NEELIE KROES

VICE-PRESIDENT OF THE EUROPEAN COMMISSION

Brussels, 21. 01. 2011
D (2011) 72111

Your Excellency,

I refer to the measures notified by Hungary for the purpose of transposing Directive 2007/65/EC[1] amending Directive 89/552/CE, which has been codified by Directive 2010/13/EU (the Audiovisual Media Services Directive, hereinafter the AVMSD)[2].

The Commission services' initial examination, covering some essential aspects of the Directive, concludes that the Hungarian legislation raises a number of questions regarding their compatibility with the Directive or more generally with EU law. As soon as we have analysed all the transposing measures we might come back to you with further comments.

At this stage, we require clarifications on the following points:

Obligation of balanced coverage applicable to all audiovisual media service providers.

The Commission services first have doubts as to the conformity of the balanced coverage obligation, as defined in Article 13(2) of the Media Constitution (MC) and Article 12 of the Media Act (MA) with the AVMSD and the Treaty rules on the freedom of establishment and free provision of services (Articles 49 and 56 TFUE).

According to Article 4(1) AVMSD, Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive *provided that such rules are in compliance with Union law.*

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[1] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27.

[2] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, OJ L 95, 15.4.2010, p. 1.

Tibor Navracsics
Deputy Prime Minister
Minister of Public Administration and Justice
Vam u.5-7
H-1011 Budapest

The Commission services understand the above mentioned obligation on balanced coverage as including a more detailed or stricter rule with respect to the provision on the right to reply (Article 28 AVMSD). It is therefore necessary that it complies with Union Law. However, the Commission services have doubts about its compliance with the principle of proportionality and the fundamental right of freedom of expression and information enshrined in Article 11 of the EU Charter of Fundamental Rights.

As underlined in Recital 102 of the Directive, a balanced coverage obligation is a common obligation for television broadcasters. However, the imposition of this obligation and, as a consequence, of the dispositions of Article 181 MA, to all audiovisual media service providers, including on-demand audiovisual media services (VOD and audiovisual blogs), without further qualification or limiting criteria related to the existence of licensing conditions, size, market share, targeted audience, thematic scope or the existence of a wide variety of competing media of this type, could constitute a disproportionate obstacle to the activity of such operators. Moreover, for the same reasons, these provisions could constitute an unjustified restriction of the freedom of expression and information.

More generally, such wide imposition of the balanced coverage obligation – which in addition is drafted in quite general terms, leaving a rather large room for interpretation -, could create an obstacle to the freedom of establishment and the free provision of services guaranteed by Articles 49 and 56 TFEU, as it could deter the establishment in Hungary of media service providers from other Member States and the provision of media services in Hungary.

Lastly, the Commission will carefully assess the way Article 13 MC and Article 181 MA are implemented by the competent authorities as far as concerns broadcasters.

Country of origin principle.

The Commission services also have doubts as to the conformity of Articles 176 and 177 MA with Article 3 AVMSD. The latter provides for the possibility to provisionally derogate from the obligation to ensure freedom of reception and not to restrict retransmission of AVMS from other Member States, in case where it considers that they infringe the rules on protection of minors and incitement to hatred, under the condition that the measures taken were assessed by the Commission and considered compatible with EU law, included the proportionality principle.

Taking into account that such measures constitute a derogation to the country of origin principle and that they would apply to cases where the media service provider would have been considered by the competent authorities of the Member State where they are established as not infringing the rules on protection of minors and incitement to hatred, , the Commission services have doubts as to whether the imposition of fines, which seems to be envisaged by Articles 176 and 177 MA, in any circumstances, can be considered as a proportionate measure.

Registration requirements

The analysis of the Commission services also indicates that Article 41 MA requiring the registration of all media (in particular press and online media) may constitute disproportionate restrictions to the freedom of establishment and the free provision of services (Articles 49 and 56 TFUE).

While registration of broadcasters is a common practice in other Member States, and some Member States have also chosen that option with respect to on–demand media services, the same obligation with respect to other media (such as internet sites, non-private blogs and economic analyses) can be considered as an unjustified obstacle for those media providers that want to establish themselves in Hungary or want to provide their services in Hungary from another Member State.

Such obstacle does not seem to be justified, as the extension of such registration requirement to all media service providers would not be compatible with the principle of proportionality and would create an unjustified restriction of the aforementioned fundamental right of freedom of expression and information.

Conclusion

In the light of the foregoing, the Commission services have serious doubts as to the compatibility of the Hungarian legislation with Union law. Considering the urgency of this case, and as agreed by us at our last meeting on 17 January 2010, I invite the Hungarian government to submit within two weeks observations on how these serious doubts may be addressed.

Should you fail to satisfy the above requests or provide for information that is not satisfactory, the Commission reserves the possibility to decide to send a letter of formal notice to the Hungarian Authorities.

cc: Permanent Representation of the Republic of Hungary to the European Union