# [DE] Several public service broadcasters introduce three-step test for telemedia services under Article 32(5) MStV

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Alongside their traditional offer of radio and television channels, German public service broadcasters are increasingly providing telemedia offers in accordance with Article 27 of the *Medienstaatsvertrag* (state media treaty – MStV). According to Article 30(2) MStV, such offers particularly include “broadcasting of their programmes on demand before and after their scheduled broadcasting”, sometimes with time limitations, e.g. for sports events, “as well as independent audiovisual content”, and “historical/cultural archives with informative, formative and cultural telemedia”. They should be provided “through electronic portals with access unobstructed to the greatest possible extent” (Article 30(4) MStV) and, in order that they do not compete directly with press publishers, they may not be of a press-type nature (Article 30(7) MStV). Services provided over the Internet in particular fall within the telemedia category.

In accordance with Article 32(3) to (7) MStV, the compatibility of a new telemedia offer, orof significant changes made to an existing telemedia offer with legislative provisions, must be verified before they can be approved. The definition of a new telemedia offer, or of a significant change to an existing telemedia offer, is determined by the state broadcasting authorities in accordance with standard criteria in their statutes or guidelines. When the overall content-related orientation of an existing telemedia offer or the intended target audience changes, a significant change is considered to exist.

The verification process is carried out by the respective broadcasting council or television council of the state broadcasting authorities in accordance with a three-step procedure described in Article 32(4) MStV.

The first step is to verify the extent to which the new telemedia offer, or the significant change, complies with the democratic, social, and cultural needs of society, and whether the offer falls within the public service remit and is therefore, in principle, allowed. The second step involves checking the extent to which the telemedia offer concerned contributes to media competition from a qualitative point of view. This quality check is a central part of the procedure. The extent to which the offer fits in with and affects other existing freely accessible telemedia offers of public service broadcasters, in all relevant markets, is

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analysed. The opinion-forming function of the offer is especially relevant in this verification process. Finally, in the third step, the proportionality of the financial means required for the offer is examined. This is determined with reference to the public benefit of the telemedia service, i.e. the journalistic value that it adds.

In order to ensure that a balanced outcome is reached, Article 32(5) MStV states that members of the public should be given the opportunity to comment, especially via the Internet, within a minimum period of six weeks. Such public consultation processes were opened in September by the SWR Broadcasting Council regarding changes to SWR telemedia, ARD.de and planet-schule.de, and by the NDR Broadcasting Council for NDR Online. The changes, which concern a total of 17 ARD telemedia concepts, relate to online audiovisual content separate from broadcasting ("online only"/"online first"), the role and the importance of third-party platforms such as YouTube, and the retention period concept.

After the deadline for the submission of public comments has passed, the relevant broadcasting council must analyse the comments received. The opinions of independent experts, whose names must be published, may also be commissioned. The NDR plans to seek such opinions on the effects of fundamental changes to its offers on all relevant markets.

Under Article 32(6) MStV, the competent broadcasting council or television council must decide whether the legislative provisions are met with a majority of two thirds of the members present, which must at the same time represent at least the majority of all its members. The reasons for the decision must be given, taking into account the comments and any expert opinions received, and the result should be published along with any such opinions. The approval process is not complete until the result of the assessment has been submitted to and confirmed by the authority responsible for legal supervision, in the aforementioned cases the state chancelleries of the *Länder*. The description of the new or significantly changed offer must then be published on the website of the relevant state broadcasting authority. It must also be mentioned in the official gazettes of the *Länder* concerned. This procedure should ensure conformity with EU law. New or significantly changed telemedia offers may not be provided until the procedure is complete and the required information has been published.

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https://www.swr.de/unternehmen/organisation/gremien/rundfunkrat/pressemitteilung-dreistufentest-100.html

*SWR press release*

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