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Proposed measures to restore provider diversity and competition in digital media markets

Suggested for the rework of the German Interstate Media Treaty in August 2024

German original >> see www.mstv2go.de

[Explanations and background information are formatted in italics throughout the text; the proposed regulations are formatted in regular font]

General background:

The growing monopolisation of the media by digital companies is currently causing major problems in the media sector. First, the ongoing substitution of analogue media by quasi-monopolies of digital corporations is leading to a worrying concentration of opinion-forming power. Second, independent offers on their own domains, such as the digital extensions of analogue editorial media, are being ‘starved’ of traffic in an environment where digital companies are monopolising the traffic. Privately financed editorial media are thus losing their financial base. Even fee-based content providers (i.e. from public service broadcasting) currently have little choice but to make their content available on the platforms and therefore yield to their algorithms. Finally, many influencers, creators and content creators are also becoming dependent on the platforms that they supply as they have no feasible opportunity to switch to alternative providers in the current environment where digital monopolies are prevailing.

The rise of digital media monopolies is bringing the status quo of our media system into conflict with the democratic principles of our constitution. We therefore need a concrete plan of action to emancipate the internet from excessive concentrations of opinion-forming power in order to secure media freedom for the digital future. The constitutionally mandated rules of media law must apply without exception, including to all digital media providers. They must all be independent, diverse (both on the level of provider diversity as well as on the level of audience attention) and independent of the State. Journalistic and editorial content (private or financed by fees) must be given fair access to the digital sphere so that it can find its audience in an environment of digital monopoly or oligopoly formation. Furthermore, the financial base for editorial and journalistic content must remain secure in the long term, even in this digital environment.

In the following text, we set out proposals on how we can stop the increasing concentration of power and creation of monopolies by digital tech corporations. We therefore regard this draft as a discussion paper and welcome feedback, suggestions and criticism. Above all, we look forward to suggestions on how we can achieve the goal of democratically liberating the digital media markets even more quickly and consistently than we have outlined in the following paragraphs.

Measures to restore competition and diversity in the digital media market

1. Open standards and interoperability

Background:

Digital corporations have established closed standards to lock users into their respective platforms and severely restrict their freedom to leave and seek offers outside the platforms. Conversely, content providers (influencers, creators, etc.) are also being led into a relationship of dependency. Closed standards enable the abuse of market and communication power in digital media markets and should therefore be prevented.

Regulation proposal:

Platforms with an annual turnover of 7.5 billion euro or more in the European Union (EU) and European Economic Area (EEA) should be required to offer all content available on their platforms exclusively via open standards (as is currently the case with email, for example) so that this content can be used independently of the provider in the future. This would enable users to share content such as videos, images and text seamlessly and freely from one platform to another. These open standards would also have to enable followers (with their consent) to be ‘transferred’ across platforms using simple functions.

2. Full outlink freedom for content creators

Background:

Digital corporations have massively reduced the permeability of their platforms to the outside digital world by either not offering outlinks (links that take users outside the platform) at all or by placing high barriers in their way. This active suppression of outlinks serves the purpose of binding users to the respective platform, massively restricting their freedom of choice and, conversely, placing content providers (influencers, creators, etc.) in a relationship of dependency. Above all, suppressing outlinks massively restricts the media freedom of providers to distribute content because this makes it almost impossible for them to monetise their content outside the platforms. In addition, individual platforms have restricted the visibility of content with outlinks ('dimming') for the same purpose. The various means used by tech corporations to reduce outlinks enable the abuse not only of market power but also of communication power in digital media markets and should therefore be regulated.

Regulation proposal:

For this reason, all platforms or intermediaries with an annual sales volume of 7.5 billion euro or more in the EU and EEA whose business model is based on the monetisation of user-generated content should, in future, be required to enable the same users at all levels of content to set external links, i.e. at the level of headlines, images or videos and text. Furthermore, it would need to be ensured that, when an outlink is clicked by users in apps, the in-app browser is exited and the selected content is accessed outside the app. Every click on a piece of content should be respected as the user's decision to leave the platform. Finally, platforms should not use algorithms to disadvantage posts that contain outlinks. Any structural barrier to outlinks, no matter how small, as well as the mere discrimination or dimming of posts with outlinks, should be legally considered an abuse of technically possible exclusivity (insofar as this constitutes a monopoly-like power). As self-preferencing in the sense of abuse of a dominant market position, any such action by platforms should be punished as severely as other antitrust offences, even if the self-advancement does not concern products but information and communication. The underlying principle is therefore that anyone who wants to provide an open platform maintained by the work of its users should allow those same users to attract traffic to their own offerings through relevant content without discrimination.

In agreement with the the German Commission on the Determination of Concentration in the Media (KEK), the German Federal Antitrust Office (*Bundeskartellamt*) would monitor the non-discriminatory openness of platforms in the digital media markets on an annual basis. In the event of non-compliance, the German Federal Antitrust Office may impose a fine of up to 10 percent of the global turnover of the company concerned.

3. Abolition of active traffic manipulation and sanctions for self-preferential treatment

Background:

Over the years, digital corporations have built ecosystems consisting of various interconnected quasi-monopolies and oligopolies. Because they control the gateways, they can currently allocate traffic to themselves (e.g. from Google to YouTube) without competitors having any realistic chance of control or co-determination; content creators (influencers, streamers, etc.) are also being led into a relationship of dependency. This practice enables the abuse of market and communication power in digital media markets and should therefore be abolished.

Regulation proposal:

Gatekeepers should not actively manipulate traffic in any way to favour their own offerings. Traffic flows should be reviewed annually by the KEK through an independent scientific study based on real usage measurements.

The monitoring of the non-discriminatory distribution of traffic by the platforms should be carried out annually by the German Federal Antitrust Office in agreement with and after consultation with the KEK. It would make sense to assign the data collection to the KEK, which already conducts audience share and reach surveys. In the event of non-compliance, the German Federal Antitrust Office should then be able to impose a penalty of up to 10 percent of the global turnover of the company concerned.

4. 30 percent market share cap in media categories relevant to democracy

Background:

Under constitutional law, monopolies in parts of media that are relevant to democracy are undesirable in Germany. The provisions of the Interstate Media Treaty are clear in this regard and stipulate, as a maximum, a 30 percent share of the market in the respective media genre for nationwide broadcasting.

Regulation (proposal):

Germany's constitutional principles also apply to digital media genres. The following categories should be considered democracy-relevant digital media types: Free video (as the digital successor to television, i.e. services such as YouTube, TikTok, etc.), digital audio providers (as the digital successor to radio, i.e., Apple Music, Spotify, etc.), social media (as the typical digital successor to press and print content, such as Facebook and Instagram) and finally search engines as gatekeepers, which have a significant gatekeeping function for all types of digital media.

Market power in these media categories relevant to democracy should be determined annually by the KEK through real usage measurements on the end device categories of smartphones, tablets and desktops, and presented to the public.

If digital market and opinion power exceeds the threshold of 30 percent in the respective categories, the KEK should take the following steps:

4.1 Separation of channel and content / opening up to third-party providers

Background:

The strict separation of channel and content has proven effective in media and telecommunications law in terms of establishing effective checks and balances. They offer reliable protection against the systematic abuse of market and communication power in media markets.

Regulation (proposal):

Digital platforms with a dominant position in categories relevant to democracy should therefore be split into two levels at the company level, which then monetise the distribution channel on the one hand and the content on the other.

For example, YouTube would have one company for YouTube Platform Services and another for YouTube Content Services. The video platform itself would have to be designed to be fully interoperable (see point 1 above). In addition to interoperability, YouTube would have to provide the technical means for creators to host their content themselves and still distribute it via the YouTube platform.

From this perspective, YouTube Platform Services would be transformed into an operator that enables various providers (i.e. a number of providers or agencies beyond YouTube) to monetise content independently and in competition with YouTube Content Services through advertising. These providers would not be allowed to influence content in any way.

This would also empower many creators, influencers, but also editorial teams and bloggers. They could host content independently and monetise it through alternative inventory marketers and agencies — and might find that they get better terms or additional visibility without leaving the platform itself (in this case, YouTube). YouTube Platform Services could receive a fixed share (e.g. 5 percent) of all advertising revenue generated by independent inventory marketers and third-party providers until their market share within the affected media category falls below 30 percent. Competition would create transparency with regard to cost and offering structures within the respective platform. This would make it possible to compare key indicators in order to prevent any form of abuse of dominant positions from the outset.

Public broadcasters could also host their own content on YouTube, for example, and handle it through a specific marketer or agency. This structure would enable such

content to be monetised through advertising, even under the conditions of the platform economy. The profits generated could be used for public benefit, either to reduce broadcasting fees or to finance the production of digital content. The State media authorities would decide on the use of these funds after consulting the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (the German Commission for determining the financial requirements of public service broadcasting (KEF)).

Proven syndication models can be applied to search engines. The market leader (in this case, Google Platform Services) would have to grant competitors access to data on favourable terms.

The respective opening up of monopolistic and oligopolistic platforms to third-party providers and the conditions that they offer would be monitored by the German Federal Antitrust Office in agreement with the KEK. The monitoring of monopolistic and oligopolistic structures would be made available to the public in an annual report by the Federal Antitrust Office in agreement with the KEK.

4.2 Oversight Boards

Background:

The separation of channel and content enables transparency in order to monitor traffic flows within the platforms, which in the past has often proved to be arbitrary and opaque for influencers and creators.

Since the value of these platforms consists almost exclusively of the network of users, influencers, creators and the network effects that they generate, it is not legitimate that these communities are not allowed to have a say in the network they themselves create through their own work. The fact that the community of users are increasingly becoming content providers themselves, thus gaining importance for opinion formation, should also be taken into account.

Regulation (proposal):

Platforms with dominant positions should be required to set up oversight boards, one-fifth of which should be made up of ...

1. elected representatives of the content creators,
2. elected representatives of the platform users,
3. representatives of the independent inventory marketers (see above, 4.1),
4. digital experts from the field of the digital economy and regulation, and
5. representatives from the platform's management.

The composition of the Oversight Boards would be monitored by the *Kommission für Zulassung und Aufsicht* (German Commission for Licensing and Supervision of the State Media Authorities (ZAK)) with the participation of the KEK.

These Oversight Boards would monitor the distribution of traffic within the platform on an annual basis in order to prevent any abuse of power by the platform infrastructure *vis-à-vis* content providers (influencers, creators, etc.) and marketers.

Furthermore, the Oversight Boards would determine the rules relating to community standards and self-regulation of the platforms, such as options for appeal, appeal bodies, processes and the organisational composition of the ‘judges’ in the event of disputes.