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EPC DIGITAL MEDIA TASK FORCE

Workshop

Review of the Audiovisual Media Services Directive

Max Kohnstamm Room, EPC 14-16 Rue du Trône, 1000 Brussels

Intervento di Francesco Graziadei

I was asked to share with you the main key findings of the Report “il video e la terza rivoluzione di internet”. This is a joint Report by ITMedia Consulting (a well-known research and consulting company in digital economy sector and Luiss Dream where Luiss means the first private University in Rome and Dream means, a research centre instituted by the Department of Law of Luiss Guido Carli University, in Rome, directed by Prof. Gian Domenico Mosco, and vice-directed by Prof. Gustavo Olivieri. I am part of Luis Dream research centre and I teach IPR and Communication law at the Luiss Guido Carli University of Rome. I co-authored one of the chapters of this Report together with Prof Gustavo Olivieri and with the cooperation of Dr. Giulia Gianni.

More specifically, the Report is divided in four chapters. The first three chapters, curated by Itmedia, analyse economic tendencies, dynamics and competition problems as internet has increasingly become a strategic instrument to diffuse video contents. The forth chapter, by Luiss Dream, analyses the regulation trend and perspectives, aimed at granting consumer protection about audiovisual contents in the more complex digital eco-system.

This Report was conceived more than a year ago and was ended in fall 2015. It was officially submitted in Rome (at the Luiss University) for the first time on April 6 2016. The Next

presentation is scheduled for June 14th in the AGCOM which is the National regulatory Authority for the communication sector.

It is obviously not easy to describe the main contents and findings of this Report since such many things have happened in this matter. (DSM Strategy on May, Regulation proposal on cross-border access to digital online contents on December, the Better Regulation package on May 2015, plenary meetings of the Community of Practice for Better Self- and Co-Regulation, and – last but not least - the proposal on AVMSD review we are discussing today, to name some of them).

Therefore I should not exempt myself to describe the main contents from one side but also to see and check if our assumptions have been confirmed or otherwise disagree with the on-going actions.

In our analysis we focused, from one side, on the methodology outlining the rising role of alternative forms of regulation such as self-regulation or co-regulation. As the distribution of video contents become more and more complex due mainly to digital convergent technology, we see the need to switch from traditional regulation methodology based on the command and control paradigm to a new more flexible bottom up form of regulation to rule more efficiently and rapidly many aspects the consumer protection involves in the distribution of media contents.

This is more and more acknowledged by European institutions in many legislative acts or proposals and by the adoption of [Principles for Better Self- and Co-Regulation](#) in 2013, and the debate over such Principles which takes place within the Community of Practice and in the framework of the Better Regulation package which recognise the need to combine regulatory and well-designed non-regulatory means and deems the Principles cited above as a good instrument to pursue such an objective.

As we have seen such findings are now broadly confirmed by the new AVMSD proposal, which give the Commission and ERGA a role in promoting (and empowering) a new form of regulation steaming from stakeholders (such as Code of Conduct).

In our Report we provide an overview of number of sectors in which Code of Conduct and self-regulatory bodies or co-regulation approaches have been introduced such as:

- Advertising (es. European Advertising Standard Alliance)
- Contents on mobile networks (es. Mobile Operator's Code of Practice in UK and the Mobile Alliance against child sexual abuse within the GSMA)

- Internet (es. self-regulatory initiatives such as Coalition to make a Better Place for Kids within (o recognised by) the institutional European Strategy for a Better Internet for Kids - BIK)
- Social networks (es. Safer Social Networking Principles for the EU del 2009 founded on awareness, empowerment, report tools).
- Search engines (es. codes of conduct adopted in Germany on 2005)
- Technical standardisation (es. ETSI born on a voluntary basis, Internet, Internet Engineering Task Force, World- Wide-Web Consortium, etc.
- Press (es. in Italy many codes of conduct adopted firstly by the Association of Journalists and by Italian Federation of the Press that decline professional ethics with regard of protection of minors, independence of journalist, financial and judicial, information etc.)
- Media and minors (es. in Italy the co-regulation of the Media and Minors code, equipped with a commission, the Committee, that is in charge of supervising the application)
- European works in VoD's services (es. in Italy, criteria of evidence in the catalogues)
- Product placement (es. in Italy, implementing rules)
- UGC Platform (copyright violation, content ratings)

In our Report we outlined, by reference to the literature on this issue, benefits and risks of self and co-regulation solutions and the main key factors that grant or not success to different type of regulatory scheme, such as input legitimacy (regarding the involved stakeholders), output legitimacy, transparency, independency (from regulated industries) but at the same time knowledge and specialization (with the need of a broad participation of industry experts) and enforcement powers (as much important as a law degree of input legitimacy does not grant itself a high level of self compliance).

Also for this reason we quoted specifically the experience of PEGI (either because relevant for the second step of the report, as we will see in a while or) as an example of a well structured co- (or self-?) regulation case (stakeholders involvement, governance, enforcement, complaints etc.).

From the other side, we tried to go in-depth to see (by facts finding) how the new form of regulation and market practices (or market practices using new form of regulations) are dealing with the involvement of different players in the "game" of access and distribution of video contents.

About the protection of traditional media regulation's values, a field rich of case studies and best practices about both the new form of regulations and the new form of involvement of new players in the consumer protection, is the protection of minors.

Usually, protection of minors is regulated, co-regulated or self-regulated by using a system of classification and information about contents (normally a system of ratings on the basis of different factors: age suggested or prescribed for audience, descriptors of content, reporting tools etc.).

We provided an overview of content rating bodies (with regulatory, co-regulatory or self-regulatory nature) in traditional (movies, tv programmes etc.) and new digital contents (Apps, Videogames etc.).

Therefore, among other remarks, we saw and outlined that these systems are basically aimed at protect minors starting from an increase of quality and amount of information available (for minors and their parents) and that this is possible and even more and more desirable (giving to the end users more awareness and more power to self-protect while ensuring an evolution in the relation between user and media never seen before) due to the opportunity made possible by interactive technology.

Such different role of end user, go hand in hand with the need to rise media Literacy by the broad public. This is well acknowledged for instance by the UK laws and the UK regulator, where the Law (The Communication act of 2003) specifically gives to Ofcom the task to promote media literacy (Section 11) and to carry out research in this field (Section 14).

According to his duties Ofcom has carried out during the last ten years many researches about Media Literacy. The last update was in November 2015 where Ofcom claims that:

Media literacy also helps people to manage content and communications, and protect themselves and their families from the potential risks associated with using these services.

Ofcom's definition of media literacy is:

"the ability to use, understand and create media and communications in a variety of contexts".

As said, about fact findings we focused on systems and practices to protect minors (by giving them more information, coming from an Authority, a self-regulated Authority, the content provider, the feedback by the audience etc.) in the online distribution of various kind of contents including videogames and Aps. And this is why we described the PEGI (and IARC) system (the Pan European

Game Information, the European standard for content rating in this field), its nature of alternative form of regulation (as already described) and how it works. We briefly overviewed online stores, Vod services, UGC platforms etc.

We saw that in many cases platform play an important role in making the information available to end users (either the information coming from the content provider, or from an Authority or from other end users).

More in detail we analysed how some of the online stores manage contents for the protection of minors and how often self- or co-regulamentary schemes are involved. This is by a complex mechanism that contemplates the cooperation of more subjects on voluntary basis.

The content classification criteria are elaborated by an authority recognized on a voluntary basis by the operators in the sector. The supplier of contents spontaneously choses to undergo a system of rating; if he doesn't do so, its content results as "unrated" and becomes excluded from the visualization in certain territories and/or for some users. The classification system is generally automated on the basis of an online questionnaire, and the result is predetermined in relation to the answers given. The responsibility resides in the classification authority and in the supplier of contents (or only in the latter in case of self-rating in UGC), who, in answering the questionnaire on the characteristics of the specific content, must provide an objective and truthful assessment. Usually when the classification is provided by an Authority, it is possible to refuse the classification and to appeal to the classification Authority

So according to this model, the protection of some fundamental interests is reached by different instruments (with respect to the classic model of public command and control) that operates a reallocation of responsibility between content provider and end user, enabling the latter with adequate instruments of self-protection, and a mere technical (but very useful) role of the intermediaries.

We therefore concluded that without affecting the general framework, and in particular the separation of role and responsibility set by the actual EU audiovisual regulation, it would be possible to create specific rules for specific phenomena (linked to the world of technical intermediation), that impose behaviours (well-defined, and most importantly proportioned to the objectives) also to subjects formally not belonging to the SMAV sector, aiming at a better

protection of consumers in the convergent media.

As has been noted in a Report by European Audiovisual Observatory published at the end of 2015, *“in a system where all stakeholders, the State and users included, are part of a more complex value chain with mixed duties as a result of the interdependencies that develop, one could also imagine that issues of empowerment and awareness may develop into new forms of shared commitment. This would not be the classical ex ante responsibility with subsequent passive liability for the actions put in place, but rather a form of active accountability”*.

In Italy (as well as in many other countries and by the European Courts) The role of intermediaries in the distribution of audiovisual contents is strongly debated by the Courts (as well as by Scholars) mostly in case of copyright violation.

The approach is swinging among those who see an active role of the host provider and therefore his responsibility on content stored and those who consider crucial the uploading of content by a third party (basically End User in UGC platform).

In our Report's conclusions we outlined our preference for the second approach, because this is in line with the requirement provided by law (the AVMSD) that says that the editorial responsibility on contents raises only when two element occur (together): the organization from one side and the “selection” from the other. Without the second, can not be seen an activity which implies a responsibility on what is diffused (information, values, adds etc.) by an audiovisual content.

And this is exactly what the AVMSD review new proposal seems to acknowledge by Recital 3, 28, 29 and 30 and rule in article 28a.

The main approach could work not only for protection minors but also for the fulfilment of another main content and objective of the media regulation: freedom of speech and pluralism.

Video sharing platform provider and intermediaries in general, take more and more part in the distribution of contents and become more and more instruments (this is my opinion, only instruments) to grant access to contents. As providers of technical means to access to audiovisual contents they could be asked to fulfil some obligations of access and interoperability

This is in line with some positions expressed by the Commission (Green Paper on connected tv on 2013) the European Parliament (Resolution on march 2014), the stakeholders who participated in the public consultations on the 2013 Green Paper (see for instance Ofcom).

But – again - these sort of cooperation asked to new players does not lead to recognise a responsibility on contents itself as for the Audiovisual media service providers.

It seems that the new proposal leaves space in favour of Member States (see recital 38 of the proposal) in this matter.

We outlined that what described seemed to go exactly in the direction of the auspices expressed by the Ofcom, within the consultation of the European Commission on the Green Paper *“Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values”*, in which it affirms how it could be possible to tend toward an industry-led mechanism on a self-regulatory basis that, with respect to the operators that manage the access to contents, *“without subjecting them to editorial responsibility”*, could bind them (and make them accountable) to consenting and offering to the SMAV providers the instruments for content classification, through systems that could indicate to the users which framework to apply to those contents, binding them to prepare and accept a set of complaint procedures (also of the notice and take down type). And in the public consultation on the AVMSD REFIT Ofcom further claimed that *“the Directive strikes an appropriate balanceAvoiding the undesirable attempt to impose mass media content regulations, intended for TV businesses, on other digital services and/or on thousands of individuals creating and sharing content online”* and that *“While it might be reasonable to consider whether YouTube and other AV platforms might have some specific regulatory responsibilities – potentially including roles which support the same purposes as the AVMSD - these responsibilities will need to reflect their specific role and function of platforms and should not, for example, entail some kind of editorial scrutiny of the characteristics of the AV content hosted”*.