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Italy

Subject: Notification 2023/208/I

Launch of the public consultation on the draft regulation implementing Article 41(9) of Legislative Decree No 208 of 8 November 2021 on programs, 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 referred to in resolution No 76/23/CONS of 16 March 2023

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535¹, the Italian authorities notified to the Commission on 21 April 2023 a draft entitled "*Launch of the public consultation on the draft regulation implementing Article 41(9) of Legislative Decree No 208 of 8 November 2021 on programs, 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 referred to in resolution No 76/23/CONS of 16 March 2023*" (hereinafter, "*the notified draft*").

In the notification message, the Italian authorities explain that the notified draft aims at ensuring the application of the provisions of Article 41(7) of the TUSMA (the Act on

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 of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

audiovisual media services, transposing Directive (EU) 2018/1808², hereafter the “AVMSD”) which states that the freedom to provide programs, user-generated videos and audiovisual commercial communications, conveyed by a platform whose video-sharing provider is established in another Member State and addressed to the Italian public, may be limited 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.

More specifically, the notified draft empowers the Italian competent authority to issue orders to limit the provision of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose provider is established in another Member State for the following purposes: a) protection of minors from content that may harm their physical, mental or moral development; b) countering incitement to racial, sexual, religious or ethnic hatred and the violation of human dignity; c) consumer protection, including investors.

The notification message states that the notified draft is in line with the provisions of Article 5(2), (3) and (4) of Legislative Decree No 70 of 2003 (which transposes Directive 2000/31/EC³, hereinafter, the “e-Commerce Directive”), and without prejudice to its Articles 14 to 17.

The Commission services addressed to the Italian authorities a request for supplementary information on 12 May 2023. The answers provided by the Italian authorities on 31 May 2023 are taken into account in the following assessment.

In their replies, the Italian authorities clarify that the notified draft intends to transpose and specify the national procedure in application of Article 3(4) and (5) of the e-Commerce Directive for video-sharing platform services.

An examination of the notified draft has prompted the Commission to issue the following comments.

Regulation (EU) 2022/2065⁴ (hereinafter, the “Digital Services Act” or “DSA”) sets out a harmonised regulatory framework for providers of online intermediary services regarding their obligations to address illegal and harmful content on their services. While some provisions of the DSA have already entered into force, that Regulation will become fully applicable by 17 February 2024.

The DSA applies to all providers of online intermediary services, which include online platforms as defined in Article 3(i) thereof. In as much as online platforms would fulfil the criteria of Article 1(1), aa, of the AVMSD, read in combination with the Commission Guidelines of July 2020⁵, these would also qualify as video-sharing platform services

²² 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, OJ L 303, 28.11.2018, p. 69–92

³ 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, OJ L 178, 17.7.2000, p.1.

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 (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102.

⁵ Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive 2020/C 223/02.

under the AVMSD. Therefore, in such a situation, both the AVMSD and the DSA would apply.

According to the notification message and the replies submitted by the Italian authorities, the procedure set out in the notified draft would apply to providers of video-sharing platform services as defined in Article 1 of Annex A, which coincides with the definition of the AVMSD. More concretely, the notified draft details the procedure applicable for restricting the availability of content stored by those video-sharing platform services stemming from providers established in other Member States than Italy and offering their cross-border services in the Italian territory. As the service in question is also an online platform within the meaning of the DSA, it is appropriate to assess the notified draft in view of the provisions of the DSA.

The Commission takes note of the information provided by the Italian authorities in their replies to the request for supplementary information and in particular, the non-mandatory nature of the appointment of a point of contact under Article 8(1) of the notified draft, which remains voluntary for the service provider and may coincide with the point of contact identified in Article 12 of the DSA. The Commission also acknowledges the additional explanations regarding the effects of the eventual orders set out in the notified draft which would be limited to the recipients of the services in the Italian territory. The Commission also welcomes the clarification that the notified draft does not prevent orders being sent to the other Digital Services Coordinators within the meaning of Article 9 (4) of the DSA.

Articles 9 and 10 of the DSA harmonise certain specific minimum conditions that administrative or judicial orders originating from a Member State should fulfil in order to give rise to the obligation of providers of intermediary services to inform the relevant authorities about the effect given to those orders. Among those conditions, the DSA requires that orders: (i) include clear information enabling the provider of intermediary services to identify and locate the illegal content concerned, such as one or more exact URL and, where necessary, additional information (Article 9(2), letter a, indent iv); and (ii) is transmitted in one of the languages declared by the service provider pursuant to Article 11(3) 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 authority issuing the order provided that it is accompanied by a suitable translation (Article 9(2), letter c, and Article 10(2), letter c).

According to the information provided by the Italian authorities in their reply, in the light of recent national case-law, the Italian authorities did not consider it appropriate to mandate the inclusion of the exact URL in the administrative orders set out in the notified draft. However, the Italian authorities also point out that this is without prejudice to including the URL where available and to future amendments of the notified draft to this effect in order to make it easier to identify the relevant content.

On this point, the Commission notes that the orders sent to providers of video-sharing platforms pursuant to the notified draft need to abide by the conditions set out in Article 9, including providing clear information to enable the identification of the content concerned, to trigger the obligation for the service providers to provide feedback and the related consequences set out in the DSA. The Commission services remain available to support the Italian authorities in clarifying this point of the notified draft.

In their replies to the request of supplementary information sent by the Commission services, the Italian authorities state that the orders pursuant to the notified draft will be

sent only in Italian, as it is the current practice in other areas. The Commission would like to bring to the attention of the Italian authorities that Articles 9 and 10 of the DSA harmonise certain conditions of the orders, to be complied with when the order is transmitted to the provider, in order to trigger the obligation by providers of intermediary services to inform the relevant authorities about the effects given to such orders.

The Commission also notes, as confirmed by the Italian authorities in their reply, that the procedure laid down in the draft measure is meant to implement the procedural steps laid down in Article 3(4) and (5) of the e-Commerce Directive, including notifications to the country of origin of the service provider and the Commission. In this regard, the Commission stresses that the pilot project launched by the Commission on the basis of Article 29 of Regulation 1024/2012⁶ (the “IMI Regulation”), the Internal Market Information System (“IMI”) is currently being used for notifications under Article 3 of the e-Commerce Directive. According to Recital 38 of the DSA, orders issued in accordance with the conditions laid down in Articles 9 and 10 of the DSA may be considered, in principle, not to restrict the providers’ freedom to provide services. For orders which do not fulfil those conditions, for the issuance of any measure against a given cross-border provider which falls under the scope of Article 3 of the e-Commerce Directive, the Commission invites, where necessary, to make reference to the use of such a system.

The Commission would thus like to remind the Italian authorities of the need to ensure that their national legislation is consistent with the DSA and, where appropriate, with the e-Commerce Directive, including the implementation system provided for in the context of IMI. The Commission services are open to engage with the Italian authorities to support them as may be needed.

The Commission invites the Italian authorities to take into account the abovementioned comments.

The Commission furthermore reminds the Italian authorities that once the definitive text has been adopted, they are required to communicate it to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535.

Yours faithfully,

For the Commission

Thierry Breton
Member of the Commission

⁶ 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’), OJ L 316, 14.11.2012, p. 1–11.