

**Decision**  
of the Bundesrat

**Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities**

**COM(2016) 287 final**

At its 948th meeting on 23 September 2016, the Bundesrat adopted the following opinion in accordance with Sections 3 and 5 EUZBLG:

1. The Bundesrat welcomes the Commission's proposal to revise the Audiovisual Media Services Directive (AVMSD) with the aim of adapting it to the increasing convergence of media markets and media technology.
2. The Bundesrat opposes the formal establishment of the European Regulators Group for Audiovisual Media Services (ERGA) in the AVMSD and the consequent curtailment of Member State competences. This constitutes an unlawful encroachment on the constitutional law of the Member States, and on their competences both in the Council of the EU and in the AVMSD Contact Committee. On no account can the Bundesrat agree to the proposed expansion of the ERGA's competences, as laid down in Articles 2, 3, 4, 6a, 9, 28a and 30a of the proposed AVMSD.

At most, the tasks proposed in Article 30a(3)(a), (c) and (d) of the proposed AVMSD may be transferred to the ERGA. This means that it can only be empowered to advise the Commission in order to ensure consistent implementation with regard to practical matters concerning the existing rules

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<sup>1</sup> First Resolution of the Bundesrat of 8 July 2016, Bundesrat document 288/16 (decision)

of the AVMSD. In addition, it can best serve as a platform for the exchange of best practice and information necessary for the application of the AVMSD.

In the view of the Bundesrat, the Commission may not draw on the ERGA to examine legal matters concerning the further development of the AVMSD and going beyond its current substance, such as the preparation of supporting studies. The Member States must remain the Commission's direct point of contact for matters concerning the future legislative development of the AVMSD. The appropriate forum for such discussions, excluding specific legislative proposals that are dealt with in the Council of the EU and its working groups, must remain the Contact Committee.

The Bundesrat also opposes the Commission's suggestion of assigning the ERGA executive functions. Powers must not be transferred to it to 'encourage' media service providers as provided for in Article 6a(3) and Article 28a(7) of the proposed AVMSD. The Bundesrat is also opposed to an active role for the ERGA in external relations with third parties, as intended in Article 9(2) and Article 28a(7) of the proposed AVMSD. It rejects the obligatory participation of the ERGA in the Commission's decision-making process, as set out in Article 2(5b), Article 3(4) and Article 4(4)(c) of the proposed AVMSD. It also opposes the ERGA's involvement in self- and co-regulation, in particular in drawing up codes of conduct, as provided for in Article 4(7) and Article 28a(8) of the proposed AVMSD.

3. The Bundesrat emphasises that the independence of the national regulatory authorities is imperative and should not be questioned. However, it rejects the detailed and binding provisions in the second sentence of Article 30(1) to Article 30(7) of the proposed AVMSD, since they run counter to the principle of subsidiarity, encroach unnecessarily on national self-government and are not appropriate to achieve the Commission's intended objective. Rather, they unlawfully restrict the national legislators' discretion to organise the independent national regulatory authorities. With regard to the cultural significance of the media in particular, the EU is obliged under Article 167 TFEU to limit its actions to supporting and encouraging, while excluding any harmonisation, and not to curtail the competence of the Member States.
4. The Bundesrat rejects the substance of the cumulative provisions in the proposed Directive intended to safeguard the independence of the national regulatory authorities. The selection of the criteria laid down is arbitrary and does not take into consideration other criteria by which the necessary independence can be secured. The established, tried-and-tested supervisory

structures in Germany for public and private broadcasters are evidence of this. They include, in particular, a combination of controls on the pluralism of management boards and – owing to the relative independence of the broadcasters – restricted legal supervision by the State.

5. With regard to the second sentence of Article 30(1) of the proposed AVMSD, the Bundesrat takes the view that the words ‘legally distinct and functionally’ should be deleted to place the focus only on independence. More detailed regulations are to be laid down by the Member States.
6. The Bundesrat also welcomes the proposal for the extensive provisions on the protection of minors to apply equally to both linear and non-linear audiovisual media services in future. It considers it correct that Article 12 of the proposed AVMSD maintains the high level of protection for minors through a graduated level of protection proportionate to the severity of the potential harm. In this connection, it also welcomes the Commission’s intention in Article 6a of the proposed AVMSD to reinforce the protection of minors by increasing the technical protection of minors, the compatibility of software for the protection of minors, and service providers’ handling of complaints regarding inappropriate content.
7. The Bundesrat acknowledges that the Commission has shown itself willing to expand the scope of the Directive to video-sharing platforms through the insertion of Articles 28a and 28b in the proposed AVMSD. However, it opposes the planned full harmonisation for this specific type of platform by means of self- and co-regulation recognising the exemption from liability in Articles 14 and 15 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’)).

Instead, the Member States should ensure, using appropriate means and while removing the exemption from liability in Articles 14 and 15 of the E-Commerce Directive, that video-sharing platform providers ensure that videos produced by users and made available on the video-sharing platform do not incite violence or hatred within the meaning of the AVMSD and that minors are protected from content that could harm their physical, mental or moral development. The selection of appropriate means for this should be left to the Member States, while the use of self- and co-regulation should be encouraged.

In the view of the Bundesrat, imposing stricter obligations on this particular form of platform service under the AVMSD as a *lex specialis* in relation to the E-Commerce Directive is therefore justified, because video-sharing platform providers do not hold a neutral position with regard to the videos produced by users, but in fact decide on the organisation and presentation of the stored content and gain a financial advantage from this business model. Moreover, they have the technical resources at their disposal to identify and remove videos with harmful content. Stricter obligations on video-sharing platform providers are also necessary in order to effectively combat terrorism. Terrorist organisations use this specific type of platform service to spread their calls for violence and hatred and the glorification of their organisations.

Since commercial communication is part of video-sharing platform providers' business model, they should, insofar as they show video advertisements, be subject to the same qualitative requirements for audiovisual commercial communications as media service providers in order to protect consumers and ensure equal competition conditions.

8. The Bundesrat supports the Commission's adherence to the country of origin principle in Article 2 of the AVMSD for all types of services as a cornerstone of the Directive, so that in future services will continue to be governed solely by the law of the Member State in which the company is based. However, it is doubtful as to the necessity and feasibility of the list introduced in Article 2(5a) AVMSD, which is intended to show which media service providers are under which jurisdictions. For the Member States, drawing up a list of this kind would entail substantial legal examination, and its validity could not be continually maintained owing to the rapid changes in the media sector. If compliance with such a provision were to be required, it would be necessary for the lists to be drawn up by the Commission, approved by the relevant Member States and published.
9. The Bundesrat regrets that the Commission has not fully followed Germany's key request to abandon the differentiation of linear and non-linear services, and the approach that involves, in favour of graduated, content-focused regulations that are open to development. Consequently, too little consideration is given to the convergence of media technologies and media markets and future fair competition conditions. It therefore calls for an approach to regulation that focuses on content and not on distribution method.

10. The Bundesrat recognises the step taken by the Commission to harmonise the different procedures for the exceptional restriction on freedom of reception with regard to linear and non-linear services in Article 3 of the proposed AVMSD on the basis of the existing principles. It is important to note that the Commission has followed Germany's request to remove the criterion of 'similarity to television' from the definition of 'programme' in Article 1(1)(b) of the proposed AVMSD. It is no longer in keeping with the times and is inconsistent with technology neutrality.
11. The Bundesrat disagrees with the Commission's proposal to delete the accessibility requirements in Article 7 of the AVMSD. This is particularly pertinent in view of the implementation of the UN Convention on the Rights of Persons with Disabilities. Because of their media-specific nature, the requirements should remain in the AVMSD and not in the European Accessibility Act.
12. The Bundesrat welcomes the fact that the Commission has addressed Germany's request and has drawn up quantitative restrictions on advertising that are somewhat more flexible, in Articles 20(2) and 23 of the proposed AVMSD.
13. The Bundesrat stresses the necessity for advertising to continue to be clearly separated from programme content, Article 9 AVMSD.
14. The Bundesrat takes the view that replacing the term 'children's programmes' with 'programmes with a significant children's audience' in Article 9(2) and Article 11(2) of the proposed AVMSD in relation to inappropriate commercial communication is not practical and would lead to increased legal uncertainty. It considers a return to the current term 'children's programmes' to be appropriate.
15. The Bundesrat opposes the Commission's proposal to allow product placement in principle in all audiovisual media services. The exceptions listed in Article 11(2) of the Commission's proposed AVMSD leave considerable scope for interpretation. There is a risk that their exploitation could damage trust in audiovisual media as a whole. It opposes the Commission's endeavours to lower the current high qualitative restrictions on product placement in order to safeguard editorial independence and to avoid misleading consumers. The ban on overemphasising a particular product should also be retained.

16. The Bundesrat maintains that it is for the Member States alone to decide how European works are promoted.
17. The Bundesrat understands the Commission's approach established in Article 4(7) of the proposed AVMSD of a greater emphasis on self- and co-regulation. However, it insists that the scope for national regulation must not be restricted: important issues must continue to be decided by the Member States' legislators, in accordance with the principles of subsidiarity, democracy and the rule of law, and the exclusive competence of the Member States in the area of culture. In this context, the opportunities provided for in Article 30a of the proposed AVMSD to decide details of regulations by means of substatutory EU codes of conduct through the ERGA are too far-reaching. Since these processes do not provide for the involvement of the Member States, which have the power to legislate, they risk undermining the Member States' legislative competence. We would refer you to our remarks under point 2 of this opinion.
18. This opinion is to be taken into consideration by the German Government pursuant to the second sentence of Article 23(5) of the German Constitution (GG) and Section 5(2) EUZBLG, since the process of revising the AVMSD concerns the powers of the *Länder* to legislate on the design of broadcasting law in and for Germany. Insofar, in accordance with constitutional jurisprudence, the Federal authorities have no right to legislate. Rather, the *Länder* have legislative competence in accordance with Article 30 and 70 GG. The Bundesrat also requests that the German Government delegate the handling of negotiations to the *Länder* for the consultations from the Council working groups and the Council in accordance with Article 23(6) GG and Section 6(2) EUZBLG.
19. The Bundesrat is submitting this opinion directly to the Commission.