Council of the European Union
General Secretariat

Interinstitutional files:
2016/0151 (COD)

Brussels, 03 May 2017

WK 5061/2017 INIT

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CONTRIBUTION

From: To:	General Secretariat of the Council Audiovisual Working Party
N° prev. doc.: N° Cion doc.:	8464/17 9479/16
Subject:	Comments from the United Kingdom delegation - Revised Presidency compromise text amending Directive 2010/13/EU (AVMS)

Delegations will find attached the comments from the United Kingdom delegation on the revised Presidency compromise text amending Directive 2010/13/EU (AVMS).

UK comments following the AVMSD Attaché meeting 2 May 2017

Article 1 - extension of scope.

According to the European Commission's guidelines on Better Regulation and impact assessments this states:
An IA is required for Commission initiatives that are likely to have significant, economic, environmental or social impacts" (extension of scope is). Also, the guidelines state that policy makers should cross-check that the final proposal would contribute positively to regulatory fitness in the EU. Verifying regulatory fitness for a proposal requires checking issues some of which will have already been touched upon during the impact assessment process:

- Does the draft (legal) text fully comply with subsidiarity?;
- Is the proposal proportionate?;
- Is it in line with the Charter of Fundamental Rights?;
- **Are the draft legal provisions as simple and clear as possible**? Do they avoid unnecessary deviations from international standards? Can they be made easier to implement?;
- **Has the "Think Small First" principle been applied? Could microenterprises be exempted from the scope of the initiative, and if not, why?;**
- Do the draft legal provisions take into account the challenges and opportunities offered by developments in ICTs (e.g. simplified monitoring and information reporting)?;
- Without affecting the overall achievement of the objectives, is there scope to modify some of the legal provisions so as to reduce:
- Expected compliance costs for SMEs and any other relevant stakeholder; **(this should be highlighted)**
- Any negative impact on sectoral EU competitiveness;
- Any potential negative impacts on international trade, developing countries etc.;
- Impact on human rights in the partner country in relation to its obligations arising from international treaties (for proposals with an external dimension);
- Any other impact (including social, environment, or those on specific groups, territorial areas, Member States, innovation, etc.).
- Without affecting the overall cost of the proposal, are there still ways to modify some of the proposed legal provision so as to increase the effectiveness and coherence of the proposed text?

Whilst we recognise that the extension of scope was not a proposal from the Commission, the lack of impact assessment makes it difficult if not impossible to conform with the concept of Better Regulation, and as such creates legal and regulatory uncertainty.

The reference in Article 1(aa)(i) to “livestreaming” and, more importantly, the text in Article 1(aa)(iii) referring to “the principle purpose of the service, a dissociable section of that service **or a significant proportion of the service** is devoted to providing programmes or user generated videos …”, alongside the removal of the reference to “a large amount” of content are the key problems. As you’re aware, these changes could have the dual effect not only of bringing into scope a potentially exceptionally wide range of online services (as noted in the UK’s written comments) but also of subjecting the whole of a site to the regulatory provisions for VSPs, whether that particular bit of content it contains programmes or videos or not. (in other words having a video on the site could make the whole of the site come into scope, not just the video)

The new recital 3a) does not, in our view, help to limit that scope – if that is indeed the intention of the new recital – because criteria such as “whether the service has put in place shared revenue models for the distribution and placement of audiovisual commercial communications” or “whether the service has decided to use algorithms to decide which audiovisual content is run and how prominently it is displayed” are, again, applicable to a potentially very wide range of services.

As we don’t support the proposal we do not have alternative wording, however, our request would be that as we don’t think the intention is to capture the whole of the internet, rather to capture mainstream social media with a significant impact - that some wording should be considered by those who support this concept to limit the wording to ensure that what was intended to be captured is captured, and not everything else.

We note that the commission's proposal did not exclude social media, rather it included it within a specific context, which we do support.

We are concerned that as drafted, the text goes beyond the area of the Commission’s competence, in particular online newspapers that are not dissociable video services. Whilst it is made explicit in recital 3 that online newspapers are excluded unless they are dissociable, there is a lack of clarity because this is not explicitly set out in recital 3A. **Therefore, the online newspaper exclusion should be repeated in recital 3A.**

Additionally the following should be inserted into Recital 3

The definition of an audiovisual media service should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within non-commercial communities of interest.

The recitals are simply an aid to interpretation and as such, the continued use of the word "significant" needs to be changed in order to reflect the intention to capture social media, rather than the whole of the internet. We do not have the wording to suggest at this stage.

Article 2

2 (3) (b)

The 'majority of the workforce' wording does not work and risks the perverse effect of not achieving the desired outcome, as it increases the likelihood of a service falling to a Member State where no decisions are taken about the service (this is because the decision makers will always be in the minority numerically as the employee numbers in any given organisation)

EU case law sets out the criteria for determining jurisdiction. In *VT4 Ltd v Vlaamse Gemeenschap*(C-56/96, 5 June 1997), para 23, the Court of Justice sets out the following criteria:

"...Article 2(1) of the Directive is to be interpreted as meaning that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If a television broadcaster is established in more than one Member State, the Member State having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, in particular where **decisions concerning programme policy are taken and the programmes to be broadcast are finally put together**." (*emphasis added*)

Perhaps the best case alternative is to return to the original wording 'significant' and reference the wording from this case in the recital to clarify what this actually means in practice.

Proposed inclusion in new recital

A significant part of the workforce involved in the pursuit of programme-related audiovisual media service activities is to be determined by reference to the nature of the work undertaken. Work which involves the taking of decisions concerning programme policy or involves the final putting together of the programmes to be broadcast will be considered to be "significant".

Article 2 (5b)

Although it's implied that the Commission makes the final decision, it might be clearer to say so explicitly. As such, we propose including the following wording at the end of para 5 **"[t]he Commission shall make the final decision on jurisdiction"**. This should deal with the uncertainty around ERGA's role or otherwise.

Article 5 1b - Media transparency

It seems that it should be Member States "shall", rather than "may", as otherwise media transparency is completely voluntary and there doesn't seem to be much purpose to the inclusion as Member States can already do this on a voluntary basis.

Article 13 - Levies and Quotas

Para 2 - Ideally we would like to see the deletion from 13(2) onwards.

However we recognise that the majority of Member States support this initiative for on-demand levies. We have concerns about the extension to linear, as there has not been an impact assessment and as noted above in comments for article 1 , that is a requirement to form a basis for better regulation.

Therefore, as it did not form part of the Commission's proposal and given that there has been no impact assessment, we request that the addition of linear channels been removed.

Para 2 - In the first sentence of para 2, we question the use of the word "and" in the following wording "including via direct investment in content **and** contribution to national funds". We think it would be better and fairer if the "And" should be replaced by **"or"**, otherwise there scope for Member States to require service providers to make a double contribution, both financial and direct contribution, which seems unfair/disproportionate. If a direct contribution is being made to European Works, this should be taken into account.

Para 5 - Member States '**may'** also waive, when it is impracticable or unjustified. Logically this should be '**shall**' waive. If something is unjustified or impracticable, saying that it '**may**' be allowed, when you have acknowledged it's unjustified or impracticable, means that it would be acceptable for Member States to act unreasonably. That is not legally certain or robust. We would suggest that the wording needs to be changed to "**shall"**.

Article 30 - a

We raised our concern with this article in the meeting on 12 April and noted that this was not recorded in the annotated copy sent on the 24 April.

There is a problem with the following wording: "from a media service provider under their jurisdiction that it wishes to provide a service that is wholly or mainly directed at the audience of another Member State".

We would suggest the amending the wording from "wholly or mainly directed at the audience of another Member State" to '**made available in another Member State**'.

As drafted, the wording is extremely problematic. The majority of licensing/notification systems in Member States do not require the service provider to declare if they are intending to target a single Member State, as the regimes are set up to provide a service under the AVMSD.

Additionally, service providers often indicate an intention to cover the whole of Europe but will launch in one particular country without informing NRA's.

This means that often NRA's do not have this information. The work that NRA's are doing with the Audiovisual Observatory to improve this shared information between regulators for the database does not include targeting because of this difficulty, rather they include, where a service is available.

There is the additional problem of single language services that cross several borders, e.g. services available in France, Luxemburg and Belgium or services available in both Austria and Germany. So the concept of targeting is often unclear.

Our preference is to say 'made available in' rather than 'targeting' for regulatory clarity.