

Meeting between Article 4(1)(b), MDR, and Commissioner OETTINGER at 18:30, on 1 September 2016

I. Scene setter

For Mitteldeutscher Rundfunk: Article 4(1)(b) MDR Article 4(1)(b) ARD

For the DG: -

For the Cabinet: TBC

Estimated duration: TBC

Agenda:

1) Copyright

Their Position

- MDR wants to discuss the upcoming copyright reform, in particular the review of the Satellite and Cable Directive (the "SatCab").
- MDR has not responded to the public consultation on the review of the SatCab Directive. However, their views are expected to be aligned with those of ARD and EBU (representing public broadcasters). Public broadcasters ask for an extension of the country of origin principle to their online services, while maintaining contractual freedom to limit the territorial distribution of content. They also ask to apply the mandatory collective licensing regime, presently applicable for cable retransmissions, to other retransmission technologies.

Our position

- The second package of legislative proposals is planned for September 2016. It will notably include measures aimed at enhancing the cross-border provision of TV and radio programmes online. The objective is to facilitate the clearance of rights and in this way open new opportunities to offer TV and radio programmes across borders.
- The Commission is considering extending the country of origin principle to certain online transmissions of broadcasters as well as extending the mandatory collective management to certain types of digital retransmissions (notably IPTV). The special regime foreseen for broadcasters in the case of cable retransmissions (possibility to directly licence their rights to retransmission service providers) is likely to be maintained if mandatory collective management is extended to digital retransmissions.
- The Commission's proposal will be supported by an Impact Assessment which carefully examines the impacts of different policy options, including on broadcasters and right holders. In addition, the Commission relies on the results of the public consultation

carried out last autumn, together with a study on the application of the SatCab Directive (which will be published at the time of the legislative proposal).

- We are aware of the importance of cultural diversity, diverse distribution channels and the need to embrace the diverse audiences in a linguistically and culturally relevant manner. The approach of the copyright reform is a step-by-step, pragmatic and targeted modernisation rather than a complete overhaul of the system. [There is no intention to affect the contractual freedom of broadcasters and right holders.]

2) AVMSD (especially Art. 30)

Their Position

ARD's position on the AVMSD Review during the 2015 Public Consultation:

- On independence of regulators: ARD supports maintaining the status quo. According to ARD, any interference from the EU level would risk undermining the subsidiarity principle and the competence of Member States. [This position is related to the fact that the supervision and budget structure related to ARD may not meet the criteria set out in Article 30 of the AVMSD proposal. For more details see background.]
- On extending the scope to video sharing platforms: the AVMSD should include specific rules for video sharing platforms. These rules should ensure that signal integrity is respected.
- On geographical scope: ARD would welcome the introduction of an obligation to designate a EU representative for all audiovisual providers established outside the EU but targeting a "significant" part of national audiences.
- On country of origin principle: ARD supports maintaining the COO principle and reinforcing its implementation.
- On protection of minors: ARD calls for reinforcing rules on on-demand services and video sharing platforms given their popularity among minors. ARD suggests establishing a harmonized age rating system.
- On promotion of European works: ARD suggests clarifying that thematic channels are not covered by rules on promotion of European works and that levies towards national film funds do not fall within the AVMSD.

Our position

- On May 25 we took another big step forward in the completion of the DSM Strategy.
- The Commission presented its legislative proposal for updating EU audiovisual rules (AVMSD).
- The reform of the audiovisual framework fits perfectly in the Digital Single Market philosophy. On the one hand, it confirms, reinforces and improves what works well: the Country of origin principle. Audiovisual providers will continue to be only subject to the

rules of the country where they are established. Then, they can freely distribute across borders.

- On the other hand, the reform brings the Directive in line with the new realities. Viewers, and particularly minors, are moving from traditional TV to the online world, while the regulatory burden is much higher on TV. The Directive therefore introduces flexibility when restrictions only applicable to TV are no longer justified. At the same time, it ensures 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.
- We want to achieve a higher degree of harmonisation, but not by introducing more unnecessary detailed legislation. We do it by giving a new role to independent Audiovisual regulators and their cooperation mechanism, the European Audiovisual Regulators Group (ERGA). A stronger role of Audiovisual regulators will also be achieved by introducing a legal requirement of independence of regulatory authorities and a minimum set of features that regulators need to meet.
- The proposal for a revised AVMSD addresses some of the concerns of ARD:
 - Video-sharing platforms are covered via a limited extension of the AVMSD scope to protect minors and combat hate speech. Implementation of the new regime would be encouraged via co-regulation.
 - COO is maintained and jurisdiction and derogation procedures are simplified
 - Protection of minors is strengthened via reinforcing obligations for on-demand services
 - The proposal clarifies that Member States have the possibility of imposing levies also to providers established in other Member States but targeting their national audiences.

3) Revision of telecom package

Their Position

Questions of access and frequencies; special interest in the promotion of digital radio.

Our position

- The review of the Telecoms Framework will set some principles and means for EU level coordination of spectrum assignment. It will not materially change broadcasters' situation regarding spectrum awards as these will continue to take place at national level, and specific general interest objectives will still be a basis for potential specific treatment with regard to the providers of radio and TV broadcast content services.
- The aim of the Commission proposal for a Council and Parliament decision on the use of 700 MHz band is to safeguard digital terrestrial television (DTT) below the 700 MegaHertz band while providing room for innovative technologies to develop (for the benefit of broadcasters and telcos alike).

- The Commission considers that all EU level regulatory provisions to introduce digital radio are already in place. All the prominent stakeholders (broadcasters, manufacturers, car companies) are members of the DAB consortium. If there is a request to impose DAB technology in all radios (a common DAB request), it is outside the scope of the Commission's power. It would also amount to a tax on the listeners. The other common request is to dedicate the VHF band (below 300 MegaHertz) to DAB. As this band is shared used by TV in many Member States, and will be important in the efforts to clear the 700 MHZ band, it is difficult to support that request.
- With regard to access regulation, the proposal will maintain and protect the progress achieved so far by access regulation based on significant market power and competition law principles, in making the European telecoms markets more competitive and creating the conditions for market entry.
- At the same time, we will amend it to take into account changed market circumstances and new business models and to support investments into very high capacity networks. The new framework must have the flexibility and the ambition, to encourage change and improve the levels of connectivity for most our citizens, managing a transition to new technologies and new networks, the potential of which we can only start imagining today.
- We will ensure that regulation is targeted to where it is necessary and proportionate, wholesale regulation must always be targeted to solve an identified retail problem, we will extend the cycle of market reviews to give more predictability to operators. We will clarify the use of symmetrical access rules and those applicable to wholesale only models to foster network deployment by alternative players. We will also promote co-investments and risk sharing between network owners and access seekers as these new forms of cooperation can be very beneficial to competition and network deployment too. Last but not least we propose to improve the geographic tool of regulation and provide new tools to regulators to map their territory. This can support other public tools used to promote deployment of high connectivity networks.

II. Defensives

1) Copyright

Would the Commission maintain the contractual freedom and the right to encrypt TV/radio programmes as provided in the SatCab Directive if the country of origin principle were to be extended to online transmissions?

- The existing rules under the Satellite and Cable Directive are indeed our starting point.
- It is important to note, however, that any intervention will need to respect the Treaty rules, including the competition provisions and the rules on the free movement of services. Also, one should accept that any new provisions will be subject to interpretation by the EU Court of Justice.

How will the 'SatCab' proposal be linked to other initiatives (e.g. portability, geoblocking)?

- The other recent proposals have a different scope / purpose:
 - the geo-blocking proposal will not affect audiovisual services (excluded from the scope of the regulation);
 - the portability proposal is about cross-border portability of online content services by consumers who subscribed to such service in their Member State of residence and not about cross-border access to content. There are safeguards in the proposal – in particular the residence condition and verification mechanism – to prevent misuse of that regulation.

2) AVMSD

What is the Commission proposing?

- The new Directive will require Member States to have independent regulatory authorities for audiovisual media services. They will have to fulfil the criteria of independence listed in the Directive. This will contribute to the better functioning of the internal market for audiovisual media services and will guarantee media pluralism across the EU.
- The proposal reinforces the role of the European Regulators Group for Audiovisual Media Services (ERGA) by giving it more tasks when advising and assisting the Commission in the consistent implementation of the directive in all Member States.

Why is it necessary to reinforce Article 30 AVMSD?

- The current wording of Article 30 AVMSD refers only to the cooperation between the regulatory authorities as regards cross-border implementation of the AVMSD. It does not directly establish an obligation to create independent bodies. Experience pointed to the limitations of this provision, in particular in the Hungarian case where the said provision did not constitute an adequate legal basis to challenge the Hungarian Media Law with respect to its provision on Media Authority. More recently, its limits were visible in cases of risks to the independence of regulators in Greece, Croatia or Poland.

- When regulatory bodies lack independence, this has a direct impact on the effective transposition and application of EU legislation and consequently on the functioning of the internal market. Moreover, since the way regulatory authorities function can differ significantly from one Member State to the other, it can translate into different levels of user protection across the EU. In markets with weak regulators, consumer rights risk not to be sufficiently protected.
- The independence of regulatory authorities both from political bodies and from commercial interests is also essential to ensure an objective supervision of markets. A lack of independence can result in an unfair treatment between players competing on the same market and have a negative economic impact on service providers.
- Moreover, regulatory authorities lacking independence are not in a position to guarantee media freedom and pluralism.

Why do you need to set the detailed criteria of independence?

- The introduction of proper independence requirements applicable across all the EU countries would contribute to guaranteeing legal certainty and a level playing field for all market players in the EU.
- Failure to fully align to each of these criteria does not necessarily imply a lack of independence. However, they provide a formal framework to ensure the highest possible level of independence and hence better ensure an efficient implementation of the AVMSD.
- As underlined in new Article 30, setting –up of the criteria of independence does "not prevent supervision in accordance with national constitutional law." Member States, in particular Germany, would thus be free to align the requirements of independence with their constitutional orders (e.g. as regards legal supervision of the regulator's decision making by the government).

Why is the formalization of ERGA necessary? Couldn't it function on the basis of the current Commission's Decision?

- The formalisation of ERGA would enhance cooperation between the regulatory authorities in the EU and thus enhance legal certainty and level playing field between audiovisual media service providers
- It would also have a positive impact on the cross-border protection of consumers for example in case of cross-border infringement cases.
- Moreover, the new Directive assigns a number of new tasks to ERGA. It is thus essential to accord it a stronger legal basis.

What is the relationship between ERGA and Contact Committee (CC)?

- CC will continue to play an important role in advising and assisting the Commission on the policy choices, while the role of ERGA will maintain to be limited to advising and assisting the Commission in ensuring the consistent implementation of the AVMS Directive.

Is the proposal for the AVMS Directive setting up a BEREC like body?

- The new AVMSD will not create a new body or the agency similar to BEREC. It will just reinforce the role of ERGA by establishing it in the Directive, repealing the existing Decision of 2014. ERGA will gain a number of additional tasks but it continue to act as Commission's expert group.

3) Revision of telecom package

There should be no EU regulation of the sub-700 MHz band

- Besides giving safeguards to broadcasters, a common EU approach on the sub-700 MHz band including flexibility will give regulatory certainty and predictability to the market, send a strong European signal to international spectrum and equipment standardisation, enable an European ecosystem of equipment and services, and avoid single market fragmentation influenced from outside Europe. A future review will enable Europe to prepare and respond to outcomes of the World Radiocommunication Conferences and dynamic market developments.

The RSPP for 800 MHz band and the pending EP and Council proposal for 700 MHz show that there is no need to address licensing timing coordination in the Review.

- Starting a new ordinary legislative procedure with the European Parliament and Council each time licensing of a specific band needs to be time coordinated is burdensome and long. There is a need for more rapid solutions through implementing decisions, as it is also the case under the Radio Spectrum Decision for technical harmonisation, provided that this is in line with an already agreed general EU policy approach.

III. Background

1) Copyright

- Even though widely referred as the "review" of the SatCab Directive, the ongoing reflection concerns possible application of the mechanisms contained in the Directive to certain types of online transmissions by broadcasters and certain digital retransmissions but not the review of the existing Directive.

Impact Assessment

- On 22 July the RSB gave a positive opinion on the draft impact assessment, covering among others the following measures:
 - Application of the country of origin principle to the clearing of rights for broadcasters' online services ancillary to their initial broadcast (e.g. simulcasting, catch-up services).
 - Application of mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other retransmission services provided over "closed" electronic communications networks (the preferred option excludes OTT). As in the case of cable retransmission, broadcasters would be able to directly license to the retransmission operators the rights in respect of their own broadcasts (both broadcasters' own rights and the rights which have been transferred to them by right holders).

Public consultation

- Prior to preparing the impact assessment, in August 2015 the Commission launched a public consultation on a possible extension of the SatCab rules to cross-border online (re)transmissions of TV and radio programmes. The public consultation gathered a total of 255 replies.
- Concerning an extension of the country of origin principle to online transmissions: while consumers, public service broadcasters, commercial radios and ISPs favour such an extension, the rest of stakeholders (right holders, CMOs, most commercial broadcasters, the majority of service providers other than broadcasters) are against it or call for a cautious and well-measured approach. Commercial TV broadcasters and right holders are generally against the extension of the country of origin principle due to the fear that, considered together with the application of the free movement of services principle and competition law, it may lead to the weakening of territorial licensing or even to mandatory pan-European licences.
- Concerning an extension of the mandatory collective management regime to simultaneous retransmissions on platforms other than cable: many stakeholders are in favour of such extension. Nevertheless, most right holders as well as commercial broadcasters are against such extension arguing that this may lead to potential disruptive effects on the markets.

2) AVMSD

The current wording of Article 30 AVMSD does not directly establish an obligation to create independent bodies. It is a result of the compromise between the Parliament, that wanted to

guarantee the independence of the regulatory authorities in the field of audiovisual media, and some Member States, (including Germany and Austria) who strongly opposed this idea.

Germany - leading opponent against stronger Article 30 - opposed the introduction of an obligation to ensure independence of regulatory authorities because the Union would have no power to determine how the Directive should be implemented. Germany also was worried that its current governance system for public service broadcasters could come under scrutiny. The public service broadcasting system in Germany is decentralised, giving the federal states autonomous responsibility for developing a legal framework to regulate public broadcasting within their territory. More importantly, public service broadcasters are not subject to the regulatory supervision by the *Länder* regulators. They are rather subject to a self-regulatory system, where the supervisory authority is part of the structure of public service broadcaster.

German position on the proposal for the Audiovisual Media Services Directive (AVMSD)

The new Article 30, as proposed in the revised AVMS Directive, adopted by the College on 25 May, imposes on Member States a requirement of independence and sets detailed criteria of independence.

In reply to the public consultation of 2015, Germany stated that full independence of regulatory bodies is incompatible with the principle of democracy (chain of democratic legitimacy up to the sovereign).

During the Council working groups meetings in June and July this year, German and Austrian delegations expressed concerns over the detailed description of the independence criteria and the new powers given to European Regulates Group for Audiovisual Media Services (ERGA).

Germany argued that the level of detail on how the Directive should be implemented may be contrary to the Treaty. It rejected the need to ensure legal separation of regulatory authorities, as required in new Article 30.

The German opposition to this provision is linked to its dual broadcasting system of 10 public service broadcasting institutions (nine at the level of *Länder* – ARD and one nationwide public service provider - ZDF) and privately owned broadcasters operating under the supervision of 14 media authorities established by the *Länder* (Landesmedienanstalten, LMA).

While LMA fulfil largely all the criteria of independence listed in the new Article 30, this is not entirely the case with respect to Broadcasting Councils supervising the public service broadcasters. This is due to the fact that supervisory bodies are internal part of the public service broadcasters. Therefore they do not fulfil the criteria of being established as distinct legal entity with separate annual budget.

Moreover, the German delegation also raises the issue of the legal supervision by the *Länder* which may impact on the principle of impartiality of the regulators (both private and PSBs). The supervision by the *Länder* is however limited to checking compliance with media law and the *Länder* have no power to otherwise review the suitability or political desirability of regulators' decisions. The legal supervision is always exercised within the strict limits of the independence of media, which is constitutionally guaranteed.

IV. Background

Article 4(1)(b)

Biografie

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