

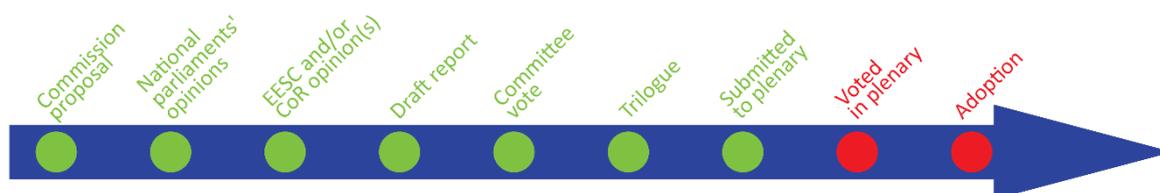
Regulating online TV and radio broadcasting

OVERVIEW

In December 2018, the co-legislators reached an agreement on a European Commission proposal for facilitating the cross-border provision of online TV and radio content. The co-legislators agreed to extend the 'country of origin' principle to a limited set of online services, and to facilitate the licensing of retransmission services over the internet under certain conditions. Furthermore, at the request of the European Parliament, the compromise text contains new rules on 'direct injection', a process used increasingly by broadcasters to transmit their programmes to the public. The compromise also includes a change of the instrument from a regulation into a directive in order to leave flexibility to the Member States to implement the new rules on 'direct injection'. The Member States' negotiators and the Legal Affairs Committee (JURI) endorsed the political agreement in January 2019. The compromise text must now gain the approval of the European Parliament during the March II plenary session.

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

<i>Committee responsible:</i>	Legal Affairs (JURI)	COM(2016) 594 14.9.2016
<i>Rapporteur:</i>	Pavel Svoboda (EPP, Czech Republic)	2016/0284(COD)
<i>Shadow rapporteurs:</i>	Angelika Niebler (EPP, Germany) Tiemo Wölken, (S&D, Germany) Sajjad Karim (ECR, UK) Jean-Marie Cavada (ALDE, France) Julia Reda (Greens/EFA, Germany) Jiří Maštálka (GUE/NGL, Czech Republic) Isabella Adinolfi (EFDD, Italy) Marie-Christine Boutonnet (ENF, France)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	First-reading vote in plenary	



Introduction

On 14 September 2016, in line with the [digital single market strategy](#), the European Commission adopted a package of legislative proposals for the [modernisation of European Union \(EU\) copyright rules](#), including a [proposal for a regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes](#). The proposal aims at promoting the cross-border provision of online services ancillary to broadcasts and facilitating digital retransmissions of TV and radio programmes originating in other Member States. The Commission's proposal also seeks to limit the use of geo-blocking practices in the EU, in the same way as the [Portability Regulation](#)¹ (directly applicable since 20 March 2018) and [Geo-blocking Regulation](#)² (adopted by the European Parliament and the Council in February 2018).

Context

Growing demand for online broadcasting services

Broadcasters traditionally distribute 'linear' broadcast television and radio content. 'Linear' content services can be accessed by users only at the particular time they are offered and on the particular TV channel on which they are presented. Such services are typically broadcast on dedicated networks (e.g. analogue and digital terrestrial television, cable, satellite, or broadband-based internet protocol television (often referred to as IPTV)).

Digital technologies have radically changed the way creative content is accessed, produced and distributed and broadcasters increasingly propose 'non-linear' content. The main characteristic of 'non-linear' content services is the autonomy they offer to the user to decide what they want to watch, where to watch it, when, and on which device. Non-linear online content services encompass '[simulcasting services](#)' (i.e. TV channels and radio programmes which are offered simultaneously over the internet by broadcasting organisations), '[webcasting \(webstreaming\)](#)' services (e.g. YouTube live channels), '[TV catch-up \(replay\)](#)' services (i.e. enabling consumers to view programmes at the own choice of timing for a short period – typically 7 to 30 days – after transmission), '[podcasts](#)' (i.e. radio programmes that can be streamed or downloaded), and other types of '[video on demand](#)' services (e.g. services from broadcasters such as BBC iPlayer and subscription online video services such as Netflix and Amazon).

In addition, high-quality online video services provided over the internet and referred to as '[over-the-top](#)' (OTT) services are delivered over third-party networks with which the service provider has no direct business relationship (e.g. free online video available through video sharing services such as YouTube).

While there has been recently a **rapid growth of the broadcast related online** services market in the EU, this market is expected to continue to represent a comparatively smaller market share by 2020 when compared to the number of households subscribed to satellite, cable and telecom operator services.³ Audience research figures also indicate that most people still watch programmes on television at the time of transmission. However, there are demographic differences, and **younger viewers tend to watch more programmes online**.⁴

Copyright clearance and geo-blocking

Television and radio broadcasting content incorporate a variety of copyright protected content (including audiovisual, musical, literary or graphic works). Because of the [principle of territoriality](#) – under which copyright is normally acquired and protected on a country-by-country basis – broadcasters transmitting online television and radio programmes need to clear the rights for the relevant territories before making their online services available across borders. This means that they must obtain authorisation to transmit and make available the protected content for all of the

Member States in which they transmit their programmes, often from a multitude of right holders and in a short time-frame.

Such copyright clearance requires engaging in a complex process to obtain the online rights (given the national disparities in provisions on copyright), and generates high transaction costs, which in turn reduce the broadcasters' incentives to provide cross-border services.⁵ As a result, TV broadcasters often make their online services available in a single Member State and put measures in place that prevent cross-border access to these services, such as [geo-blocking](#) of IP addresses from other territories.⁶

According to the European Commission report on the [e-commerce sector inquiry](#) published in 2017, **80 % of public service TV broadcasters** and **67 % of commercial TV broadcasters** who responded to the inquiry applied **at least one type of geo-blocking** to their online services. In this respect, it is worth noting that a review clause enclosed in the recently adopted [Geo-blocking Regulation](#), which prohibits to implement unjustified geo-blocking practices in the EU, requires the Commission to assess if such rules should also apply to audiovisual services by 2020.

Existing situation

Satellite and Cable Directive

In 1993, the [Satellite and Cable Directive](#)⁷ (usually referred as the SatCab Directive) was introduced to facilitate cross-border broadcasting services by satellite as well as cable retransmission of programmes within the EU. This legislation harmonises national provisions concerning the right of communication to the public by satellite and the right of retransmission by cable based on the two following core principles:

Country of origin (COO) principle

To prevent fragmentation of the European satellite market, the directive established at Union level a right for communication to the public by satellite and defined that the act of communication to the public by satellite occurs only in the country of origin of a satellite transmission (i.e. '[country-of-origin principle](#)'). Accordingly, rights only need to be cleared for the country of origin of the broadcast and not for the countries where the signals are received. The applicable law is that of the Member State from which the programme-carrying signals are broadcast and not that of the Member State where the signals are received. Therefore, broadcasters only need a licence in the country of origin of the satellite broadcast to broadcast programmes in other Member States.

Mandatory collective management of cross-border cable retransmission

Operators of retransmission services aggregate TV and radio channels into packages (basic, premium, thematic, etc.) and provide them to consumers simultaneously to their initial transmission (unaltered and unabridged), usually against payment. Retransmission was historically performed by cable and satellite providers that must acquire all rights necessary for retransmission of TV and radio channels. However, because cable operators retransmit the television and radio broadcast programmes without alteration (i.e. with no say in their composition), they usually cannot identify the rights holders for all parts of the programmes, which makes it impractical for them to negotiate individual licences.

Against this background, the SatCab Directive introduced a 'system of compulsory collective management' ([Article 9](#)) in order to avoid a scenario in which cable operators would need to clear a very high number of individual rights. Under this system, television programme copyright holders (e.g. film producers, screenwriters) cannot exercise their cable retransmission rights individually vis-à-vis cable operators, and cable (retransmission) rights may be exercised only by collecting societies representing individual rights owners. This system was set up to avoid the risk of 'black-outs' (or 'black holes'), i.e. non-airing of a certain programme by a cable operator because of

lack of rights to that particular programme.⁸ The right holders' exclusive right to authorise a 'communication to the public' of their copyright-protected work is therefore limited.⁹

Limitation of the Satellite and Cable Directive

The 'COO principle' for satellite broadcasting and the 'system of mandatory collective copyright management' for cable retransmission have remained unchanged since the adoption of the directive in 1993. However, although, the directive has largely achieved its objective of facilitating the clearance of rights for satellite broadcasting, the European Commission's investigations have shown that broadcasters encounter some limitation and face practical difficulties with the acquisition of rights for their online services when they are offered across borders.¹⁰

The COO principle is not applicable to broadcasters' online services

Firstly, the 'COO principle' for satellite broadcasting only concerned linear services. The principle does not apply when a broadcaster clears rights for its online services or retransmissions, which are increasingly preferred by consumers. For online services offered across borders, this potentially implies clearing rights in multiple jurisdictions. The difficulties and increased transactions costs related to such clearance of rights reduce broadcasters' incentives to provide cross-border services. As a result, TV broadcasters often make their online services available only in one Member State and use geo-blocking measures that prevent cross-border access to these services from other territories.¹¹

While the rights for broadcasting a **satellite TV** programme must only be cleared in the **country of uplink** (i.e. from which the programme signal is sent), the rights for **webcasting** a TV programme need to be cleared for **every territory** where a work is made available.

The 'mandatory collective management' system does not apply to new types of broadcasting retransmissions

Secondly, the 'mandatory collective management' system is limited to retransmissions by cable and does not extend to retransmissions by other means. However, today TV and radio channels are increasingly retransmitted by 'IPTV' providers (i.e. TV/radio over closed circuit internet protocol-based networks), 'digital terrestrial TV' (DTT) providers, and 'over-the-top' (OTT) TV/radio services providers.¹² This means that providers of retransmission services by means other than cable often cannot benefit from the system facilitating the clearance of relevant rights. They therefore face a heavy rights clearing burden in order to be able to provide their services, in particular when they retransmit TV and radio broadcasts from other Member States. The lack of mechanisms facilitating the licensing rights for retransmission services for means other than cable leads to a limited access to TV and – to a lesser extent – of radio channels from other Member States.

According to a commonly accepted definition from the International Telecommunications Union (ITU), [IPTV services](#) are 'multimedia services such as television/video/audio/text/graphics/data delivered over **IP-based networks** managed to provide the required level of quality of service and experience, security, interactivity and reliability'. **IPTV retransmission services** are expected to account for **16 % of the EU 28 TV households in 2020**. [OTT \(over-the-top\) services](#) are defined as 'online content delivery service without the intervention of an internet service provider in the control or distribution of the content'. End-users access and share OTT content services on the public internet through their connected devices (such as PCs, laptops, tablets, smartphones, set-top boxes, etc.). **OTT retransmission services** are provided by **new services providers** such as Zattoo or Magine, which propose subscriptions to end users to access and watch a specific, locally tailored TV channel portfolio (e.g. via mobile apps for tablets and smart phones or directly via streaming); as well as by **traditional telecom operators** (such as KPN or Telecom Austria).¹³

Lack of harmonised rules on 'direct injection'

Notion of 'direct injection'

'Direct injection' refers to a broadcast retransmission technique. Under the traditional system of retransmission, a cable operator captures the free-to-air transmission of radio and television programmes received (usually through an antenna) by the public, and then injects the signal into its cable network in order to deliver the programmes to the subscribers' radio or television sets. There is no direct contact between the broadcaster and the cable operator. In contrast, 'direct injection' technology is increasingly used to bypass the reception of the initial broadcast and the subsequent injection of the signal into the cable network. As a result, broadcasters compose the TV and radio programmes and then transfer them directly to the cable operator.¹⁴

There does not seem to be a commonly agreed technical definition of 'direct injection' (based on a standard for example) so far. In practice, according to a 2016 study from the French Conseil supérieur de la propriété littéraire et artistique,¹⁵ 'direct injection' involves a **two-step process**. First, a broadcaster transmits programme-carrying signals to a distributor (i.e. cable operator, satellite TV operator, fixed copper or fibre-based operator, or an operator broadcasting via mobile telephony networks). The transmission is performed using a private wired or wireless point-to-point line, or by satellite, in such a way that the programme-carrying **signals cannot be captured by the general public during the transmission**. Second, a distributor receives the programmes and distributes them to its subscribers. Only when the distributors send the signals to their subscribers can the subscribers receive the signals so that they can watch the TV programmes.

Legal issues posed by 'direct injection' and 'communication to the public'

Article 1 paragraph 3 of the SatCab Directive currently in force states that 'cable retransmission' means 'the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public'. Cable retransmission thus implies a 're-broadcasting' of the programmes initially broadcast by another organisation (i.e. TV channels, distributors). As a result, it has traditionally been considered that cable retransmission organisations are reaching a separate audience (i.e. different from the 'primary communication') and that cable retransmission qualifies therefore as an act of 'secondary communication' to the public, subject to mandatory collective administration on the basis of Article 9(1) of the SatCab Directive.¹⁶

However, because in a 'direct injection' scenario, there is no retransmission of the signals initially broadcast by another organisation, broadcasting and cable companies in some Member States have argued that they are no longer engaged in 'secondary communication', but rather in 'primary communication to the public'. Therefore the rules of the SatCab Directive on mandatory collective administration would not apply to them and they would not be required to clear the rights (i.e. pay the cable retransmission fees) with the collective management organisations.¹⁷

The **Commission's impact assessment and preparatory studies do not address the issue of direct injection** at length. Many doctrinal sources highlight however that there is a **lack of legal certainty** on how to deal with 'direct injection' in the EU. The use of 'direct injection' technology in the transmission of broadcast signals creates **uncertainty regarding the qualification of the act taking place**, i.e. whether it constitutes an act of 'cable retransmission' and whether one or two distinct 'communications to the public' take place. As a consequence, some **legal questions** have arisen, including whether cable operators need to obtain a separate authorisation for retransmission, who should grant the authorisation for retransmission, and who is liable for the payment of remuneration to authors and right holders.¹⁸

Some **national laws** address the issue of direct injection, but they **vary considerably** in the EU.¹⁹ **National courts** have ruled in **divergent ways** and 'direct injection' is sometimes considered to fall under the definition of a 'cable retransmission' (e.g. Spain), sometimes not (e.g. in the Netherlands),²⁰ and is sometimes considered to give rise to remuneration to the benefit of collective management organisations (e.g. Germany), but sometimes not. In addition, the **very limited EU Court of Justice case law**²¹ does not provide clear and comprehensive guidelines.²²

Parliament's starting position

The European Parliament [resolution](#) of 19 January 2016 on 'Towards a Digital Single Market Act' calls for measures to be taken in the audiovisual field and in particular urges the Commission to take changing viewing patterns and new ways of accessing audiovisual content by aligning linear and non-linear services into account.

Preparation of the proposal

The Commission carried out an evaluation of Directive 93/83/EEC, and the [2016 REFIT evaluation of the Satellite and Cable Directive](#) confirmed the need to modernise the EU legislative framework.²³ The Commission also launched a [public consultation](#) followed by extensive discussions with stakeholders in 2015 and 2016. Several [legal](#) and [economic](#) studies on the applications of EU copyright rules to the digital environment were conducted and an [impact assessment](#) carried out. The European Parliament published an [implementation appraisal briefing](#) assessing the implementation of the Satellite and Cable Directive in May 2016.

The changes the proposal would bring

Objective

The Commission's proposal aims at promoting the cross-border provision of ancillary online services provided by broadcasters in the EU and to facilitate digital retransmissions of TV and radio programmes originating in other Member States. The new provisions more specifically aim at addressing the difficulties related to the clearance of rights and at creating the conditions allowing broadcasters and operators of retransmission services to offer wider access to TV and radio programmes across the EU. The proposal would extend the rules enshrined in [Directive 93/83/EEC](#) (also referred to as the SatCab Directive) that are applicable to cable and satellite providers so far to new online broadcasting providers.

Extending the 'country of origin' principle to ancillary online services (Article 2)

The Commission proposed to extend the 'country of origin' (COO) principle to online services that are ancillary to the initial broadcast. According to the proposal, 'ancillary online services' would consist of the public provision of radio or television programmes online (simultaneous to broadcast or for a defined period of time following broadcast) by a broadcaster or under its control and responsibility.²⁴ This definition would comprise 'simulcasting services', providing access to TV and radio programmes simultaneously to the broadcast; 'non-linear catch-up' services; and services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, such as 'previews', 'reviews' and 'supplementing content'.²⁵

Consequently, the copyright-relevant acts (i.e. 'communication to the public', 'making available' and 'reproduction' of the protected content) would be considered to take place solely in the Member State where the broadcasting organisation has its principal establishment. As a result, broadcasters would only need to clear the rights in their own country for making such 'ancillary online service' available in other Member States. However, right-holders would still retain a certain control over the

licensing of their rights. Based on the principle of contractual freedom, it would be possible for them to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this regulation (recital 11).

Extending the system of mandatory collective management to other types of retransmission (Articles 1 and 3)

The Commission proposed to extend the solution found for cable operators to facilitate the clearance of rights (i.e. the compulsory management of cross-border retransmission) to some new means of retransmission. The initial draft text states that rules similar to those applicable to cable retransmission as defined in the SatCab Directive would apply to operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile or similar networks in order to provide legal certainty and to overcome disparities in national law.²⁶

To that end, the Commission proposed to amend the definition of 'retransmission' to cover 'any simultaneous, unaltered and unabridged retransmission, other than cable retransmission [as defined in the SatCab Directive] and other than retransmission provided over an internet access service [as defined in [Regulation \(EU\) 2015/2120 on network neutrality](#)] intended for reception by the public of an initial transmission from another Member State, by wire or over the air' (Article 1).

As a result, the Commission proposed to extend the compulsory collective management system to internet protocol television (IPTV) retransmission services and other retransmission services (satellite, mobile, DTT) accessible by consumers through an electronic communications network fully or partially dedicated to the retransmission service (i.e. provided over 'closed' electronic communications networks), but not to online OTT retransmission services (i.e. provided through the open internet or any electronic communications network giving access to the internet).²⁷

The Commission stressed that extending the compulsory collective management system to a **wide variety of OTT retransmission** services could have a **detrimental impact** on right holders and on **licensing revenues**, as the same content could be made available in a territory at the same time through different services.²⁸ It is worth noting however that, within the EU, some Member States (Denmark, Finland and Sweden) have already extended their collective licensing systems to retransmissions by all means, including OTTs.

Advisory committees

The European Economic and Social Committee (EESC), in its [opinion](#) on the copyright package adopted in January 2017, agrees with the extension of the COO principal and the simplification of the rights clearance process for new types of providers as proposed by the Commission.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 30 November 2016. A number of [national parliaments](#) have examined the proposal, without raising any objections on the grounds of subsidiarity. Contributions were received from chambers in Belgium, the Czech Republic, Denmark, Germany, Lithuania, Austria, Portugal and Romania.

Stakeholders' views²⁹

Following the political agreement reached by the co-legislators' negotiators on 13 December 2018, stakeholders have expressed, inter alia, the following views.

The European consumer organisation, [BEUC](#), regrets that the new law does not give consumers the right to access content from broadcasters based in another EU country since broadcasters may still decide which content they want to open up to foreign viewers. The European Broadcasting Union, [EBU](#), representing public broadcasters, welcomed the modernisation of the retransmission licensing

regime but regrets that the scope of programmes that can be offered cross-border on the broadcasters' own online platforms has been drastically narrowed and does not cover 'on demand' services, such as catch-up TV. The [Association of Commercial Television in Europe](#) (ACT) finds the political agreement disappointing.

The [European Authors' Societies](#) (GESAC) and the [European Composer and Songwriter Alliance](#) (ECSA) welcome the political agreement reached and especially the provisions aiming at improving the remuneration of authors and creators. The society of audiovisual authors, [SAA](#) stresses that although the political compromise reached by the co-legislators is not fully satisfactory for the audiovisual industry, it still greatly improves the initial proposal. They praised the co-legislators for reducing the scope of the country of origin principle to 'news and current affairs' programmes and 'fully financed own productions of broadcasters'. They also back the Council and Parliament for having taken market evolutions into account in the final text and including important elements – initially excluded or ignored – such as retransmissions over an internet access service and the problem of direct injection.

In contrast, [Cable Europe](#) stressed that the rules governing 'direct injection' were not part of the Commission's original proposals or their own impact assessment and argue that, in their view, the inclusion of these provisions in the final legal act is in contravention of the inter-institutional agreement on better law-making of 13 April 2016.

Finally, in a [joint letter](#), a number of associations representing the audio-visual and sport sectors expressed their concerns about the introduction of the COO principle for the licensing of broadcasting rights which, in their view, would endanger cultural and linguistic diversity, plurality of content and business models, as well as competitiveness on Europe's future audiovisual landscape. They urge the European institutions to define 'ancillary services' in the narrowest possible manner.

Academic views

Extension of the 'country of origin' (COO) principle

According to the Max Planck Institute for Innovation and Competition, the extension of the COO principle should be limited to ancillary online services (which are linked to an original broadcast by the broadcasting organisations) and exclude other online services such as webcasting and podcasts (which are independent of a primary transmission). In their view, without this restriction, distortions of competition would arise because platforms that are not also broadcasting organisations would not benefit from simplified rights clearing for similar offers.³⁰ Hugenholtz argues that the draft legislation does not create an obligation on broadcasters to provide ancillary services online across borders. Hugenholtz explains that the COO principle applies only to the versions broadcasted in the country of origin and rights holders can still impose territorial limitations and geo-blocking given the contractual freedom enshrined in the text.³¹

Retransmission

According to the Max Planck Institute for Innovation and Competition, it is reasonable to limit mandatory collective management to the rights for retransmission over closed networks like IPTV. An extension of the rights clearance system to OTT services is not desirable because such OTT services compete with the business models of paid video-on-demand services (such as Netflix and Amazon) and could hamper their development.³²

Direct injection

Sirinelli, Benazerf and Bensamoun called for clarification of the issue of direct injection at EU level and proposed a definition of direct injection and imposition of a joint liability regime in this respect.³³ Hugenholtz stressed that national laws, such as those in the Netherlands, are able to

address the issue and ensure an unwaivable remuneration right, while Depreeuw warns that the proposed amendments left several legal questions open (e.g. Who is subject to clearance via collective management in case of joint liability?).³⁴

Discussions on 'direct injection' held at the European Audiovisual Observatory in 2017³⁵ revealed some discrepancies of views between stakeholders. Collective management organisations (CMOs) claimed that the discount in revenues due to direct injection is substantial, and that the regulation proposal was an opportunity to address this problem. Commercial broadcasters believe that direct injection is only a local issue and should be without the scope of the proposed regulation. Several stakeholders (e.g. pay TV) did not consider that the joint liability proposal was a useful amendment, as there is no clarity regarding how that would work in practice.

Legislative process

European Parliament position

The proposal for a regulation on online transmissions was referred to the European Parliament Committee on Legal Affairs (JURI), which appointed as rapporteur first Dietmar Köster (S&D, Germany), who was replaced on 12 October 2016 by Tiemo Wölken (S&D, Germany), and then again by Pavel Svoboda (EPP, Czech Republic, the committee chair) on 15 January 2018. The JURI committee [adopted](#) its position on 21 November 2017 along with a mandate to open trilogue negotiations. This was confirmed by a plenary vote on 12 December 2017.³⁶ Parliament's negotiating position deviates from the proposals put forward by rapporteur Wölken in May 2017 and significantly amends the European Commission's original draft proposal on several points. The trilogue negotiations were led by Pavel Svoboda in his capacity as chair of the committee.

The European Parliament rejected a general extension of the country of origin principle to content ancillary to broadcast as proposed by the Commission and proposed instead to narrow the scope of the regulation that would extend the COO principle to cover only online services ancillary to broadcast of 'news' and 'current affairs' content.

The Parliament position stressed that it is important that geo-blocking remains possible if there is an agreement between the rights-holder and the broadcaster. Therefore, Parliament wanted to state more clearly in an article (and not only in a recital, as proposed by the Commission) that it will be possible for broadcasters to geo-block their online content if the rights-holder and broadcaster so agree in their contracts.

The European Parliament wished to restrict the extension of the system of a compulsory collective management system proposed by the Commission to retransmission to 'cable-like or IPTV-like services' provided in 'managed environments', i.e. with secured and restricted access. Parliament explained that this is justified on the basis of the principle of contractual freedom and in order not to unreasonably prejudice existing licensing models such as exclusive territorial licensing.

The European Parliament proposed to include a harmonised definition of 'direct injection', which would qualify as 'cable retransmission', in EU law. Furthermore, Parliament wanted broadcasters that transmit their programme-carrying signals through a 'direct injection' process to distributors to take joint liability with their distributors for the single and indivisible acts of 'communication to the public' and 'making available to the public' (as defined in Article 3 of [Directive 2001/29/EC](#)), which they carry out together. As result, broadcasting organisations and distributors would be required to obtain an authorisation from the right holders in question for their respective participation in communicating and making available to the public the relevant programmes protected under copyright.

Council position

The Council agreed its [general approach](#) on 15 December 2017.

The Council proposed limiting the extension of the COO only to certain broadcasting ancillary online services, given the specificities of the financing and licensing mechanisms for audiovisual works often based on exclusive territorial licensing. As a result, the Council sought that only television programmes (a) related to 'news and current affairs', or (b) 'fully financed and controlled' by a broadcasting organisation can benefit from the COO principle. 'Fully financed and controlled productions' would include productions carried out by a broadcaster with its own resources (including through its subsidiaries) and also productions outsourced to third parties when the content remains exclusively in the broadcaster's ownership. However, all sports events would be excluded from the scope of the regulation. The scope of the regulation would therefore be broader than in the Parliament's position, but narrower than in the Commission's proposal.

The Council did not substantially modify the Commission's new definition of retransmission services (Article 1). However, departing from the Commission and Parliament's positions, the Council stressed that retransmission services that are offered through internet access services should be subject to the mandatory collective management system when such services are provided to a controlled circle of users (e.g. through a subscription or user registration) and where the level of security provided is comparable to that for content transmitted over managed networks (recital 12).

Under this formulation, it is arguable that some **OTT retransmission services** (proposed on the basis of a subscription or a registration) would be subject to mandatory collective management, while other OTT retransmission services relying on different business models (e.g. advertising-based) would be excluded from the scope of the regulation. It is worth noting that in its impact assessment, the Commission stressed that extending the compulsory collective management system to such a wide variety of OTT retransmission services would create **competitive distortion** between OTT services and could have a **detrimental impact** on right holders and on **licensing revenues**, since the same content could be made available in a territory at the same time through different services.³⁷ However, the Commission also admitted that the **impacts on right holders are difficult to assess** given the niche nature of the OTT market.

Finally, the Council initially did not agree to address direct injection in this regulation, primarily because the Commission did not carry out any impact assessment on this question. The exact consequences of including provisions on direct injection would in their view create uncertainty, which would in turn make such provisions difficult to implement.

Compromise text

After six trilogue meetings and very difficult negotiations, the European Parliament and the Council reached an agreement on a [compromise text](#) in December 2018.³⁸ The main points of the agreed text are the following:

Change of legal instruments and legal basis

The EP and Council negotiators agreed to change the legal nature of the instrument. The final text will be adopted in the form of a directive (and not a regulation as initially proposed by the Commission) since some Member States have already passed national legislation on 'direct injection' and need some flexibility to implement the provisions negotiated at EU level.

Co-legislators [considered](#) as well that the **reference to Article 114 TFEU as a legal basis should be deleted** in the final text since there is a specific legal basis available (i.e. the combination of Articles 53(1) and 62 TFEU already used for the SatCab directive currently in force).

Extension of the 'country of origin' (COO) principle (Article 2)

The new directive introduces the country of origin (COO) principle to facilitate the licensing of rights for certain programmes that broadcasters can offer on their online services (e.g. simulcasting, catch-up services). The scope of the COO extension is, however, rather limited. Following the compromise text, broadcasters will be able to clear copyright only in their EU country of establishment (i.e. the

country of origin) in order to make radio programmes, TV 'news and current affairs' as well as their 'fully financed own productions' available online in all EU countries. Existing contracts will remain unaffected for a period of four years from the entry into force of the directive. The Commission will assess the need for extending this coverage to additional types of TV programmes six years after the entry into force of the directive.

Recital 9 clarifies that **broadcasting organisations' own productions** cover productions carried out by a broadcasting organisation with its own resources but does not cover the productions commissioned by a broadcasting organisation from independent producers nor co-productions. **Sports events for TV are also excluded from the copyright clearance mechanism.**

Retransmission (Articles 1 and 3)

The new directive provides a mechanism to facilitate the licensing of retransmission services over the internet. Under the compromise text, retransmission services over the open internet would fall under the scope of the mandatory collective management regime but only when they are provided in a 'managed environment' in order especially to ensure sufficient safeguards against piracy.

A **managed environment** means an environment where a retransmission operator provides a secure retransmission to authorised users (Article 2(2)). Recital 14 clarifies that retransmission services which are offered through the internet fall within the scope of the directive only when they are provided with a **level of content security comparable to that used for retransmission over cable or closed-circuit IP-based networks where content is encrypted.**

Direct injection

The directive clarifies the legal status of the 'direct injection' technique, i.e. when a broadcaster transmits its programme-carrying signals to signal distributors in such a way that these signals are not accessible to the public during that transmission. In such a case, only a single act of communication to the public is deemed to occur. This means that both the broadcaster and the signal distributor will have to clear the underlying rights. Member States will be free to choose to impose or not a mandatory collective management right to 'direct injection' signal distributors.

In cases **where signal distributors merely provide broadcasting organisations with technical means**, within the meaning of the case law of the Court of Justice of the European Union, to ensure or improve the reception of the broadcast, the **signal distributors should not be considered to be participating in an act of communication to the public.**

Next steps

The Member States' ambassadors (Coreper) [endorsed](#) the compromise text on 18 January 2019, and the Legal Affairs Committee (JURI) did so on 23 January, with 22 voting in favour and one against. The [text](#) must now gain the approval of the European parliament in plenary.

EP SUPPORTING ANALYSIS

Remáč M., [The Satellite and Cable Directive](#), Implementation Appraisal briefing, EPRS, European Parliament, May 2016.

OTHER SOURCES

[Online transmissions of broadcasting organisations and retransmissions of television and radio programmes, European Parliament](#), Legislative Observatory (OEIL).

European Audiovisual Observatory, [Summary of the workshop 'Online \(re\)transmission of TV programmes'](#), 2017.

De Wolf & Partners, [Study on the application of Directive 2001/29/EC on copyright and related rights in the information society](#), 2013.

Hilty R. and Moscon V., [Position statement of the Max Planck Institute for innovation and competition on the proposed modernisation of European copyright rules](#), 2017.

Sirinelli P., Benazeraf J.A. and Bensamoun A., Conseil supérieur de la propriété littéraire et artistique, [Mission sur le droit de communication au public](#) (English version : [Mission of the CSPLA on the right\(law\) of communication for the public](#)), 2016.

ENDNOTES

- ¹ [Regulation \(EU\) 2017/1128](#) of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.
- ² [Regulation \(EU\) 2018/302](#) of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market.
- ³ See Study for the Commission, [Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension](#), p. 118.
- ⁴ *Ibid.*, p. 59.
- ⁵ See [Commission impact assessment](#), p 21.
- ⁶ See [Commission impact assessment](#), pp. 23-24.
- ⁷ [Council Directive 93/83](#) on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive).
- ⁸ See P.B. Hugenholtz, [Copyright without frontiers: is there a future for the Satellite and Cable Directive?](#).
- ⁹ This rule is enshrined in Article 3.1 of the [Directive 2001/29](#) (i.e. the Information Society Directive). Only the broadcasting organisations do not fall under the compulsory collective rights management system (Article 10) because they are easily identifiable and there is no need for pursuing their copyright claims through a collecting agency.
- ¹⁰ See [Commission staff working document evaluation of the Council Directive 93/83/EEC](#), p. 27.
- ¹¹ See [Commission impact assessment](#), pp. 23-24.
- ¹² *Ibid.*, pp. 39-52.
- ¹³ *Ibid.*, pp. 40-42.
- ¹⁴ See De Wolf & Partners, [Study on the application of Directive 2001/29/EC on copyright and related rights in the information society](#), 2013, p. 200. See also S. Depreew, cited in European Audiovisual Observatory, [Summary of the workshop 'Online \(re\)transmission of TV programmes'](#), 2017, p. 31.
- ¹⁵ See Conseil supérieur de la propriété littéraire et artistique, [Mission droit de communication au public](#) (English version: [Mission of the CSPLA on the right\(law\) of communication for the public](#)), 2016, p 30.
- ¹⁶ See L. Guibault and J. Pedro Quintais, Copyright, technology and the exploitation of audiovisual works in the EU, 2014, p. 20.
- ¹⁷ *Ibid.*
- ¹⁸ See: De Wolf & Partners, [Study on the application of Directive 2001/29/EC on copyright and related rights in the information society](#), 2013, pp. 226-227; study from Europe Economics and IViR for the Commission, [Remuneration of authors and performers for the use of their works and the fixations of their performances](#), 2015, p. 137; E. Van Passel, [Value creation in film and television markets: the impact of copyright regimes in transition](#), 2016; L. Guibault and J. Pedro Quintais, *op. cit.*, p. 22.
- ¹⁹ For an overview, see study prepared for the Commission on [Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension](#), 2016, p. 85.
- ²⁰ For an overview of the cases, see De Wolf & Partners, *op. cit.*, pp. 220-227.
- ²¹ See [Case C-325/14, SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers SABAM](#), November 2015.
- ²² See E. Rosati, [Direct Injection TV: Who pays the royalties?](#), 2015; A. Ross, [Direct injection – the new copyright bypass operation](#), *Entertainment Law Review*, 2016, Vol. 27, Issue 3, pp. 121-123; S. Van leeuwen, [CJEU: direct injection Broadcasting not an Act of Communication to the Public: SBS Belgium NV v SABAM](#), *European Intellectual Property Review*, 2016, pp. 458-461.
- ²³ See [Commission ex-post \(REFIT\) evaluation of the Satellite and Cable Directive \(93/83/EEC\)](#).
- ²⁴ See article 1a of the proposal.
- ²⁵ See recital 8.
- ²⁶ See recital 13.
- ²⁷ See [Commission impact assessment](#), p. 44.

- ²⁸ Ibid., p. 50.
- ²⁹ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- ³⁰ See R. Hilty and V. Moscon, [Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules](#), 2017.
- ³¹ See P.B. Hugenholtz, [Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?](#).
- ³² See R. Hilty and V. Moscon, above.
- ³³ See P. Sirinelli, Mrs J-A. Benazeraf and A. Bensamoun, [Mission of the CSPLA on the right\(law\) of communication for the public](#), 2016.
- ³⁴ See European Audiovisual Observatory, above at p 32-33.
- ³⁵ See European Audiovisual Observatory, p 31.
- ³⁶ The mandate of the European Parliament was challenged during the November II plenary, but was confirmed on 12 December 2017.
- ³⁷ See [Commission impact assessment](#) p. 50.
- ³⁸ See Council, [Analysis of the final compromise text with a view to agreement](#), 15 January 2019; European Parliament, [Online radio and news broadcasts: Parliament and Council reach deal](#), Press release, December 2018; Council, [Online cross-border TV and radio broadcasts: Council agrees negotiating stance](#), Press release, 15 December 2017.

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