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***Television Broadcasting in the European between freedom to provide
services and freedom of expression***

Abstract

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The present paper represents a study on the present European regulatory framework of broadcasting activities. The analysis has the aim to identify the problematic issues risen by the above mentioned regulatory framework, moreover highlighted from the new regulation contained in the Audio Visual Media Services directive 2007/65/CE.

The historical whereas of the analysis consisted in the valuation of the fast development of the technologies and of the internationalization of the economy that took the provision of services in the European Union to a fast growth. With reference to the broadcasting activities, the development of cable television and satellite television gave to operators and users an high number of options. These elements created a real European market of television transmissions. Consistently, the provision of transfrontalier television programs increased in a market more and more dynamic that allows users to join many different television programs coming from different EU countries through different technologies and at affordable costs.

The above analysis resulted as a sort of first achievement of the present work. This was followed from the analysis of the regulatory frame work and how this organizes and sets the new market structures. But this element has to be enriched by the study of the legal characters of the broadcasting activity itself. Broadcasting activities have been considered an activity they maintain a key role for the development of the European Union and the protection of the European cultural identity. Broadcasting activities represent, in other words, an example of the exercise of freedom of expression in an European landscape. The 1985 Convention on the Transfrontalier Television and then the European Directive 89/552 – “Television without Frontiers” clearly stated that the broadcasting activities would not have been reduced to a simple provision of services aimed to the creation of a common market.

On this basis, the analysis proceeded with the evaluation if the present European regulatory framework is able to grant and improve the exercise of the mentioned freedom of expression, building the so called <<*European audiovisual landscape*>>.

First step (Chapter I) of the paper was the study on how the European regulation qualified the broadcasting activities on its jurisprudence. The study of the leading cases such as *Sacchi* (1974) and *Debauve* (1979) took to the qualification of the television transmissions as services in the European Union, subject to the rules provided by the EC Treaty at article 59 and 60.

Starting from these first cases a new will in European institutions raised and first result was the White Paper adopted by the EU Commission on 1984, followed by another leading case (*Bond Van Adverteerders* - 1988) that definitely conduct to the qualification of the broadcasting activity within the services provided in the European Union; between the others, no relevance shall be

given to the circumstance that, even if a legal contact between user and broadcaster was created, and at the same time first points that will then conduct to the qualification as a form of freedom of expression appeared in the legal landscape.

All these points will conduct, in a short period of time, to the definitive acknowledgement of the broadcasting activities as <<*specific manifestation in Community law of a more general principle, namely the freedom of expression*>> with the Television without Frontiers Directive and its Whereas 8.

Afterwards, the paper tried to list the legal instruments that European legislation adopts in order to support the transfrontalier movement of services, also in order to evaluate which one of the legal procedures represent the best one that can allow the movement of television transmission and the exercise of the freedom of expression.

The result, based also on a comparative analysis, was that in all the key fields of the economic activities inside the EU, the country of origin principle (COO principle) was the best legal solution adopted by the legislator. The adoption of the COO principle grants in fact to the broadcaster that the only rules applicable to its activities will be the rules of the Country of origin where it is established.

Directives on financial services, electronic commerce and the new directive on provision of services showed that the COO principle has been the preferred principle applied to the services characterized by a strong technological and digital elements. For sure, the COO principle had different formulas, particularly with reference to the rules applicable and to the power (more or less broad) of the Country that hosts the services.

Another element was the overtaking of the COO principle realized with the Directive 2006/123. First element of this overtaking was the aim of partial harmonization chosen by the Directive, while the second element was the will to avoid the so called social dumping (i.e. the escape of service providers in Countries that have less restrictive rules).

Television without Frontiers Directive adopts an integral application of the COO principle, providing a limited number of exceptions applicable to the provision of broadcasting activities, related only to limited cases and in the total respect of strict conditions. Moreover, under the Television without Frontiers Directive, the application of stricter rules would be limited only to the broadcasters established in the same member State, and not to foreigner broadcasters.

Notwithstanding the above, Television without Frontiers Directive opted for a “minimal” regulation, that seemed efficient as regulation of the television transmission (EU quotas, advertisement limits, protection of minors), but not so efficient as regulation of the transmission between one State and another.

The opportunity to give coherence to the regulatory framework occurred with the new Directive 65/2007 – Audiovisual Media Services (AVMS); but this text showed on the above mentioned topics (COO principle, applicable law, power of the host State) numerous issues and legal concerns.

Chapter III deeply analyzes the new article 3 of the AVMS Directive; this article gives to single Member States the faculty to introduce stricter rules not only to established broadcasters but also to the broadcasters operating from another Member State. The only condition for imposing the respect of such rules is the mere destination of transmissions to another State.

Based on that rule and in light of following co-operation between the regulators of the different Member States, a likely scenario will be the one that request to a transfrontalier broadcaster the compliance with all the regulations of the States in which it broadcasts. Moreover, the control of the Commission on these measures shall only follow the adoption and introduction of the same measures.

The ambiguity consists in the fact that the European Union is searching to create a legal environment based on common principles and values and with more and more constitutional characters. Moreover, the same Treaty of Lisbon adopts directly the European Chart of Fundamental Rights, that on article 11 expressly recognizes the freedom of expression as a right that *<<shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers>>* and *<<the freedom and pluralism of the media shall be respected >>*.

In conclusion, the new formulation of the COO principle represents a limitation to the provision of the broadcasting activities in a transfrontalier and European perspective and to freedom of expression that is inherent to this activity.

The goal of enhance the freedom of expression in the European Union can be reached through the recovery of a full application of the COO principle, that would be the most appropriate one in light of the present technological environment. Probably future decisions from the European Court of Justice could help in correct the European regulation, especially on the matters of the definition of stricter rules and to the exception to the same COO principle.

If this will not happen the concrete risks could be a European legislation submitted to the Member States interests and not able to grant rules that can create the *<<European audiovisual environment>>*. A result that would contrast the new dimension of legal order that the new European Treaties aim to build.