

35th EPRA meeting
 Portorož, 30 May – 1 June 2012

Working Group 1: Jurisdiction

DRAFT Terms of Reference

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This paper sets out the Terms of Reference of an EPRA working group on jurisdiction, including proposals for main areas of focus and a work plan for 2012.

Introduction

The issue of legal jurisdiction over broadcasters is a familiar and recurrent topic at EPRA meetings. In one form or another, this issue was on the agenda in Paris and Amsterdam in 1996, Lisbon in 1997, Bratislava in 2000, Brussels in 2002, Dubrovnik 2006, Riga 2008 and Brussels again in 2011.

Underpinning the issue of jurisdiction is the “Country of Origin Principle”, which lies at the heart of EU broadcasting policy and serves as the basis for the creation of a single market for audiovisual services through the removal of administrative barriers to trade. The Country of Origin Principle ensures that broadcasters only need to comply with the rules of the EU Member State in which they are established, and prevents Member States from interfering with broadcasts under another Member State’s jurisdiction. This principle was first embodied in 1989, in the first Television without Frontiers Directive, and remains the cornerstone of the AVMS Directive.

The complexity of the legal provisions and the transnational character of the topic account for its importance to the EPRA. In the context of the European single market, there is also a natural need for regulatory authorities to cooperate taking into account the differences in legal frameworks and cultural sensitivities.

The AVMS Directive has introduced a set of newly formalised procedures to deal with cross-border cooperation and circumvention. In addition, EPRA members have also developed informal networks and cooperation procedures to address some of the tensions stemming from jurisdiction.

Objectives

In this context, and two years after full implementation of the AVMS Directive, the EPRA Working Group on Jurisdiction will revisit some of the challenges and tensions posed by cross-border broadcasting. Specifically, the group will aim to:

- Identify what are the most common challenges and tensions arising as a result of the cross-border nature of European broadcasting
- Consider how far changes in the AVMS and in the media landscape are affecting these challenges
- Gather knowledge and information about the practical implementation of the Country of Origin principle; and
- Examine whether there is an appetite for further co-operation amongst EPRA members.

Themes for Discussion

As a result of legislative and technological developments, we have identified some key themes that have persisted or emerged in the past 6 years:

- *Establishment criteria.* Terms such as “head office”, “significant part of the workforce” or “editorial decisions” have proved difficult to apply in some circumstances. These terms, moreover, may experience still greater tensions when the audiovisual media service providers are not in the traditional linear medium and as converged services take off in Europe, with unforeseen difficulties in correctly identifying the territory of establishment.
- *Tensions when national rules of the country of reception* are different or stricter than those in the country of origin.
- *Circumvention, also often qualified as abusive delocalization and relocation.* This is the case where a broadcaster puts together a television channel aimed at the audience of a State (of reception) but can be shown to have established itself in another State (of origin) with the sole intention to evade the national rules of the State of reception.
- *Co-operation between regulators.* The AVMS strengthens the role for co-operation in this area and EPRA members have a good deal of experience in cross-border complaints and the establishment of formal and informal networks for cooperation.

Work Areas

We propose the following three broad work areas for the working group throughout the rest of the year:

1. Establishment

The group will look at the challenges of applying establishment criteria. To this end, we will:

- consider the criteria and processes used by EPRA members to determine establishment;
- gather broad information about the procedures by which members award licenses to broadcast, in so far as these procedures relate to issues of jurisdiction; and
- compare the practical steps taken by regulators going about the task of ascertaining if a broadcaster falls under their jurisdiction.

The group can then go on to discuss any further options open to members for co-operation in this area.

2. Informal Co-operation

The group will carry out an audit of the informal co-operation that has taken place among EPRA members since the coming into force of the AVMS Directive. To this end, we will:

- gather examples of informal co-operation between regulatory authorities to solve problems;
- consider which problems have proved the most common in this area, i.e. ask what subject matters and issues have been the focus of informal co-operation, and whether any themes emerge (e.g. around protection of children or advertising)
- analyse which of these have been successful and why; and
- gather information on any more structured networks of co-operation or bilateral agreements have emerged among neighbouring states;

The group can then go on to discuss any further options open to members for co-operation.

3. Formal Co-operation

The group will also carry out an audit of the practical application of the legislative framework for formal co-operation and escalation provided for by the AVMS Directive. We will:

- gather details of instances when members have invoked the enhanced cooperation procedure under Article 4;
- similarly, gather details of instances when members have been asked to respond to a request under the enhanced co-operation procedures;

- ask whether members have considered/been able to prove that a broadcaster has established itself in one territory for the deliberate purpose of circumvention of stricter rules in another one (Article 4);
- seek examples (if any) of derogation (Article 3); and
- collect views to analyse the efficacy of the formal procedures in place to address the tensions around establishment criteria and national rules.

The group can then go on to discuss any further ideas that we may wish to explore around potential future changes to the legislative framework.

Planned Structure of the Working Group

The work will be spread throughout the year. Members of the group will exchange information, analyse relevant cases and discuss the proposals for further cooperation in the Working Group sessions during EPRA meetings and through participation in the online Working Group, the development of surveys to gather information, analysis of relevant case studies and proposals for further cooperation.

1) EPRA meetings:

Portorož:

In the first session of the Working Group in May 2012, we intend to conduct round-table discussions around the scope of the Working Group as suggested in the three areas outlined above, and get agreement on this Terms of Reference. Members will also be invited to present any practical experiences in these areas (applying establishment criteria; informal and formal co-operation and escalation of issues) and to offer to contribute throughout the year.

Jerusalem:

At the second Working Group session in November 2012, we intend to consider further any specific proposals or concrete examples raised in the first session, and discuss the results of any surveys conducted after the May Working Group.

2) Information gathering and online working group:

To gather information and to facilitate online communication between members of the Working Group, a forum topic has been created on the new EPRA website:

<http://www.epra.org/forum/topics/working-group-1-on-jurisdiction>

Members are invited to contribute to one or all of the work areas and to any other topics agreed at the May session of the Group through the discussions throughout the year – we will conduct some online surveys and new discussion threads on the EPRA website on these and/or any other topics agreed at the May session of the Group.

3) Final outputs:

Subject to agreement by and contribution from the Working Group, we would propose the production of a report by the end of the year, recording the discussions, identifying common issues of concern, highlighting best practice and also looking at ways in which this topic could be developed in the future.