

16.12.16

**Resolution
of the Bundesrat**

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes

COM(2016) 594 final Council document 12258/16

At its 952nd session, on 16 December 2016, the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 of the Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG):

1. The Bundesrat welcomes the overall aim of the Commission's proposal, which is to enable online transmissions of broadcasting organisations and retransmissions of television and radio programmes across borders.
2. In general, it recognises the proposed Regulation's aim of addressing the difficulties related to the clearance of rights in order to create the conditions allowing broadcasters and operators of retransmission services to offer wider access to TV and radio programmes. In this connection, it emphasises that the cultural diversity in the Member States must not be affected as a result and an equitable balance must be ensured between the interests of rights holders, distributors, producers, broadcasters and consumers. In this respect, the Bundesrat also refers, in particular to point 5 of the opinion it submitted to the Commission on 22 April 2016 (BR document 167/16 (resolution)).
3. The Bundesrat understands in principle why the Commission wishes to limit the scope of application of mandatory collective management of rights to IPTV retransmission services and other retransmission services provided over 'closed' electronic communications networks. This has a lower impact on right

holders than would be the case with an extension to other services of the ‘open internet’ and over-the-top retransmission services, as long as they are provided to a defined number of users. The Commission itself assumes, in its proposal, that such an extension of the scope of application would entail risks of undermining right holders’ exclusive online rights and distribution strategies, leading to a reduction of licensing revenues. In the view of the Bundesrat, such disadvantages for right holders must effectively be avoided.

4. The Bundesrat welcomes the fact that recital 19 explicitly renounces regulations which oblige broadcasters and operators of retransmission services to provide the relevant services across borders under certain conditions. In this respect, it refers to points 8 and 9 of the opinion it submitted to the Commission on 22 April 2016 (BR document 167/16 (resolution)).
5. The Bundesrat calls on the Commission to correct differences between the different language versions, in particular between the German and English versions, throughout the proposed Regulation.
6. It asks the Commission to verify whether the aim pursued by the proposed Regulation could not be better achieved by means of a revision of the existing Council Directive 93/83/EEC of 27 September 1983 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. In this way, difficulties of differentiating between the two pieces of legislation could be minimised and the principle of freedom of contract could be better protected. Likewise, this applies with regard to the Commission’s proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market, BR document 612/15. Furthermore, the Bundesrat refers, in particular to point 6 of the opinion it submitted to the Commission on 22 April 2016 (BR document 167/16 (resolution)).
7. The Bundesrat welcomes the basic principle of the Commission’s approach, which seeks, in Article 1 of the proposed Regulation, to reconcile the various interests of rights holders, distributors, broadcasters, producers, collecting societies and consumers through relatively narrow definitions (‘ancillary online service’ and ‘retransmission’). In this regard, it asks the Commission to examine whether the considerations underlying the proposed Regulation regarding the reduction of transaction costs related to cross-border transmissions, and thus the assumed benefits for broadcasters to offer their

online services across borders, are in fact appropriate and take sufficient account of the interests of right holders.

8. Moreover, the Bundesrat asks the Commission for a more detailed explanation of whether the possibility for right holders and broadcasters to continue licensing rights on a territorial basis, in accordance with the principle of freedom of contract, as supposed by the Commission in recital 11 for example, will effectively remain unaffected. The Commission itself refers sweepingly, in its observations on the impact assessment, to possible contradictory provisions of EU and national law, without, however, addressing actual ongoing competition cases within the Commission, which could in future represent a significant restriction of the principle of freedom of contract.
9. It also invites the Commission to examine whether the considerations underlying Article 2 of the proposed Regulation concerning the application of the country of origin principle to ancillary online services are in fact appropriate and take sufficient account of the interests of right holders. Right holders' exclusive online rights and distribution strategies, as well as the principle of freedom of contract, could be undermined, leading to a reduction of licensing revenues, in particular in conjunction with anti-trust rules and decisions.
10. Furthermore, the Bundesrat asks the Commission to examine whether the provisions in Article 2(2) on setting the payment amount need to be brought into line with the principle of freedom of contract, and whether, in this context, other criteria taken into account for the payment calculation should not be omitted in the rule.
11. It also asks for an examination of whether the duration of the transitional provision referred to in Article 5 of the proposed Regulation is sufficient.
12. With regard to copyright, it refers to its opinions of 10 July 2015 (BR document 212/15 (resolution)), 18 March 2016 (BR document 15/16 (resolution)) and 22 April 2016 (BR document 167/16 (resolution)), which have previously been submitted to the Commission.
13. The Bundesrat is sending this opinion directly to the Commission.