EU Regulation

# DIGITAL CROSS-BORDER TRANSMISSION OF TV AND RADIO

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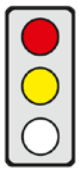
## KEY ISSUES

**Objective of the Regulation:** Cross-border access to television and radio programmes via digital channels will be made easier.

**Affected parties:** Consumers, rights-holders, broadcasting organisations, online service providers, operators of retransmission services, collective management organisations.



**Pro:** The country of origin principle and mandatory collective management facilitate the EU-wide cross-border transmission of television and radio programmes.

**Contra:** (1) The country of origin principle, however, breaches the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR) because it is disproportionate.

(2) The Regulation distorts competition because it is neither supplier-neutral nor technology-neutral.

## CONTENT

### Title

**Proposal COM(2016) 594** of 14 September 2016 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**

### Brief Summary

- **Context and objectives**
  - In addition to conventional modes of transmission, television and radio programmes are often (p. 2)
    - transmitted by the broadcasters online and
    - retransmitted by other providers.
  - Television and radio programmes contain inter alia (Recital 3)
    - works protected by copyright, such as works of music, and
    - "other protected subject matter" protected by "related rights", such as musical performances.
  - For the purposes of transmission, online broadcasting and retransmission, broadcasting organisations and retransmission providers require rights – such as the right of communication to the public – which they have to acquire from rights-holders or collective management organisations by way of a licensing procedure (Recital 3).
  - According to the Commission, particularly in the case of cross-border transmissions and retransmissions, as well as cross-border online broadcasting, the licensing process is often very complex because it frequently has to take place in all the Member States concerned (SWD(2016)301 p. 22).
  - The Satellite and Cable Directive (93/83/EEC) already simplifies the licensing process for cross-border transmissions via satellite and retransmissions via cable, but not for online broadcasting and modern retransmission channels such as the internet (p. 2).
  - According to the Commission, this is one reason why TV and radio programmes "often" remain unavailable online to EU citizens in other Member States and why the number of cross-border retransmissions in the EU varies (p. 2).
  - The Regulation will facilitate EU-wide access to television and radio programmes and take account of technological change by simplifying the licensing process for (p. 2)
    - "ancillary online services" of broadcasting organisations and
    - cross-border "retransmission services".
- **Ancillary online services**
  - Ancillary online services are services with which a broadcasting organisation places television and radio programmes online, either itself or via a third party (Art. 1 (a)),
    - simultaneously with the broadcast, i.e. "live streaming" ("simulcasting services") or
    - after the broadcast for a limited period, e.g. in an online media centre ("catch-up services").
  - Ancillary online services also include materials which supplement the programmes, e.g. previews (Art. 1 (b), Recital 8).
  - The following, in particular, are not ancillary online services:
    - provision of online access to individual works or "other protected subject matter", such as music or pictures, that have been incorporated into the programmes transmitted (Recital 8) and
    - provision of online access to e.g. individual musical or audio-visual works independently of broadcast, such as in the case of YouTube or iTunes - (Recital 8) and

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- "webcasting", such as transmissions similar to television and radio broadcasts which only take place online – and without any conventional equivalent – as well as services ancillary to such transmissions (SWD(2016) 301, p. 26).

- **Country of origin principle for "ancillary online services"**
  - The "copyright-relevant acts" – i.e. communication to the public, making available and reproduction – which are necessary for providing ancillary online services, are notionally deemed to take place solely in the Member State in which the broadcasting organisation is established even if they actually take place in another EU country (principle of country of origin; Art. 2 (1), p. 8). A broadcasting organisation therefore only has to acquire the rights necessary for the Member State in which it has its principal establishment and not for other Member States from which consumers wish to have access to its services.
  - The principle of country of origin also applies, with a transitional period, to existing licence agreements in order to prevent circumvention by extending existing agreements (Recital 15, Art. 5).
  - Rights-holders can also in future
    - issue their licences at varying fees and conditions to broadcasting organisations from different Member States (p. 7) and
    - place other restrictions on exploitation of the rights, especially restriction to certain technical means of transmission or language versions (Recital 11).

- **Cross-border retransmission services**
  - Retransmission services are services which receive and distribute the initial transmission of television and radio programmes (Art. 1 (b)).
  - Retransmission services often combine a large number of TV and radio channels from broadcasting organisations into chargeable packages (p. 1). An example is EntertainTV from Deutsche Telekom.
  - The Regulation only applies to retransmission services which retransmit programmes in EU countries other than the country of initial transmission (Art. 1 (b)). Generally, in this case the retransmission service receives the initial transmission from another country and redistributes it in the country where it is established.
  - The Regulation also applies only to retransmissions which (Art. 1 (b))
    - are for reception by the public,
    - take place simultaneously, in an unaltered and unabridged manner,
    - do not take place on the for all services "open internet" but via "closed" networks (see also Recitals 12 and 13).
      - Closed networks – together with their access technologies such as receivers or set-top boxes where applicable – are fully or partially "dedicated" to one retransmission service (SWD(2016)301, p. 41).
      - These include in particular satellites, digital antenna networks, mobile networks and "internet protocol television" ("IPTV") (Recital 12).
      - "IPTV" is the transmission of television and radio programmes via "closed circuit" IP-based networks (p. 2), e.g. EntertainTV.
  - The Regulation does not apply to (Art. 1 (b))
    - cable retransmission; this is governed by the Satellite and Cable Directive [93/83/EEC];
    - retransmissions of initial transmissions which take place exclusively online, and
    - retransmissions made by the broadcasting organisation which made the initial transmission.

- **"Mandatory collective management" for retransmission services**
  - Rights-holders can only grant or refuse the retransmission of their works via a collective management organisation (Art. 3 (1)).
  - If the rights-holder does not authorise a collective management organisation, the organisation which manages rights in the Member State concerned is deemed to be mandated (Art. 3 (2)). Where several collective management organisations are possible, the Member State must choose one (Art. 3 (3)).
  - The rights-holder has the same rights vis à vis a collective management organisation which is deemed to be mandated – i.e. rights to remuneration or information – as rights-holders that have themselves mandated it. The rights-holder can claim those rights within a period, to be fixed by the Member State concerned, which cannot be shorter than three years from the "retransmission". (Art. 3 (4))
  - Mandatory collective management does not apply to broadcasting organisations where these are themselves rights-holders in relation to a transmission or where they exercise corresponding rights (Art. 4).

## Main Changes to the Status Quo

- The Regulation extends the scope of the principle of country of origin for transmissions via satellite – governed by the Satellite and Cable Directive (93/83/EEC) – to include ancillary online services.
- The Regulation extends the scope of mandatory collective management for retransmissions via cable – governed by the Satellite and Cable Directive (93/83/EEC) – to include cross-border retransmission services via closed networks.

### Statement on Subsidiarity by the Commission

EU-wide access to television and radio programmes can only be effectively achieved at EU level (p. 4).

### Policy Context

The Regulation is part of the Digital Single Market Strategy [COM(2015) 192, see cep**PolicyBrief**]. It will contribute to the gradual removal of "obstacles to cross-border access to content and to the circulation of works" proposed in the Communication "Towards a modern, more European copyright framework" [COM(2015) 626].

### Legislative Procedure

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|---|---|
| 14 September 2016 | Adoption by the Commission |
| 16 October 2016 | 1st Reading in European Parliament |
| 28 November 2016 | Debated by the Council |
| Open | Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force |

### Options for Influencing the Political Process

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|---|---|
| Directorates General: | DG Communications Networks, Content & Technology (leading) |
| Committees of the European Parliament: | Legal Affairs (leading), Rapporteur: D. Köster (S&D Group, DE) |
| Federal Ministries: | Justice and Consumer Protection (leading) |
| Committees of the German Bundestag: | Legal Affairs and Consumer Protection (leading); Economy and Energy; Education; Culture and Media |
| Decision-making mode in the Council: | Qualified majority (adoption by 55% of the Member States making up 65% of the EU population) |

### Formalities

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|---|---|
| Legislative competence: | Art. 114 TFEU (Internal Market) |
| Form of legislative competence: | Shared competence (Art. 4 (2) TFEU) |
| Legislative procedure: | Art. 294 TFEU (Ordinary legislative procedure) |

# ASSESSMENT

### Economic Impact Assessment

Ordoliberal Assessment

**The country of origin principle and mandatory collective management facilitate,** on the one hand, the EU-wide **cross-border transmission of television and radio programmes** because they respectively eliminate or simplify the necessary licensing procedures**.** On the other hand, they have several negative consequences.

**The country of origin principle breaches the rights-holders' right to property, freedom of contract and the freedom to conduct a business because** – after providing an ancillary online service with content – **they only have limited ability to decide from which Member States consumers can access their content via ancillary online services.**

Until now, broadcasting organisations have been prohibited from making active offers to sell content in other countries due to national licenses. Since, in an online context, it is virtually impossible to distinguish between passive access by consumers and an active offer for sale, broadcasting organisations themselves prevent access to their online services from other Member States by geoblocking. The country of origin principle means that this no longer applies; broadcasting organisations can now actively offer their services for sale in other countries. In order to prevent this, rights-holders will in future have to expressly oblige the broadcasting organisations to carry out geoblocking, which is often contractually unlawful.

Although rights-holders can continue to demand varying licence fees from broadcasting organisations from different Member States, licensing by country can only be effectively implemented if – mainly as a result of language barriers – the demand for ancillary online services from broadcasting organisations outside their Member State is low. This is unlikely to be the case for ancillary online services in English for example. In such cases, the only possibility for rights-holders is to completely bar broadcasting organisations from placing individual content or certain language versions online.

The country of origin principle may also therefore mean that rights-holders increasingly avoid offering – principally high-quality English – content to broadcasting organisations but distribute it via other – particularly fee-based – channels where they can continue to prevent Europe-wide transmission. Thus the true aim of the Regulation would be defeated.

It is also unclear whether the country of origin principle does in fact substantially simplify licensing for the broadcasting organisations. The Commission has not convincingly substantiated whether the current procedure for EU-wide provision does actually give rise to difficulties.

**Mandatory collective management also restricts** rights-holder's **freedom of contract and freedom to conduct a business** because it forces them to be represented by a collective management organisation for the licensing of retransmission services. This leaves rights holder with only limited ability to individually market their rights. Although the burden on retransmission services is relieved if, instead of approaching individual

rights-holders, they only have to contact a small number of collective management organisations when they want to include foreign channels in their product range, the extent of this relief is questionable.

### Impact on Efficiency and Individual Freedom of Choice

**The Regulation distorts competition because it is** framed in such a way that is **neither supplier-neutral nor technology-neutral.** The country of origin principle favours ancillary online services of broadcasting organisations because it does not apply to other competing online services such as certain webcasting services. Mandatory collective management favours retransmission via "closed networks" because it does not apply to similar and therefore competing retransmission services via the open internet - such as Zattoo.

### Impact on Growth and Employment

Negligible.

### Impact on Europe as a Business Location

Negligible.

## Legal Assessment

### Legislative Competency

Unproblematic. Art. 114 TFEU authorises the EU to harmonise national copyright regulations in order to promote cross-border access to protected content.

### Subsidiarity

Unproblematic.

### Proportionality with respect to Member States

The choice of a Regulation as the legislative instrument is proportionate (Art. 5 (4) TFEU). Although the Commission chose to use a Directive to regulate satellite transmissions and cable retransmissions, another equivalent Directive or an extension to the Satellite and Cable Directive would not give Member States significantly greater scope for discretion in relation to implementation because one of the aims of the proposal is complete consistency of the affected copyright provisions in the Member States. In order to achieve this, alternative provisions would hardly be able to allow Member States any degree of leeway.

### Compatibility with EU Law in other respects

**The country of origin principle,** in its current form and on the current basis, **breaches the freedom to conduct a business** (Art. 16 CFR) **and the right to property** (Art. 17 CFR) **because it is disproportionate.**
Encroachment on these fundamental rights may be justified inter alia for reasons relating to the freedom of expression and information (Art. 11 CFR), which is likewise protected as a fundamental right, insofar as such encroachment is proportionate (Art. 52 (1), sentence 2 CFR).

**The Commission has not convincingly indicated the extent to which** barriers to the cross-border provision of ancillary online services exist as a result of which **the country of origin principle would be justified** in the proposed form. Since cross-border accessibility of ancillary online services can be disabled by technical means, service providers have not so far been subject to any legal uncertainty about the countries for which they require licences, as was the case for satellite transmission prior to introduction of the country of origin principle. Equally, the Commission has failed to provide sufficient data to substantiate the extent to which the country of origin principle is suitable for reducing transaction costs in the licensing process. Broadcasting organisations that want to offer content via an ancillary online service, must at least clarify and acquire the rights for the country of origin. The rights of use to be acquired in this regard have already been harmonised under EU law. Thus it is not clear why simultaneous acquisition of a licence for other countries should increase the transaction costs.

Justification only arises from the fact that restrictions on copyright protection currently diverge in the Member States for reasons of public interest. It is therefore the case that the online provision of content for specific purposes is permitted without a licence, e.g. in the home country whilst in other EU countries, licences have to be acquired. This would be solved by the country of origin principle. Here, however, **it would be sufficient to bring in the country of origin principle only for** protected content in such **programmes where,** balanced against encroachment upon the freedom to conduct a business and the right to property, **there is a legitimate public interest in ensuring its cross-border accessibility.**
As regards retransmission services, however, mandatory collective management provides a simple, fast and legally secure procedure. Since, in addition, only sent content is affected, this justifies the encroachment upon the freedom to conduct a business.

### Impact on German Law

It remains to be seen whether the German legislator will extend mandatory collective management to purely domestic cases to avoid unequal treatment of these cases. This would require an amendment of the Copyright Act.

## Conclusion

Although the country of origin principle and mandatory collective management facilitate the EU-wide cross-border transmission of television and radio programmes, the country of origin principle breaches the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR) because it is disproportionate. The Regulation distorts competition because it is neither supplier-neutral nor technology-neutral.