

34th EPRA Meeting
Content Regulation and New Media :
Jurisdiction Challenges in a VOD Environment¹

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Introduction

EPRA's work programme identified the issue of "**Content regulation and New Media**" as a major theme for 2011. The aim was to reflect on the significant challenges that content regulators face as a result of technological developments and the increasing integration of editorial, advertising, commercial and non-television content, including user generated content.

The plenary session in Ohrid (May 2011) explored **regulatory boundaries between traditional and new media, with a specific focus on on-demand media services**. It looked at how RAs follow the market of on-demand media services, examined the first guidance documents produced by RAs to ease the practical application of the seven cumulative criteria which underpin the definition of an audiovisual media service as set in Art. 1 (a) of the AVMSD, looked at issues of implementation and the first experiences of RAs with assessing whether specific services fall within the scope.

In a nutshell, the session in Ohrid discussed the first question that regulators will need to address:

1. *Is it an on-demand audiovisual media service?*

The session in Brussels will look at the following two questions:

2. *Who is the media service provider?*
3. *Where is this provider established? Or in other words: Which member state has jurisdiction over an on-demand media service?*

We will particularly focus on the last question because of its particular relevance with regard to the cooperation between regulatory authorities.

Jurisdiction: a recurring issue at EPRA meetings

The issue of legal jurisdiction over broadcasters is a recurrent topic at EPRA meetings and has been regularly on the agenda since 1996, the last key debates having taken place in 2002 (Brussels), 2006 (Dubrovnik) and 2008 (Riga). The complexity of the legal provisions and the transnational character of the topic may certainly account for its prominence at EPRA meetings.

A wide variety of concrete cases have been examined and debated. Notably, this included "circumvention cases" where a broadcaster puts together a television channel aimed at the audience of a State (of reception) but establishes itself in another State (country of origin) deliberately in order to bypass (the usually stricter) rules of the State of reception. Positive conflicts of jurisdiction (where two countries claim jurisdiction over the same broadcaster) were also reported and raised discussion on the interpretation of jurisdiction criteria. Concerns regarding non-EU satellite channels broadcasting programmes inciting to hatred added a new facet to the topic of jurisdiction, as illustrated during the Istanbul (2004) and Sarajevo (2005) meetings. Finally, the practical consequences of the change in the technical subsidiary criteria in the AVMSD (use of uplink before satellite capacity) were the main focus of the discussions in Dubrovnik and Riga.

The first plenary session in Brussels will, for the first time, consider the challenges associated with the issue of jurisdiction over on-demand services.

In particular, the session aims to identify problems that may arise at each stage of the reasoning to determine which Member State has jurisdiction over an on-demand media service. It will examine the extent to which a Member State may derogate from the freedom of reception principle, identify the applicability of instruments to fight against relocation and look at how

¹ **Disclaimer:** *This document has been produced by the EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is a background information document aimed to facilitate and stimulate debate at EPRA meetings. It is not a comprehensive overview of the issues, nor does it purport to represent the views or the official position of the EPRA or of any member within the EPRA network.*

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regulators could/should further cooperate in order to implement the provisions of the Directive. After a brief panorama of the legal framework, a list of hypothetical cases (in the absence of real cases reported so far among EPRA members) will provide the basis for discussion.

The plenary session will mirror the structure of this paper. *Dr. Rachael Craufurd-Smith* from the University of Edinburgh, School of law will open the session with a legal keynote on Jurisdiction Challenges in a VOD Environment. A panel of EPRA members composed of *David Mahoney*, Ofcom (UK), *Emmanuel Gabla*, CSA (FR) and *Juraj Polak*, CBR (SK) will consider these issues and be invited to give their views on the case studies.

1. LEGAL FRAMEWORK

1.1 Identification of an AVMS provider

The implementation of the rules of the AVMS Directive relating to the jurisdiction of a Member State over an audiovisual media service (also including on-demand services) requires, as a first step, to identify **who** the provider of a given service is.

Art. 1, d) AVMS defines a media service provider as “*the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised*”;

Art 1, c) AVMS stipulates that the notion of “*editorial responsibility*” should be understood as “*the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided*”;

1.2. Jurisdiction criteria

Once the identity of an on-demand AVMS provider is known, then the next step is to find out under which jurisdiction the service operates. Jurisdiction criteria over AVMS are stipulated by Art. 2 AVMSD. The legal provisions are identical for TV broadcasting and on-demand services (the same provider may indeed provide both types of services). The objective of the rules is to avoid cases where there is a vacuum of jurisdiction. They can be summarised as follows:

Location of Head office	Place where editorial decisions about the AVMS are taken	Place where a significant part of the workforce operates	Country of jurisdiction
Member State A	Member State A	not relevant	Member State A
Member State A	Member State B	Member State A	Member State A
Member State A	Member State B	Member State B	Member State B
Member State A	Member State B	Member States A and B	Member State A
Member State A	Member State B	Neither Member State A, or Member State B	MS where it first began its activity, provided that it maintains a stable and effective link with the economy of that MS
Member State A	Third country B	Member State A	Member State A
Third Country A	Member State B	Member State B	Member State B

In addition, media service providers which are not deemed to be established in a Member State on the basis of the criteria listed in the table fall under the jurisdiction of a Member State if they use a satellite up-link situated in that Member or, failing this, if they use satellite capacity appertaining to that Member State.

However, the Directive does **not** envisage any subsidiary criterion where a media service provider is established in a third country and retransmits its services in one or several Member States with a technology other than satellite (i.e. cable or, - of particular relevance for on-demand media services - the Internet).

If the Member State who has jurisdiction cannot be determined by applying the above-mentioned criteria (Para. 3 and 4), the final criterion is that of establishment, understood in the meaning of Art. 49 to 55 of the Treaty on the Functioning of the European Union (further to Para. 5, see also Recital 35). The provisions of Art 49 to 55 TEU lay down the principle of freedom of establishment as one of the four fundamental freedoms enshrined in the EU.

1.3. Derogation to the freedom of reception principle

The Directive allows for derogation of the freedom of reception principle only on exceptional cases, where there are serious public policy concerns.

Art. 3. Para 1 AVMSD allows a Member State, by means of an exception to the freedom of reception principle, to restrict retransmissions on its territory of a television broadcasting service coming from another Member State if it seriously and gravely endangers the protection of minors or incites hate speech. If this has happened on at least two prior occasions, if the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of the measures it intends to take should any such infringement occur again, and if no amicable settlement was found with the transmitting Member State and the Commission, the Member State is allowed to take measures against the retransmission, prior notification and approval by the Commission.

A different and specific procedure for on-demand media services is described in Art. 3, Para. 4 to 6. The criteria which allow derogating from the principle of freedom of reception for on-demand services are broader than those applicable to television broadcasts. They mirror the criteria of Art. 3 of Directive 2000/31/CE on electronic commerce, which apply to information society services. Measures can be taken against an on-demand media service which prejudices or which presents a serious and grave risk of prejudice to objectives of public policy (including the protection of minors and the fight against any incitement to hatred and violations of human dignity), of protection of public health, of public security or of consumer protection. The measures have to be necessary and proportional to the preservation of these objectives.

The Member State intending to adopt such measures should as a first step (i.e. ex-ante), ask the Member State under whose jurisdiction the media service provider falls to take measures to address such concerns. If the latter does not take such measures, or if these are inadequate, and only after notifying the Member State and the Commission of its intention to take measures, the Member State may restrict retransmissions on its territory. In urgent cases, such a notification should take place ex-post "*in the shortest possible time*" indicating the reasons for which the Member State considers that there is urgency. In both cases, the Commission has to approve the measures so that they can continue.

1.4. Measures against alleged circumvention of national legislation

The Directive also allows Member States to take action in situations where a broadcaster has deliberately established itself in one Member State in order to avoid the rules of another Member State (circumvention).

Art 4.2. AVMSD enables a Member State, under certain conditions, to adopt measures against a broadcaster which is under the jurisdiction of another Member State but whose broadcasts are wholly or mostly directed towards its territory.

No similar procedure exists for on-demand AVMS services. Nevertheless, some Member States have introduced a specific circumvention procedure for non-linear services in their legal framework.

As an example, *in France*, Art. 43-10 of the law of 30 September 1986 on Freedom of communication states that "*if a television service or a on-demand audiovisual media service whose programmes are wholly or mostly directed at the French public is established on the territory of another Member State of the European Community or part of the European Economic Area, in the main objective to escape from the application of French regulation, it is deemed to be subject to the rules applicable to services established in France, in conditions set by a decree of the Conseil d'Etat*". Art. 4 of the Decree of 17 December 2010 on television services and on-demand audiovisual media services retransmitted from other European States sets identical conditions for television and on-demand services, namely that transposing Art. 4.2. of the Directive - thus effectively extending the scope of article 4.2. to on-demand services.

In the *French speaking Community of Belgium*, the legislator introduced the possibility to intervene against an on-demand media service whose provider is established in another Member State with the aim to circumvent the rules applicable to the services falling under its jurisdiction: Art. 159 § 6 of the coordinated Decree on audiovisual media services (*décret coordonné sur les services de médias audiovisuels*). However, in contrast to France, it does not require a consultation of the European Commission - thus effectively introducing a *sui generis* rule for on-demand services.

1.5. Cooperation

The AVMS Directive encourages close cooperation between regulators (Recital 95), especially when the countries of establishment and reception are different, and including before licences are granted. Art. 30 AVMSD also stipulates that Member States should take “*appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive*”, in particular concerning issues of jurisdiction. This communication takes place through the competent independent regulatory bodies in every Member State. Finally, as highlighted in the previous paragraph on circumvention, the Directive has introduced an “Enhanced cooperation procedure” (but for TV broadcasting only) whereby the country of reception can request voluntary compliance with its ‘rules of general public interest’ that go beyond the minimum in the AVMS Directive. The country of establishment (generally via the regulator) corresponds with the broadcaster.

In addition, there is regular cooperation and exchange of information between regulators, there are also forms of informal cooperation. For example, the UK regulator Ofcom adopted in 2010 “Cooperation Guidelines” setting out how they will cooperate with other regulators when dealing with complaints from other Member States in relation to content transmitted by UK licensed channels.

The next two sections set out some specific (but fictional) case studies, to tease out some of the particular questions that regulators may be faced with in the future, as well as some more general questions for debate regarding the future of cooperation. We encourage all participants to think about these in advance of the meeting (and think outside of the box!).

B. HYPOTHETICAL CASE STUDIES

Case-study 1: Identification of an AVMSD provider

Zahoo.KG.Ltd, is identified as the provider of an on-demand media service (**Zahoo-VOD**) by **Member State A**.

Zahoo.KG.Ltd is established in EU **Member State B** in the meaning of the AVMS Directive.

Zahoo-VOD services targets wholly/mostly the public of EU **Member State A**

Member State B does not consider **Zahoo-VOD** as an AVMSD because:

- *Hypothesis A*: further to the national implementation measures, the annual turnover of Zahoo.KG.Ltd is below a certain economic threshold (i.e. not considered to be directly in competition with TV services and thus out of scope).
- *Hypothesis B*: further to technical specificities of its service, Member State B considers Zahoo-VOD as an Information Society service, not an audiovisual media service.

Question:

- What happens in case of conflicting interpretation by Member States of the definition of an on-demand media service and the identification of the media service provider?

Case-study 2: Jurisdiction criteria for non-EU services

On-demand AVMS provider **VODSuper.inc** is established in the US. Its services are retransmitted in EU Member State A via the Internet.

Question:

- In the absence of valid subsidiary technical criteria (uplink/satellite capacity), can Member State A claim jurisdiction on the service, for instance using the location of the server as a legal basis?

Case-study 3: Derogating from the freedom of reception principle

VOD service Kiddy-Star, established under the Directive in Member State A, specialises in children programmes and includes advertising spots targeting young children.

Member State B has introduced stricter rules than the Directive for the VOD services under its jurisdiction which prohibits advertising targeted at young children.

Member State B initiates a derogation procedure based on public policy and consumer protection objectives (protection of young children against excessive advertising) in order to restrict the transmission in its country of VOD service Kiddy Star.

Questions:

- Is the derogation procedure used by Member B based on such grounds likely to be considered as proportionate and necessary to the preservation of these policy objectives, (taking into account that Member B would not be in a position to act if the content was broadcast instead of transmitted on-demand?)

- Would the outcome be different if the derogation procedure is on an area which is not coordinated by the Directive? (e.g. gambling)

Case-study 4: issues of Circumvention

The programmes of VODxxxdeLuxe are wholly or mostly directed at the public of Member State A but its provider is established in Member State B. Member State A claims that VODxxxde Luxe established itself in Member State B with the main objective to escape the application of the legislation of Member State A.

Questions:

- What can Member State A do to fight against circumvention of its legislative provisions?

- Can the circumvention clause applicable to television broadcasts be extended to on-demand services through the national implementation measures?

Case-study 5: Issues of Cooperation

A VOD portal/aggregator on the Internet, (www.ondemandUnlimited.com) contains many on-demand services. These services are under different editorial responsibility as they emanate from a plurality of service providers in the meaning of the Directive. As a consequence, services of the same portal fall under the jurisdiction of several Member States.

Questions:

- *Should the Member States and the RAs cooperate in such a case in order to ensure an effective implementation of the Directive? If so, how?*
- *How to ensure that the viewers are aware of country of jurisdiction, e.g. in order to lodge a complaint?*

C. FURTHER QUESTIONS FOR DEBATE

- 1. What rules applicable to VOD are you most concerned with in relation to possible circumvention?**
- 2. What are your views regarding how cooperation regarding jurisdiction is working under the current framework, both formally (under the procedures identified in the AVMS Directive) and informally?**
- 3. Is there anything else that could be done? If so, how?**
- 4. Are there legislative changes that you believe will be needed in a future review of the AVMS Directive?**