

Backdoor regulation: the European
Audiovisual Media Services (AVMS) Directive

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Overview

- **Television regulation in the EU generally applies to service providers, not carriers**
- **Where the service providers are outside but the service is receivable within the EU, and are carried by an EU uplink or satellite, member states must regulate them too**
- **In practice this means member states will try to regulate them through the uplink and satellite carriers**
- **The UK in particular proposes to take powers to force operators to turn off the uplink or satellite capacity if required**
- **That is easier said than done: consider the consequences**
 - contractually
 - technically
- **Damage limitation may be achievable by invoking electronic communications law**

The AVMS Directive

- **Purpose:**
 - a single market in audiovisual media services
- **Scope:**
 - Originally television broadcasting
 - now extended to non-linear services such as VOD
 - if receivable within EU on standard consumer equipment
- **Main requirement: ensure compliance by media service providers who are:**
 - established in a member state, or
 - use an uplink in or satellite capacity appertaining to a member state
- **How it works:**
 - Country of origin principle - freedom of reception and retransmission
 - Each member state to impose minimum standards on MSPs under its jurisdiction

Jurisdiction – the problem

- **Special rules for MSPs to be assigned to the jurisdiction of a single member state**
- **The main criteria – location of:**
 - head office
 - editorial decisions
 - workforce
- **But if that doesn't settle it – location of:**
 - uplink
 - the state to which satellite capacity “appertains”

Jurisdiction – the text (Article 2(4))

Media service providers to whom the provisions of paragraph 3 [the main criteria] 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.**

Jurisdiction – the practical effect

- **Any non-EU AVMS that**
 - is uplinked in the EU, or
 - is carried on an EU satellite, and
 - can be received on standard consumer equipment
- **is deemed to be under the jurisdiction of a member state**
- **That member state must ensure those services comply**
- **How is it going to do that?**

Compliance – the text (Article 3(6))

Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.

The UK Government's proposals

- **So far limited to**
 - television broadcasting
 - uplinking
- **“... the UK will require a power to intervene to prevent the channel from being uplinked from the UK.”**
- **Could be done by**
 - power to require termination of uplinking
 - imposing ongoing regulation on uplink operators
- **But what about**
 - Transmission of non-linear material
 - Satellite transmissions, particularly with the HYLAS satellite on the horizon (joke)

Practicality

- **Maybe workable in the old analogue world with one television service per transponder**
- **Wholly impractical in the digital world where services are**
 - multiplexed
 - on-demand
- **How do you turn a non-compliant service off?**
- **What warranties and indemnities could provide adequate protection?**
- **What technical solutions are there short of abandoning multiplexing?**
- **Are there legal solutions?**

The e-Commerce Directive

- **Article 12**
 - Safe harbour for mere conduit
 - Member states must ensure that the SP is “not liable” for information transmitted
 - But not so as to affect the possibility of an injunction
 - So no comfort here
- **Article 15**
 - Member states must not impose a general obligation to monitor or to seek out illegal activity
 - So some comfort here

The new (2002) regulatory framework Directives

- **A single market measure**
 - Harmonised framework for all electronic communications services and networks
 - Implemented in UK by Part 2 of Communications Act
- **Authorisation Directive**
 - General authorisation replaced telecoms licences
 - Strict rules as to conditions that may be applied as part of the general authorisation
 - Can the Government's proposals be implemented?
- **The text (Article 6(1)):**

The general authorisation for the provision of electronic communications networks or services ... may be subject only to the conditions listed respectively in parts A, B and C of the Annex

The conditions that can be applied

- **Set out in the Annex to the Authorisation Directive**
- **Possible gateways for Government:**
 - Consumer protection rules under Universal Service Directive (nothing relevant)
 - Restrictions on transmission of illegal content under e-Commerce Directive (nothing relevant)
 - Restrictions on transmission of harmful content under Art. 2a(2) of TWF Directive (concerns only exceptional derogation procedure)
 - Uplinks outside scope (no chance, s. 32(6) of the Communications Act)
 - Satellites outside scope (possibly, but only in relation to satellite capacity)
- **Hard to see how the proposals would be lawful**

How did we end up in this position?

- **Original scheme adopted in 1997 (Directive 97/36/EC) when the world was largely analogue**
- **Original scheme treated uplink as a fallback mechanism**
- **UK had no satellite capacity**
- **Non-EU channels were France's problem**
- **France was originally not constrained by the Authorisation Directive**
- **France got the order reversed (probably)**
- **The UK has to face the problem for the first time**
- **The UK consultation did not address these issues and did not consider online issues at all**

How do we get out of it?

- **Not clear but whose problem is it?**
 - At present it is the Government's problem
 - If the proposals are implemented it becomes the operators' problem
 - That could be expensive
 - Suggest damage limitation by opposing implementation if the problem is passed on
- **Next steps on implementation**
 - Responses to consultation end Jan 2009
 - Policy proposals and draft legislation about same time
- **Opportunities to oppose**
 - Make urgent representations now to DCMS
 - Look out for policy proposals and respond
 - Brief local MP to pray against the legislation in Parliament

Regulation of ground and space segment

- **space: Outer Space Act 1986**
- **spectrum: Wireless Telegraphy Act 2006**
- **telecommunications: Communications Act 2003**
- **Other:**
 - Not broadcasting since a carrier, not provider, of content
 - Safe harbour for mere conduit: e-Commerce regulations