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Working group 3: Round table on Jurisdiction

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1. Introduction

Generalities

The issue of legal jurisdiction over broadcasters is a recurrent topic at EPRA meetings and was on the agenda in Paris and Amsterdam in 1996, Lisbon in 1997, Bratislava in 2000, Brussels in 2002.

On these occasions, a wide variety of concrete cases were examined and debated. This included notably "circumvention cases" where a broadcaster puts together a television channel aimed at the audience of a State (of reception) but establishes itself in another State (country of origin) in order to effectively bypass (the usually stricter) rules of the State of reception. Positive conflicts of jurisdiction where two countries claim jurisdiction over the same broadcaster were also reported and raised discussion on the interpretation of jurisdiction criteria. As an example among many others, the various stages of the conflict of jurisdiction between the Netherlands and Luxembourg with regard to the channels RTL4 and 5 were illustrated at regular intervals during meetings. Various cases of advertising and programme windows inserted in the programmes of an existing channel aimed at a targeted foreign audience were also documented and commented upon at the Brussels meeting[1]. Most recently, the concern regarding non-EU satellite channels broadcasting programmes inciting to hatred has added a new facet to the topic of jurisdiction, as illustrated during the Istanbul (2004) and Sarajevo (2005) meetings[2].

The complexity of the legal provisions and the transnational character of the topic may account for its importance to the EPRA. The issue of jurisdiction over broadcasters also has many facets. It is not only legally difficult but indeed very sensitive as it touches upon many cultural and economic factors. The concerns at the core of the problems of jurisdiction are very varied: advertising in general, advertising targeted at children, advertising and programme windows in "small" countries, religious broadcasting, pornographic programmes and hate broadcasts.

The current issues at stake:

Even though they are deeply intertwined, four main specific issues can currently be identified:

- *Circumvention, also often qualified as abusive delocalization and relocation*. As described above, this is the case where a broadcaster puts together a television channel aimed at the audience of a State (of reception) but establishes itself in

[1] See paper EPRA /2002/04 by the CSA of the French Community of Belgium, available under:http://www.epra.org/content/english/members/working_papers/Brussels/EPRA0204.doc
[2] See inter alia the presentations from the French CSA on the Control of Broadcasts inciting Racial Hatred, available under:
http://www.epra.org/content/francais/members/working_papers/Istanbul/Haine_raciale_CSA.doc and
http://www.epra.org/content/english/members/working_papers/Sarajevo/powerpoint_hatred_en.ppt

another State (of origin) in the sole intention to evade the legislation of the State of reception.

- *Non-respect of national rules of the country of reception* which are stricter than the European minimum standards by foreign broadcasters targeting a specific country. Examples of stricter rules include, inter alia, advertising aimed at children, for alcoholic beverages etc.
- *Competition with regard to advertising revenues.* This is particularly acute in the case of advertising windows inserted in the programmes of an existing channel, usually orginating from a ”large country” aimed at a targeted foreign audience in a “small” country sharing the same language, or a limited linguistic area.
- *Third-country (i.e. non-EU) programmes containing hate-speech*.

Objectives of the round-table:

The focus of the present round-table will be two-fold.

Firstly, it will examine the suggested changes regarding jurisdiction in the draft Audiovisual Media Service Directive.

- Are the proposed amendments likely to solve some of the existing problems faced by regulators?
- Are radical changes or merely further adjustments necessary?

Secondly, and most of all, it will focus on the role that the regulatory authorities can play in practice.

- Can co-operation between regulatory authorities solve the problems?
- How far can co-operation go?
- On what should the co-operation focus?

2. Proposed changes of the Directive

Country of origin principle

The draft Directive includes several changes concerning jurisdiction. However, the *country of origin principle*, often qualified as the cornerstone or the condition sine qua non of the TVWF Directive remains unchanged. The country of origin principles ensures that only one EU Member State has jurisdiction over any given media service provider and that Member States may not hinder broadcasts by broadcasters under another Member States jurisdiction.

Derogation of country of origin principle – unacceptable content/considerations of overriding public interest

The Article 2(a)2, which constitutes a derogation to the principle of freedom of reception, allows Member States under specific conditions and further to a specific procedure with the European Commission to restrict retransmissions on their territory originating from other Member States was only slightly modified. The suggestion to extend the scope of the article to cover other considerations of overriding public interest other than the ones already included at present (i.e. serious harm to minors, broadcasts containing incitement to hatred on grounds of race, sex religion or nationality) which was put forward during the consultation meetings[3], was applied very restrictively. The exception has only been broadened to include broadcasts containing incitement to hatred based *on*

[3] See p.6 Issues paper for the Liverpool Audiovisual Conference, Rules applicable to Audiovisual Content Services, July 2005.

ethnic origin, belief, disability, age or sexual orientation. The new recital 24 confirms this restrictive approach as it quotes the ECJ cases Commission v. Belgium and Calfa which held that *any restriction of the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively*[4].

Criteria for assessing establishment
The criteria of Article 2 for assessing establishment remain the same. Suggestions to clarify the criteria to avoid divergent interpretations such as on the terms "*significant part of the workforce*" or "*editorial decisions*[5]" received mixed feelings during the consultation process and were not taken into account in the current draft[6]. The idea of adding further criteria in order to better reflect where the broadcaster is actually carrying out its activities or the proposals to make a reference to the language of a programme were not taken on board as suitable criterion for assessing territorial competence so far.

The only change concerns the subsidiary or ancillary criteria which apply when a broadcaster is not established in one of the EU countries. The criterion of the use of a frequency was deleted and the order of the technical criteria was reversed to place the use of uplink before the satellite capacity. This change comes as the direct consequence of hate speech cases in broadcasts originating from third countries (Al Manar and Sahar 1). The main idea behind this change is to divide the responsibility more equitably between Member States involved. Currently, this burden lays heavily on France and Luxemburg because of the location of the satellite operators Eutelsat and Astra.

Circumvention - "Abusive" delocalization or "relocation"
While the TVWF Directive only mentioned circumvention in recital 14, the draft AVMS Directive includes a series of specific provisions dealing with that matter in Article 2 par. 7 to 10 (see below). Additionally, recital 23 provides guidance on the new provisions and refers to the case-law of the ECJ. As a solution against the circumvention of stricter rules, the Commission proposes a codification of the case law of the Court of justice combined with a new procedure to deal with circumvention complaints. The receiving Member State is still expected to settle the matter amicably with the country of origin. However, the Commission will now have the right to decide on the measures notified. Until now, the Contact Committee established under Article 23a was merely a forum of discussion of practical jurisdictional issues and did not have such powers at its disposal. Member States that were convinced that a specific service provider had abused its freedom of establishment had to initiate a cumbersome and often very time-consuming infringement procedure.
It is worth noticing that the main difference between the new mechanism of Art. 2 (7) and Article 2a is that measures under Article 2a may be taken before the Commission's decision on the compliance of Community law. Under Art. 2(7), the receiving Member State may only take action against a broadcaster when given the formal go-ahead by the Commission (ex-ante control). Furthermore, the provisions of Art. 2 (9) seem to indicate a restrictive approach.

7. A Member State may in order to prevent abuse or fraudulent conduct, adopt appropriate measures against a media service provider established in another Member State that directs all or most of its activity to the territory of the first Member State. This shall be proven on a case by case basis by the first Member State.

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[4] Case C-355/98 Commission v Belgium, case C-348/96 Calfa.
[5] See for instance the concrete suggestions made by Inge Brakman from the Dutch Commissariaat voor de Media in her intervention of june 2006 in Brussels, available under:
[6] See p.5 Issues paper for the Liverpool Audiovisual Conference, Rules applicable to Audiovisual Content Services, July 2005

8. Member States may only take measures pursuant to paragraph 7 if all of the following conditions are met:
(a) The receiving Member State asks the Member State in which the media service provider is established to take measures;
(b) the latter Member State does not take such measures;
(c) the first Member State notifies the Commission and the Member State in which the media service provider is established of its intention to take such measures and
(d) the Commission decides that the measures are compatible with Community law.

9. Any measures pursuant to paragraph 7 shall be objectively necessary, applied in a nondiscriminatory manner, be suitable for attaining the objectives which they pursue and may not go beyond what is necessary to attain them.

10. The Commission shall decide within three months following notification under paragraph 8. If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.

Questions for debate:

- Are the proposed amendments likely to solve some of the existing problems faced by regulators?
- Are radical changes or merely further adjustments necessary?
- Can the derogations of Article 2(a)2 be extended to cover other considerations of overriding public interest?
- Should the criteria for assessing establishment in Article 2 be modified and how?
- Are the criteria "abuse and fraudulent content" of Article 2 (7) – Article 2 (10) workable in practice? Even though the Commission's attempt to avoid the abuse of the country of origin principle was generally welcomed, some doubts about the practical impact of this provision have been expressed from various sources[7]. Does it provide an adequate answer to concerns dealing with safeguarding cultural diversity and media pluralism?[8]
- Does the ECJ-case law[9] prevent the EU from taking further steps to regulate the circumvention situation?
- Hate speech: Are the proposed changes in the draft directive sufficient?

[7] See for instance Ofcom Position Paper on Country of Origin, available under: http://www.europarl.europa.eu/comparl/cult/hearings/20060601/position_ofcom_origin_en.pdf
[8] See on that point the EBU position paper, available under http://www.europarl.europa.eu/comparl/cult/hearings/20060601/position_ebu_en.pdf
[9] See in particular the judgements C212/97 Centros, C-33/74 van Binsbergen, C23/93 TV10 SA v Commissariaat voor de Media, C11/95 Commission of the European Communities v Kingdom of Belgium.

3. Issues of co-operation between regulatory authorities

Even if regulatory authorities may be involved in the process of the review of the TVWF Directive, they will not have the final say in the matter. However, the co-operation between regulatory bodies may constitute an interesting avenue to deal with a variety of problems in the area of jurisdiction. Lately, the idea of reinforcing the co-operation between regulatory authorities has received a great deal of support from varied sources.

As an example, the Commission current draft Directive now contains a new Article 23b dealing with regulatory authorities, whose para. (2) states that:
"National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive".

The Draft Report of the European Parliament's Committee on Culture and Education (*Hieronymi report*[10]) is even more specific and suggests that *"The National regulatory bodies shall cooperate more closely, particularly in the resolution of problems as referred to in Article 2(7) of the Directive".*

This co-operation between fellow regulators may take different forms.

It may consist in a *reinforced exchange of information* between regulators:

- This is illustrated by the ongoing project of a central database of licensed broadcasters in Europe which was put forward by EPRA members (see *EPRA Channel and Company Search Database*) and the High-Level Group of Regulators in Brussels; or the Commission's suggestion to appoint a contact person within each regulatory authority in charge of jurisdiction issues, especially concerning broadcasts containing incitement to hatred, or the proposal of *a "mutual and immediate information exchange between Member States' audiovisual regulators, together with a close co-operation in cases where an authorization is withdrawn of a channel is banned to allow in particular consideration of the reasons behind the withdrawal*[11]*.*
- Another possibility, which has been suggested in 1997 during EPRA meetings in the form of a very informal "Code of Conduct between Regulators" or rather guidelines of good behaviour between regulators, would be that regulatory authorities of the country of origin inform their counterparts prior of to the granting of a broadcasting licence targeting specific audiences in the country of reception. It was recently suggested to formalize this specific information exchange by adding an amendment to this purpose within the European Convention on Transfrontier Television (Latvian suggestion). Similar propositions have been made for the draft Directive.
- The organisation of the exchange of information needed to monitor compliance is a further example. When a broadcast is targeted at the Member State of reception and is not broadcast in the language of the Member State where it is established, the supervision may be rendered difficult. Some colleagues have attempted to solve this problem by means of a pragmatic approach. On several occasions, the Swedish Broadcasting Commission and the Norwegian Mass Media Authority undertook a survey of how the TV3 programmes targeted at their respective

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[10] http://www.hieronymi.de/PDF%20Dokumente/CULT_PR(2006)376676_EN.pdf

[11] See Commission's MEMO/05/98 of 17/03/2005
http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en

countries complied with some of the rules in the Directive. Meetings were then held with the UK regulator (at the time the ITC) in London.

But could this co-operation between regulators go even further than the mere exchange of information? Could it go as far as a *voluntary application* of stricter national rules (outside the coordinated fields of the Directive) by the regulator of the country of origin to broadcasters under its jurisdiction which target a specific country of reception?
Would this be still compatible with the country of origin principle and the non-discrimination principle?
The "Fan TV case", where a broadcaster established in Latvia but targeting the Swedish audience, accepted voluntarily to follow some stricter Swedish rules, seems to be an unprecedented example so far.

Another possibility would be to *formalize* such a bilateral co-operation between the authorities of the country of origin and of the country of reception to ensure that the broadcaster targeting the audience abroad complies with more stricter or detailed rules of general public interest existing in that receiving State while guaranteeing at the same time the compliance with Community law, through a notification and a formal decision of the Commission. Concretely, this would imply a reformulation of Art. 2(7). This seems to be one of the solutions currently envisaged by the Council.

Questions for debate:

- Can co-operation between regulatory authorities solve the problems?
- How far can co-operation go?
- On what should the co-operation focus?