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**Subject: Notification 2023/205/I**

**Public consultation on the prominence of audiovisual and radio media services of general interest and accessibility of the automatic numbering system of the digital terrestrial television channels**

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

**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) 2015/1535<sup>1</sup>, the Italian authorities notified to the Commission on 20 April 2023 the draft “*Public consultation on the prominence of audiovisual and radio media services of general interest and accessibility of the automatic numbering system of the digital terrestrial television channels*” (the “notified draft”). It consists of the draft “*Regulation on the Accessibility of the Automatic Numbering System for Digital Terrestrial Television Channels*” (Annex A) and the draft “*Guidelines on Prominence of Audiovisual and Radio Media Services of General Interest*” (Annex B) and a decision to launch a public consultation on them.

According to the notification message, the notified draft (Resolution No 14/23/CONS and its annexes) intends to implement Article 29 of Legislative Decree No 208 of 8 November 2021 (TUSMA) transposing Article 7a of Directive (EU) 2018/1808 (the

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<sup>1</sup> 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.

“AVMSD”)<sup>2</sup>. The notified draft concerns the adoption of measures to ensure the adequate prominence of audiovisual and radio media services of general interest and the automatic numbering system of the digital terrestrial television channels.

The Italian authorities originally notified only the public consultation on the prominence of audiovisual and radio media services of general interest and accessibility of the automatic numbering system of the digital terrestrial television channels under notification 2023/73/IT but withdrew this notification and notified the whole set of texts again as described above as new Notification 2023/205/IT. In the context of said previous notification, the Commission services addressed to the Italian authorities a request for supplementary information on 24 March 2023, in order to obtain clarifications regarding the notified measure. The answers provided by the Italian authorities on 6 April 2023 are taken into account in the following assessment.

In the notification message and in their reply of 6 April 2023 to the request for supplementary information sent by the Commission services in furtherance to the previous notification 2023/73/IT, the Italian authorities indicated that the ultimate aim of the notified measure is ensuring pluralism, freedom of expression, cultural diversity and effectiveness of information for the widest possible audience.

Media pluralism is a foundational value of the European Union, as enshrined in Art 11(2) of the Charter of Fundamental Rights of the European Union. As such, the Commission acknowledges and shares the objective of initiatives that seek to pursue media pluralism. The Commission is also committed to safeguard and promote media diversity and media pluralism in the online environment. In this context, the EU has adopted the Digital Services Act<sup>3</sup>, which includes specific safeguards to protect media plurality online. Additionally, the Commission adopted a proposal for the European Media Freedom Act (EMFA)<sup>4</sup>, which is currently being examined by the co-legislators.

The Commission notes that, according to the reply received from the Italian authorities, the notified measure consists of a public consultation of a draft measure and two annexes: (i) guidelines on the prominence of audiovisual and radio media services of general interest (Annex B); and (ii) draft regulation on the accessibility of digital terrestrial television channels (Annex A). These are all included in the same document in the new notified draft. The Italian authorities explain that the final decision to be adopted by the Italian authority will take account of the contributions received and the assessment of the European Commission under this notification.

The Commission also takes note of the fact that, as clarified by the Italian authorities in their reply, the notified measure, including the annexes, is of regulatory nature and applicable to the scope of services mentioned thereof.

Concerning Annex B, on the prominence of audiovisual and radio media services of general interest, the notified measure would impose certain obligations to ensure prominence of a list of services to be determined by the Italian authority, which will

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<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU.

comprise both public and commercial audiovisual and radio service providers. According to the information provided by the Italian authorities in their notifications, the Italian authorities consider that the entities subject to the prominence obligations should be those who are able to influence the manner in which the content and services are presented to users. In point 3, paragraph 13, of Annex B, those entities are further detailed as including “*internet-connected televisions*” and “*user interfaces or applications available at a distributor or app store that allow access to services of general interest on other devices*”.

The notified measure, in point 6 of Annex B, entrusts the Italian authority with the competence of monitoring and supervising compliance of services concerned with the above obligations on prominence, and to impose penalties in the event of an infringement.

Examination of the relevant provisions has prompted the Commission to issue the following detailed opinion and comments.

## **1. Detailed opinion**

### **1.1 Assessment of Annex B of the notified draft in the light of the Directive 2000/31/EC<sup>5</sup>**

#### **a) Applicability of the e-Commerce Directive**

The e-Commerce Directive constitutes the horizontal framework for information society services.

According to the information provided in the notification and in the reply of the Italian authorities to the request for further information sent by the Commission services, at least some of the services within the scope of Annex B would qualify as information society services under Article 2(a) Directive 2000/31/EC (the e-Commerce Directive) and Article 1(b) of Directive (EU) 2015/1535.

This is particularly the case of user interfaces and the software of Internet-connected TVs. As regards the former, the Italian authorities state that user interfaces may fall within the definition of information services, as services normally provided for remuneration, remotely, electronically and at the individual request of a recipient of services. In as much as these fulfil the definition set out in those provisions (“*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”), the provision of services related to user interfaces, such as the software used in connected equipment and those provided via online services (e.g., application stores), are considered to constitute information society services for the purposes of the e-Commerce Directive.

In their reply to the Commission services’ request for further information, the Italian authorities also state that the measures and obligations set out in Annex B of the notified draft would also apply to service providers established outside the Italian territory.

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<sup>5</sup> 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'), Official Journal L 178.

The obligations aimed at giving prominence to certain content set out in Annex B of the notified draft concern requirements on the taking up or pursuit of the activity of information society services. As such, these obligations fall within the coordinated field of the e-Commerce Directive as set out in its Article 2(h)(i) and, consequently, have been assessed against this Directive.

In their notification message, the Italian authorities highlight that audiovisual and radio media services of general interest should be given adequate prominence with the aim of ensuring pluralism, freedom of expression, cultural diversity and effectiveness of information to the widest possible audience. On this aspect, the Commission would like to point out that while the objective of ensuring diversity and pluralism of the media is recognised and promoted by the e-Commerce Directive, its Article 1(6) provides that measures adopted for the promotion of pluralism must nonetheless respect EU law, including the rules laid down in the e-Commerce Directive itself.

#### *b) Article 3(1) and (2) of the e-Commerce Directive*

With regard to information society services, as defined in Article 1(b) of Directive (EU) 2015/1535, Article 3 of the e-Commerce Directive sets out in secondary EU law the freedom to provide services cross-border as enshrined in Article 56 of TFEU. Article 3 of the e-Commerce Directive is based on the principle that information society services must be regulated at the source of the activity and are, as a rule, subject to the law of the Member State in which the service provider is established (see recital 22 of the e-Commerce Directive).

Under Article 3(1), Member States are required to ensure that information society services providers established in their territory comply with the applicable provisions of their respective national laws applicable to information society service providers or information society services. Article 3(2) adds that Member States may not restrict, for reasons falling within the coordinated field, the freedom to provide such services from another Member State.

As confirmed by the Italian authorities in their reply, the obligations set out in Annex B of the notified draft would apply to information society services (in as much as user interfaces and the software on Internet-connected TVs constitute information society services) established outside of the Italian territory. Consequently, those information society services established in other Member States than Italy would be required to:

- Give appropriate visibility in the Italian territory to certain services, which are deemed of general interest by the Italian authority;
- In order to do so, adapt their services and the way they pursue their activity in the Italian territory to the presentational requirements set out in Annex B of the notified draft: (i) dedicated tile or icon box, immediately visible on the home page of the user interface; (ii) accessibility to those services of general interest with a maximum number of two clicks (actions) by the user; (iii) and at least one additional measure amongst a list set out in Annex B of the notified draft to ensure the findability of those services of general interest;
- Correctly identify the services of general interest as published by the Italian authority in a dedicated list, updated annually;
- Abide by any other means of implementation decided by the competent Italian authority;

- Notify the Italian authority of the measures put in place in order to comply with said obligations.

Moreover, under the notified draft, the Italian authorities are empowered to monitor and supervise compliance to the providers of user interfaces covered by the obligations, as well as to issue fines in cases of non-compliance.

Against this background, the Commission's view is that the obligations set out in the notified measure constitute a restriction to the cross-border provision of information society services, within the meaning of Article 3(2) of the e-Commerce Directive, in as much as they would apply to providers of information society services established in other Member States which provide their services in Italy.

### c) Article 3(4) of the e-Commerce Directive

Article 3(4)(a)(i) of the e-Commerce Directive lists exhaustively the reasons allowing a derogation from the principles set out in Article 3(1) and (2).

It is worth noting that the Italian authorities have not argued whether the notified measure would fall within any of the reasons allowing a derogation on the basis of Article 3(4). Consequently, they have not provided any information that would allow the Commission to form an assessment on the fulfilment of the substantive and procedural requirements of Article 3(4) of the e-Commerce Directive.

As a general rule, general and abstract provision which impose obligations on any provider of information society services, such as those laid down in Annex B of the notified draft, cannot constitute a 'measure' within the meaning of Article 3(4) of the e-Commerce Directive. Under that provision, a Member State other than the Member State of establishment can only derogate from the free provision of information society services guaranteed by Article 3(1) of the e-Commerce Directive by adopting measures on an ad hoc and case-by-case basis.

In addition, the nature of a measure by which a Member State of destination may derogate from the principles laid down in Article 3(1) and (2) of the e-Commerce Directive depend on the substantive and procedural conditions laid down in Article 3(4) (a) and (b) of that directive Article 3(4)(a)(ii) requires that any derogation has to be targeted ("taken against a given information society service"), in view of the prejudice – or the serious and grave risk of prejudice – of the service to the objectives invoked to justify the restrictive measures. In addition, in accordance with point (iii) of that provision, the measures must be proportionate to those objectives.

Pursuant to Article 3(4)(b), certain procedural requirements must be met for a Member State to derogate from the home state control principle. Specifically, before taking the restrictive measures in question, the "host" Member State (in this case Italy) should request the "home" Member State of the service provider(s) concerned to take measures to address the identified public policy problem. If that Member State fails to take (adequate) measures, it must, together with the Commission, subsequently be notified of the measure that the "host" Member State intends to take. To the Commission's knowledge and on the basis of the information provided in the context of this notification, the Italian authorities have not fulfilled these procedural requirements mandated by Article 3(4)(b).

In view of all of the above, and on the basis of the information available to it, the Commission is of the view that the adoption of Annex B of the notified draft will result in an undue restriction to the free provision of information society services in the Italian territory in violation of Article 3 of the e-Commerce Directive.

For the reasons stated above, the Commission delivers a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 to the effect that it considers the notified measure is in breach of Article 3 of the e-Commerce Directive, were it to be adopted without giving due consideration to the above remarks.

The Commission would remind the Italian authorities that under the terms of article 6(2) of the above-mentioned Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State which has drawn up the draft technical regulation concerned to postpone its adoption for four months from the date of its notification.

This deadline therefore comes to an end on 21 August 2023.

The Commission further draws the attention of the Italian authorities to the fact that under this provision the Member State which is the addressee of a detailed opinion is obliged to inform the Commission of the action which it intends to take as a result of the opinion.

The Commission furthermore invites the Italian authorities to communicate to it on adoption the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

Should the Italian Government not comply with the obligations foreseen in Directive (EU) 2015/1535 or should the text of the draft technical regulation under consideration be adopted without account being taken of the above-mentioned objections or be otherwise in breach of European Union law, the Commission may commence proceedings against Italy pursuant to Article 258 TFEU.

## **2. Comments**

### **2.1 General comments on Annex B of the notified draft**

Based on the explanations given by the Italian authorities regarding Annex B of the notified draft, the Commission understands that three types of services would be included in the basket of services of general interest. Firstly, public service audiovisual and radio media services, distributed free of charge either through digital terrestrial television, satellite or online (catch-up TV or radio, online FM and DAB+). Secondly, national commercial (private) audiovisual and radio services distributed free of charge in the aforementioned manners. Thirdly, local commercial (private) audiovisual and radio services distributed through digital terrestrial television.

All three types of services will include programmes of a generalist, semi-generalist and information nature (as defined in the context of the update of the new automatic numbering plan for digital terrestrial television channels referred to in Decision No 116/21/CONS), and will have an editorial director.

In addition, following an assessment procedure put in place by the national regulatory authority, other national commercial audiovisual and radio services, without programmes of a generalist, semi-generalist and information nature, distributed free of charge in the same way as the public services and the national commercial services described above, may qualify as services of general interest where they contribute to ensuring media pluralism and cultural and opinion diversity. The evaluation will be done following an assessment procedure put in place by the national regulatory authority. To this end, services will have to send a formal request to the authority, using an online form. The authority will take into account a set of pre-determined indicators when it makes an assessment concerning their inclusion.

The Commission notes that it is not immediately clear from the notification nor from the answers to the request for supplementary information sent in the context of the previous notification how many audiovisual and radio media services could potentially qualify as services of general interest and consequently benefit from the prominence scheme. The list of services that are automatically included already appears extensive. Recital 25 of the Directive (EU) 2018/1808 amending the AVMSD states that obligations to ensure the appropriate prominence of content of general interest “should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations”.

In view of a potentially very large total number of channels considered as services of general interest, the Commission reminds the Italian authorities of the need for proportionate obligations. As a result, the Commission questions the potential effectiveness and practical implementation of the prominence obligation.

Additionally, the Commission notes that it is unclear whether further prominence measures would be required or granted among the potentially high number of selected audiovisual services of general interest within the overall basket and if so, based on what specific criteria. In other words, it is not apparent whether further ranking will be established among the services of general interest.

## **2.2 Assessment of Annex B in light of Article 56 of the Treaty on the Functioning of the European Union**

The Commission notes that it is also not immediately clear whether the procedure for commercial broadcasters to qualify as services of general interest in Annex B of the notified draft distinguishes between providers of offers which fall under the jurisdiction of Italy under Article 2 of the revised AVMSD and those which do not. It is stated in Annex B of the notified draft that the assessment will include the elements of time spent on national, regional and local information, time devoted to topical, social, educational and cultural programmes, the proportion of European works and the percentage of accessible offers.

The Commission would like to recall that there should be no direct discrimination against foreign media service providers regarding eligibility to request to be included among services of general interest.

The Commission also recalls that the Court of Justice of the EU has adopted a narrow interpretation of allowed restrictions to the freedom to provide services. Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other

Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services<sup>6</sup>.

In this light, the Commission draws the attention of the Italian authorities to the need to ensure that practical conditions surrounding the application procedure laid down in the notified draft, such as language requirements and information about the request forms, will not pose any restrictions on the freedom to provide services for media service providers established outside the territory of Italy. This need also stems from Article 11 of the Charter of Fundamental Rights of the EU, which enshrines *inter alia* the freedom to “*receive and impart information and ideas without interference by public authority and regardless of frontiers*”.

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

The Commission services are open to a close cooperation and discussion with the Italian authorities on possible solutions to the identified issues in full respect with EU law.

Yours faithfully,

For the Commission

Thierry Breton  
Member of the Commission

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<sup>6</sup> See, for instance, judgment of 25 April 2013, Jyske Bank Gibraltar (C-212/11, EU:C:2013:270, paragraphs 58-59).