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SG.E.2-Knowledge and Infrastructure

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Minutes of the fifth meeting of the Copyright review Inter-Service Steering Group Brussels, 23 May 2016

The Chair, [REDACTED] (SG.E2), opened the meeting and referred to the document under consideration, which covers the chapters of the copyright draft impact assessment related to measures aimed at ensuring wider access to content.

By way of introduction, DG CNECT recalled the specific objectives identified in the December 2015 Copyright Communication with a view to improving access to content, namely 1) enhancing online distribution of TV and radio programmes; 2) increasing access to and availability of EU audiovisual works on VOD platforms; 3) facilitating the digitisation and making available of out of commerce works based on easier licensing of rights. Policy options under consideration to achieve the first objective will include the application to online distribution of certain mechanisms that are similar to those in place under the Satellite and Cable Directive. This will not entail a modification of the existing regime for cable and satellite. Certain elements are still missing from the draft document (some data, section on monitoring and evaluation and problem tree) and will be added as soon as available. The document will also need to be shortened in order to comply with the maximum number of pages set by the RSB.

The group reviewed the draft text section by section and made the following principal comments:

3.1 Introduction

DG TRADE asked for an explicit clarification that the country of origin (COO) principle, which is proposed in policy options related to the online transmissions of broadcasting organisations, does not apply to operators established outside the EU.

In relation to impacts on SMEs, and as a general remark concerning the assessment of impacts throughout the document, SG stated that the draft IA should reflect all impacts in a balanced way. In particular where a risk of negative impact exists and has been highlighted by stakeholders, this should be reflected in the analysis in a neutral and objective manner.

3.2.2 Online transmissions of TV/radio programmes

DG COMP expressed support for the objectives and instruments proposed. Written comments will be provided on references to exclusive licensing practices. DG COMP questioned the exclusion of on-demand services- a growing means of access to content- from the scope of the COO principle and asked for further justification of this limitation of the scope to be added in the IA. The exclusion of on-demand services could also be perceived as inconsistent with the measures proposed in the revised AVMSD, which extend certain obligations to VOD services. DG COMP asked whether there could be any conflicts

between COO for satellite (where the COO is the country where the uplink takes place) and the proposed COO for online (where the COO would be the country of establishment of the operator). DG COMP also asked for information about the results of the study on the Cable and Satellite (Cabsat) Directive.

DG CNECT explained that the approach to the scope resulted from a political decision, reflected in the December 2015 Copyright Communication where it was announced that a gradual approach would be adopted and that the initiative should apply to TV and radio programmes. As regards the Cabsat study, it is currently being finalised. It aims at collecting information on the functioning of the current regime and on licensing practices. It provides only very limited data on costs of licensing, as this information is considered confidential by the sector. The results of the study will be shared with the ISSG group as soon as possible (not for further dissemination). There is no issue of consistency with AVMSD as the two instruments follow a different logic, have different scopes, and regulate different domains. As regards application of the COO rule, it makes more sense as regards online transmission to determine the COO on the basis of the operator's place of establishment. Having different approaches on this point for satellite and online should not create any problem.

DG TRADE asked for enforcement aspects, e.g. articulation with article 8.3 of the Infosoc Directive, to be addressed.

DG CNECT indicated that as regards enforcement the legislative proposal could clarify that the localisation of the making available right refers only to the act of licensing and does not apply to enforcement.

SG enquired about the availability of further data on licensing and transaction costs. As the main promoters and beneficiaries of Option 1, public broadcasters in particular should be asked to provide more evidence. Option 1 is expected to facilitate the cross-border availability of content but there is no guarantee as to the extent to which this would be the case. To reinforce the effect of this measure, SG suggested considering how this could actually be followed-up and incentivised, for instance through some form of monitoring system. Economic impacts should be presented in a more balanced way, reflecting also potential negative impacts, such as the potential increase in the cost of licenses (to reflect potential/actual viewers), which – if applied to thousands of contracts- could have a significant impact on broadcasters' programming budgets. In addition, the draft IA should make adequate reference to the concern raised by a large majority of right holders and commercial broadcasters that the COO could, taking into account the recent ECJ case-law and policy context but also in itself, undermine the ability to guarantee territorial exclusivity and complicate the enforcement of rights, and that this could affect their licensing decisions to the detriment of smaller/secondary markets.

DG ECFIN suggested providing a clearer explanation of the COO rule: why is it not currently available as a possibility? And in what ways would it be better than the current regime which foresees voluntary multi-territorial licensing? The description of impacts on right holders and commercial broadcasters could be revised in order to address the concerns that these categories of stakeholders have raised. As it currently stands the IA seems to suggest that no negative impacts are foreseen for them under preferred Option 2, however in the consultation both stakeholders have expressed negative views on this option.

DG JUST echoed the comments by DG COMP on the exclusion of on-demand services. DG JUST also supported the idea of a mechanism to monitor the effect of the COO on cross-border availability of programmes. A number of statements related to territorial restrictions should be re-drafted to ensure consistency with the geo-blocking proposal.

DG CNECT stressed the difficulties in obtaining additional data, despite repeated requests to stakeholders. Some form of monitoring mechanism could be considered. COO and multi-territorial licences have different merits, depending on the specific situation and the type of right holder involved but in general transaction costs are expected to be lower with COO. On the concerns raised by right holders and commercial broadcasters, it would be difficult and sensitive to analyse in detail the potential consequences of the introduction of COO combined with any form of limitations of contractual freedom that could potentially result from the enforcement of competition law or from ECJ case-law.

SG stressed the need to indicate clearly why more data could not be obtained and to mention the various efforts made to obtain them.

3.2.3. Digital retransmissions of TV and radio programmes

DG TRADE enquired about the link with international obligations (Berne Convention) and the compliance with the three-step-test. DG TRADE also asked whether catch-up services were covered by policy options.

DG CNECT responded that all the proposed options were in compliance with the Berne Convention as they concerned retransmissions only (and not the making available right). Catch-up services are not included, as the intervention only relates to 'unaltered and unabridged retransmissions'.

SG suggested looking at whether there is any correlation between the number of foreign channels available on IPTV services in MS and the existence of a mechanism facilitating the licensing process at national level. SG also asked if there was any risk of disaggregation of repertoire and whether the proposed intervention would also clarify the situation of direct injection by broadcasters of their signals into the cable networks.

DG CNECT clarified that the risk of disaggregation of repertoire was not part of the likely impact of this intervention; it could result from the policy options considered as regards the transmission of programmes (COO) but not for retransmission. The intervention would not clarify the question of direct injection.

DG ECFIN pointed out that the problem definition would benefit from a more straightforward identification of the main issues. As it is currently presented, it does not convey the idea that the market is failing to deliver in terms of digital retransmission of TV programmes. The impact description, especially of preferred Option 1, should be more balanced. The concerns of the stakeholders, especially the right holders, are not reflected in the analysis. The IA should better justify its impact evaluation as regards impacts of different modes of management of rights (collective and individual) on right holders.

DG CNECT indicated that compulsory collective management was perceived negatively by certain categories of right holders and that it might impact their revenues in different ways depending on their situation. However, data on revenues which would allow comparisons is not available.

DG JUST stated that Option 2, which covers more types of services, appeared to be more future-proof, therefore the choice of a narrower approach should be further justified. The existence of a potential negative impact of Option 2 on consumers, in terms of lower availability of premium content, should be better evidenced.

3.3 Access to and availability of EU audiovisual works on VOD platforms

SG asked whether the participation of parties in the negotiation mechanism (under Option 2) needed to remain voluntary, given that there would be no obligation to reach an agreement. SG also suggested including in the legislative intervention an obligation to respect a firm timeline for conducting and completing the negotiation. SG also asked for an annex detailing all other measures addressing this problem that are either already ongoing or planned (as outlined in the December Copyright Communication), to be added to the IA.

DG TRADE referred to the complementarity of the proposed intervention with the new obligations on VOD providers to be introduced by the AVMSD proposal.

DG CNECT replied that this mechanism was intended to address very specific situations of lack of exploitation of rights. It would be preferable to keep the mechanism as flexible as possible so as not to impose a disproportionate burden on the market and avoid strong resistance. An obligation to respect a certain timeline could be envisaged but it would be for each Member State to define it.

DG COMP questioned the concrete added value of Option 1 (Stakeholders' dialogue) and the possibility of reaching concrete results in terms of facilitating the licensing process, given that the market is characterised by a very high number of parties and contracts, in contrast with the situation in other sectors.

DG JUST referred to the mandate of Hadopi in France, mentioned in the IA, which includes receiving viewers' complaints regarding the lack of legal offer for certain works: could this be further encouraged at EU level?

DG CNECT indicated that such complaint mechanism did not currently exist at EU level; however several search tools, which provide information about available legal offers, already exist in some Member States and a similar pan-European tool is being developed.

3.4. Out-of-commerce works in the collection of cultural heritage institutions

DG TRADE asked for the international dimension of this issue and related policy options to also be reflected (the envisaged intervention could also affect authors from non-EU countries, and there is growing cooperation between EU-based and non-EU cultural heritage organisations). The way in which the status of out-of-commerce works (OOCs) would be established should be better explained. Determining such status is essential: will specific instruments be developed to support this process, for instance on the basis of the ARROW project?

SG enquired about the geographical scope to be taken into account when determining the OOC nature of a work: only in the MS where the licence is sought or in the whole EU?

DG CNECT clarified that the definition of an OOC will follow the model of the existing Memorandum of Understanding concerning OOC books. For the intervention to effectively facilitate the use of such works the determination of the OOC status should not be too burdensome, therefore a diligent search will not be required. MS will be able to introduce additional criteria for the determination of an OOC to the definition provided at EU level (e.g. cut-off dates). The ARROW database concerns only books. The OOC status will be determined with reference to the Member State where the licence is sought. However, a number of mitigating measures will be present, including notably a national attachment of the work requirement, transparency/publicity obligations, and an EU transparency portal).

Next steps

DGs are invited to send their comments or contributions to DG CNECT ([REDACTED] and [REDACTED]), with copy to the SG ([REDACTED]), by **27 May**. Revised versions of this chapter and the one examined in the previous meeting (on exceptions) will be circulated before the next ISSG meeting. The next meetings of the ISSG are tentatively scheduled for 14 June and 24 June. A preliminary version of the draft IA should be submitted to the RSB by 22 June and a finalised version by 1 July, in view of the RSB meeting of 20 July.

[e-signed]
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