Institut für Europäisches Medienrecht
Institute of European Media Law
Institut du droit européen des médias

The AVMSD Jurisdiction Criteria concerning Audiovisual Media Service Providers after the 2018 Reform

by

Professor Dr. Mark D. Cole

Director for Academic Affairs at the EMR

D-66121 Saarbrücken, Franz-Mai-Straße 6
Tel.: +49-681-99 275-11 • Fax: +49-681-99 275-12
emr@emr-sb.de • www.emr-sb.de

December 2018

Table of Contents

1. Background and Scope of Analysis

1.1. Background to the Legal Opinion

The Audiovisual Media Services Directive (AVMSD)[1] is the cornerstone of European Union media law. It is not only the longest standing piece of EU legislation that directly influences the markets for television and on-demand audiovisual media offers, it has also been a major driver for enabling and increasing the cross-border offer and reception of such content. In addition, it has remained to be based on the same fundamental principles as when it was first conceived and enacted as the then Television without Frontiers Directive in 1989 (TwFD)[2].

The core principle of the AVMSD and its predecessor TwFD has always been that the country of origin-principle determines the regulatory approach towards providers of linear and non-linear audiovisual media services. In the strongest possible manner this idea of single jurisdiction for each provider was laid down in the provisions of the Directive. The principle known also in other areas of EU law[3], was enacted in a way 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. Article 2 lays down in paragraphs 3 and 4 under which circumstances jurisdiction can be assumed. The flipside of this approach was to ensure that a certain number of key issues relevant for all Member States would be harmonized by the Directive in which way they would become the minimum standard that is respected across the EU. The principle worked well over the three decades that the Directive already exists and gave legal certainty to those providers that intended to target not only one Member State but Member States that could also be different from the State which has jurisdiction over them.

1 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, AVMSD), OJ L 95, 15.4.2010, p. 1–24

2 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 (Television broadcasting activities: "Television without Frontiers" (TVWF) Directive).

3 For an overview, especially for non-media or information society oriented services cf. *Sørensen*, The Country-of-Origin Principle and balancing jurisdiction between home Member States and host Member State, p. 2 et seq. The principle is also known by similar expressions such as "principle of home state control", "home country authorisation", "seat state principle" etc. Cf. also *Cole*, The Country of Origin Principle – From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union, p. 118.

In order for the provision to function in practice it is crucial to be certain about which Member State has jurisdiction over a provider. Therefore, to remove some lack of clarity in the early formulation of the Directive, as will be shown below, the provision of Article 2 was amended in the first reform of the Directive in 1997 and again only in a very minor way in the following two revisions of 2007 and the most recent one of 2018. Article 2 sets out that Member States have to ensure compliance of providers under their jurisdiction (paragraph 1) with the law and for this purpose declares (paragraph 2) that there is the standard case of jurisdiction in paragraph 3 and a subsidiary set of criteria (paragraph 4) that can be applied if the criteria of paragraph 3 are not applicable. There is also a fallback clause in paragraph 5, if both sets of criteria do not lead to a clear decision about jurisdiction and a limitation of the scope of the Directive in paragraph 6 that excludes services directed to non-EU-States. In the amended Directive (EU) 2018/1808[4] paragraphs 5a-5c were inserted that concern procedural rules about the setting up of a list of providers under their jurisdiction by all Member States.

In that way, it was and is key how Article 2 and namely the jurisdiction criteria are interpreted. This legal opinion provides an analysis of the jurisdiction criteria taking into consideration the evolution of the provision. It will focus especially on the meaning of the few newly inserted words in Article 2 according to the amending Directive (EU) 2018/1808 and the new definition corresponding to Article 2.

The legal opinion was prepared on request of the Service des Médias et des Communications (SMC) of the Luxembourgish Government. As is the case with many other EU Member States, Luxembourg has jurisdiction over a number of providers that offer services not (only) intended for the Luxembourgish population. In addition, with SES the operator of one of the most relevant satellite systems for broadcasting (ASTRA) has its seat in Luxembourg. Therefore, the country of origin-principle and the application of the jurisdiction criteria that are connected to it are of high relevance in Luxembourg.

[4] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

1.2. Scope and Structure of the Legal Opinion

Against this background the legal opinion will focus on Article 2 AVMSD in its historical dimension but with a focus on the most recent changes.[5] It will present the findings based on the following structure:

Firstly, the relevant legislative framework will be presented. This will be done in several steps. First, the currently applicable Directive 2010/13/EU – which codified the Directive 89/552/EEC[6] including all changes made by the Directives 97/36/EC[7] and 2007/65/EC[8] – will be compared to the changes in Article 2 brought by Directive (EU) 2018/1808. The newly inserted definition in Article 1 paragraph 1 lit. bb) concerning "editorial decision" is presented as it was first proposed by the European Parliament in the legislative process – the Commission had not foreseen such a provision in its Proposal of 2016[9] – in comparison to the final version as in Directive 2018/1808. After this, in order to be able to analyse whether the discussion about the Commission proposal for Article 2 gives additional perspectives on the interpretation of the provision the original proposal is compared to the positions of the European Parliament and Council of the EU as they were decided to enter the trilogue. To allow a historical interpretation, subsequently the development of the provision between 1989 and 2018 is illustrated by comparison of the Directive's versions. Because the codified version of the Directive 2010/13/EU only summarises the recitals of all three previous versions, the relevant recitals are mentioned too.

The TwFD was prepared in the then European Economic Community in parallel to the drafting of a convention in the Council of Europe. The latter was eventually

5 Overview of the overall changes by Directive (EU) 2018/1808 *Weinand*, UFITA 1/2018, 260 et seq. and *Kogler*, K&R 9/2018, 537.

6 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, p. 23–30.

7 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC 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 202, 30.7.1997, p. 60–70.

8 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC 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 332, 18.12.2007, p. 27–45.

9 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, Procedure 2016/0151/COD.

opened for signature as the "European Convention on Transfrontier Television"[10] and was ratified until December 2018 by 34 States, of which 20 are EU Member States.[11] It was drafted in the same way as the Directive for many parts and also amended in 1998 by ETS No. 171 (entering into force on 1 March 2002). A further reform proposal following the path of the 2007/65/EC-Directive was prepared at the Council of Europe but negotiations came to a halt when the European Commission indicated to the EU Members States that for competency reasons they would no longer be able to negotiate such an international treaty in the field already covered by the AVMSD. Nonetheless, it is worth showing for further comparison in what way the jurisdiction question was defined in the Convention which continues to be applicable for the ratifying States.

Secondly, the individual criteria to define establishment according to Article 2 (3) as well as the ancillary "satellite-use" criteria of Article 2(4) are discussed in detail in the way they are applicable under Directive 2010/13/EU. It also discusses the other elements of Article 2.

Thirdly, the development of the provision in Directive (EU) 2018/1808 is presented from the original proposal of the Commission to the final wording. This includes the newly inserted definition of "editorial decision" in Article 1.

Finally, in a conclusion the result for the future application of the jurisdiction criteria is summarized.

10 European Convention on Transfrontier Television, European Treaty Series - No. 132.
11 Cf. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132.

2. Applicable Rules for the Country of Origin-Principle

2.1. The EU Audiovisual Media Services Directive

The relevant set of rules that define the country of origin-principle and the home state jurisdiction stem from Article 2 AVMSD.

In a first overview the currently applicable provision as it was codified in Directive 2010/13/EU after the last change by Directive 2007/65/EC will be presented in comparison to the future formulation after the Amending Directive of 2018 will have entered into force. Based on the Commission's proposal of 2016, the amendments of the European Parliament and the general approach of the Council of May 2017, the trilogue was completed in June 2018. The Council confirmed to the European Parliament in a letter dated 13 June 2018[12] the version of the agreement reached in the informal trilogue between Commission, European Parliament and Council. After linguistic revision the Amending Directive was published as Directive 2018/1808 in the Official Journal of the European Union on 28 November 2018.[13] It will enter into force on 18 December 2018 and the 21-month transposition period for the EU Member States will end on 19 September 2020.

In order to be able to refer to the discussions around the country of origin-principle during the negotiation period – although there was only a minor change concerning this provision in the final agreement– in the following tables an overview can be

12 Available at http://www.europarl.europa.eu/RegData/commissions/cult/lcag/2018/06-13/CULT_LA(2018)005158_EN.pdf.

13 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1543826604342&uri=CELEX:32018L1808.

found between the Commission's original reform proposal of 2016[14] and the position of the EP[15] and the Council[16] before entering the trilogue period.[17]

In addition to the (relevant parts of the) provision of Article 2, further below the additional new insertion to the AVMSD that needs to be analysed in the next parts of this study will be presented. It concerns an additional element of the definitions in Article 1 and it was only entered into the negotiations by the EP, as the Commission had not originally proposed such a change to Article 1.

As the interpretation in this report will also analyse the future meaning of the country of origin-principle in the light of its historical development another part will present the evolution of the Directive's provisions from the original Directive 89/552/EEC via the 97/36/EC and 2007/65/EC versions until the version of today. This overview will include the accompanying recitals that shed additional light on the interpretation of the provision.

2.1.1. Article 2 AVMSD in the current and future version

The following table compares Article 2 AVMSD with the amendments as foreseen in Directive (EU) 2018/1808. As will be seen the substantive parts of the rule – what the country of origin-principle means and how the relevant country is to be identified – remain nearly completely unchanged (paras. 1 to 4) but for a small change in para. 3 (b). Beyond that, some additional paragraphs (5a to 5c) have been inserted that lay down new rules concerning procedural aspects around the determination

14 Proposal of the European Commission 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, 2016/0151(COD), available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0287&from=EN.

15 Amendments of the European Parliament 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, as of 10 May 2017, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BREPORT%2BA8-2017-0192%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN#title8.

16 General Approach of the Council 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 (First reading) as of 24 May 2017, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.

17 For an overview of the whole reform process cf. the AVMSD synopsis of the Institute of European Media Law, available at https://emr-sb.de/gb/synopsis-avms/.

and transparency of the competent State having jurisdiction over a specific provider.

Directive 2010/2013/EU	Directive (EU) 2018/1808
1. 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.	1. 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
2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following: (a) those established in that Member State in accordance with paragraph 3; (b) those to whom paragraph 4 applies.	2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following: (a) those established in that Member State in accordance with paragraph 3; (b) those to whom paragraph 4 applies.
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:	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;	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, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the 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 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;	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	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 the pursuit of the audiovisual media service activity operates in that Member State.	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 the pursuit of the audiovisual media service activity operates in that Member State.
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.	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.
5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that 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.	5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that 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.
	5a. Member States shall ensure that media service providers inform the competent national regulatory authorities or bodies about any changes that may affect the determination of jurisdiction in accordance with paragraphs 2, 3 and 4.
	5b. Member States shall establish and maintain an up-to-date list of the media service providers under their jurisdiction and indicate on which of the criteria set out in paragraphs 2 to 5 their jurisdiction is based. Member States shall communicate that list, including any updates thereto, to the Commission. The Commission shall ensure that such lists are made available in a centralised database. In the event of inconsistencies between the lists, the Commission shall contact the Member States concerned in order to find a solution. The Commission shall ensure that the national regulatory authorities or bodies have access to that database. The Commission shall make information in the database publicly available.
	5c. Where, in applying Article 3 or 4, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request the European Regulators Group for Audiovisual Media Services (ERGA) to provide an opinion on the matter in accordance with point (d) of Article 30b(3). ERGA shall provide such an opinion within 15 working days from the submission of the Commission's request. The Commission shall keep the Contact Committee established by Article 29 duly

	informed. When the Commission adopts a decision pursuant to Article 3(2) or (3), or Article 4(5), it shall also decide which Member State has jurisdiction.
6. This 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.	6. This 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.

2.1.2. Additional insertion of definition element in Article 1 AVMSD

In the initial proposal of the Commission there was no suggestion to add a definition of "editorial decision". The European Parliament introduced it and the trilogue confirmed it, but in a significantly changed version. The Council's initial position to add some wording to Article 2 was replaced by this new definition.

Amendments EP	**Directive (EU) 2018/1808**
Article 1 (1) (bb) 'editorial decision' means a decision taken on a day-to-day basis for the purpose of exercising editorial responsibility;	Article 1 (1) (bb) 'editorial decision' means a decision which is taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the audiovisual media service;

2.1.3. Article 2 AVMSD: Amendment proposal by Commission and positions of European Parliament and Council

Although the Commission initially suggested some changes to Article 2, at the end it was retained in nearly the same manner as it is currently. Three new subparagraphs were inserted.

Proposal Commission[18]	**Amendments EP**[19]	**General approach Council**[20]

18 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0287&from=EN.

19 Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BREPORT%2BA8-2017-0192%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN#title8.

20 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN.

Article 2	**Article 2**	**Article 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:	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:	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;	(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;	(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken on a regular basis 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, it shall be deemed to be established in the Member State where the majority of the workforce involved in the pursuit of the audiovisual media service activity operates;	(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, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the 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 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	(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken on a regular basis in another Member State, it 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

	State	a stable and effective link with the economy of that Member State
[…]	[…]	[…]
		5-a. Member States shall ensure that media service providers inform the competent national regulatory authorities about any changes that may affect the establishment of jurisdiction in accordance with paragraphs 2, 3 and 4.
5a. Member States shall communicate to the Commission a list of the audiovisual media service providers under their jurisdiction and the criteria set out in paragraphs 2 to 5 on which their jurisdiction is based. They shall subsequently inform the Commission without undue delay of any changes to that list. The Commission shall ensure that the competent independent regulatory authorities have access to this information.	5a. Member States shall maintain a list of the audiovisual media service providers under their jurisdiction and the criteria set out in paragraphs 2 to 5 on which their jurisdiction is based. This list shall also include information on Member States, to which audiovisual media service is made available and language versions of the service. Member States shall ensure that regulatory authorities and / or bodies share such lists with the Commission and ERGA, in a central database and make it publicly available. These lists shall be updated, without undue delay, whenever changes occur.	5a. Member States shall establish and maintain an up-to-date list of the audiovisual media service providers under their jurisdiction and indicate on which criteria set out in paragraphs 2 to 5 … their jurisdiction is based. Member States shall communicate this list, including any updates, to the Commission. In case of inconsistencies between the lists, the Commission shall contact the Member States concerned in order to find a solution. The Commission shall ensure that the national regulatory authorities have access to this list. To the extent possible, the Commission shall make this information publicly available.
5b. Where, in applying Articles 3 and 4 of this Directive, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request the European Regulators Group for Audiovisual Media Services (ERGA) to provide an opinion on the matter within 15 working days from submission of the Commission's request. If the Commission requests an opinion from ERGA, the time-	5b. Where, in applying Articles 3 and 4 of this Directive, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request that the European Regulators Group for Audiovisual Media Services (ERGA) provide an opinion on the matter within 15 working days from submission of the Commission's request. The opinion of ERGA shall also be sent to the contact committee.	5b. Where, in applying Articles 3 and 4 of this Directive, the Member States concerned do not agree on which Member State has jurisdiction, they shall bring the matter to the Commission's attention without undue delay. The Commission may request the European Regulators Group for Audiovisual Media Services (ERGA) to provide an opinion in accordance with Article 30a(3)(e) on the matter within 15 working days from submission of the Commission's request. The Commission shall

limits set out in Articles 3(5) and 4(5) shall be suspended until ERGA has adopted an opinion. […]	If the Commission requests an opinion from ERGA, the time-limits set out in Articles 3(5) and 4(5) shall be suspended until ERGA has adopted an opinion. The Commission shall decide on which Member State has jurisdiction following the request of the Member State concerned or (following) the opinion provided by ERGA. […]	keep the Contact Committee duly informed. […]

2.1.4. Evolution of Article 2 from TwFD 1989 to AVMSD 2007

The following table compares the versions of Article 2 as it was included in the Directive's versions of 1989, 1997 and 2007. The major change in 1997 was result of a codification of CJEU case law because it had become evident that the provision in the 1989 version was not sufficient to give guidance in case of controversies. In 2007 there was only a minor change apart from the fact that it was adapted to cover all audiovisual media service providers under the scope of the Directive.

AVMSD 1989	AVMSD 1997	AVMSD 2007
1. Each Member State shall ensure that all television broadcasts transmitted - by broadcasters under its jurisdiction, or - by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State, comply with the law applicable to broadcasts intended for the public in that Member State.	1. Each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction ___ comply with the rules of the system of law applicable to broadcasts intended for the public in that Member State.	1. 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.
2. Member States shall […][21]	2. For the purposes of this Directive the broadcasters under the jurisdiction of a Member State are:	2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State

21 This provision concerned freedom of reception and was moved to Article 3 in the 1997 revision so needs not be displayed in this synopsis.

	- those established in that Member State in accordance with paragraph 3; - those to whom paragraph 4 applies.	are those: (a) established in that Member State in accordance with paragraph 3; or (b) to whom paragraph 4 applies.
	3. For the purposes of this Directive, a broadcaster shall be deemed to be established in a Member State in the following cases:	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 broadcaster has its head office in that Member State and the editorial decisions about programme schedules are taken in that Member State;	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 broadcaster has its head office in one Member State but editorial decisions on programme schedules are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Member States, the broadcaster 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 television broadcasting activity operates in neither of those Member States, the broadcaster shall be deemed to be established in the Member State where it first began broadcasting in accordance with the system of law of that Member State, provided that it maintains a stable and effective link with the economy of 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, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the 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 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 broadcaster has its head office in a Member State but decisions on programme	c) if a media service provider has its head office in a Member State but decisions on the

	schedules 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 the pursuit of the television broadcasting activity operates in that Member State.	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 the pursuit of the audiovisual media service activity operates in that Member State.
	4. Broadcasters 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 frequency granted by that Member State; (b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State; (c) although they use neither a frequency granted by a Member State nor a satellite capacity appertaining to a Member State they do use a satellite up-link situated in that Member State.	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.
	5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the broadcaster is established within the meaning of Articles 52 and following of the Treaty establishing the European Community.	5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 43 to 48 of the Treaty.
3. This Directive shall not apply to broadcasts intended exclusively for reception in States other than Member States, and which are not received directly or indirectly in one or more Member States.	6. This Directive shall not apply to broadcasts intended exclusively for reception in third countries, and which are not received directly or indirectly by the public in one or more Member States.	6. This 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.

2.1.5. The relevant recitals from TwFD 1989 to AVMSD 2018

In the following the recitals accompanying Article 2 in the different versions of the Directive are listed. These include the recitals to Directive (EU) 2018/1808.

AVMSD 1989[22]

Whereas it is consequently necessary and sufficient that all broadcasts comply with the law of Member State from which they emanate; […]

Whereas it is necessary, in the common market, that all broadcasts emanating from and intended for reception within the Community and in particular those intended for reception in another Member State, should respect the law of the originating Member State applicable to broadcasts intended for reception by the public in that Member State and the provisions of this Directive;

Whereas the requirement that the originating Member State should verify that broadcasts comply with national law as coordinated by this Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same grounds in the receiving Member States; whereas, however, the receiving Member State may, exceptionally and under specific conditions provisionally suspend the retransmission of televised broadcasts;

AVMSD 1997[23]

(10) Whereas the application of Directive 89/552/EEC has revealed the need to clarify the concept of jurisdiction as applied specifically to the audiovisual sector; whereas, in view of the case law of the Court of Justice of the European Communities, the establishment criterion should be made the principal criterion determining the jurisdiction of a particular Member State;

(11) Whereas the concept of establishment, according to the criteria laid down by the Court of Justice in its judgment of 25 July 1991 in the Factortame case (5), involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period;

(12) Whereas the establishment of a television broadcasting organization may be determined by a series of practical criteria such as the location of the head office of the provider of services, the place where decisions on programming policy are usually taken, the place where the programme to be broadcast to the public is finally mixed and processed, and the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located;

(13) Whereas the fixing of a series of practical criteria is designed to determine by an exhaustive procedure that one Member State and one only has jurisdiction over a broadcaster in connection with the provision of the services which this Directive addresses; nevertheless, taking into account the case law of the Court of Justice and so as to avoid cases where there is a vacuum of jurisdiction it is appropriate to refer to the criterion of establishment within the meaning of Articles 52 and following

22 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, p. 23–30.

23 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities Official Journal L 202, 30.07.1997 P. 0060 – 0070.

of the Treaty establishing the European Community as the final criterion determining the jurisdiction of a Member State;

AVMSD 2007[24]

(7) Legal uncertainty and a non-level playing-field exist for European companies delivering audiovisual media services as regards the legal regime governing emerging on-demand audiovisual media services. It is therefore necessary, in order to avoid distortions of competition, to improve legal certainty, to help complete the internal market and to facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services). The basic principles of Directive 89/552/EEC, namely the country of origin principle and common minimum standards, have proved their worth and should therefore be retained.

(27) The country of origin principle should remain the core of this Directive, as it is essential for the creation of an internal market. This principle should therefore be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.

(28) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the European Union, only one Member State should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the European Union.

(29) Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation and to give players genuine power over the content of an audiovisual media service.

(30) As this Directive concerns services offered to the general public in the European Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment. The definition of 'standard consumer equipment' should be left to the competent national authorities.

(31) Articles 43 to 48 of the Treaty lay down the fundamental right to freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasised that 'the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established' (17).

(32) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Community law. In order to deal with 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, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case-law of the Court of Justice (18), combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The notion of rules of general public interest has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and includes, inter alia, rules on the protection of consumers, the protection of minors and cultural policy. The Member State

[24] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC 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 332, 18.12.2007, p. 27–45.

requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner, and proportionate.

(33) A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, 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.

(34) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions and following the procedure laid down in this Directive. However, 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 (19).

AVMSD 2018[25]

(7) In order to ensure the effective implementation of Directive 2010/13/EU, it is crucial that Member States establish and maintain up-to-date records of the media service providers and video-sharing platform providers under their jurisdiction and that they regularly share those records with their competent independent regulatory authorities or bodies and the Commission. Those records should include information about the criteria on which jurisdiction is based.

(8) Establishing jurisdiction requires an assessment of factual situations against the criteria laid down in Directive 2010/13/EU. The assessment of such factual situations might lead to conflicting results. In applying the cooperation procedures provided for in that Directive, it is important that the Commission can base its findings on reliable facts. The European Regulators Group for Audiovisual Media Services (ERGA) should therefore be empowered to provide opinions on jurisdiction upon the Commission's request. Where the Commission, in applying those cooperation procedures, decides to consult ERGA, it should inform the Contact Committee, including about notifications received from Member States under those cooperation procedures and about ERGA's opinion.

(9) The procedures and conditions for restricting freedom to provide and receive audiovisual media services should be the same for both linear and non-linear services.

(10) In accordance with the case-law of the Court of Justice of the European Union (the 'Court'), it is possible to restrict the freedom to provide services guaranteed under the Treaty for overriding reasons in the general public interest, such as obtaining a high level of consumer protection, provided that such restrictions are justified, proportionate and necessary. Therefore, a Member State should be able to take certain measures to ensure respect for its consumer protection rules which do not fall in the fields coordinated by Directive 2010/13/EU. Measures taken by a Member State to enforce its national consumer protection regime, including in relation to gambling advertising, would need to be justified, proportionate to the objective pursued, and necessary as required under the Court's case-law. In any event, a receiving Member State must not take any measures which would prevent the re-transmission, in its territory, of television broadcasts coming from another Member State.

(11) A Member State, when notifying the Commission that a media service provider has established itself in the Member State having jurisdiction in order to circumvent the stricter rules in the fields coordinated by Directive 2010/13/EU, which would be applicable to that provider if it were established in the notifying Member State, should adduce credible and duly substantiated evidence to that effect. Such evidence should detail a set of corroborating facts allowing for such circumvention to be reasonably established.

25 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

2.2. The Council of Europe's Convention on Transfrontier Television

To give a complete overview, in addition the Council of Europe's Convention on Transfrontier Television is presented.

2.2.1. The provision of Article 5 CTT in the current version

Article 5 – Duties of the transmitting Parties

1 Each transmitting Party shall ensure that all programme services transmitted by broadcasters within[26] its jurisdiction comply with the terms of this Convention.

2 For the purposes of this Convention, a broadcaster within the jurisdiction of a Party is:

– a broadcaster who is deemed to be established in that Party according to paragraph 3;

– a broadcaster to whom paragraph 4 applies.

3 For the purpose of this Convention, a broadcaster shall be deemed to be established in a Party, hereinafter referred to as "transmitting Party" in the following cases:

a the broadcaster has its head office in that Party and the decisions on programme schedules are taken in that Party;

b if a broadcaster has its head office in one Party but decisions on programme schedules are taken in another Party, it shall be deemed to be established in the Party where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of those Parties, the broadcaster shall be deemed to be established in the Party where it has its head office; if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in neither of those Parties, the broadcaster shall be deemed to be established in the Party where it first began broadcasting in accordance with the system of law of that Party, provided that it maintains a stable and effective link with the economy of that Party;

c if a broadcaster has its head office in a Party but decisions on programme schedules are taken in a State which is not Party to this Convention, or vice-versa, it shall be deemed to be established in the Party concerned, provided that a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Party;

d if, when applying the criteria of paragraph 3 of Article 2 of Directive 97/36/EC of the European Parliament and of the Council of 19 June 1997 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in member States concerning the pursuit of television broadcasting activities, a broadcaster is deemed to be established in a member State of the European Community, that broadcaster shall also be deemed to be established in that State for the purposes of this Convention.

4 A broadcaster to whom the provisions of paragraph 3 are not applicable is deemed to be within the jurisdiction of a Party, so-called transmitting Party, in the following cases:

a it uses a frequency granted by that Party;

b although it does not use a frequency granted by a Party it does use a satellite capacity appertaining to that Party;

c although it uses neither a frequency granted by a Party nor a satellite capacity appertaining to a Party it does use a satellite up-link situated in that Party.

26 In the AVMSD „within" is used as „under".

5 If the transmitting Party cannot be determined according to paragraph 4, the Standing Committee shall consider this issue according to Article 21, paragraph 1a, of this Convention, in order to determine this Party.

6 This Convention shall not apply to television broadcasts intended exclusively for reception in States which are not Party to this Convention, and which are not received directly or indirectly by the public in one or more Parties.

2.2.2. The Explanatory Report

The Convention is accompanied by an Explanatory Report from which the relevant excerpts are included here.[27]

IVb. Main features of the amending Protocol

[g. Jurisdiction]

60. In order to ensure a coherent approach to the regulation of transfrontier television programme services at the European level and, in particular, to avoid possible problems in determining the competence of States with regard to such services, the criteria concerning jurisdiction which appeared in the original text of the Convention were revised so as to be consistent with those of the revised Directive.

61. The establishment criterion was chosen as the primary criterion for determining the jurisdiction of a particular contracting Party.

V. Comments on the provisions of the Convention

Article 5 – Duties of the transmitting Parties

Paragraph 2

131. This paragraph sets out the criteria for establishing the competence of a Party vis-à-vis a television broadcasting organisation for the purposes of the Convention.

132. According to paragraph 2, two hypotheses are enumerated for determining the competence of a Party vis-à-vis a television broadcasting organisation. They are designed to avoid, as far as possible, any circumvention of the provisions of the Convention.

133. Paragraph 2, first indent, lays down the general principle whereby the transmitting Party is the Party in which a television broadcasting organisation is established, on the basis of and in accordance with the criteria set out in paragraph 3 to determine such establishment. The pre-eminence given to the criteria of establishment is aimed at ensuring that the competent Party with regard to a television broadcasting organisation is the Party in which the operation of such an organisation is actually carried out, in order to avoid the possible circumvention mentioned above.

134. In the event that the competence of a Party cannot be defined on the basis of the principle of establishment in accordance with the criteria of paragraph 3, the second indent of paragraph 2 sets out an ancillary rule for determining the competence of the Parties by indicating that they assume the role of transmitting Party vis-à-vis those services to which paragraph 4 applies.

Paragraph 3

135. This paragraph determines a chain of criteria to determine whether a television broadcasting organisation is established, within the meaning of paragraph 2, in a given Party. As indicated above, the objective of these cascading criteria is to ensure that the competent Party is the Party in which the activities of a television broadcasting organisation are carried out, given the fact that such organisations may split up their activities between several States.

[27] Full version of the Explanatory Report is available at https://rm.coe.int/16800cb348.

136. Paragraph 3(a) covers the situation, in principle the most common, in which a television broadcasting organisation has its head office in a Party and where the editorial decisions on programme schedules are taken in that Party. In such a case, the organisation concerned clearly falls within the competence of that Party, in so far as the decisions concerning the most important activities related to management and programming matters are taken on the territory of that Party.

137. However, it may arise in certain cases that a television broadcasting organisation has its head office in one Party, while editorial decisions on programme schedules are taken in another Party. In such a situation, paragraph 3(b) provides that this organisation is deemed to be established in the Party where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates, given that this provides considerable material evidence of the place where the broadcasting activity is effectively carried out.

138. There may be, however, cases where a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in each of the Parties, or in neither of those Parties. This situation may make it more difficult to determine the place of establishment. In the first case, paragraph 3(b) again uses the criterion of the head office to determine the competent Party. In the second case, the television broadcasting organisation is deemed to be established in the Party where it first began broadcasting in accordance with the law of that Party, provided that it maintains a stable and effective link with the economy of that Party.

139. A last situation concerns the hypothesis in which a television broadcasting organisation has its head office in a Party, but editorial decisions on programmes schedules are taken in a State which is not Party to the Convention, or vice-versa. In such a case, paragraph 3(c) provides that such an organisation will be deemed to be established in the Party concerned if a significant part of the workforce involved in the pursuit of the television broadcasting activity operates in that Party.

140. It should be noted that the alignment of the criteria for establishing jurisdiction in the Convention with those in the revised Directive does not exclude that marginal problems of conflict of jurisdiction may arise in the context of the implementation of the two instruments as long as some member States of the European Community have not become Parties to the Convention and Parties to the Convention have not become members of the European Community. In the course of the revision of the Convention, the Standing Committee noted that a solution to such conflicts might be to introduce in the Convention a special provision in order to avoid that, as a result of the simultaneous application of the criteria of Article 5, paragraph 3 of the amended Convention and of Article 2, paragraph 3 of the revised Directive, two States would assume jurisdiction at the same time and in respect of the same broadcaster. To this end, Article 3(d) provides that if a broadcaster is deemed to be established in a member State of the European Community, when applying the criteria of paragraph 3 of Article 2 of the revised Directive, that broadcaster shall also be deemed to be established in that State for the purposes of the Convention. In the case where conflicts of jurisdiction cannot be resolved, despite of the application of paragraph 3 (d) of Article 5, a solution should be sought by the bodies responsible for supervising the implementation of the amended Convention and the revised Directive.

Paragraph 4

141. It may be the case that the application of the cascading criteria set out in paragraph 3 does not make it possible to determine that a television broadcasting organisation is established in a Party within the meaning of paragraph 2. In such a case, the ancillary rule laid down in paragraph 4 has to be examined to settle the question of the competence of the Parties. As for the rule concerning establishment, paragraph 4 provides for a chain of criteria based on the means used for the transmission of the programme service or services of the television broadcasting organisation. These criteria are the use of a frequency granted by a Party or, failing this, the use of a satellite capacity appertaining to a Party or, if the two aforementioned means are not used, the use of a satellite uplink situated in that Party.

Paragraph 5

142. Should the ancillary rule provided for under paragraph 4 not make it possible to determine the transmitting Party, paragraph 5 provides that the Standing Committee shall consider the issue according to Article 21 of the Convention in order to determine this Party. On this issue, Article 5 of the Convention departs from the solution retained in Article 2, paragraph 5, of the revised Directive which provides, as an ultimate criterion for determining competence, that "the competent Member

State shall be that in which the broadcaster is established within the meaning of Articles 52 and following of the Treaty establishing the European Community". Although this criterion shall, under Article 27, paragraph 1 of the Convention, apply to those Member States of the European Community which are Parties to the Convention, it cannot, on the other hand, be used in the direct relationship between Member States and non-Member States of the European Community, as well as in the relationship existing only between these non-Member States.

2.2.3. Relevance of the Convention for jurisdiction

Not only because the Convention was drafted in parallel to the Directive it could be source for comparative interpretation. It also included already in its first version a provision about duties of the Convention Parties from which territory broadcast signals emanated. The initial formulation of Article 5 in combination with Article 3 was very much related to the technical process of dissemination and consequently referred to terrestrial and satellite broadcasting technology and only as a solution of last resort the seat of the broadcaster was supposed to be taken into account. In that way it had a different approach and it could have been interesting to see why the formulations about jurisdiction differed initially. However, the CJEU in a judgment concerning jurisdiction criteria under the original TwFD 1989 explicitly rejected the arguments of one of the parties to the proceedings that wanted to rely on the Convention for interpretation of the Directive's provisions.[28] The Court pointed out the differences between the Convention and the Directive mentioning inter alia their different aims[29] which is why the Convention could not be used for interpretation. In addition, in the relationship between Parties of the Convention that are EU Member States the rules stemming from EU law shall be applicable and the Convention shall only be applied where there are no rules under EU law (Article 27 (1)).

With the amending protocol, the Convention's jurisdiction approach was brought in line with Directive 97/36/EC. Since then, establishment according to Article 5 (3) lit. a) is based on head office and main decisions. These decisions are – in accordance with the Directive 97/36/EC – differently formulated than in Directive 2010/13/EU and concern "decisions on programme schedules". This is a quite precise description on one type of decisions that are relevant: they concern the programme's "look", not individual day-to-day decisions about programme elements.

The further alternatives of the provision are equal to what is in Directive 2018/1808/EU with the difference that it is limited to broadcasting. Article 5 (2) lit.

28 CJEU, Case C-222/94, Commission v UK para. 49 et seq.; for background also *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', p. 174 et seq.

29 The Court stated, that whereas the Directive is designed to establish the internal market in television services, the Convention, is designed to facilitate the transfrontier transmission and retransmission of television programme services, para.49.

d) of the Convention lays down a specific rule that (beyond the general reference to the Directive in Article 27) jurisdiction decisions according to the Directive shall preempt the allocation under the Convention, too. The subsidiary technical criteria of the Convention, which were shifted in 1997, still include the use of frequencies and have not swapped the order between satellite capacity and satellite uplink as was the case for the Directive 2007/65/EC. This deviation is due to the fact that an attempt to adapt the Convention another time to bring it in line with the AVMSD came to a halt when the Commission decided that Member States could not continue to negotiate on the topic matter as it was the competency of the EU to do so.[30] With this development the use of the Convention for comparative interpretation concerning the Directive 2018/1808/EU is limited.

[30] Cf. *Weinand*, Implementing the EU Audiovisual Media Services Directive, p. 127 et seq.

3. Elements establishing jurisdiction according to Article 2 AVMSD 2010/13/EU

3.1. Overview and Structure of provision

As mentioned above in the background to the study, Article 2 AVMSD is the foundation for the AVMSD as it lays down the country of origin-principle and gives the criteria to define jurisdiction over providers of audiovisual media services.[31] The basic starting point is that for each provider there should only be one Member State competent to regulate, i.e. have jurisdiction, and this 'one-stop-shop principle' should facilitate the making use of cross-border transmission of content while avoiding conflicts and legal uncertainty resulting from double or even multiple jurisdiction claims by two or several Member States over one provider.[32]

3.1.1. The obligation to ensure compliance by providers

Article 2 first lays down the reason for its existence: as the AVMSD gives providers the privilege to be able to disseminate across borders as long as they are compliant with the applicable legal framework in one Member State – their state of jurisdiction –, these States are obliged by the provision to ensure that the providers act in accordance with the laws. The provision does not merely explain which Member State has jurisdiction over a service provider by giving the criteria to be applied to each case. It rather states the obligation of Member States that are competent due to the assignment of jurisdiction criteria to ensure that all such service providers

31 Background and generally on the principle and provision: *Cole*, The Country of Origin Principle – From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union, p. 113-129; *Cole/Ukrow/Etteldorf*, Audiovisual Sector and Brexit: the Regulatory Environment, p. 26 et seq.; *Cole*, Medienrechtliches Sekundärrecht der EG, Das Sendestaatsprinzip, para. 61; *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), paras.1-63 ; *Faßbender*, AfP 2006, p. 505-512; *Gibbons*, Jurisdiction over (Television) Broadcasters, Criteria for Defining „Broadcaster" and „Content Service Provider", p. 53-60; *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', p.173-193; *Herold*, Journal of Consumer Policy, 2008 vol. 31, p.5-24; *Hörnle*, International & Comparative Law Quarterly, 2005 vol. 54(1), p.89-126; *Kramer*, Das sekundärrechtliche Herkunftslandprinzip als Regelungstechnik des Binnenmarktes; *McGonagle/Van Loon*, Iris Special: Jurisdiction over Broadcasters in Europe; *Wagner*, Journal of Media Law no. 06/2014, p. 286-304; *Weinand*, Implementing the EU Audiovisual Media Services Directive, p. 96 et seq.; *Woods*, Jurisdiction in the Television without Frontiers Directive, p. 145-163.

32 *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', p.173; *Woods*, Jurisdiction in the Television without Frontiers Directive, p.145. Cf. also CJEU, Judgment of 4 September 2018, C-244, 245/10, Mesopotamia Broadcast A/S METV and Roj TV A/S v Federal Republic of Germany, paras. 21, 45; on this decision *Cole*, RDTI 2012, p. 50 et seq.

"comply with the rules of the system of law applicable" to such services that are "intended for the public in that Member State". It therefore is an obligation for the Member States to be active. The motive of having criteria establishing jurisdiction over a specific type of service provider is to make sure that no provider that qualifies as being within the scope of the AVMSD falls in a "gap" by not having a Member State competent to it. This was already made clear in the recitals of the very first Directive: "Whereas it is consequently necessary and sufficient that *all* broadcasts comply with the law of Member State from which they emanate" [*emphasis added*].[33]

3.1.2. The relevance of the circumvention procedure

A further indication of this underlying motivation is the introduction of "circumvention procedures". These include on the one hand temporary derogations from the obligation of Member States to ensure freedom of retransmission and reception of "incoming services" in Article 3 and the procedure for replacement of jurisdiction in case of circumvention of stricter rules in one Member State in Article 4. It shall be avoided that the link between the Member State that is competent and the providers under its jurisdiction loses relevance either because the State (through its national regulatory authorities) or the provider by its behaviour does not comply with the rules of the Directive and the national law.

In order to avoid a situation that was regarded as abusive use of the freedom of establishment or the country of origin-principle as laid down in the Directive, Article 4 serves as a backstop in cases when a provider has relocated to another Member State in order to avoid having to comply with stricter rules that this Member State has enacted while targeting mainly the territory of that Member State.[34] Differently put, the AVMSD includes a limitation to the country of origin-principle. However, as this constitutes an exception to a (fundamental) freedom it needs to be interpreted narrowly.[35] Because of that reason, the target Member State can only assume jurisdiction after a multi-step and lengthy procedure involving the home Member State of the provider and the Commission. Nonetheless, the circumvention procedure has potential tension with the country of origin-principle.[36] Because of

33 Cf. Council Directive 89/552/EEC; also Recital 13 Directive 97/36/EC in explaining the introduction of the reference to the services provision in the Treaty as fallback clause in order to avoid "cases where there is a vacuum of jurisdiction".

34 Cf. in more detail *Cole*, The Country of Origin Principle – From State Sovereignty under Public International Law to Inclusion in the Audiovisual Media Services Directive of the European Union, p.120; *Herold*, Journal of Consumer Policy, 31, p.6.

35 Cf. Recital 43 of Directive 2010/13/EU and CJEU Case C-6/98 ARD/Pro Sieben; on this *Cole/Haus,* JuS 2001, 435 et seq.; overview also in *Doukas*, The EU Media Market and the interplay between the legislature and the judiciary, p. 147, 155.

36 *Sorensen*, The Country-of-Origin Principle and balancing jurisdiction between home Member States and host Member State, rightly points this out and explains that this

the link with the freedom of establishment in light of the CJEU case law, it is not surprising that the use of the procedure has been rare. The Commission sets a high threshold for evidence about a circumvention as it needs to be clearly distinguished from a "simple" use of the right to decide on establishment and profit from the country of origin-principle which the Directive grants providers.[37]

3.1.3. The different criteria and their development

The provision sets as the standard case to decide on jurisdiction the criterion of the establishment of the provider.[38] This is defined in paragraph 3 and contains a number of constellations reflecting that many media companies offering television (or today audiovisual media services) are multi-territorial in their activity and sometimes also in their company structure. If establishment is not clear by seat there is a reliance on the relevant workforce's location and under certain circumstances it then depends on the place of first activity of the provider (in accordance with the law of the relevant Member State).

Only for situations in which companies operate "within" the EU but without having an establishment according to paragraph 3 a set of ancillary or subsidiary criteria are applicable in paragraph 4. These technical criteria were mainly meant to target the situation of content disseminated on the territory of the EU which had emanated from third countries. In cases where the dissemination infrastructure is located within or attached to a EU Member State it is regarded to be appropriate to be able to apply the rules of the Directive e.g. concerning prohibition of incitement to hatred as a public interest goal. Only in case none of the two constellations is applicable, there is another ancillary establishment criterion laid down in paragraph 5 referring to the Treaty provisions. Finally, paragraph 6 excludes from the scope of the Directive services that are meant for reception outside the EU and cannot be received by standard equipment in an EU Member State.

The first version of the Directive in 1989 did not provide any definition or criteria to determine jurisdiction but simply stated that the Member State was competent for a provider under whose jurisdiction such provider fell. This is not surprising, especially considering that the Directive created a completely new situation in contrast to the previous status quo when cross-border transmission of services had to be evaluated under primary law and, more specifically, freedom to provide

is the reason for the exceptional assumption of jurisdiction only to be applicable after having respected the multi-step and lengthy "circumvention procedure", p. 20.

37 Cf. Commission decision C(2018) 532 final, 31.1.2018, on the Swedish intention to impose a ban on alcohol advertising on two UK broadcasters which was considered as not compatible with EU rules.

38 This is clearly stated in Recital 10 Directive 97/36/EC in light of the CJEU case law: "establishment criterion should be made the principal criterion".

services.[39] This had as a consequence that each receiving Member State could potentially – as long as there was a justification – restrict the retransmission of the signal within its territory. Changing from this situation into a new framework where a Member State had to first clarify that it had jurisdiction before it could take regulatory measures against a provider, it was to be expected that there would be disputes in situations where several Member States claimed responsibility or none. Therefore, the CJEU had to clarify the notion of jurisdiction in a series of cases, which also underlined that the criteria needed to stem from European law in order to ensure a uniform application of the provision.[40] The criteria developed were subsequently included in the Directive with the 1997 revision from which point onwards there was the distinction between the main jurisdiction criteria establishment in the way it is defined in the provision, and the subsidiary technical criteria.

The "series of practical criteria"[41] included are meant to clarify every situation of (unclear) jurisdiction matters.[42] Although in general the idea was that – at least as long as it was television-broadcasting-oriented – the establishment as explained in Article 2 (3) would typically be the seat state which issued the broadcast licence. But this is not an automatic correlation according to the Directive as it does not refer to the licensing procedure as criterion. In the following, the different criteria will therefore be briefly analysed.

3.2. Establishment according to Article 2 (3) AVMSD

Establishment according to Article 2 (3) has two cumulative elements: the head office of the provider (to be located in an EU Member State except in third country

39 *Cole*, Medienrechtliches Sekundärrecht der EG, Das Sendestaatsprinzip, para. 35 et seq.; *Weinand*, Implementing the EU Audiovisual Media Services Directive, p. 57 et seq.

40 Cases C-222/94 Commission of the European Communities v United Kingdom, ECR 1996, p. I-4025, paras.56, 58; C-56/96 VT4 v Vlaamse Gemeenschap, ECR 1997, p. I-3143, paras. 16-18; C-11/95 Commission of the European Communities v Kingdom of Belgium, ECR 1996, p. I-4115, para. 86; C-14/96 Criminal proceedings against Paul Denuit, ECR 1997, p. I-2785, paras. 22, 23. See also *Cole*, The country of origin principle – from state sovereignty under public international law to inclusion in the Audiovisual Media Services Directive of the European Union, p. 122; *Helberger*, ZUM 01/1998, p.50 et seq.
It is noteworthy that the Court in Case C-222/94, para. 49 et seq. did not follow for interpretation reasons what it regarded to be a different approach in Article 5 CTT (in its original form) which determined jurisdiction depending on the technology employed for dissemination.

41 As mentioned in Recital 35 Directive 2010/13/EU.

42 In the words of Recital 13 Directive 97/36/EC: "exhaustive procedure that *one* Member State *and only one*" [*emphasis added*] is competent. Cf. also *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction paras. 29 et seq., suggesting that more criteria could be taken into account.

cases) and the place where editorial decisions about the audiovisual media service are made. There are different constellations how these two elements can play together depending on whether both are located in one Member State, in two different or several Member States or when decision-making takes places outside of the EU.

3.2.1. Head office and editorial decisions in one Member State

The straightforward case is if a service provider operates (mainly) from the territory of one Member State: If there is a "head office" in one Member State and in the same state also the relevant decisions about the media service in question are made, then this State is (obviously) the one holding jurisdiction according to lit. a) of Article 2 (3). Clearly, the situation from when the provision was drafted originally to when it was first subject to contentious proceedings had changed in the sense that not necessarily an operation of a media service was concentrated at one place.[43]

3.2.1.1. *The notion of "head office"*

Although "head office" is not defined in the provision (or in the AVMSD elsewhere) – which is also the case for "editorial decisions" that only was included in Directive 2018/1808/EU (see below) – and therefore could include either the seat of the company, the incorporated head office, as a more formal criterion, or the place where the actual economic activities are pursued, the interpretation given by the CJEU brought clarification. Earlier, not broadcasting-related interpretation of "establishment" (as laid down in the freedom of establishment in the Treaty on the Functioning of the European Union[44]) mentioned the "actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period"[45]. In the first major case interpreting Article 2 of the TwFD 1989 the Court followed the Commission's argument that even without a fixed definition, along this idea of the actual pursuit of the economic activity a solution could be found by "referring to the place in which a broadcaster has the centre of its activities, in particular the place where decisions concerning programme policy are taken and the programmes to be broadcast are finally put together".[46] The idea was to find a

43 *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', p.185.

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

45 CJEU, case C-221/89 The Queen v Secretary of State for Transport, ex parte Factor-tame Ltd and others, para. 20.

46 CJEU, case C-222/94, Commission v UK, para. 58. This was confirmed in CJEU, case C- 56/96, VT4 v Vlaamse Gemeenschap, para 17.

criterion that shows the relevance of the office and a genuine link to the economy of the Member State in which this office is located.[47]

3.2.1.2. *The notion of "editorial decisions"*

This approach was picked up in the 1997 revision of the Directive which mentioned in the Recitals as elements (i.e. only examples for relevant elements) "the location of the head office of the provider of services, the place where decisions on programming policy are usually taken, the place where the programme to be broadcast to the public is finally mixed and processed, and the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located"[48] and amended Article 2 accordingly.

Therefore, head office and relevant decision-making should not be seen as isolated from each other, but considered together. Therefore, even if there are several places at which decisions are taken that have an impact on the service offered, if there is a head office at which such decisions are taken that are of high relevance for the programme such as the "programming (scheduling) policy" (still speaking in the language of when the Directive was TV-only) then that location is decisive for establishment. This is also the case, as the Court not only concerning the freedom of establishment in general, but very specifically also in the interpreting decisions about the TwFD 1989 underlined, if the provider does not offer its (i.e. the concerned) service in that Member State.[49] Moreover, the country of origin-principle in its specific form of the Directive seen together with the general principle of freedom of establishment[50] opens up the possibility for providers to choose their jurisdiction according to their requirements or economic needs / environmental conditions. Reasons for the choice of a specific location can range from the regulatory framework applicable in a specific Member State including the administrative setting to tax reasons, the availability of trained personnel and other conditions.[51]

3.2.1.3. *Result for jurisdiction in case of same location for both elements*

The media service provider, according to the definition in Article 1 (1) d) Directive 2010/13/EU is "the natural or legal person who has editorial responsibility for the

47 Similar indicators mentioned by *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), para. 33.

48 Recital 12 Directive 97/36/EC.

49 CJEU, case C 56/96, VT4 v Vlaamse Gemeenschap, para. 21.

50 CJEU, cases C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen; C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC); C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.

51 Cf. ERGA report on territorial jurisdiction in a converged environment as of 17 May 2016, p. 24 et seq. See also *Cole/Ukrow/Etteldorf*, Audiovisual Sector and Brexit: the Regulatory Environment, p. 27.

choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised", while editorial responsibility according to Article 1 (1) c) is "the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule […] or in a catalogue […]" and does "not necessarily imply any legal liability under national law for the content or the services provided". This means that the company hiring the personnel responsible for the decisions mentioned is the one that needs to be determined for the relevant seat.[52] And if the decisions taken by the staff employed by the company with that seat have the quality of impacting the service in a relevant manner, the combination of both elements brings a conclusive result as to jurisdiction of that Member State on which territory the seat is. As the seat question is provider- and not service-related this includes in principle unique jurisdiction over one provider offering different (types of) services.[53]

3.2.2. Head office and editorial decisions in more than one Member State

The two decisive elements "head office" and "editorial decisions" are of relevance also for the further constellations to be dealt with under Article 2 (3). The second alternative (b) is the splitting of head office and editorial decisions between two Member States. In such a case the decisive criterion shall be a 'numerical' one: without giving any indication on the actual number (ratio), the provision foresees that the "significant part of the workforce", more precisely the one dealing with the "audiovisual media service activity" needs to be ascertained.

3.2.2.1. *The criterion of "significant part" of relevant workforce*

Although "significant part" relates to a numerical element, it is clear that there is no fixed number or percentage of e.g. personal or technical infrastructure of a provider that can be assumed as relevant to pass the threshold. Significant is different from a mathematical majority. This is not only clear from the wording but also because it has been discussed in the past to replace the formulation of "significant" by "majority", not last in the proposal of the Commission in 2016 for a further revision of the Directive.[54] "Significant" has to be seen in connection with the overall workforce, but the significance of the share of persons concerned

52 Cf. also *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), para 17 on the lack of relevance of subsidiaries in this context; although he is critical about the level of precision reached to determine establishment (in 2008) he concludes that the reliance on a broadcasting-specific element ("responsibility for the adoption of programme schedules", para. 33) by CJEU and Commission was extraordinary but understandable and that it did not mean that the decisions about the programming had to be taken "all the time in the boardroom" but that "the centre of decision making" was relevant (para. 38).

53 Conclusion also by *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), para 39.

54 Cf. the Commissions' proposal COM/2016/0287 final, ibid (fn. 14).

depends not only on their number but also on their function, as the provision refers to the activity connected to the service itself. It was discussed early on that "significant" as criterion is meant to avoid situations in which only a small number of any type of workforce members could be decisive in determining jurisdiction.[55]

However, it is necessary to recall that the alternative of lit. b) only comes into play if there is not an identical Member State for seat and editorial decisions (in which case lit. a) is decisive). This means that a large part of the workforce (related to the service activity) could be located in one Member State, but nonetheless another has jurisdiction if the (even few) members of the workforce there take the editorial decisions and it is the head office of the company. Otherwise, in the case of lit. b), the presence of significance needs to be decided on a case-by-case basis taking into consideration the structure of the service provider and the decision-making process for the service. It would contradict the idea of attaching jurisdiction to that part of the provider which has to take responsibility for the main decisions and can be held accountable, if significance would only be seen as a certain share, because then potentially a very large number of staff involved in the content production as an example would be more decisive to determine the Member State in charge of monitoring the service.[56] This result is mirrored by national implementations of the provision which use formulations that indicate a meaning of "essential" rather than significant in a purely numeric sense.[57]

3.2.2.2. *The different divisions of the "significant part" of relevant workforce*

Within Article 2 (3) lit. b) three alternatives are mentioned concerning the significant workforce in the way it was defined above. The *first alternative* is the reason for introducing the notion of "significant workforce": in a case in which editorial decision-making is not at the same place as the head office – and, to recall, only in that case lit. b) becomes relevant – the location of the significant part of the workforce involved decides about the place of establishment.

As the notion "significant part" is not mainly numerical and certainly not whatever form of majority of the workforce, it is possible (and easily conceivable) that there is such a part of the workforce in different places simultaneously. If this is the case, more precisely a significant part is located in the Member State of head office as well as in the Member State of editorial decision-making, the *second alternative* defines establishment. In this case the head office is again the sole decisive

55 Cf. *McGonagle/Van Loon*, Iris Special: Jurisdiction over Broadcasters in Europe, p.13.

56 Other examples of staff that should not be seen as decisive for the overall service even though they might be large in numbers compared to e.g. the management level, are advertising and marketing staff, cf. on this *McGonagle/Van Loon*, Iris Special: Jurisdiction over Broadcasters in Europe, p.13.

57 *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), para. 43. Cf. for the German transposition *Kreile/Hartstein*, in: Hartstein/Ring/Kreile/Dörr/Stettner/Cole/Wagner, HK-RStV, § 1 para 19.

criterion. This underlines the starting point that typically the head office would be regarded as a defining aspect for establishment and that the additional criteria only reflect the specificity of the broadcasting / audiovisual media services context.[58] In combination with the head office, the significant part of the workforce working there in connection with the service activity is regarded as being the (overall) relevant part. It thereby becomes more significant than the part of the workforce in the "editorial decisions-Member State".

The *third alternative* concerns the situation when there is no significant part of the workforce in either of the two Member States with the head office and the place of editorial decisions. In that case, the establishment is deemed to be at the place of the first lawful activity. Typically, in the broadcasting context that is the Member State which issued the licence, in the case of on-demand audiovisual media services the State in which the operation began, which is more clearly visible if that Member State foresees in its law a notification requirement for such types of services on the occasion of entering the market. This alternative for establishment again underlines, indirectly, the significance of a company's head office in the context of jurisdiction, as the head office is usually the place where a service provider's activity began and will remain to be the head office if there was no relocation. The third alternative of lit. b) has a further condition: only if the original attachment to the Member State of first activity is still maintained by a stable and effective link with the economy in that State that Member State can assume jurisdiction instead of the place where a significant part of the workforce is located. Such a link can be determined by a continued presence and integration into the local economy.

3.2.3. Involvement of a third country

The combination of the criteria head office and decision-making is again relevant in Article 2 (3) lit. c), although here the element is only "decisions" in general and not as for the other parts of the provision the "editorial decisions". This reflects the fact that it would be more difficult to determine the type of decisions made at a service provider's office located outside of the EU as that is the case regulated by lit. c). Interestingly this constellation shall be applicable not only if the decision-making takes place outside of the EU whilst the head office of the provider being in an EU Member State, but also "vice versa". This means that irrespective of the head office of a service provider, a share of workforce located within an EU Member State can be sufficient to trigger jurisdiction. However, the workforce part again needs to be significant and related to the media service activity. If that is the case, the Member State in which the workforce operates or alternatively in which the head office is located has jurisdiction. This provision complements the technical criteria set out in Article 2 (3) (see below) in that it tries to open a path to jurisdiction of an EU

58 This is also the result of *Sorensen*, The Country-of-Origin Principle and balancing jurisdiction between home Member States and host Member State, p. 13, even though he first mentions the condition too narrowly as meaning "majority" (see fn. 79).

Member State if physical presence of decision-makers is to be assumed, even though the location of the provider itself may be (possibly deliberately) outside the EU. It is consistent with the assumption under lit. b) that the significant part of the workforce can play the decisive role in split situations between EU Member States, if there is not anyway a sole place of jurisdiction because both head office and editorial decisions are made at the same place (lit. a)).

3.3. Establishment according to Article 2 (4) AVMSD

As mentioned, the criteria of Article 2 (4) are only applicable if paragraph 3 does not lead to a clarification of jurisdiction. The subsidiary criteria are of technical nature and in the AVMSD now are limited to the use of satellite dissemination technology.[59]

3.3.1. The subsidiarity, hierarchical order and unconditional nature of the technical criteria

More specifically, the provision foresees that for non-EU providers, i.e. providers that do not qualify having an establishment in the EU in the way it is defined by paragraph 3, jurisdiction can still be established if either a satellite uplink is used on the territory of a Member State or a satellite capacity appertaining to a Member State. The provision was introduced to ensure that "external" service providers can be obliged by EU law in subjecting them to jurisdiction of a Member State. In that way, the rules and obligations of the AVMSD are applicable although the concerned provider is not physically present on the territory of the EU. The "technical link" is considered to substitute a regular establishment and allows for an efficient enforcement of rules via the satellite operator located on the territory of the Member State.

The provision is only supposed to become applicable in exceptional circumstances and will be limited in application to "satellite states", i.e. Member States from which satellite signals are up-linked or that have granted capacities to satellite operators that use these for dissemination of audiovisual media services. It also is hierarchical in the sense that primarily the place of satellite up-link is to be taken into consideration and only if an up-link exterior to the EU is applied, secondarily the "satellite host state" is the one acting as the bridge to local jurisdiction. It should be mentioned that the order of these technical criteria was changed in the reform of 2007 – where also the criterion of the use of frequencies granted by a Member

[59] As mentioned above, in the CTT the connection to frequencies granted by a State Party to the Convention still exists as was the case in the original TwFD.

State was deleted – as it was assumed that more clarity could be achieved by focusing on the up-link.[60]

Conversely, in the recent reform discussion some Member States suggested that reducing the technical criteria to the satellite capacity only could be a response to situations in which the satellite up-link moves between Member States.[61] In addition it should be highlighted that even with the recent reform – as it left the technical criteria untouched – the technical link is for satellite technology only and no other distribution network.[62] This is due to the fact that satellite technology was the most widely available technology for distribution of audiovisual media services content which by nature of its technology was cross-border and not only limited to small overspill as with terrestrial technology or controllable as in the case of cable network distribution.

Irrespective of potential problems in the application of the technical criteria – e.g. the possible existence of parallel satellite broadcasts of the same service, the potential volatility of up-link locations during a given time period (although there may be contractual reasons that limit frequent changes of the up-link location), the combination of several services in one multiplex which is then transmitted to the satellite operator for use of a transponder by a reseller, etc. – the provision in Article 2 (4) is unconditional. If no other jurisdiction is established, a Member State that has the "technical jurisdiction" either because of up-link or satellite capacity, does not have a choice, but an obligation to assume jurisdiction. Although the provision was clearly foreseen to cover exceptionally cases in which EU legal standards should "reach out" to externally originating content if there is a possibility to enforce it via the satellite operators within the EU, it is not limited in terms of applicability.

Therefore, it is imaginable and – considering the fact that the provision remained unchanged in the 2018 reform – not unlikely that there will be an increasing number of cases to which this constellation applies. In the context of Brexit-discussions the question has been raised whether in case of a "hard Brexit", i.e. a withdrawal of the United Kingdom from EU membership without a follow-up agreement providing for some form of partnership between EU and the UK, service providers located in the UK using satellite up-links in an EU Member State or one of the satellite operators could continue to be included in the legal framework of the AVMSD. This question

60 Cf. further on this and the number of providers concerned *Kogler*, TV (On Demand), p. 82 et seq.; Minutes of the 26th Meeting of the Contact Committee of the Television without Frontiers Directive, Doc CC TVSF (2008) 2, p. 1-2.

61 Cf. comments in ERGA Report on territorial jurisdiction, p. 53 et seq.; an overview of different positions of regulators in application of the technical criteria is on p. 33 et seq.

62 *Dommering*, Article 2 AVMSD (Country of Origin Principle/Jurisdiction), para. 6, speaks (from the perspective of 2008) of it being "useless for Internet" because of its limitation to satellite technology.

has to be answered in the affirmative.[63] Even if the original goal of the provision was different, the wording leaves no room for interpretation to at least in principle include providers covered by these criteria in the jurisdiction of the respective Member States. In practice, it may be more reasonable from the perspective of a service provider to have legal certainty and clarity about jurisdiction by relocating to an EU Member State with its establishment in a post-Brexit scenario. But the satellite-related jurisdiction criteria would allow (to the extent they are applicable to the service of that provider) to have an entry point into the EU market also in terms of the legal framework. While allocation of jurisdiction to Member States concerned is clear, this is much less the case when it comes to the question of enforcement of the rights and obligations of the national applicable law. Although the wording of the provision establishes a Member State obligation to apply "rules of the system of law applicable to audiovisual media services intended for the public in that Member State" (Article 2 (1) AVMSD)[64] the extent of the application of rules may be questionable if there are different categories of media services laid down in the national law.

3.3.2. The connecting factor "satellite up-link"

The applicability of the technical criteria, how they relate to the standard establishment criteria of Article 2 (3) and to each other is more complex as has been shown above. The criteria themselves are straightforward and have therefore never been explained in more detail in any of the recitals (or the Explanatory Report to the CTT).

The up-link refers to the place where the audiovisual media service is handed over to the company that sends the "package" to the satellite from where it can then be down-linked to the individual recipients using a satellite dish for direct-to-home broadcasting or to a cable headend from where it is further disseminated. Typically, the up-link is done by the satellite operator, but this service can also be delegated to other entities. Also, there is no obligatory link between the seat of the satellite operator and the place of up-link. To the contrary, the up-link can take place from anywhere, both within or outside of the EU, as long as the satellite operator has an agreement with the up-linking company to receive the signal. Indeed, it is possible to up-link to a satellite from different places and this could also change for example over the course of a year. In that case, the criterion satellite up-link is easy to confirm on first view, but less clear if there are several options of potentially applicable up-link locations. In practice, this may be less relevant due to contractual

63 Cf. more extensively *Cole/Ukrow/Etteldorf*, Audiovisual Sector and Brexit: the Regulatory Environment, p. 28, 33 et seq., 43 et seq.

64 Cf. on this also *Blasi*, Das Herkunftslandprinzip der Fernseh- und der E-Commerce-Richtlinie, p. 110 et seq.

arrangements that will usually be designed to ensure a stable upload solution and for cost reasons not an accommodation with several parallel up-link possibilities.

The reason for using the up-link location to define jurisdiction (as an ancillary criterion) is obvious: an enforcement measure against a provider that is otherwise not within the reach of an EU Member State, is possible by requesting the up-link provider to react to a measure of the competent State. Enforcement can be problematic if it is directed at individual services that are up-linked in "packages" (multiplexes) with other services not affected by a measure, but technically speaking a reaction is possible.

3.3.3. The connecting factor "satellite capacity"

If the up-link to the satellite takes place outside of the EU there is an alternative technical criteria that can be used. Every satellite in an orbital space is using a capacity that has been accorded to a State under international telecommunications arrangements. If the service uses a satellite operator which is operating its satellite on such an orbital position, then the "host" state (if it is an EU Member State) of the satellite obtains jurisdiction also over the service. This criterion can be applied clearly, too. It is only necessary to find out which satellite operator the service uses and clarify with the operator which satellite is being used as there is a registration for each satellite that shows the "host" state. In order to make this function smoothly in practice it is reasonable from the perspective of these states to oblige "their" satellite operators to notify any audiovisual media service that is being distributed via one of the operator's satellites that are using an orbital space of that state.

3.4. The question of relevance of the general provision on services in the TFEU

Only if jurisdiction cannot be determined according to establishment in Article 2 (3) or by referring subsidiary to the technical criteria of Article 2 (4), the fallback clause of Article 2 (5) can be used. With this alternative it shall be ensured that no lacuna of jurisdiction exists, or in other words, that every provider of audiovisual media services operating from within the EU is covered by the Directive. If no other of the specific criteria help, the general rules of primary law on establishment shall be applied. However, in practice there should not be cases for application of this provision. The rules set out in paragraph 3 are indeed guided by the freedom of establishment as defined in Articles 49 to 55 TFEU and are exactly meant to give the criteria to determine establishment in the sense of primary law in the way it has been concretised in secondary law.[65] The confirmation of freedom of establishment at fallback position confirms that the application of the establishment criteria in paragraph 3 should be made in light of the freedom. In that sense, paragraph 5

[65] Cf. similarly *Dommering*, Article 2 TWFD (Country of Origin Principle/Jurisdiction), para. 63.

with its reference to the freedom of establishment serves as interpretation guideline for paragraph 3. It further confirms the focus that is put on the establishment as main criterion for deciding on jurisdiction as can be seen with the relevance of head office described above.

3.5. National implementation of the jurisdiction criteria

The jurisdiction criteria as presented above, are applicable by the Directive itself. Although a Directive needs to be transposed in national law, Article 2 could be read in a way that it only serves as a clarification between Member States about which is responsible for a specific service provider. However, if one takes a closer look at the transposition situation after Directive 2007/65/EC, the Member States have chosen to explicitly include jurisdiction clauses in their national laws. This can be illustrated by the German example where there was no specific provision reflecting the rules of the AVMSD in the provision on scope of the *Rundfunkstaatsvertrag* (Broadcasting State Treaty between the States that are competent for media law in the federal system) until the Commission requested this to be included and hence § 1 RStV was expanded accordingly.[66] Some only reference the provision of the Directive in parts or completely,[67] others used the method of inserting a provision rephrasing closely the Directive,[68] again other Member States used parts of the provision but changed its wording or structure.[69] In the following some examples shall highlight how the main establishment criteria in Article 2 (3) have been transposed in national law.

Concerning the question of "head office" some Member States have attempted to give further clarification. Latvia, for example, attaches the notion of the head office with the management level of the media service provider concerned (place where the "management board is based"), thus, the head office of a service provider is

66 Cf. *Kreile/Hartstein*, in: Hartstein/Ring/Kreile/Dörr/Stettner/Cole/Wagner, HK-RStV, § 1 para. 1d, 16 et seq.

67 Cf. e.g. Dutch (Art. 1 (2) (1) of the Dutch Mediawet of 2008), Portuguese (Art. 3 (2) of the Portuguese Television and Audiovisual Services on Demand Act), Irish (Art. 3 (1) of the Irish European Communities Audiovisual Media Services Regulations 2010), Swedish (Art. 3 (1) of the Swedish Radio and Television Act), UK (Sec. 368A (1) (e) of the British Media Services Regulations of 2009 and further indications in Ofcom Television Licensable Content Services, Guidance notes for licence applicants, published 5.7.2011, available at http://licensing.ofcom.org.uk/binaries/tv/tlcs_guidance.pdf, paras. 54-61, in particular para. 57) examples. National transposition acts can be researched at www.medialaw.lu or at avmsd.obs.coe.int.

68 Cf. e.g. German (§ 1 (3)-(5) RStV), Cypriot, Maltese, Bulgarian, Greek and Italian examples.

69 Cf. e.g. German Community of Belgium (Art. 23 and 39 of the amended Decree on Radio Broadcasting and Cinema Presentations), Czech (Sec. 3 of the On-demand Audiovisual Media Services Act and sec. 3 of the amended Radio and Television Broadcasting Act of the Czech Republic) examples.

associated with the place of the central administration. Other Member States such as the Czech Republic and Slovakia appear to emphasize the nationality of an undertaking to be assessed on the basis of its residence or registered office ("place of business"). Concerning "editorial decisions" some Member States make an explicit link to "editorial responsibility" by using the wording of Art. 1 (1) (c) AVMSD (e.g. Czech Republic, France, Germany) and characterizing the decision-making (French: "the decisions of the management concerning the programming" or Lithuanian: "editorial decisions concerning the programmes broadcast"). Concerning the "significant part of the workforce" there are less clarifications to be found. The Slovak transposition postulates that the work of this staff is "directly connected with broadcasting or providing on-demand audiovisual media services", but this also does not answer how "direct" the connection must be, although it seems to hint at e.g. advertising activities in the acquisition period to be excluded. The Polish solution refers to the employer to be identified via the work contracts, but again this only helps in achieving some overall number, but not which of that is "relevant". Without presenting a complete comparative overview for these criteria, the Member State transpositions in their majority stick close to the Directive's provisions and thereby reiterate the significance of the establishment as laid down in the AVMSD to establish jurisdiction for the purpose of the country of origin-principle.

4. Elements establishing jurisdiction according to Article 2 AVMSD (EU) 2018/1808

4.1. Development of Article 2 AVMSD 2018/1808 from Commission Proposal to final wording

Based on the above analysis of the jurisdiction criteria in the different alternatives of Article 2 Directive 2010/13/EU, this section will examine which changes in the wording of the provision were made by the Amending Directive 2018/1808/EU and whether and if answered in the positive how these amendments impact the above found results. In order to better interpret the final wording, it will be briefly recalled what proposals Commission, European Parliament and Council made concerning this provision (see also above at 2.1.3 for the text).

Although in the Commission's proposal Article 2 (3) lit. b) was marked as being replaced by a new provision (a new lit. b)), in actual fact only one small change was proposed: shifting "a significant part" of the workforce to "the majority" and consequently, as there would not have been the possibility of several majorities of workforce, the deletion of the further alternatives of lit. b). The European Parliament rejected in its position to this purely numerical approach. With all difficulties that a reliance on a simple mathematical figure would have meant in terms of the effectiveness of jurisdiction,[70] the Commissions' proposal would also not have clarified how to determine which part of the workforce would have to be included in the counting. This would have been very important, because if it was a purely number-oriented share, it would be especially relevant to know which categories of staff are concerned with the "pursuit of the audiovisual media service activity". The European Parliament further suggested to re-introduce in exactly the same manner the significant part criterion in case of divided workforce.

In the General Appr of the Council there was a similar approach as in the Parliaments position concerning the replacement of the "significant part" with the "majority" of the workforce, arguing primarily that staff levels can fluctuate and therefore the majority criterion might not be sufficiently stable.[71] Instead, the Council opted to keep the current formulation in lit. b) but specify more detailed the staff that is concerned by introducing the word "programme-related". In addition,

70 On this, see above at 3.2.2.1.

71 Outcome of proceedings of the Audiovisual Working Party meetings of 4 and 15 July 2016, http://data.consilium.europa.eu/doc/document/ST-11361-2016-INIT/en/pdf. The Commission pointed out in the meeting that "significant part" as criterion in its proposal would be maintained for the third country-constellation in lit. c) as there was no need expressed in the past to simplify or precise the elements in this case. See also Progress report of 15 November 2016, http://data.consilium.europa.eu/doc/document/ST-13624-2016-REV-1/en/pdf at point 3 c).

the Council suggested to add the words "on a regular basis" in lit. a) where the editorial decisions are mentioned. This change to the relevant workforce of which the significant part is relevant and that had not been foreseen by the Commission at all, would have gone in the direction of some earlier suggestions by a number of Member States to state that unregular and possibly only once annually taken decisions in relevant board meetings should not be sufficient.[72] The further work in the Council showed that some Member States were of the opinion that the circumvention procedure would need to be replaced by a different system, but that the majority of Member States supported keeping the country of origin-principle along with the main jurisdiction criteria as they already exist.[73]

Concerning the newly inserted provisions about the procedure around determining jurisdiction and making this information available to the other national authorities, the Commission and the public, European Parliament and Council agreed from the outset in principle with the proposal of the Commission. There were some changes suggested and especially the Council's position argued for introduction of an obligation on the side of the service providers to inform the national regulatory authorities of any change that may impact the jurisdiction. This adds to the obligation of the Member States to have a list of service providers under their jurisdiction established and published as well as regularly updated. Subsequently, the Council position was maintained and therefore in future there will be an overview of jurisdiction decisions including the criteria on which a Member State assumes jurisdiction in the concrete case of a provider. The two institutions added to the Commission proposal the involvement of the Contact Committee as well as a procedure in case of double jurisdiction claims. Interestingly, on proposal of both institutions in a slightly other manner, a further obligation for the Commission was introduced (future Art. 2 (5c)), namely to take a positive decision mentioning which Member State has jurisdiction when it decides about the compatibility of a circumvention or derogation procedure according to Articles 3 (2)-(3) or 4 (5).

Apart from the rejection of the numeric fixation as "majority" of workforce the other noteworthy development in the legislative procedure was the EP's proposal to introduce a definition of "editorial decision". This was not originally foreseen by the

72 Cf. on these ultimately rejected suggestions the summary in Guidance for future work 24 April 2017, http://data.consilium.europa.eu/doc/document/ST-8242-2017-INIT/en/pdf, p. 7.
The relevant recital that the Council suggested in its Common Approach to accompany the proposed provision would have read: "(4a) Effective editorial responsibility is ensured through editorial decisions taken on a regular basis. In order to assess where editorial decisions are taken on a regular basis, account should be taken of the frequency of such decisions and their link to the day to day operation of the audiovisual media service.".

73 Guidance for future work 24 April 2017, http://data.consilium.europa.eu/doc/document/ST-8242-2017-INIT/en/pdf.

Commission, but the EP suggested to add it in order to have a clearer position on which type of decisions amount to being relevant in determining jurisdiction by Article 2 (3) lit. a). Although the Council did not share this approach in its own position, as a result of the trilogue such a definition was included in the final text, but in a reformulated way in comparison to the EP suggestion. This change is of high importance as it brought the definition close to what the interpretation of the current provision would result in, as will be shown below.[74] It also meant that the Council proposal for an addition of the decision-making as mentioned in Article 2 (3) lit. a) and b) with the indication "on a regular basis" was not retained as it was not any longer necessary.

In the compromise finding of the Council with the European Parliament it also became evident that the position of these few Member States was not decisive in moving towards a final result. Although five Member States voted against the compromise found – knowing that their vote together with the announced abstention by two further States would not result in an overall rejection – this was based on criticism about the regulation of video-sharing-platforms and not because of fundamental discrepancies concerning the jurisdiction questions.[75]

In sum, the amendment of Article 2 by Directive 2018/1808/EU is marginal as far as the previously existing text is concerned and characterized more by the addition of three paragraphs on procedural elements around jurisdiction. Only the Council proposal of adding "programme-related" for the cases when the significant part of the workforce is decisive, and the newly inserted definition of Article 1 (1) lit. bb) which helps in applying Article 2 (3), are amendments while the complete rest of the provision's original text remains unaltered.

4.2. Comparison to existing Article 2 AVMSD 2010/13

Above the changes proposed, discussed and finally adopted were presented in addition to the textual overview in part 2. In this section the differences in the AVMSD of 2018 compared to 2010 will once again be summarized explaining what

74 This is even more evident if one considers how different the final version is of the proposed Recital that the EP suggest as accompanying the new definition. It would have read: "(3a) Editorial decisions are decisions taken on a day-to-day basis, in particular by programme directors and editors-in-chief, in the context of an approved programme schedule. The place in which editorial decisions are taken is the normal place of work of the persons who take them.".

75 Result of vote and Statements (Addendum 1), Voting result concerning 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 (Audiovisual Media Services Directive) in view of changing market realities, adoption of the legislative act, 3646th meeting of the Council, 6 November 2018, available at http://data.consilium.europa.eu/doc/document/ST-13908-2018-INIT/en/pdf.

consequences they will have. First, the parts of the provision that in the end remained unchanged will be mentioned before the actual changes are discussed.

4.2.1. No change in the "number-criterion"

Article 2 (3) lit. b) would have seen a relevant change which would have needed an intensive analysis as to the consequences in practice if the "number-criterion" would have referred to "majority". Instead, in the final compromise this aspect of the provision remains completely the same, which is why the established interpretation of "significant part" continues to have relevance. The workforce to be analysed in case of situations where head office location and taking of editorial decisions are in different Member States needs to be the one concerned with the audiovisual media service activity – more specifically the programme-related activity as will be shown below. Not a specific share of that workforce constitutes a "significant part" but the category of staff *in concreto* that influences and takes the major decisions impacting the service are to be seen as "significant". And it needs to be a not insignificant number such as a single individual. But this finding applies already under the Directive 2010/13/EU and will therefore continue to be applicable.

4.2.2. No direct change in the "temporal-criterion"

In addition, other than suggested by the Council, there was also no change in the "temporal-criterion", at least not directly in the provision of Article 2 (3). The proposed extension of the wording to relate to decisions taken "on a regular basis" was not included. The provision continues to refer both in lit. a) and b) to editorial decisions without giving them a specific quality in terms of regularity. However, the insertion of a definition of "editorial decisions" itself includes an explanation that inter alia refers to the reoccurrence of such decisions.

4.2.3. Precision of the "relevant workforce"-criterion

The main change to Article 2 – apart from the insertion of the new paragraphs that do not relate to the actual criteria for jurisdiction – does not come with the text of the provision but with the definition in Article 1 (1) lit. bb) which is only relevant for the understanding of Article 2 (3) and therefore needs to be considered together with it.[76] The other minor change relates to the new definition and serves to further clarify the application of the jurisdiction provision.

[76] In the European Parliaments' position editorial decision would also have been used in Article 30 (2), but this was shifted in substance to Recital 54 in the final version mentioning that editorial decisions should be free from any influence by authorities.

4.2.3.1. *Introduction of "editorial decision"-definition*

As mentioned above there have been discussions in the past about the type of decisions addressed in Article 2 (3). These resulted from challenges by means of jurisdiction Member States had regarding a service to be directed (only or mainly) at their territory but being established in another (the home) Member State. The Directive's proposed solution in the balancing of interests of providers using their freedom of establishment and the Member States to be assured of a minimum level of obligations being respected by the providers, was to lay down unconditionally the country of origin-principle apart from some exceptional deviations (Articles 3 and 4). To be sure about establishment, this criterion was not connected purely to the seat of the company but also the location of where the relevant decisions about the service are made. The question therefore could arise, which type of decisions qualify as "editorial decisions" and how often these were typically made by whom. Because of a lack of indication in the Directive itself it was necessary to resort to the CJEU case law on this question. As shown above, the use of the freedom of establishment even in a way that the service offered is not at all made available in the Member State of establishment, was in accordance with EU law and could therefore not be limited by States. The Directive harmonized this question for the area of broadcasting and later audiovisual media services by requiring the link to the State of establishment to be reflected in the relevance of the staff employed there and the operative decisions made by these.

The new definition follows in this direction by maintaining that the decisions characterized as editorial are the ones taken to exercise editorial responsibility. The wording clarifies that it is not meant to refer each individual decision on content of the audiovisual media service which can have a consequence for editorial responsibility, but an overall decision on the general structure and programming (in form of a schedule or catalogue) of the service as well as more specific decisions where there is need e.g. to decide an internal discussion about whether or not to continue offering a specific content.

The final wording of the provision did not pick up the much further reaching proposal of the European Parliament which would have targeted the "decisions taken on a day-to-day basis" and therefore in other words the individual content-related decisions e.g. at the beginning of a day concerning which current affairs topic would be featured in a specific programme element. It is highly significant that the proposal for the provision and accompanying Recital was not followed because it was evident from the proposal that a different understanding compared to the current situation was aimed for. It would have required a much stronger involvement of the relevant editorial staff in the day-to-day work.[77] The final text

[77] Already long before the revision discussion *Harrison/Woods*, Jurisdiction, forum shopping and the 'race to the bottom', p. 178 et seq., show how problematic the reliance

does not mention a regularity that would necessitate a daily basis or comparable close involvement by the staff related. To the contrary, now the decision-making "on a regular basis" is the expressly used standard. This clarifies what would already have been inadmissible under the 2010 version of the Directive: that a singular decision e.g. on the occasion of launching the service or at the beginning of a multi-annual planning (for acquisition of content) by high-level management staff members could not be qualified as "editorial decision*s*". The plural of the decision-making and the elevation to being one decisive element for establishment in addition to the head office (where typically high-level management decisions are taken) made clear that a certain reoccurrence of decisions with editorial impact was necessary.

This is now codified explicitly, albeit without an exact framing of regularity. But the fact that these decisions have to be "linked to the day-to-day operation" necessitates that the decisions are impacting what eventually is to be seen in the service beyond making e.g. financial commitments. At the same time, in stark contrast to the proposed Recital by the European Parliament, the definition neither refers to specific job profiles of the staff taking these editorial decisions nor to a condition that the decisions need to be taken at the regular workplace. This reflects the situation of many media companies that operate from a head office but with company structures at different places relating to specific services, typically offered at the place of the subsidiary or the local offices. The main decisions of relevance for all of the services will be regularly taken at the head office, but the Directive foresees in Article 2 (3) – as it did already since the different elements for establishment were introduced – a solution also for the case when these decisions are taken elsewhere (and if this other place is in another Member State).

In light of the above-mentioned CJEU case law on freedom of establishment, the definition of editorial decisions may not be too narrowly interpreted. The freedom of establishment allows for the head office to be chosen at a location in which the service offered is not available. The approach in the Directive, including now the definition of "editorial decisions", constitutes a limitation to the use of the freedom by adding a (media-specific) condition to establishment. The Court consistently interprets exceptions to the fundamental freedoms in secondary law in a narrow sense. Would the EU legislator wanted to have introduced an exception to the country of origin-principle by not allowing multi-territorial structures of companies in this sector to be reflected in the establishment or by giving Member States the possibility to impose their own rules, it would have had to explicitly foresee this. European Parliament and Council were aware of this general possibility of opening clauses for the national law, as can be seen in the new Article 13 (2), (3) and (6) which enables Member States under certain conditions to extend the obligation for financial contributions to the production of European works to "targeting services"

on factors that contradict fundamental principles of EU law, including discrimination effects, would be. Cf. specifically their conclusions from CJEU, case C-23/94 TV 10.

that are established in another Member State but reach out to audiences in the receiving Member State. The notion of "editorial decision" in contrast does not introduce such an exception. It rather clarifies that not the day-to-day operational decisions are meant, but the main decisions with which editorial responsibility is exercised and that have an effect on the operation of the service. The narrower approach of the European Parliament was rejected in favour of this formulation.

4.2.3.2. *Insertion of "programme-related" character of activity of workforce*

Besides the newly inserted definition, on proposal of the Council the alternative of Article 2 (3) lit. b) was slightly reformulated. It was a compromise to achieve the goal of the Commission to make the share of the workforce to be considered more clear, but without following the suggestion of using a numerical criterion of "majority". It follows now from the new formulation that not every part of the workforce is to be taken into account, but that there is staff which is not concerned with the content side of the service and can be disregarded. This would be e.g. the staff managing subscribers of the service. Connecting the relevant staff with the programme resembles the definition of editorial decision goes beyond it. The programme is defined in Article 1 (1) lit. b) and means the individual items in a schedule or catalogue established by the provider, whereas editorial responsibility in lit. c) concerns the control over selection and organisation of the programmes. Decisions about exercising this control are taken by a smaller portion of the workforce which is contributing to the programme, while this in turn is not the overall staff of an audiovisual media service provider. Already the Directive 2010/13/EU was to be interpreted as including such a limitation in the counting of relevant workforce as was shown above, by taking a qualitative approach in deciding which part of the staff can at all be relevant for the pursuit of the audiovisual media service connected to its core, the content.[78] Therefore, the addition of "programme-related" confirms that not the total headcount of a provider is decisive, but the share of staff dealing with the programme-related activity.

4.3. Further indications in the procedure-related extension of Article 2 AVMSD

The extension of Article 2 by Directive (EU) 2018/1808 concerns procedures in connection with jurisdiction decisions which are aimed at a good functioning cooperation between Member States and their regulatory authorities as well as the Commission. The goal is to achieve transparency as to which Member State has jurisdiction over a provider, to make sure the information available is up to date and introduce a kind of "dispute mechanism" in case the application of circumvention and derogation rules is a matter of controversy between Member States. Without having to present these newly introduced aspects in detail, such as

[78] Cf. e.g. *Blasi*, Das Herkunftslandprinzip der Fernseh- und der E-Commerce-Richtlinie, p. 104 et seq.

the obligation of the Member States to provide lists of providers under their jurisdiction, it is sufficient to point out here that the procedural improvements underline the perpetuation of the fundamental principle of country of origin and the existing jurisdiction criteria:

In full knowledge of some existing disputes about jurisdiction and the first procedures of derogation and circumvention that reached the final stage of decision by the Commission,[79] the legislators decided not to amend the question of establishment as main case for jurisdiction but instead chose an improvement of the cooperation procedures also for communication and exchange about the jurisdiction decisions taken by the Member States. All the procedural elements introduced are based on the decisions about assuming jurisdiction which consequently have to come first and are based on either Article 2 (3) or (4). The decision in each individual case needs to be the result of an "assessment of factual situations" as Recital 8 of Directive (EU) 2018/1808 put it. The communication not only of the identity of the providers for which a Member State assumes jurisdiction but also the criteria on which the decision is based in each case, will help the Commission in reviewing the situation (as is again mentioned explicitly in Recital 8) and the involvement of ERGA by providing opinions on jurisdiction questions can help to resolve potential disputes by having an open discussion within the group of all regulators and not only the ones concerned by a dispute between two or more Member States or their regulatory authorities or bodies.

79 Cf. 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 concerning Lithuania's decision to suspend broadcast of the Russian language channel "RTR Planeta"; also Commission decision C(2018) 532 final, 31.1.2018, on the Swedish case (fn. 37).

5. Conclusion: Future application of jurisdiction criteria

The result of the above analysis is noteworthy in several ways. The question of which Member State has jurisdiction over the provider of an audiovisual media service in the meaning of the EU Audiovisual Media Services Directive can be answered clearly and the criteria provided for by the Directive lead to unequivocal results in most cases. When there are unclear situations as to the application of the criteria, the 2018 reform of the AVMSD with the Amending Directive (EU) 2018/1808 promises to contribute to faster resolution of these cases in light of the increased transparency and exchange procedures between national regulatory authorities and the Commission about the criteria applied. Beyond that, the new version of the Directive maintains the existing regulatory framework for establishing jurisdiction and has only added elements for clarification of the use of the criteria provided.

In more detail, these three findings result in the following key elements to be taken into consideration when analysing the establishment of a provider as basis for assuming jurisdiction by a Member State:

The main achievement of the AVSMD from the outset was the introduction of the country of origin-principle clarifying the consequence of the use of the fundamental freedom of establishment as guaranteed by the Treaty on the Functioning of the European Union for the specific sector of broadcasting and non-linear audiovisual media services. The clear goal was to create a "European single market" for (originally) broadcasters in order to facilitate their use of cross-border dissemination of content. Especially with the rapid growth of the satellite business the technological basis had been set to enable a direct-to-home broadcasting well beyond State borders, but this had to be complemented by a legal framework offering legal certainty to providers wanting to apply this technology. One of the main reasons for the harmonisation on EU level beyond the use of the economic potential of this opening of the market was the enhancement of the individuals' freedom of information or reception by enlarging the content available to her and him and thereby ensuring media pluralism. It is worth underlining this goal in any discussion about the practical application of the Directive, as it has again been highlighted at several points in the Amending Directive of 2018, most generally formulated in Recital 61: "Any measure taken by Member States under Directive 2010/13/EU is to respect the freedom of expression and information and media pluralism […]".[80] This goal is also a guiding overarching principle when the EU acts in the area of media as can be seen from the explicit inclusion of the respect for media pluralism in Article 11 (2) Charter of Fundamental Rights of the EU (beyond

[80] Further mentions are in Recitals 16, 25, 49 as well as Article 30 (2) concerning activities of national regulatory authorities and the corresponding Recital 53.

media freedom (also in paragraph 2) and freedom of expression and information in paragraph 1).

Based on this goal, the AVMSD is the result of a political agreement on a minimum level of harmonization for certain areas related to the activities of audiovisual media services providers. There was always agreement, that beyond the areas coordinated by the AVMSD Member States can impose additional obligations on providers of services active on their territory as long as this is in accordance with other principles of EU law.[81] In addition, Member States are entitled by the Directive to apply stricter standards to providers under their jurisdiction without being able to extend those to incoming services from providers established elsewhere.[82] In order to safeguard the interests of such Member States, there was even a circumvention procedure introduced to exclude abusive use of the possibility to freely decide about establishment, albeit the procedure necessarily in light of the fundamental freedom is complex and only meant to apply in evidently abusive cases.[83] It was complemented by a temporary derogation procedure assuring that enforcement issues that may appear in certain cases can be resolved faster by involving receiving states in the monitoring to a certain extent. Finally, the new Directive sets an explicit deviation from the fundamental rule of the country of origin by authorizing Member States exceptionally to apply local rules about financial obligations to support production of European works also to "incoming services" if they target that Member State (Article 13 (2)). However, beyond these exceptions concerning scope and resulting from specific procedures, the country of origin-principle is absolute. This means that providers need to be able to rely on the rule set by the Directive that compliance with the legal framework of one Member State, the State of their establishment or in the sense of the Directive the county of origin of their service, leads to open access to the complete single market without being subjected to another jurisdiction and legal requirements there.

Because of this, jurisdiction criteria of the AVMSD are so paramount. And for that reason, the precision sought by the reform of the Directive in 1997 taking into account the case law of the CJEU succeeded in giving more guidance to Member

81 The most discussed case in this context, although decided at a very early stage of applicability of the TwFD is CJEU, Joined Cases C-34, 35/95 Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop. Another example of measures a Member State can take with relation to an audiovisual media service, as long as it does not hamper the principles of the AVMSD is Joined Cases C-244/10 and 245/10 Mesopotamia Broadcast and Roj TV v Germany, cf. on that *Cole*, RDTI 2012, p. 50 et seq.

82 Article 4 (1) and CJEU, Case C-222/07 Unión de Televisiones Comerciales Asociadas (UTECA).

83 In this context the decisions of the CJEU can be recalled that are very explicit about the significance of the free choice of establishment because of the fundamental freedom, generally in CJEU, C-212/97 Centros para. 29 as well as specifically for broadcasting in C-23/93 TV10 para 21 C-148/92 Veronica para 12 et seq.

States in how to determine establishment. Since then, the basic rule which should apply to the majority of cases is that the establishment is clearly identifiable due to the fact that the provider is established in a Member State by having its head office there and editorial decisions are taken there (Article 2 (3) lit. a)). This remains unchanged the primary approach for finding out jurisdiction. Only in cases, where these two elements are not concentrated in one Member State the trifold alternatives of Article 2 (3) lit. b) come into play. In those cases, the location of the significant part of the workforce is decisive. As has been shown above, this criterion is to be regarded as "quantitative-qualitative". Although the number is relevant, too, because it is not allowed to be an insignificant one, the more important aspect is that not the *overall* workforce is to be considered, but the staff that is concerned with the decisions impacting the programme. In that regard, the Amending Directive of 2018 makes some precisions while clearly reinstating the approach of the Directive until now according to which the different alternatives of lit b) are guided by the establishment in the sense of head office or initial place of operation except for the case of the first alternative when there is only one Member State where there is a significant part of the workforce. When determining the workforce that is "involved in the pursuit of the programme-related" operation of the service this newly inserted word of programme-related underlines that it is only a selection of the overall staff. In addition, reference can be made to the new definition of "editorial decision" (Article 1 (1) lit. bb)) which clarifies that such decisions are not meant to be the ones that are taken every day about the actual content or operation of the service, but the ones that result from editorial responsibility and impact the day-to-day operation. In that way, these decision-makers are just as significant for the programme-related activity as the staff actually implementing the decisions in the actual programmes in the schedule or catalogue. With these clarifications, the three alternatives of Article 2 (3) are applicable even more precisely than in the past. The solution of Article 2 (3) lit. c) when a third country outside the EU is involved, remains unchanged and therefore continues to be applied as in the past.

Concerning the additional criteria for establishing jurisdiction in Article 2 these remain unchanged, too. Firstly, this means they were construed only as subsidiary, and remain to be so, in cases when the primary criteria of Article 2 (3) do not lead to a result. The technical criteria of Article 2 (4) that concern the use of a satellite dissemination may become much more relevant in practice due to the political development about withdrawal of the United Kingdom from the EU, but the criteria themselves are the same that were applicable until now. If no establishment according to paragraph 3 can be found in an EU Member State, but an external service provider uses an uplink from a Member State or a satellite capacity appertaining to this, then jurisdiction over these providers is created anyway. The goal of this provision is to avoid dissemination of content in the EU over which control could be achieved via the technical provider but which disregards the minimum standards set by the Directive and applicable to competing providers established in the EU. This jurisdiction is not optional for Member States, but if they

are competent due to the technical solution used being linked to them, then they have to assume responsibility. Article 2 (1) is clear in putting this burden on the Member States that are competent. Therefore, it is advisable that Member States concerned by this, implement or apply procedures that allow them to have an overview of which services are being transported via up-links in their territory or via "their" satellites. Potentially the technical criteria can lead to some practical difficulties in cases where there are parallel up-links in or satellite capacities used of different States.[84] The cooperation mechanism under the Contact Committee as well as within ERGA between the national regulatory authorities and the establishment of a central database on jurisdiction decisions will likely contribute to detect and resolve unclear situations also in this regard in future.

These procedural developments introduced with the new Directive (EU) 2018/1808 are actually the solution that allows the fundamental principles of the AVMSD to be retained while finding ways to resolve faster potential disputes or unclear situations. Instead of endangering the principle of country of origin by attempting to apply national rules against providers established elsewhere, more intensive collaboration and cooperation between Member States and their regulatory authorities in ensuring the safeguarding of the minimum standards laid down in the Directive, is the appropriate answer to clarifying situations that may be seen critical by "target states" of certain services. Article 2 (5a) is an important achievement by obliging now all Member States to ensure that providers under their jurisdiction notify about any possible changes that could affect jurisdiction. To that end, the availability of an up-to-date list of jurisdiction assignment for all Member States, the Commission and ultimately every interested person will be helpful. It will identify cases where there is an open situation and accelerate solutions to be found.[85] In case there is a dispute that cannot be resolved by applying the criteria, because one Member State does not agree with the result found, it is only up to the Commission to decide whether the assumption of jurisdiction by a Member State is in breach of the Directive's provision in which case an infringement procedure can be initiated which could lead finally to a judgment of the CJEU.[86] This is the same situation even where there is already a cooperation procedure foreseen, namely in the cases of

84 Cf. on this also ERGA report on territorial jurisdiction in a converged environment as of 17 May 2016, p. 33 et seq. and 53 et seq. as well as minutes of the 48th Meeting of the Contact Committee of the Audiovisual Media Services Directive, Doc CC AVMSD (2018) 2, esp. p. 2-3 with reference made to earlier arrangements in the Committee to use the criterion of size of footprint of the satellite or anteriority (first up-link) in case of parallel situations (see fn. 2)

85 This procedure is further supported by the exchange mechanism foreseen in Article 30a.

86 This "backup" solution for ensuring proper application of the Directive is not specific for AVMSD but indeed the last resort if there are disputes, cf. also *Sorensen*, The Country-of-Origin Principle and balancing jurisdiction between home Member States and host Member State, p. 27.

derogation and assumed circumvention according to Articles 3 and 4. The decision of the Commission can be challenged, if a Member State does not agree with it, which ultimately leads to a clarifying interpretation decision by the CJEU. Newly inserted is a more explicit role of ERGA as basis for the decision-making of the Commission, as this body can now be asked to provide (non-binding) opinions by and to the Commission so that it can use this in the further procedure.[87] Involvement of the Contact Committee as the established place for exchange of point of views between the Member States is also foreseen. All of this should result in a more swift and final resolution of the cases – based on the experience so far, one has to say: few cases – of challenged jurisdiction.

In sum, jurisdiction criteria of the AVMSD can be applied in the same way as has been the case in the past before the 2018 reform. This reform has led to some precision about which elements need to be considered in applying those criteria as well as introducing procedural means about the communication of decision-finding on jurisdiction. It has also confirmed that the establishment of a provider via its head office and placement of relevant staff in the relevant decision-making is the standard case to decide about jurisdiction and that the further alternatives and ancillary criteria can be applied in a precise manner based on the previous experience with the AVMSD 2010/13/EU and its predecessors.

87 Article 30b (3) lit. d) and Recital 58: "[…] Upon the Commission's request, ERGA should provide non-binding opinions on jurisdiction, on measures derogating from freedom of reception and on measures addressing the circumvention of jurisdiction. […]".

Bibliography

Blasi, Martina	Das Herkunftslandprinzip der Fernseh- und der E-Commerce-Richtlinie, Schriftenreihe zum gewerblichen Rechtsschutz des Max-Planck-Instituts für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, Vol. 132, Köln, 2004.
Cole, Mark D.	Medienrechtliches Sekundärrecht der EG, Das Sendestaatsprinzip, in: Fink/Cole/Keber (eds.), Europäisches und Internationales Medienrecht, Heidelberg, 2008.
Cole, Mark D.	Note d'observations, "Roj TV" entre ordre public et principe du pays d'origine, in: Revue du Droit des Technologies de l'Information (RDTI) 2012, pp. 50-61.
Cole, Mark D.	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: Meng/Ress/Stein (eds.), Europäische Integration und Globalisierung – Festschrift zum 60-jährigen Bestehen des Europa-Instituts, 2011.
Cole, Mark D. / Haus, Florian C.	Dienstleistungsfreiheit brutto oder netto? Probleme der europäischen Sprachenvielfalt am Beispiel der EG-Fernsehrichtlinie - EuGH, Slg. 1999, I-7599, in: Juristische Schulung (JuS) 5/2001, pp. 435-439.
Cole, Mark D. / Ukrow, Jörg / Etteldorf, Christina	Audiovisual Sector and Brexit: the Regulatory Environment, Research for CULT Committee, 2018, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/629177/IPOL_STU(2018)629177_EN.pdf.
Dommering, Egbert	Article 2 TWFD (Country of Origin Principle/Jurisdiction), in: Castendyk/Dommering/Scheuer (eds.), European Media Law, Kluwer Law International, 2008, paras.1-63.
Doukas, Dimitrios	The EU Media Market and the Interplay between the Legislature and the Judiciary, in: Doukas/Syrpis (eds.), The Judiciary, the Legislature and the EU Internal Market, Cambridge University Press, Cambridge, 2012, pp. 147-176.
Faßbender, Kurt	Zu Inhalt und Grenzen des rundfunkrechtlichen Sendestaatsprinzips, Archiv für Presserecht (AfP) 2006, pp. 505-512.

Gibbons, Thomas	Jurisdiction over (Television) Broadcasters – Criteria for Defining 'Broadcaster' and 'Content Service Provider'", in Die Zukunft der Fernsehrichtlinie – The Future of the 'Television without Frontiers' Directive, Schriftenreihe des Instituts für Europäisches Medienrecht (EMR) – Band 29, Baden-Baden, 2005, p. 53-60.
Harrison, Jackie / Woods, Lorna	European Broadcasting Law and Policy, Cambridge University Press, 2007.
Hartstein, Reinhard / Ring, Wolf-Dieter / Kreile, Johannes / Stettner, Rupert / Dörr, Dieter / Cole, Mark D. / Wagner, Eva Ellen (eds.)	Heidelberger Kommentar (HK) zum Rundfunkstaatsvertrag / Jugendmedienschutz-Staatsvertrag (HK-RStV), Looseleaf commentary, 76th suppl., Heidelberg, 2018.
Helberger, Natali	Die Konkretisierung des Sendestaatsprinzips in der Rechtsprechung des EuGH, Zeitschrift für Urheber- und Medienrecht (ZUM) 01/1998, pp. 50-60.
Herold, Anna	Country of Origin Principle in the EU Market for Audiovisual Media Services: Friend or Foe?, in: Journal of Consumer Policy, 2008 vol. 31, p. 5-24.
Hörnle, Julia	Country of origin regulation in cross border media: one step beyond the freedom to provide services?, in: International & Comparative Law Quarterly, 2005 vol. 54(1), p. 89-126.
Kogler, Michael R.	TV (On Demand) – Europäische Content-Regelungen für Audiovisuelle Mediendienste, Wien, 2010.
Kogler, Michael R.	Hauptzweck und wesentliche Funktionalität der Bereitstellung audiovisueller Inhalte, in: Kommunikation & Recht (K&R) 9/2018, p. 537-544.
Kramer, Thorsten	Das sekundärrechtliche Herkunftslandprinzip als Regelungstechnik des Binnenmarktes, Berlin, 2007.
McGonagle, Tarlach / Van Loon, Ad	Jurisdiction over Broadcasters in Europe, Report on a Round-table Discussion, in: European Audiovisual Observatory (ed.), Iris Special, 2002.
Sørensen, Karsten Engsig	The Country-of-Origin Principle and Balancing Jurisdiction Between Home Member States and Host Member State, Nordic & European Company Law, LSN Research Paper Series No. 16-32.

Wagner, Michael A. — Revisiting the Country-of-Origin Principle in the AVMS Directive, in: Journal of Media Law no. 06/2014, p. 286-304.

Weinand, Jenny — 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, 2018.

Weinand, Jenny — The revised Audiovisual Media Service Directive 2018 – Has the EU learnt the right lessons from the past?, in: UFITA 1/2018, p. 260-293.

Woods, Lorna — Jurisdiction in the television without frontiers directive, in: Ward (ed.) The European Union and the Culture Industries: Regulation and the Public Interest, Routledge, 2008, p. 145-164.