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Working Group 3:
Data Protection & Big Data – What impact on media regulation?
Introduction and Objectives
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1. Introduction

A man walks down an alley inside a shopping centre. His eyes are flashed by a multitude of cameras equipped with eye-recognition software. Immediately the shop windows start to show on flashy screens advertising specially tailored to him...

This is obviously a scene taken from a science-fiction film (Steven Spielberg's "Minority Report"). However, it is not so far away from what we can experience in today's real life. In this age of Internet, connected TV sets and "second screens", the possibilities to obtaining personal data of media users in both legal and illegal ways have multiplied exponentially. Such data is a very important commodity for advertisers, which can be used to provide individually targeted ads on online services and on all sorts of connected devices. Furthermore, personal data obtained via search engines, social media and connected devices can be used as a means to provide a better experience for the user of an online service.

However, the obtaining and using of personal data by third parties, whether provided willingly or inadvertently by the users, can also have a very intrusive effect on their personal lives. Moreover, there are situations in which the State or private parties require insight into a user's life that goes beyond what a user is prepared to accept. Two examples of this have raised a lot of attention recently. The first concerns rightsholders seeking to find out about the identity and whereabouts of Internet users in order to sue them for copyright infringement. The second concerns the eavesdropping activities of national intelligence agencies for the purpose of protecting their citizens from terrorist and other criminal activities. In both cases, the fact that they need this data does not mean that they are legally allowed to have it.

2. The issues at stake and the Observatory-EPRA workshop

When touching upon the issue of the impact of big data on media regulation, there are many aspects to consider. Apart from general matters of principle, such as:

- freedom of expression versus privacy,
- or copyright protection versus data protection,
- or even data retention obligations for telecom providers versus data protection,

there are several domains where the borders between the two sectors are not necessarily clear, both with regard to applicable provisions as to monitoring and enforcements aspects. In many cases nobody intervenes and the underlying rights risk remaining unprotected.

In December 2015, the European Audiovisual Observatory and EPRA co-organised a workshop on the grey areas between data protection and media regulation. By bringing together experts in both fields in a workshop, the idea was to develop a discussion on practical case studies focusing on the underlying regulatory framework in the respective areas with the view of gathering findings as to possible gaps or overlaps which might undermine the legitimate expectations of adequate protection of European citizens.

The final brainstorming exercise at the end of the day addressed the role of the different stakeholders in this domain – media regulators, data protectors, users, industry, EU Commission – and explored two basic questions:

- what do you expect from the others,
- what can you do yourself.

The results were quite interesting especially when it comes to the need of more research and cooperation (see attached table), which was felt by all participants.¹

3. Objectives of this WG session

“Why should media regulators care about data?” is the question this session aims at providing an answer to.

With one foot in the data protection field and the other in the media regulation sector, and concentrating on the possible impacts that the (massive) use of personal data can have on rights and principles protected under media legislation, the situation appears quite complex:

	DATA PROTECTION	MEDIA REGULATION
	Data footprint (cookies, social media ratings, etc.) and web navigation	Impact on freedom of expression
	The use of personal data by the media and right to be forgotten	
	Algorithms of search engines	Impact on pluralism of information
	New business models based on big data and media algorithm	
	Profiling and advertising	Impact on editorial responsibility
	Clouds (data security, data location etc..)	

¹ The summary of the workshop and the presentations of the participants are available at http://www.obs.coe.int/web/obs-portal/workshops/-/asset_publisher/kNG5qM2wH8Kq/content/dli-workshop-obs-epra-the-grey-areas-between-media-regulation-and-data-protection and the “storify” of photo gallery and tweets can be accessed from <https://storify.com/EuAVObservatory/workshop-2015>.

Data protection authorities have been put in place to care about the protection of the data of the users. This explains why data protection issues tend to fall outside the scope of action of media regulators. But there are various aspects where data could become part of the activity of the media regulators as well and thus depart from a situation of “governance by algorithms to governance of algorithms”.²

4. Structure of the session

In order to make the session as concrete as possible, the discussion will be introduced by **Lucia D’Acunto**, Research Scientist at the TNO³, who will provide the necessary technical toolkit in order to get a proper understanding of the most relevant technical issues underlying exploitation of data in the field of media. This overview will be followed by an immediate Q&A session to clarify possible unclear terms.

Maja Cappello, Head of the Department for Legal Information at the European Audiovisual Observatory, will then report from the joint Observatory-EPRA workshop on “The grey areas between media regulation and data protection” and briefly introduce the three blocks of discussion of the working groups moderated by the Chairperson of EPRA, **Celene Craig**:

1. Algorithms and Prominence of European works
2. Big data and Pluralism of information
3. Profiling and targeted advertising

There will be no pre-set panel discussion, but rather a brainstorming around best (or worst!) cases from the floor.

5. Issues for debate

5.1. Algorithms and Prominence of European works

Algorithms are actively exploited by VOD providers in order to ensure that their offer corresponds to the preferences of their viewers. This is especially true in the case SVOD providers, where the primary purpose is the retention of the clients (or “fidelisation”), also by ensuring that the suggestions they get meet their wishes.

By combining the data concerning the viewing habits of their clients, i.e. through analysing the behaviour of their clients and comparing their profiles, the providers are able to produce algorithms they can use for the promotion and recommendation of content on the basis of profile similarities between users.

In the logic of moving from a situation of governance by algorithms to a governance of algorithms, Article 13 of the Audiovisual Media Services Directive could provide media regulators with an interesting perspective of how to ensure prominence of European works.⁴

² An interesting research paper from the University of Zurich can be downloaded from <http://www.emeraldinsight.com/doi/full/10.1108/info-05-2015-0025>.

³ TNO is an independent research institute founded by law in 1932 and based in The Netherlands, <https://www.tno.nl/en/>.

⁴ Article 13 of the AVMSD: “Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share

If providers were encouraged to programme their algorithms so as to give preference to European works within the genre preferences of their users, both objectives of keeping clients and promoting European works could be fulfilled. In this context, algorithms could be used to give prominence to audiovisual content originated in Europe also through advertising or labelling practices.

5.2. Big data and Pluralism of information

In a context of abundance of information, where algorithms help reach desired content, the benefits of algorithms are also accompanied by risks, as they may:

- challenge the pluralism of information, by interfering in the user’s choice (suggestion of content, way of displaying search results, ...)
- threaten fair competition by creating a dominant position of providers able to dictate the access to the content and its findability according to their own economic and political agendas
- diminish variety and create echo chambers of content that has already been shown so as to create an amplification effect.

Considering the impact the exploitation of big data may have:

- on the structure of the audiovisual market, both in terms
 - of external pluralism by strengthening the position of certain major operators and
 - of internal pluralism, by limiting the choices of the viewers,
- and on the creation of new content, which is likely to become closer to the already existing preferences of viewers and thus less diverse,

media regulators have an important tool in their market analysis activity.

Most national legislations foresee a periodical analysis of the structure of the audiovisual market, and various indicators are employed, such as market share, audience share, concentration etc. In this context a very concrete effect could be produced by also considering algorithms in this exercise, by encouraging AVMS providers to ensure a more neutral functioning of the algorithms and transparency over the business practices that might affect the pluralism of information

5.3. Profiling and targeted advertising

It’s already some years that advertising has turned digital and started targeting AV content. The value of online advertising in 2015 was approx. €36.2bn with nearly €30bn growth in 10 years and it has the big advantage of reaching mobile devices, which account for a quarter of all European advertising displays, approaching 50% in most advanced markets.⁵

Audiovisual content is very attractive for advertisers, considering that video is an increasingly important part of display with a European average of 16.7% and that its long format enables insertion of ads in various forms (pre-roll, med-roll, end-roll). To ensure that this potential reaches its full exploitation by addressing the right users with right advertising, data gathering technologies use cookies to collect users’ data:

and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.”

⁵ IAB Europe, <http://www.iabeurope.eu/wp-content/uploads/2016/05/AdEx-Benchmark-Interact-Presentation-2015.pdf>

- the first step is to identify the right users: for this purpose providers stick to profiling through the collection of personal information are collected and used to generate users' profiles based on their age, gender, preferences, interests, etc.
- the second step is to find the right information to identify the users: social media help are particularly relevant for the collection of in-depth information about users and thus track them across devices (including mobile devices, where cookies don't fit in),
- the third step is to define what type of commercial communications is the most efficient, as advertising in EPGs (trailers, visuals), pre-roll/med-roll/post-roll ads.⁶

The result of this matching activity is the provision of tailor-made advertising which is likely to be more efficient in the choice-process of the users. An indirect effect can be the levelling down of the variety of choices and also the possible abuse of the data (mostly inadvertently) provided by the users.

In addition to setting up a cooperation procedure with data protection authorities for the activities related to the assessment of the level of compliance with the regulatory framework on data protection, media literacy can be an important response from media regulators. The enhancement of the level of awareness among AVMS consumers is a crucial pre-condition to ensure the right tools for a well-informed consumption of all audiovisual content, including advertising.

6. How to participate

The aim of the session is to share experiences and to learn from each other.

All participants are encouraged to reflect on the topics underlying each discussion block and to intervene from the floor. Ideas and suggestions will be collected during the session so as to set the basis for a follow-up document for further discussions and exchanges, if wished.

Contribute your thoughts, speak your mind and, not least, don't be shy to share!

⁶ For further detail see IRIS Special on "New forms of commercial communications in a converged audiovisual sector", European Audiovisual Observatory, Strasbourg, 2014, <http://www.obs.coe.int/-/pr-iris-special-new-forms-of-audiovisual-commercial-communications>.

7. Overview table from the OBS-EPRA workshop in December 2015

	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
Media regulators 	<p>Can do</p> <p>Foster close relations with data protectors. Promote exchange of expertise with counterparts. Research implications of the data market for regulatory objectives [such as diversity and promotion of European culture].</p> <p>Cannot do</p> <p>Intervene in sector of data protectors.</p>	<p>Share expertise with media regulators. Learn from media regulators' expertise in the sector. Identify common purposes.</p>	<p>Take responsibility and exercise it. This may be hard. NGOs could take responsibility for representing and defending the interests of the users.</p>	<p>Educate users. Offer more transparency. Take on media literacy responsibility. Organise campaigns to raise awareness.</p>	<p>Deliver joined-up regulation, which has been promised in the context of the Digital Single Market but remains a big task. Give regulators more powers.</p>
Data protectors 	<p>Liaise more with data protectors.</p>	<p>Can do</p> <p>Raise awareness, with more campaigns directed at all actors on requirements of data protection laws and on what people can and cannot do.</p> <p>Implement more robust</p>	<p>Take more responsibility to protect data.</p> <p>Exercise rights when needed.</p>	<p>Integrate data protection into business models, e.g. "privacy by design" [an initiative by the Canadian Data Protection Commission). Think about privacy when developing new products. Ensure security of collected data. Be transparent</p>	<p>Apply consistency in drafting legislation and documents. Harmonise the wordings in the Audiovisual Media Services Directive and the Data Protection Directive. Review some definitions and adapt them to fit in the digital era, e.</p>

	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
		<p>enforcement upon breaches of the regulation.</p> <p>Award compensation [for the authorities who have the power to do so].</p> <p>Cannot do</p> <p>Intervene in sector of media regulators.</p>		<p>with users and regulators. Empower the users to be able to take decisions. Foresee the establishment of a dedicated data protection officer to give advice.</p>	<p>g. the definition of a journalist. Have more data controllers.</p>
<p>Users</p> 	<p>Base decisions on research. Raise awareness among users. Consult each other and NGOs in the decision-making processes. Inform about the collected data.</p>	<p>Create easier complaint forms for users. Make information available through transparent databases for consultancy by other stakeholders. Inform about the collected data. Raise awareness.</p>	<p>Can do</p> <p>Be more informed about rights and duties, along with the other stakeholders. Incentivise media literacy while remaining cognisant that this will not solve all the issues.</p> <p>Cannot do</p> <p>Take on all responsibilities relating to educating users, because of the variety of issues to address [legal, technical, social].</p>	<p>Inform about the collected data. Underscore the distinction between public/private: public industry has remit to serve public interest. Both private and public industries should develop technology and tools that allow users to protect their rights.</p>	<p>Make homogenous rules. Have quality label for awareness initiatives.</p>

	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
Industry 	Adopt a technical neutral approach. Embrace consistency. Have lighter regulation.	Redefine the concept of consent in the digital world [different from the analogue world]. Adapt regulatory framework to the evolution of the market.	<p>Make use of rights. Inform yourselves and be aware.</p> <p>Make choices in a thoughtful way, and be proactive in the consumption of media content.</p>	<p>Can do</p> <p>Raise trust, transparency. Give choice to users and enable them. Ensure they have control, and consent to services they use.</p> <p>Commit to collecting data in a thoughtful and respectful way.</p> <p>Gain trust by following the guidelines set by the industry itself.</p> <p>Cannot do</p> <p>Avoid following innovation and allow opportunities to pass by. Avoid dapting business models to stay competitive.</p>	To have a technical neutral approach in data protection regulation, consistency, more concise regulation, stick to a pan European level, more transparency
EU Commission 	Fulfil roles, and make sure to refer requests for information to the right instance. Promote more cooperation and raise awareness.	Fulfil their roles, and make sure requests for information are referred the right instance. Promote more cooperation and raise awareness.	Get more informed about their rights.	Act with responsibility.	<p>Can do</p> <p>Before acting, determine what should be addressed on a European level rather than on a national level, to close regulatory gaps.</p>

	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
					<p>Cannot do</p> <p>Create ex ante regulation for future problems. Not consider subsidiarity [the role of the Commission is very limited when it comes to public service broadcasters]. Act alone, as the responsibilities are shared among institutions [the Council; the European Parliament].</p>

