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National Youth Protection and the European Union's *Appetite* for Regulations – An Overview

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Ladies and Gentlemen,
dear colleagues,

I feel honoured to speak at the 'anniversary' occasion of this important gathering of European experts. It was rather easy to accept the invitation, because the topic – which will in some way be at the heart of your discussion today – is very interesting.

A Few words on the Institute of European Media Law (EMR)

The EMR was established in 1990 as a private and independent research institute; its main office is located in Saarbrücken; there exists a small liaison office in Brussels. The Institute focuses on the main issues of media and telecommunications law. Its 5 fields of activity cover legal studies, conferences, publications (EMR-series, IRIS), consultancy/information services (databases), and research. German media authorities, commercial and public service broadcasters are the main institutional members. Recently, the focus of activity was on the following topics: Access to digital TV broadcasting over satellite; the application of the TWF-Directive's advertising regulations in several EU-Member States; Co-regulation in electronic media; and, Prospects for a well-balanced dualistic broadcasting system.

Introduction

Preparing my presentation today has not proven to remain free of all difficulty. – As you all know, the issue at stake is quite complex. For many reasons, promoting the idea of greater European harmonisation in the sector of youth protection is rather hazardous; you have been highlighting the relevant arguments *against* a more uniform regime in past discussions already.

One small element of earlier discussions that I would like to mention in the present context relates to some of the fundamental questions: What is a child? Which age is required to consider a young person an adolescent – no longer a child, not yet an adult?

When asked whether the European Community would actually show a significant degree of appetite *in favour of* additional regulation or, more generally speaking, action, I would say that the answer depends, as it does in ordinary life, on whether a delicious or, moreover, a delicate issue is at hand.

What dishes have already been served? Suffice here to simply name the TWF-Directive, the eCommerce-Directive, the Recommendation on the protection of minors and human dignity

on the Internet, and the Communication on certain legal aspects relating to cinematographic and other audiovisual works[1].

State of origin principle – free circulation

When agreeing on the terms of the TWF-Directive, in particular in respect of the principles of state-of-origin control and free circulation in the Internal Market, the Member States were enabled to accept the supervision exercised by other countries over the broadcasters established there. It was deemed both necessary and sufficient because the minimum criteria had been harmonised beforehand. Mutual recognition or mutual trust was rendered applicable.

First, this allowed for the media policy in France, for instance, to have no reason to believe that media enterprises in the UK would achieve competitive advantages over their domestic players simply because the latter's legal framework would be less restrictive or their broadcasters' practice would not be scrutinised the same way as it was done by the CSA.

In addition, all Member States sort of made a promise: they undertook not to differentiate between those programmes that were offered to a resident audience and those targeting viewers abroad. Therefore, in principle, it would have become less attractive for those providing audiovisual services over e.g. satellite to do 'forum-shopping'. I.e. to establish the centre of the activities in a Member State which would exercise the least control with regard to e.g. advertising regulation or youth protection principles.

Thirdly, the efforts to secure a level-playing-field even went further: Under the Transparency-Directive Member States are obliged to notify to the Commission planned national legislation, among others, as far as Information Society services are concerned,. The aims of such procedure are to avoid increasing disparity in national regulations through the introduction of additional laws. This involves that no distortion in competition should arise from one Member State treating e.g. video-on-demand services in an identical way as broadcasting while others might offer less strict regimes such services must obey to.

New approaches?

However, these basic approaches followed by numerous acts of Community legislation and, within the media sector, also by the eCommerce-Directive, have very recently been questioned. Interestingly, concerns raised by the competent Irish minister[2], heading for EU presidency in the first half of next year, deal with the protection of minors issue. He deems inadequate that broadcasters, established in one Member State but specifically (or even exclusively) targeting the audience of another Member State, have no obligation to respect the set of rules applicable to services on the latter's territory.

Harmonisation / Co-ordination vs. Uniformity

What is harmonisation good for? Generally speaking, it being implemented will often lead to that Member States will be deprived of invoking reasons of special national interest they consider indispensable. This, certainly, is no value *per se* – said effects of harmonisation have to be judged against the diminishing of barriers to a proper functioning of the internal market.

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1 http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/cincom_en.pdf

2 Press release, 20 August 2003, www.dcmnr.ie

So, harmonisation is mainly used in order to achieve a minimum set of common understanding. This covers both the necessity of measures upheld in the interest of public policy and the suitability of available instruments.

While the notions of harmonisation and co-ordination are frequently used as synonyms, the Treaty on the European Community is also not giving the impression that the implementation of the different words in the Treaty text follows a stringent pattern. Therefore, it has been suggested that, in general, both terms would have the same meaning. However, what is apparently meant when concerns are formulated against Community action in view of divergent national laws or administrative provisions, is a threat of a *uniform model* being imposed. As has been described in detail by *Mr. Wallander*, a uniform approach might face considerable opposition because it is – if not necessary in rather exceptional cases – mainly not suited to take sufficiently into account what kind of national peculiarities exist. Especially as concerns our subject matter, different cultural backgrounds throughout Europe have a decisive impact on what measures are deemed necessary and, where appropriate, by which institution they should be effected.

Harmonisation may be implemented through different levels of intensity. The more fundamental certain divergences in national provisions are (fundamental meaning that they significantly hamper the exercise of fundamental freedoms or that they distort competition), the more likely that in a first step minimum standards are employed so as to allow for the subsequent application of the concept of mutual recognition. *Co-ordination* points somewhat to a concept that accentuates or relies on procedural rules, thus allowing for a greater margin of independence from developments elsewhere – except where dysfunctional effects would occur.

Even harmonisation in the field of criminal law has become a European (Union) reality. You will recall that the prohibition of child pornography and its distribution over different media has become such a case which is also relevant in the framework of the Council of Europe's activities.

Existing differences

Is harmonisation of national youth protection regimes needed? The principal condition for Community action would be that there are significant differences in national laws and/or practices. A study prepared by Olsberg SPI on behalf of and recently published by DG Education and Culture lists four main factors which lead to a heterogeneous picture of protection of minors in the media in Europe: There are differences between:

- Member States;
- Different kind of media (Film, Video, DVD, broadcasting (TV movies, shows, news or documentaries), games, and the Internet);
- Systems applied (whole range of factors: number of age groups, labelling, legal framework, state institutions, co- or self-regulation, etc.);
- Standards (objectives, understanding of the role of youth protection measures, soft-criteria).

One example: films

These differences seem to be quite fundamental. By way of exemplification and as far as my understanding of film classification goes, I would like to present how I perceived the way the issue is generally dealt with:

1. There is an initial decision that films should be analysed for the purpose of having an idea of its content and way of presentation in order to prepare a judgement on its implications for the protection of minors. In many cases, a decision is also taken in view of the competent body that should be entrusted with such task.

2. Secondly, what may be seen as the main common factor, the film is watched.

3. Then, often a decision is taken as to whether the audiovisual work would be in breach of criminal law provisions, and, if this the case, its distribution shall be forbidden, it may be indexed. Probably, the film will not be suitable for adolescents under the age of 18. Provided that there are no reasons for such findings, it will be subsumed under a given age category. If I am correct, in many cases said evaluation is based on the manner in which the film deals with such issues as the portrayal of sex or violence, to what extent the viewer might be put into a state of fear, how the drug problem is dealt with, and, whether there is unacceptable language. The handling of these issues is reflected against what is understood as acceptable for a young viewer according to his age. Sometimes, or even increasingly, the possibility of parents or guardians accompanying the minor is taken into account.

4. So, the oeuvre is classified which means that its content has been assessed and it was put into a category – in some cases this is done by also giving a content-related label or indication, the logos or pictograms. There are rules in place which, in a fourth step, are providing guidance on how the film may be distributed or shown.

Certainly, you will have in mind many shortcomings of this sort of model description, exceptions that are made, different approaches being followed, not only in your country but also in others. What about the inclusion of video films (or DVDs) ? What about Belgium where there is either under 16, or over? What about the underlying factors leading to a given age classification?

Nevertheless, I wanted to trigger your attention towards what in my opinion seems to be the most crucial question despite of all differences in regulatory frameworks, practical outcome or the importance attributed to parental control: I presume it is the **link** between the categories of age groups available and the potentially harmful content of an audiovisual work, game or else. Most likely, this is no news for you. However, I think it represents the motivation both for the sceptics against more common rules and results as well as for the perceived difficulty any Community action in this field will be confronted with.

While refraining from any proposal, I already would like to make one remark at this stage: Age categories do not seem to enjoy an invariable status or eternal character, they have been changed, new groups have been introduced, the aspect of parental control has been taken into account when allowing for a derogation from age groups – provided a guardian is accompanying the child.

Additional aspects

1. There are linkages between different forms of media distribution, ratings for cinema or video may have an impact, either *de iure* or *de facto*, for broadcasting; ratings for video or computer games may show significance for making available games on the Internet; and the ratings for cinema showing or TV broadcasting may be decisive for using the Internet as an alternative mode of distribution.

2. Different instruments have been applied in view of the medium used, and, in addition, the distribution mode has implications for the rating process as well. With cinema, it is control of access; as regards traditional TV, watersheds, tonal or visual warnings and, in particular in the digital environment, technical means of access control have been implemented. For video or DVDs it is the point of sale or rental where some control is exercised. Concerning the conveying of broadcasting-like content over the Internet or other forms of new media, technical control measures are under discussion. Is there yet a clear picture of how to deal with Internet games? What measures will prove appropriate in times of convergence and digitalisation and what will be their impact both on national regimes as well as on the handling of transfrontier cases.

3. To what extent differ the 'fundaments' of youth protection policies? Besides stressing the importance of responsibility assumed by those making products or services available, concepts like parental control (family viewing for TV, PG/A for cinema), and media literacy have increasingly become topical. How to deal with divergent understandings of how much of a basic confidence the public attributes to the children?
   There are large differences, as you all are aware, between the instruments applied, i.e. whether state regulation is appropriate, e.g. for cinema and TV. What would be the role for co-regulatory systems as regards TV, for instance, providing for a wide range of different programme categories (films, sport, shows, news, documentaries etc.) ? Probably, even voluntary agreements can prove sufficient, like for games (PEGI) or Internet content (ICRA).
   Again, the exercise of mirroring the instruments applied against the basic concepts of youth protection followed will show that there is a high level of interdependence which may not allow for a shift in the regulatory approach in short term.

That, definitively, are most relevant differences!

Common objectives?

Are there any generally accepted standards or common objectives available as well? If there are, who should care about who does what, how many age categories are available, how much of a 'discount' one will offer if parental guidance is at hand?

Still, at the core of the common concern lies the welfare of the youth which is a genuine value. However, additionally, the positive effects on society as a whole are relevant as well. Most of the countries seem to agree that as a general rule, minors should not be confronted with content that could be harmful to their mental or physical development. As regards TV broadcasts, at least, pornography and gratuitous violence have been considered unacceptable in a legally binding form (Art. 22 (1) TWF-Directive).

Apparently, national rating processes keep showing considerably differing results. These may become less significant the more a constant exchange of views is secured. To keep such

process ongoing and to intensify the debate, both on a cross-media and a European level, represents, too, a common objective.

Thresholds for the European Community to take action

The ECJ has recently established several criteria in order to determine whether or not any Community action aimed at eliminating barriers towards, on the one hand, the free movement of persons or the free provision of services, and, on the other, towards the proper competition would in effect be suited to improve the functioning of the Internal Market. The decision I will refer to concerned the Tobacco Advertising Directive (98/43/EC).

Conditions for harmonising measures

As has already been outlined, the most important criterion is built by a two-fold condition: There must be (i) considerably important (existing or expected) divergences in national regulation that (ii) lead to obstacles to the exercise of the fundamental freedoms or the competitive functioning of the Internal Market. (Arts. 3 lit. c), h), 47 para. 2 and 95 TEC) [3]

The legal basis for Community action, either under Art. 95 or under Art. 47 together with Art. 55 TEC, has to be understood as providing for the necessary instrument *in order to* achieve the aims of an Internal Market – it must be interpreted in a *functional manner*. Therefore, any measure has to follow the objective of eliminating barriers to the free provision of services, for instance.

"[...] harmonisation measures which impose considerable restrictions in the public interest should not invariably be regarded as seeking to reduce trade in the sector concerned. The entitlement of the Community legislator to impose such restrictions, even to the point of prohibiting trade in certain products, *in parallel pursuit of broader free movement goals* and of some other public interest" has been accepted by the ECJ.

However, not every measure is legitimate. Community legislation will be controlled by the ECJ, in this context in application of a test[4]: It is examined whether there exists a *real link* between harmonisation and the improvement in the Internal Market situation[5].

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[3] "The issue of competence must instead be resolved by assessing the Directive's compliance with the objective requirements of the internal market, having regard, in particular, to the concrete internal market benefits claimed for the measure. In the case of the Advertising Directive, such benefits are invoked by the Community legislator exclusively in respect of the tobacco advertising and sponsorship sector and the media employed in that sector. As the Directive imposes, effectively, a total ban on economic activity in that sector, and does not harmonise national rules governing those relatively minor areas where tobacco advertising is not prohibited, it cannot be said to facilitate the free movement of goods or the freedom to provide services, or to remove distortions of competition, in the sector in question. It is, therefore, invalid having regard to the requirements of the legal bases employed by the legislator." Conclusions AG Fennelly, dated 15 June 2000, joint cases C-376/98 u. 74/99, Germany v Parliament and Council et al., Rec. 58.

[4] Aimed at coping with the "[...] risk transferring general Member State regulatory competence to the Community if recourse to Article 100A to adopt harmonising measures *in the interests of undistorted competition* were not subject to some ***test of the reality of the link between such measures and internal market objectives***." Conclusions AG Fennelly, dated 15 June 2000, joint cases C-376/98 u. 74/99, Germany v Parliament and Council et al., Rec. 86, 89 (emphasis added) with reference to ECJ, case C-359/92, Germany v Council, [1994] ECR I-3681. "I would conclude that the contribution by a given measure to the equalisation of conditions of competition in the sector which is supposed to benefit thereby should be specific to that sector, however widely drawn, and should not be merely incidental. It follows that Community rules whose sole effect in a given sector is to prohibit the relevant business activity cannot be

When the Community measure is designed to address future obstacles resulting from the disparate development of national laws, those impediments have to be rather likely and the legal act has to be suited for them not to emerge[6].

Provided that the measure fulfils these conditions it may even foresee rules which ensure that no circumvention of illegitimate action by market participants is possible[7].

The measure will not be accepted if "[t]he effects of such advantages on *competition* are, however, *remote and indirect* and do *not* constitute distortions which could be described as *appreciable*." [8]

Means and level of a harmonisation approach

Mainly, the Community legislator will opt for a directive as the most suited instrument. It allows to give the Member States a larger margin of appreciation how best to achieve, in their respective national legal system, the goals defined or outlined in the EC instrument. Full harmonisation is less often used, however, this does not exempt the EC legislation to be quite concrete in some cases, as with total bans of certain activities.

Olsberg findings: the market (legal and economic) situation today and tomorrow

The Commission's consultants have put an emphasis on differentiating between the situation as it presents itself today and the challenges of tomorrow. The study suggests that for the time being the existing differences between countries and media platforms would not construe

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said to equalise conditions of competition *in that sector*, whatever may be its effects on competition in some related field." Ibid., rec. 91. (original emphasis)

"In order to determine whether a Community measure pursues internal market objectives, a two-stage enquiry is necessary. First, it must be ascertained whether the preconditions for harmonisation exist, that is, disparate national laws which either constitute barriers to the exercise of the four freedoms or distort conditions of competition in an economic sector. [...] Secondly, the concrete action actually taken by the Community must be consistent with the establishment and functioning of the internal market. This involves review of how the Community legislator attempted to reconcile the central requirement of provisions like Articles 57(2) and 100A that measures adopted thereunder facilitate free movement or equalise conditions of competition in a specific sector with its duty to take into account public-interest factors which may militate in favour of a highly restrictive approach to certain economic activities."
"It has been suggested, especially by the Commission, that this essentially raises the question whether a measure is *appropriate*, or *opportune*, which is a question of *proportionality* rather than of *competence*." Ibid., rec. 93, 94. (emphasis added)

5 "If a *mere finding of disparities* between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory." ECJ, joint cases C-376/98 and 74/99, Germany v Parliament and Council e. al., judgment dated 5 October 2000, rec. 84, 86, 100, 109. (emphasis added)

6 "It is true, [as the Court observed in paragraph 35 of its judgment in Spain v Council, cited above,] that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of *future obstacles to trade resulting from multifarious development of national laws*. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them." Ibid.

7 "Admittedly, a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles *to exercise of the fundamental freedoms* provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not *circumvented*." Ibid.

8 Ibid.

obstacles for the provision of services or for an effective competition. Nevertheless, they pointed to the mere amount of probably relevant content that appears to put forward arguments in favour of self-regulation (Film – TV-programmes – Games – Internet). This should, however, not be construed as to neglect the states' responsibility for the protection of minors – hence, my sympathy for a co-regulatory approach.

Elements of 'encouraged' harmonised action

The consultants at Olsberg have made several recommendations for Community action:

- Encourage countries to use common descriptive rating criteria in their rating practices;
- Ensure the exchange of good practice between different media platforms;
- Encourage the development of cost-efficient and time-saving procedures through the exchange of best practices (including the promotion of accessible databases of rated films and efficient online rating procedures);
- Consider methods of content evaluation other than the current ex ante system, attention should be paid to a greater extent to ex post control mechanisms;
- Encourage the role of co- and self-regulation;
- Encourage the inclusion of civil society;
- Educate consumers in view of a shift in regulatory approaches.

Elements for discussion

There are probably answers needed for, i.a., the following questions: How to ensure best practise in youth protection? What is the particular role of state institutions and self-regulatory bodies, respectively, when it comes to a narrowing down of divergent ratings in Europe? Who is more likely to be entrusted with a task of securing that a certain corridor of estimations will be reached more often in future?

In my opinion, the starting point for better regulation in a European context would be to address the possibility of common criteria that allow for comparable descriptions of audiovisual content. Based on such model, the assessment of films, programmes etc. would be left to the national authorities or institutions, thus enabling them to take cultural specificity into account.

As I have already indicated, there appears to be room for an agreement of age groups.

In addition, if the ratings or classifications are more based on common criteria for shared concerns, this could also militate for a broader acceptance of the content descriptions employed, thereby allowing for pictograms to become harmonised.

Only where ratings and descriptions provide for the necessary basis, both parental control and technical measures are likely to become a pan-European additional instrument. Not to neglect, the impact such might in future have on the position of service providers.

Conclusion

In the beginning of my presentation, I acknowledged that all the issues involved are both complicated and complex. My suggestions therefore are of a rather abstract nature. It seems important to me that you continue to have conferences like the one today, that there is in every country an exchange of views between institutions responsible for different media.

Where there are co- or self-regulatory bodies in place, they should be encouraged to institutionalise a process of mutual information and discussion. Whatever the individual setting in one Member State, it would seem worth to consider that there should be one 'address' in each country that could – either on the political, the administrative or the professional level – act as an intermediate, internally as well as externally.

Is it likely that a possible Community appetite will materialise in the format of a legally-binding instrument? Probably the answer would be more easy if one knew whether the current Commission during the last month of its mandate will be presenting a constructive proposal for a revised TWF-Directive. In particular, it seems to be decisive whether there is a chance for a comprehensive approach regarding all electronic media. Next week, the responsible Commissioner will hold an expert hearing in Brussels on the very topic. In autumn, or late this year, the Commission is expected to present another evaluation report on the 1998 Recommendation. Besides the European Parliament, which in its resolution on the Cinema Communication of July 2002 remained rather mute on the present topic, some Member States have already signalled that they would be interested in giving their views on the outcome of the Olsberg study.
Summing up, I think there will only be some sort of soft-law approach which could turn out to be a good starting point.

Thank you very much for your attention!

Alexander Scheuer
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