

Berlin, April 2018
Directors' Conference of the State Media Authorities

Necessity to Secure Diversity on the Internet – Need to Regulate Information Intermediaries

For many people, Web 2.0 was a synonym of the decentralised, open, and participative culture of the internet. Today, however, we are confronted with underlying questions and challenges for society, politics, and regulation. Topics of controversy also include who actually determines or should determine what users see and hear on the internet, and what sort of information they are offered. As a result, media diversity is indispensable for a vibrant, politically active public, and without (critical) journalism and media that does battle with journalistic competition, this diversity would not be imaginable.

One term is on everybody's mind: intermediaries – middlemen between content providers and users – and the question of which role they play in relation to opinion formation and plurality of opinion. How exactly companies such as Facebook, Twitter, and Google – so-called information intermediaries – use algorithms remains hidden in their trade secrets. They collect personal data about their users, accumulate these data, and analyse them on the basis of underlying algorithms. These algorithms use the data streams to continuously improve.

Without a doubt, offers by information intermediaries create more plurality in terms of quality, and without algorithmic decision-making systems we would not even be able to manage the flow of information, which would make plurality unthinkable. However, information intermediaries also influence the topics we look at, the range of information we receive, and what media appears in our mix of communications and information. This creates new challenges when ensuring plurality.

Therefore, the Media Authorities explicitly support the initiatives of the states to set minimum regulatory standards for information intermediaries in the Interstate Broadcasting Treaty. These minimum standards must include the regulatory elements mentioned below (chapter 1), the adherence to which must also be supervised by the Media Authorities (chapter 2). In doing so, regulation must only ever be imposed to the extent necessary (chapter 3).

Gesellschafter

Landesanstalt für Kommunikation
Baden-Württemberg (LFK)
Bayerische Landeszentrale für neue Medien
(BLM)
Medienanstalt Berlin-Brandenburg (mabb)
Bremische Landesmedienanstalt (brema)
Medienanstalt Hamburg/Schleswig-Holstein
(MA HSH)
Hessische Landesanstalt für privaten Rundfunk
und neue Medien (LPR Hessen)
Medienanstalt Mecklenburg-Vorpommern
(MMV)
Niedersächsische Landesmedienanstalt (NLM)
Landesanstalt für Medien NRW
Landeszentrale für Medien und Kommunikation
Rheinland-Pfalz (LMK)
Landesmedienanstalt Saarland (LMS)
Sächsische Landesanstalt für privaten Rundfunk
und neue Medien (SLM)
Medienanstalt Sachsen-Anhalt
Thüringer Landesmedienanstalt (TLM)

1 Setting the Necessary Minimum Requirements

In order to ensure plurality of opinion, regulations for information intermediaries must be set up to ensure transparency and non-discrimination, as well as the obligation to provide information to the Media Authorities. The acceptance of a duty to provide a domestic authorised recipient is also necessary.

1.1 Transparency towards the User

Users often do not know what mechanisms are used to select, compile, and present information during a Google search, a recommendation, or the display of a Facebook newsfeed, for instance. This information deficit must be balanced. In addition, information intermediaries should be obliged to inform the users about the main criteria for the aggregation, selection, and presentation of content, as well as any underlying personalisation, and make the respective information easy to find. However, there are restrictions to the scope of this rule. Search and recommendation functions must, in particular, still be able to perform their tasks.

1.2 Prohibition of Discriminatory Misuse

Non-discrimination must be ensured. An information intermediary may not exercise any unlawful influence on what opinion-relevant content its users become aware of. Consequently, unreasonable obstruction and the objectively unjustified unequal treatment of content must be excluded. In this case, a prohibition of discrimination which could be derived from the discrimination prohibition in accordance with broadcasting law (Art. 52c [1] RStV) is necessary. Reasons for objective justification must be specified in the light of plurality of opinion.

However, this does not entail any obligation to maintain complete neutrality: Personalisation is often the basis for the presentation of selection decisions. Information intermediaries should additionally be permitted to offer search and recommendation results in return for a remuneration. These search and recommendation results, however, would then have to be marked as advertisements.

No grounds exist to assume that a duty of transparency alone will entice information intermediaries to maintain objectivity (not neutrality!) or prevent (unjustified) unequal treatment: Information intermediaries do not violate the duty of transparency if they do not treat content providers in accordance with their transparent criteria, and an individual (in this case discriminating) provider cannot derive a subjective right to (equal) treatment in accordance with the disclosed criteria solely from the duty of transparency. This proves that a separate prohibition of discriminatory misuse is required.

1.3 Duty to Report

Effective supervision is only achieved if a review is possible. Transparency towards the supervisory authorities is also required. In order to make sound decisions, they must receive a current and comprehensive picture of the workings of the selection, aggregation, and presentation mechanisms used by information intermediaries, and this picture must be as informative as possible. The disclosure of the workings of an algorithmic decision-making process is therefore not the aim; on the contrary, trade secrets must be preserved as the core of the economic activity of many information intermediaries.

Therefore, a statutory duty to report is required, according to which the information intermediaries' providers regularly disclose information, particularly about preferential treatment and remuneration for the presentation of content, to the media authorities (which are bound to confidentiality).

1.4 Authorised Recipients

The implementation of minimum standards is only possible if somebody can be reached on the part of the provider. This has often proven difficult in the past, particularly with providers based abroad. Therefore, information intermediaries should be legally obliged to appoint a domestic authorised recipient in Germany.

2 Ensuring Effective Supervision by the Media Authorities

The requirements needed for the supervision of information intermediaries are varied. They are only fulfilled by the media authorities:

They are organised in an independent manner, external from the government, have regulatory executive rights, and possess the necessary specialist expertise and experience required for the assertion of plurality of opinion on the internet. The internal structures of the Media Authorities also guarantee, in a federal system, nationwide uniformity of supervisory decisions.

The statutory competency of the Media Authorities also enables them to react to the rapidly changing technical framework conditions in an agile manner. This statutory competency therefore must be extended to the regulation of information intermediaries.

Appropriate pressure to comply is necessary for effective regulation. This should be ensured by means of according financial penalty provisions.

3 Setting Clear Scopes of Application and Materiality Thresholds

Defining sufficiently clear scopes of application in regulation is important for providers and supervisory authorities alike. Therefore, it must be legally defined what an intermediary or information intermediary is exactly. To ensure plurality of opinion, only the information intermediaries, not sales platforms, need to be involved.

In addition, it must be determined for which information intermediaries the minimum standards apply. Obligations must only be placed on information intermediaries whose influence on the formation of opinion in Germany can actually be classified as significant. In addition, to preserve proportionality, materiality thresholds must therefore also be set, for example based on unique user numbers.

Ultimately, all these information intermediaries must comply with the minimum standards that are set for use in Germany, not just those whose providers have a base in Germany. Information intermediaries from the US, such as Facebook and Google, make this need for regulation clear.

die medienanstalten
Gemeinsame Geschäftsstelle/joint management office
Friedrichstraße 60
10117 Berlin

Phone: +49 30 2064690-0
Mail: info@die-medienanstalten.de
www.die-medienanstalten.de