AUTORITÀ PER LE GARANZIE NELLE COMUNICAZIONI
AGCOM COMMUNICATIONS REGULATORY AUTHORITY

RESOLUTION NO 298/23/CONS

REGULATION IMPLEMENTING ARTICLE 41(9) OF LEGISLATIVE DECREE NO 208 OF 8 NOVEMBER 2021 ON PROGRAMMES, USER-GENERATED VIDEOS OR AUDIOVISUAL COMMERCIAL COMMUNICATIONS ADDRESSED TO THE ITALIAN PUBLIC AND CONVEYED BY A VIDEO SHARING PLATFORM WHOSE SUPPLIER IS ESTABLISHED IN ANOTHER MEMBER STATE

THE AUTHORITY

AT the Council meeting of 22 November 2023;

HAVING REGARD TO Law No 481 of 14 November 1995 on '*Rules relating to competition and the regulation of public utility services. Establishment of regulatory authorities for public utility services*';

HAVING REGARD TO Law No 249 of 31 July 1997 on '*Establishing the Communications Regulatory Authority and laying down rules relating to the telecommunications and radio-television systems*';

HAVING REGARD TO Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter also *E-commerce Directive* or EC Directive);

HAVING REGARD TO Legislative Decree No 70 of 9 April 2003 on the '*Implementation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*' and in particular Article 5(2), (3) and (4) thereof;

HAVING REGARD TO Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 on the '*Amendment of Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities'* (hereinafter also AVMS Directive);

HAVING REGARD TO in particular Recital 10 of Directive (EU) 2018/1808, according to which '*In accordance with the case-law of the Court of Justice of the European Union (the 'Court'), it is possible to restrict the freedom to provide services guaranteed under the Treaty for overriding reasons in the general public interest, such as obtaining a high level of consumer protection, provided that such restrictions are*

justified, proportionate and necessary. Therefore, a Member State should be able to take certain measures to ensure respect for its consumer protection rules which do not fall in the fields coordinated by Directive 2010/13/EU. Measures taken by a Member State to enforce its national consumer protection regime, including in relation to gambling advertising, would need to be justified, proportionate to the objective pursued, and necessary as required under the Court's case-law. In any event, a receiving Member State must not take any measures which would prevent the re-transmission, in its territory, of television broadcasts coming from another Member State'.

HAVING REGARD TO Regulation (EU) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, hereinafter also DSA) and in particular Articles 4, 5, 6, 8, 9, 10 and 85 thereof;

HAVING REGARD TO the bilateral cooperation agreement between the European Commission and the Communications Regulatory Authority for the application of the Digital Services Act signed on 30 October 2023;

HAVING REGARD TO Decree-Law No 123 of 15 September 2023 '*Urgent measures to combat youth distress, educational poverty and juvenile crime, as well as for the safety of minors in the digital world*converted, with amendments, by Law No 159 of 15 November 2023, and in particular Article 15 '*Designation of the Digital Services Coordinator in implementation of Digital Services Regulation (EU) 2022/2065*';

NOTING, in particular, that pursuant to Article 15(1) of the above-mentioned legislative provision '*In order to ensure the effectiveness of the rights and the effectiveness of the obligations set out in Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 relating to a single market for digital services, as well as the related supervision and achievement of the intended objectives, including with regard to the protection of minors from pornographic content available online, as well as other illegal or otherwise prohibited content, conveyed by online platforms or other intermediary service operators, and to contribute to the definition of a secure digital environment, the Communications Regulatory Authority shall be designated as the Digital Services Coordinator, within the meaning of Article 49(2) of Regulation (EU) 2022/2065*';

HAVING REGARD TO Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation'), and in particular Article 29 thereof;

HAVING REGARD TO Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of

information in the field of technical regulations and of rules on Information Society services (*codification*) and in particular Article 5 thereof;

HAVING REGARD TO Legislative Decree No 208 of 8 November 2021 on the '*Implementation of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the Consolidated Act for the provision of audiovisual media services in view of changing market realities*' (hereinafter referred to as the 'TUSMA' or 'Consolidated Act'), and in particular Articles:

- 3(1)(c), in which '*video-sharing platform service*' is defined as 'a service, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the main objective of the service, a distinguishable section or essential functionality thereof is the provision of programmes, user-generated videos or both, addressed to the general public, for which the video-sharing platform provider has no editorial responsibility, for the purpose of informing, entertaining, or educating through electronic communications networks pursuant to Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 12 July 2002 and whose organisation is determined by the provider of the video-sharing platform, including by automated means or algorithms, in particular by means of display, tag allocation, and sequencing';

- 4(1), of the *Consolidated Act*, establishing that '*1. Fundamental principles of the system of audiovisual media services, radio broadcasting, and video-sharing platform services include the guarantee of freedom and pluralism of broadcast media, the protection of the freedom of expression of every individual, including the freedom of opinion and the freedom to receive or communicate information or ideas without limits, while respecting human dignity, the principle of non-discrimination, and the fight against hate speech, the objectivity, completeness, faithfulness, and impartiality of information, the protection of copyright and intellectual property rights, openness to different political, social, cultural, and religious opinions and trends, and the safeguarding of ethnic diversity and cultural, artistic, and environmental heritage, at a national and local level, while respecting freedoms and rights, in particular the dignity of the person and the protection of personal data, the promotion and protection of the well-being, health, and harmonious physical, mental, and moral development of the child, guaranteed by the Constitution, European Union law, international rules in force in Italian law, and by state and regional laws.*

- 9(1), according to which '*The Authority, in the exercise of the tasks entrusted to it by law, ensures that the fundamental rights of the person in the field of communications are respected, including through audiovisual or radio media services. The Authority shall exercise its powers impartially and transparently and in accordance with the objectives of Directive (EU) 2018/1808, in particular as regards*

media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market, and the promotion of fair competition.';

- 9(2), according to which '*the Authority, in the field of audiovisual and radio media services and video-sharing platform services, shall exercise the powers provided for in the rules of this Consolidated Act, as well as those already conferred by the other rules in force, even if not included in the Consolidated Act, and, in particular, the powers referred to in Laws No 223 of 6 August 1990, No 481 of 14 November 1995 and No 249 of 31 July 1997*';

- 41(7), according to which '*Without prejudice to Articles 14 to 17 of Legislative Decree No 70 of 9 April 2003, and without prejudice to the provisions of the preceding paragraphs, the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and addressed to the Italian public may be restricted, by decision of the Authority, in accordance with the procedure referred to in Article 5(2), (3) and (4) of Legislative Decree No 70 of* 2003, for the following purposes: (a) the protection of minors from content which may adversely affect their physical, mental or moral development in accordance with Article 38(1); *(b) the fight against incitement to racial, sexual, religious, or ethnic hatred and against the violation of human dignity; (c) the protection of consumers, including investors, pursuant to this Consolidated Act*';

- 41(8), according to which '[*F*]*or the purpose of determining whether a program, a user-generated video or an audiovisual commercial communication are addressed to the Italian public, criteria such as, by way of example, the language used, the involvement of a significant number of contacts on the Italian territory or the achievement of revenues in Italy*';

HAVING REGARD TO Article 21 (Non-discrimination) of the Charter of Fundamental Rights of the European Union of 2000 and, in particular, paragraph 1, according to which '*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*';

HAVING REGARD TO Article 22 (Cultural, religious and linguistic diversity) of the Charter of Fundamental Rights of the European Union of 2000 according to which '*The Union shall respect cultural, religious and linguistic diversity*';

HAVING REGARD TO Article 3 of the Constitution according to which '*All citizens have equal social dignity and are equal before the law, regardless of sex, race, language, religion, political opinions, personal and social conditions. It is the duty of*

the Republic to remove obstacles of an economic and social nature, which, by effectively limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country';

HAVING REGARD TO Framework Decision 2008/913/JHA of the Council of the European Union of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, and to Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA;

HAVING REGARD TO ECRI General Policy Recommendation No 15 (European Commission against Racism and Intolerance of the Council of Europe), on combating the hate speech adopted on 8 December 2015 which encourages States to take concrete action to ensure that all forms of ethnic discrimination are countered and eliminated, consistent with international law protecting human rights;

HAVING REGARD TO Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law;

HAVING REGARD TO the Code of Conduct to combat illegal forms of hate speech online signed by the European Commission on 31 May 2016;

HAVING REGARD TO the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM (2017) 555 '*Tackling Illegal Content Online*. *Towards an enhanced responsibility of online platforms';*

HAVING REGARD TO the *'Self-Regulation Code for Media and Minors'*, approved by the Commission for the setting up of the broadcasting system on 5 November 2002 and signed by the broadcasters and signatory associations on 29 November 2002;

HAVING REGARD TO Decision No 165/06/CSP of 22 November 2006 on '*Addressing act on respect of the fundamental rights of the person, personal dignity and the correct physical, mental and moral development of minors in entertainment programmes*';

HAVING REGARD TO Decision No 23/07/CSP of 22 February 2007 entitled '*Addressing Act on Respect of the Fundamental Rights of the Person and on the Prohibition of Broadcasts with Pornographic Scenes*';

HAVING REGARD TO Resolution 51/13/CSP of 3 May 2013, containing the '*Regulations on technical measures to be adopted to exclude the viewing and listening by minors of broadcasts made available by providers of on-demand audiovisual media services, which may seriously harm their physical, mental or moral development pursuant to Article 34 of Legislative Decree No 177 of 31 July 2005, as amended and supplemented, in particular, by Legislative Decree No 44 of 15 March 2010, as amended by Legislative Decree No 120 of 28 June 2012*';

HAVING REGARD TO Decision No 157/19/CONS adopting the '*Regulation laying down provisions on respect for human dignity and the principle of non-discrimination and combating hate speech*';

HAVING REGARD TO Decision No 37/23/CONS of 22 February 2023 on the '*Regulation on the protection of the fundamental rights of the person pursuant to Article 30 of Legislative Decree No 208 of 8 November 2021 (Consolidated Act for audiovisual media services)*';

HAVING REGARD TO Decision No 194/23/CONS of 26 July 2023 entitled '*Amendment of the regulatory framework for dispute resolution procedures between users and electronic communications operators or audiovisual media service providers and for the implementation of Article 42(9) of the TUSMA with regard to video-sharing platforms*';

HAVING REGARD TO Resolution No 224/23/CONS of 27 September 2023, '*Amendment of Resolution No 666/08/CONS, on the "Regulation for the organisation and maintenance of the Register of Communication Operators", aimed at the establishment of the list of media service providers under Italian jurisdiction, as well as extension of the deadline for concluding the procedure referred to in Article 1(5) of Resolution No 105/23/CONS for the part relating to registration in the Register of Communication Operators of postal service providers, including parcel delivery service providers*';

HAVING REGARD TO Decision No 223/12/CONS of 27 April 2012 on the '*Adoption of the new Regulation on the organisation and functioning of the Communications Regulatory Authority*', as last amended by Decision No 434/22/CONS;

HAVING REGARD TO Decision No 107/19/CONS of 5 April 2019 on the '*Regulation on consultation procedures in proceedings falling under the Authority's competence*';

HAVING REGARD TO Decision No 410/14/CONS of 29 July 2014, on the '*Rules of Procedure on administrative fines and commitments*', as amended, most recently, by Decision No 437/22/CONS;

HAVING REGARD TO Decision No 76/23/CONS of 16 March 2023, on the '*Launch of the public consultation on the draft regulation implementing Article 41(9) of Legislative Decree No 208 of 8 November 2021 on programmes, user-generated videos or audiovisual commercial communications addressed to the Italian public and conveyed by a video-sharing platform whose supplier is established in another Member State*';

NOTING, in particular, that recitals 45 to 48 of the E-Commerce Directive clarify that:

'*(45) 'The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds. Such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.*

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned. The removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level. This Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.';

NOTING that Recital 38 of the Digital Services Act clarifies that:

'(38) Orders to act against illegal content and to provide information are subject to the rules safeguarding the competence of the Member State in which the service provider addressed is established and the rules laying down possible derogations from that competence in certain cases, set out in Article 3 of Directive 2000/31/EC, only if the conditions of that Article are met. Given that the orders in question relate to specific items of illegal content and information, respectively, where they are addressed to providers of intermediary services established in another Member State, they do not, in principle, restrict those providers' freedom to provide their services across borders. Therefore, the rules set out in Article 3 of Directive 2000/31/EC, including those

regarding the need to justify measures derogating from the competence of the Member State in which the service provider is established on certain specified grounds and regarding the notification of such measures, do not apply in respect of those orders';

Also NOTING that Article 6(4) of the Digital Services Act clarifies that: '*This Article shall be without prejudice to the possibility, in accordance with the legal system of the Member State, for a judicial or administrative authority to require the service provider to prevent or put an end to an infringement*.'

WHEREAS the draft regulation annexed to the aforementioned Decision No 76/23/CONS was notified to the European Commission (hereinafter also the Commission) by the Central Notification Unit at the Ministry of Enterprises and Made in Italy, pursuant to Article 5 of Directive (EU) 2015/1535, dated 19 April 2023 (Ref. No 107032). In particular, the Commission sent a request for clarification on 12 May 2023 (Ref. No 128467 and subsequent supplement Ref. No 129255 of 15 May 2023), which was replied on 25 May 2023 (Ref. No 141380), transmitted on 31 May 2023 via the aforementioned Central Notification Unit. Based on the feedback received, the Commission intended to make some conclusive considerations with a note received on 26 July 2023 (Ref. No 199894);

HAVING REGARD TO the contributions received in the context of the public consultation by the following stakeholders: Confindustria Radio TV (Ref. No 134774 of 19 May 2023), Google Ireland Limited – hereinafter also Google only – (Ref. No 135451 of 19 May 2023), Meta Platforms Ireland Ltd – hereafter also Meta only) (Ref. No 135845 of 22 May 2023) and U.Di.Con. A.P.S. – Unione Difesa Consumatori (Ref. No 135846 of 22 May 2023);

HAVING HEARD the comments made during the hearings by the following stakeholders who so requested: Google Ireland Limited on 6 July 2023 and Meta Platforms Ireland Ltd on 7 July 2023;

HAVING COMPLETED the public consultation provided for in Resolution No 76/23/CONS;

CONSIDERING, in particular, the following regarding the comments made by the European Commission:

in its request for clarification, made following the notification of the draft regulation published for consultation, the Commission requested to specify whether the notified draft is to be considered a national measure transposing Article 3(5) of the e-Commerce Directive (Directive 2000/31/EC) and the reasons justifying the need to adopt a separate procedure for services consisting of video sharing platforms established outside the Italian territory. In addition, the Commission requested to provide some additional information, including the language in which the

transmissions and communications between the platform provider and the Italian authorities are expected to take place, in accordance with the notified draft, and the contact person referred to in Article 8(1) of the notified draft also with reference to the contact point referred to in Article 12 of Regulation 2022/2065 (Digital Services Act) or if, on the contrary, it is an additional obligation for the platform provider. In addition, the Commission requested clarification as to whether the identification of the subject content, within the meaning of Article 8 of the notified draft, should be understood as including or not the exact URL (if available) to facilitate the localisation of the content, and also clarification on the measures referred to in Article 9(2) of the notified draft consisting of the removal of content and, in particular, the adoption by the Italian authorities of measures that also affect the availability of content outside the Italian territory. Finally, the Commission asked to clarify whether the notified draft should be interpreted as not preventing the transmission of orders to the other Digital Services Coordinators pursuant to Article 9(4) of Regulation 2022/2065.

In response to the above-mentioned request for additional information, the Authority noted that the notified Regulation is to be considered a national measure implementing, on the basis of the provisions set out in the Consolidated Text, the procedure laid down in Article 3 of the e-Commerce Directive, for video-sharing services. In this sense, the Authority has stated that the above Regulation follow '*the procedure laid down in Article 5(2), (3) and (4) of Legislative Decree No 70 of 2003*', in line with the provisions of Article 41(7) of the TUSMA. In particular, the rules referred to in Article 5(2), (3) and (4) of Legislative Decree No 70 of 2003 transpose those contained in Article 3(4), in part, and paragraph 5 of the Directive.

Agcom, therefore, being an independent administrative authority which has no legislative powers but rather secondary regulation powers, with the Regulation in question intended to implement a legislative provision of primary law (ex Article 41 TUSMA).

With regard to the request for additional information about the contact person referred to in Article 8(1) of the notified Regulation, the Authority has specified that this measure is intended to facilitate the process of dialogue with VSP providers and that it is not an obligation, but the exercise of a mere option by the VSP providers and that it may coincide with the figure identified by Article 12 of the DSA. Also in relation to the measures referred to in Article 9(2) of the notified Regulation, the Authority noted that the same defines the procedure for restricting the circulation of programmes, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose provider is established in another Member State and directed to the Italian public, for specific purposes defined therein, and that this provision follows the same procedure provided for in Article 5(2) to (5) of the e-commerce decree. In this regard, the Authority recalled that since 2013 it has established and implemented a similar procedure aimed at the identification and cessation of infringements in the field of copyright protection on electronic

communications networks, in implementation of Articles 14, 15 and 16 of Legislative Decree No 70 of 9 April 2003, as governed by the Regulation adopted by Resolution No 680/13/CONS, which has already been notified to the Commission (notification procedure No 2013/0496/I). Similarly, in the Regulation in question, in cases of urgency, the Authority intends to directly address the provider of the video-sharing platform, ordering it to adopt any measures, including removal, suitable for preventing the Italian public from accessing illegal content. It is therefore a mere order limiting (geoblocking) the content addressed to Italy disseminated by the VSP provider established in another Member State of the Union and the site is not shut down. It should also be noted that this measure is justified in the same cases as those laid down in Article 3(1) of the e-Commerce Directive and deemed worthy of particular protection (the protection of minors, the protection of the consumer including the investor, and the fight against incitement to racial, sexual, religious or ethnic hatred, as well as against violations of the human dignity of the person).

As regards the language in which the transmissions and communications are expected to take place between the platform provider and the Italian authorities in accordance with the notified Regulation, the Authority has specified that the method of application in all the administrative acts and measures adopted by the Authority, also towards entities which are not established in Italy but allocate their services there, is that of the use of the Italian language. Furthermore, as regards the identification of the programme, the user-generated video or the audiovisual commercial communication, pursuant to Article 8 of the notified Regulation, the Authority stated that it did not consider it appropriate to provide for the exact URL, also in the light of the recent national case-law, on the understanding that, where available, timely communication would be given to the VSP provider. In any case, the Authority has made itself available to amend the Regulation in order to allow easier identification of the content to be removed.

Finally, the Authority clarified that the notified Regulation does not prevent the transmission of orders to the other Digital Services Coordinators pursuant to Article 9(4) of Regulation 2022/2065.

The Commission, also in the light of the additional information obtained, made some conclusive comments on the notified draft Regulation. As a preliminary step, it referred to the DSA Regulation, which establishes a harmonised regulatory framework for online intermediary service providers as regards their obligations to address illegal and harmful content on their services. The Commission noted, in that regard, that online platforms are one of the intermediary services within the meaning of Article 3(i) of the DSA and that, where they meet the criteria set out in Article 1(1)(aa) of the AVMSD, read in conjunction with the Commission's July 2020 Guidelines, those platforms would also qualify as video-sharing platform services under the AVMSD. Therefore, in such a situation, both AVMSD and the Digital Services Act would apply.

In general, the Commission notes that the notified Regulation could be assessed in the light of the provisions of the DSA, since it specifies the applicable procedure to limit the availability of content stored by video-sharing platform services provided by entities established in Member States other than Italy and offering cross-border services on the Italian territory.

With regard to the details, the Commission took note of the information provided in the reply to the request for additional information and, in particular, of the non-mandatory nature of the appointment of a contact point pursuant to Article 8(1) of the notified Regulation, which remains voluntary for the service provider and may coincide with the contact point referred to in Article 12 of the Digital Services Act. Likewise, the Commission took note of the additional explanations concerning the effects of any orders set out in the notified draft, which would be limited to the recipients of the services on the Italian territory. The Commission also welcomed the clarification that the notified draft does not prevent orders from being sent to other Digital Services Coordinators pursuant to Article 9(4) of the Digital Services Act.

Furthermore, with regard to the content of the orders adopted pursuant to the notified Regulation, in relation to the insertion of the exact URL for the identification of illegal content and the use of the Italian language for the transmission of the same to video-sharing platform providers, the Commission pointed out that Articles 9 and 10 of the DSA harmonise certain specific minimum conditions that administrative or judicial orders from a Member State must meet in order to trigger the obligation for intermediary services providers to inform the competent authorities of the follow-up given to such orders. Among these, the Commission mentions: (i) the inclusion of clear information enabling the intermediary services provider to identify and locate illegal content (Article 9(2)(a)(iv)) and (ii) the transmission in one of the languages declared by the intermediary services provider or in another official language of the Member States, agreed between the authority issuing the order and that provider, or in the language of the issuing authority, provided it is accompanied by an appropriate translation (Article 9(2)(c) and Article 10(2)(c)).

In addition, the Commission noted that the procedure provided for in the notified draft is intended to implement the procedural steps set out in Article 3(4) and (5) of the E-Commerce Directive, including notifications to the service provider's country of origin and to the Commission. On this point, it therefore referred to the Internal Market Information System ('IMI'), developed under the pilot project on the basis of Article 29 of Regulation (EU) No 1024/20126 ('the IMI Regulation'), and invited, where necessary, to refer to the use of that system for the issuance of any measure against a particular cross-border provider falling within the scope of Article 3 of the E-Commerce Directive.

Finally, the Commission recalled the need to ensure that national legislation is consistent with the Digital Services Act and, where appropriate, with the e-Commerce Directive, including the IMI implementation system.

IN VIEW OF the contributions acquired in the context of the public consultation and the related evaluations of the Authority as set out below:

General comments

Main positions of the entities involved

All entities participating in the consultation welcome the proposed Regulation in question aimed at ensuring a high level of protection of Italian users in relation to the content used through the video-sharing platform services.

One entity hopes that the criteria for identifying the videos to be subject to restrictive measures will be as strict as those of the broadcasting system.

Another entity notes certain critical issues relating to the coordination of the Draft Regulation with the Audiovisual Media Services Directive 2010/13/EU, as subsequently amended by Directive 2018/1808, with the DSA Regulation, with the e-Commerce Directive and, more generally, with the Country of Origin Principle. In particular, from a first point of view, it notes that, although inspired by Article 3 of the EC Directive, the draft regulation qualifies as a national rule, the adoption of which is not provided for – and, indeed, is expressly excluded – by the AVMS Directive and is not necessary, given the existence of the provisions of Legislative Decree 70/03 which are exhaustive, immediately applicable, and fully overlapping with said draft. Moreover, from another point of view, the same entity notes critical issues with regard to the coordination between the draft regulation and the DSA Regulation. It cites, in this regard, recital 9 of the above-mentioned Regulation, under which Member States are prohibited from adopting additional national requirements in relation to matters falling within the scope of application of the Regulation itself, unless expressly provided otherwise therein, since this would affect the direct and uniform application of the fully harmonised rules applicable to intermediary services providers in accordance with the objectives of the Regulation itself. Indeed, the entity notes that the scope of application of the draft regulation would appear to overlap with that of the DSA Regulation, which includes the protection of minors and consumers, as well as the fight against hate speech or discriminatory content. Finally, the same entity believes that the draft regulation presents inconsistencies in relation to compliance with the Country of Origin Principle referred to in Article 3 of the e-Commerce Directive under which the Member State cannot restrict free circulation of a given service of the information society in relation to content to be considered merely ‘dangerous’ and not illegal. Finally, in this context, the entity notes that the only interpretation consistent with Union law of Article 41(7), TUSMA, is that which limits its scope of application only to the content constituting an unlawful act. A different interpretation, in fact, would conflict with the Country of Origin Principle and the prohibition of gold plating. Consequently, it suggests to specify better the scope of application of the legislation, clearly referring the content subject to limitation to the category of the content contrary to Italian laws.

Another entity stresses the need to respect the principles of European law as an essential tool for the proper functioning of the single market in order to favour European and Italian users; in addition, in its capacity as a video-sharing platform, it emphasises that it has equipped itself with extremely stringent advertising standards that apply to all users, including minors, and which impose very high standards for paid advertisements. It stresses the importance of harmonisation as a key principle to ensure that online services and consumers can benefit from a truly EU digital single market.

Finally, another entity highlights the importance of the provisions introduced by the regulation in question, especially with reference to the new procedure aimed at removing illegal content, which foresees a new possibility of intervention both directly by the Communications Regulatory Authority, for cases of urgency, and by the Regulatory Authority of the country in which the sharing platform is established for all other cases. For this reason, it considers it necessary to disseminate it as widely as possible, also through the support of consumer associations in order to raise awareness among users of the content of this same Regulation.

Comments by the Authority

With regard to the concerns raised about the coordination between the regulation in question and the main European regulations referred to herein (the DSA Regulation, the e-Commerce Directive, the AVMS Directive), it is reiterated at the outset that it was the national legislator, when transposing Directive 2018/1808, that gave the Authority this power in Article 41 of the TUSMA. In this regard, it should be noted that the legislator made an express reference to the procedures laid down in Article 5 of Legislative Decree 70/03.

It is also noted that the draft regulation submitted for public consultation was notified to the European Commission which, although it made a request for clarification, found no conflict with EU legislation. In addition, as pointed out by the European Commission, the regulation in question merely provides for intervention in certain cases specifically identified by Article 41(7) of Legislative Decree 208/2021, for the following purposes: '*a) the protection of minors from content that may harm their physical, mental or moral development [...]; b) the fight against incitement to racial, sexual, religious or ethnic hatred and against the violation of human dignity and c) the protection of consumers, including investors'*.

As for the concerns raised regarding compliance with the country of origin principle, it is reiterated that the Regulation is based on Directive 2000/31/EC on electronic commerce, under which each Member State may restrict the circulation of information services from another State with regard to a given service of the information society to certain conditions. In particular, under Article 3(4) of that Directive, the measures that a Member State intends to take must be: i.) necessary for a number of identified reasons (law and order, protection of public health, public security, and protection of consumers, including investors ii.) relating to a given service of the information society which is detrimental to the objectives set out in point 1) or constitutes a serious and grave risk of

prejudice and iii.) proportionate to those objectives. In such cases, the legislation provides that the Member State, before taking the measures in question and without prejudice to judicial proceedings, including investigative ones, and acts carried out in the context of a criminal investigation, must first ask the Member State in which the subject is established to intervene; if it has not taken measures or the measures are not appropriate, it must notify the Commission and the Member State of its intention to take such measures.

The aforementioned Article 3(5) also provides for the possibility, for cases of urgency, to derogate from those conditions. In this circumstance, any measures taken must be notified as soon as possible to the Commission and to the Member State in which the entity is established or considered to be established, together with the matters of urgency.

On the basis of these assumptions, the Authority adopted the Regulation aimed at protecting copyright in electronic communications networks annexed to Resolution No 680/13/CONS – which also regulates the Authority's interventions for unlawful acts committed by entities established outside Italy. The above regulation, it should be remembered, was also notified to the European Commission and was endorsed by the administrative court.

With specific reference to the coordination between the Regulation in question and the DSA Regulation, it should be noted that Article 6 of the DSA (which replaced Article 14 of the e-Commerce Directive) dedicated to the rules and regulations governing the 'storage of information' is without prejudice to the possibility, in accordance with the legal system of each Member State, for a judicial or administrative authority to require the service provider to prevent or put an end to an infringement.

In this respect, it should be noted, as already pointed out by the European Commission itself, that the new provisions apply in accordance with and within the limits laid down in the DSA. In particular, the Authority, in line with what has been expressed by the European Commission, refers to Recital 38 of the DSA Regulation according to which '*orders to act against illegal content and to provide information are subject to the rules safeguarding the competence of the Member State in which the service provider is established and the rules laying down possible derogations from that competence in certain cases, set out in Article 3 of Directive 2000/31/EC, only if the conditions of that Article are met. Given that the orders in question relate to specific items of illegal content and information, respectively, where they are addressed to providers of intermediary services established in another Member State, they do not, in principle, restrict those providers' freedom to provide their services across borders. Therefore, the rules set out in Article 3 of Directive 2000/31/EC, including those regarding the need to justify measures derogating from the competence of the Member State in which the service provider is established on certain specified grounds and regarding the notification of such measures do not apply in respect of those orders*'.

Therefore, it being understood that, pursuant to Article 8 of the DSA, general obligations to monitor or actively ascertain facts or circumstances indicating the presence of illegal activities against digital platforms are not mandatory, this is without prejudice to the possibility for the Authority to require the intermediation service provider to prevent or put an end to an infringement, in line with the provisions of Article 6(4) of the DSA Regulation.

Furthermore, also in consideration of the discussions with the Commission, in order to ensure maximum alignment with the procedures provided for in the DSA, it is considered appropriate to provide that the Authority, as the Digital Services Coordinator for Italy (pursuant to Article 15 of Decree-Law No 123 of 16 September 2023 converted, with amendments, by Law No 159 of 15 November 2023), proceeds to forward, pursuant to Article 9(4) of the DSA, the adopted order to all Digital Services Coordinators through the system established under Article 85 of the DSA.

<u>On the definitions referred to in Article 1</u>

Main positions of the entities involved

One entity suggests deleting in Article 1(f) the phrase '*excluding the so-called gifs*" because, as is well know, gifs (graphics interchange formats) are series of images that can only be defined through their format and can go on for a significant time, for the purposes referred to in the provision under consultation. In particular, it notes that even gifs of 10 or 20 seconds can convey harmful content, and moreover, the same rule in question states that it wants to disregard the duration of the programme for definition purposes.

Comments by the Authority

With regard to the suggestion to delete the reference to *gif*s from the definition of a programme and, more generally, to extend the Regulation to those images as well, it should be noted that this wording (which expressly excludes them) was provided for directly by the Italian legislator in Article 3(1)(g) of Legislative Decree 208/2023 with specific reference to the definition of 'programme'. Moreover, this inclusion was a choice made when the Italian legislator transposed Directive EU 2018/1808, also in line with Recital 6 of the Directive.

<u>On the subjective criteria for the identification of content addressed to the Italian public referred to in Article 3</u>

Main positions of the entities involved

With regard to the identification criteria aimed at determining whether a content is directed to the Italian public, one entity notes that they conflict with Article 41(8) and (9) of the Consolidated Law, and at the same time appear to be generic and excessively broad. In particular, it stresses that the primary legislation does not give the Authority the power to define the criteria for identifying content addressed to the Italian public; it notes, in this regard, that Article 41(9) of the Consolidated Law merely restricts the

Authority's regulatory powers to '*the procedure for adopting the measures referred to in paragraph 7*", without mentioning the determination of the criteria by which the content directed to the Italian public are identified. On the other hand, the same entity notes that the provision by the national legislator of a series of elements by way of example would seem to require that the content directed to the Italian public must be considered according to an assessment to be carried out on a case-by-case basis.

From another point of view, the same entity argues that the Authority's intervention would not, in its opinion, be limited to clarifying the provisions of the primary legislation but, instead, presents an unduly innovative nature. On the one hand, it notes that the provision that the fulfilment of even just one of the criteria set out in Article 3 is sufficient to qualify the content as directed to the Italian public is in conflict with Article 41(8), TUSMA, which, in contrast, merely mentions a number of criteria by way of example. On the other hand, it believes that the draft regulation introduces criteria which are unrelated to the primary rule, some of which, in its opinion, do not appear to be relevant to the assessment at issue. In particular, the same entity notes that the facts that a VSP provider generates revenues in Italy or provides for a user interface in Italian or makes Italian available as the language of use of the platform are all irrelevant for assessing whether certain user-generated content hosted on that platform is directed to the Italian public. In contrast, it notes that the application of the criteria to a VSP provider operating in various EU countries would de facto bring all the content available on the platform within the scope of application of the Draft Regulation, in conflict with the same rationale of Article 41(7) of the Consolidated Law. Therefore, the same entity suggests deleting the entire provision.

Comments by the Authority

With regard to the exception that the primary legislation did not expressly confer on the Authority the power to define the criteria for determining whether a programme, a user-generated video or an audiovisual commercial communication are directed to the Italian public, it is preliminarily observed that Agcom, as an independent administrative authority responsible for regulating and supervising the areas of competence, exercises its prerogatives in a manner functional to the most effective satisfaction of the public interest underlying the rules conferring power. In this sense, it may adopt regulations or interpretative guidelines aimed at better clarifying the scope of the provisions of primary law. In the present case, the legislator has already identified criteria, albeit by way of example, on the basis of which the Authority has decided to formulate further interpretative guidelines without prejudice to the possibility of assessing the case on a case-by-case basis.

With specific reference to the fact that the Authority decided to consider the live criteria identified as alternative and not cumulative in order to determine whether a programme, a user-generated video or an audiovisual commercial communication, disseminated by a provider established in another Member State, is directed to the Italian public, it is noted that this choice is based precisely on the purely explanatory and illustrative scope of that list.

Finally, with reference to the comments made with regard to the criterion relating to revenues, it is recalled that this criterion was inserted directly by the national legislator.

On the reports to the Authority provided for in Article 6

Main positions of the entities involved

One entity fears the potential overlapping of proceedings before the Authority with judicial proceedings concerning the same audiovisual content. In particular, it notes that although the draft regulation provides that proceedings before the Authority cannot be initiated or continued if there are proceedings pending before the judicial authority in relation to the same content, within the meaning of Article 6(4), the obligation for Agcom to abstain arises, in its opinion, only if the proceedings concern the same content and have been initiated between the same parties. In this regard, it notes that, since these are proceedings based on the protection of the public interest, the identity of the entity requesting the removal of a particular content is of no primary importance, unlike the identity of the content at issue in the proceedings in question and the VSP provider hosting it. Therefore, it believes that judicial proceedings involving the same VSP Provider but a different counterparty should in any event result in an original or subsequent bar to further proceedings, in line with the principle of *ne bis in idem*.

Comments by the Authority

With regard to the comments made on the risk of possible overlapping of proceedings before the Authority with judicial proceedings concerning the same audiovisual content, we agree with the suggestion made. In fact, considering that the proceedings for the removal of content from a video content sharing platform are based on the protection of the public interest, it is agreed that the identity of the entity requesting its removal is irrelevant, while the identity of the content covered by the same proceedings is relevant.

On the preliminary investigation procedure before the Directorate referred to in Article 8

Main positions of the entities involved

With regard to the preliminary investigation procedure before the Authority and, in particular, before the competent Directorate governed by Article 8 of the draft

regulation, an entity believes that the time frame of the preliminary investigation procedure before the Directorate is excessively long and suggests a significant contraction of time limits. In particular, it suggests that the administrative procedure should be concluded in 5 days instead of 30 days and should be suspended for a maximum of 5 days instead of 15 days. In addition, with reference to the time limits for spontaneous adaptation, it suggests allowing 2 days instead of 5 days and a possible extension for another 3 days instead of 5 days. The proposed amendments, the entity notes, are necessary since the procedure is aimed at removing content deemed harmful to the psycho-physical development of minors and to human dignity, which incites hatred, therefore it must be a quick and efficient tool, which can be used to protect such legal situations and interests, providing time frames such as to prevent serious and irreparable harm to users and their rights.

On the other hand, another entity expresses strong doubts as to the provision of strict time limits for video-sharing platform providers. In particular, it notes that the indication of peremptory and determined time limits would conflict with the approach of the European legislator which, both in the e-Commerce Directive and in the DSA Regulation – and in particular Article 9 dedicated to orders aimed at acting against illegal content issued by national judicial or administrative authorities – has avoided introducing predetermined time limits precisely to leave room for a case-by-case assessment, also on the basis of the nature of the Content and other factual circumstances, so as to allow a more accurate balancing of interests and reduce the risks to freedom of expression online. It suggests, therefore, to remove any reference to specific time limits for VSP providers provided for in Article 8 of the draft Regulation and to maintain, in line with the provisions of Article 9 of the DSA Regulation, a general reference to the adoption of the required measures 'without undue delay.' The same entity notes that according to Article 8(5), Agcom is required to close the proceedings only if the applicant initiates legal proceedings. On the other hand, it notes the absence of provision for the provider wishing to initiate legal proceedings against the user who uploaded the allegedly infringing content onto a platform. It therefore suggests that it should be amended accordingly.

Comments by the Authority

With regard to the request to reduce the time limits of the procedure provided for therein, it is noted that these have been defined by making a reasonable balance between the different interests involved, taking care to ensure effective protection of users in compliance with procedural guarantees and taking into account the need for the Authority to carry out the necessary investigations. Therefore, referring to what has already been noted in relation to the time limits for video-sharing service providers to proceed with the removal, it is noted that the time limits set out here are non-mandatory time limits functional to ensure certainty in administrative action.

However, in the light of the comments made by the various entities involved in the consultation and with a view to the efficiency and effectiveness of the administrative

action, the time limits for concluding the pre-investigation verification activities are reduced from twelve to five (ex Article 5(4)). Similarly, in the event of spontaneous adaptation by the video-sharing platform provider referred to in Article 8(3), also on the basis of the provisions of the Regulation to combat piracy online (Resolution 680/13/CONS as amended), it has been provided that the proceedings will end with a dismissal decision by the director. The competent collective body shall periodically be informed of the filings so arranged.

With specific reference to the time limits of the procedure, in the light of the comments received and taking into account the need, in certain cases, to proceed by obtaining information relevant to the administrative action, it is considered appropriate to provide expressly in Article 11 that any requests for information, made necessary, suspend the time-limits of the procedure referred to in Article 8. Finally, with regard to the time limit for the conclusion of the procedure in the light of the comments received and with a view to the efficiency and effectiveness of the administrative action, the relevant time limits are reduced from 30 to 15.

<u>On the final measures referred to in Article 9</u>

Main positions of the entities involved

With regard to the provision dedicated to the final measures that can be adopted by the Authority, two entities consider the time frames set out in Article 9.2 of the draft regulation to be extremely binding for the execution by the video sharing platform provider of a measure of the Authority (the removal of content), as it would incentivise the excessive removal of potentially legitimate content and in any case would conflict with the principles established by the DSA. In particular, they note that the DSA did not provide for predefined deadlines for the removal of content as this would risk undermining freedom of expression and would not allow the differences between the various types of content to be recognised. Finally, they note that the provision of time limits applicable only at national level would undermine the DSA's objective of establishing a harmonised framework for content regulation and would risk creating legal uncertainty for companies operating in Europe. They therefore suggest to remove from the draft regulation the provision of time limits for the removal of content and to align it with the spirit and letter of the DSA, according to which intermediary services providers must follow up on a content removal order '*without undue delay*.'

An entity, with specific reference to the order given by the Authority to the content sharing service provider (pursuant to Article 9(2) of the draft regulation), suggests providing for the identification of the content through the relevant URL in order to identify it in a unique way. In this regard, referring to the provisions of Article 9 of the DSA Regulation (according to which '*Member States shall ensure that the order referred to in paragraph 1 transmitted to the provider meets at least the following conditions: a) the order shall contain the following elements: [...] iv) clear information*

enabling the intermediary services provider to identify and locate the illegal content concerned, such as one or more exact URLs and, if necessary, additional information') it notes that the URL is the only way to unequivocally identify the exact electronic location of the content subject to the Authority's measures and to allow the video-sharing service provider to assess it and immediately take the appropriate measures.

An entity believes that the measure which the Authority may adopt pursuant to Article 9 of the Draft Regulation is excessively general and broad ('*any measures, including removal, suitable for preventing the Italian public from accessing content deemed to be in conflict with the purposes set out in Article 4'*); the same entity notes that such a wide scope could lead to excessively burdensome, disproportionate or arbitrary orders such as, for example, monitoring obligations (expressly prohibited by the e-Commerce Directive, the AVMS Directive, and the DSA Regulation) or blocking obligations that are not commensurate with the extent of the infringement (e.g., the blocking of entire channels in the face of limited or minor infringements), or technically unenforceable obligations (to the detriment of the same objective that TUSMA aims to achieve). In addition, the Draft Regulation does not provide for a detailed indication of the elements that the restrictive order issued by the Authority must necessarily contain, in breach of the principle of legal certainty. Such orders, according to the same entity, should include the same elements as those provided for in Article 9 of the DSA Regulation, including a full statement of reasons for explaining why the information would constitute illegal content by reference to one or more specific provisions of the Union law or of the national law consistent with the same law.

Comments by the Authority

With regard to the comments made by the participants in the consultation regarding the identification of specific time limits for the execution of a measure of the Authority by the video-sharing platform provider, the above is reiterated. In particular, since these are merely non-mandatory and non-peremptory time limits, it is considered appropriate to maintain the provision of the document placed for consultation. In addition, it is reiterated that the same does not appear to conflict with the wording used by the European legislator in the DSA Regulation, given the non-mandatory character thereof.

With regard to the request to indicate the exact URL of the content within the order, also in the light of what the European Commission has noted, it is considered appropriate to provide that the order sent to the video-sharing platform providers complies with the conditions set out in Article 9(2)(a)(iv) of the DSA Regulation, relating to the inclusion of clear information, such as one or more exact URLs and, if necessary, additional information, enabling the video-sharing platform provider to identify and locate the illegal content in question. Furthermore, still in view of the specific minimum conditions that administrative orders must meet in order to trigger the

obligation on the part of intermediary services providers to inform the competent authorities of the follow-up given to such orders, as pointed out by the Commission, the Regulation provides that orders are to be transmitted in accordance with the indications referred to in Article 9(2)(c) of the DSA.

With regard to the concerns raised by an entity about the content of the Authority's order to the video sharing service platform, it is noted that in any case the orders are accurate and specific. As is well known, in fact, Article 8 of the DSA Regulation prohibits the adoption of general monitoring obligation or active fact-finding obligations. On the other hand, however, Article 6 of the same regulation is without prejudice to the possibility, in accordance with the legal system of the Member State, for a judicial or administrative authority to require the service provider to prevent or put an end to a specific infringement as in the case at hand. As regards the fear of the disproportionality of the order, it is recalled that the latter, being an expression of an administrative power, translates into the adoption of an administrative act which not only must be reasoned, but also proportionate to the objective pursued. In addition, it should be noted that all measures adopted by the Authority can be challenged before the competent judge.

Finally, with a view to ensuring maximum transparency and harmonisation with the procedures of the Digital Services Act, provision was made for the transmission of the order given to the VSP provider to the Digital Services Coordinators of the other Member States, in line with Article 9(4) of the DSA.

<u>On the procedure for reporting to the national competent authority referred to in Article 10</u>

Main positions of the entities involved

One entity appreciates the procedure proposed by the draft Regulation, which provides for notification to the European Commission and the national competent authority, i.e., that of the Member State where the video sharing platform provider is (or is deemed to be) established. However, it notes that the time limits laid down in the Regulation, and in particular Article 10(2) of the draft regulation for the coordination of Agcom with the national competent authority in the Member State in which the provider is established, are excessively strict. It suggests in this respect to refer to the wording used by the Memorandum of Understanding ('MOU') of ERGA, which uses the expression 'without undue delay' instead of a precise indication within which to reply.

On the other hand, another entity notes that the intervention times provided for therein are excessive and such as to make the intervention of the Italian Authority or the foreign authority late and therefore ineffective. In this regard, it proposes the inclusion of a simplified procedure of cooperation between the two Authorities with the introduction of temporary powers which '*in circumstances of particular confirmation of the*

harmfulness of the content under investigation, are aimed at the precautionary removal of the same pending the definition of the procedure.'

Comments by the Authority

With regard to the concerns raised by some participants in the consultation, it is noted that the time limits set out therein are to be understood merely as non-mandatory and non-peremptory time limits. In this regard, we do not consider to accept the suggestion made to use the same wording already provided for in the DSA Regulation because the inclusion of a time-limit, although non-mandatory, ensures greater certainty to the Authority's action in the interest of all the entities involved.

In addition, with regard to the procedure of cooperation between the Authorities of the different Member States, in line with the Commission's comments on the issuing of measures against a cross-border provider within the meaning of Article 3 of the E-Commerce Directive, it is considered appropriate to clarify in the Regulation that all communications made to the authorities of the other Member States and to the Commission, in the context of the notification to the national competent authority, take place through the Internal Market Information System for Administrative Cooperation, as referred to in Regulation (EU) No 1024/2012 (IMI system).

<u>On the sanctioning supervision referred to in Article 12</u>

Main positions of the entities involved

One entity suggests expressly providing that when the cases covered by the regulation in question occur, administrative pecuniary penalties cannot be imposed, because Article 41 of the Consolidated Law does not confer any sanction on video-sharing service providers established in another Member State. Article 41(13) of the Consolidated Law also contributes in this sense, providing that '*[i]n the event of infringements of Articles 41 and 42 by a video-sharing platform provider established in another Member State, the Authority may send an appropriate report to the national regulatory authority of that Member State.*' Therefore, it suggests deleting Article 12(1) of the regulation in question or making a specific reference to the provisions of that sanctions regulation applicable to the regulation in question, given the absence of a sanctioning power of the Authority.

Comments by the Authority

With regard to the request to delete the reference to the rules of procedure on administrative penalties and commitments of the Authority, it is noted that the regulation under consideration is a procedural regulation which does not introduce new and different penalties from the provisions of the primary legislation. In any case, the

possibility remains for the Authority to proceed pursuant to Article 1(31) of Law 249/1997 in case of non-compliance with the order given.

On the entry into force of the regulation

Main positions of the entities involved

An entity suggests setting a time limit from the publication of the regulation only after which it becomes effective. This is in order to allow video-sharing platform providers to adapt to the provisions contained therein.

Comments by the Authority

In acceptance of the request made, with which we agree, also in view of the adaptations necessary to ensure timely compliance with the orders for the removal of illegal content by video-sharing platform providers, the Authority provides for a time limit of 30 days for the entry into force of the regulation.

CONSIDERED, moreover, it appropriate to supplement the regulation in question with what has been noted above with specific reference to Regulation (EU) 2022/2065 (Digital Services Act) and to the Internal Market Information System for Administrative Cooperation (the IMI system), as well as to make some formal clarifications and amendments for the sake of greater procedural clarity in the carrying out of the preliminary investigation procedure and in the Authority's managing of the reports;

CONSIDERING it necessary, therefore, in the light of the comments made in the context of the public consultation by stakeholders and of the comments of the European Commission, to amend and supplement the draft regulation placed for consultation within the limits and for the reasons set out above;

HAVING HEARD the President's report;

HEREBY DECREES

Single article

1. The Regulation '*implementing Article 41(9) of Legislative Decree No 208 of 8 November 2021 on programmes, user-generated videos or audiovisual commercial communications addressed to the Italian public and conveyed by a video-sharing platform whose supplier is established in another Member State*', as set out in Annex A to this resolution of which it forms an integral part, is hereby approved.

This resolution may be challenged within sixty days of its publication before the Regional Administrative Court of Lazio.

This resolution is published on the Authority's website and shall enter into force 30 days after its publication.

Rome, 22 November 2023

THE PRESIDENT
Giacomo Lasorella

Attesting the conformity of the decision
THE SECRETARY-GENERAL
Giulietta Gamba

Annex A to Resolution No 298/23/CONS

REGULATION IMPLEMENTING ARTICLE 41(9) OF LEGISLATIVE DECREE NO 208 OF 8 NOVEMBER 2021 ON PROGRAMMES, USER-GENERATED VIDEOS OR AUDIOVISUAL COMMERCIAL COMMUNICATIONS ADDRESSED TO THE ITALIAN PUBLIC AND CONVEYED BY A VIDEO-SHARING PLATFORM WHOSE SUPPLIER IS ESTABLISHED IN ANOTHER MEMBER STATE

PART I

Article 1
Definitions

1. The following definitions are set out for the purposes of this regulation:

a) 'TUSMA' means: Legislative Decree No 208 of 8 November 2021 on the '*Implementation of Directive (EU) 2018/1808 of the European Parliament and of*

the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the Consolidated Act for the provision of audiovisual media services in view of changing market realities';

b) 'Legislative Decree' means: Decree No 70 of 9 April 2003 on the '*Implementation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*';

c) 'Service provider' means: the information society service provider, or the natural or legal person or non-recognised association providing an information society service, namely the service referred to in Article 1(1)(b) of Law No 317 of 21 June 1986 as amended by Legislative Decree No 223 of 15 December 2017 and subsequent amendments;

d) 'Video-sharing platform service' means: a service, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the main objective of the service, its distinguishable section or essential functionality is the provision of programs, user-generated videos or both, addressed to the general public, for which the video-sharing platform provider has no editorial responsibility, for the purpose of informing, entertaining, or educating through electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 12 July 2002 and whose organisation is determined by the provider of the video-sharing platform, including by automated means or algorithms, in particular by displaying, tagging and sequencing;

e) 'Video-sharing platform provider' means: the natural or legal person providing a video-sharing platform service;

f) 'Program' means: a series of animated images, whether with sound or not, excluding the so-called *gif*, which constitute a single element, regardless of its duration, within a schedule or catalogue established by a media service provider, including feature films, video clips, sports events, situation comedies (sitcoms), documentaries, children's programmes, and original fiction;

g) 'User-generated video' means: a series of animated images, whether with sound or not, which constitute a single element, regardless of its duration, created by a user and uploaded to a video-sharing platform by the same or any other user;

h) 'Audiovisual commercial communication' means: images, whether with sound or not, intended to promote, directly or indirectly, the goods, services or image of a natural or legal person engaged in an economic activity including, inter alia,

television advertising, sponsorship, television promotion, television shopping and product placement, inserted or accompanying in a user-generated program or video for payment or other remuneration or for self-promotion purposes;

i) 'Consumer' means: any natural person acting for purposes other than his commercial, business, craft or professional activity;

j) 'User' means: the natural or legal person who uploads on a video-sharing platform the content referred to in points g) and h) of Article 3(1) of the TUSMA, namely the natural person who uses the content accessible through a video sharing platform.

k) 'Investor': the retail client or retail investor pursuant to Legislative Decree No 58 of 24 February 1998 laying down the Consolidated Act on Finance, i.e. the client or investor who is not a professional client or professional investor;

l) 'Digital services coordinator of the place of establishment' means: the digital services coordinator of the Member State where the main establishment of an intermediary service provider is located or where its legal representative resides or is established;

m) 'Authority': the Communications Regulatory Authority;

n) 'Collective Body': the Council of the Authority;

o) 'Directorate' and 'Director' mean: respectively, the Authority's Digital Services Directorate and the Director *pro-tempore* (temporary);

p) 'Office': the second-level organisational unit;

q) 'National Competent Authority': the Administrative Authority or the Digital Services Coordinator of the Member State where the provider of a video-sharing platform is established or deemed to be established and which has jurisdiction for cases governed by this regulation;

r) 'Person in charge of the proceedings' means: the manager or official who, in accordance with the Rules of organisation and operation of the Authority, has the responsibility for carrying out the investigative activities and any other duty related to the procedure referred to in these Regulations;

s) 'Electronic communications networks' means: networks as defined in Article 2(1)

of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018;

t) 'Sanctions Regulation' means: Annex A to Decision No 410/14/CONS on 'Rules of procedure on administrative penalties and commitments', as last amended and supplemented by Decision No 697/20/CONS;

u) 'AVMS Directive' means: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018.

v) 'DSA Regulation' or also 'DSA': Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 relating to a single market for digital services and amending Directive 2000/31/EC (Digital Services Act).

w) 'ERGA': the European Regulators Group for Audiovisual Media Services, established by Decision C(2014) 462 of the European Commission of 3 February 2014.

x) 'Memorandum of Understanding': the document adopted by ERGA on 3 December 2020 with the aim of establishing a framework for cooperation and exchange of information between its members, with a view to a harmonised application of the AVMS Directive.

y) 'IMI system': the Internal Market Information System for Administrative Cooperation, as referred to in Regulation (EU) No 1024/2012, is the system currently used for notifications under Article 3 of the E-Commerce Directive.

CHAPTER I
Scope

Article 2
General principles

1. Without prejudice to the provisions of paragraphs 1, 2, 3, 4, 5 and 6 of Article 41 of TUSMA, this Regulation governs the procedure for restricting by order of the Authority the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in

another Member State and which are addressed to the Italian public, in accordance with the criteria set out in Article 3.

2. The Authority shall take the measures referred to in paragraph 1 where they are:

a) necessary in relation to the purposes referred to in Article 4

and

b) proportionate to those purposes.

Article 3
Subjective identification criteria

1. In order to determine whether a program, a user-generated video or an audiovisual commercial communication conveyed by a provider established in another Member State is addressed to the Italian public, at least one of the following criteria must be met:

a) the prevailing use of the Italian language in the program, user-generated video or audiovisual commercial communication to be assessed in relation to the audio, subtitles or use of the Italian sign language;

b) the use of the Italian language within the video sharing platform service, to be assessed in relation to the presence of textual elements in Italian in the user interface, as well as the availability of the multilingual function that includes the Italian language;

c) the involvement through the video-sharing platform service, or the program, the user-generated video or the commercial communication of a significant average number of single monthly users in Italy on the basis of data provided by bodies with the highest representation of the entire sector of reference, also in view of multimedia convergence processes, whose organisation also meets principles of impartiality, autonomy and independence;

d) the achievement by the video-sharing platform provider of revenues earned in Italy, even if accounted for in the financial statements of companies based abroad.

Article 4
Purpose of the intervention

1. Pursuant to Article 41(7) and (8) of TUSMA, the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video

sharing platform referred to in Article 2(1) may be limited, by decision of the Authority, for the following purposes:

a) the protection of minors from content that may harm their physical, mental or moral development in accordance with Article 38(1) TUSMA;

b) the fight against incitement to racial, sexual, religious, or ethnic hatred and against the violation of human dignity;

c) consumer protection, including investors, within the meaning of TUSMA.

2. For the purposes of the preceding paragraph, the Authority shall act:

a) immediately and directly, in accordance with the first sentence of Article 7(4), if, at the end of the pre-investigation referred to in Article 5, there is a matter of urgency within the meaning of Article 5(4) of the *Legislative Decree* related to the emergence of facts or circumstances constituting a serious, imminent and irreparable prejudice to the rights of users;

b) in accordance with the procedure referred to in Article 10, in accordance with the provisions of the second sentence of Article 7(4), in cases where there is no matter of urgency within the meaning of the previous point a).

CHAPTER II
The procedure for the adoption of limitation measures

Article 5
Intervention arrangements and pre-investigation activities

1. The Directorate, ex officio or upon notification by the party, shall carry out the necessary checks to verify the presence of content addressed to the Italian public not complying with the purposes set out in Article 4.
2. The Directorate collects every necessary element, including through inspections, requests for information and documents, hearings, and reports.
3. For the purposes of carrying out the supervisory activity, the Directorate can avail itself of the support of the Editorial Radio Broadcasting group, part of the Special Team Goods and Services of the Finance Police and the Section of Postal Police and the Communications of the State Police in accordance with the memorandums of understanding signed with the Authority.
4. The pre-investigation verification activity shall be completed, except for specific and justified requirements, within 5 days from the moment the Directorate has gained formal knowledge of the facts.

Article 6
Reporting to the Authority

1. Anyone may report to the Authority the dissemination of programs, user-generated videos and audiovisual commercial communications conveyed by a video sharing platform referred to in Article 2, paragraph 1, if it considers that the content is against the purposes indicated in Article 4.
2. The request referred to in paragraph 1 shall be sent by using and filling out in its entirety, under penalty of inadmissibility, the model made available on the Authority's website, indicating in particular:
   a) personal data of the reporting person: name, surname and residence or domicile or name, legal representative and registered office in the case of legal persons;
   b) the name of the concerned video-sharing platform provider;
   c) the content which is presumed to be unlawful under this Regulation, providing all relevant elements for its unequivocal identification and, where possible, the person who uploaded it to the video-sharing platform;
   d) any further functional element to the assessment of the reported conduct, copy of any reports already sent to the video sharing service provider and the outcome thereof, as well as a copy of any correspondence between them;
   e) the reasons justifying the request and the interest assumed to be damaged by the dissemination of the content;
3. If the reporting does not contain the elements referred to in paragraph 2 above, the Directorate, in the exercise of its powers, may in any case initiate the investigation where, on the basis of a summary examination of the documentation received, the conditions for the adoption of the measure referred to in Article 9 appear to be met.
4. The proceedings before the Authority must not be conducted if proceedings before the Judicial Authority are pending for the same subject matter.
5. The reports received may be grouped in relation to the subject matter, the damaged interest or the platform concerned and dealt with jointly. In this case, the time limit referred to in Article 5(4) shall run from the receipt of the last report.

Article 7
Outcome of pre-investigation activity

1. The Directorate within the period referred to in Article 5(4) shall provide for the administrative closure of applications which are:

a) inadmissible on grounds of non-compliance with the requirements laid down in Article 6(2) or for lack of essential information;

b) inadmissible pursuant to Article 6(4) or for the termination of the alleged infringement;

c) inadmissible as they do not fall under the scope of application of this regulation;

d) manifestly unfounded as manifestly lacking the factual and legal preconditions capable of constituting an infringement, including with regard to the powers of the Authority.

2. The Directorate shall notify the applicant of the filings made pursuant to paragraph 1(a), (b), (c) and (d).

3. Every three months the Directorate informs the Collective Body of the proceedings initiated or closed.

4. The Director, having obtained the proposal of the competent office containing the precise reconstruction of the facts and the assessment of the existence of a matter of urgency within the meaning of Article 4(2)(a), except where provided for in paragraph 1, within the time limit referred to in Article 5(4), initiates the proceedings pursuant to Article 8(1). Where the Director does not consider that there is a matter of urgency within the meaning of Article 4(2)(a), and provided that he does not order the archiving pursuant to paragraph 1, the same Director, within the same time limit referred to in Article 5(4), transmits the results of the pre-investigation activity to the Collective Body for the consequent decisions referred to in Article 10(1).

Article 8

Procedure of inquiry before the Directorate

1. The Directorate notifies the initiation of the proceedings to the video sharing platform provider at the contact point for Italy, where indicated also pursuant to Article 12 of the DSA regulation, or at its registered office. The proceedings shall be concluded within 15 days of notification, except for any suspension, not exceeding 15 days, for the conduct of specific and reasoned in-depth investigations.

2. The initiating communication shall contain the identification of the program, the user-generated video or the audiovisual commercial communication which is alleged to be against the interests and purposes referred to in Article 4, a summary of the facts and the outcome of the investigations carried out, an indication of the competent office and the person in charge of the proceedings, as well as the time limit for submitting the defence pleadings and for the conclusion of the proceedings starting from the notification.

3. With the same communication referred to in paragraph 1, the Directorate shall inform the video-sharing platform provider that he/she can spontaneously comply with the request within 5 days from the notification of the initiation, informing the Directorate, who shall order the administrative closure of the proceedings.
4. Except in the case of spontaneous adaptation referred to in paragraph 3, at the outcome of the investigation the Directorate shall forward the documents to the Collective Body, making a proposal for the filing or adoption of the measures referred to in Article 41(7) of TUSMA.
5. If, in the course of the proceedings, the applicant refers to the judicial authority for the same situation, he shall promptly inform the Directorate thereof. In this case, the Director shall arrange for filing by administrative means.

Article 9
Final measures

1. The Collective Body shall terminate the proceedings if it considers that the conditions laid down in Article 2(2) are not fulfilled.
2. If the conditions set out in Article 2(2) are met, the Collective Body shall order the video-sharing platform provider to take all measures, including removal, which would prevent the Italian public from accessing content deemed to be against the purposes set out in Article 4.
3. The order referred to in paragraph 2 above shall contain clear information enabling the video-sharing platform provider to identify and locate the illegal content in question, such as one or more exact URLs and, if necessary, additional information, in line with the provisions of Article 9(2)(a)(iv) of the DSA and shall be transmitted in accordance with the indications referred to in Article 9(2)(c) of the DSA.
4. The order must be executed promptly and, in any case, within 3 days as of notification.
5. The measures referred to in paragraph 2 shall be communicated promptly and in any case no later than 3 days after notification to the European Commission and to the competent Administrative Authority in the Member State in which the supplier is established or is deemed to be established, together with the matters of urgency, as well as to all Digital Services Coordinators pursuant to Article 9(4) of the DSA.

CHAPTER III
The reporting procedure to the national competent authority

Article 10
Reporting to the national competent authority

1. The Collective Body, having examined the documents and assessed the report submitted pursuant to the second sentence of Article 7(4), unless it considers that the conditions for archiving are met or, in case of matters of urgency, for the initiation of the procedure pursuant to Article 8, shall order the immediate transmission of the documents to the national competent authority in the Member State in which the supplier is established or is deemed to be established, activating the relevant procedures of cooperation between Member States through the IMI system, also by using the relevant indications provided by the Memorandum of Understanding.
2. If no communication has been received from the national competent authority within 7 days of the transmission of the documents referred to in paragraph 1, or within the different time limit provided for in the relevant cooperation procedures, the Directorate shall inform the Collective Body and order the initiation of the procedure, in accordance with Article 8.
3. In the event that the national competent authority has forwarded the measure adopted within the time limit referred to in paragraph 2, the Directorate evaluates its appropriateness and draws up a specific report which it forwards to the Collective Body within seven days, which acknowledges or orders the initiation of the procedure, the final act of which, if it consists of an order within the meaning of Article 9(2), shall be communicated before adoption to the European Commission and the national competent authority through the IMI system.

PART II
Final provisions

Article 11
Deadlines

1. When calculating the deadlines referred to in this Regulation, only working days shall be taken into account.

2. Where it is necessary to request information, the time limits shall be suspended from the date of the outgoing protocol to that of the incoming protocol and in any case for a period not exceeding ten days.

Article 12
Referral rules

1. For what is not expressly provided for in these Regulations, the Sanction Regulation applies.
2. The power of the other Digital Services Coordinators to adopt orders pursuant to Article 9(4) of the DSA Regulation remains unaffected.

Article 13
Review clause

1. The Authority reserves the right to review this Regulation within two years of its entry into force in the light of the application experience.