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Subject: 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
- Final Presidency compromise proposal

Delegations will find in the Annex final Presidency compromise proposal, as agreed at the COREPER meeting on 15 December 2017.

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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) In order to contribute to the functioning of the internal market, it is necessary to provide for wider dissemination of television and radio programmes originating in other Member States for the benefit of users across the Union by facilitating licensing of copyright and related rights in works and other protected subject-matter contained in broadcasts of such programmes. Indeed, television and radio programmes are important means of promoting cultural and linguistic diversity, social cohesion and access to information.

¹ OJ C [...], [...], p. [...].

² OJ C [...], [...], p. [...].

- (2) The development of digital technologies and internet has transformed the distribution of and access to television and radio programmes. Users increasingly expect to have access to television and radio programmes both live and on-demand, using traditional channels such as satellite or cable and also through online services. Broadcasting organisations are therefore increasingly offering, in addition to their own broadcasts of television and radio programmes, online services ancillary to their broadcast, such as simulcasting and catch-up services. Retransmission services operators, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously to the initial transmission of the broadcast, unaltered and unabridged, use various techniques of retransmission such as cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks as well as the open internet. On the part of users, there is a growing demand for access to broadcasts of television and radio programmes not only originating in their Member State but also in other Member States of the Union, including from members of linguistic minorities of the Union as well as from persons who live in another Member State than their Member State of origin.
- (3) A number of barriers hinder the provision of online services which are ancillary to broadcasts and the provision of retransmission services and thereby the free circulation of television and radio programmes within the Union. Broadcasting organisations transmit daily many hours of news, cultural, political, documentary or entertainment programmes. These programmes incorporate a variety of content such as audiovisual, musical, literary or graphic works, which are protected by copyright and/or related rights under Union law. That results in a complex process to clear rights from a multitude of right holders and for different categories of works and other protected subject matter. Often the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs. In order to make their online services available across borders, broadcasting organisations need to have the required rights to works and other protected subject matter for all the relevant territories which further increases the complexity of the rights' clearance.

- (4) Operators of retransmission services, that normally offer multiple programmes which use a multitude of works and other protected subject matter included in the retransmitted television and radio programmes, have a very short time-frame for obtaining the necessary licences and hence also face a significant rights clearing burden. There is also a risk for right holders of having their works and other protected subject matter exploited without authorisation or payment of remuneration.
- (5) The rights in works and other protected subject matter are harmonised, among others, through Directive 2001/29/EC of the European Parliament and of the Council³ and Directive 2006/115/EC of the European Parliament and of the Council.⁴
- (6) Council Directive 93/83/EEC⁵ facilitates cross-border satellite broadcasting and retransmission by cable of television and radio programmes from other Member States of the Union. However, the provisions of that Directive on transmissions of broadcasting organisations are limited to satellite transmissions and therefore do not apply to online services ancillary to broadcasts while the provisions concerning retransmissions of television and radio programmes from other Member States are limited to simultaneous, unaltered and unabridged retransmission by cable or microwave systems and do not extend to such retransmissions by means of other technologies.
- (7) Therefore, cross-border provision of online services ancillary to broadcasts and retransmissions of television and radio programmes originating in other Member States should be facilitated by adapting the legal framework on the exercise of copyright and related rights relevant for those activities.

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

⁴ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 376, 27.12.2006, p. 28–35.

⁵ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, p. 15–21.

- (8) The ancillary online services covered by this Regulation are those services offered by broadcasting organisations which have a clear and subordinate relationship to their broadcasts. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, within a defined time period after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, the ancillary online services covered by this Regulation include services, which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content. The provision of access to individual works or other protected subject matter which are not related to any programme broadcast by the broadcasting organisation, for example through video-on-demand services does not fall in the scope of this Regulation.
- (8a) This Regulation should apply to both ancillary online services that are provided to users by broadcasting organisations in a bundle with the broadcasting service and to ancillary online services that can be accessed by users separately from the broadcasting service without the precondition for the user to obtain access to the broadcast service, for example via a subscription. This is without prejudice to the broadcasting organisations' freedom to offer such ancillary online services free of charge or against the payment of money.

- (9) In order to facilitate the clearance of rights for the provision of ancillary online services across borders it is necessary to provide for the establishment of the country of origin principle as regards the acquisition and the exercise of the acquired copyright and related rights relevant for acts occurring in the course of the provision of, the access to or the use of an ancillary online service. This should cover the clearance of all rights that are necessary for the broadcasting organisation to be able to communicate or make available to the public their programmes when providing ancillary online services, including the clearance of any copyright and related rights in the works or other subject matter used in the programmes, for example the rights in phonograms or performances. That principle of country of origin should apply exclusively to the relationship between right holders (or entities representing right holders such as collective management organisations) and broadcasting organisations and solely for the purpose of the provision of, the access to or the use of an ancillary online service. The principle of country of origin should not apply to any subsequent communication to the public or making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them and reproduction of content which is protected by copyright or related rights and which is contained in the ancillary online service.
- (9a) The principle of country of origin provided for in this Regulation does not establish any obligation for broadcasting organisations to communicate or make available programmes in their ancillary online services or to provide such ancillary online services in a Member State other than the Member State of their principal establishment.

- (9b) Taking into account the specificities of the financing and licensing mechanisms for certain audiovisual works, often based on exclusive territorial licensing, it is appropriate, as regards television programmes, to limit the scope of application of the country of origin principle set out in this Regulation to certain categories of programmes. These include programmes, such as news and current affairs as well as programmes which are controlled by a broadcasting organisation and financed exclusively by it whereas the funds for the financing may come from different sources, including national public funds and European Union funds. Productions that are fully financed and controlled by a broadcasting organisation should include productions carried out by a broadcasting organisation with the use of its own resources, including those carried out by the organisation's commercial subsidiaries, and should also include cases where production is outsourced to third parties as long as the works produced remain solely the broadcasting organisation's own with no rights maintained by the parties that the production was outsourced to. The latter case implies that the parties to whom the production was outsourced will not retain any exploitation rights in the works produced for any territory of the European Union. For the same reasons, the principle of country of origin should not apply to the broadcasts of sports events.
- (10) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that when determining the amount of the payment to be made by the broadcasting organisation for the rights in question, the parties should take into account all aspects of the ancillary online service such as the features of the service, the audience, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used, as well as the language versions provided. This should not affect the freedom of the parties to agree on specific methods for calculating the amount of the payment to be made.

- (11) Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.
- (12) Operators of retransmission services may use different techniques when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes. Their services may be offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks or through internet access services as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council. Operators using these techniques for their retransmissions should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. In order to ensure sufficient safeguards against the unauthorised use of works and other subject-matter, retransmission services which are offered through internet access services should be included in the scope of the Regulation only where those retransmission services are provided to a controlled circle of users, for example through a subscription or user registration and where the level of security provided is comparable to the level of security for content transmitted over managed networks, such as closed circuit IP-based networks, which is particularly important in the case of content subject to paid-for subscriptions. These measures must be feasible and adequate.

- (13) Acts of retransmission need to be authorised by the holders of the exclusive right of retransmission. Right holders should obtain appropriate remuneration for the retransmission of their works and other subject matter. In order to provide legal certainty to the operators of retransmission services and to overcome disparities in national law regarding such retransmission services, rules similar to those that apply to cable retransmission as defined in Directive 93/83/EEC, which include the obligation to exercise the right to grant or refuse authorisation to an operator of a retransmission service through a collective management organisation, should apply. This is without prejudice to the collective exercise of the single equitable remuneration right for performers and phonogram producers for the communication to the public of commercial phonograms as provided for in Article 8(2) of Directive 2006/115/EC. This is also without prejudice to Directive 2014/26/EU⁶ and in particular to its provisions concerning rights of right holders with regard to the choice of a collective management organisation.
- (13a) This Regulation should not exclude the application of national law provisions allowing for agreements concluded between a collective management organisation and retransmission operators, for the retransmission rights that are subject to mandatory collective management under this Regulation, to be extended to apply to the rights of right holders who are not represented by that collective management organisation, without the possibility for the rightholders to exclude their works or other subject-matter from the application of this mechanism, as long as those national law provisions are in compliance with Union law. In those cases, when it is for a Member State to determine which collective management organisation or organisations shall have the right to grant or refuse the authorisation for a retransmission, it should be possible for such determination to follow from the operation of national legislation.

⁶ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

- (14) Any rights held by broadcasting organisations themselves in respect of their broadcasts, including rights in the content of the programmes, should be exempted from the mandatory collective management of rights applicable for retransmissions. Operators of retransmission services and broadcasting organisations generally have ongoing commercial relations and as a result the identity of broadcasting organisations is known to operators of retransmission services and hence the clearance of rights with broadcasting organisations is comparatively simple. Thus, to obtain the necessary licences from broadcasting organisations, operators of retransmission services do not face the same burden as they face to obtain licences from holders of rights in works and other protected subject matter included in the retransmitted television and radio programmes. Therefore, there is no need for the simplification of the licensing process with regard to rights held by broadcasting organisations. It is however necessary to ensure that where broadcasting organisations and operators of retransmission services enter into negotiations, they negotiate in good faith regarding the licensing of rights for the retransmissions covered by this Regulation. Directive 2014/26/EU provides for similar rules applying to collective management organisations.
- (15) In order to prevent circumvention of the application of the country of origin principle through the extension of the duration of existing agreements concerning the acquisition of copyright and related rights relevant for the provision of an ancillary online service as well as the access to or the use of the online service, it is necessary to apply the principle of country of origin also to existing agreements but with a transitional period. The Regulation therefore provides for a period of 2 years for existing contracts to be adapted, where necessary in light of this Regulation. The country of origin principle should not, therefore, apply to existing contracts which expire before [*the date mentioned in Article 7(2) + 2 years*].

- (16) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Whilst there may be an interference with the exercise of the rights of right holders insofar as mandatory collective management is required for the exercise of the right of communication to the public with regard to retransmission services, it is necessary to prescribe such a condition in a targeted manner for specific services and in order to allow more widespread cross-border dissemination of television and radio programmes by facilitating the clearance of these rights.
- (17) In order to achieve the objective of promoting the cross-border provision of ancillary online services and of facilitating retransmissions of television and radio programmes originating in other Member States, it is appropriate to adopt a Regulation, which directly applies in Member States. A Regulation is necessary in order to guarantee a uniform application of the rules across Member States and their entering into force at the same time with regard to all the concerned transmissions and retransmissions. The direct applicability of a Regulation reduces legal fragmentation and provides greater uniformity by introducing a harmonised set of rules which promote the free circulation of television and radio programmes originating in other Member States.
- (18) A review of the Regulation should be undertaken after the Regulation has been in force for a period of time, in order to assess, among others, to what extent the cross-border provision of ancillary online services has increased to the benefit of European consumers and hence also to the benefit of improved cultural diversity in the Union.

(19) Since the objective of this Regulation, namely promoting the cross-border provision of ancillary online services and facilitating retransmissions of television and radio programmes originating in other Member States, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objective. As concerns the cross-border provision of ancillary online services, this Regulation establishes enabling mechanisms to facilitate the clearance of copyright and related rights. This Regulation does not oblige broadcasting organisations to provide such services across borders. Neither does this Regulation oblige operators of retransmission services to include in their services television or radio programmes originating in other Member States. This Regulation concerns only the exercise of certain retransmission rights to the extent necessary to simplify the licensing of copyright and related rights for such services and only with regard to television and radio programmes originating in other Member States of the Union. This Regulation should be without prejudice to the possibility for the Member States to apply rules as those established in this Regulation and in the Council Directive 93/83/EEC ⁷ to situations where both the initial transmission and the retransmission take place within their territory.

HAVE ADOPTED THIS REGULATION:

⁷ COUNCIL DIRECTIVE 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15–21

CHAPTER I
GENERAL PROVISIONS

Article 1

Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) "ancillary online service" means an online service, whether bundled with or provided separately from a broadcast service, consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation, as well as of any material produced by or for the broadcasting organisation which is ancillary to such a broadcast;
- (b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC, intended for reception by the public of an initial transmission from another Member State of television or radio programmes intended for the reception by the public, where such initial transmission is by wire or over the air, including that by satellite but excluding online transmission, provided that:
- (i) the retransmission is made by a party other than the broadcasting organisation which made the initial transmission or under whose control and responsibility such transmission was made, and
 - (ii) the retransmission over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council⁸ is provided to a controlled circle of users.

⁸ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

CHAPTER II

BROADCASTING ORGANISATIONS' ANCILLARY ONLINE SERVICES

Article 2

Application of the principle of 'country of origin' to ancillary online services

- (1) The acts of communication to the public and of making available to the public, by wire or wireless means, in such a way that members of the public may access works or other subject matter from a place and at a time individually chosen by them, occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation as well as the acts of reproduction which are necessary for the provision of, the access to or the use of such online service shall, for the purposes of acquiring and exercising the acquired copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.
- (1a) As regards television programmes, paragraph 1 shall only apply to any copyright and related rights that are required for the inclusion in the ancillary online service of a broadcasting organisation of programmes which are:
 - (a) related to news and current affairs or
 - (b) fully financed and controlled by a broadcasting organisation

Paragraph 1 shall not apply to the broadcasts of sports events and works and other subject matter included in them.

- (2) When fixing the amount of the payment to be made for the rights subject to the country of origin principle as set out in paragraph 1, the parties shall take into account all aspects of the ancillary online service such as features of the ancillary online service, the audience, and the language version.
- (3) The principle of country of origin set out in paragraph 1 does not affect the freedom of right holders and broadcasting organisations to agree, in compliance with Union law, on limitations, including geographic limitations, to the exploitation of their rights referred to in that paragraph.

CHAPTER III

RETRANSMISSION OF TELEVISION AND RADIO PROGRAMMES

Article 3

Exercise of the rights in retransmission by right holders other than broadcasting organisations

- (1) Holders of copyright and related rights may exercise their rights to grant or refuse the authorisation for a retransmission only through a collective management organisation.
- (2) Where a right holder has not transferred the management of the right referred to in paragraph 1 to a collective management organisation, the collective management organisation which manages rights of the same category for the territory of the Member State for which the operator of the retransmission service seeks to clear rights for a retransmission shall be deemed to have the right to grant or refuse the authorisation for a retransmission for that right holder.

If, in such a situation, more than one collective management organisation manages rights of that category for the territory of that Member State, it shall be for the Member State for whose territory the operator of the retransmission service seeks to clear rights for a retransmission to decide which collective management organisation or organisations shall have the right to grant or refuse the authorisation for a retransmission.

- (3) Deleted
- (4) A right holder shall have the same rights and obligations resulting from the agreement between the operator of the retransmission service and the collective management organisation or organisations which act in accordance with paragraph 2, as the right holders who have mandated that collective management organisation or organisations and shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the retransmission which includes his or her work or other protected subject matter.
- (5) Deleted

Article 4

Exercise of the rights in retransmission by broadcasting organisations

- (1) Article 3 shall not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other holders of copyright or by holders of related rights.
- (2) Where broadcasting organisations and the operators of the retransmission services enter into negotiations regarding authorisation for retransmission under this Regulation, those negotiations shall be conducted in good faith.

Article 4a

Retransmissions of an initial transmission originating in the same Member State

Member States may apply the rules of this Chapter and of Chapter III of Directive 93/83/EEC to situations where both the initial transmission and the retransmission take place within their territory.

CHAPTER IV
FINAL PROVISIONS

Article 5

Transitional provision

Agreements on the exercise of copyright and related rights relevant for the acts of communication to the public and the making available to the public, by wire or wireless means, in such a way that members of the public may access works or other subject matter from a place and at a time individually chosen by them, occurring in the course of provision of an ancillary online service as well as for the acts of reproduction which are necessary for the provision of, the access to or the use of such online service which are in force on *[the date mentioned in Article 7(2), to be inserted by OPOCE]* shall be subject to Article 2 as from *[the date mentioned in Article 7(2) + 2 years, to be inserted by OPOCE]* if they expire after that date.

Article 6

Review

- (1) No later than *[3 years after the date mentioned in Article 7(2) to be inserted by OPOCE]*, the Commission shall carry out a review of this Regulation and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
- (2) Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

Article 7
Final provisions

- (1) This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
- (2) It shall apply from [24 months following the day of its publication, to be inserted by OPOCE].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

For the Council

The President

The President