

10 July 2015

Resolution of the Bundesrat

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe

COM(2015) 192 final

At its 935th meeting on 10 July 2015, under §§ 3 and 5 of the Act on Cooperation between the Federation and the *Länder* in European Union Affairs (EUZBLG), the Bundesrat adopted the following opinion:

General comments on the Communication

1. The Bundesrat welcomes the objective of creating a digital single market (DSM). It will contribute to more growth and employment and securing Europe's 'digital sovereignty' in an economic environment increasingly shaped by digitisation. The free movement of goods and services is one of the foundations of the EU. A common DSM makes sense and is necessary to fully realise the potential for growth and innovation across Europe. The continuing digitisation of society and the economy is a new challenge for legislators in all Member States which calls for a substantively, politically and institutionally interconnected and coordinated approach in completing the European DSM. In many areas isolated measures at national, regional and local level alone are not sufficient. Only a European single market with more than 500 million consumers is capable of facing the major markets in Asia and America on an equal footing.
2. However, EU regulations must be implemented in line with the participation rights of the Federal Government and the *Länder*.
3. Subject to the objective of safeguarding information and media freedom, media pluralism and cultural diversity which takes precedence over the Member States' media and cultural policy prerogative, the Bundesrat comments on the Commission's plans to create a European single market as follows:

General provisions

4. The DSM relates to subject areas in which the Bundesrat has already adopted resolutions but which are in a new context as a result of the DSM initiative (notably Bundesrat documents 689/13 (Resolution), 321/13 (Resolution), 211/13

(Resolution), 527/12 (Resolution), 395/12 (Resolution) and 566/10 (Resolution)). As a result of this European framework strategy almost all future legislative and non-legislative measures in the digital field fall within the scope of the DSM. The Bundesrat's positions continue to apply, also in the context of the DSM initiative.

5. The Bundesrat is concerned that an EU Regulation would lead to legal uncertainty and problems of differentiation between it and the current Directive package. With the exception of roaming, it therefore rejects a solution in the form of an EU Regulation and favours a recommendation within the meaning of Article 288 of the TFEU. At most an EU Directive could be appropriate.
6. The Bundesrat expects the Federal Government to make adequately clear to the Commission, when the DSM is created, the particular importance of audiovisual and journalistic content, text and other content and their creators, producers and intermediaries. In this connection it stresses that, as a result of their investments in Europe's cultural and creative industries, public-law, commercial and non-commercial audiovisual and press-related media providers and other content producers make a key contribution to the developability and competitiveness of these sectors and therefore create and secure future-oriented jobs. In this context proper account should also be taken of the interests of the public, which creates original audiovisual and other media content and makes it available digitally, as well as new forms of creation and distribution of content through digital technologies.
7. The Bundesrat emphasises the importance of consumers' rights of access to an open internet across Europe. However, they must be in accord with the rights and the remuneration of content producers and creators. Of equal importance is interoperability, in the framework of which the switch and selection options of consumers may not be indiscriminately restricted either.
8. It also points out that the freedom to conclude contracts and pricing freedom are fundamental pillars of market economies. The Bundesrat is critical of the Commission's proposals aimed at directly interfering in these principles.

Comments on the individual measures proposed

Point 2.1. Cross-border e-commerce rules

9. In the opinion of the Bundesrat, in principle the harmonisation of rules governing intra-Community online trade can be a useful instrument to increase the attractiveness of the European single market for businesses and consumers, and to reduce the burden – in particular for small and medium-sized enterprises (SMEs). However, this must not lead to a deterioration of tried-and-tested consumer protection standards. The existing structures for implementing them must be taken into account.
10. The Bundesrat thinks it appropriate to review the Regulation on Consumer Protection Cooperation. However, this will not eliminate the existing uncertainties in individuals' seeking redress in cross-border transport.

Point 2.2. Parcel delivery services

11. As regards the Commission's intention to launch measures to improve price transparency and regulatory oversight of parcel delivery services and thus encourage cross-border online trade, the Bundesrat would point out that price transparency measures and antitrust measures can also contribute to greater competition in the parcel delivery sector. Direct market intervention should be restricted to extreme exceptional cases, in particular abuses of dominant market positions.

Point 2.3. Geo-blocking

12. As regards the proposals to end unjustified geo-blocking, the Bundesrat takes the view that non-discriminatory access to the services offered in the single market is to be welcomed. Nevertheless, it would point out that geo-blocking may well be entirely justified (in copyright law, for example, or in the case of public-law arrangements for gaming regulatory authorities) and that different pricing in the single market can also be a reflection of different levels of purchasing power.
13. The Bundesrat trusts that the regulatory proposals announced by the Commission will not alter the current system of territorial licences for audiovisual works and the associated geo-blocking necessary for reasons of copyright protection until new and equally effective financing models for European audiovisual works as cultural assets, which are necessary and desirable, have been developed with the stakeholders. It welcomes the readiness signalled by Commissioner Oettinger to look into preferential arrangements for the audiovisual sector. The Bundesrat calls on the Commission, the European Parliament and the Council to provide for rules in the DSM which ensure preferential arrangements for the audiovisual sector and thus take account of the cultural sovereignty of the Member States. The fact sheet already recognises that currently the financing of the audiovisual sector is largely based on a system of territorial exclusivity which as such cannot be regarded as unjustified geo-blocking.

Notwithstanding the above, the Bundesrat calls on the Commission, in developing the DSM, to take initiatives that can help to promote cross-border access by consumers to content legally acquired in their home country and take particular account of the interests of content producers and creators. It must be ensured that there is an equitable balance between the interests of viewers in access, adequate income for producers and rightholders, and the objective of a diverse media offering. On the grounds of cultural diversity and diversity of opinion, justified geo-blocking must continue to be possible.

Point 2.4. Copyright

14. The Bundesrat welcomes the adaptation of copyright to the digital age. It therefore supports the Commission's efforts to modernise European copyright law to reduce avoidable restrictions of use and exploitation rights resulting from the fragmentation of the different legal regimes in the Member States. It should be designed to ensure an equitable balance between the interests of creators, operators and users. Effectively combating commercial copyright infringements is a

particular concern of the Bundesrat. In the field of education and science, the use of copyright-protected works should be made more practicable by means of a harmonised education and science barrier.

15. The Bundesrat is in favour of arrangements which not only build on current technological developments, but also cater for future cultural patterns without, however, diminishing cultural and linguistic diversity in the Member States at national, regional and local level. The Bundesrat considers it essential to establish the legal conditions for reasonable remuneration for creative artists and, at the same time, lay down rules to balance the economic benefits for other actors in the value chain against the interests of users. The Bundesrat welcomes initiatives that enable the advertising industry to jointly refrain from placing advertisements on online sites which are structurally geared to generating revenue from copyright infringements. In doing so it is important that such agreements ensure transparency and verifiability and that the scope is clearly defined in order to avoid possible negative consequences for the freedom of expression and innovative new services.

Point 2.5. VAT-related administrative burdens

16. The Bundesrat shares the Commission's view that reducing the VAT-related administrative burden and barriers to foreign business to facilitate intra-Community online trade can be of help. The design of the ultimate regulatory framework must ensure that new rules do in fact lead to a verifiable reduction in the administrative burden for businesses and the authorities.

Point 3.1. Fit-for-purpose telecoms rules

17. It welcomes the Commission's initiative to review the regulatory framework in the field of telecommunications and adapt the rules to structural changes on the market.

18. It shares the Commission's view that the successive adaptations of EU telecoms rules combined with the EU competition rules have been instrumental in ensuring more competitive markets.

The Bundesrat also agrees with the Commission that effective competition is a key driver for investment in telecoms networks.

19. It does not agree with the Commission that the inadequate investment by telecoms companies in rural areas is due above all to a lack of consistency and predictability in regulation within the EU.

In the Bundesrat's view the insufficient investment in rural areas is due to a lack of aggregate demand as a result of the low population density in these areas. This leads to investment decisions in favour of regions with lower opportunity costs and higher earnings prospects.

20. The Bundesrat stresses the importance of achieving the 2020 European broadband targets. To enable the EU to catch up with 'superfast' broadband networks as

quickly as possible, a high-speed strategy must also be developed for beyond 2020 which addresses the problem of underinvestment in particular.

21. It also rejects the equivalence of open internet and managed services. On the contrary, there must be a clear 'rule/exception' correlation in favour of the open internet over managed services. Any departure from this principle should only be permitted on the basis of a fixed set of narrowly defined exceptions with objectively verifiable criteria. Otherwise managed services, which are in the interests of telecoms providers due to the high infrastructure and maintenance costs of the networks, would lead to the marginalisation of the open internet and thus to an unacceptable restriction of the diversity of content and opinion. The Bundesrat therefore stresses that, in business models featuring contracts with limited broadband volume, certain data services must not be allowed to be deducted arbitrarily from volume consumption or arbitrarily limited after the booked data volume has been consumed (zero ratings ban). It rejects the possibility for the particular telecoms provider concerned to declare any content, applications and services in contracts to be their managed services with an assured level of quality. The Bundesrat refers to its opinion of 29 November 2013 (BR document 689/13 (Resolution)) and reaffirms it here, in particular paragraphs 16 to 30 on net neutrality and the best effort principle, and paragraphs 22 to 25 and 27 to 30 not reiterated here.
22. Spectrum is a scarce public resource. National spectrum management has proved itself to be an effective means of maintaining the balance between economic, social and cultural aspects. As regards the 700 MHz and 800 MHz bands, the Bundesrat notes that these were already allocated in Germany in 2010 (800 MHz) and June 2015 (700 MHz). It thinks the speed with which the procedure was handled is exemplary and should provide an incentive for other EU Member States.

Against this background, the Bundesrat is critical of the fact that this incentive effect is to be abandoned in favour of the potentially very slow-burn harmonisation of spectrum policy in Europe.

It strongly supports the coordinated release of the 700 MHz band, as this will facilitate the expansion of even more powerful networks, which are an essential prerequisite for Industry 4.0 and networked mobility. It also points to the need for the reform of telecoms rules to continue to take account of the interests of the authorities and organisations with security responsibilities and the need for further spectrum utilisation and allocations for data transmission.

Agreement on EU-wide criteria for spectrum allocation must safeguard the Member States' decision-making powers in order to secure diversity of opinion. The Bundesrat advocates maintaining a radio spectrum which, in addition to the existing programming variety, also ensures the economic operation of DVB-T and its development potential. Similarly, sufficient spectrum must also be available for the operation of PMSE (wireless microphone and video technology in education, culture and sport). The Lamy Report describes how the Commission could develop a spectrum-policy initiative in the UHF band. The Bundesrat calls on the Federal Government to make representations to the Commission to ensure that the Lamy Report, in particular its proposal for a spectrum access guarantee for broadcasting, is taken into account in the planned REFIT review of the Telecoms Package and the Radio Spectrum Policy Programme.

23. The Bundesrat agrees with the Commission that effective competition and adequate returns relative to the development risk are a prerequisite for investment in even more powerful high-capacity networks.
24. It sees the previous arrangements for sector-specific regulation in the telecommunications market and the European agreement on the Body of European Regulators for Electronic Communications as a success. In the Bundesrat's opinion, changes which build on the structural developments on the market and are designed to implement a DSM should be based on the further development of the approach adopted so far. In order to ensure planning certainty, predictability and subsidiarity, the Bundesrat is in favour of maintaining national telecommunications regulation and avoiding any overhasty paradigm shift.

Point 3.2. Media legislation

25. The Bundesrat takes the view that new rules responding to technological developments and creating a level playing field for all audiovisual media in Europe are urgently needed. Reviewing the Audiovisual Media Services Directive (AVMSD) abandons the obsolete differentiation of media regulation between linear and non-linear services. In the opinion of the Bundesrat the objective of future regulation must be producing a level playing field between broadcasters and internet services.
26. As regards the planned review of the AVMSD, the Bundesrat again refers to its opinion of 5 July 2013 (Bundesrat document No 321/13 (Resolution)) on the Commission Green Paper on Preparing for a Fully Converged Audiovisual World. It refers in particular to paragraphs 6 to 10, in which it recommends a uniform regulatory framework for linear and non-linear audiovisual services, advocates the country-of-origin principle, identifies a need for urgent action on the rules on commercial communications, regards ensuring the integrity of content to be necessary, and supports all measures which improve the protection of minors. The Bundesrat also refers to the ongoing work of the Federal/*Land* commission on media convergence.

Point 3.3. Platforms and intermediaries

27. The Bundesrat also welcomes the fact that, in its review of the telecoms rules, the Commission intends to ensure a level playing field for players which will also include services increasingly used by end-users as substitutes for traditional electronic communications services. It therefore welcomes the Commission's intention to conduct a thorough analysis of the role of platforms and intermediaries. As a result of their evaluating and aggregating activities, the platforms which the Commission has in mind (such as search engines, social media, e-commerce platforms, App Stores and price comparison websites) have an influence on what content users' attention is drawn to. Part of this influence is exercised by companies in a strong market position. In particular, in addition to the aspects referred to by the Commission (including transparency), non-discrimination over and above existing general competition law must be ensured across Europe. In doing so, Member States' decision-making powers to ensure diversity of opinion and equal communication opportunities must be maintained.

Point 3.4. Data protection in digital services

28. The Bundesrat advocates a high level of data protection and enabling value added creation in equal measure. Consumers must be able to use digital media safely. A prerequisite for this is that they are confident that their data are being handled responsibly. Only consumers who can be sure that their data are safe and will not be processed or passed on against their will can make full use of media pluralism.
29. The Bundesrat welcomes the announcement that the e-Privacy Directive (Directive 2002/58/EC on privacy and electronic communications) is to be reviewed. In this respect it refers to its opinion of 30 March 2012 (BR document 52/12 (Resolution), paragraph 9), in which the legal uncertainties arising in this area after the entry into force of the proposed General Data Protection Regulation were highlighted.
30. The Bundesrat takes the view that a 'learning organisation' consisting of businesses, science and government can be a useful instrument to ensure that products and services are generated from science and industry which can directly address the security needs identified by the State (cybersecurity awareness). It therefore supports the Commission's plans to establish a cybersecurity network.

Point 4.2. Boosting competitiveness

31. The Bundesrat agrees with the Commission that interoperability and standardisation are an important precondition for the functioning of a single market. However, it also points out that setting uniform standards for technical systems is a highly complex subject area which should only be addressed with due caution and taking into consideration the legitimate interests of business and the public. This applies, for example, to the field of e-health, since the treatment of sensitive health data is involved.

Point 4.3. An inclusive e-society

32. Regarding the Commission's proposals aimed at promoting an inclusive e-society, the Bundesrat would point out that responsibility for their own administrative organisation lies with the Member States. Not only from a data protection point of view, it is critical of the registration of all data relating to one person in a single database.
33. The Bundesrat questions the objective of extending the 'once only' principle. The automated processing of personal data must meet data protection requirements, and measures must be taken which, depending on the type of the personal data or categories of data to be protected, enable data collected for different purposes to be processed separately. We reject any move towards a comprehensive database containing all the information on citizens.

Skills and expertise

34. The Bundesrat agrees with the Commission that there is a need to improve the digital skills of citizens in the EU. However, this applies not only as regards the

ICT professional shortage forecast by the Commission, but also and in particular against the background of the ever-increasing digitisation in all aspects of life. Digital skills and expertise are consequently a key task which education and training systems must tackle in order to prepare young people for life. In order to give schoolchildren information and media literacy and enable them to participate in the digital world as early as possible, it is important that schools are also included in the expansion of broadband. The Bundesrat therefore supports the Commission's statement that the expansion of broadband also needs to be promoted in the area of basic services.

35. It endorses the Commission's statement that there are great opportunities for prosperity, quality of life and sustainability across Europe in the digital era. Consequently, it is essential that the Member States also tackle the teaching of digital expertise and skills. In addition, the use of digital media can enhance lessons and complement current pedagogical approaches to promote teaching and learning. The Bundesrat points out that the Länder already provide extensive support for digital expertise and skills. In this context, education and training systems are being continually adapted to digital requirements. It is important not only how information and communication technologies (ICT) are used, but also and in particular how content conveyed by means of digital media should be handled.
36. The Bundesrat takes the view that the social dimension of educational communication must not be lost in the context of ICT use. Direct and real communication must continue to play a significant role in teaching and learning processes, in addition to virtual communication via the internet. It notes, therefore, that the benefits of a shift of educational content to digital platforms need to be weighed carefully against indispensable learning in a real social setting (cf. Bundesrat document 709/13 (Resolution)).
37. The Bundesrat agrees with the Commission that the digital transformation is happening on a scale and at a speed that bring immense opportunities for innovation, growth and jobs. However, despite the fact that education is a key factor in equipping people for adapting to these changes, it again stresses that focusing on education too narrowly as an economic factor does not do justice to the much broader educational remit in the Länder, which is aimed at the cognitive and social education of the individual and focuses on the personality as a whole. In addition to access to the current technical possibilities, the rapid pace of change also makes it necessary to teach technology-independent basic skills such as reading, writing and arithmetic and ethical standards for dealing with the new technical possibilities. The aim is to provide students with the ability to cope with future and as yet unforeseeable changes.
38. In its Communication the Commission points out that new platforms, inter alia in the field of education, have enabled exponential growth, and highlights the opportunities provided by the sharing economy for increased efficiency, growth and job creation. The Bundesrat acknowledges that the development of open educational resources (OER) should be encouraged. However, it notes that in its working paper the Commission only makes a generalised criticism of the fragmented use of OER in the Member States without going into the pressing legal issues in this area, in particular copyright law and quality assurance.

39. The Bundesrat views the Commission's announcement that it intends to promote changes in education and training systems, drawing on ongoing EU-level initiatives, with concern. As regards digital education, the Bundesrat stresses that responsibility for the content of education and its further development lies entirely with the Member States, and in Germany with the Länder. In the education sector the EU has only a supporting role while fully respecting the responsibility of the Member States for teaching content and the voluntary nature of cooperation on education at European level. This division of responsibilities must also be complied with in the framework of a digital single market and must not be undermined by the establishment of 'Sector Skills Alliances' which, as announced in the Commission working document, will define specific educational curricula with stakeholders from various economic sectors.
40. In the Communication the Commission announces that it intends to assist in the recognition of digital skills and qualifications. According to the working document, a competency framework and a self-assessment tool for this are to be developed at European level. Recognition is to be facilitated in an online skills portfolio. However, at most this can only serve as a non-binding guide, simplify a comparison of qualifications and increase transparency. In this context the Bundesrat again warns against mixing up recognition and transparency instruments (cf. BR document 725/12 (Resolution)) and questions the added value of the creation of new instruments in this area.
41. The Bundesrat notes the Commission's plans to support investment in the digital single market with funds from Erasmus+ and Horizon 2020. In principle it welcomes investments in digital education, skills and expertise. However, it points out that not every use of ICT for teaching and learning in itself provides pedagogic added value. Where funds under EU programmes are used for the digital single market, attention should be paid to the pedagogically useful application and monitoring of ICT. Notwithstanding the importance of promoting digital expertise, the promotion of person-to-person contacts under the Erasmus+ programme, in particular in school settings, must not be neglected. In particular, the number of pure school partnerships has fallen dramatically due to the change in the funding structure. Against this background a change of course in programme implementation is urgently needed to counter the structural handicapping of school education under the Erasmus+ programme.

Direct transmission of the opinion

42. The Bundesrat is sending this opinion directly to the Commission.