



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Message 201

Communication from the Commission - TRIS/(2024) 3025

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Notification: 2024/0578/IT

Forwarding of the response of the Member State notifying a draft (Italy) to request for supplementary information (INFOSUP) of European Commission.

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2. Italy

3A. MINISTERO DELLE IMPRESE E DEL MADE IN ITALY

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4. 2024/0578/IT - SERV60 - Internet services

5.

6. With reference to the Commission's request for additional information concerning notification 2024/0578/IT on 'Technical and procedural arrangements for ascertaining the age of majority of users pursuant to Article 13a of Decree-Law No 123 of 5 September 2023, converted with amendments into Law No 159 of 13 November 2023', the Communications Regulatory Authority provides the below information following the order set out in the request itself:

1. The Italian authorities are kindly invited to clarify whether the provisions in the notified draft are intended to apply to providers of information society services as per the meaning of Directive 2000/31/EC. In the affirmative, the Commission services would like to receive further information on:

(a) whether the notified draft would apply to providers of information society services established in the territory of Member States other than Italy;

(b) what obligations would apply to those service providers arising from the notified draft;

(c) whether the Italian authorities have identified such providers or what the basis for identifying them would be;

(d) how the Italian authorities intend to comply with the requirements of Article 3(4) of Directive 2000/31/EC, also referred to in Article 28a(1) and (5) of Directive 2010/13/EU (as amended by Directive (EU) 2018/1808); in particular in view of the CJEU judgement in case C-376/22.

As a preliminary point, it should be noted that the notified draft regulation implements the provisions of a primary law and, in particular, of Article 13a ('Provision for ascertaining the age of majority for access to pornographic sites') of Decree-Law No 123 of 15 September 2023 on 'Urgent measures to combat youth hardship, educational poverty and child crime, as well as to promote child safety in the digital environment', converted, with amendments, into Law No 159 of 13 November 2023 (the so-called 'Caivano Decree').

More specifically, paragraph 1 of the aforementioned Article 13a introduced a ban on minors accessing content of pornographic nature, as such content undermines respect for their dignity, compromising their physical and mental well-being, and thus constituting a public health problem.



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The following paragraph 2 concerns the scope of the subject matter of that provision insofar as it provides that website operators and providers of video-sharing platforms, which disseminate pornographic images and videos in Italy, are required to verify the age of majority of users, in order to prevent access to pornographic content by minors under the age of eighteen.

The following paragraph 3 assigns AGCOM the task of establishing, after consulting the Data Protection Commissioner, the technical and procedural methods that website operators and providers of video-sharing platforms are required to adopt to ascertain the age of majority of users, ensuring a level of security appropriate to the risk and the compliance with the minimisation of personal data collected for the purpose.

Paragraph 4 of Article 13a then provides that website operators and providers of video-sharing platforms must, within six months of the date of publication of the AGCOM measure, put in place effective age verification systems that comply with the requirements laid down in that provision.

Finally, paragraph 5 assigns AGCOM the task of overseeing the correct application of all parts of Article 13a, providing, in the event of non-compliance, the possibility of challenging, including ex officio, website operators and providers of video-sharing platforms for any infringement detected, warning them to comply within 20 days. In the event of non-compliance with the warning, AGCOM shall take all appropriate measures to block the site or platform until the website operators and the providers of video-sharing platforms restore conditions of service provision that comply with the contents of the warning given.

In this regard, it should be noted that the Undersigned, being an independent administrative authority, does not have legislative powers, but rather secondary regulation powers. Therefore, the Regulation in question implements a legislative provision of primary law (pursuant to Article 13a of the Caivano Decree).

Furthermore, the Undersigned considers it useful to note that the measure notified is entirely similar to the one notified by France on the same subject of age verification <https://technical-regulation-information-system.ec.europa.eu/en/notification/24221>, which aims to protect minors specifically with regard to sites with pornographic content and which in recent days was implemented by the French regulator ARCOM.

That said, it is considered necessary to note that the notified measure consists of the identification of an effective, suitable, and functional system of general requirements and performance indicators, which the obligated entities, under the Law, have to take into account when implementing a system for ascertaining age. In particular, it should be noted at the outset that the Authority intends to adopt a technologically neutral approach, which grants the identified entities a reasonable level of freedom for assessment and choice, while laying the principles and requirements that must be met by the systems put in place.

Furthermore, as can be read in the body of the notified text, the Authority intended to extend the same procedures on a voluntary basis, also by other entities than those directly regulated and with reference to other types of content, in addition to that of pornographic nature, which could in any case harm the physical, mental or moral development of minors.

With regard to the comments made, in response to the first question, the Authority considers that the provisions set out in the draft are not addressed in a general and abstract manner to all providers of information society services within the meaning of Directive 2000/31, but only to specific providers of such services, namely (1) website operators and (2) providers of video-sharing platforms that disseminate pornographic images and videos in Italy.

Consequently, the notified draft applies exclusively to those specific categories of information society providers, irrespective of their place of establishment.

With specific reference to the request for information concerning the obligations applicable to these service providers deriving from the notified project, the Authority notes that, pursuant to Article 13a(4) of the Caivano Decree, the aforementioned entities (i.e. website operators and providers of video-sharing platforms that disseminate pornographic images and videos in Italy) are required to have effective age verification systems in place, in compliance with the requirements set out in the notified measure. These entities shall verify the age of users in order to prevent access to pornographic content by minors under the age of eighteen, in accordance with the technical and procedural arrangements set out in the notified draft regulation.

With regard to the request concerning the identification of such persons, the Authority notes that, as already mentioned, since this is not a general and abstract provision, it is addressed only to website operators and providers of video-sharing platforms that disseminate pornographic images and videos in Italy.

In particular, with specific reference to providers of video-sharing platforms, the entities concerned by the Regulation will be those identified and listed in the MAVISE database of the European Audiovisual Observatory, specifically dedicated to



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the dissemination of adult content, the number of which is approximately 50 (https://mavise.obs.coe.int/advanced-search?service_type=4&genre=1).

Finally, as regards compliance with the requirements laid down in Article 3(4) of Directive 2000/31/EC and Article 28a(1) and (5) of Directive 2010/13/EU (as amended by Directive 2018/1808), it should be noted – by analogy with what has recently been stated in relation to the protection of minors (2022/638/I - <https://technical-regulation-information-system.ec.europa.eu/en/notification/17522> - & 2023/0208/I <https://technical-regulation-information-system.ec.europa.eu/en/notification/23694>) – that AGCOM, in the draft of the notified Regulation, intended to define only the technical and procedural arrangements that entities falling within the scope of the law will have to implement in order to verify the age of users so as to prevent access to online pornographic content by minors under the age of eighteen.

The rationale for this measure lies in the need to protect minors – in line with the provisions of the DSA Regulation 2025/2022 and, in particular, Article 28 thereof – from adult content as it ‘undermines respect for their dignity and compromises their physical and mental well-being, constituting a public health issue’.

Precisely in line with the provisions of Article 3(4) of the e-Commerce Directive, the protection of the psycho-physical development of minors from content, such as pornographic content, which may be risky and harmful to their developments, falls, inter alia, within the scope of the safeguarding of the national or international public order.

In this sense, it is worth noting that the Joint Chambers of the Court of Cassation, most recently, in judgement No 9006 of 2021, stated that: ‘The College strongly adheres to the concept of international public order developed in the Joint Chambers ruling No 16601 of 2017 and reiterated more recently in No 12193 of 2019. Both judgements are in line with the open and universalistic conception of international public order, already expressed in previous guidelines, recognising the principles of international public order not only as a limit to the application of foreign law (Article 16 of Law No 218 of 1995) and to the recognition of foreign acts and measures (Article 64 of Law No 218 of 1995) but also as a means of promoting and guaranteeing the protection of fundamental human rights, through principles deriving from European Union law, from the Conventions on the Rights of Persons to which Italy has acceded and with the essential contribution of the case-law of the Court of Justice and the European Court of Human Rights’.

More generally, with reference to the provisions of the e-Commerce Directive, it should be noted that Article 3(4) thereof identifies the derogations from the provisions set out in paragraphs 1 and 2 of that provision. These are cases worthy of particular protection: the protection of minors, of consumers, including investors, and the fight against incitement to racial, sexual, religious, or ethnic hatred, as well as violations of human dignity, to which are added the derogations set out in Annexes 1 and 2, including copyright protection.

With this in mind, it should be noted that, since 2013, this Authority has adopted a procedure aimed at ascertaining and bringing to an end infringements relating to the protection of copyright on electronic communications networks, in implementation of Articles 14, 15 and 16 of the aforementioned Legislative Decree No 70 of 9 April 2003, governed by the Regulation adopted by Decision No 680/13/CONS, which is the subject of the notification (notification procedure No 2013/0496/I).

As mentioned above, the provision does not concern other players in the information society than those who clearly use their services to host adult content and is justified by the necessary action to protect minors. Nevertheless, the measures provided for in respect of those entities leave them fully free to choose an independent third party.

In addition, the measures taken are proportionate to these objectives (point (iii) of Article 3(4) of the e-Commerce Directive). The purpose of the draft regulation, which is to regulate the age ascertaining systems for websites and platforms that disseminate pornographic content in Italy, is to set out the general procedures to be implemented by those systems. The basic requirement is that the rules laid down must be proportionate to the objectives laid down by law. This principle constitutes a general requirement, of a primary nature, which refers to finding the right balance between the means used to achieve the intended objective, in this case age verification, and its impact on the limitation of the rights of individuals. The entity required under the law to implement the age control system for access to content must use a tool that is as non-invasive as possible to achieve the intended goal. Furthermore, in accordance with the principle of accountability pursuant to Articles 5(2) and 24 of Regulation (EU) 2016/679 (‘GDPR’), it is provided that the ‘regulated entities’ choose the age assurance tools to be implemented in their service and demonstrate the effectiveness of the tool used according to the general principles and requirements set by the Authority’s draft regulation, as well as the compliance of the same tool with the principles and rules on data protection, in particular, that of proportionality. In this context, the draft regulation also considers the impact of the tool used on the ‘rights of individuals’ to be considered as fundamental rights and freedoms.



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In light of the above, one can also see that there is a different scope of the Regulation compared to the Austrian provision that was the subject of the recent judgement of the Court of Justice of 9 November 2023 in Case C-376/22 concerning the proceedings Google Ireland Limited, Meta Platforms Ireland Limited, Tik Tok Technology Limited v.

Kommunikationsbehörde Austria (KommAustria). Indeed, the notified measure does not concern general and abstract provisions, but precise and specific ones as they relate to certain information society entities hosting adult content that is identifiable as such without any need for ex ante control in line with Article 8 of the DSA. Moreover, by defining in detail all the stages of the age verification process to be carried out by certain service providers (that distribute pornographic content through websites and video-sharing platforms), without specifying, from a technical point of view, the particular protocols, products, and technologies to be used, which remain under responsibility of providers, it does not constitute – also from this perspective – a general and abstract measure within the meaning of the ruling of the European Court of Justice.

2. The Italian authorities are kindly required to clarify whether the notified draft would apply to providers of online intermediary services as defined in Regulation (EU) 2022/2065. In the affirmative, the Commission would like to receive more information on the various types of services covered by the notified draft and the exact obligations that would apply to them.

As mentioned above, the draft regulation applies to a specific sub-category of providers of intermediary hosting services within the meaning of Regulation (EU) 2022/2065, such as website operators and video-sharing platforms disseminating pornographic images and videos in Italy.

The measures provided for these entities concern the implementation of age verification mechanisms, in order to stop pornographic content from being accessible to minors under the age of 18, in compliance with the general requirements defined by the draft regulation, as well as obligations to communicate with the Authority about the third parties entrusted with age verification operations (independent third parties), together with a report containing any useful information on the entity, on the method of age verification and on the reasons for the choice, for the purposes of competence supervision activities, and, finally, transparency obligations towards users.

3. The Italian authorities are invited to provide further clarification on the objectives pursued by the notified draft, in particular in light of the framework provided by Regulation (EU) 2022/2065.

The objectives pursued by the notified project are in line with the provisions of Regulation (EU) 2022/2065 on the protection of minors. In particular, as mentioned above, it is noted that the objective pursued by the notified draft regulation, in implementation of Article 13a of the Caivano Decree, is the definition of procedural rules that website operators and video-sharing platforms disseminating pornographic images and videos in Italy must implement to verify the age of users, ensuring a level of security appropriate to the risk and compliance with the minimisation of personal data collected for the purpose, in order to protect minors under the age of eighteen when accessing online pornographic content that undermines respect for their dignity and compromises their physical and mental well-being, constituting a public health issue.

The objectives are considered to be in line with the framework provided by Regulation (EU) 2022/2065, which defined, in Article 1(1)(i) online platforms as: ‘a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation’; With this regulation, the European Commission addressed the issue of the protection of minors online, supporting and promoting the implementation of targeted rules; in particular, Article 28 of the DSA Regulation requires that all online platform providers accessible to minors take appropriate and proportionate measures to ensure a high level of privacy, security, and protection of minors, primarily through the activation of age verification mechanisms.

4. The Commission services would like to better understand the intended interplay between the notified draft, and the underlying law, and the on-going work concerning age assurance in the context of the European Board for Digital Services under the Digital Services Act (DSA), as well as its objective to set up an EU wide solution for age assurance.



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As mentioned above, the notified draft regulation implements the provisions of Article 13a of the Caivano Decree. Through the draft regulation, the Authority adopted a technologically neutral approach, leaving the entities responsible for carrying out the age assurance processes, i.e. regulated entities, a reasonable level of freedom of assessment and choice, while establishing the principles and requirements that must be met by the systems introduced. These principles, which include 'personal data protection', 'security', and 'the intervention of an independent third party' (with respect to the service provider) providing 'proof of age', are consistent with those established by the European Commission in the context of the ongoing work on age assurance. It is noted, in fact, that the Undersigned took part in the Task Force convened by the Commission specifically on the protection of minors and on age verification tools, which was recently merged into one of the 8 working groups (WG-6 Protection of Minors) of the European Commission for the implementation and coordination of the DSA. In this regard, it is reiterated in the notified document that, pursuant to Article 12b(3) of the 'Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing the European Digital Identity Framework', very large online platforms, as defined by the DSA, which require user authentication for access to online services, will also have to accept the use of European Digital Identity Wallets (EU digital wallets), at the voluntary request of the user, including with regard to the minimum attributes necessary for the specific online service for which authentication is required, such as proof of age.

5. The Commission services take note of the fact that, according to the definitions section of the notified draft, the obligations set out herein would apply as regards websites and video sharing platforms for the dissemination and/or publication in Italy of pornographic images and videos, including advertising. The Commission's services would like to receive more information on whether the notified draft would apply only to those websites and video sharing platforms the main purpose of which is to disseminate pornographic content and how would this be determined. Otherwise, the Commission services would like to receive more information on how operators of websites and video-sharing platforms should determine whether their services have been used to disseminate pornographic content, in particular under Article 8 of the DSA.

It is confirmed that the draft regulation, as laid down in Article 13a of the Caivano Decree, applies to website operators and providers of video-sharing platforms, wherever established, that disseminate pornographic images, programmes and videos in Italy which are to be considered subject to the age verification requirement.

The same primary law provides that website operators and providers of video-sharing platforms which disseminate pornographic images and videos in Italy are required to verify the age of majority of users, in order to prevent access to pornographic content by minors under the age of eighteen.

Therefore, website operators and providers of video-sharing platforms, where they disseminate, among other things, images and videos of pornographic nature, are required to verify the age of majority.

In line with Article 8 of the DSA, there are no general obligations to monitor the information transmitted or stored by intermediary services.

Addressing only specific sites and VSPs dedicated to hosting adult content, the obligation concerns the establishment of an age verification IT system where the site or platform is aware that pornographic content can be accessed through its infrastructure.

In other words, it is a measure that does not involve any supervision by the content hosts, but, in line with the provisions of the DSA, serves as a technical specification only for those entities that have set up websites and/or a content sharing service specifically dedicated to hosting content aimed at adults.

6. The Commission services would welcome more information on the outcome of the testing of the "double anonymity" mechanisms confirming its technical feasibility and its ability to meet the need for privacy protection and to ensure a high level of privacy, security and safety. It would further welcome clarification whether this "double anonymity" represents anonymity in the meaning of Regulation (EU) 2016/679 (GDPR).

The Authority has not yet initiated any testing of age assurance mechanisms based on the principle of 'double anonymity'.

The measure of 'double anonymity' is a minimum requirement to protect citizens' privacy and therefore falls within the scope of the protections established by Regulation (EU) 2016/679 (GDPR), aimed at guaranteeing the overall



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confidentiality of citizens' data and activities, leaving regulated entities the freedom to choose the particular technology to be adopted.

Double anonymity ensures both the confidentiality of user identification data (e.g. date of birth, bank details, etc.) and online activities (e.g. access to sites with pornographic content).

'Double anonymity' is a requirement that concerns 'enhanced confidentiality' and refers to the impossibility for regulated entities to identify the user using the proof of age, to recognise a user who has already used the system on the basis of the data generated by the age verification process, and to know or infer the source or method for obtaining evidence of age involved in the age verification process of a user, as well as the impossibility for the entities providing the proof of age to know for which service the age verification will be performed.

Finally, it should be noted that, precisely in order to guarantee the anonymity of the data and in line with the provisions of Article 13a of the Caivano Decree, AGCOM obtained the favourable opinion of the Data Protection Authority on the draft regulation.

7. The Italian authorities presented a set of minimum requirements applicable to all age verification systems including on their precision and effectiveness. The Commission services would welcome additional clarifications on who and how will measure and confirm that a given solution is precise and effective enough for a given age or age range and content type being accessed.

The Authority decided not to specify, within the draft regulation, the tolerance limits within which age assurance schemes should be considered valid. This is because, first of all, the study, analysis, and determination of tolerance parameters, which are generally extremely complex, should be carried out on the basis of measurements of the systems implemented. The theoretical setting of tolerance parameters, without concrete experience, entails the risk of setting limits that are either unachievable or which are not strict enough. This position follows the extensive experience gained in the electronic communications sector, where the Authority has set tolerance parameters only in a few cases, such as customer support, albeit following monitoring of the values concretely achievable by operators.

The Authority provided that, similarly to what happens in the electronic communications sector, at the first application stage it is appropriate that each regulated entity, with the support of the service provider, publishes on its website the appropriate performance indicators and the related values that characterise it.

In this respect, it is clarified that the age assurance system proposed by the Authority falls within the category of age verification systems as it refers to those systems that rely on hard (physical) identifiers and/or verified sources of identification, which already provide a high degree of certainty in determining the age of a user.

Conversely, so-called age estimation systems, which according to AGCOM do not comply with the confidentiality criteria laid down in the notified draft measure, refer to methods which establish with a certain probability that a user is of a certain age, falls within a particular age group or is above or below a certain age. In general, precision and effectiveness parameters are defined for this type of system which, as mentioned above, the Authority does not consider to be compliant with the notified measure.

8. The Commission would also welcome the confirmation if those requirements are applicable only to age verification systems as defined in Article 1? If affirmative, if the Italian authorities plan to have another set of requirements for age estimation systems?

As mentioned above, the draft regulation applies to age verification systems which are already characterised by a high degree of precision and certainty.

9. The Commission services welcome additional clarifications on the Code of conduct which the Italian authorities mentioned in the background of Annex B: Efforts are also being stepped up at EU level through the adoption of a Code of Conduct, which is being analysed. Which Code of conduct the Italian authorities refer in this paragraph?

Reference is made to the 'code of conduct on age-appropriate design' for the protection of minors when using digital services and products, as defined under the BIK+ strategy.

10. The Italian authorities are invited to correct the description of the Code of Conduct as part of the Better Internet for



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Kids (BIK+) strategy, which should have addressed age-appropriate design rather than age verification, as indicated in the preamble of Annex B.

With reference to the above, it is noted that the Authority will proceed with the suggested correction by including the following provision in the text: In addition, the new European strategy for a Better Internet for Children provides for an EU Code of Conduct for age-appropriate design by 2024, based on the new rules of the Digital Services Act (DSA) and in line with the AVMSD and the GDPR.

European Commission

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