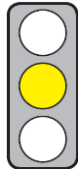


KEY ISSUES

Objective of the Communication: The Commission wants to create a "supportive investment climate" for digital networks, research and innovative business.

Affected parties: Whole economy, in particular: telecommunications network operators, telecommunications and internet service providers, national telecommunications regulatory authorities.



Pro: (1) Greater European coordination of radio frequency policy and administration may increase economies of scale for cross-border operators.

(2) Services provided by OTT players and those provided by telecommunications companies should, insofar as they can be assigned to the same market, receive equal regulatory treatment in order to remove distortions of competition.

(3) On the audiovisual media services market, instead of extending the rules for on-demand media services, restrictive rules on television programmes should be reduced.

Contra: (1) Variations in national regulatory measures are the result of varying technical and economic conditions in the Member States. Creating a European regulatory authority will have no effect on this.

(2) The pricing policy proposed by the Commission to increase development of the fibre optic network may result in inefficient investments.

CONTENT

Title

Communication COM(2015) 192 of 6 May 2015: **A Digital Single Market Strategy for Europe**

Brief Summary

► Context and objectives

- With the Digital Single Market Strategy, the Commission wants to make the EU the "leader of the digital economy", combat the "fragmentation" of digital markets and break down barriers.
- The strategy is based on three pillars:
 - Pillar 1: Better cross-border online access to goods (cepPolicyBrief to follow),
 - Pillar 2: Creating the conditions for digital networks and services (this cepPolicyBrief), and
 - Pillar 3: Maximising the growth potential of the digital economy (cepPolicyBrief to follow).
- Pillar 2 deals, in particular, with the following subject areas:
 - Reform of telecommunications regulations,
 - Examination of the rules on audio-visual media services,
 - Examination of the role of online platforms,
 - Examination of the rules on illegal content on the Internet and
 - Examination of the ePrivacy Directive.

► Reform of telecommunications regulations

- In the Commission's view, the telecommunications sector in the EU suffers from (p. 9)
 - "isolated" national markets,
 - "a lack of regulatory consistency and predictability", particularly for radio spectrum,
 - a lack of sufficient investment notably in rural areas.
- The Commission is therefore intending to propose an "ambitious reform" in 2016 focussing on the following subject areas (p. 10).

Creation of a single market for radio spectrum

- Until now, the management of radio spectrum has been determined by the Member States, e.g. via licence durations and coverage requirements. According to the Commission, this creates barriers to market entry, hinders competition and reduces predictability for investors. (p. 9)
- The Commission will present a "single market approach to spectrum policy and management" (p. 10).
- It will also propose a "coordinated release of the 700 MHz band" (p. 10).
- The Member States will still be entitled to the revenue from the sale of spectrum rights (p. 9).

Harmonisation of regulatory conditions

- The Commission is highly critical of the "significant" differences between the national regulatory conditions - such as the price of Local Loop Unbundling (LLU) - (p. 35, SWD(2015) 100).

- It wants to remove these differences to "allow economies of scale for efficient network operators and service providers" thereby creating a "true single market" (p. 10).

Development of faster networks

- According to the Commission, the transfer from copper-based telecommunications networks to high-capacity fibre optic networks has been slow. It believes that former monopolists only upgrade their own copper-based networks and that the competition lacks both the means and the incentive for investment if the regulated prices for access to existing networks are "disproportionately attractive" [p. 36 et seq. SWD(2015) 100].
- In areas where infrastructure competition has emerged at "regional or national scale", the Commission believes there is a need for "simpler and more proportionate" regulation (p. 10).
- Incentives for investment in "very high capacity networks" should be based on ensuring adequate returns relative to risks (p. 10). In addition, as part of the review of the Universal Service Directive (2002/22/EC), the Commission wants to clarify how to promote network expansion to include inaccessible areas (p. 10).

Strengthening the "institutional framework" and the EU bodies

- The Commission wants to strengthen the "institutional framework" and bodies, such as the Body of European Regulators for Electronic Communications (BEREC) and the Radio Spectrum Policy Group (RSPG), in which the authorities of the Member States are represented (p. 10).

Creating a level playing field for OTT players

- Providers of traditional electronic communications services such as voice telephony are, according to the Commission, competing with providers of internet services which are increasingly being used as substitutes ("Over The Top players", "OTT Players"). These are not subject to the same rules as the traditional providers. The Commission is therefore aiming to achieve the "same regulatory regime" for all market operators. (p. 10)

► **Examination of the rules on audiovisual media services**

- Audiovisual media services - primarily television programmes and video on demand - are subject to the same set of minimum rules under the Audiovisual Media Services Directive (2010/13/EU). In some respects, however, obligations applicable to on-demand services - such as measures for the promotion of European works or advertising rules - are less strict. (p. 11)
- The Commission wants to review the Directive in 2016 (p. 11 and 20). In this regard it will clarify (p. 11)
 - whether the current material and geographical scope should be broadened,
 - how to promote European works on video-on-demand platforms and
 - whether the advertising rules and the rules on the protection of minors require amendment.

► **Examination of the role of online platforms**

- Online platforms bring providers and users of content, goods and services together via the internet [p. 52 SWD(2015) 100]. They include for example search engines, social media, e-commerce platforms, app stores and price comparison websites (p. 11).
- According to the Commission, online platforms have proven to be "innovators in the digital economy". They can help smaller businesses to reach new markets. In addition, they facilitate a sharing economy which offers opportunities for increased efficiency, growth and jobs.
- The Commission wants to carry out a comprehensive assessment of the "increasing market power" of some online platforms in 2015.
- In this regard it will deal in particular with [p. 11 and 13 as well as p. 54 et seq., SWD(2015) 100]
 - constraints on the ability of platform users to transfer to another platform,
 - promotion by online platforms of their own services to the disadvantage of offers by other providers such as where platforms act as a marketplace and a retailer at the same time (vertical integration),
 - non-transparent pricing policies and restrictions on sale conditions and
 - the strong bargaining power of online platforms with respect to small and medium-sized companies when setting terms and conditions.
- The Commission will not restrict itself to competition rules when making its assessment (p. 12).

► **Examination of the rules on illegal content on the internet**

- Under the e-Commerce Directive (2000/31/EC), internet service providers are not liable for the content that they "transmit, store or host", as long as they act in a strictly passive manner.
- If they become aware of illegal content, however, they must take measures to remove it. According to the Commission, this can take a long time and may also result in lawful content being deleted. (p. 12)
- The Commission will analyse whether, with due regard to the impact on the fundamental right to freedom of expression and information, there is a need to amend the e-Commerce Directive (p. 12) in order to
 - impose greater responsibility and stricter duties of care on service providers and
 - introduce "rigorous procedures" for removing illegal content without resulting in lawful content being taken off the internet.

► **Examination of the ePrivacy Directive**

- Following the – not yet completed – adoption of the General Data Protection Regulation (COM (2012) 11,

see [cepPolicyBrief](#)), the Commission will review the more specific ePrivacy Directive (2002/58/EC), relating to the privacy of electronic communications, probably in 2016 (p. 13, 20).

- The Commission will review the ePrivacy Directive in order to ensure a level playing field for providers of electronic communication services and "information society service providers" offering communication services on the internet. It also wants to ensure a high level of protection for users. (p. 13)

Policy Context

In July 2014, Commission President Juncker declared that the completion of a Digital Single Market was to be one of the priorities of his period of office. During the European Parliament's (EP) last legislative period, the Commission submitted a proposal for the creation of an EU Telecommunications Single Market. This included the harmonisation of radio spectrum management and specific rights of veto for the Commission (see [cepPolicyBrief](#)). The EP and Council struck out these elements however. What remained was net neutrality (see [cepPolicyBrief](#)) and roaming (see [cepPolicyBrief](#)), on which the EP and Council reached an agreement in June 2015. On 6 July, the Commission started a [Consultation](#) on the forthcoming revision of the Audiovisual Media Services Directive.

Options for Influencing the Political Process

| | |
|-------------------------------|--|
| Leading Directorate General: | DG Communications Networks, Content & Technology |
| Leading Committees of the EP: | Internal Market and Consumer Protection, Rapporteur: TBA |
| Leading Federal Ministry: | Federal Ministry for Economy and Energy |
| Leading Committee of the BT: | Committee for Economy and Energy |

ASSESSMENT

Economic Impact Assessment

Greater European coordination of radio spectrum policy and management is urgently needed. Harmonisation of the timing of national auctions and the duration of auctioned user rights **may increase economies of scale for cross-border operators** and reduce the likelihood of disruption in border areas. In addition, user rights should be tradeable after the auction.

Varying national regulatory measures can, as the Commission rightly points out, lead to inefficiencies as they make it more difficult to use economies of scale when providing cross-border telecommunications services. These regulatory measures are however adopted by independent national authorities. They typically provide a broad scope for discretion and **are the result of very different technical and economic conditions in the Member States**. Although the Commission does not indicate specifically which changes to the "institutional framework" it will make in order to remove the regulatory differences, the following is apparent: **The creation, as here implied, of an independent European regulatory authority** - instead of national regulatory authorities - **would initially have no effect** on these differences. Thus its added value also disappears. Even the Commission itself is unsuited to the role of EU regulator: it cannot be independent because it plays a quasi-legislative role and pursues its own political objectives such as comprehensive broadband development.

The Commission apparently bases what it considers to be the lack of sufficient investment in the fibre optic network on the fact that prices for access to existing copper-based networks, set by the regulatory authorities, are too low. Higher network access prices for copper-based networks and thus higher retail prices would reduce the difference in the retail price between access to copper-based and access to fibre optic networks and could thus give rise to investment in the fibre optic network. **The pricing policy proposed by the Commission to increase the development of the fibre optic network may however result in inefficient investments.**

Services provided by OTT operators and the services of telecommunications companies may become substitutes for one another as a result of technological progress. As proposed by the Commission, they **should** therefore, **where they can be assigned to the same market, receive the same regulatory treatment in order to remove distortions of competition.** Depending on the regulatory purpose, however, the design of these measures may vary greatly.

The market for audiovisual media services is characterised by increasing competition which is driven, in particular, by an increased supply of on-demand media services. Increasingly, both television programmes and media services can be received on demand on electronic devices. In this market, the varying regulation of the two forms of media leads to distortions of competition. This should be remedied by an extensive harmonisation of the regulatory conditions. **Instead of extending the rules for on-demand media services, restrictive rules on television programmes should be reduced.** A reduction in regulation is particularly appropriate in the case of rigid advertising requirements and the rules on the promotion of European films. In order to create a level playing field, media service providers from outside Europe must be effectively included in the scope of the Directive.

Analysing powerful internet platforms is very complex. Thus internet platforms are often active on several market levels ("multi-sided markets") and provide one market level, particularly end customers, with their services free of charge. This is a challenge for the traditional methods used to define markets and determine market power: Firstly, it is not enough to consider only one market level. Secondly, where services are provided

free of charge on one market, the prices which were previously used to determine market power are not available. Thirdly, the digital economy is subject to many innovations and potentially problematic monopolies are often only of a temporary nature. Consequently, there can be no generally applicable answers to the question of whether internet platforms should be regulated. The fact that the Commission is resisting the growing pressure for rapid regulatory measures and will first carry out a comprehensive assessment is therefore appropriate.

The current exemption from liability for internet service providers in the e-Commerce Directive reduces the hurdles to the provision of online content. Removing this exemption would give rise to a disproportionate amount of effort in controlling the content provided by third parties. It should therefore remain in place. The varying implementation of the Directive by the Member States and the diverging national case law have, however, created a range of legal uncertainties for service providers and the producers of digital content ("rights-holders"). This concerns, for example, the question of who actually benefits from the exemption from liability and the question of when illegal content should have to be removed. The rules on liability in the e-Commerce Directive should therefore be fully harmonised in order to create legal certainty.

The ePrivacy Directive generally only applies to the providers of electronic communication services. This creates distortions of competition when, for example, requirements on the management and storage of business data or on unsolicited messages (spam) do not apply to providers of communication services who offer their services via the internet. An extension of the scope of the Directive is therefore required. In addition, following the proposed full harmonisation in area of the General Data Protection Rules, greater convergence under the e-Privacy Directive should also be considered. This reduces costs for the affected parties and tends to ensure a level playing field.

Legal Assessment

Legislative Competency

The legal basis for legislative EU follow-up measures is provided by the internal market competence (Art. 114 TFEU) and by the competence to coordinate national provisions concerning the taking-up and pursuit of self-employed activities (Art. 53 (1) TFEU).

Subsidiarity

Dependent on the actual design of the follow-up measures but due to the cross-border nature of the internet unlikely to be problematic.

Proportionality with respect to Member States

Dependent on the actual design of the follow-up measure.

Compatibility with EU Law in other respects

Dependent on the actual design of the follow-up measure. With regard to the removal of illegal content from the internet, the affected fundamental rights must be considered: the freedom to conduct a business [Art. 16 Charter of Fundamental Rights of the EU (CFR)] of e.g. internet providers, the freedom of expression (Art. 11 CFR) of users and the protection of their personal data (Art. 8 CFR) and, e.g. in cases concerning copyright, the intellectual property (Art. 17 CFR) of rights-holders.

Impact on German Law

Dependent on the actual design of the follow-up measure. Changes to the Telecommunications Act, the Telemedia Act and the Interstate Broadcasting Treaty will probably be necessary.

Conclusion

Greater European coordination of radio frequency policy and administration may increase economies of scale for cross-border operators. Variations in national regulatory measures are the result of varying technical and economic conditions in the Member States; the creation of a European Regulatory Authority will have no effect on this. The pricing policy proposed by the Commission to increase development of the fibre optic network may result in inefficient investments. Services provided by OTT players and those provided by telecommunications companies should, insofar as they can be assigned to the same market, receive equal regulatory treatment in order to remove distortions of competition. The market for audiovisual media services is characterised by increasing competition; instead of extending the rules for on-demand media services, restrictive rules on television programmes should be reduced.