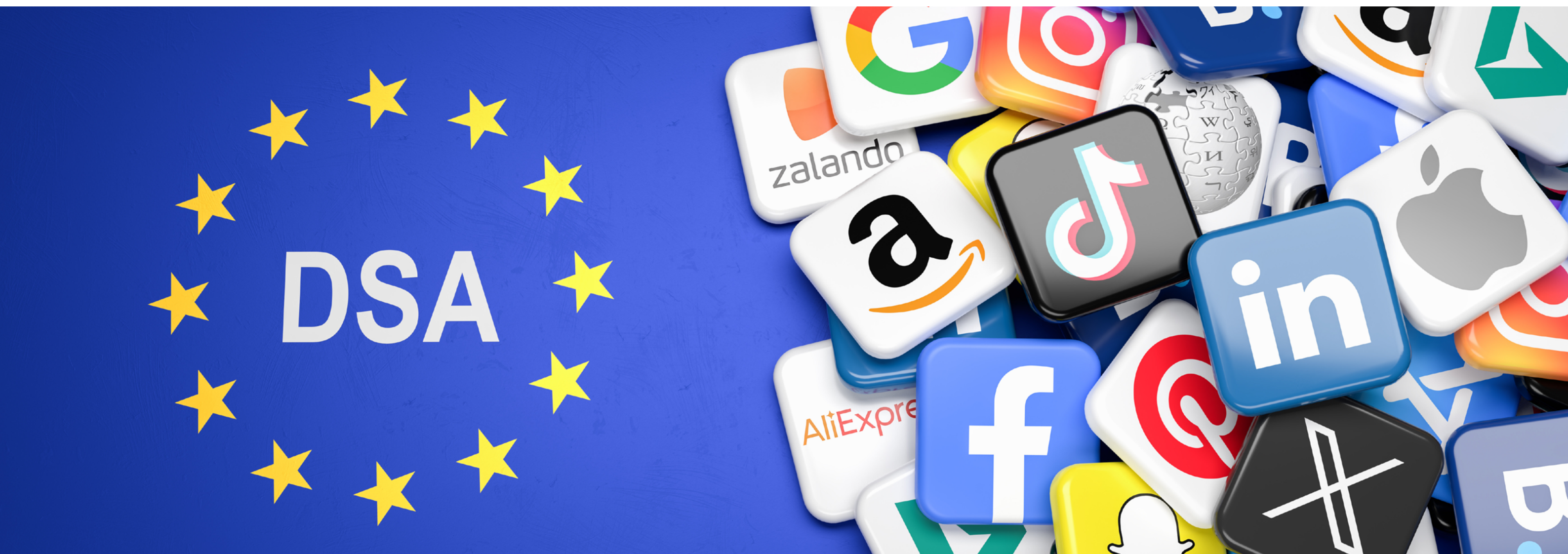
Tiered obligation model of the DSA – Which services are subject to which obligations?

The due diligence obligations contained in the DSA apply in stages according to the different categories of intermediary services. Hosting services and online platforms in particular are faced with extensive compliance obligations.

However, the scope of application is often underestimated: **All intermediary services** – i.e., mere conduit, caching and hosting services – have the following basic obligations under the DSA:

- → Designation of contact points for authorities and users ("single point of contact")
- → Publication of transparency reports on moderated content
- → Appointment of a legal representative in the EU if no establishment is maintained in the Union but services are offered in the EU
- → Transparency requirements for user agreements/terms and conditions: Among other things, it must be explained how illegal content is dealt with, what measures are provided for in the event of breaches of the terms and conditions, how users can submit complaints, and how these are processed.

In addition to these obligations, however, the **liability privileges** must also be emphasized: Intermediary services are generally not liable for third-party content as long as they do not take an "active role" or have knowledge of infringing content. There are no general inspection obligations for providers — they are not required, for example, to check all content uploaded by users for legal violations.



“Notice and action” procedure

Hosting services and **online platforms** are subject to further extensive requirements for dealing with illegal content. They must establish procedures for reporting and removing such content and, where necessary, processes for identifying illegal content. This may include the use of automated tools as well as manual moderation.

However, according to a recent ruling by the Berlin Court of Appeal (KG Berlin, August 25, 2025, Ref. 10 W 70/25), users are not obliged to use solely the standardized reporting procedures provided by the platforms. The court clarifies that the DSA requirements are intended to facilitate reporting, but do not exclude alternative reporting channels (e.g., lawyer‘s letter, email). However, users bear the risk that reports are only effective and lead to the platforms‘ obligation to take note and respond if they are precise, comprehensible, and comply with the DSA requirements in terms of content.

Additional compliance and transparency obligations

Online platforms in particular must fulfil additional, complex compliance and transparency obligations. These relate in particular to advertising, out-of-court dispute settlement, and recommendation systems.

→ Providers must make it clear who is responsible for an advertisement and according to which parameters it is displayed to users. This is to ensure that users can better understand the origin and intention of the advertisement. The following also applies to user interfaces (e.g., apps): They may not use manipulative (“dark pattern”) designs.

→ To avoid “overblocking,” providers must set up a complaint procedure that allows users to take action against measures such as the blocking of content or accounts. In addition, they must provide information on out-of-court dispute settlement bodies so that users can resolve conflicts independently, quickly, and inexpensively.

→ When platforms display content or products using recommendation systems (e.g., “rankings”), they must disclose the most important factors influencing these systems. Users must also have the option to change or influence these parameters. This is intended to increase transparency and control over the content displayed.

“Know Your Business Customer” principles

The DSA requires providers of online platforms that enable consumers to conclude distance contracts to implement Know Your Business Customer (KYBC) processes. Traders must be comprehensively identified and checked with regard to their registered office, corporate structure, and creditworthiness. The aim is to prevent fraudulent or anonymous business activities and to strengthen accountability in online commerce.

Very large online platforms

Very large online platforms are required, among other things, to conduct an annual risk assessment to identify systemic risks. Relevant factors include the dissemination of illegal content, impacts on fundamental rights and the rule of law, and risks to user health.

Going beyond what is required of normal online platforms, users must also be able to use recommendation systems that are not based on profiling. In addition, a public archive must be set up for advertising placed on the online platform.

2. Regulation under the Interstate Media Treaty

The Interstate Media Treaty recognizes a variety of different categories that service providers can fall under. Media intermediary, media platform, or user interface – what is the difference, and who is currently being targeted by the regulatory authorities?

Media intermediaries

Media intermediaries are services that, unlike traditional media, do not publish their own content, but instead forward user-generated content such as newspaper articles to users. Examples include search engines such as Google and social networks such as Facebook. The Interstate Media Treaty defines media intermediaries as services with journalistic and editorial offerings that aggregate, select, and present content without combining it into an overall offering. Accordingly, media intermediaries publish journalistic and editorial offerings such as newspaper articles or broadcast content, aggregate these contributions, select them using algorithms, and present them publicly without combining them into their own offering.

A separate overall offering only exists if journalistic and editorial control is exercised over all content, but not in the case of purely functional controls such as app stores. In their current regulatory decisions, the state media authorities therefore tend to classify both app stores and music streaming providers such as Spotify as media intermediaries. Even though content on Spotify can only be posted via certain distributors, the state media authorities and the Berlin Administrative Court believe that no editorial selection takes place here.

Regulatory requirements for media intermediaries

Most regulatory requirements apply primarily to media intermediaries that reach at least one million users per month, do not specialize in goods or services, and do not pursue exclusively private purposes. Media intermediaries must appoint a German authorized representative who must be easily recognizable and locatable. Transparency requirements also require media intermediaries to provide information about what content is deleted and what criteria are used to sort content, without having to disclose the entire algorithm. Social bots must be identified in social media if it is recognizable that they are such.

Video sharing services

Video sharing services such as YouTube and TikTok are essentially media intermediaries that do not publish their own content, but rather forward third-party broadcasts and user-generated videos. They mainly contain moving images and user-generated videos that are made accessible using algorithms. The content is arranged algorithmically based on user interests. Video sharing services also bear no editorial responsibility for the content transmitted, unlike broadcast-like telemedia such as Netflix (see below).

Regulatory requirements for video sharing services

Video sharing services are also subject to specific regulatory requirements. Advertising regulations for broadcasters, such as the requirement to separate advertising from editorial content and regulations on product placement, also apply to video sharing services. However, these advertising regulations must be observed not only by the service providers themselves, but also by the users of video sharing services. Service providers must take measures to ensure that their users comply with these advertising regulations, for example by requiring them to comply with the advertising regulations in their terms and conditions and by providing a function that allows users to label their advertisements.

Broadcast-like telemedia

Broadcast-like telemedia includes streaming services such as Apple TV+, Disney+, and Netflix. These services offer on-demand video and audio content, allowing users to decide for themselves when to stream which content. Linear live streaming services such as ZATTOO are not included. Broadcast-like content, such as feature films and series, is compiled into a catalog by the provider based on its own editorial selection decisions. Upload platforms such as YouTube are therefore not considered broadcast-like telemedia overall, as users decide what content is uploaded there. However, individual YouTube channels could be classified as broadcast-like telemedia if a YouTuber makes their own editorial selection.

Even though services such as Spotify are classified as media intermediaries by the state media authorities, other parts of these services may in principle also constitute broadcast-like telemedia. With regard to the Spotify service, the Berlin Administrative Court expressly emphasizes that it is entirely conceivable that parts of the service could also be classified as broadcast-like telemedia insofar as the service offers its own productions on its own responsibility.

Regulation of broadcast-like telemedia

On the one hand, broadcast-like telemedia are subject to general requirements that also apply to traditional broadcasters. These include general advertising regulations, such as the requirement for recognizability and separation, according to which advertising must be clearly recognizable and distinguishable from editorial content. The regulations on product placement also apply: as in traditional linear television, product placements in broadcast-like telemedia must be clearly indicated. On the other hand, specific regulatory requirements also apply to broadcast-like telemedia. The Interstate Media Treaty introduces a quota of 30% for European works, which providers must ensure. A similar quota also applies to broadcasters. In order to promote the accessibility of European productions, they should be highlighted in a special section on the platform. This can be implemented, for example, by creating a special section for European productions that can be accessed from the main page of the service.

Media platforms and user interfaces

Media platforms such as Amazon Prime Video, Sky, Zattoo, and digital cable network operators such as Vodafone, as well as end devices such as smart TVs and streaming sticks, fall under the term media platform or user interface. The state media authorities have now also determined that various car entertainment systems can fall under the term media platform or at least under the term user interface.

The Interstate Media Treaty defines media platforms as services that combine broadcasting, broadcast-like or journalistic-editorial telemedia into a comprehensive offering determined by the provider. Media platforms bundle various media offerings, including broadcasting (linear television or streaming), broadcast-like telemedia (VoD services) and journalistic-editorial telemedia (online press). User interfaces, on the other hand, are the textual or acoustic overview of offerings or content on media platforms. The provider of media platforms decides according to its own criteria which content to offer on its platform and presents it as an uniform overall offer. Classic social media platforms are not media platforms, as users determine the content uploaded there. The key point is that media platforms must also integrate offerings designed by third parties, such as Google News Showcase, which provides editorial and journalistic content from various press publishers as a closed overall offering. Mixed offers are also conceivable, combining a provider-curated area with an open area, e.g., for uploading UGC.

The state media authorities also classify the car entertainment systems from Audi, BMW/Mini, and Tesla as user interfaces. The apps preinstalled in the entertainment systems provide access to broadcast-like telemedia such as Apple Music, Netflix, and Spotify. The Tesla Media Player is even classified as a media platform. Tesla not only decides on the design of the overview of the various apps, but also on the specific inclusion of offers in the Tesla Media Player.

Regulation of media platforms

Media platforms are subject to specific regulatory requirements, some of which depend on their platform size. A mixed offer that falls into different service categories must comply with all applicable regulatory requirements. Media platforms are required to notify the state media authorities one month before going live. Media platform providers must also ensure non-discriminatory access by guaranteeing equal access conditions for all content providers. Changes to media offers may not be made without the consent of the content providers.

The findability of media offers in user interfaces must also be non-discriminatory. Certain regulations apply to the findability of content offers in user interfaces in order to ensure diversity: Media offers must be sorted, arranged, and presented in a non-discriminatory manner. Permissible criteria for sorting include, for example, alphabetical order or genre.

In addition, certain content must be easy to find in the user interfaces of media platforms. For example, the linear offerings of broadcasters must be easily and quickly accessible in their entirety at the first selection level of a user interface. Within the broadcasting offering, certain selected content that makes a special contribution to public opinion-forming, known as “public value content,” must be privileged in terms of findability. This includes, for example, the offerings of public broadcasters.

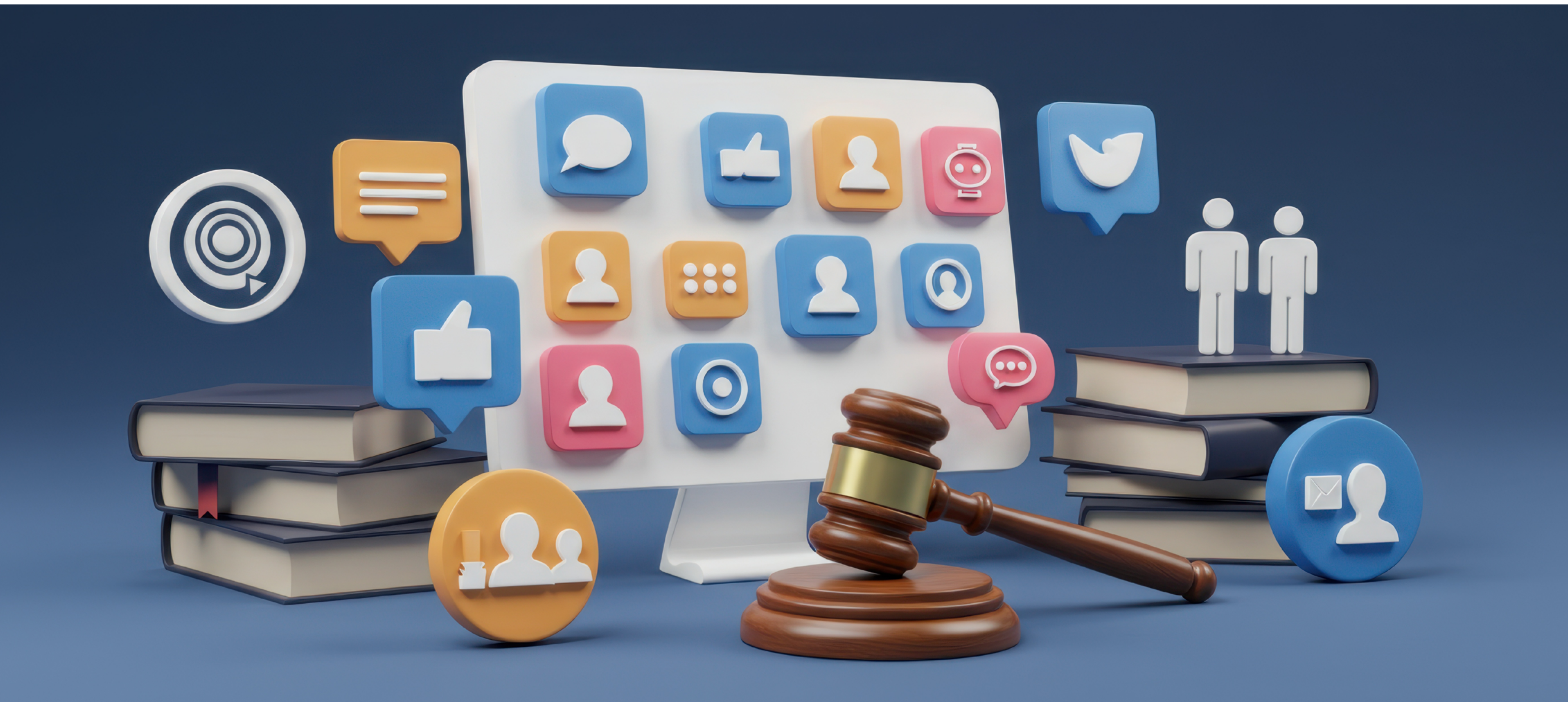
Finally, platforms that reach a certain minimum size must meet certain transparency requirements. For example, media platform providers must be transparent to their users about the principles according to which offerings are granted access to their platform. This includes, among other things, information about the criteria used to sort, arrange, and present content on their platform.

3. Regulation under the Copyright Service Provider Act – Liability despite platform privilege?

Platform regulation = copyright liability privilege? The Copyright Service Provider Act (UrhDaG) has turned this principle on its head. Since 2021, it has established copyright liability for online platforms for user-generated content. The aim of the UrhDaG is to establish the liability of platform operators for user-generated content by obliging them to obtain rights and to remove or block illegal content.

The UrhDaG thus establishes an exception to the classic "notice and take down" principle because it obliges platforms to prevent the publication of certain copyright-relevant content as soon as it is uploaded ("notice and prevent" or "qualified blocking"), provided that the rights holders provide the relevant information. It also forces platforms to enter into license agreements with collecting societies to obtain the rights to content published by users.

The UrhDaG covers service providers whose main purpose is to store and make publicly available copyright-protected user-generated content. Typical examples are platforms such as YouTube or Pinterest, which store and organize large amounts of user-generated image content. However, a further requirement is that the platforms must compete with online content services for the same target group. Accordingly, many platforms, such as career networks, are not covered by the regulation.



4. Battle of the Giants – Interaction between national and EU regulation

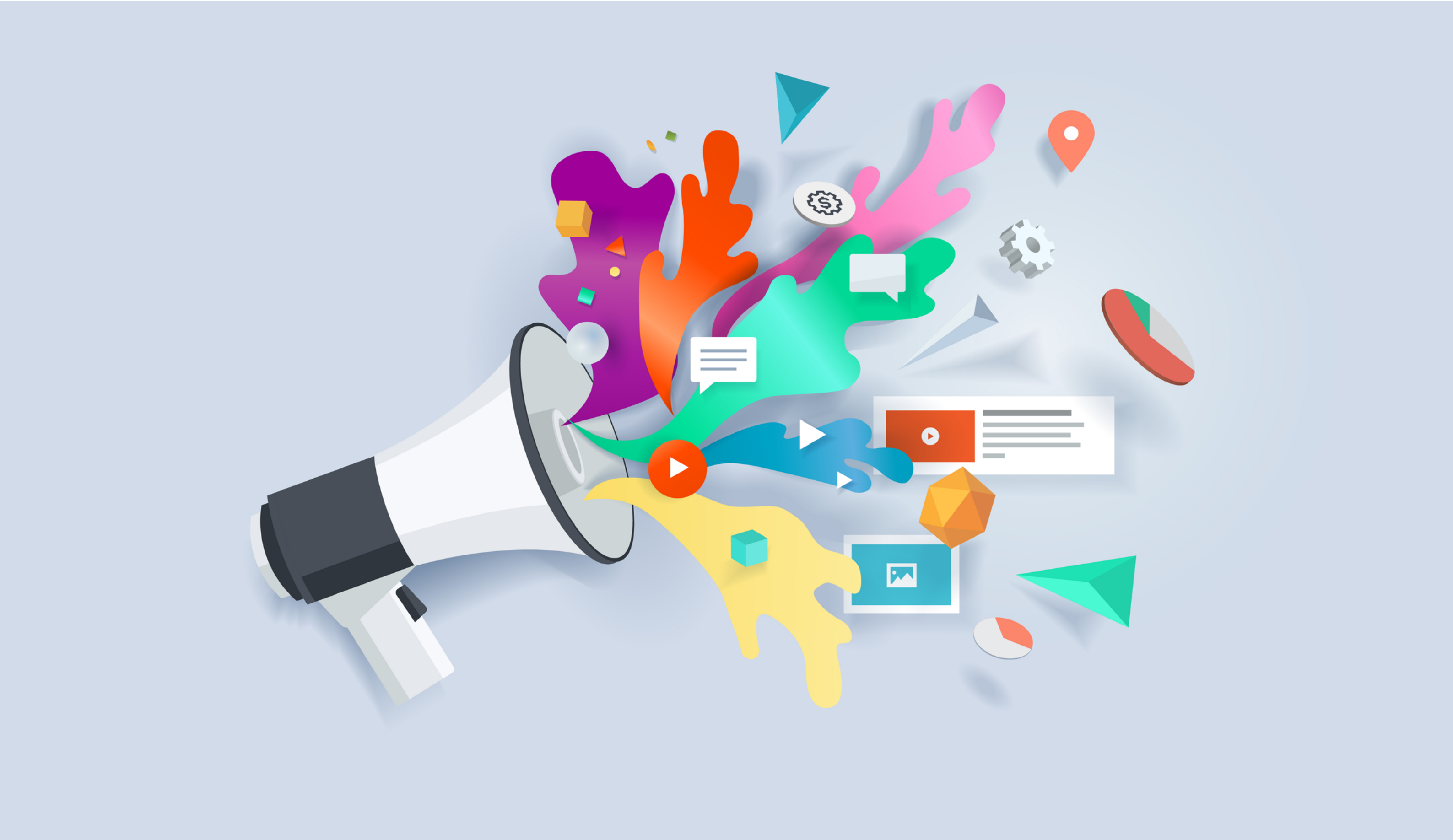
DSA, MStV, UrhDaG, AVMD Directive – how does it all fit together?

The provisions of the Interstate Media Treaty also expressly apply to media intermediaries and media platforms or user interfaces that are established in another EU member state but direct their offerings to German users. The conformity of these provisions with EU law has still not been conclusively clarified. The DSA also addresses media intermediaries and, as a regulation, provides for full harmonization. At the same time, it does not affect the provisions of other EU legal acts that regulate other aspects of the provision of intermediary services in the internal market or clarify and supplement this regulation, and thus does not prohibit national regulations per se. Therefore, with regard to each regulatory provision, it must be examined whether the Interstate Media Treaty is still applicable or whether it is superseded by the DSA. While the DSA is primarily oriented toward the internal market and consumer protection, national regulations in some cases also pursue the protection of media pluralism. The legal situation here is particularly complex, as on the one hand, complete EU harmonization in the area of transparency can be assumed, but on the other hand, the EU has no explicit regulatory competence in the area of media diversity.

Currently, there is also a particular focus on the complex relationship and possible conflicts between the country of origin principle enshrined in the E-Commerce Directive and the national obligations under the Interstate Media Treaty. In a case brought by the service provider Spotify against the competent state media authority, the Berlin Administrative Court has now initiated a preliminary ruling procedure before the ECJ. Specifically, transparency obligations for media intermediaries are being examined here. The central problem lies in the country of origin principle of the E-Commerce Directive, according to which providers of information society services are generally only subject to the regulations of the member state in which they are established. Additional requirements imposed by other member states are only permissible in cases of expressly regulated exceptions. The German transparency obligation under the Interstate Media Treaty is therefore considered by the streaming provider to be contrary to European law, as no such requirements exist in the country of establishment.

In particular, the interpretation of Article 1(6) of the E-Commerce Directive, which leaves measures to protect cultural diversity and pluralism of opinion "without prejudice to Community law" "unaffected" by the Directive, is being discussed. While the state media authorities understand this provision as a genuine exception to the country of origin principle for national media diversity regulations, the service providers concerned rightly see it as merely a clarification without restricting the country of origin principle. The EU Commission has also already expressed considerable doubts in the notification procedure about the conformity of the German regulations with European law and emphasised that Art. 1 (6) also requires compliance with the country of origin principle. Accordingly, there are good reasons for service providers to doubt the legality of the provisions under EU law.

Similar discussions are currently taking place in the area of Internet communication services (OTT services, cloud email communication services), some of which are integrated into (media) platforms or offered separately by providers. Once again, a court (VG Cologne) recently ruled that the specific service should at least also be classified as an information society service within the meaning of the E-Commerce Directive, which is why the court subsequently considered large parts of national telecommunications law to be inapplicable.



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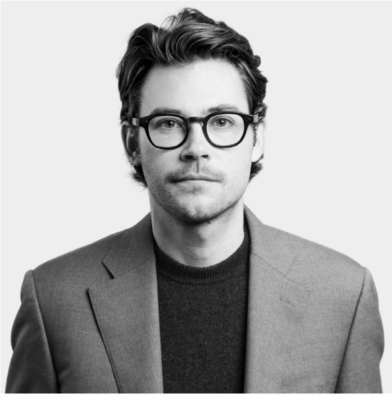

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