

IMPLEMENTATION OF THE REVERSAL OF SUBSIDIARY JURISDICTION CRITERIA

1. INTRODUCTION

Directive 2007/65/EC amended the Television without Frontiers Directive which became the Audiovisual Media Services Directive (AVMSD). The number and order of the subsidiary jurisdiction criteria in Art 2(4) AVMSD was changed.

TVwFD (Directive 89/552/EEC as amended by Directive 97/36/EC)	AVMSD (Directive 89/552/EEC as amended by Directive 97/36/EC and by Directive 2007/65/EC)
<p>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:</p> <p>(a) they use a frequency granted by that Member State;</p> <p>(b) although they do not use a frequency granted by a Member State they do use a satellite capacity appertaining to that Member State;</p> <p>(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.</p>	<p>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:</p> <p>(a) they use a satellite up-link situated in that Member State;</p> <p>(b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.</p>

This will change jurisdiction for a number of audiovisual media services not established in the EU but transmitted via a satellite provider using satellite capacity appertaining to a Member State. A non-coordinated approach of Member States implementing the Directive during the transposition period could lead to cases of double jurisdiction or a situation where no Member State claims jurisdiction.

This working document intends (1) to further detail the solution found following discussions at the Contact Committee, and (2) to propose a one off exercise to identify the media services that need special attention at the moment of entry into force of national implementing measures which will change jurisdiction.

2. COORDINATED IMPLEMENTATION OF ART 2(4) AVMSD

The reversal of subsidiary jurisdiction criteria could lead to either double jurisdiction by two Member States or a situation where no Member State claims jurisdiction, because one

Member State still applies the rules of the TVwF Directive whereas the other Member State already applies the rules of the AVMSD. This situation can arise under the following conditions:

- 1) The media service provider is not established in a Member State according to Art 2(3) AVMSD, and
- 2) The satellite up-link is situated in a Member State different from the one to which the satellite capacity appertains, and
- 3) The two Member States potentially having jurisdiction transpose the AVMSD at a different point in time (within the transposition period).

The discussions at the Contact Committee showed that a *coordinated entry into force of national measures implementing this provision of the AVMSD at the end of the transposition period*, i.e. 18/12/2009, would be the best solution. If all Member States have the new provisions concerning the reversal of subsidiary jurisdiction criteria entered into force at the same point in time conflicts should be excluded. This coordinated approach is necessary only with regard to the transposition of Art 2(4) AVMSD. It is without prejudice to the transposition of other provisions of the AVMSD.

3. IDENTIFICATION OF THE MEDIA SERVICES CHANGING JURISDICTION

To effectively implement the Directive Member States have to know where audiovisual media services using satellite capacity appertaining to them are established or where their satellite up-link is situated. Member States can only refuse jurisdiction for an audiovisual media service provider using their satellite capacity if they can demonstrate that the media service provider is established in another Member State or that the up-link is situated in another Member State.

The specific issues related to the change of the subsidiary jurisdiction criteria only highlight a more general need for cooperation and regular exchange of information between national regulators. The existing structures of the European Commission's Regulators group and especially the European Platform of regulatory authorities - EPRA seem best suited to accomplish these tasks on a permanent basis.

However, with regard to the specific situation at the end of the transposition period it might be appropriate that the Contact Committee in a singular exercise cooperates to identify the audiovisual media services which change jurisdiction at the end of the transposition period. There are only a few Member States where satellite operators are established, i.e. when a satellite capacity appertains to them. And only a limited number of services is concerned as services which are transmitted over these satellites and which are established in another Member State according to Art 2(3) AVSMD will not change jurisdiction. Similarly services whose up-link is not situated in the EU won't change jurisdiction either. Only for those services whose up-link is situated in another Member State jurisdiction will pass at the end of the transposition period to that Member State. To ensure transparency and identify the audiovisual media services that are prone to change jurisdiction we suggest the following procedure:

- 1) Member States with satellite capacity appertaining to them identify the services that they think will change jurisdiction and for which they intend to refuse responsibility under the amended rules. They should do so by providing the necessary information

to determine which Member States has jurisdiction (e.g. up-link in Member State X) by 31 May 2009. They should provide, as a minimum, details of the media service provider and of the operator of the up-link and how to contact them.

- 2) The Member States concerned, where an up-link is claimed, declare by 31 August 2009 whether they accept jurisdiction or provide evidence why they are not to be held responsible.
- 3) In cases of disagreement as to which Member State should have jurisdiction the Commission would have to follow up and take a preliminary position. To prepare that position the Commission will invite the parties concerned to tri-lateral meetings in the course of October and November 2009.

This would leave enough time for verification and would also be close enough to the end of the transposition period to produce valid results. However, this procedure is not meant to replace close cooperation between regulators, who should do the utmost to agree on the status of a given audiovisual media service.

Date	Action
Until 31 May 2009	Member States with satellite capacity identify the services that they think will change jurisdiction
Until 31 August 2009	Member States with a claimed up-link declare whether they accept jurisdiction
October and November 2009	Tri-lateral meetings in cases of disagreement
18 December 2009	Coordinated entry into force of national measures implementing Art 2 (4) AVMSD