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Exceptions to the Principle of Free Transmission and Retransmission of Audiovisual Media Content – Recent European Case-Law

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Abstract. Case-law of the Court of Justice of the European Union as well as procedures taking place before the Commission aiming to clarify certain aspects regarding freedom of services – in this case, the principle of free transmission and retransmission of audiovisual media services – have always been regarded as particularly important in offering guidance in interpreting and applying European legal norms. The adoption in December 2018 of the revised text of the Audiovisual Media Services Directive (Directive 2018/1808) marks the transition to a new, amended legal framework. It also enables the critical review of the last case decided before the Court of Justice of the European Union, still instrumented according to the provisions of Directive 2010/13/EU: Case C-622/17 (Baltic Media Alliance v Lietuvos radijo ir televizijos komisija). While the main focus of the present paper lies with Case C-622/17, for a cogent understanding of the extended judicial and legal context of the case, we will briefly examine the four procedures successfully submitted to the Commission (by Lithuania and Latvia between 2015 and 2018), based on Art. 3 of the AVMSD (restriction based on public policy reasons – in this case, incitement to hatred), and the only procedure based on Art. 4 (the 'anti-circumvention procedure') submitted in the lifespan of Directive 2010/13/EU by the Kingdom of Sweden (2017).

Keywords: European law, audiovisual media regulation, freedom of transmission and retransmission, restrictions, Audiovisual Media Services Directive, CJEU, Case C-622/17

1. Introduction

Acting as the main media policy tool of the European Union, the Audiovisual Media Services Directive (AVMSD)[1] establishes the legal framework for a con-

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,

vergent media landscape and covers all services of audiovisual content irrespective of the technology used to deliver the content. The implementation of the EU digital strategy comprises also an extensive revision process of the AVMSD, started in 2015 and concluded in December 2018, Member States having to transpose it into their national law by 19 September 2020.

Although more recently the revised directive's *material scope* also extends certain audiovisual rules to video-sharing (online) platforms (VPS-s), such as YouTube, and user-generated content shared on social media services, such as Facebook, aspects relating to the *territorial scope* of the AVMSD remain unaltered. The territorial scope of the Directive gains 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 EU media policy. The country of origin principle is used in establishing jurisdiction over audiovisual media services (including here all types of content).

In the revised text of the AVMSD, the principle of freedom of transmission or retransmission of audiovisual media services also remains unaltered though the European legislator has significantly amended the legal norms governing restrictions of non-domestic broadcasts.

As of this moment (June 2020), transposition of the revised AVMSD into the national law of all Member States is not fully concluded. Procedures for preliminary rulings before the CJEU or procedures regarding the compatibility or incompatibility of measures concerning the provision of audiovisual media services initiated before the adoption of the revised text and judged in the timeframe 2018–2020 have been based on the former provisions of the AVMSD.

Taking into consideration that scholars in the field of European media law have long argued that restriction of freedom of transmission should be read in the light of case-law, the fact that the case-law of the Court of Justice of the European Union as well as procedures taking place before the Commission aiming to clarify certain aspects regarding freedom of services – in this case, the principle of free transmission and retransmission of audiovisual media services – have always been regarded as particularly important in offering guidance in interpreting and applying European legal norms, the present paper aims to present a critical review of the latest case decided in front of the Court of Justice of the European Union, still instrumented according to the provisions of Directive 2010/13/EU: Case C-622/17 (*Baltic Media Alliance v Lietuvos radijo ir televizijos komisija*).

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); 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).

While the main focus lies with Case C-622/17, for a cogent understanding of the extended legal and jurisprudential context of the case, we will briefly examine the four procedures successfully submitted to the Commission (by Lithuania and Latvia between 2015 and 2018), based on Art. 3 of the AVMSD (restriction based on public policy reasons – in this case, incitement to hatred), and the only procedure based on Art. 4 (the 'anti-circumvention procedure') submitted in the lifespan of Directive 2010/13/EU by the Kingdom of Sweden (2017).

While case-law in the field of cross-border audiovisual media services has been extensively reviewed by academics and legal practitioners, procedures before the Commission have been known to a more restricted circle of scholars. A 2018 study on media law enforcement without frontiers[2] attributes very limited practice in the field of procedures for deviation from the country of origin principle as a cause to insufficient legal clarity and certainty about the extent of the power of Member States to apply the procedure.

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 Television without Frontiers Directive TWFD (1989)[3] and then the AVMSD (2007),[4] the case-law of the European Court of Justice also contributing to the shaping of this debate.[5] Even though media consumption habits have undergone significant changes in this period, with emerging new technologies resulting in a highly diverse audiovisual media landscape, this principle still remains the governing element 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.

2 Media law enforcement without frontiers 2018-2. 13.

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 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.

5 Notable cases including: Case C-56/96 VT4 Ltd. v Vlaamse Gemeenschap [1997] ECR I-3143; Case C-212/97 Centros v Erhvervs-ogSelskabsstyrelsen [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 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.

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

Member 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,[6] 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 a detailed set of circumstances under which jurisdiction for media service providers can be established and organized by primary as well as ancillary or technical criteria (the text before the 2018 revision also contained a fallback clause in case that jurisdiction could not be determined and identifying the competent Member 'in which the media service provider is established within the meaning of articles 49 to 55 of the Treaty on the Functioning of the European Union'[9] (TFEU).

3. Exceptions to the Country of Origin Principle under the AVMSD – Exceptions from the Principle of Freedom of Transmission

Derogations from the country of origin principle as expressed in the legal provisions of AVMSD are possible only in certain cases such as situations not cov-

6 All references to and citations from AVMSD pertain to the legal provisions of the Directive before its revision unless explicitly stated otherwise.

7 AVMSD, Art. 2.1.

8 AVMSD, Art. 2.6.

9 AVMSD, Art. 2.5.

ered by the coordinated area, exceptions due to violations (provisional derogations), and exceptions due to circumvention of law.

Measures based on grounds that fall outside the fields coordinated by the Directive can be taken by national regulators against providers of audiovisual media services established 'in another EU Member State if these measures are based on grounds outside the fields [coordinated] by the Directive. However, whether this may be deemed to be the case is interpreted in a restricted fashion according to current Court of Justice of the EU (CJEU) case-law.'[10]

Exceptional derogations from the retransmission requirement due to violations imply provisional measures (the unrevised text of AVMSD differentiates between linear services and non-linear services).

> The Directive provides that use may be made of the possibility of derogation in the case of a television broadcast when it 'manifestly, seriously and gravely infringes' the provisions of Article 27(1) or (2) of the Directive concerning the protection of minors or the ban under Article 6 on incitement to hatred based on race, sex, religion, or nationality and when such an infringement has taken place on two occasions over the previous 12 months.[11]

In a similar fashion to limitations based on the grounds that fall outside the fields coordinated by the AVMSD, the procedure of exceptional derogation from the retransmission requirement initiated on the grounds of Article 3(2) must be interpreted restrictively. The procedure sets out a series of measures to be taken by the Member State in order to preserve compatibility with European law (these measures imply a consultation phase and the provision of information and then a notification to the European Commission for evaluation). Procedural steps in the unrevised text of AVMSD are similar for linear and for non-linear audiovisual media services, but,

> in contrast to linear services, paragraph 5 specifies an *urgent procedure* in the case of on-demand services: the obligation to provide information about a planned derogation can be dispensed with when urgent action is required – and the relevant information (including a statement of the reasons why the matter is particularly urgent) is provided later. The Commission must examine the question of compatibility with European Union law 'in the shortest possible time'.

Provided that the required procedural steps are complied with and the European Commission confirms its conformity with Union law, the 'reception' of the content can be prevented. However, this does not include supervisory measures in the

10 Media law enforcement without frontiers 2018-2. 23.
11 Media law enforcement without frontiers 2018-2. 16.

form of enforcement that directly target the foreign provider but ways of preventing the distribution of services (by involving infrastructure managers, for instance) instead of the imposition of a fine, for example.[12]

The third method for circumventing Article 3(1) of the AVMSD is set forth in Article 4(2), which refers to the CJEU's so-called 'circumvention case-law' with regard to linear media services ('circumvention of law' denoting the phenomenon of 'forum shopping' for the most favourable jurisdiction). 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.[13]

Restriction of freedom of reception and retransmission by a Member State invoking 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.

Two aspects are pertinent from 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).[14]

4. Recent Case-Law Pertaining to the Restriction of Freedom of Reception

4.1. The Anti-Circumvention Procedure

Bearing in mind the above listed difficulties pursuant to the measures against alleged circumvention of stricter rules, also evidenced by scholarly work[15] stating that the choice of establishment because of a favourable regulatory climate as such does not prove the motive of circumvention, it should not come as a surpri-

12 Media law enforcement without frontiers 2018-2. 24.

13 34th EPRA Meeting Content Regulation and New Media: Jurisdiction Challenges in a VOD Environment. Brussels, La Hulpe, 5–7 October 2011.

14 Oster 2016. 168.

15 Castendyk–Dommering–Scheuer–Böttcher 2008. 859–861.

se that the anti-circumvention procedure in the spirit of the AVMSD has known only few instances of consideration and only one fully completed procedure.

The only Member State to fully execute the anti-circumvention procedure based on Art. 4 in the history of these provisions spanning 10 years was the Kingdom of Sweden. This was the first time that the Commission decided on the application of Article 4 of the AVMSD.[16]

In December 2014, Sweden notified the Commission of the proposed measures in relation to two broadcasters broadcasting to Sweden from the UK for alleged circumvention of stricter Swedish rules on alcohol advertising, but then it subsequently withdrew the notification due to formality shortcomings, and thus at that moment it was not investigated by the European Commission. As the case was ongoing, Sweden opted for renewal and notified the Commission in October 2017 of its intention to impose measures (fines) 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.

In arguing that the broadcasting companies direct their programming, wholly or mostly, towards the territory of the notifying Member State, the Swedish authorities asserted that both broadcasters target with their television programmes the territory of Sweden. The notifying authorities considered that this is supported by the fact that the programmes in question are broadcast in Swedish or have Swedish subtitles and contain advertising directed towards Swedish markets. Moreover, both broadcasters have a licence to broadcast in the Swedish terrestrial network, whereas it is not possible to view the broadcast in the United Kingdom via cable or satellite.

The European Commission has decided, on the basis of the AVMS Directive, 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 Art. 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

16 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.

Commission found in this case that Sweden failed to prove circumvention on the part of the broadcasters.

The argumentation provided by the Commission in this case evaluated the claim that one of the broadcasters in question established in the UK in order to circumvent stricter rules and found that at the time when MTG established itself in the UK (1986) the Television Without Frontier Directive enshrining the country of origin principle had not yet been adopted, and the mere adoption of a Commission's proposal does not amount to existing legislation as it remains uncertain whether and when such proposal would be endorsed by the European Parliament and the Council in the legislative process and, if so, in which form and content. The company in question could not have drawn from the mere existence of a Commission's proposal any guarantee of the fact that such proposal would be adopted or that it would not be adopted in a substantially modified form.

Furthermore, it should be considered that Sweden in 1986 was not yet a Member of the then European Economic Community (EEC) and that it would not become a member until 1995, i.e. approximately 8 years later. In addition, Sweden only became a member of the European Economic Area and was therefore bound by the Directive in 1994, i.e. 7 years after MTG's decision to establish itself in the United Kingdom. Moreover, the European Convention on Transfrontier Television, containing similar rules, was only signed in 1989, only entered into force for other Contracting Parties in 1993, and was never ratified by Sweden.

As a consequence, circumvention was not legally and technically an option when the company established itself in the United Kingdom, and for this reason no causal link between the stricter Swedish rules and the broadcasting company's decision to establish itself in the United Kingdom can convincingly be made on the basis of this argument.

4.2. Procedures for Temporary Derogation from the Principle of Freedom of Transmission

In contrast to exceptions on the ground of circumvention of law, exceptions citing infringements on public policy grounds have been resorted to by Member States on more instances and have been deemed as compatible with European legal provisions by the Commission. All four cases of procedures for temporary derogation from the principle before the revision of the AVMSD refer to public policy reasons, namely incitement to hatred. *Sedes materiae*, the reasonings and judgments of the Court are almost identical in these cases: Lithuania has initiated 3 procedures between 2014 and 2017[17] (Com-

17 Commission Decision of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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

mission decisions in 2015, 2017, and 2018) and Latvia one procedure in 2018 (Commission decision in 2019).[18]

Given their historical similarities as formerly being part of the Soviet Union and their sizeable Russian-speaking minority, which appears to be the addressee of television broadcasts deemed as pro-Kremlin propaganda, Lithuanian and Latvian authorities have resorted to a policy of fines and broadcast suspensions to curb the influence of Russian state media. This policy implies a more ample framework, containing, besides procedures for temporary derogation from the ban on restriction of retransmission, other means from outside the scope of the AVMSD (for example, the refusal to register a local branch of Russian state news agency, blocking access to local versions of Rossiya Segodnya's Sputnik website, and, lately, financial sanctions).[19]

Actions taken in 2014 by Latvian and Lithuanian regulators (blocking Russian-language channels for inciting hatred and provoking conflict) were analysed by the Commission in a discussion paper.[20] Judging by the presence of a satellite uplink, jurisdiction in the Latvian case was attributed to Sweden and in the case of Lithuania to Sweden and the UK. These regulators were reacting to a perceived potential for incitement to violence in their own countries, stemming from Russia's actions in Ukraine. While clearly a concerted effort of the two Baltic countries, formally only Lithuania notified the Commission and followed the required series of steps in the procedure.

administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final.

Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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, Brussels, 17.2.2017, C(2017) 814 final.

Commission Decision of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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, Brussels, 4.5.2018, C(2018) 2665 final.

18 Commission Decision of 3.5.2019 on the compatibility of the measures adopted by Latvia pursuant to Article 3(2) 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, 3.5.2019, C(2019) 3220 final.

19 https://en.rebaltica.lv/2020/03/will-the-biggest-baltic-russian-media-house-survive-eu-sanctions-breach/.

20 European Commission, Doc CC AVMSD (2014) 4 rev Discussion Paper on the Application of articles 3 and 4 of the AVMSD case study: Suspension of Some Russian-language Channels in Latvia and Lithuania (2014).

The mandatory consultation phase with the Swedish regulating authority holding jurisdiction failed to reach a mutually satisfying solution because Swedish law

> prevents the regulator from taking action against audiovisual media services that are retransmitted to other States and are not intended for audiences in Sweden. The Swedish Broadcasting Commission (SBC) concluded that the broadcasts had not breached any of the rules applicable to the broadcasts since there are no rules regarding impartiality and accuracy in respect of satellite channels contained in the RTA [*Radio and Television Act* – author's note]. Issues regarding, for example, freedom-of-expression offences are not assessed by the SBC. Instead, such questions are handled by the Chancellor of Justice, who is the sole prosecutor in cases concerning offences against freedom of expression.
>
> The Chancellor of Justice has, however, concluded that the broadcasts do not constitute offences under the Fundamental Law since the programmes are neither broadcast from Sweden nor intended to be received in Sweden. If an alleged offence does not fall under the Fundamental Law or the remit of the Chancellor of Justice, it may be handled by the police and a public prosecutor. The Swedish Police have, however, in turn concluded that there are no indications that a crime has been committed that could be prosecuted under Swedish law.[21]

In 2015, the Lithuanian regulator repeated the block on the Russian channel in cause (RTR Planeta), and the Commission determined that the Lithuanian regulator had adhered to the procedures required by the Directive and deemed its restriction of the service compatible with European Union law. In confirming the legitimacy of the Lithuanian reasons for restricting the transmission of RTR Planeta, the Commission drew on the Court's interpretations of incitement and hatred from the 2011 Mesopotamia Broadcast and Roj TV case, which included both animosity and intention to direct behaviour. The argument invoked by the broadcaster citing freedom of speech was rebutted.[22]

In a nearly identical fashion, Lithuania repeated the procedure in 2016 and 2017 as it deemed that similar circumstances made it necessary: on the second occasion, measures for temporary suspension, not only of the retransmission of

21 Media law enforcement without frontiers. 78–79.

22 See Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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, Brussels, 17.2.2017, C(2017) 814 final, recital (16) et seq.

the television broadcast RTR Planeta but also of access to it including on the Internet, in the territory of Lithuania were sought.

> As regards the argument that the broadcaster does not have editorial responsibility over views expressed by participants of a talk show, the Commission [recalled] that, in relation to television broadcasts, the Directive defines editorial responsibility as the exercise of effective control both over the selection of the programmes and their [organization] in a chronological schedule [Article 1(c) of the Directive], [and] as a consequence the broadcaster's argument that editorial responsibility does not extend to the views expressed in a programme cannot be retained.[23]

While in the previous two decisions against RTR Planeta the Lithuanian authorities imposed a suspension of three months, in the third case (2018) they imposed a suspension for a substantially longer period (i.e. twelve months). The Commission observed that national authorities enjoy a margin of discretion in deciding which measures and/or sanctions to impose on broadcasters for infringements of the prohibition under Article 6 of Directive 2010/13/EU, and therefore the Commission would only question under Article 3(2) of the Directive the measures taken by the national authority, and precisely the duration of the suspension imposed on the broadcaster concerned in cases where this appears to be manifestly disproportionate.[24]

After reviewing the arguments by the national authorities emphasizing that RTR Planeta has already engaged in violations of Article 6 of Directive 2010/13/EU several times in the past and that the broadcaster has not modified its behaviour following the two previous suspension decisions, the Commission concluded to share the assessment justifying a substantially longer suspension period.

Latvian authorities followed a similar path after the 3-month suspension in 2014 of the broadcasts by the Russian-speaking channel Rossiya RTR (operating a satellite uplink and properly observing the procedure). As the infringements continued with Rossiya RTR broadcasting in Latvia content deemed to incite to hatred, involving on the one hand action intended to direct specific behaviour and, on the other, language that can be considered to create a feeling of animosity

23 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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, Brussels, 17.2.2017, C(2017) 814 final, recital (23).

24 Commission Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of 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, Brussels, 17.2.2017, C(2017) 814 final, recital (20).

or rejection with regard to a group of persons, the national regulating authorities decided to suspend the retransmission for a period of 3 months, and their measures were deemed compatible with EU law by the Commission.

In the subsequent Commission actions regarding the Baltic States' problems with Russian-language broadcasts, one can see states being given more room to restrict services in the name of public order or security.[25]

As far as the efficiency of these procedures is concerned (in their specific context), there are diverging opinions and practical examples which also indicate a more nuanced picture: evidence in the Baltic States indicates that shutting down a specific Russian-language channel has seen either a spike in interest to other accessible Russian channels[26] or a migration to online platforms and freely available channels where the same broadcast can be viewed without limitations (for example, YouTube).

4.3. Case-Law before the CJUE – Baltic Media Alliance Ltd. v Lietuvos radijo ir televizijos komisija, Case C-622/17

In the lifespan of Directive 2010/13/EU (2010-2018), *Mesopotamia Broadcast and Roy TV v Germany [2011]* (joined cases C-244-245/1) marks the first case argued based on the legal provisions of the then newly adopted Directive, while *Baltic Media Alliance Ltd. v Lietuvos radijo ir televizijos komisija* (Case C-622/17) marks the last one instrumented according to the unrevised text.

Though reference for a preliminary hearing was lodged in 2017, initial measures brought against Baltic Media Alliance Ltd. (BMA) by Lithuanian regulatory authorities can be seen in a wider context, integrated in the concerted effort of Lithuania and Latvia aiming to curb pro-Kremlin Russian influence among their Russian-speaking national minorities. As early as 2014, the EU Commission paper has discussed the issue of jurisdiction for two Russian-speaking channels broadcasting in Lithuania: RTR Planeta and NTV Mir Lithuania (subsequent dealings with RTR Planeta, under Swedish jurisdiction, were presented earlier). As to NTV Mir Lithuania, Lithuanian authorities disputed UK jurisdiction claiming that the major part of NTV Mir Lithuania was a rebroadcast of the Russian channel NTV and that the editorial decisions about the content of that channel were not taken in London. Moreover, it was asserted that despite the fact that the company Baltic Media Alliance Ltd. holds a licence for the channel NTV Mir Lithuania from the UK regulator (Ofcom), it has only one employee in the UK at an address where more than 200 other companies are registered. On the other hand, 200 persons would be employed in Riga by another company – Baltic Media Alliance – to distribute this and four other channels, licensed by Ofcom

25 Broughton Micova 2019. 9.

26 A Report of Anti-Disinformation Initiatives 2018. 11.

to the Baltic Media Alliance Ltd., the satellite uplink being also located in Riga. The issue at hand was then settled by the assertion of Ofcom that Baltic Media Alliance is established in the UK, with an Ofcom licence.[27]

On 18 May 2016, the Lithuanian authorities adopted a decision which required that bodies retransmitting television channels by cable and other persons providing Lithuanian consumers with a service relating to the distribution on the Internet of such channels to distribute the channel NTV Mir Lithuania only in pay-to-view packages (or, if such packages were not offered, in return for an additional fee which could not be included in the price of the basic package) for a period of 12 months from the entry into force of that decision. That decision was based on the fact that a programme broadcast on 15 April 2016 on the channel in question, entitled *Ypatingas įvykis. Tyrimas* (Special Event: Investigation), contained information that incited hatred based on nationality, prohibited under the relevant national law.

On 22 June 2016, the regulating authority adopted a new decision which amended its initial decision, removing the obligation to distribute the channel NTV Mir Lithuania only in pay-to-view packages and initiating the procedure for the temporary suspension of that channel. In that connection, that authority notified BMA of the infringements identified in its initial decision and the measures which it intended to take should any such infringement occur again. As required by the procedures seeking temporary derogation, the Lithuanian authorities also notified Ofcom, the NRA for Baltic Media Alliance.

On the same day, BMA brought an action before the Vilnius Regional Administrative Court (*apygardos administracinis teismas*) in Lithuania, seeking the annulment of the decision of 18 May 2016, arguing in particular that the decision was taken in breach of the Audiovisual Media Services Directive, which requires the Member States to ensure freedom of reception and not to restrict the retransmission in their territory of television broadcasts from other Member States for reasons such as measures against incitement to hatred.

Deciding to stay the proceedings, the national court lodged a request for preliminary ruling, asking the Court of Justice whether a decision such as that taken by the Lithuanian authorities is covered by the AVMSD.

Taking into consideration that the decision disputed by BMA refers to a withdrawn decision, the Lithuanian regulating authority (LRTK) and the Lithuanian Government asserted the hypothetical nature of the questions raised and, consequently, also the issue of admissibility. However, both the Advocate General, and the Court agreed that in the present case the referring court stated in the order for reference that, notwithstanding the amendment to the decision of 18 May 2016

27 European Commission, Doc CC AVMSD (2014) 4 rev Discussion Paper on the Application of articles 3 and 4 of the AVMSD case study: Suspension of Some Russian-Language Channels in Latvia and Lithuania (2014).

by which the Lithuanian authority withdrew the measures challenged by BMA, it will have to rule on whether it infringed BMA's rights by that decision and whether the decision was lawful when it was adopted.

In his Opinion, Advocate General Henrik Saugmandsgaard Øe expressed the view that the AVMSD which requires Member States to ensure freedom of reception and not to restrict retransmissions on their territory of television broadcasts from other Member States for reasons such as incitement to hatred does not prevent the Republic of Lithuania from adopting such a measure.

According to the Advocate General, the directive does not prevent the receiving Member State from controlling, by certain specific arrangements, the distribution of television programmes originating from other Member States. The receiving Member State can thus require television channel distributors, on public interest grounds, to organize the services offered by them in such a way that certain channels are included only in specific packages. Such measures do not hinder the retransmission or reception as such of the channels concerned. Those channels can, if those rules are observed, still be broadcast and consumers can view those channels legally provided that they subscribe to the appropriate package.

Moreover, the Advocate General expresses an opinion which was favourable to the measure adopted by the Lithuanian authorities against the television channel NTV Mir Lithuania, as being compatible with the freedom to provide services enshrined in Article 56 of the TFUE (the measure is justified and proportionate). In that regard, the Advocate General observed that the Republic of Lithuania has, by means of a reasonable measure, legitimately sought to protect the Lithuanian information area from Russian propaganda in the context of the information war to which the Baltic States are subject.

> We cannot lose sight of the background to the present case. According to the information provided by the LRTK and the Lithuanian Government, Article 33(11) and (12)(1) of the Law on information for the public was adopted in order to protect the Lithuanian information area and to provide a swift response[28] to Russian propaganda in the context of the information war to which the Baltic States are subject in view of their geopolitical situation. The

28 'I note that, as well as being onerous, the procedure laid down in Article 3(2) of Directive 2010/13 is relatively long. Those features explain why, in practice, that procedure is rarely used (and is rarely successful). See: European Regulators Group for Audiovisual Media Services (ERGA) – Report on territorial jurisdiction in a converged environment, 17 May 2016, in particular pp. 9 and 12. Moreover, at the time of the case in the main proceedings and in respect of television broadcasting, that directive did not provide for an urgent procedure allowing an immediate derogation from the freedom to receive and retransmit a television broadcast, even though such a measure was already laid down with regard to on-demand audiovisual media services in Article 3(5) of that directive. I note, however, that the recent Directive 2018/1808 has just extended that urgent procedure to television broadcasts.' – opinion of Advocate General Saugmandsgaard Øe delivered on 28 February 2019. Footnote no. 64.

> EU institutions have themselves noted that the Baltic States are confronted with the spread in the media of false information targeted at their Russian-speaking minorities, with the aim of denigrating those States, of undermining the European narrative based on democratic values, human rights and the rule of law and, more generally, of destabilising the political, economic and social situation of those States.
>
> (65) Given the particularly great influence that television has on public opinion, the Lithuanian legislature's reaction seems perfectly reasonable.

The Opinion provided by Advocate General Henrik Saugmandsgaard Øe also tackled the issue of editorial responsibility, another long-standing element in the dispute surrounding the de facto establishment of Baltic Media Alliance. In his reading, BMA could be seen as deemed to be established in the United Kingdom, in accordance with Article 2(3)(c) of the AVMSD, only if a significant part of its workforce involved in the pursuit of the audiovisual media service activity operates in that Member State. In his argumentation, even if it were demonstrated that the editorial responsibility for the channel NTV Mir Lithuania is assumed not by BMA but by a Russian company and/or that the editorial decisions are taken in Russia and the condition regarding the workforce laid down in Article 2(3)(c) of Directive 2010/13 is not fulfilled, the connecting factors laid down in Article 2(4) of the directive, which concern the use of a satellite or an uplink in a Member State, would still have to be examined.

The decision rendered by the Court of Justice follows the conclusions presented by the Opinion and, accordingly, asserts that:

> a national measure does not constitute a restriction within the meaning of Article 3(1) of the directive if, in general, it pursues a public policy objective and regulates the way in which a television channel is distributed to consumers of the receiving Member State, where those rules do not prevent the retransmission as such of that channel. Such a measure does not introduce a second control of the channel's broadcasts in addition to that which the broadcasting Member State is required to carry out.
>
> As regards the disputed measure, the Court notes that the Lithuanian legislature, by adopting the Lithuanian law on information for the public, on the basis of which the decision of 18 May 2016 was taken, intended to combat the active distribution of information discrediting the Lithuanian State and threatening its status as a State in order, having regard to the particularly great influence of television on the formation of public opinion. The [legislation also intends] to protect the security of the Lithuanian information space and guarantee and preserve the public interest in being correctly informed. The information referred to in that law includes material inciting the over-

> throw by force of the Lithuanian constitutional order, inciting attacks on the sovereignty of Lithuania, its territorial integrity and political independence, consisting in war propaganda, inciting war or hatred, ridicule or contempt or inciting discrimination, violence or harsh physical treatment of a group of persons or a person belonging to that group on grounds, inter alia, of nationality.[29]

In its observations, the Lithuanian regulating authority stated that:

> the decision of 18 May 2016 had been taken on the ground that a programme broadcast on the channel NTV Mir Lithuania contained false information which incited hostility and hatred based on nationality against the Baltic [States] concerning the collaboration of Lithuanians and Latvians [during] the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries, policies which were said to be a threat to the Russian national minority living in those countries. That programme was addressed in a targeted manner to the Russian-speaking minority in Lithuania and aimed, by the use of various propaganda techniques, to influence negatively and suggestively the opinion of that social group relating to the internal and external [public] policies of Lithuania, Estonia, and Latvia, to accentuate the divisions and [polarization] of society, and to [emphasize] the tension in the Eastern European region created by Western countries and the Russian Federation's role of victim.[30]

The decision of the Court seems to correspond in spirit with the Commission's actions regarding temporary suspensions and giving Member States more room to restrict services in the name of public order or security as it considers measures restricting freedom of transmission as pursuing, in general, a public policy objective.

5. Conclusions

European case-law regarding limitations to the principle of freedom of transmission as regulated by the AVMSD before its revision in 2018 comprises actions before national regulating agencies, a relatively small body of procedures before the Commission, and a case judged by the CJUE.

29 Court of Justice of the European Union, Press Release No 87/19, Luxembourg, 4 July 2019, https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-07/cp190087en.pdf.

30 Court of Justice of the European Union, Press Release No 87/19, Luxembourg, 4 July 2019, https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-07/cp190087en.pdf.

As far as procedures of temporary derogations are concerned, the answer can be found in the overly complex and time-consuming nature of these legal provisions. This issue was addressed in depth during the revision process of the Directive, with both Article 3 and Article 4 modified in order to absorb best practices and experiences of the case-law and implementation suggestions made by NRA-s, representative bodies, legal scholars, or other interested parties.

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

The procedures in the case of exceptions to the country of origin for TV broadcasting and video on-demand services have been aligned, resulting in a single procedure irrespective of linear or non-linear audiovisual media services. The list of causes that can be invoked for the temporary derogation from the freedom of reception reunites all previously known instances and also adds new circumstances – namely, when an audiovisual media service provided by a media service provider under the jurisdiction of another Member State manifestly, seriously, and gravely infringes point (b) of Article 6(1) or prejudices or presents a serious and grave risk of prejudice to public security, including the safeguarding of national security and defence. In the revised text of the AVMSD, Article 6 refers to the obligation of Member States to ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain:

a) any incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter *or*

b) public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541.[31]

The amended legal provisions are not one-sided: besides giving Member States a wider space to exert limitations based on public policy reasons, the revised Directive also asserts the obligation for Member States to respect the rights of defence of the media service provider concerned and, in particular, give that provider the opportunity to express its views on the alleged infringements.

The new set of provisions relating to the anti-circumvention procedure does not conceptually differ from its predecessor text versions but is visibly simplified in its administrative course of action, with the European Regulators Group for

31 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, 6–21).

Audiovisual Media Services (ERGA) confirmed as part of the apparatus for consistent enforcement of the Directive.

The efforts invested in the implementation of these procedures ensure, without doubt, the involvement and perseverance of the European legislator to provide efficient legal tools for issues regarding freedom of reception and the ban on restricting retransmission. The fact that these procedures intensified over time in the lifespan of the Directive until its revision could indicate the acuteness of an ongoing problem (as is the serious issue of disinformation campaigns or incitement to hatred combated by public policy means) on the one hand and also the acquirement of a certain familiarity in exploiting these procedures on the other hand.

However, the question remains as to the efficiency of these procedures in the context of a rapidly changing converged media landscape. Monitoring in particular the effects these legal provisions produced in the Baltic States, it was concluded that the suspended television broadcasts or audiovisual media services were replaced extremely rapidly either by similar or (nearly) identical broadcasts by the same broadcaster or by formats not affected by the decision of the national regulating authority reinforced by the Commission (pirate channels, freely available online platforms, etc.).

Regarding the Baltic Media Case, the first question as to its factual effects would be the actual introduction of paywalled foreign broadcasts: although now deemed legal and compatible with EU law, so far, to our knowledge, neither Lithuania nor other Member States have yet resorted to this option.

It is too early to draw far-reaching conclusions regarding the effects of the recent case-law before the revised text of the AVMSD is transposed by Member States and potential new cases arise, where a ground for comparison also permits an in-depth analysis.

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