

**MINUTES OF THE 31ST MEETING OF THE CONTACT COMMITTEE ESTABLISHED BY THE
“TELEVISION WITHOUT FRONTIERS” DIRECTIVE
TUESDAY, 3 NOVEMBER 2009**

1. Adoption of the agenda

The Chairman welcomed the members of the Contact Committee (CC). The agenda was adopted.

2. Transposition AVMSD – State of Play

The Commission announced upcoming meetings before 19th December and explained further proceedings after the end of the transposition phase. A roundtable discussion with Member States showed that at the moment only a few countries have adopted and notified transposition measures (Belgium and France). Luxemburg has communicated its new rules on TV advertising and Slovakia¹ and Ireland have adopted implementing legislation (for linear services in the case of Ireland). Romania has also adopted legislation, but it remains to be approved by Parliament. In Austria so far the advertising rules have been transposed.

In a number of countries, a legislative proposal is before the Parliament: Czech Republic, Denmark, Spain, Finland, Latvia, Malta, the Netherlands and United Kingdom.

In many countries however, works are still at a pre-legislative stage. Public consultations are completed in Bulgaria, Cyprus, Germany, Denmark, Estonia, Greece, Ireland, Malta, Sweden, Slovenia, Poland, Portugal, Italy, and Lithuania. Austria and Luxemburg – for the provisions that have not yet been transposed - are still at an earlier stage or have not carried out a public consultation.

AT raised the question in which cases audiovisual commercial communication appearing on the same website as an on-demand service is part of the audiovisual service and therefore falls within the Directive's scope. The Commission recalled that audiovisual commercial communication "means images" – not necessarily moving images – that "accompany or are included in a programme". Audiovisual commercial communication must be linked to an audiovisual media service. Audiovisual media services are characterised by an editor making editorial decisions. The UK proposed to ask whether a viewer will see the advertising in question because he chooses a specific audiovisual on-demand service. If this is the case, it is part of the service and subject to the rules of the Directive.

The French delegation questioned the Commission on the possible notification, under the Directive 98/34/EC of 22 June 1998 amended by the Directive 98/48/EC of 20 July 1998, of national transposition measures relating to on-demand audiovisual media services. The Commission explained the notion of "stricter or more detailed national rules", bringing to mind that if the details included in the national law only specify the implementation of a general obligation from the Directive (such as Article 3h on protection of minors and Article 3i on the promotion of European works), those measures will not be considered as "stricter or more detailed rules" and will not, therefore, be subject to a notification under the amended Directive 98/34/EC. The Commission indicated as an example that the definition of the legal

¹ Still needs to be signed by the President.

framework particular to ensure the protection of minors is not considered as a "stricter or more detailed rule".

Furthermore, the Commission recalled that even if the national transposition measures shall be notified by the 19th of December, the Commission will take into account the fact that the adoption of "stricter or more detailed national rules" relating to on-demand audiovisual medias services subject to notification to the Commission under the amended Directive 98/34/EC before the 19th of December shall be postponed for three months in accordance with Directive 98/34/EC.

3. Transposition AVMSD – Change of subsidiary jurisdiction criteria

The Chairman recalled the agreement at the 29th meeting of the Contact Committee to have an approach in 3 phases [see Doc CC TVSF(2008)8]: So far 13 out of 16 Member States who receive jurisdiction have answered. Phase 1 had to be prolonged by 2 months as one Member State provided necessary data belatedly. We are currently at the end of phase 2, where Member States concerned have to declare whether they accept jurisdiction or provide grounds why they refuse jurisdiction. The Chairman recalled that there needs to be a decision on the transfer of jurisdiction from one to the other Member State by December 19th. The burden of proof is on the Member State who has satellite capacity: 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 Commission reiterated that in cases of disagreement Member States should, in the final phase 3, first have bilateral contacts and only contact the Commission where disagreements cannot be resolved amongst the parties concerned.

Furthermore, the Commission proposed to refine the solution of anteriority of the up-link for services with different up-links: if the oldest up-link concerns a satellite whose footprint is not focussed on Europe while the more recent one concerns a satellite whose footprint is focussed on Europe, the more recent one should be taken into consideration for determining the jurisdiction. The focus of a footprint is the region where the highest signal strength occurs. Most delegations considered this to be a sensible approach.

On request of some Member States the Commission provided links to publicly available information on footprints.² Following another question the Commission explained that the notion of "satellite capacity appertaining to a Member State" should be interpreted in accordance with the ITU Radio Regulations³, which will coincide, in most cases with the place of establishment of the operator.

Several delegations were astonished by this interpretation, stating that the Member States could be obliged to regulate non-EU channels for which neither the satellite up-link nor the satellite operator are established in Europe. The Commission recalled that the services in question are services for which the Member States had notified a satellite capacity to the ITU. Moreover, under Article 2 (6) of the Directive, "the Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States".

² www.lyngsat-maps.com; www.kingofsat.net

³ See www.itu.int/ITU-R/space/plans/ for further details and a database of assigned orbital positions.

4. Creative content online

The Commission presented the Reflection Paper on "Creative Content in a European Digital Single Market" jointly published by DG INFSO and DG MARKT on October 27th. This paper points out the challenges for both, the content industries and consumers, in order to achieve the goal of delivering a wider, more diverse choice of content across Europe and presents possible actions to overcome those challenges. The public consultation on the paper ends on 5 January 2010.

5. Any other business

- **AVMSD Codification**

The draft proposal was approved by the EP Legal Affairs Committee on September 29th and adopted in plenary on October 20th. Lawyer-linguists in the Council are now working on the finalization so that the text can be submitted to COREPER by the end of this year. The codified Directive should be adopted early in 2010.

- **Information on the letter sent by Commissioner Reding to all Member States party to the Convention on Transfrontier Television**

The Chairman reported that on October 23rd Commissioner Reding sent a letter to the 20 Member States that are party to the Council of Europe Convention on Transfrontier Television recalling their dual obligation not to enter into international commitments that conflict in substance with Community Law and to respect the case law of the European Court of Justice with regard to the external powers of the Community. The letter calls to mind that the matters covered by the Convention fall to a great extent under Community competence since the Convention deals broadly with matters covered by the Audiovisual Media Services Directive (Dir 89/552 EEC as lastly amended by Dir 2007/65/EC). Therefore, in accordance with the case law of the European Court of Justice, Member States may not conclude alone international agreements which cover matters falling under Community competence. This is clear from the Open Skies ruling (see par. 101 of C-467/98), which states that this applies even when there is a "disconnection clause": "... the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community Law."

Several delegations were surprised about the letter as regards its timing, tone and meaning. Some delegations stressed the fact that they had been working hard on the revision of the Convention to bring it in line with the AVMSD and criticized the fact that the Commission had not officially expressed its concerns earlier. These delegations requested more information on the possible conflicts between the Convention and Community Law. Furthermore, delegations expressed their concerns about possible re-negotiations of the Convention and infringement procedures.

The Commission explained that the letter only recalls legal reality which should not come as a surprise to Member States. It stressed that it had raised this issue from the very beginning: already in 2005 the Commission suggested that Convention and Directive should complement each other, which would have avoided the current situation. The Commission had raised this issue also in the Standing Committee of the Council of Europe and had informed in December 2008 the Contact Committee. This is a matter of principle and concerns the Union's external powers, an issue which can not be sorted out on a technical level between the Legal Services of the Council of Europe and the European Commission.

The PL delegation requested to have substantive issues as clearly described formal items on the agenda to allow for appropriate preparation.

- **Questionnaire on the protection of minors**

The Chairman reminded delegations to reply to the questionnaire that was prepared by the IT delegation and sent out in March by the end of November. 8 Member States have not replied yet. The result will be discussed at the next CC meeting.

Next meeting: May or June 2010