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The Role of the RSPG and support to Member States: EECC Article 28

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1. INTRODUCTION

The introduction of Article 28 in the European Electronic Communications Code (EECC)¹ is a major step towards ensuring radio spectrum coordination among Member States so that radio spectrum is organised in each Member State in a way that no other Member State is prevented from allowing on its territory the use of harmonised radio spectrum in accordance with Union law, especially due to cross-border harmful interference and in line with the general need to ensure effective and efficient use of spectrum as provided in EECC Article 45.

This is summarised in EECC recital 72:

“Lack of coordination between Member States when organising the use of radio spectrum in their territory can, if not solved through bilateral Member States negotiations, create large-scale interference issues severely impacting on the development of the Digital Single Market. Member States should take all necessary measures to avoid cross-border and harmful interference between them. The Radio Spectrum Policy Group (RSPG) established by Commission Decision 2002/622/EC² should be tasked with supporting the necessary cross-border coordination and be the designated forum for resolving disputes between Member States on cross border issues.

Building on the RSPG’s proposed solution, an implementing measure is required in some circumstances to resolve cross-border interference definitively or to enforce under Union law a coordinated solution agreed by two or several Member States in bilateral negotiations. Lack of coordination between Member States and countries neighbouring the Union can also create large-scale interference issues. Member States should take appropriate measures to avoid cross-border and harmful interference with countries neighbouring the Union, and cooperate with each other to that end. Upon the request of Member States affected by cross-border interference from third countries, the Union should provide its full support for those Member States”.

The purpose of this note is to explain the possibilities available to the Member States (MSs) under EECC Article 28 and Article 8 of the RSPG RoP, which establish a step-by-step procedure for cooperation between MSs in the cross-border coordination of the use of radio spectrum.

¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

² Commission Decision 2002/622/EC of 26 July 2002 establishing a Radio Spectrum Policy Group (OJ L 198, 27.7.2002, p. 49).

EECC Article 28(2), (3) and (4) as well as Article 8(2)-(5) of the RSPG Rules of Procedure (RoP) set out detailed provisions on the cooperation among MSs in the cross-border coordination: starting with a general obligation of cooperation (EECC Article 28(2)) which may – on the initiative of the MSs – lead to the RSPG’s opinion on a cross-border problem or dispute (EECC Article 28(3) and Article 8(2)-(5) of the RSPG RoP) and, if need be, a Commission implementing decision (EECC Article 28(4)).

Additionally, pursuant to EECC Article 28(5) and Article 8(6) of the RSPG RoP, the Union shall also provide support upon request to any affected Member States to resolve radio spectrum coordination issues with countries neighbouring the Union, including candidate and acceding countries.

2. GENERAL PRINCIPLES OF EECC ARTICLE 28

EECC Article 28(1) obliges MSs and their competent authorities to “*ensure that the use of radio spectrum is organised on their territory in a way that no other Member State is prevented from allowing on its territory the use of harmonised radio spectrum in accordance with Union law, especially due to cross-border harmful interference between Member States. Member States shall take all necessary measures to this effect without prejudice to their obligations under international law and relevant international agreements such as the ITU Radio Regulations and the ITU Radio Regional Agreements*”.

This provision should be read in conjunction with the general principles on management of radio spectrum and specific obligations under the EECC and in particular EECC Article 45(1) and (2):

“(1) Taking due account of the fact that radio spectrum is a public good that has an important social, cultural and economic value, Member States shall ensure the effective management of radio spectrum for electronic communications networks and services in their territory in accordance with Articles 3 and 4. They shall ensure that the allocation of, the issuing of general authorisations in respect of, and the granting of individual rights of use for radio spectrum for electronic communications networks and services by competent authorities are based on objective, transparent, pro-competitive, non-discriminatory and proportionate criteria.

In applying this Article, Member States shall respect relevant international agreements, including the ITU Radio Regulations and other agreements adopted in the framework of the ITU applicable to radio spectrum, such as the agreement reached at the Regional Radiocommunications Conference of 2006, and may take public policy considerations into account.

(2) Member States shall promote the harmonisation of use of radio spectrum by electronic communications networks and services across the Union, consistent with the need to ensure effective and efficient use thereof and in pursuit of benefits for the

consumer such as competition, economies of scale and interoperability of networks and services [...]”.

As regards the applicability of EECC Article 28 in time, it should be emphasised that the procedural steps preceding the issuing of the RSPG opinion (such as a request by the MS to the RSPG to use its good offices, start of the good offices procedure, RSPG investigation of the matter, finding of a compromise, drafting of the draft opinion) could be carried out already prior to 21 December 2020 (i.e. the date by which MSs need to transpose the EECC into national law).

3. PROCEDURAL DETAILS

3.1. EECC Article 28(2)

In accordance with the first subparagraph of EECC Article 28(2), MSs are obliged (the requirement transpires from the wording “*Member States shall*” (emphasis added)) to cooperate with each other (including through the RSPG) in the cross-border coordination of the use of radio spectrum in order to: (a) ensure compliance with Article 28(1); (b) resolve any problem or dispute in relation to cross-border coordination or cross-border harmful interference.

3.2. Opinion of the RSPG (EECC Article 28(3))

In order to ensure compliance with EECC Article 28(1), a possibility for any affected MS to request the RSPG to use its good offices to address any problem or dispute in relation to cross-border coordination or cross-border harmful interference is set out in EECC Article 28(3).

As provided in EECC Article 28(3) and Article 8(2) of the RSPG RoP, it should be underlined that a request by the affected MS is a prerequisite for the RSPG to issue an opinion proposing a coordinated solution. This means that neither, for example, the RSPG, nor the Commission on their own initiative can trigger the opinion of the RSPG.

The detailed working arrangements of the RSPG in aiming to resolve such problems or disputes are established in Article 8(2)-(5) of the RSPG RoP.

According to Article 8(2) of the RSPG RoP, any affected MS may request RSPG³ to start the good offices procedure and at any time may ask the RSPG to suspend or terminate the process.

In accordance with Article 8(3) of the RSPG RoP, RSPG determines the organisation of the process while taking into account the urgency of the matter⁴. In line with Article 8(4) of the

³ Regarding Article 8(2)-(5) of the RSPG RoP, references to “RSPG” are to be read as including also “a subgroup that may be created for the task”.

RSPG RoP, RSPG investigates the matter, taking into account all available information submitted by the MSs concerned, or any other information including information provided by CEPT and ITU as appropriate.

As provided in Article 8(5) of the RSPG RoP, the RSPG will seek to find a compromise between the concerned MSs, where necessary by proposing a coordinated solution. Regarding harmonised spectrum, where no compromise can be found to the satisfaction of the concerned MSs, the relevant sub-group, if any, shall report on the disagreement to the RSPG together, where appropriate, with a draft opinion proposing a coordinated solution, for possible adoption by the RSPG at its next meeting.

The RSPG has a discretion to decide whether to issue an opinion. This transpires from the wording of EECC Article 28(3): “[w]here *appropriate*, the RSPG *may* issue an opinion” (emphases added).

3.3. Implementing Decision by the Commission (EECC Article 28(4))

If the above described actions under EECC Article 28(2) and (3) fail to resolve the problem or dispute, in accordance with EECC Article 28(4) any affected MS may request the Commission to adopt decisions addressed to the MSs concerned by the unresolved harmful interference.

In the same vein as explained above with regard to EECC Article 28(3), the request by the affected MS is a prerequisite for the Commission’s decision and neither, for example, the RSPG, nor the Commission on their own initiative can trigger the Commission’s decision.

Equally as stated with regard to EECC Article 28(3), the Commission has a discretion to decide whether to adopt such decision. This transpires from the wording of Article 28(4): “*Commission may* [...] *adopt decisions*” (emphasis added). However, should the Commission decide to adopt such decisions, it has to take utmost account of any opinion of the RSPG recommending a coordinated solution. Commission’s decisions take a form of implementing acts to be adopted with the assistance of the Radio Spectrum Committee pursuant to EECC Article 118(2) and in accordance with the examination procedure referred to in EECC Article 118(4).).

4. CONCLUSION

The Commission invites Member States to make full use of all the possibilities offered by the new procedure under EECC Article 28 to ensure radio spectrum coordination and efficient use of spectrum in the Union in line with the EECC.

⁴ In case of absence of the representative of a MS involved in the cross-border coordination issue at stake at a scheduled meeting, RSPG decides whether or not to postpone that meeting.

