

The New Resolutions of the Italian Media Authority on the Audiovisual Media Services via the Internet

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The AGCOM (the Italian Media Authority) has recently published (on December 28th, 2010) two resolutions concerning the broadcasting services of audio and/or video contents (so-called "audiovisual media services") in "linear" mode ("*streaming*" or "*simulcast*" services: Resolution n. 606/10/CONS) and in "non-linear" mode ("*downloading*" or "*on demand*" services: Resolution 607/10/CONS) through the "other means of electronic communication" contemplated by the Broadcasting Code (as recently amended by the legislative decree March 15th, 2010 no. 44, so-called "Romani Decree") which had not been regulated yet (principally, the Internet).

These resolutions are of great significance not only for the novelty of the matter (administrative regulation of the audiovisual media services provided via the Internet), but also for the way they regulate the new matter: appearing somewhere to overlap and in some way collide with the rules of the Broadcasting Code as amended by the Romani Decree (which are super-ordinate and which the new resolutions were expected to simply implement from an administrative perspective), and with the rules of the legislative decree no. 70/2003 on the "electronic commerce" (which also is super-ordinate) as to the liability of the Internet Service Provider.

The Contents of the New Resolutions

The new resolutions extend to the audiovisual media services providers via the Internet which fall in its field of action (see below) the authorizations, operations and sanctions system provided by the Broadcasting Code and the implementing AGCOM resolutions for the audiovisual media services providers via cable, satellite and digital terrestrial (fixed and mobile).

The Authorizations System

In order to lawfully provide audiovisual media services over the Internet in linear mode, the Internet operators subject to the new regulations must preliminary require to, and obtain from, the AGCOM a specific authorization.

As to non-linear audiovisual media services, the authorization is replaced by a certified start-up notification to be sent to AGCOM.

In any case, a one-off payment of 500 euro (for audiovisual services) and of 250 euro (for audio services) must be paid to AGCOM.

The Internet operators which, at the date of the coming into force of the new resolutions, have already been delivering audiovisual media services over the Internet capable to fall within the field of action of the new resolutions, must file their application for authorization or, as the case may be, their start-up notification with AGCOM within the term of one year.

The Operations System

All providers of audiovisual media services via the Internet which are subject to the new resolutions, both in linear and non-linear mode, must:

- a) fill the register of their broadcast programmes month-by-month;
- b) keep full records of their broadcast programmes quarterly;
- c) observe the rules of the Broadcasting Code on users and copyrights protection, advertising and under age audience protection.

Linear services providers are also bound to comply with the rules of the Broadcasting Code (as implemented by the AGCOM resolutions) on corporate separation (should they act also as electronic network operators), rectification and audiovisual broadcast and production shares.

Non-linear services providers must observe the rules of the Broadcasting Code (as implemented by AGCOM) concerning the promotion shares of European audiovisual works.

The Sanctions System

Violation of the authorizations system: i) administrative fine from 516,46 euro to 103,291.38 euro in case of missed authorization or start-up notification within the terms and conditions provided by the new resolutions; ii) administrative fine from 10,329.14 to 258,228.45 euro in case of non-compliance with AGCOM orders or warnings; iii) administrative fine from 2% to 5% of the last yearly turnover in case of non compliance with AGCOM order and warning relating to dominant positions.

Violation of the operations system: in addition to monetary fines, for the weightiest cases the suspension of the activity or the revocation of the authorization may be ordered by AGCOM.

Field of Action of the New Resolutions

The new resolutions apply to providers of audio and/or video contents broadcasting services via the Internet which meet, cumulatively, the following conditions:

1. editorial liability over the broadcast contents in any form exercised;
2. provision of the service with a view to profit;
3. minimum revenues rising from advertising, TV sales, sponsorship, contracts and agreements with private and public entities, public funds and/or Pay TV services, equal to 100,000.00 euro per year;
4. establishment in Italy.

The Editorial Liability

According to article 2.2.b of the Broadcasting Code, only providers of audiovisual media services having "*editorial liability*" over the broadcast contents are bound to the rules of the Broadcasting Code and to the implementing regulations of the AGCOM; provided that "editorial liability" means, under article 2.2.h of the Broadcasting Code (as amended by the Romani Decree), solely and exclusively "*the exercise of an effective control both over the selection of the broadcast contents [...], and over their organization*", that must consist of "*a chronological schedule*" for linear audiovisual services, or that may consist of "*a thematic catalogue*" for non-linear audiovisual services.

The new resolutions, by expressing in terms of "*editorial liability in any form exercised*", seem to extend the concept of editorial liability compared to the concept provided by the Broadcasting Code; and under this aspect they seem to collide with the rules of the Broadcasting Code and of the Romani Decree (which are super-ordinate), and to overlap the rules of the legislative decree on the electronic commerce (which is super-ordinate as well, and) which, as to the providers of audiovisual contents broadcasting services via the Internet to which no "editorial liability" under the strict terms of the Broadcasting Code is attributable, states an exemption from both the application of the broadcasting rules and regulations and the civil rules on the tort or quasi-tort liability for violation of intellectual property rights over the broadcast contents.

The above suggests a strict reading of the letter of the regulations under consideration, complying with the super-ordinate rules of the Broadcasting Code and of the e-commerce legislative decree, by default of which such regulations would create a possible internal conflict of rules.

The View of Profit and the Minimum Revenues

The "*view of profit*" and the "*minimum revenues*" conditions would have been, under the Broadcasting Code (as amended by the Romani Decree), directed to exclude, from the enforcement of the broadcasting rules and regulations, not only the Internet audiovisual media service providers operating for "*no-profit*" purposes (e.g. educational, cultural, recreational purposes and in any case aiming at the break even); but also the Internet providers that, though providing services with a view of profit, may not be regarded, due to their revenues, as "*in competition with*" the cable, satellite and/or digital terrestrial broadcasters.

Under this aspect as well the new resolutions do not seem to be completely consistent with the Broadcasting Code, given that operators generating yearly revenues for 100,000 euro may be unlikely regarded as competitors of the well-established cable, satellite or digital terrestrial operators.

The Establishment in Italy

The new regulations apply only to providers "*established in Italy*", where "*establishment*" means - according to article 1-bis of the Broadcasting Code and the uniform line of precedents of the European Court of Justice - "*the prevailing or effective centre of the activity*", regardless of the location of the registered office.

Internet operators that are not established in Italy, and therefore which do not have in Italy the prevailing or effective centre of their activity, are therefore not subject to the authorizations system, nor likely to the operations and sanctions system, provided for by the new regulations.

This exemption would not however prevent from the theoretical possibility that, an Italian judicial authority having otherwise jurisdiction over an Internet Service Provider not established in Italy apply, for purposes other than the administrative enforcement of the new regulations (which does not fall within its competence), and namely in order to assess the civil liability of the Internet Service Provider for the contents broadcast through its platform, the same parameters adopted by the AGCOM in order to assess whether an Internet operator may be regarded as an audiovisual media services provider, and in particular the broad concept of "editorial liability" and the minimum revenues of 100,000 provided by the new regulations to this end.

Exemptions

The new regulations expressly provide that the following Internet operators may not be regarded as "*audiovisual media service providers*", and cannot be therefore subject neither to the new regulations nor to the implications of such qualification under other perspectives:

- any form of private correspondence, including emails;
- online newspapers and electronic version of newspapers and magazines;

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- services in relation to which the audiovisual contents are only marginal, e.g. animated images, short spots or information relating to a product or a non-audiovisual service;
- gambles with money, including lotteries, bets and other kinds of gambling services, as well as online games and search engine, except the broadcasts concerning gambles and games of chance;
- services direct to a close number of individuals, or close circuit television also broadcasted in public places, e.g. rail stations;
- services provided in the context of non commercial activity;
- services consisting in programmes broadcasting for less than 24 hours per week;
- non-linear services with catalogues consisting exclusively of programmes previously broadcast in linear mode, e.g. catch-up tv or archive services; and (last but not least)
- broadcasting services of audiovisual contents generated by private users (so called *user generated contents*) which directly select and organize the contents in order to share or exchange them within their community, except that the provider of the broadcasting service had the "*editorial liability in any form exercised*" over the contents (in which case, should the other 3 conditions be met - i.e view of profit, minimum revenues equal to 100,000 euro and establishment in Italy - the service provider would be subject to the new regulations).

Once again, the provision of this last exemption in those terms seems to corroborate the feeling that the notion of "editorial liability" provided by the new regulations is different and broader than the notion provided by the Broadcasting Code; and also as to this provision the new regulations run the risk of lacking in legitimacy for possible internal conflict with a super-ordinate rule of law.

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