Act on Copyright Content Sharing Service Providers

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umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

in sub. 1. This should definitely be done in order to ensure an uncomplicated, out-of-court dispute resolution procedure for research data access as well. Other copyright disputes not mentioned in the provision, such as the infringement of moral rights (cf. § 13 (3); → § 13 mn. 7 et seq.), cannot be settled before the arbitration body. Instead, courts must be seized upon for such matters (cf. § 13 (4); → § 13 mn. 6).

III. Recognition of the arbitration body (sub. 2)

1. Relevant provisions

The recognition as an arbitration body pursuant to sub. 2 is in principle carried out according to the requirements of the NetzDG for the recognition of arbitration bodies organised under private law. These can be transferred structurally to out-of-court dispute resolution under the UrhDaG.[8] The requirements and the procedure for recognition can be found in **§ 3c NetzDG**, which, in turn, partly refers to the provisions on the recognition of external complaints bodies in § 3 NetzDG (→ § 15 mn. 7 et seqq.). The provisions of the NetzDG are slightly modified in sub. 2 with regard to the authorities involved in the recognition procedure. **6**

2. Responsible body

The Federal Office of Justice is **responsible** for recognising an institution as an arbitration body organised under private law (sub. 2). **7**

3. Procedure

The Federal Office of Justice must take the decision on recognition under sub. 2 in agreement with the **DPMA**. Therefore, the DPMA must have given its consent prior to the recognition. **8**

4. Recognition requirements

a) Cumulative

The requirements for the recognition of an institution as an arbitration body organised under private law can be found in sub. 2 in conjunction with § 3c (2) sent. 1 NetzDG. In contrast to § 15 (2) sent. 2, sub. 2 does not explicitly stipulate that not only the procedure for recognition but also the requirements for it are governed by the NetzDG. However, the reference in sub. 2 must be understood in such a way that the requirements are to be adopted from the NetzDG, too, because these requirements are neither regulated in § 16 nor elsewhere in the UrhDaG. Therefore, an institution that wishes to be recognised as an arbitration body within the meaning of § 16 must fulfil **all the requirements set out in § 3c (2) sent. 1 NetzDG**. There are no further requirements; the catalogue is **exhaustive**. Sub. 2 is thus a reference not only to the legal consequences but also to the conditions of § 3c (2) sent.1 NetzDG. **9**

b) Body organised under private law

The arbitration body must be organised under private law. This is further specified by sub. 2 in conjunction with § 3c (2) sent. 1 No. 1 NetzDG to the effect that the responsible body for the arbitration body must be a **legal entity** which has its **registered** **10**

[8] BT-Drs. 19/27426, 145.

office in a Member State of the EU or in a contracting state of the EEA to which the AVMSD applies. In addition, this legal entity must be established on a permanent basis and its financing must be secured. These requirements are intended to ensure that the arbitration body is accessible and viable in the long term.[9]

c) Persons engaged

11 With regard to the persons engaged in arbitration, it must also be ensured that they are **independent, impartial and competent** (sub. 2 in conjunction with § 3c (2) sent. 1 No. 2 NetzDG). The terms independence and impartiality are congruent. They presuppose that the persons have no material or personal dependency on the OCSSP or the users or rightholders involved, and that they are not subject to any instructions from them (also → § 15 mn. 11).[10] The requirement of competency is intended to ensure that the persons have the necessary copyright law expertise.[11] However, it is not necessary that they are fully qualified lawyers, as this is not a mandatory requirement for the acquisition of this expertise. For example, training in business law with a corresponding focus is also conceivable (also → § 15 mn. 11).

d) Equipment and processing

12 Pursuant to sub. 2 in conjunction with § 3c (2) sent. 1 No. 3 NetzDG, the arbitration body must also be **properly** equipped. It must also be guaranteed that it will **quickly** process the arbitration proceedings. The law does not contain more detailed time requirements for this; in particular, the arbitration procedure does not have to be completed within one week. On a systematic interpretation, this follows from the fact that this decision-making period is specified for the external complaints procedure according to § 15 (2) sent. 1 in conjunction with § 3 (6) No. 2 NetzDG, but there is no such requirement for the arbitration procedure. An arbitration body is properly equipped if it can guarantee a speedy processing of arbitration proceedings in the long term (also → § 15 mn. 12).

e) Arbitration rules

13 In addition, the arbitration body must maintain arbitration rules that must contain certain minimum regulations according to sub. 2 in conjunction with § 3c (2) sent. 1 No. 4 NetzDG. First of all, a regulation on the **jurisdiction** of the arbitration body is required. In addition, the arbitration rules must specify the details of the **arbitration procedure**, for example, the communication channels through which such a procedure can be initiated. The arbitration rules must enable a simple, inexpensive, non-binding and fair procedure for users, rightholders and OCSSPs (for more details on the procedural design, see → mn. 19 et seq.). If costs are incurred for participation in the procedure, these should also be stated in the conciliation rules so that the financial burden of the procedure is foreseeable in advance for the parties involved.[12] It remains to be seen how high this burden will turn out to be in practice. The operation of the NetzDG does not provide any clues in this respect because § 3c NetzDG only recently came into force.

f) Information

14 Finally, it must be ensured that the **public** is permanently informed about how the arbitration body can be accessed and over which disputes it has jurisdiction. In addition,

[9] Cf. BT-Drs. 19/18792, 48.
[10] Cf. BT-Drs. 19/18792, 48.
[11] Cf. BT-Drs. 19/18792, 48.
[12] Cf. BT-Drs. 19/18792, 49.

information must be provided on the course of the arbitration procedure, and the arbitration rules must be communicated (sub. 2 in conjunction with § 3c (2) sent. 1 No. 5 NetzDG). This can be done, for example, on the website of the arbitration body.[13] This information is of crucial importance in helping the arbitration procedure to be effective in practice as a mechanism for dispute resolution. If knowledge of how to access the arbitration body is easily accessible, this reduces the time users have to invest in appeals and thus helps to make it more attractive to them.[14]

5. Right to recognition

a) Bound decision

If the requirements for recognition as an arbitration body within the meaning of § 16 are met, the applying institution is entitled to recognition. The decision on recognition is not a discretionary but a bound decision. This follows from the wording of § 3c (2) sent. 1 NetzDG, according to which the conciliation body '**shall**' **be recognised** if all requirements are met. The recognition decision is made by an administrative act. **15**

b) Ancillary provisions

Pursuant to sub. 2 in conjunction with § 3c (2) sent. 2, § 3 (7) sent. 3 NetzDG, the administrative act of recognition can be subject to ancillary provisions. A **time limit**, a **condition**, a **reservation of revocation**, an obligation or a **reservation of obligations** are conceivable (§ 36 (2) VwVfG). In principle, the time limit can be of any length. The requirement under § 3 (7) sent. 4 NetzDG that the recognition of external complaint bodies should not be for less than five years is not transferred to the recognition of arbitration bodies organised under private law in § 3c (2) sent. 2 NetzDG. General administrative law does not contain any time limits either. However, they can arise in individual cases from the affected fundamental rights, particularly from the principle of proportionality. **16**

6. Legal situation after recognition

a) Duties of the arbitration body

A recognised arbitration body organised under private law must immediately **inform** the Federal Office of Justice (cf. § 121 (1) sent. 1 BGB) if circumstances relevant to its recognition or other information it provided in its application for recognition change (sub. 2 in conjunction with § 3c (2) sent. 2, § 3 (8) of the NetzDG). Furthermore, by 31 July of each year, it must prepare an **activity report** on the previous calendar year, which it publishes on its website and sends to the Federal Office of Justice (sub. 2 in conjunction with § 3c (2) sent. 2, § 3 (9) NetzDG). Illustrative examples of this from the implementation of the NetzDG do not yet exist, as § 3c NetzDG only recently came into force. **17**

b) Revocation of recognition

Once recognition as an arbitration body within the meaning of § 16 has been granted, the Federal Office of Justice may subsequently **revoke** it in whole or in part (cf. § 49 VwVfG) or **attach ancillary provisions** to it (cf. § 36 (1) VwVfG) if the conditions for its recognition are no longer fulfilled (sub. 2 in conjunction with § 3c (2) sent. 2, § 3 (10) NetzDG). The principle of proportionality requires a step-by-step approach in such **18**

[13] Cf. BT-Drs. 19/18792, 49.
[14] Kaesling/Knapp MMR 2021, 11 (14).

a case. First of all, the Federal Office of Justice must use ancillary provisions (e.g., an obligation) to try to ensure that the external complaints body again fulfils the requirements for recognition. Recognition can be revoked only if this does not lead to success within a reasonable timeframe or is futile from the outset. If the prerequisites for recognition were not met from the beginning, a **withdrawal** of recognition under the general provision of § 48 VwVfG can be considered even without an explicit provision in the NetzDG.

7. Legal protection

19 Administrative proceedings are available against decisions of the Federal Office of Justice (cf. § 40 (1) sent. 1 VwGO). The right to recognition as an arbitration body organised under private law can be enforced by the institution that has applied for this recognition by means of an action for issuance of an administrative act pursuant to § 42 (1) Alt. 2 VwGO. The external appeal body may appeal by means of an action for annulment pursuant to § 42 (1) Alt. 1 VwGO against the revocation of a recognition decision or the imposition of ancillary provisions.

IV. Arbitration procedure

1. No orientation towards the NetzDG

20 The procedure according to which the arbitration body organised under private law can be invoked is – unlike the complaint procedure described in detail in § 14 – **not regulated in the UrhDaG itself**. The reference to the NetzDG in sub. 2 suggests at first glance that the procedure should be governed by § 3c (3) NetzDG.[15] According to this, the arbitration body can only be invoked if an internal cross-appeal procedure *(Gegenvorstellungsverfahren)* pursuant to the NetzDG has been completed beforehand or if an institution of regulated self-regulation has been invoked. The transfer of these requirements to arbitration proceedings under the UrhDaG is contradicted by the fact that the explanatory memorandum to the UrhDaG merely refers to the requirements of the NetzDG for the recognition of the arbitration body organised under private law.[16] On the other hand, its requirements for the procedure before this arbitration body are not mentioned. The application of the procedure regulated in § 3c (3) NetzDG is also not specified in Art. 17 (9) DSMD: According to this provision, it is not a prerequisite for resorting to the conciliation body that another internal procedure has already been completed.[17] If the German legislature had wanted to introduce such a requirement in § 16, there would at least have been an indication of this in the explanatory memorandum to the UrhDaG.

2. Leeway for design

21 In the absence of statutory provisions for the arbitration procedure, the arbitration bodies organised under private law have a great deal of leeway in designing one. However, in order for arbitration procedures to achieve their objective of enabling users to enforce their rights, they must be organised in such a way that **access to them is as**

[15] See Wandtke/Hauck ZUM 2020, 671 (679 et seq.).
[16] BT-Drs. 19/27426, 145.
[17] Specht-Riemenschneider, Leitlinien zur nationalen Umsetzung des Art. 17 DSM-RL aus Verbrauchersicht, 95.

simple as possible.[18] In particular, this can be achieved by the parties being able to communicate with the arbitration body in text form, for example, by e-mail, and not having to be present in person.[19] For the same reason, representation by a lawyer in the proceedings should not be prescribed.[20] The parties involved should also have the possibility to communicate with the arbitration body in German.[21] The arbitration procedure should also be free of charge[22] or at least so inexpensive that it does not have a deterring effect.[23]

§ 17
Out-of-court dispute resolution by the public arbitration body

(1) The Federal Office of Justice shall establish a public arbitration board in agreement with the German Patent and Trademark Office.

(2) [1]The public arbitration body shall only be competent if an arbitration body organised under private law within the meaning of § 16 is not available. [2]§ 16 subsection 1 shall apply mutatis mutandis.

(3) The provisions of the Network Enforcement Act on the public arbitration body shall apply mutatis mutandis.

§ 17
Außergerichtliche Streitbeilegung durch die behördliche Schlichtungsstelle

(1) Das Bundesamt für Justiz richtet im Einvernehmen mit dem Deutschen Patent- und Markenamt eine behördliche Schlichtungsstelle ein.

(2) [1]Die behördliche Schlichtungsstelle ist nur zuständig, wenn eine privatrechtlich organisierte Schlichtungsstelle nach § 16 nicht zur Verfügung steht. [2]§ 16 Absatz 1 ist entsprechend anzuwenden.

(3) Die Vorschriften des Netzwerkdurchsetzungsgesetzes über die behördliche Schlichtungsstelle sind entsprechend anzuwenden.

Bibliography: Grisse, 'After the storm – examining the final version of Art. 17 of the new Directive (EU)', 2019/79014 JIPLP (2019) 887; Kaesling, 'Die EU-Urheberrechtsnovelle – der Untergang des Internets?', JZ 2019, 586; Kaesling, 'Umsetzung der Plattformverantwortlichkeit in der EU: Nationale Rechtskulturen statt digitaler Binnenmarkt?', GRUR Newsletter 02/2020, 20; Wagner, 'Haftung von Plattformen für Rechtsverletzungen (Teil 2)', GRUR 2020, 447. – See also the bibliography in the Introduction.

Content

[18] COM(2021) 288 final, 25; cf. Grisse 14 JIPLP (2019), 887 (899).
[19] Cf. BT-Drs. 19/18792, 49.
[20] Cf. BT-Drs. 19/18792, 49.
[21] Cf. BT-Drs. 19/18792, 49.
[22] COM(2021) 288 final, 25.
[23] Cf. BT-Drs. 19/18792, 49.

I. General remarks

1. Objective

1 The fact that disputes about a blocking request can first be resolved within the framework of an out-of-court dispute resolution mechanism can counteract over blocking by the OCSSP by discouraging rightholders at the outset from expressing unjustified blocking requests.[1] In this respect, an external arbitration board does not face the same concerns with regard to the independence of its decisions as a dispute resolution by the OCSSP itself.[2] This is particularly true for state arbitration bodies that offer a high guarantee of neutrality.[3]

2. EU law requirements

2 Together with § 16 (→ § 16 mn. 2), § 17 serves to implement Art. 17 (9) subpara. 1 and 2 DSMD. It provides that the Member States shall regulate the possibility of out-of-court dispute resolution in an effective and expeditious redress procedure. In Germany, the implementation of this provision of the Directive was overreaching in that not only users but also rightholders were given access to the arbitration procedure. Furthermore, the German legislature went beyond this by providing for arbitration procedures not only for resolving disputes about blocking but also for disputes about the rights of access under § 19.

3. Origin

3 Before the start of the legislative process, it was suggested in the literature to resort to existing mechanisms for alternative dispute resolution in consumer matters.[4] However, the German legislature decided to regulate out-of-court dispute resolution in the UrhDaG itself. § 17 was introduced with this aim, and **only slight modifications** were made in the legislative process, and these were mainly linguistic. A content-related modification was made by the addition of sub. 2 in the RefE: In it, reference was made for the first time to the provisions for dispute resolution by a private arbitration body in § 16.

4. Systematics

4 The official arbitration procedure is an independent procedure alongside the (internal or external) complaints procedure under §§ 14 and 15. The procedures are only interconnected insofar as the complaints procedure can precede the arbitration procedure and thus relieve the arbitration bodies and, at a later stage, the courts.[5] Nothing

[1] Kaesling/Knapp MMR 2021, 11 (14); Leistner ZGE 2020, 123 (180).
[2] Kaesling/Knapp MMR 2021, 11 (14); Wagner GRUR 2020, 447 (455); for more on the concerns, see Kaesling JZ 2019, 586 (589).
[3] Cf. Kaesling GRUR Newsletter 02/2020, 20 (21).
[4] Schwartmann/Hentsch MMR 2020, 207 (212); see also Wagner GRUR 2020, 447 (454).
[5] Metzger/Pravemann ZUM 2021, 288 (296).

else follows from the case law of the BGH, which obliges platform providers to meet certain procedural requirements before deleting hate speech in order to protect users' fundamental rights.[6] The DSMD does not provide for the priority of the complaints procedure or any other internal procedure of the OCSSP over the out-of-court arbitration procedure but requires – in the sense of effective legal protection of users – an equal coexistence of all existing remedies (→ § 16 mn. 4). Therefore, priority of the complaints procedure cannot be introduced at the national level with (national) fundamental rights arguments. On the contrary, this would reduce the protection of users' fundamental rights as they would be forced to participate in the complaints procedure, contrary to the express provision in § 13 (1) and could not immediately resort to an arbitration body (or a civil court). The provisions on the public arbitration procedure are closely related to those on the arbitration procedure at an arbitration body organised under private law in § 16, which are declared applicable *mutatis mutandis* by sub. 2 sent. 2. The general provisions on out-of-court dispute resolution in § 13 (2) must also be considered, according to which the rightholders, users and OCSSP do not have to participate therein (→ § 13 mn. 5). In addition, § 13 (4) is relevant, according to which the existence of or recourse to the arbitration procedure does not affect the possibility of seeking judicial redress (→ § 13 mn. 6). Therefore, the court can always be seized. For details on the relationship between the remedies, see → § 16 mn. 4.

II. Subject matter of the arbitration proceedings (sub. 2 sent. 2)

Within the framework of the public arbitration procedure, decisions can be made on the same disputes that can also be settled by arbitration proceedings before an arbitration body organised under private law. These are disputes about the blocking or the communication to the public of protected works by the OCSSP on the one hand and disputes about the rights of access under § 19 (1), (2) (sub. 2 sent. 2 in conjunction with § 16 (1)) on the other hand. However, access to the arbitration body is not open to the holders of the research data access claim under § 19 (3). They do not fall within the group of possible parties under § 16 (1) to which sub. 2 sent. 2 refers. However, *de lege ferenda*, they should definitely be included in this group because they also need an uncomplicated, out-of-court dispute resolution procedure for research data access. On all this, see also → § 16 mn. 5. **5**

III. Establishment of the arbitration body (sub. 1, sub. 3)

1. Relevant regulations

In addition to the requirements of sub. 1, the provisions of the NetzDG on the official arbitration body, which sub. 3 declares to be applicable *mutatis mutandis*, are decisive for the establishment of the public arbitration body. This refers to **§ 3f NetzDG**, which regulates the establishment of such an arbitration board for disputes with video sharing platform services. This provision, in turn, refers in part to the requirements of § 3c NetzDG for arbitration bodies organised under private law (→ § 16 mn. 6 et seqq.). **6**

[6] BGH GRUR-RS 2021, 23970 mn. 83 et seqq. – Facebook.

2. Responsible body

7 The public arbitration body is established by the Federal Office of Justice according to sub. 1. However, the Federal Office of Justice is not only in charge of its establishment but is **also the responsible body** for the public arbitration body.[7]

3. Procedure

8 The Federal Office of Justice must act in agreement with the **DPMA** in setting up the arbitration body (sub. 1). Therefore, it must first obtain the consent of the DPMA before setting up the arbitration body.

4. Requirements for the institution

9 The requirements for the design of the public arbitration body are largely identical to those for arbitration bodies organised under private law: It must be guaranteed that the persons involved in the arbitration act **independently, impartially and with expertise** (sub. 3 in conjunction with §§ 3f (2), 3c (2) sent. 1 No. 2 NetzDG; → § 16 mn. 11). In addition, it must be ensured that the arbitration body is **properly equipped** and that it **quickly** processes arbitration proceedings (sub. 3 in conjunction with §§ 3f (2), 3c (2) sent. 1 No. 3 NetzDG; → § 16 mn. 12). Furthermore, the arbitration body must maintain **arbitration rules** that meet certain minimum requirements (sub. 3 in conjunction with §§ 3f (2), 3c (2) sent. 1 No. 4 NetzDG; → § 16 mn. 13). If it charges fees for conducting the arbitration proceedings, these must be stated in the arbitration rules (sub. 3 in conjunction with § 3f (3) NetzDG; → mn. 14). Finally, the arbitration body must ensure that the public is **informed** about its accessibility and competence as well as the course of the arbitration proceedings (sub. 3 in conjunction with §§ 3f (2), 3c (2) sent. 1 No. 5 NetzDG; → § 16 mn. 14).

5. Legal situation after the establishment

10 Pursuant to sub. 3 in conjunction with §§ 3f (2), 3 (9) of the NetzDG (→ § 16 mn. 17), the public arbitration body is obliged to prepare an **activity report** on the previous calendar year by 31 July of each year and to publish it on its website. The obligation to additionally transmit the activity report to the Federal Office of Justice that exists in the wording due to the reference to § 3 (9) NetzDG is waived. There is no practical need for this as the Federal Office of Justice is the responsible body for the public arbitration body.

IV. Jurisdiction of the arbitration body (sub. 2 sent. 1)

11 Pursuant to sub. 2 sent. 1, the public arbitration body only has jurisdiction for settling disputes if an **arbitration body organised under private law is not available**. This means that recourse to it is subsidiary to recourse to private arbitration bodies.[8] On the one hand, a private arbitration body is not available if the OCSSP does not participate in the arbitration procedure at such a body. On the other hand, this is the case if no recognised arbitration body organised under private law exists (cf. § 3f (1) sent. 3 NetzDG).

[7] BT-Drs. 19/27426, 47: 'an official arbitration board at the Federal Office of Justice' (the authors' translation of the German source text).

[8] Rauer/Bibi BB 2021, 1475 (1479); Wandtke/Hauck ZUM 2020, 671 (680).