

Media Market in Flux:

- Audiovisual Media Services Directive - changes
- Brexit

Karol Laskowski
Counsel

5 October 2018

Agenda

1 Cross-border delivery of AVMS

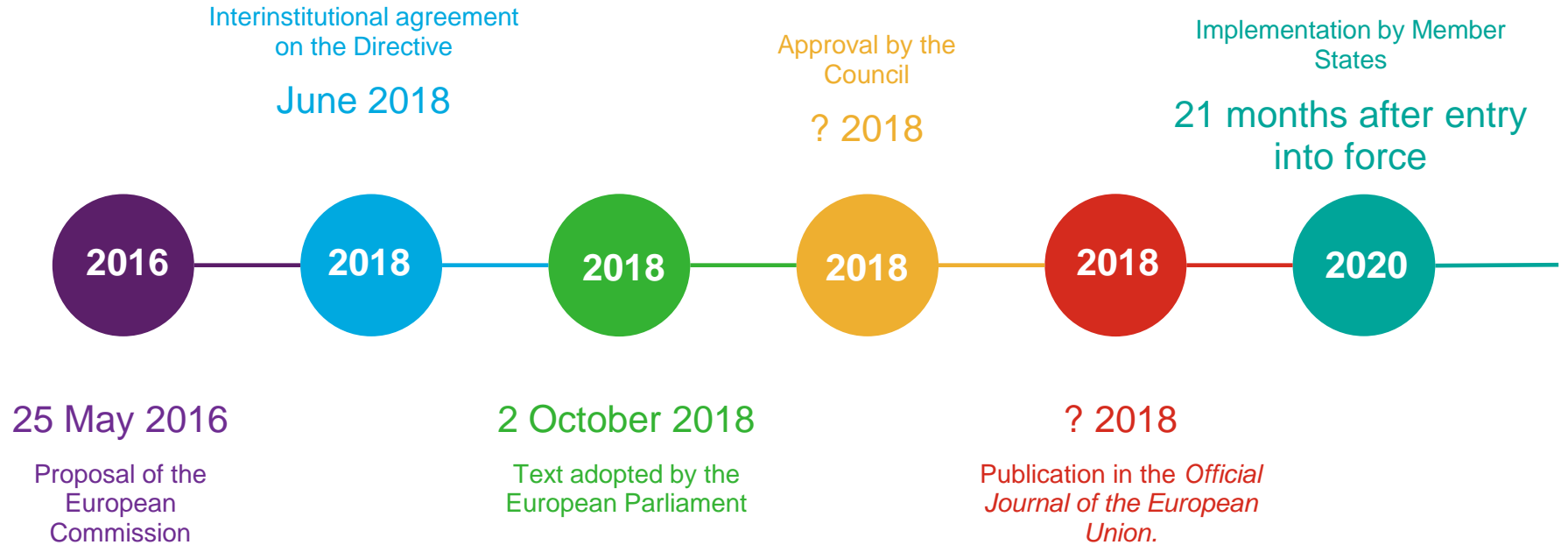
4 Responsibilities of VOD providers and broadcasters

2 New services (but not only)

5 Brexit

3 Responsibilities of VSP providers

Timetable



Cross-border delivery of AVMS



Jurisdiction

- The rules for determining jurisdiction are essentially unchanged
- Two important clarifications:
 - “**A significant part of the workforce**” relates to the workforce involved in the pursuit of program-related AVMS activity
 - “**Editorial decision**” – taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of the AVMS
- Cooperation procedures, maintaining an up-to-date list of media service providers, information duties

Art. 2

Derogation to country of origin

Freedom of reception

Aligned for linear and on-demand services grounds and procedures for provisional derogation (art. 3)

Circumvention procedure

Extended to VOD services (art. 4)

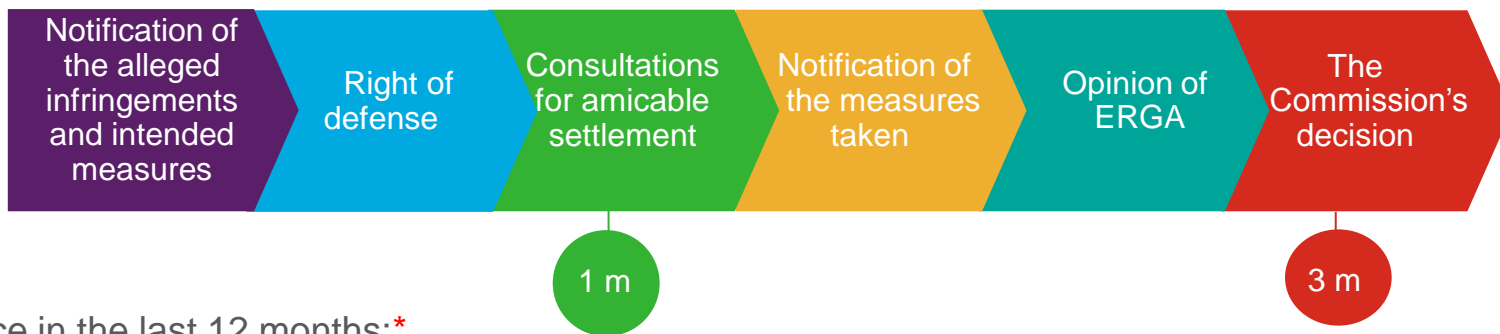
Financial contributions

Financial contributions to the production of European works in targeted Member State (art. 13)

Provisional derogation to freedom of reception and not restricting retransmissions

Two procedures depending on type of infringement (art. 3):

- Twice in the last 12 months:
 - incitement to violence or hatred (infringement of art. 6(1)(a))
 - may impair the physical, mental or moral development of minors (infringement of art. 6a(1))
 - prejudices or presents a serious and grave risk of prejudice to public health



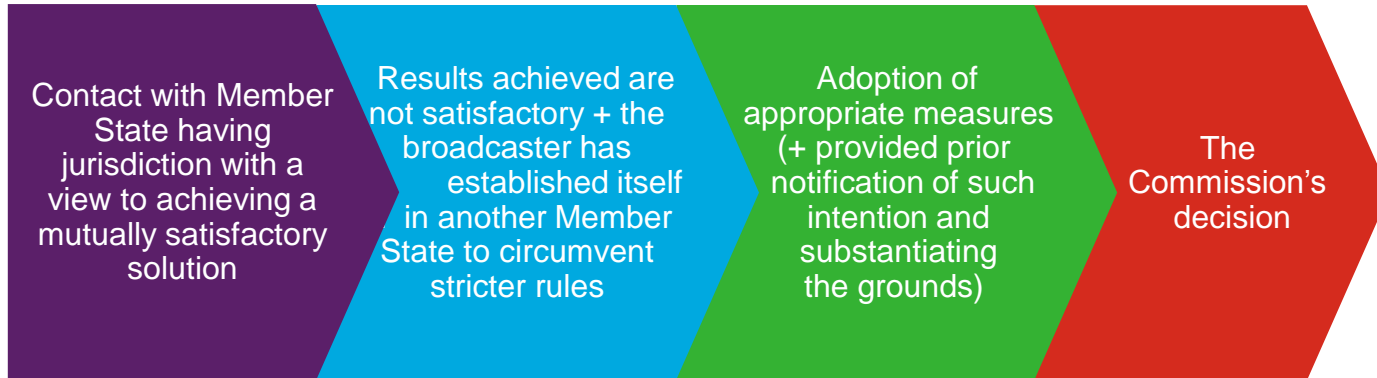
- Once in the last 12 months: *
 - public provocation to commit a terrorist offence (infringement of art. 6(1)(b))
 - prejudices or presents a serious and grave risk of prejudice to public security, incl. national security and defense



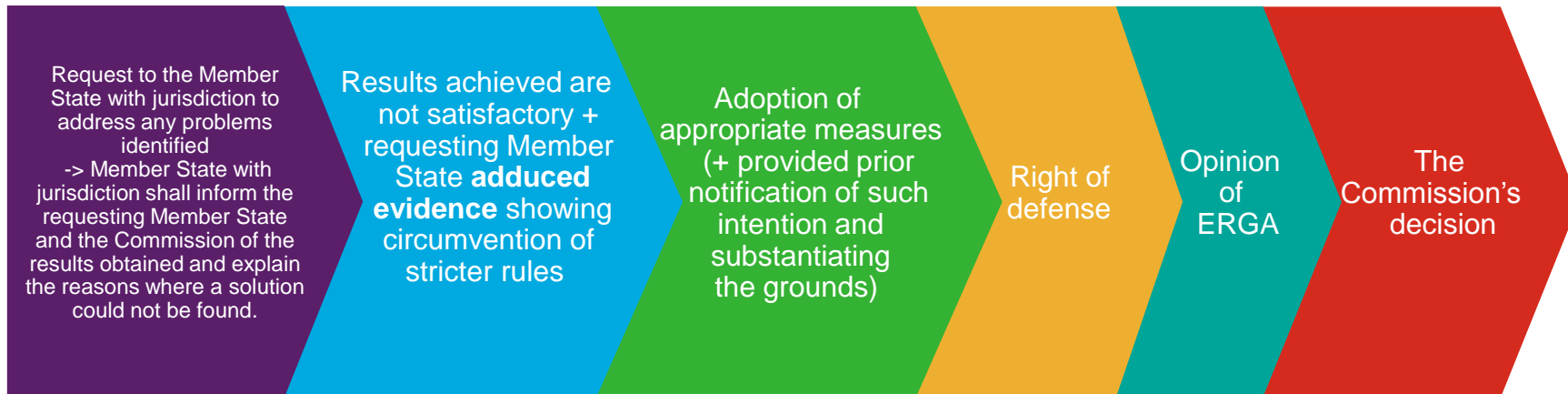
* A possibility to derogate from the procedure in urgent cases: max. one month after alleged infringement, notification of measures taken in the shortest possible time, examination by the Commission

Circumvention of more detailed or stricter rules (art. 4)

- Extended to VOD services providers (only broadcasters were covered to date)
- New procedure:
 - **Previous procedure**



- **New procedure**



Financial contributions to production of European works

- Member States may require media service providers under their jurisdiction to **contribute financially** to the production of European works
- Such requirement may also be imposed on media service providers **targeting audiences in their territories**, but established in other Member States
- Financial contribution:
 - via direct investment in content and contribution to national funds
 - based only on the revenues earned in the targeted Member State
 - shall be proportionate and non-discriminatory
- **Exclusions:** media service providers with low turnover or low audience, obligations or requirements where they would be impracticable or unjustified

Art. 13

New services (but not only)



Scope of Directive – regulation of AVMS

Substantially unchanged

Service

Under editorial
responsibility

Inform, entertain, educate

Incl.: a TV broadcast and
on-demand AVMS

Additional clarifications

“Dissociable section”

Not only “TV-like”

Examples of AVMS

Covered by Directive

Broadcasting online, VOD

VOD service available on YouTube

Dissociable video section of newspapers available online

Not covered by Directive

Distribution of TV channels

Newspapers available online with videos linked to articles

UGV made available without remuneration

Music services

Definition of video-sharing platform service

- Service
- Principal purpose (of the service or of a dissociable section thereof), an essential functionality: **providing programmes, user-generated videos, or both**, to the general public
- **Video-sharing platform provider does not have editorial responsibility**
- **VSP provider determines the organization**, incl. by automatic means or algorithms in particular by **displaying, tagging and sequencing**
- Inform, entertain and educate
- Available through electronic communications networks

Art.
1(1)(aa)

Examples of VSP

Covered by Directive

VSP providing user-generated videos or programmes

Social media providing programmes or user-generated videos – the Commission's recommendations

Not covered by Directive

Social media not providing user-generated videos or programmes

Platforms which do not organize shared content

Platforms providing programmes

Extended jurisdiction for non-EU entities

- VSP provider **not established on the territory of a Member State** but having:
 - parent undertaking
 - subsidiary undertaking
 - another undertaking of group established on the territory of that Member State

Art. 28a

Responsibilities of VSP providers



Protection of customers

- **Minors** from content which may impair their physical, mental or moral development
- General public from content containing incitement to **violence or hatred**
- General public from content containing public provocation to commit a **terrorist offence, child pornography, racism and xenophobia**

Art. 28b

Audiovisual commercial communication

Provided by VSP

Comply with the requirements of
Art. 9(1)

Provided by other entities

Take appropriate measures to
ensure that others comply with the
requirements of Art. 9(1)

Informing users

Clearly inform users where
programmes and user-generated
videos contain audiovisual
commercial communications

Exposure of children to HFFS

Co/self-regulation encouraged to
reduce the exposure of children to
audiovisual commercial
communications of HFFS

Appropriate measures (10 types of measures)

- Measures include:
 - including and applying in the **Terms and Conditions** what activities are prohibited, incl. restrictions on advertising
 - **functionality** for users who upload user-generated videos to declare if they contain audiovisual commercial communications
 - transparent and user-friendly **mechanisms for users to report or flag** harmful content to the video-sharing platform provider
 - **age verification and parental control** systems
 - **user complaints procedures**
 - **media literacy** measures and tools
- Member States may apply additional measures

Art.
28b(3)

Responsibilities of VOD providers and broadcasters



Promotion of European works - VOD

- Promotion of European works by on-demand AVMS providers:
 - min. **30% share of European works in their catalogs**
 - **prominence of European works**

Art. 13

Protection of minors, personal data protection

- AVMS which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors **will not normally hear or see them**
- **Strictest measures** of access control for the most harmful content (gratuitous violence, pornography)
- Prohibition on processing of **personal data of minors** for commercial purposes (direct marketing, profiling, behaviourally targeted advertising)

Art. 6a

Audiovisual commercial communications / product placement

- Rules related to audiovisual commercial communications for **alcoholic beverages** extended to on-demand AVMS, exception: sponsorship and product placement
- Prohibition of all forms of audiovisual commercial communications extended to **electronic cigarettes and refill containers**
- **Product placement allowed** in all AVMS, except in news and current affairs, consumer affairs, religious and children's programmes

Art. 9
Art. 11

Advertising spots and teleshopping spots

- The share of TV advertising and teleshopping spots remains at **20% of total broadcasting time**, but the Directive gives broadcasters greater flexibility - the limit applies in two slots:
 - 06:00 - 18:00
 - 18:00 - 24:00
- The limit does not include **announcements** made by the broadcaster **in connection with its own programmes** and ancillary products directly derived from those programmes or with programmes and AVMS from other entities in the **same broadcasting group**

Art. 23

Increased role of co/self-regulation

Describing the potentially harmful nature of the content of an AVMS for minors

Exposure of children to audiovisual commercial communications to HFFS

VSP

Audiovisual commercial communications for alcoholic beverages

Content integrity

Art. 7b

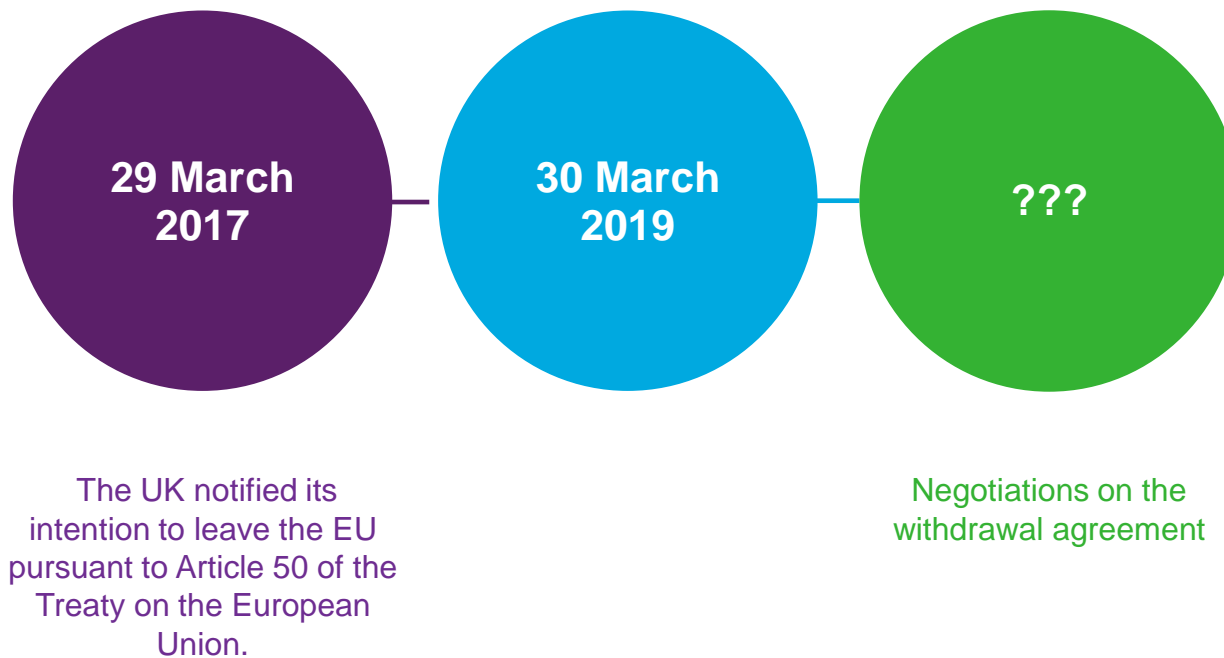
Member States shall take appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified.

Brexit



The clock is ticking....

Brexit



Brexit - no deal?

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)

Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Directive 2012/28/EU on certain permitted uses of orphan works

Directive 96/9/EC on the legal protection of databases

Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market

Possible scenarios

Reorganization of the organizational structure

Possible destinations to establish (The Netherlands, Ireland, Spain, the Czech Republic, Estonia)

Fallback on the European Convention on Transfrontier Television

- Limited application: EU, Belgium, Denmark, Greece, the Netherlands, Ireland, Luxembourg, Sweden have not ratified ECTT
- Does not fully reflect EU regulations (on-demand services not covered by ECTT, restrictive advertising requirements)
- Cannot be effectively enforced by the Council of Europe

Dentons

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com