

23 September 2016

Decision
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: Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe

COM(2016) 288 final

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

1. The Bundesrat welcomes the fact that the Commission is addressing the issue of online platforms and thus taking into account the opportunities and challenges linked to online platforms and their major importance for the digital single market. It shares the Commission's view that online platforms make an important contribution to innovation and digital added value, increase the range of products available to consumers, facilitate access to information, and offer opportunities for greater inclusion of citizens in society and democracy; however, this also gives rise to new challenges for politicians and legislators.
2. Online platforms such as search engines, social media, app platforms and platforms for distribution of creative content are not only relevant to trade in goods and services, but also to the formation of public and individual opinion. This concerns intermediaries that provide structures for public communication. The Bundesrat refers to the joint position paper of the Federal Government and the *Länder* of April 2016 on the regulatory environment for platforms, online intermediaries, data, cloud computing and the collaborative economy, which has already been submitted to the Commission.
3. The Bundesrat supports the Commission's efforts to achieve a level playing field for comparable digital services at European level.

4. It would stress that in all the Commission's efforts to regulate online platforms, scope must be preserved for the Member States to ensure diversity of opinion and equal opportunities in communications.
5. The Bundesrat agrees with the Commission's observation that over-the-top communication services (OTT services), i.e. the transfer of video and audio content via internet connections without an internet service provider being involved in the control or distribution of the content, are increasingly competing with traditional telecommunications services. It supports more equal regulatory treatment of such equivalent services and telecommunications services. The modernisation of the existing regulatory framework is crucial to this, yet the Bundesrat would emphasise that it considers the current market regulation mechanisms to be also essentially appropriate for OTT services with the same functionality.
6. With regard to copyright, the Bundesrat refers to its opinions of 10 July 2015 (BR document 212/15 (decision)), 18 March 2016 (BR document 15/16 (decision)) and 22 April 2016 (BR document 167/16 (decision)), which have previously been submitted to the Commission.
7. With regard to protection of minors on video platforms, the Bundesrat will give its view in connection with the Commission's proposal for the amendment of the Audiovisual Media Services Directive.
8. In connection with the rules on audiovisual media services on platforms that comprise the bundling and distribution (repackaging) of content, the Bundesrat refers to the remarks in the position paper of the Federal Government and the *Länder* to the Commission of April 2016. In particular, transparency, findability, non-discriminatory and transparent access and user autonomy must be safeguarded.
9. The Bundesrat agrees with the Commission's statement that greater transparency is needed for users to understand how the information presented to them has been filtered, edited or personalised, especially when this information forms the basis of purchasing decisions or influences their participation in civic or democratic life.
10. The Bundesrat also refers to the position paper to the Commission of April 2016 in which the Federal Government and the *Länder* called for European regulation to safeguard the necessary transparency and specified some principles for this. In particular, users should be able to recognise whether

search and recommendation functions are based only on the relevance of the content or whether the online platform's own services or content are being prioritised. Unequal treatment on political or religious grounds or on the grounds of world view should also be recognisable.

11. In particular, the Bundesrat would emphasise that a definition of online platforms must be found that leaves scope for developments.
12. The Bundesrat supports the Commission's efforts to review EU consumer and competition law in order to safeguard trust, transparency and fairness in business-to-consumer platforms (B2C). In the light of this, the Bundesrat would call for transparency provisions for search and recommendation functions to be included in Directive 2000/31/EC (the E-Commerce Directive), Articles 5 and 6 of which already contain information requirements.
13. Trust, transparency and fairness are not only necessary in relation to commercial decisions by users, but should also be safeguarded for all search and recommendation functions on online platforms. The separation and identification of paid content are important measures, but additional transparency requirements are also needed. If comparison portals were obliged to present their selection criteria transparently, but not other online platforms that could have an influence on public opinion in other areas of life, this would create a situation of imbalance.
14. In its Communication, the Commission encourages industry to step up voluntary efforts to prevent trust-diminishing practices. In order to achieve the goal of safeguarding the necessary transparency, the Commission should introduce legislative measures if effective voluntary self-regulation measures are not taken soon enough. The objective and the fundamental principles of the regulation should thus be laid down through legislative measures. The further design of these principles and supervision could then be a matter for self- or co-regulation.
15. It is positive that the Commission emphasises the advantages of principles-based self- and co-regulation. However, rules on self- and co-regulation must not lead to inappropriate limitations on the opportunities for national regulation.
16. The Bundesrat also welcomes the fact that the Commission is examining whether the applicable competition law requires additional measures to address fairness of B2B relations, and that the Commission is thus seeking to address

whether online platform providers unfairly promote their own services and whether there is a lack of transparency in search results.

17. Transparency and non-discrimination are particularly important, insofar as content that influences opinion is transmitted via online platforms. The Commission's reflections on dispute resolution mechanisms are particularly welcome. The Bundesrat refers to its opinion of 10 July 2015 that has already been submitted to the Commission (Bundesrat document 212/15(decision)), which calls for non-discrimination over and above existing general competition law to be safeguarded across Europe.
18. The Bundesrat would stress the importance of user autonomy, which must also be protected with regard to switching between platforms. It supports the Commission's efforts in this area.
19. The Bundesrat is submitting this opinion directly to the Commission.