

Press Publishers' Rights in Italy

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Outline

1. Implementation of Art. 15 CDSM in Italy
 - ▶ Art. 43-*bis* ICL
 - ▶ Implementing Regulation (attached to Agcom resolution)
2. Meta *vs.* Agcom
3. Conclusions



1. Implementation of Art. 15 CDSM in Italy

Art. 43-*bis* Italian Copyright Law (ICL)

- ▶ **Par. 1-7 + 13-16: *quasi verbatim* implementation of the D.**
 - ▶ Press publishers' right is an exclusive right (par. 1 + par. 16)
- ▶ **Par. 8-12: additional measures to make protection «effective»**
 - ▶ What is the **problem**?
 - ▶ Assuming that the problem is to fill the value gap...
 - ▶ ... exclusivity might not be enough!
 - ▶ What if ISSPs prefer to discontinue their services to avoid paying?
 - ▶ What if ISSPs leverage on their market power to obtain unfair conditions?
 - ▶ What if ISSPs exploit information asymmetries to pay an unfairly low remuneration?

Art. 43-*bis* ICL

- ▶ What is the **solution** provided for by Art. 43-*bis* par. 8-12 ICL?
 - ▶ In brief:
 - ▶ Obligation for ISSPs to pay a “fair remuneration”
 - ▶ *i.e.*, a remuneration:
 - ▶ “freely” negotiated (individually or collectively) but...
 - ▶ not under the threat of a denial of service by ISSPs
 - ▶ not blind
 - ▶ taking into account “fairness” criteria set by AGCOM
 - ▶ relying on AGCOM’s ADR in case of need
 - ▶ without losing access to court
 - ▶ Let’s have a closer look

Art. 43-*bis* ICL

- ▶ Par. 8
 - ▶ **Obligation for ISSP to pay a “fair compensation”**
 - ▶ **AGCOM to adopt a regulation to set criteria of fairness**
 - ▶ taking into account, *inter alia*:
 - ▶ data on users’ access to contents
 - ▶ PP’s profile (years of activity, relevance on the market, number of employees)
 - ▶ costs/benefits for both parties
- ▶ Par. 9
 - ▶ **ISSP-PP to negotiate “taking into account” AGCOM’s criteria**
 - ▶ **Prohibition for ISSP to arbitrarily restrict visibility** of PP’s contents in search results during negotiation
 - ▶ If they do: pre-contractual liability applies

Art. 43-*bis* ICL

- ▶ Par. 12
 - ▶ **Disclosure obligations for ISSP**
 - ▶ data required to calculate “fair” compensation
 - ▶ fines apply in case of non-performance
 - ▶ Up to 1% of yearly ISSP’s turnover
- ▶ Par. 10
 - ▶ **Access to IP court up-front**
 - ▶ **“Alternatively”, AGCOM’s ADR**
 - ▶ AGCOM decides which proposal (PP or ISSP) is “fair”
 - ▶ if none, AGCOM provides its determination
- ▶ Par. 11
 - ▶ **Access to IP Court if no agreement follows AGCOM’s determination**
 - ▶ “... also in order to carry out the action referred to in article 9 of law 18 June 1998, n. 192” (par. 11)

Implementing Regulation (Annex to Agcom resolution 3/2023)

▶ **Scope of application**

- ▶ Use of journalistic publications aimed at the Italian public (art. 2)
 - ▶ Criteria? Only examples: language, revenues obtained in Italy

▶ **Structure**

- ▶ Distinguishes media monitoring or press review services from other ISSPs
 - ▶ Rationale: bargaining power (-), business model (≠)

▶ **Disclosure obligations**

- ▶ Expanded in scope
 - ▶ AGCOM shall have access also to main parameters governing the functioning of relevant services (other than media monitoring and press review s.) (art. 5.4)
- ▶ Intensified in strenght
 - ▶ Inspection powers to AGCOM

Implementing Regulation

- ▶ **Criteria to determine a «fair» remuneration**
 - ▶ Use by ISSPs other than media monitoring or press review services (art. 4):
 - ▶ Up to 70% of X, where:
 - ▶ $X = \text{ISSP's advertising revenues from PP's publications} - \text{PP's revenues thanks to traffic channelled by ISSP}$
 - ▶ % depends on the following cumulative criteria of decreasing relevance:
 - ▶ Number of users' views and interactions with PP's contents
 - ▶ PP's relevance on the market based on online audience
 - ▶ Number of journalists employed to produce relevant contents
 - ▶ Technological and infrastructural investments by PP to produce relevant contents
 - ▶ Technological and infrastructural investments by PP to reproduce and make available relevant contents
 - ▶ Compliance by PP and ISSP to codes of conduct, ethical codes and international standards regarding quality of information and fact-checking
 - ▶ PP's seniority

Implementing Regulation

- ▶ Use by media monitoring or press review services (art. 6)
 - ▶ Remuneration based on **ISSPs turnover**, taking into account the following cumulative criteria of decreasing relevance:
 - ▶ Number of articles reproduced in the relevant year
 - ▶ Number of clients
 - ▶ Relevance of the PP for the client
 - ▶ Number of PP's employees
 - ▶ PP's seniority

Implementing Regulation

- ▶ **Rules of procedure**
 - ▶ ISSP or PP invites the other party to start negotiation
 - ▶ 30 days to reach an agreement
 - ▶ If negotiation fails, each party can apply for AGCOM's ADR within 60 days
 - ▶ Application form provided by AGCOM: includes information + economic offer
 - ▶ Defendant to submit economic (counter-) offer
 - ▶ Meeting to facilitate agreement
 - ▶ In case of failure, AGCOM determines compensation
 - ▶ Non-binding
 - ▶ But: abuse of economic dependence?
 - ▶ AGCOM's ADR ends if a judiciary proceeding for the same matter starts (either before/during ADR)

2. Meta vs. Agcom

Meta vs. Agcom

Meta claims the annulment of Agcom resolution on the following grounds: the Regulation attached to the resolution

- ▶ (i) would allow Agcom to arbitrarily determine the amount of fair compensation to be paid by information society service providers to publishers;
- ▶ (ii) would impose onerous and unilateral obligations solely on service providers, which are not provided for at European Union level;
- ▶ (iii) would violate Meta's fundamental rights, including the freedom to bargain and the freedom to conduct a business; and
- ▶ (iv) conflicts with the country of origin principle and Directive 2015/1535;
- ▶ (v) should be considered unacceptable as the notification to the European Commission of the Resolution and also of Article 2 of Legislative Decree 177/21, which introduced Article 43 bis of the Copyright Law, was omitted.

Meta vs. Agcom

Meta requested also:

- ▶ a preliminary reference to the Court of Justice and
- ▶ a referral of the case to the Italian Constitutional Court and
- ▶ the suspension of the effects of the Agcom decision and, consequently, of the regulation adopted.

Lazio Regional Administrative Court (TAR)

With the non final decision no. 18790 of 12 December last year, the Lazio TAR

- ▶ a. rejected the second and third grounds of appeal raised by Meta Platforms;
- ▶ b. referred preliminary questions to the Court of Justice of the European Union;
- ▶ c. suspended the execution of the Agcom decision and the regulation challenged by the petition, pending the referral to the EU Court

→

In view of the precautionary needs identified, combined with the immediate executability of the contested provisions, the panel orders the suspension of the effectiveness of the contested acts pending the referral to the Court of Justice of the European Union and until the new setting of a public hearing for the definition of the dispute, following the outcome of the judgment before the Union judge.

Referral to the CJEU

Whether Article 15 of the EUCD can be interpreted as hindering the introduction of national provisions – such as those provided for in Article 43-bis of the copyright law and those established in Agcom Resolution 3/23/CONS – to the extent that:

1.a) obligations of remuneration (fair compensation) are provided, in addition to the exclusive rights indicated by Article 15 EUCD, to the detriment of ISSPs and in publishers' favor;

1.b) obligations are established, for the same ISSPs:

- to initiate negotiations with the publishers,
- to provide the publishers and the national Authority (namely Agcom) with the information needed for the determination of fair compensation, as well as
- not to limit the visibility of the publishers' content in search results pending the completion of negotiations;

Referral to the CJEU

Alternatively, and if the answer to question 1 is negative, whether Article 15 of the EUCD can be interpreted as precluding the Agcom resolution insofar as it provides, in favor of publishers, the obligation for ISSPs to initiate negotiations with the latter for

- ▶ determination of fair compensation,
- ▶ provision of the information necessary for such negotiation, and
- ▶ regulation of the visibility of publishers' content in search results, pending the completion of negotiations.

Referral to the CJEU

Whether Article 15 of the EUCD, interpreted in the sense that it does not preclude the national rules at issue, must be interpreted as precluding the national rules at issue, pursuant to which Agcom is conferred:

- ▶ 3.a) the power to identify criteria for determining fair compensation, including criteria other than those indicated in the EUCD, and
- ▶ 3.b) the power to determine, in the event of failure to reach an agreement between the parties, the amount of the remuneration due to publishers, without there being any obligation for Agcom to take into account the negotiation solutions proposed by the parties or any of the information communicated by the parties themselves, and in the absence of any obligation on the part of the parties to respect the criteria and modalities identified by Agcom.

Agcom appeal

Against TAR Lazio judgment, Agcom filed an appeal to the Council of State, namely the second degree administrative judicial authority in Italy, requesting:

- ▶ the annulment of the judgment;
- ▶ the annulment of the suspension of the execution of the Agcom resolution and its annexes, emphasizing the lack of reasoning in the interim decision regarding the existence of the relevant requirements.

Meta appearance in Agcom appeal proceedings before Council of State

Meta Platforms appeared in the proceedings

- ▶ requesting a stay of the proceedings pending the referral to the CJEU,
- ▶ contesting the validity of the arguments developed by AGCOM, and
- ▶ filing an appeal against the parts of the judgment that rejected the second and third grounds of the first-instance petition.

Specifically, Meta Platforms argued that:

- (i) the interim suspension was well-grounded;
- (ii) TAR conducted a fair and adequate balancing of rights in light of the principle of proportionality as delineated by EU case law;
- (iii) the suspended Regulation would cause serious and irreparable harm to both Meta Platforms and publishers, violating their fundamental rights (not merely financial ones).

Council of State decision no. 894 dated March 11, 2024

With the cited decision the Council of State accepted Agcom's appeal and thus rejected the interim application proposed in the first instance by Meta, based on several considerations:

- a) the interim appeal does not involve any evaluation of the matters submitted to the CJEU.
- b) The requirements for the interim measure are inexistant as the prejudices claimed by the appellant are neither concrete nor current, and certainly not serious and irreparable. At most, these prejudices could result in financial losses, which can be compensated by equivalent. Moreover, the prejudices that Meta could suffer cannot be considered a direct consequence of the Agcom resolution and of the attached Regulation, but rather of any initiatives that the Authority may take against Meta.
- c) The Regulation attached to the Agcom resolution provides a mechanism to reach an agreement, but the right to resort to the competent judge remains.



Thanks for your attention!

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