



EUROPEAN COMMISSION

*Brussels, 20.4.2017
C(2017) 1759 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the 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}.

This proposal is one of the key initiatives of the Digital Single Market strategy which calls for a modernisation of the Audiovisual Media Services Directive (AVMSD) to reflect market, consumption and technological changes. Viewers, and particularly minors, are moving from traditional TV to the online world, while the regulatory burden is much higher on TV. The proposal therefore would introduce flexibility when restrictions only applicable to TV are no longer justified. At the same time, it would ensure that consumers will be sufficiently protected in the on-demand and Internet world. This is done while making sure that innovation will not be stifled.

The Commission is pleased with the Bundesrat's broad support for the aims of the proposal and that the Bundesrat expresses a favourable opinion on several of its substantive elements, in particular the protection of minors and quantitative rules on advertising.

The Commission takes note of the Bundesrat's concerns relating to the formal establishment of the European Regulators Group for Audiovisual Media Services (ERGA) and the requirements for the independence of regulatory authorities.

The Commission also notes the Bundesrat's doubts as regards the full harmonisation approach for the rules on video sharing platforms and the preservation of the differentiation between linear and non-linear services, changes to the list of criteria for the establishment of jurisdiction, the notion of "programmes with a significant children's audience", the new approach to product placement and the need to maintain the provisions on the accessibility of audiovisual content.

*Ms Malu DREYER
President of the Bundesrat
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At the Conference of the Minister Presidents on 27 October 2016 in Rostock, Commissioner Günther Oettinger had the opportunity to explain our goals on AVMSD and address many questions. We would like to reiterate that the Commission will continue a constructive dialogue and do its utmost to dispel doubts concerning the proposed measures.

The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal in the attached annex and trusts that these will allay the Bundesrat's concerns.

The clarifications provided in this reply are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council.

The Commission would again like to thank the Bundesrat for its Opinion and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Andrus Ansip
Vice-President*

ANNEX

The Commission welcomes the inquiry that the Bundesrat has carried out into this important subject. As regards the points to which the Bundesrat has drawn the Commission's particular attention, the Commission would like to make the following comments:

Points 2 and 17: The creation and current governing rules of the European Regulators Group for Audiovisual Media Services (ERGA) are contained in a 2014 Commission decision¹. According to this Decision, ERGA's tasks are to advise and assist the Commission in its work to ensure a consistent implementation of the regulatory framework for audiovisual media services, as well as to provide for an exchange of experience and good practice. The proposal does not envisage any change in ERGA's existing legal nature and powers.

According to the proposal, ERGA would remain a Commission expert group. It merely foresees the formal establishment of ERGA by virtue of the revised AVMSD. ERGA's mission is already provided in the Decision establishing this group. As under the current rules, ERGA's main objective is to provide the Commission with advice based on national regulators' experience of the day-to-day implementation of the Directive. ERGA has already made a positive contribution towards a consistent regulatory practice and has provided high level advice to the Commission on implementation matters. Its five reports adopted in 2015 and 2016 have provided the Commission with a valuable expertise on regulatory matters.

ERGA's powers are purely advisory. As is already the case under Article 5.8 of the Decision establishing ERGA, it adopts opinions, recommendations or reports. These are acts which, in accordance with Article 288 of the Treaty on the Functioning of the European Union (TFEU), do not have binding force. The Commission can in no way grant ERGA, being an expert group, decision-making powers. It has been confirmed by the European Court of Justice case law², that the Commission could not entrust a Commission expert group (such as ERGA) with decision-making powers. The set-up of ERGA, as envisaged in the proposal, fully respects this fundamental principle. The proposal does not foresee the adoption of any act by ERGA that would have a mandatory nature.

ERGA would provide advice to the Commission at its request. The only exception thereto is the derogation procedure (Article 3(4) of the proposal), in the framework of which the Commission would have to consult ERGA. However, even in this case ERGA could only issue opinions, which do not bind the Commission. ERGA could thus bind neither the Commission, nor the Member States, nor media service providers through its opinions.

The Contact Committee deals with horizontal issues of significance in terms of policy, including questions of application. ERGA's added value is that it focuses on the day-to-day application of the Directive and is therefore in a better position to provide technical and practical advice. The proposal does not call into question the role of the Contact Committee. In fact, the proposal leaves Article 29 AVMSD establishing the Contact Committee untouched. Neither does ERGA affect the powers of the Member States in the Council. As is

¹ Commission Decision of 3.2.2014 (C(2014) 462 final).

² Judgment of the Court of 13 June 1958. - Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community. - Case 9-56.

the case under the current set-up, ERGA does not touch upon the institutional arrangements in the Member States.

Point 3-5: The requirements regarding the independence of national regulatory authorities set in Article 30 of the proposal, are, in the Commission's view, not too detailed. Specific provisions on independence of national regulatory authorities from third parties are already contained in the EU Telecom Framework, EU Data Protection law, the EU framework on Postal Services and the Gas and Electricity Frameworks. The AVMSD proposal does not go beyond these provisions.

Introducing minimum harmonisation for regulatory independence in the fields covered by the AVMSD seeks to ensure the smooth operation of the internal market by preventing or eliminating differences between the legislation and practice in the various Member States. The absence of Union rules in this field has contributed to diverse regulatory structures and varying degrees of independence. Recent developments in certain Member States have further highlighted the importance of independent regulators. The objective of guaranteeing the smooth functioning of the internal market in audiovisual media services through independent regulators can only be achieved by legislative action at Union level.

As regards the reference to Article 167 TFEU, the Commission notes that its proposal is based on the EU's powers to coordinate Member States laws to bring about the freedom to provide services in the internal market (Article 53 (1) TFEU in conjunction with 62 TFEU), and is in full respect of Article 167 TFEU.

Point 7: In order to avoid regulatory fragmentation and ensure predictability for emerging business models, the Commission has proposed full harmonisation; including a list of appropriate measures that video-sharing platforms are expected to adopt to protect minors from harmful content and all citizens from incitement to hatred (Articles 28a and 28b of the Proposal).

The proposal seeks to achieve a high degree of responsibility by video-sharing platforms, using technical means to limit the exposure of their users to third-party generated illegal and harmful content.

It should be seen as a complement to Directive 31/2000/EC³ (the "E-commerce Directive"), leaving the intermediary liability regime laid down in Articles 14 and 15 of the E-commerce Directive unaffected. The obligation for video-sharing platforms to adopt measures to protect minors from harmful content and all citizens from incitement to hatred will only affect the organisation of the content on these platforms (for instance by including flagging mechanisms for users) but does not entail any ex ante control or monitoring of content.

The horizontal application of the liability regime of the E-commerce Directive has facilitated the scaling up of online platforms and is a driver for innovation⁴. The proposal allows Member States to adopt stricter measures for as long as they are in line with this limited

³ OJ L 178, 17.7.2000, p. 1–16

⁴ (cf. Communication Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM(2016)288/2)

liability regime. At the same time, the Commission will explore the need for guidance on the liability of online platforms when putting in place voluntary, good-faith measures to fight illegal content online. Further, the Commission has announced its intention to review the need for formal notice-and-action procedures, in light of the results of, inter alia, the updated Audio-Visual Media and Copyright frameworks, and ongoing and future self-regulatory and co-regulatory initiatives. The reforms on audio-visual and media services and copyright already contain a number of provisions addressing the main concerns brought about by content handling by platforms in the EU.

Point 8: By simplifying the jurisdiction rules, the proposal would facilitate the application of the country of origin principle. The AVMSD jurisdiction rules are crucial to determine where a provider is established and thus what Member State is the country of origin. By making it less cumbersome for the Member States, regulators and providers to know what the country of origin is, the proposal would improve the country of origin mechanism.

Point 9: The proposal would align or reduce the gap between the rules for linear and non-linear in some areas, as for example the protection of minors or promotion of European works. The complete alignment of the rules for linear and non-linear services would not be technically possible in certain matters or could stifle innovation in markets that are still at an early stage of development.

Point 11: In December 2015, the Commission adopted a proposal for the European Accessibility Act (EAA)⁵ where it sets accessibility obligations for products and services, including audiovisual media services. At the moment, both the proposal for the EAA and the proposal for the AVMSD are being discussed by the co-legislators. These discussions should lead to a conclusion on the best placement of the accessibility requirements, including their possible re-introduction in the AVMSD.

Point 15: The liberalisation of product placement introduced by the AVMS Directive has not delivered the expected take-up of this form of audiovisual commercial communication. The prohibition of product placement, with some exceptions, has not created legal certainty for audiovisual media service providers. The revised AVMSD would therefore delete some restrictions on product placement while focusing mainly on the key principles of editorial responsibility and transparency.

In practice, the new rules for product placement would not affect viewers' ability to recognise advertising. Viewers would continue to be clearly informed of the existence of product placement or of a sponsorship agreement at the beginning and/or end of a programme.

A consequent increase in advertising revenues would increase the capacity of TV broadcasters to invest in audiovisual content. This would have a positive impact on the availability of content for consumers and would be beneficial to EU producers.

⁵ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2400&furtherNews=yes>

At the same time, the encouragement to adopt self- or co-regulation for the existing rules seeking to protect the most vulnerable (advertising for alcohol, for fatty foods, etc.) would be reinforced. Self and co-regulation should be seen as complementary to regulation and do not replace Member States' competences to legislate in the areas coordinated by the Directive. The encouragement to self- and co-regulate is already part of the current AVMS Directive.