



The Anti-Circumvention Procedure in the Audiovisual Media Services Directive

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Abstract. Recent challenges in the EU business sector also comprise the revision of the Audiovisual Media Services Directive (the new text in force since December 2018), the main media policy tool of the EU which establishes the legal framework for a convergent media landscape that comprises linear, non-linear audiovisual media services and, recently, also video-sharing platforms (VSPs) and user-generated content. One of the novelties in the revised text of the AVMSD is the new set of legal provisions enshrined in Art. 4 referring to the anti-circumvention procedure, a phenomenon the European media landscape has long been familiar with (i.e. broadcasters from another Member State circumventing the stricter rules of the target Member State). The need for a more transparent and efficient regulation originated in the practical difficulties of applying (pre-revision) Art. 4 by national regulating authorities (NRAs) as in many cases providers of audiovisual media services falling under another Member State's jurisdiction refused to comply with their stricter rules or did not show any willingness to collaborate. The burden of proving the existence of circumvention or the evidence base to identify has proved to be a particularly difficult task for NRAs. The amended text of the AVMSD extends the power of the Member States to trigger the anti-circumvention procedure based on reasonable cause rather than the former requirement to prove the intention of circumvention by the provider. Also, the new set of provisions allows Member States to have circumvention reasonably established. Another novelty in the anti-circumvention procedure is the mandatory opinion that is to be requested by the European Commission from the European Regulators Group for Audiovisual Media Services (ERGA). The paper proposes to discuss the evolution of anti-circumvention measures in the two versions of the AVMSD as well as the projected effect on the phenomenon of circumvention of stricter rules on the new provisions.

Keywords: EU single digital market, Audiovisual Media Services Directive, country of origin principle, circumvention of law, anti-circumvention procedure

1. Introduction

Recent challenges in the EU single market comprise, among other processes, the revision of the Audiovisual Media Services Directive (AVMSD),¹ the main media policy tool of the EU, which establishes the legal framework for a convergent media landscape and which covers all services of audiovisual content irrespective of the technology used to deliver the content. Taking into account the degree of choice and user control over services, the AVMSD makes a distinction between linear (television broadcasts) and non-linear (on-demand) services. Lately, the directive's material scope has also extended certain audiovisual rules to video-sharing (online) platforms (VPSs) such as YouTube and user-generated content shared on social media services such as Facebook.

Aspects relating to the territorial scope of the AVMSD gain importance in the context of dynamic and globally expanding cross-border broadcasting and content distribution. Establishing jurisdiction of a Member State over broadcasters is one of the key issues in this field, and the 'cornerstone' of the EU media policy in establishing jurisdiction over audiovisual media services is the country of origin principle (irrespective of the type of content involved).

The phenomenon of circumvention of law in the field of broadcasting, audiovisual media services, and online media content dissemination has been intrinsically linked over time to the development of the general framework of converging media markets and statutory instruments of European media law.

The phenomenon of 'forum shopping' for the most favourable jurisdiction became particularly attractive with commercial satellite broadcasting in the 1980s and is still attractive today for audiovisual media service providers from third countries that do not have an affiliation with a particular Member State.²

The Television Without Frontiers Directive (TWFD)³ (1989) did not contain measures against alleged circumvention of stricter laws by broadcaster though in practice this phenomenon was known and the corpus of pertinent case-law⁴ kept

1 Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 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) in view of changing market realities (OJ, L 303 of 28.11.2018. 69.); Directive 2010/13/EU of 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) (codified version) (OJ L 095 15.4.2010. 1).

2 Wagner 2014. 286.

3 Council Directive 89/552/EEC of 3 October 1989 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 298, 17.10.1989. 23–30.

4 Most notable cases including: Case C-56/96 VT4 Ltd v Vlaamse Gemeenschap [1997] ECR I-3143; Case C-212/97 Centros v Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459; Case C-11/95 Commission v Belgium [1996] ECR I-4115; Case C-14/96 Paul Denuit [1997] ECR I-2785; Case

extending and being refined, jurisprudence of the Court of Justice of the European Union (CJUE) offering guidelines for law practitioners in the broadcasting sector.

As a legal instrument, the anti-circumvention procedure has been created for inclusion in the AVMSD (2007), contained in Art. 4 and complemented by references in the Recital of the Directive. The text of the procedure was not modified for a decade (2007–2018), but the now codified version of the revised Directive has seen significant changes in the procedural aspect of the anti-circumvention procedure.

The need for a more transparent and efficient regulation was one of the key factors in the process of revision of the Directive, started in 2015 and concluded at the end of the year 2018, requiring Member States to include it in their national law by September 2020.

The revised version of the AVMSD (December 2018) strengthens the country of origin principle and extends the power of the Member States to trigger a circumvention procedure based on reasonable cause rather than the former requirement to prove intention of circumvention by the provider, a previously seemingly impossible task for national regulating authorities (NRAs).

It is rather early to speculate if the implemented anti-circumvention procedure will prove to be a more efficient tool than its predecessor, but some provisional remarks can be formulated.

In order to have a cogent understanding of the anti-circumvention procedure, principles, and procedural aspects involved, the guidance offered by relevant case-law and pertinent scholarship, it is necessary to first present its historical evolution as well as the underlying core principle: the country of origin principle.

2. The Territorial Scope of the AVMSD – The Country of Origin Principle

The country of origin principle has been intensely analysed, criticized, and endorsed over the decades under the TWFD (1989) and then the AVMSD (2007),⁵ the jurisprudence of the European Court of Justice also contributing to the shaping of this debate.⁶ Even though media consumption habits have undergone significant changes in this period and emerging new technologies resulted in a highly diverse audiovisual media landscape, this principle still remains the governing element

33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging [1974] ECR 1299; Case C-23/93 TV 10 SA v Commissariaat voor de Media [1994] ECR I-4795; Case C-355/98 Commission v Belgium [2000] ECR I-1221.

5 Naming here only a few titles from an otherwise abundant critical literature: Cole 2018, 2011; Weinand 2018; Wagner 2014; Craufurd Smith 2011; Polyák–Szőke 2009; Herold 2008; Kokoly 2015.

6 See *supra* Footnote 4.

for the regulatory framework for European media markets and audiovisual media offers. It states that a provider that falls under the jurisdiction of one EU Member State can rely on complying with the legal framework of (only) that specific State in order to be authorized to disseminate content across all EU Member States.

The country of origin principle creates rules both for original (sending) Member States as well as host (receiving) Member States.

Members States are required to ensure that all broadcasters of audiovisual media services falling under their jurisdiction are compliant with the national regulatory framework. This requirement also guarantees that the minimum requirements laid down by the relevant European legislation are met by all audiovisual media content providers operating in Member States.

Receiving members states are required to ensure the freedom of transmission for audiovisual media services originating from another Member State, restriction of transmission being prohibited on areas that are harmonized by the AVMS Directive.

The country of origin principle comprises the prohibition of double jurisdiction/avoidance of absence of jurisdiction and acts as the key element in guaranteeing the freedom of transmission.

This principle is enshrined in Art. 2 of the AVMS Directive, declaring in its first paragraph that each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.⁷

However, the scope of the Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.⁸

Art. 2 contains in paragraphs 3 and 4 a detailed set of circumstances under which jurisdiction for media service providers can be established, organized by primary criteria such as the media service provider's head office, editorial decisions, significant part of the workforce involved in the production of audiovisual media programmes as well as ancillary or technical criteria such as the use of a satellite up-link situated in or a satellite capacity of a Member State.

A fallback clause was provided in Paragraph 5 of the old text: in case that jurisdiction could not be determined in accordance with paragraphs 3 and 4. In this case, the competent Member State was to be that in which the media service provider is established within the meaning of articles 49–55 of the Treaty on the Functioning of the European Union (TFEU).⁹

7 AVMSD Art. 2. 1.

8 AVMSD Art. 2. 6.

9 AVMSD Art. 2. 5.

Paragraph 5 was significantly modified after the conclusion of the revision process: it does not contain additional criteria for establishing jurisdiction but rather imposes requirements on Member States meant to ensure a more swift and efficient communication between all parties concerned: media service providers in Member States, NRAs, the Commission, and the competent European body (European Regulators Group for Audiovisual Media Services – ERGA).

The role of the newly inserted paragraphs is to provide more clarity in procedural aspects referring to the determination of the competent State having jurisdiction over a specific media provider.¹⁰

The paragraphs pertaining to establishing jurisdiction of media service providers are as follows (*emphasis* added for the newly – after the revision – inserted text):¹¹

Art. 2(3)

For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

(b) if a media service provider has its head office in one Member State, but editorial decisions on the audiovisual media service are taken in another Member State, the media service provider shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the programme-related audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned provided that a significant part of the workforce involved in

¹⁰ Cole 2018. 10.

¹¹ For a detailed analysis and word-for-word comparison between the original (2007) and the revised (2018) text of AVMSD, see Cole 2018. 11–25.

the pursuit of the audiovisual media service activity operates in that Member State.

Art. 2(4)

Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

- (a) they use a satellite up-link situated in that Member State;
- (b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

The general motive of having criteria establishing jurisdiction over service providers is to make sure that no provider that qualifies as being within the scope of the AVMSD falls in a ‘vacuum of jurisdiction’ by not having a Member State competent to it. This was already made clear in the recitals of the very first TWFD: ‘Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of Member State from which they emanate.’¹²

3. Circumvention of Law

As indicated above, in the general overview, the phenomenon of circumvention of law refers to an abusive behaviour (wilful intention to elude the stricter rules of a given Member State) by media services providers, first emerging in the 1980s and still present today.

In the framework of the existing legal instruments, the country of origin principle seems to offer a great opportunity for audiovisual media service providers who want to disseminate certain content in a particular country, but who are prevented from doing so because of a stricter set of rules in that country. In such cases, these providers could simply establish themselves in a country with less strict but still EU-compatible rules and retransmit their programmes to the country that they initially intended to reach. This receiving country would basically be prohibited from imposing its own regulatory standards on the service providers.¹³

The principle that a single State has jurisdiction over a particular media service can lead to ‘regulatory disjuncture’, where the rules applicable to a specific service are established by country A, but the service is targeted at, or predominantly received in, country B, where different standards apply. This creates tensions between countries and concerns that fundamental social and

¹² Cole 2018. 28.

¹³ Oster 2016. 165–168.

cultural norms are being undermined by European Union internal market rules.¹⁴ TWFD, like AVMSD, provided a minimum standard of harmonized protection but left it open to Member States to offer higher standards of protection to be complied with by broadcasters under their jurisdiction.

Also, concerns can be voiced regarding the possibility of media service providers to easily circumvent the rules and regulations of one country by establishing themselves in another country, with little recourse to that other country on the established basis of mutual recognition of rules. The implications from a rule of law perspective would be problematic and could warp the EU audiovisual media market regulation, rendering them unsustainable in the long run.

The Court of Justice of the European Union (CJEU) has faced this issue in a wide range of cases, in which it sought to distinguish situations where the broadcaster was intentionally seeking to circumvent stricter standards in certain Member States by establishing itself in a different Member State from those in which the establishment was organic and without wilful elusion.¹⁵

Reflecting on the need to establish more transparency on the matter of anti-circumvention, a complete set of rules – both conceptual as well as procedural – has been included in the text of the AVMSD.

4. Provisions on Circumvention of National Rules in the AVMSD Before the Revision Process

The issue of legal jurisdiction over broadcasters and the arising practical aspects of circumvention of stricter laws have been recurrent topics also in scholarship and in professional forums of broadcasting regulators.

Besides case-law, professional forums have also made significant efforts to analyse and interpret circumvention of law: the European Platform of Regulatory Authorities (EPRA) established in 1995 as Europe's oldest and largest network of broadcasting regulators has had the issue of circumvention cases on the agenda as early as 1996.¹⁶

Debates for a wide variety of concrete cases of circumvention have taken place in the framework of EPRA meetings, seen by practitioners as situations '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'.¹⁷

14 Craufurd Smith 2011. 263.

15 Volman 2018. 8.

16 34th EPRA Meeting Content Regulation and New Media: Jurisdiction Challenges in a VOD Environment. Brussels, La Hulpe, 5–7 October 2011.

17 Ibid.

The adoption of the AVMSD in 2007 brought about the absolute novelty of including codified provisions on the circumvention of national rules in Art. 4 of the Directive, ensuring the right for Member States to adopt appropriate measures against the broadcasters concerned in cases involving suspected circumvention of law.

As a general rule laid down in the provisions of the AVMSD – and also in the spirit of the TFEU, which requires the EU to respect and promote the diversity of its Member States' cultures –, EU governments may not restrict which media content people can receive or what programmes foreign media service providers can retransmit in their country provided that the broadcasts comply with the EU Audiovisual Media Services Directive in the country where they originate.

At the same time, the AVMSD does not completely harmonize the rules relating to all areas to which it applies but provides only minimum harmonization. Consequently, Member States are granted the right in Art. 4(1) to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive, under the condition that they are in compliance with EU law.

Restriction of freedom of reception and retransmission by a Member State invoking the anti-circumvention procedure has been given the form of a detailed and complex set of actions, as laid down by the text of the Directive. Article 4(1) reiterates that 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 European Union law.

Art. 4

2. In cases where a Member State:

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

(b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory;

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within 2 months. Either Member State may invite the contact committee established pursuant to Article 29 to examine the case.

3. The first Member State may adopt appropriate measures against the broadcaster concerned, where it assesses that:

(a) the results achieved through the application of paragraph 2 are not satisfactory; and

(b) the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable if it were established in the first Member State.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:

(a) has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and

(b) the Commission has decided that the measures are compatible with Union law, and in particular that assessments made by the Member State taking those measures under paragraph 2 and 3 are correctly founded.

5. The Commission shall decide within 3 months following the notification provided for in point (a) of paragraph 4. If the Commission decides that the measures are incompatible with Union law, the Member State in question shall refrain from taking the proposed measures.

Two aspects are pertinent to these provisions: firstly, that the procedure is complex, time consuming, and particularly challenging as far as Members States relying on it carry the burden of proving intentional circumvention and, secondly, that the procedure applies only to broadcasters, not to on-demand audiovisual media services, and non-linear audiovisual media services fall under the general regulatory framework provided by the CJUE. This is to be inferred from Recital 57 of the E-Commerce Directive (non-linear audiovisual media services being not only subject to the AVMS Directive but also to the E-Commerce Directive).¹⁸

Nevertheless, some Member States can be considered as having introduced a specific circumvention procedure for non-linear services in their legal framework. As an example in this sense, EPRA stated that in France, Art. 43(10) of the law of 30 September 1986 on Freedom of communication states that ‘if a television service or an 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, with the main objective of escaping from the application of French regulation, it is deemed

¹⁸ Oster 2016. 168.

to be subject to the rules applicable to services established in France, in conditions set by a decree of the Conseil d'Etat'. Article 4 of the Decree of 17 December 2010 on television services and on-demand audiovisual media services retransmitted from other European Member States sets identical conditions for television and on-demand services, namely that of transposing Article 4(2) of the Directive – thus effectively extending the scope of Article 4(2) to on-demand services.¹⁹

Also in the EPRA proceedings, another example is given: 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.²⁰

Scholars such as Craufurd-Smith indicate that Article 4 of the AVMSD should be read in the light of jurisprudence. She offers an in-depth analysis on the issue whether the abuse of law principle operates at the European level merely as a principle of interpretation or whether it is of more general application. If the former is the case, it can be used to restrict the remit of a right and thus preclude reliance on it to evade domestic or EU rules, but it cannot be used '*contra legem*'. The clear limitation in the Directive of the circumvention principle to broadcast services, coupled with the jurisdictional provisions in Article 2(3) of the AVMSD, could then be seen to preclude its application to on-demand services. There is, however, a strong argument that the abuse of law principle is a general, self-standing principle of EU law.²¹

Jurisprudence in relation to circumvention of law²² is referenced also in recitals 41 to 43 of the AVMSD, which offer further legal tools in examining situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State.²³

Corroborating the recitals with the procedure laid down in Article 4 of the AVMSD, it transpires that the European legislator considered it to be an appropriate solution for circumvention cases, the cooperation of Member States, the codification of case-law of the Court of Justice, combined with a detailed procedure. Moreover, in Recital 42 of the AVMSD, it is stated that a Member State should assess on a case-by-case basis whether a broadcast by a media service

19 See *Footnote 17*.

20 Craufurd Smith 2011. 281.

21 *Id.* 282.

22 See *Footnote 4*.

23 AVMSD Recital 41.

provider established in another Member State is entirely or mostly directed towards its territory. The assessment may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service, or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.

It is important to mention that the Court of Justice has consistently held that any restriction on the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively.²⁴

Scholars have demonstrated early on²⁵ that measures against alleged circumventions of stricter rules have shown that the choice of establishment because of a favourable regulatory climate as such does not prove the motive of circumvention and the fact that the overriding part of the activities take place in another Member State than the State of the primary establishment (including the fact that the media services target an audience in another Member State than the State of establishment), as such, constitutes insufficient grounds on its own for a case of circumvention.

Bearing all these in mind, it should not come as a surprise that the anti-circumvention procedure in the spirit of the AVMSD has taken place very rarely, with only a few instances of consideration and execution being known.

Even though the original text of the AVMSD did have a detailed description in Article 2 of the circumstances under which jurisdiction can be assumed, as well as a set of rules in Article 4, regarding the freedom of the Member States to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields governed by the Directive, the fulfilment of the procedure proved to be an almost impossible task for NRSA's. The main reason of impediment in the execution of the provisions enshrined in Article 4 can be traced down to two main facets: in many cases, providers of audiovisual media services falling under another Member State's jurisdiction refused to comply with their stricter rules or showed no willingness in collaboration. Also, the burden of proving the existence of circumvention or the evidence base to identify it has proved to be a particularly difficult task for NRAs.

The overly complex and lengthy character of the anti-circumvention procedure as well as the unnecessary administrative burden it represents for Member States applying it can be exemplified by means of a few cases.

The only Member State to fully execute the anti-circumvention procedure based on Article 4 in the history (which spans ten years) of these provisions was Sweden. This was the first time that the Commission decided on the application of Article 4 of the AVMSD.²⁶

24 AVMSD Recital 43.

25 Dommering-Scheuer-Thorsten 2008, 859–861.

26 Commission Decision of 31.01.2018 on the incompatibility of the measures notified by the

In December 2014, Sweden notified the Commission of envisaged measures (fines) in relation to two broadcasters broadcasting to Sweden from the UK for alleged circumvention of stricter Swedish rules on alcohol advertising but then subsequently withdrew the notification. As the case was ongoing, Sweden opted for renewal and notified the Commission in January 2018 of its intent to impose measures under Article 4(4) of the AVMSD against the broadcasters. The notifying authorities assessed that the broadcasters in question have established themselves in the United Kingdom in order to circumvent the stricter Swedish rules concerning the prohibition of all forms of TV sponsorship by parties whose principal activity is to manufacture alcoholic beverages and all forms of marketing of alcoholic beverages through commercial advertising in TV programmes.

On the basis of the AVMSD, the European Commission has decided that the Swedish intention to impose their ban on alcohol advertising on two broadcasters based in the UK and broadcasting in Sweden is not compatible with EU law.

In order to impose such a ban on the UK broadcasters, Sweden should have demonstrated – under the specific procedure contained in Article 4 of the AVMSD – that the broadcasters in question established themselves in the UK *in order to circumvent* such rules. The burden of proof lies with the Member State, and the Commission found in this case that Sweden failed to prove circumvention on the part of the two broadcasters.

The issue of proving circumvention was featured in the public consultation launched in 2015, prior to the revision process, and respondents have confirmed that they considered the task difficult or very difficult. NRAs have listed a multitude of considerations explaining the legal difficulty: some considering it inappropriate to assign subjective intention to a legal person (i.e. an AVMS provider), while others arguing that while the burden of proof is high, proving circumvention is possible, for example, by looking at whether a media service provider has a history of trying to evade a particular regulation or whether it has tried to obtain a licence in the country targeted before.²⁷

A significant number of NRAs have had no experience at all in attempting to prove circumvention, and only one from Netherland has reported a successful experience in dealing with anti-circumvention – however, with a case still under the TVWF Directive.²⁸

Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.01.2018 C(2018) 532 final.

27 ERGA Report on territorial jurisdiction – 2016. 40–41.

28 In 1994, the Netherlands proved deliberate circumvention by a channel claiming Luxembourg jurisdiction. In that case (TV10 SA v Commissariaat voor de Media – C-23/93), the Court of Justice ruled that Member States retain the right to take measures against broadcasters established in another Member State whose activity is entirely or principally directed towards its own territory, when establishment has been set up with the aim of circumventing the rules.

The Austrian NRA had also experienced two cases of trying to prove circumvention, but in both cases the Austrian licences were surrendered before formal proceedings began. The Hungarian authority has also made an unsuccessful attempt to prove deliberate circumvention, which it believes failed as it did not receive any cooperation from the Member State responsible for the service. The Belgian Conseil Supérieur de l'Audiovisuel initiated a circumvention assessment procedure but suspended it in July 2015 because in the meantime the AVMS migrated to another jurisdiction.²⁹

In conclusion, it transpires that the set of legal instruments provided for in Article 4 of the AVMSD have proved in retrospective to be impractical. The legal justification behind the procedure remains valid, but the impossibility of practical execution has demonstrated the need for simplification and has also proved that it needs to be more fluid among all parties concerned.

This requirement on the one hand and the need for equal clarity on the other, as far as on-demand audiovisual media services are concerned, acted as the main foci in the issue of circumvention of law during the revision process.

5. Proposals to the Provisions on Circumvention of National Rules in the AVMSD Revision Process

In 2015, a public consultation phase was launched regarding the projected revision of the AVMS Directive, taking into consideration the multitude of changes affecting media markets and the rapidly extending IT&C developments which required the amendment of outdated fields as well as the creation and regulation of previously non-existent fields.

The revision process resulted in an abundant corpus of working documents, reports, case reviews, analyses, and renewed interest in scholarly publication and consultations, all of them contributing to a certain extent to the Proposal drafted by the Commission in 2016.³⁰

The AVMSD proposal was presented in a form that levels out the derogation mechanism for both linear and non-linear services, its provision concerning circumvention. The proposed Article 4 of the Directive would continue to apply exclusively to broadcasters. Academic debate focusing on the proposal has raised the question why circumvention rules were not designed for on-demand services.

Scholars have tried to offer multiple possible answers: some pointing out that even though no explicit circumvention rules were formulated for on-demand services the regulatory approach worded in Article 3(4)–(6) of the AVMSD

²⁹ See Footnote 28.

³⁰ For recent reports, analyses, and discussion papers, see ERGA Report on territorial jurisdiction 2018, ERGA Analysis & Discussion Paper 2018, ERGA Opinion on AVMSD Proposals 2016.

reflects the provisions of the E-Commerce Directive³¹ and as such is applicable to non-linear media services.³² Others express a presumption that the Commission shied away from this particular task because a simple transposition of the current circumvention rule would not do justice to the nature of on-demand media services and would have required a more fundamental change to the provision.³³ A preference for procedural guarantees in lieu of more fundamental reforms seemed also a valid explanation.

Problems in the application of jurisdiction criteria and of the derogation/circumvention procedures have been acknowledged by various policy makers as contributing to the reduction of the effectiveness of the country of origin principle, prompting also for clarifications regarding the application of the derogation and circumvention procedures.³⁴

In 2016, the European Regulators Group for Audiovisual Media Service (ERGA, created in 2014) Subgroup on territorial jurisdiction conducted a survey about the challenges faced by ERGA members as a result of the cross-border distribution of audiovisual media content. The survey revealed some cases of successful cooperation among NRAs and instances of the Directive working well but also, quite prominently, a variety of problems and a diversity of experiences with how to solve these problems amongst NRAs.

A series of common general themes emerged too: i) problems with media service providers that are trying to abuse the country of origin principle; ii) difficulties encountered with multinational services where there are stricter national rules in the country of reception (particularly in areas such as audience protection, advertising, or cultural diversity); iii) problems linked to the application of the Directive, in particular when it comes to establishing jurisdiction (Article 2), derogating from the free circulation of audiovisual media services in the EU single market (Article 3), and demonstrating the deliberate circumvention of the rules (Article 4).

On all those key issues, ERGA suggested both legislative and non-legislative solutions which, to a certain extent, were taken up by the European Commission in its original proposal, with a clear emphasis on improving (bilateral and multilateral) cooperation between Member States and amongst regulatory authorities in this area.

31 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce) OJ L 178, 17.7.2000. 1–16.

32 Wagner 2014. 289.

33 Weinand 2018. 749–750.

34 Commission Staff Working Document Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities SWD/2016/0170 final – 2016/0151 (COD).

The report made various proposals to improve the current system for linear services and find new solutions for non-linear services, in particular regarding the burden of proving the existence of circumvention or the evidence base to identify it.³⁵

Generally, the proposal aimed to comply with both the subsidiarity and proportionality principles by preserving, in general, a minimum harmonization approach and improving the derogation and circumvention mechanisms. The reason behind this was to allow Member States to take their national circumstances into account. Member States have, in practice, adopted stricter rules, in particular as regards the definition of on-demand audiovisual media service, the setting-up of national regulatory authorities, the promotion of European works, and the protection of minors and commercial communications.³⁶

6. The Anti-Circumvention Procedure in the Revised AVMSD

During the revision process of the AVMSD, there has been much debate regarding the refinement of criteria for establishing jurisdiction, the provisions of the anti-circumvention procedure featuring prominently in the pertinent discussion. The European Commission proposed amendments to this procedure in its Proposal presented in 2016, as well as the European Parliament and the European Council. Even though there were differences between the amendments proposed by three institutions, the final version after the completion of the legislative process can be seen as a compromise between all parties involved. Directive 2018/1808 comprises the following provisions regarding the anti-circumvention procedure:

Art. 4.

2. Where a Member State:

- (a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and
- (b) assesses that a media service provider under the jurisdiction of another Member State provides an audiovisual media service which is wholly or mostly directed towards its territory, it may request the Member State

35 ERGA report on territorial jurisdiction in a converged environment – 2016. An exhaustive presentation of ERGA contribution to the revision process and its role in the revised directive would exceed the limits of this paper. More in the *Reports and Opinions* section of ERGA: http://erga-online.eu/?page_id=14.

36 Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. COM/2016/0287 final – 2016/0151 (COD).

having jurisdiction to address any problems identified in relation to this paragraph. Both Member States shall cooperate sincerely and swiftly with a view to achieving a mutually satisfactory solution.

Upon receiving a substantiated request under the first subparagraph, the Member State having jurisdiction shall request the media service provider to comply with the rules of general public interest in question. The Member State having jurisdiction shall regularly inform the requesting Member State of the steps taken to address the problems identified. Within two months of the receipt of the request, the Member State having jurisdiction shall inform the requesting Member State and the Commission of the results obtained and explain the reasons where a solution could not be found. Either Member State may invite the Contact Committee to examine the case at any time.

3. The Member State concerned may adopt appropriate measures against the media service provider concerned, where:

(a) it assesses that the results achieved through the application of paragraph 2 are not satisfactory; and

(b) it has adduced evidence showing that the media service provider in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the Member State concerned; such evidence shall allow for such circumvention to be reasonably established, without the need to prove the media service provider's intention to circumvent those stricter rules.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

4. A Member State may take measures pursuant to paragraph 3 only where the following conditions are met:

(a) it has notified the Commission and the Member State in which the media service provider is established of its intention to take such measures while substantiating the grounds on which it bases its assessment;

(b) it has respected the rights of defence of the media service provider concerned and, in particular, has given that media service provider the opportunity to express its views on the alleged circumvention and the measures the notifying Member State intends to take; and

(c) the Commission has decided, after having requested ERGA to provide an opinion in accordance with point (d) of Article 30b(3), that the measures are compatible with Union law, in particular that assessments made by the Member State taking the measures under paragraphs 2 and 3 of this Article are correctly founded; the Commission shall keep the Contact Committee duly informed.

5. Within three months of the receipt of the notification provided for in point (a) of paragraph 4, the Commission shall take the decision on whether those measures are compatible with Union law. Where the Commission decides that those measures are not compatible with Union law, it shall require the Member State concerned to refrain from taking the intended measures.

If the Commission lacks information necessary to take the decision pursuant to the first subparagraph, it shall, within one month of the receipt of the notification, request from the Member State concerned all information necessary to reach that decision. The time limit within which the Commission is to take the decision shall be suspended until that Member State has provided such necessary information. In any case, the suspension of the time limit shall not last longer than one month.

The basis for restricting non-domestic broadcasts remains the assessment that the media service provider is inappropriately relying on EU law to evade the regulations of the State of reception. In its first paragraph, the text of the AVMSD reiterates that 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 European Union law.

Though the anti-circumvention procedure has been significantly altered as a result of the revision process, it has retained its dual structure, comprising two phases: a non-binding consultation phase [Article 4(2)] and the anti-circumvention procedure itself, which can result in the adoption of appropriate measures against the media service providers concerned [Article 4(3)–(5)].

One of the key novelties in the text of Directive 2018/1808 is the extension of the anti-circumvention procedure to all media content in order to comprise not only linear audiovisual media broadcasts but also non-linear media services.

The need for cooperation between Member States during the consultation phase is not a novelty in the text of the revised AVMSD; however, the new provisions lay great emphasis on this aspect, too, enshrining the principle of cooperation in the text of the Directive.

An analysis of the consultation phase indicates a somewhat greater level of freedom for Member States applying stricter rules and a higher level of responsibilities for Member States having jurisdiction. The wording of the new text may seem more nuanced and inclined to provide more rights to Member States applying stricter rules. Whereas the old text of the Directive stated that these Member States ‘may contact’ the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed, the revised text now offers the right for the latter ‘to request’ the Member State

having jurisdiction to address any problems identified in relation to the anti-circumvention procedure.

One of the obligations of Member States having jurisdiction remains the same, i.e. to inform the requesting Member State regarding the steps and results taken as a result of the anti-circumvention procedure. The revised text reiterates the necessity of regularly informing the requesting Member State of the steps taken to address the problems identified, but it also includes a new obligation of explaining the reasons where a solution could not be found.

The most significant changes regarding the anti-circumvention procedure in the revised AVMS is lifting the burden of proving intent. Proving intentional circumvention of law by requesting Member States has been a constant issue of debate as it was unclear if it sufficed for requesting Member States to prove circumvention by providing objective evidence, or it was mandatory that they proved the (subjective) intent of circumvention of stricter laws.

The revised procedure aims to have the debate closed as it provides clear provisions stating that Member States applying stricter rules may appeal to adduced evidence showing that the media service provider in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules. Also, the new provisions allow assessing the adduced evidence and consecutively requiring circumvention to be reasonably established, without the need to prove the media service provider's intention to circumvent those stricter rules.

Another new important element in the revised text is the enshrinement of right to defence granted for media service providers: media service providers have the opportunity to express their views on the alleged circumvention and the measures the notifying Member State intends to take.

All the amendments aim to grant a simplified and more efficient anti-circumvention procedure sustained by the pillars of swift cooperation between Member States, a clear set of criteria and establishing circumvention of stricter rules and the right for defence of the media service provider. However, the efficiency and the practical applicability of the procedure is yet a matter of time as assessment of its success can only be done after Directive 2018/1808 has been adapted by all Member States.

7. Conclusions

The revised AVMSD retains the right of Member States to impose stricter rules of services provided that they are consistent with EU laws. At the same time, it reserves the right for Member States to enact limitations to the freedom of reception and retransmission provided that it occurs under specific circumstances.

The principle of the country of origin remains intact and continues to govern the issue of jurisdiction over media services providers. The AVMSD gives jurisdiction over providers of media services to a single Member State at a time.

Provisions contained in the revised AVMSD principally relate to audiovisual media service broadcasts (linear and on-demand content). In the case of VSPs, the revised AVMSD Directive leaves the safe harbour provisions in the E-Commerce Directive intact and does not compel platforms to make use of upload filters. However, platform providers are obliged to establish efficient and transparent mechanisms that allow users to report offensive content, among other measures. In addition, the revised Directive explicitly leaves the decision to impose stricter requirements to the discretion of the Member States.

As a general overview, the new Directive confirms and facilitates the country of origin principle by ensuring transparency among Member States on jurisdiction: it will be easier to determine the country whose rules apply to each provider, thanks to a database which will contain a list of providers under Member States' jurisdiction, and this information will be publicly available.

The procedures in case of exceptions to the country of origin for TV broadcasting and video on-demand services will be aligned.

The new set of provisions relating to the anti-circumvention procedure does not differ conceptually from its predecessor text versions but is visibly simplified in its administrative course of action, with ERGA confirmed as part of the apparatus for consistent enforcement of the Directive.

References

Books and Journals

- COLE, M. 2011. The Country of Origin Principle – From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union. In: *Europäische Integration und Globalisierung – Festschrift zum 60-jährigen Bestehen des Europa-Instituts*. 113–130.
- CRAUFURD SMITH, R. 2011. Determining Regulatory Competence for Audiovisual Media Services in the European Union. *Journal of Media Law* 3(2): 265–270.
- DOMMERING O.–SCHEUER, E. A.–THORSTEN, A. 2008. *European Media Law*. Austin–Boston–Chicago–New York–The Netherlands.
- HEROLD, A. 2008. Country of Origin Principle in the EU Market for Audiovisual Media Services: Friend or Foe? *Journal of Consumer Policy* 31: 5–24.

- KOKOLY, Zs. 2015. Considerații privind exercitarea libertății de stabilire a societăților furnizoare de servicii mass-media audiovizuale în UE. *Revista Română de Drept al Afacerilor* 11: 105–112.
- OSTERN, J. 2016. *European and International Media Law*. Cambridge University Press.
- POLYÁK, G.–SZŐKE, L. G. 2009. The Country of Origin Principle and Regulatory Régimes for Media Competition in East Central Europe. *Central European Journal of Communication* 2(1): 83–99.
- WAGNER, M. 2014. Revisiting the Country-of-Origin Principle in the AVMS Directive. *Journal of Media Law* 6: 286–304.
- WEINAND, J. 2018. *Implementing the EU Audiovisual Media Services Directive – Selected issues in the regulation of AVMS by national media authorities of France, Germany and the UK*. Baden-Baden.

Online Resources

- 34TH EPRA Meeting Content Regulation and New Media: Jurisdiction Challenges in a VOD Environment. Brussels, La Hulpe, 5–7 October 2011. https://epra3-production.s3.amazonaws.com/attachments/files/1884/original/Jurisdiction_session1_final.pdf?1328691843.
- COLE, M. 2018. The AVMSD Jurisdiction Criteria concerning Audiovisual Media Service Providers After the 2018 Reform. https://emr-sb.de/wp-content/uploads/2018/12/EMR_MDC_AVMSD-jurisdiction-after-2018-reform_12-2018-1.pdf.
- ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive towards the application of the revised Directive by National Regulatory Authorities (NRAs). <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf>.
- ERGA Opinion on AVMSD Proposals [ERGA (2016)09]. http://erga-online.eu/wp-content/uploads/2016/10/Opinion_avmsd_0916.pdf
- ERGA Report on territorial jurisdiction in a converged environment. ERGA 2016(8). http://erga-online.eu/wp-content/uploads/2016/10/report_territ_2016.pdf.
- VOLMAN, L. 2018. *Is The Cornerstone Loose?* Critical analysis of the functioning of the ‘country of origin’ principle in the Audiovisual Media Services Directive, taking into account the rapid changes in the audiovisual industry and the recent challenges brought by Brexit. <https://www.bai.ie/media/sites/2/2018/09/BAI-Media-Content-Regulation-Essay-Lucas-Volman.pdf>.

Statutory Instruments

Consolidated version of the Treaty on the Functioning of the European Union. OJ C 326, 26.10.2012, p. 47–390.

Council Directive 89/552/EEC of 3 October 1989 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 298, 17.10.1989. 23–30.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on Electronic Commerce') OJ L 178, 17.7.2000. 1–16.

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) (codified version) (OJ L 095 15.4.2010. 1).

Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive) in view of changing market realities (OJ L 303 of 28.11.2018. 69.).

Case-Law

Case 33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging [1974] ECR 1299.

Case C-11/95 Commission v Belgium [1996] ECR I-4115.

Case C-14/96 Paul Denuit [1997] ECR I-2785.

Case C-212/97 Centros v Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459.

Case C-222/94 European Commission v United Kingdom [1996] ECR I-4025.

Case C-23/93 TV 10 SA v Commissariaat voor de Media [1994] ECR I-4795.

Case C-56/96 VT4 Ltd v Vlaamse Gemeenschap [1997] ECR I-3143.

COMMISSION DECISION of 31.1.2018 on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. Brussels, 31.1.2018 C(2018) 532 final.

Joined Cases C-244-245/10 Mesopotamia Broadcast and Roy TV v Germany [2011].

Other Documents by European Regulatory Bodies

COMMISSION STAFF WORKING DOCUMENT Ex-post REFIT Evaluation of the Audiovisual Media Services Directive 2010/13/EU accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities SWD/2016/0170 final – 2016/0151 (COD).

OPINION of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)0287 – C8-0193/2016 – 2016/0151(COD)) 2016/0151(COD).

PROPOSAL for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. COM(2016) 287 final – 2016/0151 (COD).