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His Excellency
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Italy

Subject: Notification 2024/578/IT

Technical and procedural procedures for assessing the age of majority of users within the meaning of Article 13a of Decree-Law No 123 of 5 September 2023, converted, with amendments, into Law No 159 of 13 November 2023

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Excellency,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the Italian authorities notified to the Commission on 16 October 2024 the draft “*Technical and procedural procedures for assessing the age of majority of users within the meaning of Article 13a of Decree-Law No 123 of 5 September 2023, converted, with amendments, into Law No 159 of 13 November 2023*” (hereinafter referred to as “the notified draft”).

According to the notification message, the notified draft aims at establishing the technical and procedural arrangements that website operators and video-sharing platform providers who disseminate pornographic images and videos in Italy are required to adopt in order to ascertain the age of majority of users.

The notified draft intends to implement the provisions of the underlying Article 13a of Decree-Law No 123 of 5 September 2023 (the “Caivano Decree”), converted, with amendments, into Law No 159 of 13 November 2023, which mandates the Communications Regulatory Authority to establish the technical and procedural arrangements for age verification processes for website operators and video-sharing platform providers who disseminate pornographic images and videos. Article 13a, second paragraph, of Decree-Law No 123/2023 sets out that its provisions are without prejudice

¹() 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 rules on Information Society services, OJ L 241 dated 17.9.2015, p. 1.
European Commission, 1049 Brussels, BELGIUM

to Article 42 of Legislative Decree No. 208 of 8 November 2021, which transposes into national law Directive 2010/13/EU (Audiovisual Media Services Directive or “AVMSD”)(²), as amended by Directive (EU) 2018/1808. The Commission notes that the underlying Decree-Law No 123/2023 was not notified to the Commission under Directive (EU) 2015/1535; pursuant to that Directive the Commission has limited its assessment below to the draft notified in the present notification under reference 2024/578/IT. (³)

In relation to the notified draft, the Commission addressed to the Italian authorities a request for supplementary information on 28 October 2024 to obtain clarifications on the measures of the notified draft. The answers provided by the Italian authorities on 12 November 2024 are taken into account in the following assessment.

The examination of the relevant notified provisions led the Commission to issue the following detailed opinion.

1. Introduction

The Commission takes note of the notification message, according to which the notified draft pursues the objective of protecting minors by preventing access to pornographic content, as it undermines respect for their dignity and compromises their physical and mental well-being.

The Commission shares the objective of the notified provisions to protect minors online, in particular against pornographic content, that may be prejudicial to their health, physical, mental and moral development. Although such content may be legal in the Member States, minors should not have access to it when using online services. To ensure that minors can use online services safely, the providers of platforms that may be used by minors must play their part and assume their responsibilities.

The Commission also notes that the objectives of the notified provisions are clearly aligned with those of the European legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter “the DSA”) (⁴) and Directive 2000/31/EC (Directive on Electronic Commerce) (⁵).

Furthermore, it should be noted that, on 31 July 2024, the Commission launched a call for evidence with the aim to gather feedback for its upcoming guidelines on protection of minors online under the DSA. Once adopted, these guidelines will advise on how providers of online platforms are to implement high levels of privacy, safety and security for minors online, as required by the DSA. (⁶)

²) 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 provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

³)Judgment in Case C-443/98 Unilever EU:C:2000:496 paragraphs 49-52.

⁴) Regulation (EU) 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 (DSA), OJ L 277, 27.10.2022, p. 1-102.

⁵) 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 (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1-16.

⁶) [Commission launches call for evidence for guidelines on protection of minors online under the Digital Services Act | Shaping Europe’s digital future \(europa.eu\)](#).

The Commission would like to emphasize that, as a result, the DSA provides an effective Union-wide regulatory solution to some of the objectives pursued by the notified draft. The DSA provides for a common set of Union rules that impose a wide range of obligations on hosting service and online platforms providers to combat illegal and harmful content online, while strengthening the European single market. As a Union law Regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

2. Detailed opinion

2.1. Assessment in the light of the Directive on electronic commerce and the Audiovisual Media Services Directive

a) Applicability of the Directive on electronic commerce and the Audiovisual Media Services Directive

The notified draft falls within the scope of the Directive on electronic commerce.

Firstly, concerning the personal scope of application of the notified provisions, the notified draft applies to website operators and providers of video-sharing platforms, wherever established, that disseminate pornographic images, programmes and videos in Italy, who are to be considered subject to the age verification requirement.

As confirmed by the Italian authorities in their replies, the corresponding services fall under the definition of information society services ⁽⁷⁾ and therefore fall under the scope of the Directive on electronic commerce. In particular, as regards video-sharing platform providers, the notified draft makes reference to the definition included in the AVMSD. Recital 44 of Directive (EU) 2018/1808 amending the AVMSD further indicates that video-sharing platform providers covered by that Directive provide information society services within the meaning of the Directive on electronic Commerce.

Therefore, the providers subject to the notified draft are providers of information society services within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 and thus also within the meaning of Articles 1 and 2 of the Directive on electronic commerce, insofar as they fulfil the conditions set out therein.

Secondly, concerning the material scope of the notified provisions: the rules set out in the notified draft concern in particular the requirements on providers of information society services to take certain measures aimed at preventing access from minors to content harmful to them.

In particular, under the notified draft, providers of information society services would be required to:

- put in place and operate age assurance systems of users in order to avoid access to pornographic content by children under the age of 18 (Article 2),
- comply with the technical requirements and standards mandated by the notified draft for those age assurance systems, such as, among others, proportionality, protection of personal data, confidentiality, security, accuracy and effectiveness (Article 2);

⁷⁾ In particular, “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

- communicate to the competent national authority the list of the third parties entrusted with the age verification operation (the independent third party) (Article 2),
- report to the competent national authority any useful information on their entity, on their method of age verification and on the reasons for their choice, for the purposes of the supervisory activity under their responsibility (Article 2);
- abide by the mandated transparency requirements towards users:
 - o inform users about the systems and data processed and the purposes, through simple, clear and complete explanations for adults and minors (Article 2, point viii, paragraph 1);
 - o make available on their website data on the accuracy and effectiveness of the age assurance systems used, reporting the metrics and parameters employed in the evaluation as well as the results obtained (Article 2, point viii, paragraph 2).

The notified draft also empowers the competent national authority to supervise and enforce its rules against service providers under its scope (Article 3).

These obligations that concern the pursuit of the activity of an information society service therefore fall within the coordinated field of Directive 2000/31/EC, as set out in Article 2(h) and (i) thereof. The above obligations also fall within the coordinated fields of Directive 2010/13/EU (the AVMSD) for video-sharing platform providers, especially under Article 28b(3)(f). Therefore those obligations have been analysed in the light of these Directives.

b) Article 3(1), (2) and (4) of Directive 2000/31/EC

The Commission notes that the provisions of the notified draft apply to information society services providers offering their services on Italian territory and irrespective of their Member State of establishment. This aspect has been confirmed by the Italian authorities in their reply to the request for further information.

In this regard, the Commission recalls that Article 3(1) and (2) of Directive 2000/31/EC establishes the “home State control principle” according to which information society services may only be regulated at the source of their activity. Providers of such services are therefore, as a general rule, subject to the law of the Member State in which they are established.

Article 3(4) of Directive 2000/31/EC lays down the circumstances and procedures under which a Member State of destination, i.e. the Member State in which information society services are provided by a provider established in another Member State, may derogate from the home State control principle, where necessary, for the reasons exhaustively listed in Article 3(4)(a) of the Directive and in compliance with the substantive and procedural requirements set out in its Article 3(4)(a) and (b).. The Commission draws the attention of the Italian authorities to the recent case law of the Court of Justice in this respect, which recalls the limits of relying on Article 3(4) of Directive 2000/31/EC for this purpose. According to that case law, measures of general and abstract application, that are not limited to a given information society service, such as those imposed by the notified draft cannot benefit from the exemption provided by Article 3(4) of Directive 2000/31/EC . ⁽⁸⁾

⁸⁾ Judgment of 9 November 2023 in Case C-376/22, ECLI:EU:C:2023:835, paragraphs 59 and 60:

In their replies to the request for further information addressed by the Commission, the Italian authorities state that the provisions of the notified draft would apply to specific categories of providers of information society services, namely website operators and video-sharing platform providers disseminating pornographic images and videos in Italy. The notified draft would apply in Italy indistinctively to national and foreign providers, including established in other Member States, of broad and undefined categories of information society services. As regards the website operators, the Italian authorities have not been able to provide an identification or estimate of the service providers established in Member States other than Italy that would be captured by the measure. As concerns the second category, the Commission takes note of the Italian clarifications according to which the video-sharing platform providers subject to the provisions of the notified draft will be those included in the European Audiovisual Observatory MAVISE database⁹). Nevertheless, the Commission notes that the said database contains all service providers qualifying, according to the Member State of establishment, as a video-sharing platform service under the AVMSD. As a result, the Commission is of the view that the notified draft sets out general and abstract obligations imposed on broad and undefined categories of service providers, irrespective of their place of establishment, rather than targeted measures against a given service provider following the procedures mandated by Directive 2000/31/EC. Therefore, in the form notified to the Commission, the notified draft constitutes such a set of measures of general and abstract application that would apply indistinctively to domestic and foreign providers of information society services. In any event, based on the information available to it at this stage, the Commission is not in a position to verify whether and how the Italian authorities intend to ensure that both the substantive and procedural requirements set out in Article 3(4) of Directive 2000/31/EC are or could be fulfilled. In this regard, the Commission recalls that that provision not only requires a restrictive measure to be limited to a given information society service, pursue one of the objectives laid down in that provision and do so in a proportionate manner (the substantive requirements), but that it also requires the Member State of destination to request the Member State of establishment of the provider in relation to whom the measure will be adopted to take the necessary measures and, where that Member State does not take any measure or the measure it takes is inadequate, inform that Member State, as well as the Commission, of the measure it intends to adopt (the procedural requirements).

In addition, the Commission would like to point out that the territorial scope of the notified draft, as far as it applies to video-sharing platform providers, is equally problematic with regard to the AVMSD. Being a sub-category of information society services, and as established in Article 28a AVMSD, video-sharing platforms are subject to the application of the home State control principle set out in Article 3 of Directive 2000/31/EC. The Commission reminds that the procedure to derogate from that principle for video-sharing platforms, as confirmed by Article 28a (5) AVMSD, is established in

“59. On the contrary, the consequence of such an interpretation is that Member States are not, as a matter of principle, authorised to adopt such measures, so that verification that those measures are necessary to satisfy overriding reasons in the general interest is not even required.

60. Having regard to all the foregoing considerations, the answer to the first question must be that Article 3(4) of Directive 2000/31 must be interpreted as meaning that general and abstract measures aimed at a given category of information society services described in general terms and applying indiscriminately to any provider of that category of services do not fall within the concept of ‘measures taken against a given information society service’ within the meaning of that provision.”

See also Judgment of 30 May 2024 in joint cases *Airbnb Ireland UC and Amazon Services Europe Sàrl v Autorità per le Garanzie nelle Comunicazioni*, C-662/22 and C-667/22, EU:C:2024:432, paragraph 70.

⁹ () https://mavise.obs.coe.int/advanced-search?service_type=4&genre=1.

Article 3 of Directive 2000/31/EC and must comply with the procedural and material criteria envisaged in that Article.

Therefore, in the Commission's view, as it stands, the notified draft constitutes an unjustified restriction to the freedom to provide information society services from another Member State contrary to Article 3 of Directive 2000/31/EC and the recent case law of the CJEU.

2.2. Assessment in light of Regulation (EU) 2022/2065 (the Digital Services Act)

a) Applicability of the Digital Services Act ('DSA')

The notified draft falls within the scope of the DSA, for the reasons stated below.

Firstly, as regards the personal scope of the notified draft, the latter imposes obligations on website operators and video-sharing platform providers which, as confirmed by the Italian authorities in their reply to the request for supplementary information, qualify as a subcategory of providers of online intermediary services pursuant to Article 3 of the DSA, in particular as hosting and online platform services.

In addition, as already noted in the previous section, in their replies to the request for supplementary information sent by the Commission, the Italian authorities explain that the providers of video-sharing platforms covered by the notified draft will be those listed in the European Audiovisual Observatory MAVISE database. It should be noted that that list comprises platforms that have been designated by the Commission as very large online platforms (VLOPs) ⁽¹⁰⁾.

Secondly, as regards the material scope of the notified provisions, in the notification message and in their replies, the Italian authorities confirm that the rationale of the notified draft is to protect minors, which would be in line with the DSA and, in particular, its Article 28, applicable to all providers of online platforms, which requires them to put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors on their service, as well as its Articles 34 and 35, which contain significant additional obligations applicable specifically to providers of VLOPs with regard to the protection of minors. Such providers must (i) identify, analyse and assess and (ii) mitigate any systemic risk to the protection of minors and the rights of children. In particular, the DSA refers to age verification systems as an example of an effective and targeted enforcement measure to protect children's rights (Article 35(1)(j)). Article 14 DSA also imposes requirements on all providers of intermediary services concerning the application of their terms of service, which need to be carried out with due regard to the fundamental rights of the recipients of the service (hence including the rights of the child as enshrined in Article 24 of the EU Charter of Fundamental Rights). The protection of minors is one of the main policy objectives pursued by the DSA, as explained in recitals 40, 71 and 81 of that Regulation. The notified draft therefore aims to achieve the same objectives as those pursued by the DSA, which includes the protection of minors against harmful content, including pornographic content, throughout the Union.

b) Full harmonisation effect of the DSA

¹⁰ () The following VLOPs are listed on the MAVISE database to this date: Pornhub, Stripchat, XVideos and XNXX.

The Commission would like to stress that the DSA is a horizontal legislative instrument that fully harmonises the rules for the provision of intermediary services in the Union ⁽¹¹⁾ Being a regulation, the DSA does not allow for national implementing measures. ⁽¹²⁾ This is because, pursuant to Article 288 TFEU, regulations are directly applicable throughout the Union and thus in all Member States. Unlike in the case of directives, national implementing measures are not permitted in relation to regulations, unless the regulation itself leaves it to the Member States to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation ⁽¹³⁾.

It is thus essential for the Member States to avoid enacting national legislation that may potentially overlap with the provisions of the DSA. Any such overlap would lead to fragmentation of the internal market, which is precisely what the harmonised rules of the DSA are meant to avoid, and lead to substantial legal uncertainty for both providers of intermediary services and the recipients of such services.

In this regard, in their reply to the request for supplementary information, the Italian authorities confirm that the rationale of the notified draft is to protect minors, in line with the DSA, in particular its Article 28 on the protection of minors.

In addition, Articles 15, 24 and 43 of the DSA set specific transparency reporting obligations on providers of intermediary services and of online platforms, including enhanced obligations for VLOPs providers. In this context, the obligations included in Article 2 of the notified draft, (i) to report to the Communications Authority as well as (ii) to increase transparency towards users, regarding information related to the moderation of online content through the age assurance mechanism, are deemed to fall in fields already fully harmonised by the DSA.

The DSA neither requires nor permits the Member States to adopt additional national requirements, unless otherwise expressly provided, in relation to the subject matter covered by it. ⁽¹⁴⁾

The Commission also notes that, as a result of the full harmonisation effect of the DSA, concerning the due diligence obligations imposed on providers of online platforms in particular aimed at protecting minors from illegal and harmful content, and in order to preserve the integrity of the Single Market for digital services, Member States are prevented from adopting national measures within the scope of Article 28b(6) of the AVMSD that would overlap with the DSA or contradict the fully harmonising effect thereof.

It should further be noted that the Commission services have started a cooperative exercise with Member States and their Digital Services Coordinators in the concrete area of age assurance systems for the implementation of the rules contained in the DSA. This

¹¹ () DSA, recital 9.

¹² () Case 40/69, *Bollmann*, EU:C:1970:12, para 4; Case 74/69, *Krohn*, EU:C:1970:58, paras 4 and 6; and joined Cases C-539/10 P & C-550/10 P, *Stichting Al-Aqsa*, EU:C:2012:711, para 87 (on the risk of divergent definitions under EU and national law).

¹³() Case C-606/10, *ANAFE*, EU:C:2012:348, para 72.

¹⁴() The Commission draws the attention of the Italian authorities, for example, to Section 21 of the notified draft which overlaps with Articles 11 and 13 of the DSA.

network gathers national authorities with expertise in the matter to identify best practices and standards in the field of age assurance.

The work of this task force is building on the existing measures at national level and ongoing initiatives, such as the EU Digital Identity Wallet included in the recently adopted Regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity ⁽¹⁵⁾, as also taking into account the state of the art and the current market practices. The resulting best practices and standards should be part of an EU-wide solution that can be transmitted to the providers of online platforms for the application of their obligations under the DSA.

This dedicated task force is working intensively towards this EU-wide solution, and its work is progressing quickly. In the absence of an EU-wide solution to verify the age of users, any national transitional solution should remain compliant with Union law, including Article 3 of Directive 2000/31/EC, and also envisage a mechanism to withdraw or repeal any national measures that become redundant once the European technical solution is implemented. The draft notified to the Commission does not reflect such mechanism.

For the reasons set out above, in as much as the provisions set out in the notified draft pursue the same objectives as the DSA, the Commission is of the view that such provisions are incompatible with the maximum harmonisation effect of the DSA.

c) Monitoring and enforcement system

To ensure that the DSA is fully effective in the pursuit of our shared objectives, in particular the protection of minors, it is essential to preserve the harmonising effect of that Regulation and also its supervision and enforcement system.

In accordance with Chapter IV of the DSA, the supervision and enforcement of that Regulation are based on close cooperation, on the one hand, between the appointed national digital services coordinators (and other competent authorities) under the country-of-origin principle and, on the other hand, between these national authorities and the Commission (Articles 55 and 56 of the DSA).

In this respect, the Commission notes that the notified draft entrusts the supervision and enforcement of its provisions, including those falling within the fully harmonised field of the DSA, to the Italian Communications Authority. This supervision and enforcement system under the notified draft would also apply with regard to service providers outside the jurisdiction of Italy and to VLOPs in as much as they are covered by the scope of the notified draft. The Commission calls on the Italian authorities to ensure that the final law is aligned with the supervision and enforcement architecture of the DSA.

For the reasons set out above, the Commission hereby issues a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535.

The Commission reminds the Italian authorities that, in accordance with this Article, the issuing of a detailed opinion entails that the Member State which is the author of the draft technical regulation concerned is required to postpone its adoption for 4 months from the date of its notification. This deadline therefore ends on 17 February 2025.

¹⁵() Commission proposal adopted by the European Parliament on 29 February 2024 and by the Council on 26 March 2024.

Furthermore, the Commission draws the attention of the Italian authorities to the fact that, under this provision, the Member State to which a detailed opinion is addressed is required to inform the Commission of the action it intends to take on such an opinion.

If the Italian authorities fail to comply with the obligations laid down in Directive (EU) 2015/1535 or if the text of the draft technical regulation under consideration is adopted without taking account of the objections raised or is otherwise contrary to Union law, the Commission is ready to initiate proceedings against Italy in accordance with Article 258 of the TFEU.

I remain, your Excellency, yours faithfully,

For the Commission,

Henna Virkkunen
Executive Vice-President of the
Commission