Message 201

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Forwarding of the response of the Member State notifying a draft (Romania) to of European Commission.

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5.

6. I. Regarding the considerations in the detailed opinion to the effect that the notified draft is incompatible with the Directive on electronic commerce (Directive 2000/31/EC) and in particular Article 4(1) thereof, which states that 'the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect', we submit the following:
The notification regarding the provision of video-sharing platform services falling under Romanian jurisdiction is a declaratory administrative act, issued for the purpose of officially recording the providers of such services, in accordance with the obligation laid down by Directive 2010/13/EU, as amended by Directive (EU) 2018/1808 (the Audiovisual Media Services Directive), under which Member States are required to draw up and maintain an up-to-date list of providers of video-sharing platforms established or deemed to be established on their territory.
According to Article 741(1) of Audiovisual Law No 504/2002, as subsequently amended and supplemented, the sole purpose of the notification requirement is to identify and maintain an official register of providers of video-sharing platforms under Romanian jurisdiction.
The notification procedure does not bestow the National Audiovisual Council (Consiliul Național al Audiovizualului – CNA) with the power to assess the appropriateness of market access, nor does it involve the exercise of any discretionary power regarding the commencement of operations. This is an administrative formality whereby the authority determines whether the provider is under Romanian jurisdiction and can impose the obligations laid down in the audiovisual legislation.
Consequently, the service provision authorisation referred to in Article 5 of the draft does not constitute the legal act granting the right to provide the service but merely confirms fulfilment of the notification obligation and registration of the provider in the official records of the authority.

Although Article 5(1) of the draft uses the wording that the provision of the service can only start after obtaining the authorisation, systematic interpretation of the text, read in conjunction with
(2) emphasises that the sole purpose of the authorisation is to certify that the notification procedure has been completed. Furthermore, the phrase ‘is entitled to’ is used to inform the service provider, or draw their attention to the fact, that they may not commence operations before the deadline set out in Audiovisual Law No 504/2002, as subsequently amended and supplemented.
In this context, failure to notify does not have the effect of prohibiting or blocking the provision of the information society service; rather, it constitutes solely the failure to fulfil an administrative obligation, liable to incur administrative penalties under the law. The procedure therefore does not establish a prior authorisation mechanism, nor does it create any restriction on the free provision of information society services within the meaning of Article 4(1) of Directive 2000/31/EC.
At the same time, the procedural framework established under Article 10 of the draft confirms the exclusively administrative and declaratory nature of the notification. Issuance of the authorisation is not conditional upon the adoption of a decision by the National Audiovisual Council, nor upon the exercise of any discretion as to the appropriateness of carrying out the activity. It is the responsibility of the Licensing and Authorisation Service to check compliance with the legal requirements; if it finds that the conditions laid down by law have been met, it issues the service provision authorisation. According to (3) of the cited article, the Council is informed periodically or whenever necessary of the authorisations issued, without intervening in the procedure for issuing them and without adopting an individual approval decision. It follows, therefore, that the authorisation constitutes solely an administrative act of reporting and record-keeping, issued on the basis of a check of compliance with objective conditions laid down in law, and not an authorisation granted following a discretionary decision by the regulatory authority.
Articles 1 to 4 of the draft, read in conjunction with the provisions of Article 425 of Audiovisual Law No 504/2002, as subsequently amended and supplemented, lay down objective criteria for determining Romania’s jurisdiction over providers of video-sharing platforms, namely their principal place of business and the existence of a parent company, subsidiaries or other elements provided for by law.
These criteria are not conditions for market access, but legal instruments that are indispensable for identification of the competent authority and fulfilment of the legal obligation of the National Audiovisual Council to draw up and transmit to the European Commission the list of providers under Romanian jurisdiction, in accordance with the Audiovisual Media Services Directive.
The provisions of Article 7 of the draft exclusively regulate the content of the notification and the documents required to identify the provider and establish jurisdiction in Romania, in accordance with the Audiovisual Media Services Directive. The documentation requested is of a strictly administrative nature and does not impose any substantive conditions on market access; it does not involve any assessment of the appropriateness, economic or technical capacity, or content, of the service. Consequently, the notification represents a proportionate and necessary administrative formality to fulfil the legal obligation of the CNA to keep records of providers under Romanian jurisdiction.
With regard to Article 19 of the draft, the text will be revised to reflect the fact that the withdrawal of a document issued by the CNA has effects solely on the administrative records. Withdrawal of the notification confirmation results in the provider being removed from the official CNA records and the list of providers under Romanian jurisdiction being updated; it does not constitute a measure prohibiting or suspending the provider’s activities. The rewording of the terminology thus removes any possible interpretation that the procedure might be establishing a prior authorisation system or that withdrawing the document might have the same effect as withdrawing an authorisation.
The draft Decision constitutes a sectoral regulation in the field of audiovisual media services, adopted pursuant to the Audiovisual Media Services Directive and Audiovisual Law No 504/2002, as amended, without prejudice to the general regime established under Law No 365/2002 on electronic commerce, republished, as amended.
The regulation applies exclusively to suppliers under Romanian jurisdiction, in accordance with the criteria laid down by European Union law, and does not establish any authorisation or additional control mechanisms in respect of suppliers established in other Member States.
In conclusion, in order to eliminate any possible interpretation of the notification procedure as being analogous to a prior authorisation, the National Audiovisual Council will adapt the terminology used in the draft decision so that it reflects the exclusively declaratory and administrative nature of the procedure. In this regard, phrases such as ‘obtaining the authorisation’, ‘is entitled to provide the video-sharing platform services specified in the authorisation’ or ‘termination of the right to provide the services’ may be replaced with wording such as ‘confirmation of the notification’, ‘issuance of the registration confirmation’ or ‘removal from the register of providers under Romanian jurisdiction’, thereby clearly

expressing that the authorisation does not confer the right to provide the service but merely certifies compliance with the legal obligation to notify.
The National Audiovisual Council takes note of the observations made by the European Commission in its detailed opinion and, insofar as the new arguments put forward in the statement of views do not alter the observations set out in the opinion, the authority will revise the draft decision with a view to removing any provisions or wording that might be interpreted as establishing a prior authorisation regime within the meaning of Article 4(1) of Directive 2000/31/EC.
To this end, the draft will be amended to expressly reflect the declaratory nature of the notification, the role of the authorisation as mere confirmation of compliance with the legal obligation to notify and register with the National Audiovisual Council and the fact that it neither confers the right to provide the service nor is it a condition determining access to the market.
At the same time, the provisions relating to the effects of issuing and withdrawing the authorisation, as well as the terminology used, will be reviewed with a view to removing any interpretation of the authorisation as an administrative authorisation or as having restrictive effects on the provision of information society services.
Through these adjustments, the National Audiovisual Council ensures that the administrative act issued following the notification retains its purely declaratory nature, serving only as proof of compliance with the obligation to provide information and facilitating performance of the supervisory and control duties established under Audiovisual Law No 504/2004, as subsequently amended and supplemented.
In this way, the response is not limited to a change in terminology, but demonstrates that the entire procedure has been designed as a mechanism for identifying and establishing jurisdiction, in fulfilment of the obligations imposed by the Audiovisual Media Services Directive, without establishing a prior authorisation regime prohibited by the E-Commerce Directive.
The National Audiovisual Council considers that, following these changes, the draft decision will clearly reflect the purpose of the notification procedure and will respond to the observations made by the European Commission in its detailed opinion.

II. Regarding Articles 20, 23 and 24 of the notified draft, which, according to the detailed opinion, impose obligations on providers of intermediary services and, more specifically, on video-sharing services and aim to achieve the same objectives as those pursued by the Digital Services Act (DSA), which includes the protection of minors against harmful and illegal content, the notified draft falls within the material scope of application of the DSA, we submit the following:
The draft decision must be interpreted as sector-specific legislation (lex specialis) relating to the audiovisual sector, intended to transpose the provisions of Directive (EU) 2018/1808. Although video-sharing platform services are ‘intermediary services’ within the meaning of Regulation (EU) 2022/2065 (the Digital Services Act – DSA), the proposed rules focus exclusively on the specific characteristics of audiovisual content, without extending the obligations generally to all digital service providers. The measures regarding the protection of minors and the general public from harmful or illegal content complement the horizontal framework established by the DSA, pursuing objectives of general interest recognised at Union level. The CNA is committed to ensuring that these rules are applied within the limits of, and in a manner complementary to, the DSA’s full harmonisation regime, while avoiding any conflicting overlaps.
In this regard, taking into account the rules of legislative drafting specific to the national legislative framework, in addition to stating in the preamble to the notified draft (legal grounds) that account has been taken of the provisions of Law No 50/2024 on establishing measures for the application of the 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, as well as measures for amending and supplementing Law No 365/2002 on electronic commerce, republished, as subsequently amended and supplemented, one solution would be to insert an article stipulating that this decision applies without prejudice to the due diligence obligations and liability regime established under the Digital Services Regulation.
The provisions of Article 20 of the draft will be revised to clarify that the obligations imposed on providers of video-sharing platforms are exclusively the sector-specific obligations set out in Article 28b of the Audiovisual Media Services Directive, as transposed by Audiovisual Law No 504/2002, as subsequently amended and supplemented, and do not impose any additional due diligence obligations beyond those harmonised under Regulation (EU) 2022/2065. In this regard, the CNA’s powers will relate exclusively to monitoring compliance with the specific rules governing the audiovisual sector, without affecting the enforcement mechanisms and powers of the authorities designated under the DSA with regard to the general obligations of intermediary service providers.

In relation to the legal framework of Regulation (EU) 2022/2065, this national mechanism established in Article 21 of the draft falls within the concept of an 'order to take action against illegal content', in the sense that the competent authorities may, subject to the principles of legality, proportionality and adequate justification, order the removal of or restriction of access to content deemed to be illegal.
The scope of Article 21 of the draft is determined by the types of content referred to in Article 20 (protection of minors, incitement to violence or hatred, incitement to crime, infringements concerning audiovisual commercial communications, etc.). Article 21 of the draft thus functions as an administrative intervention and enforcement rule to ensure compliance with these specific obligations.
Application of the DSA serves as a framework limiting and determining the manner in which Article 21 of the draft may be implemented. While Article 21 permits the Council to order the removal or restriction of content in breach of Article 20, any such measure must comply with the requirements of the DSA concerning orders to act against illegal content, in particular the requirements of clarity, reason and proportionality.
The key difference is that Article 21 of the draft establishes a broader substantive framework of specific measures applicable to platforms and users while the DSA primarily regulates the type of legal instrument (the order) and the conditions under which it may be issued and enforced.
More specifically, on the basis of Article 429(1) of Audiovisual Law No 504/2002, as subsequently amended and supplemented, Article 21 of the draft explicitly lists a variety of possible measures: removal of content, restriction of access, display of a warning to users or even deactivation of the account for a period of up to 12 months. These are substantive measures, i.e. technical and punitive solutions that are directly applicable to the content or the user.
In contrast, the DSA does not go into such detail regarding the types of penalties at national level, instead regulating 'orders to take action against illegal content' as a procedural legal instrument, stipulating that the authorities may request that content be removed or blocked, but only in compliance with strict conditions of legality, necessity, proportionality and justification.
Thus, Article 21 of the draft acts as a national implementing provision, but its application is conditional upon direct compliance with the standards laid down by the DSA.
Consequently, the minimum compulsory conditions set out in Article 9(2) of the DSA will be incorporated into the text of the draft for any order to take action against illegal content. This means that any decision issued by the CNA must include: detailed reasoning, a reference to the exact legal basis and precise identification of the content (specific URLs).
Regarding the provisions of Article 23 of the draft, they shall be reviewed to ensure compatibility with the harmonised 'notification and action' mechanism provided for in Article 16 of Regulation (EU) 2022/2065. To this end, those provisions imposing procedural obligations additional to those laid down in the Regulation – such as the compulsory 48-hour deadline for removing content or the obligation to retain removed content for a specified period – will be deleted or reworded. The referral resolution procedure will be configured in accordance with the standards and safeguards laid down by the DSA, avoiding the establishment of national rules that might affect uniform application of the Regulation and lead to fragmentation of the legal framework applicable to platform providers.
At the same time, the role of the CNA as the competent authority for video-sharing platform providers under Romanian jurisdiction shall be exercised in coordination with the Digital Services Coordinator, in compliance with the administrative cooperation, information exchange and mutual assistance mechanisms provided for by the DSA. This approach excludes the existence of parallel supervisory regimes.
The CNA's jurisdiction over video-sharing platform providers is set out in the provisions of Audiovisual Law No 504/2002, as subsequently amended and supplemented, which sets out the criteria for determining the jurisdiction of such providers, based on certain elements or characteristics of the providers in question, as well as a series of obligations and measures relating to the organisation of the content broadcast, so as to ensure compliance with the applicable legal provisions. However, these powers are exercised within the limits of, and in accordance with, the European framework established by the DSA, so that the national legislation operates in a manner that is complementary to, rather than parallel with or in contradiction to, the regime laid down by European Union law.
Concerning the provisions of Article 24 of the draft, they will be revised in order to delimit the specific obligations imposed under the Audiovisual Media Services Directive from the general obligations concerning the terms and conditions of services already regulated under Article 14 of Regulation (EU) 2022/2065. In this regard, the draft will be limited to the requirements relating to the protection of minors, audiovisual commercial communications and the other sector-specific obligations laid down in Audiovisual Law No 504/2002, as subsequently amended and supplemented, without imposing any additional requirements regarding mechanisms for reporting or complaint or dispute resolution;

aspects that are comprehensively harmonised by the DSA. This distinction ensures compliance with the principle of full harmonisation, avoids any overlap in the obligations applicable to providers of intermediary services and guarantees consistency between sector-specific audiovisual regulation and the general framework established under Regulation (EU) 2022/2065.

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