# **RESOLUTION NO 76/23/CONS**

**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**

# **THE AUTHORITY**

# AT the Council meeting of 16 March 2023;

HAVING REGARD TO Law No 481 of 14 November 1995 on ‘*Rules relating to competition and the regulation of public utility services. Establishment of regulatory authorities for public utility services*’;

HAVING REGARD TO Law No 249 of 31 July 1997 on ‘*Establishing the Communications Regulatory Authority and laying down rules relating to the telecommunications and radio-television systems*’;

HAVING REGARD TO Legislative Decree No 70 of 9 April 2003 on the ‘*Implementation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*’ and in particular Articles 5, 14, 15, 16 and 17 thereof;

HAVING REGARD TO 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*;

HAVING REGARD TO in particular Recital 10 of Directive (EU) 2018/1808, according to which ‘*In accordance with the case-law of the Court of Justice of the European Union (the ‘Court’), it is possible to restrict the freedom to provide services guaranteed under the Treaty for overriding reasons in the general public interest, such as obtaining a high level of consumer protection, provided that such restrictions are justified, proportionate and necessary. Therefore, a Member State should be able to take certain measures to ensure respect for its consumer protection rules which do not fall in the fields coordinated by Directive 2010/13/EU. Measures taken by a Member State to enforce its national consumer protection regime, including in relation to gambling advertising, would need to be justified, proportionate to the objective pursued, and necessary as required under the Court's case-law. In any event, a receiving Member State must not take any measures which would prevent the re-transmission, in its territory, of television broadcasts coming from another Member State*’.

HAVING REGARD TO 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) and in particular Article 6(4) thereof, pursuant to which ‘*this Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State’s legal system, to require the service provider to terminate or prevent an infringement*’;

HAVING REGARD TO Legislative Decree No 208 of 8 November 2021 on the ‘*Implementation of 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 Consolidated Act for the provision of audiovisual media services in view of changing market realities*’ (hereinafter referred to as the ‘TUSMA’ or ‘Consolidated Act’), and in particular Articles:

* 3, paragraph 1, *point* *(c)*, in which ‘*video-sharing platform service*’ is defined as ‘*a service, as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the main objective of the service itself, its distinguishable section or essential functionality is the provision of programs, user-generated videos or both, addressed to the general public, for which the video-sharing platform provider has no editorial responsibility, for the purpose of informing, entertaining, or educating through electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 12 July 2002 and whose organisation is determined by the provider of the video sharing platform, including by automatic means or algorithms, in particular by displaying, tagging and sequencing*’;
* 4(1), of the *Consolidated Act,* establishing that *‘1. Fundamental principles of the system of audiovisual media services, radio broadcasting, and video-sharing platform services include the guarantee of freedom and pluralism of broadcast media, the protection of the freedom of expression of every individual, including the freedom of opinion and the freedom to receive or communicate information or ideas without limits, while respecting human dignity, the principle of non-discrimination, and the fight against hate speech, the objectivity, completeness, faithfulness, and impartiality of information, the protection of copyright and intellectual property rights, openness to different political, social, cultural, and religious opinions and trends, and the safeguarding of ethnic diversity and cultural, artistic, and environmental heritage, at a national and local level, while respecting freedoms and rights, in particular the dignity of the person and the protection of personal data, the promotion and protection of the well-being, health, and harmonious physical, mental, and moral development of the child, guaranteed by the Constitution, European Union law, international rules in force in Italian law, and by state and regional laws.*
* 9(1), according to which ‘*The Authority, in the exercise of the tasks entrusted to it by law, ensures that the fundamental rights of the person in the field of communications are respected, including through audiovisual or radio media services. The Authority shall exercise its powers impartially and transparently and in accordance with the objectives of Directive (EU) 2018/1808, in particular as regards media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market, and the promotion of fair competition.*’;
* 9(2), according to which ‘*the Authority, in the field of audiovisual and radio media services and video-sharing platform services, shall exercise the powers provided for in the rules of this Consolidated Act, as well as those already conferred by the other rules in force, even if not included in the Consolidated Act, and, in particular, the powers referred to in Laws No 223 of 6 August 1990, No 481 of 14 November 1995 and No 249 of 31 July 1997*’;
* 41(7), according to which ‘*Without prejudice to Articles 14 to 17 of Legislative Decree No 70 of 9 April 2003, and without prejudice to the provisions of the preceding paragraphs, the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and addressed to the Italian public may be restricted, 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, for the following purposes: (a) the protection of minors from content which may adversely affect their physical, mental or moral development in accordance with Article 38(1); (b) the fight against incitement to racial, sexual, religious, or ethnic hatred and against the violation of human dignity; (c) the protection of consumers, including investors, pursuant to this Consolidated Act*’;

* 41(8), according to which ‘[*F*]*or the purpose of determining whether a program, a user-generated video or an audiovisual commercial communication are addressed to the Italian public, criteria such as, by way of example, the language used, the involvement of a significant number of contacts on the Italian territory or the achievement of revenues in Italy*’;

HAVING REGARD TO Article 21 (Non-discrimination) of the Charter of Fundamental Rights of the European Union of 2000 and, in particular, paragraph 1, according to which *‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited*’;

HAVING REGARD TO Article 22 (Cultural, religious and linguistic diversity) of the Charter of Fundamental Rights of the European Union of 2000 according to which 'The Union shall respect cultural, religious and linguistic diversity’;

HAVING REGARD TO Article 3 of the Constitution according to which *‘All citizens have equal social dignity and are equal before the law, regardless of sex, race, language, religion, political opinions, personal and social conditions. It is the duty of the Republic to remove obstacles of an economic and social nature, which, by effectively limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country’;*

HAVING REGARD TO the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, and to Directive (EU) 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA;

HAVING REGARD TO ECRI General Policy Recommendation No 15 (European Commission against Racism and Intolerance of the Council of Europe), on combating the hate speech adopted on 8 December 2015 which encourages States to take concrete action to ensure that all forms of ethnic discrimination are countered and eliminated, consistent with international law protecting human rights;

HAVING REGARD TO Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law;

HAVING REGARD TO the Code of Conduct to combat illegal forms of hate speech online signed by the European Commission on 31 May 2016;

HAVING REGARD TO the Communication from the European Commission COM (2017) 555 *‘Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms’;*

HAVING REGARD TO the *‘Self-Regulation Code for Media and Minors’*, approved by the Commission for the setting up of the broadcasting system on 5 November 2002 and signed by the broadcasters and signatory associations on 29 November 2002;

HAVING REGARD TO Decision No 165/06/CSP of 22 November 2006 on ‘*Addressing act on respect of the fundamental rights of the person, personal dignity and the correct physical, mental and moral development of minors in entertainment programmes*’;

HAVING REGARD TO Decision No 23/07/CSP of 22 February 2007 entitled ‘*Addressing Act on Respect of the Fundamental Rights of the Person and on the Prohibition of Broadcasts with Pornographic Scenes*’;

HAVING REGARD TO Resolution 51/13/CSP of 3 May 2013, containing the ‘*Regulations on technical measures to be adopted to exclude the viewing and listening by minors of broadcasts made available by providers of on-demand audiovisual media services, which may seriously harm their physical, mental or moral development pursuant to Article 34 of Legislative Decree No 177 of 31 July 2005, as amended and supplemented, in particular, by Legislative Decree No 44 of 15 March 2010, as amended by Legislative Decree No 120 of 28 June 2012*’;

HAVING REGARD TO Decision No 52/13/CSP of 3 May 2013 on ‘*Regulations on the criteria for the classification of television broadcasts which may seriously harm the physical, mental or moral development of minors referred to in Article 34(1), (5) and (11) of Legislative Decree No 177 of 31 July 2005, as amended and supplemented in particular by Legislative Decree No 44 of 15 March 2010 and Legislative Decree No 120 of 28 June 2012*’;

HAVING REGARD TO Decision No 157/19/CONS adopting the ‘*Regulation laying down provisions on respect for human dignity and the principle of non-discrimination and combating hate speech*’;

HAVING REGARD TO Decision No 37/23/CONS of 22 February 2023 on the ‘*Regulation on the protection of the fundamental rights of the person pursuant to Article 30 of Legislative Decree No 208 of 8 November 2021 (Consolidated Act for audiovisual media services)*’;

HAVING REGARD TO Decision No 22/23/CONS of 8 February 2023 entitled ‘*Initiation of the procedure and public consultation concerning the amendment of the regulatory framework for dispute resolution procedures between users and electronic communications operators or audiovisual media service providers for the implementation of Article 42(9) TUSMA with regard to video-sharing platform services*’;

HAVING REGARD TO Decision No 223/12/CONS of 27 April 2012 on the ‘*Adoption of the new Regulation on the organisation and functioning of the Communications Regulatory Authority*’, as last amended by Decision No 434/22/CONS;

HAVING REGARD TO Decision No 107/19/CONS of 5 April 2019 on the ‘*Regulation on consultation procedures in proceedings falling under the Authority’s competence*’;

HAVING REGARD TO Decision No 410/14/CONS of 29 July 2014, on the ‘*Rules of Procedure on administrative fines and commitments and public consultation on the document containing guidelines on the quantification of administrative fines imposed by the Communications Regulatory Authority*’, as amended, most recently, by Decision No 437/22/CONS;

WHEREAS the following criteria for determining whether a program, user-generated videos or audiovisual commercial communication is addressed to the ‘Italian public’:

* Article 41(7) of the TUSMA provides that, without prejudice to Articles 14 to 17 of Legislative Decree No 70 of 9 April 2003, the free movement of programs, user-generated videos and audiovisual commercial communications addressed to the Italian public and conveyed by a video-sharing platform whose supplier is established in another Member State, 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, for the purposes identified by *points (a)*, *(b)* and *(c)* of paragraph 7;
* the following paragraph 8 highlights by way of example certain criteria aimed at determining whether a program, a user-generated video or an audiovisual commercial communication are addressed to the Italian public;
* the identification of the subjective scope of the Regulation to be adopted by the Authority pursuant to Article 41(9) for the purpose of defining the procedure for the adoption of measures restricting the free movement of content conveyed on video-sharing platforms established in another Member State and addressed to the Italian public implies a precise and detailed definition of those criteria;
* in primary legislation, the indication of the criteria for identifying the subjective scope is explicitly classified as by way of example and this is relevant for the exercise of the Authority's regulatory power;
* therefore, the precise definition of these criteria represents theconditionto adopt the rules for exercising the restrictive powers to the free movement of services in respect of suppliers established in another Member State and addressed to the Italian public, in order to ensure the effective protection of fundamental rights, which, according to the legislator, are of particular importance for the effective protection of users;

HAVING NOTED, therefore, the need to precisely define to which extent the content conveyed through a video sharing service is considered to be addressed to the Italian public, specifying:

* under what circumstances the Italian language is used and in which ways, both with regard to the content shared and to the platform that conveys them;
* the size of the platform, in terms of unique monthly Italian visitors, in order to identify a threshold that addresses the dual need, on the one hand, to ensure the effective protection of users and, on the other, to guarantee efficiency and cost-effectiveness to administrative action. The data the measure is based on must therefore be a third-party data provided by bodies with the highest representation of the entire reference sector, also in view of multimedia convergence processes, whose organisation also meets the principles of impartiality, autonomy and independence such as, in our system of listening recording, those produced by a JIC (*Joint Industry Committee*);
* the scope of the content in relation to the significant number of users reached: the spread of illegal content is the more serious the greater the number of Italian users reached. The threshold related to this assessment may vary in relation to the subjective context (target of users to which it refers) as well as to the objective context in which the content is inserted;
* the achievement by the supplier of revenues in Italy, even if recorded in the financial statements of companies based abroad, as an example of addressing to the Italian public;

WHEREAS the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and addressed to the Italian public may be limited, in accordance with the procedure laid down in Article 5(2), (3) and (4) of Legislative Decree No 70 of 2003, for the following purposes: (a) the protection of minors from content which may adversely affect their physical, mental or moral development in accordance with Article 38(1) TUSMA; (b) the fight against incitement to racial, sexual, religious or ethnic hatred, as well as the violation of human dignity and (c) consumer protection, including investors, under the TUSMA;

HAVING NOTED, in particular, that the Authority in the exercise of its duties must follow the procedures referred to in Article 5(2), (3) and (4) of Legislative Decree No 70 of 2003 pursuant to Article 41(7) TUSMA;

HAVING CONSIDERED, in order to provide among the general principles of the Regulation what is required by Article 5(2) of Legislative Decree No 70 of 2003, according to which measures restricting the free movement of audiovisual content may be adopted only if they are, in the specific case, (a) necessary in respect of a particular information society service adversely affecting the objectives of the public interest, or constituting a serious risk of harming the same objectives and (b) proportionate to those objectives.

HAVING NOTED, furthermore, that in implementation of the provisions of Article 5(3) of Legislative Decree No 71/2003, the Authority, without prejudice to judicial proceedings and acts carried out in the context of a criminal investigation, must, before adopting the measure, (a) request the Member State in which the video-sharing service provider is established or is considered to be established to take the relevant measures by verifying that they have not been taken or were inadequate and (b) notify the European Commission and the said Member State of the intention to take such measures.

HAVING NOTED, lastly, that in implementation of the provisions of Article 5(4) of Legislative Decree No 70 of 2003, the Authority may intervene in matters of urgency by derogating from the procedure provided for in paragraph 3 above, by notifying the measure as soon as possible to the Commission and to the Member State in which the video-sharing service provider is established or considered to be established, together with the matters of urgency.

HAVING CONSIDERED, in this regard, that it is appropriate to provide for in the Regulation the situation in which the conditions of urgency are met, if, as a result of the pre-investigation activity, there are facts or circumstances which would constitute a serious, imminent and irreparable harm to the rights of users.

HAVING CONSIDERED the following with regard to the procedure for the adoption of restriction measures:

* the legislation introduced by the legislator in Article 41(7), (8) and (9) of TUSMA is related to the efficient and effective protection of the fundamental rights of the user as detailed in points a), b) and c) of paragraph 7: for that purpose, a specific power has therefore been attributed to the Authority even if the platform provider is established in another Member State. This power can be enforced when those purposes are seriously threatened by content addressed to the Italian public;
* the urgency underlying this intervention requires a procedure that meets a twofold requirement: on the one hand, that of speeding up the adoption of the restriction measure and, on the other, that of ensuring the necessary procedural guarantees;
* to make the protection effective, it is provided that anyone involved can report to the Authority a content that is assumed to be against the aforementioned purposes. However, the procedure for reporting is linked to a number of conditions to discourage unfounded initiatives. The Authority can, however, always act ex officio also with the support of the team of the Finance Police and the Postal Police;
* once the presence of a content addressed to the Italian public has been established and whether it appears to be against the objectives which the rule is intended to protect, the pre-investigation activities aim to verify that the conditions of urgency justifying the intervention of the Authority instead of the competent one in the supplier's Member State of establishment have been met. These conditions apply where, within the time necessary to inform the Authority of the other State in order to request its intervention, the protection is likely to be irretrievably affected or to aggravate the damage caused;
* the timing of the procedure, after the notification of the initiation, is such as to allow the provider of the platform not only to defend itself on the merits, but also to take the most appropriate measures to adapt spontaneously by limiting the content. As regards the ways in which the restriction is implemented, given that the aim pursued is to make the content no longer accessible to the Italian public and also taking into account the constant technological evolution and the different functionalities and technical means available to service providers, it is considered appropriate not to have access to a detailed formulation of the measures to be put in place in order to stop the conduct and prevent its repetition;

HAVING CONSIDERED, in accordance with the provisions of Decision No 107/19/CONS, to submit for public consultation the draft regulation implementing Article 41(7), (8) and (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 platform whose supplier is established in another Member State in order to obtain from all interested parties all the most useful information and evaluation elements;

HAVING HEARD the President's report;

**HEREBY DECREES**

**Single article**

1. 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 set out in Annex A to this Decision, is hereby launched.
2. The person in charge of the proceedings is lawyer Francesco Di Giorgi of the Digital Services Department.
3. The consultation procedures are described in Attachment B to this resolution.
4. The information and data relevant to the drafting of the regulatory impact assessment is set out in Annex C to this Decision.
5. Annexes A, B and C form an integral and substantial part of this measure.

This measure is published on the Authority's website. For the purposes of the deadlines set out in the Annexes, the date of publication shall be considered.

The present measure may be challenged before the Regional Administrative Court of Lazio within 60 days of the date of its publication.

Rome, 16 March 2023

THE PRESIDENT

Giacomo Lasorella

Attesting the conformity of the decision

THE SECRETARY-GENERAL

Giulietta Gamba

**Annex A**

**to Resolution No 76/23/CONS**

**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**

**PART I**

**Article 1**

*Definitions*

1. The following definitions are set out for the purposes of this regulation:
2. ‘TUSMA’ means: Legislative Decree No 208 of 8 November 2021 on the ‘*Implementation of 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 Consolidated Act for the provision of audiovisual media services in view of changing market realities*’;
3. ‘Legislative Decree’ means: Decree No 70 of 9 April 2003 on the ‘*Implementation of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*’;
4. ‘Service provider’ means: the information society service provider, or the natural or legal person or non-recognised association providing an information society service, namely the service referred to in Article 1(1)(b) of Law No 317 of 21 June 1986 as amended by Legislative Decree No 223 of 15 December 2017 and subsequent amendments;
5. ‘Video-sharing platform service’ means: a service, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the main objective of the service, its distinguishable section or essential functionality is the provision of programs, user-generated videos or both, addressed to the general public, for which the video-sharing platform provider has no editorial responsibility, for the purpose of informing, entertaining, or educating through electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 12 July 2002 and whose organisation is determined by the provider of the video-sharing platform, including by automated means or algorithms, in particular by displaying, tagging and sequencing;
6. ‘Video-sharing platform provider’ means: the natural or legal person providing a video-sharing platform service;
7. ‘Program’ means: a series of animated images, whether with sound or not, excluding the so-called *gif*, which constitute a single element, regardless of its duration, within a schedule or catalogue established by a media service provider, including feature films, video clips, sports events, situation comedies (sitcoms), documentaries, children's programmes, and original fiction;
8. ‘User-generated video’ means: a series of animated images, whether with sound or not, which constitute a single element, regardless of its duration, created by a user and uploaded to a video-sharing platform by the same or any other user;
9. ‘Audiovisual commercial communication’ means: images, whether with sound or not, intended to promote, directly or indirectly, the goods, services or image of a natural or legal person engaged in an economic activity including, inter alia, television advertising, sponsorship, television promotion, television shopping and product placement, inserted or accompanying in a user-generated program or video for payment or other remuneration or for self-promotion purposes;
10. ‘Consumer’ means: any natural person acting for purposes other than his commercial, business, craft or professional activity;
11. ‘User’ means: the natural or legal person who uploads on a video-sharing platform the content referred to in points g) and h) of Article 3(1) TUSMA, namely the natural person who enjoys the content accessible through a video sharing platform.
12. ‘Investor’: the retail client or retail investor pursuant to Legislative Decree No 58 of 24 February 1998 laying down the Consolidated Act on Finance, i.e. the client or investor who is not a professional client or professional investor;
13. ‘Authority’: the Communications Regulatory Authority;
14. ‘Collective Body’: the Council of the Authority;
15. ‘Directorate’ and ’Director’ mean: respectively, the Authority’s Digital Services Directorate and the Director *pro-tempore* (temporary);
16. ‘Office’: the second-level organisational unit;
17. ‘National competent authority’: the administrative authority of the Member State where the provider of a video-sharing platform is established or deemed to be established and which is competent to handle with the circumstances covered by this Regulation;
18. ‘Person in charge of the proceedings’ means: the manager or official who, in accordance with the Rules of organisation and operation of the Authority, has the responsibility for carrying out the investigative activities and any other duty related to the procedure referred to in these Regulations;
19. ‘Electronic communications networks’ means: networks as defined in Article 2(1) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018;
20. ‘Sanction Regulation’ means: Annex A to Decision No 410/14/CONS, on ‘*Rules of procedure on administrative penalties and commitments*’, as last amended and supplemented by Resolution No 697/20/CONS;
21. ‘Audiovisual Media Services Directive’ means: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018;
22. ‘ERGA’: the Group of European Regulators for Audiovisual Media Services, established by Decision C(2014) 462 of the European Commission of 3 February 2014;
23. '*Memorandum of Understanding*’: the document adopted by ERGA on 3 December 2020 with the aim of establishing a framework for cooperation and exchange of information between its members, with a view to a harmonised application of the Audiovisual Media Services Directive.

**CHAPTER I**

**Scope**

**Article 2**

*General principles*

1. Without prejudice to the provisions of paragraphs 1, 2, 3, 4, 5 and 6 of Article 41 of TUSMA, this Regulation governs the procedure for restricting by order of the Authority the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and which are addressed to the Italian public, in accordance with the criteria set out in Article 3.
2. The Authority shall take the measures referred to in paragraph 1 where they are:
	1. necessary in relation to the purposes referred to in Article 4

and

* 1. proportionate to those purposes.

**Article 3**

*Subjective identification criteria*

1. In order to determine whether a program, a user-generated video or an audiovisual commercial communication conveyed by a provider established in another Member State is addressed to the Italian public, at least one of the following criteria must be met:

* 1. the prevailing use of the Italian language in the program, user-generated video or audiovisual commercial communication to be assessed in relation to the audio, subtitles or use of the Italian sign language;
	2. the use of the Italian language within the video sharing platform service, to be assessed in relation to the presence of textual elements in Italian in the user interface, as well as the availability of the multilingual function that includes the Italian language;
	3. the involvement through the video-sharing platform service, or the program, the user-generated video or the commercial communication of a significant average number of single monthly users in Italy on the basis of data provided by bodies with the highest representation of the entire sector of reference, also in view of multimedia convergence processes, whose organisation also meets principles of impartiality, autonomy and independence;
	4. the achievement by the video-sharing platform provider of revenues earned in Italy, even if accounted for in the financial statements of companies based abroad.

**Article 4**

*Purpose of the intervention*

1. Pursuant to Article 41(7) and (8) of TUSMA, the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video sharing platform referred to in Article 2(1) may be limited, by decision of the Authority, for the following purposes:

1. the protection of minors from content that may harm their physical, mental or moral development in accordance with Article 38(1) TUSMA;
2. the fight against incitement to racial, sexual, religious, or ethnic hatred and against the violation of human dignity;
3. consumer protection, including investors, within the meaning of TUSMA.

2. For the purposes of the preceding paragraph, the Authority shall act:

1. immediately and directly, in accordance with the first sentence of Article 7(4), if, at the end of the pre-investigation referred to in Article 5, there is a matter of urgency within the meaning of Article 5(4) of the *Legislative Decree* related to the emergence of facts or circumstances constituting a serious, imminent and irreparable prejudice to the rights of users;
2. in accordance with the procedure referred to in Article 10, in accordance with the provisions of the second sentence of Article 7, paragraph 4, in cases where there is no matter of urgency within the meaning of the previous letter.

**CHAPTER II**

**The procedure for the adoption of limitation measures**

**Article 5**

*Intervention arrangements and pre-investigation activities*

1. The Directorate, ex officio or upon notification by the party, shall carry out the necessary checks to verify the presence of content addressed to the Italian public not complying with the purposes set out in Article 4.
2. The Directorate collects every necessary element, including through inspections, requests for information and documents, hearings, fact-finding investigations and reports.
3. For the purposes of carrying out the supervisory activity, the Directorate can avail itself of the support of the Editorial Radio Broadcasting group, part of the Special Team Goods and Services of the Finance Police and the Section of Postal Police and the Communications of the State Police in accordance with the memorandums of understanding signed with the Authority.
4. The pre-investigation verification activity shall be completed, subject to specific and justified requirements, within twelve days from the moment the Directorate has gained formal knowledge of the facts.

**Article 6**

*Reporting to the Authority*

1. Anyone may report to the Authority the dissemination of programs, user-generated videos and audiovisual commercial communications conveyed by a video sharing platform referred to in Article 2, paragraph 1, if it considers that the content is against the purposes indicated in Article 4.
2. The request referred to in paragraph 1 shall be sent by using and filling out in its entirety, under penalty of inadmissibility, the model made available on the Authority's website, indicating in particular:
	1. personal data of the reporting person: name, surname and residence or domicile or name, legal representative and registered office in the case of legal persons;
	2. the name of the concerned video-sharing platform provider;
	3. the content which is presumed to be unlawful under this Regulation, providing all relevant elements for its unequivocal identification and, where possible, the person who uploaded it to the video-sharing platform;
	4. any further functional element to the assessment of the reported conduct, copy of any reports already sent to the video sharing service provider and the outcome thereof, as well as a copy of any correspondence between them;
	5. the reasons justifying the request and the interest assumed to be damaged by the dissemination of the content;
3. If the reporting does not contain the elements referred to in paragraph 2 above, the Directorate, in the exercise of its powers, may in any case initiate the investigation where, on the basis of a summary examination of the documentation received, the conditions for the adoption of the measure referred to in Article 9 appear to be met.
4. Proceedings may not be brought before the Authority where proceedings are pending before the Judicial Authority for the same subject matter and between the same parties.
5. The reports received may be grouped in relation to the subject matter, the damaged interest or the platform concerned and dealt with jointly.

**Article 7**

*Outcome of pre-investigation activity*

1. The Directorate within the period referred to in Article 5(4) shall provide for the administrative closure of applications which are:
2. inadmissible on grounds of non-compliance with the requirements laid down in Article 6(2) or for lack of essential information;
3. inadmissible pursuant to Article 6(4) or for the termination of the alleged infringement;
4. inadmissible as they do not fall under the scope of application of this regulation;
5. manifestly unfounded as manifestly lacking the factual and legal preconditions capable of constituting an infringement, including with regard to the powers of the Authority.
6. The Directorate shall notify the applicant of the filings made pursuant to paragraph 1(a), (b), (c) and (d).
7. Every three months the Directorate informs the Collective Body of the proceedings initiated or closed.
8. The Director, having obtained the proposal of the competent office containing the precise description of the facts and the assessment of the existence of a matter of urgency within the meaning of Article 4(2)(a), without prejudice to the cases referred to in paragraph 1 and if he considers that such matters of urgency actually exist, shall, within the period referred to in Article 5(4), initiate the procedure pursuant to Article 8(1). Where the Director does not consider that there is a matter of urgency within the meaning of Article 4(2)(a), and provided that he does not order the filing pursuant to paragraph 1, the Director, within the same period referred to in Article 5(4), addresses the Collective Body for the consequent decisions referred to in Article 10(1), drawing up a specific report for this purpose.

**Article 8**

*Procedure of inquiry before the Directorate*

1. The Directorate notifies the initiation of the procedure to the video sharing platform provider at the contact point indicated for Italy, where indicated, or at its registered office. The procedure shall be concluded within 30 days as of notification, except for any suspension, not exceeding 15 days, for the conduct of specific and reasoned in-depth investigations.
2. The initiating communication shall contain the identification of the program, the user-generated video or the audiovisual commercial communication which is alleged to be against the interests and purposes referred to in Article 4, a summary of the facts and the outcome of the investigations carried out, an indication of the competent office and the person in charge of the proceedings, as well as the time limit for submitting the defence pleadings and for the conclusion of the proceedings starting from the notification.
3. With the same communication referred to in paragraph 1, the Directorate shall inform the video-sharing platform provider, who may voluntarily adapt within 5 days from the notification of the initiating communication, by informing the Directorate, who shall order the administrative closure of the proceedings after informing the Collegiate Body and unless otherwise determined by the latter. In the latter case, the time limits of the procedure shall be extended by 5 days.
4. Except in the case of spontaneous adaptation referred to in paragraph 3, at the outcome of the investigation the Directorate shall forward the documents to the Collective Body, making a proposal for the filing or adoption of the measures referred to in Article 41(7) of TUSMA.
5. If, in the course of the proceedings, the applicant refers to the judicial authority for the same situation, he shall promptly inform the Directorate thereof. In this case, the Director shall arrange for filing by administrative means.

**Article 9**

*Final measures*

1. The Collective Body shall terminate the proceedings if it considers that the conditions laid down in Article 2(2) are not fulfilled.
2. If the conditions set out in Article 2(2) are met, the Collective Body shall order the video-sharing platform provider to take all measures, including removal, which would prevent the Italian public from accessing content deemed to be against the purposes set out in Article 4. The order must be executed promptly and, in any case, within 3 days as of notification.
3. The measures referred to in paragraph 2 shall be communicated without delay and in any event no later than 3 days after notification to the European Commission and to the competent Administrative Authority in the Member State in which the supplier is established or is deemed to be established, together with the matters of urgency.

**CHAPTER III**

**The reporting procedure to the national competent authority**

**Article 10**

*Reporting to the national competent authority*

1. The Collective Body, having examined the documents and assessed the report submitted pursuant to the second sentence of Article 7(4), unless it considers that the conditions for filing or, in case of matters of urgency, for the initiation of the procedure pursuant to Article 8 are met, shall immediately forward the documents to the national competent authority in the Member State in which the supplier is established or is deemed to be established, in order to take the measures within its competence by activating the relevant cooperation procedures between Member States, including by using the relevant information provided by the *Memorandum of Understanding*.
2. If no communication has been received from the national competent authority within 7 days of the transmission of the documents referred to in paragraph 1, or within the different time limit provided for in the relevant cooperation procedures, the Directorate shall inform the Collective Body and order the initiation of the procedure, in accordance with Article 8.
3. In the event that the national competent authority has transmitted the measure adopted, within the period referred to in paragraph 2, the Directorate assesses its adequacy and draws up a specific report which it forwards to the Collective Body within seven days. The report referred to in the previous sentence contains a proposal for the assessment of the adequacy of the measure adopted by the national competent authority to protect the interests of users or to initiate proceedings in accordance with Article 8.
4. The Collective Body, having examined the report and assessed the proposal referred to in paragraph 3, where it does not merely acknowledge the adoption of the measure by the national competent authority, shall order the initiation of the procedure, the final act of which, if it consists of an order within the meaning of Article 9(2) of the Regulation, shall be communicated before adoption to the European Commission and the national competent authority.

**PART II**

**Final provisions**

**Article 11**

*Deadlines*

1. When calculating the deadlines referred to in this Regulation, only working days shall be taken into account.

**Article 12**

*Referral rules*

1. For what is not expressly provided for in these Regulations, the Sanction Regulation applies.

**Article 13**

*Review clause*

1. The Authority has the right to revise this Regulation on the basis of the experience deriving from its implementation and in the light of technological innovation and market evolution, after hearing the stakeholders concerned.

**Annex B**

**to Resolution No 76/23/CONS**

**CONSULTATION PROCEDURES**

The Authority intends to collect, through public consultation, comments and information 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 platform whose supplier is established in another Member State’* (see Annex A to Resolution 76/23/CONS).

All interested parties are invited to send their contributions to the consultation within the mandatory deadline of **thirty (30) days** from the publication of Resolution 76/23/CONS on the *website* of the Authority [www.agcom.it](http://www.agcom.it).

Amendments to the Regulation may be proposed in the form of an amendment to the articles with a brief justification on the aspects of interest of the respondent, together with any other elements useful for the consultation.

Communications on the public consultation should be sent via certified e-mail to the address agcom@cert.agcom.it to the attention of lawyer Francesco Di Giorgi, or by registered letter with acknowledgement of receipt, courier or hand registered letter, with the following object *‘Name of the person involved -* *Public consultation referred to in Resolution 76/23/CONS*’ to the following address:

*Communications Regulatory Authority*

*Digital Services Directorates*

*to the attention of the person in charge of the proceedings*

*Mr Francesco Di Giorgi*

*via Isonzo 21/B*

*Rome*

The interested parties may request, with a specific application, to disclose their comments during a hearing, on the basis of the written document previously sent. The above-mentioned application must reach the Authority by sending it to the above-mentioned addresses, as well as to the e-mail address segreteria.dsdi@agcom.it, within the deadline of **thirty (30) days** from the publication of Resolution 76/23/CONS on the *website* of the Authority. A contact person, a telephone contact and an *e-mail* must be indicated in the same application for the forwarding of any subsequent communications.

Participants in the consultation who wish to remove access to some of the documentary elements transmitted together with the comments, must attach to the documentation provided the declaration referred to in Article 16 of the Access Regulation, approved by Resolution No 383/17/CONS, containing the indication of the documents or parts of the documents to be removed from access and the specific reasons for confidentiality or secrecy — in relation to each part of the document — justifying the request.

Communications provided by the participants in the consultation shall not pre-establish any title, condition or obligation in relation to any subsequent decisions of the Authority.

The Authority reserves the right to publish on its website, at www.agcom.it, the comments and documents received also in non-anonymous form, taking into account the degree of accessibility indicated.

**Annex C**

**to Resolution No 76/23/CONS**

**APPLICATION OF REGULATORY IMPACT ASSESSMENT PURSUANT TO RESOLUTION NO 125/16/CONS**

Pursuant to Resolution 125/16/CONS, the Authority intends to apply the regulatory impact assessment to the Regulation referred to in Annex A. In the light of the Guidelines on the regulatory impact assessment adopted in Decision No 211/21/CONS, in particular, a simplified regulatory impact assessment is carried out; the analysis will focus on the assessment of the intervention options, which in the present case are essentially as implementation options, leaving to the reasoning part of the measure the examination of the other constituent elements of the regulatory impact assessment: the analysis of the context, the definition of the problem and the identification of the recipients.

It should be considered that the adoption of the Regulation referred to in Annex A is provided for by Legislative Decree No 208/2021, which in Article 41(9) stipulates that *‘The procedure for the adoption of the measures referred to in paragraph 7 shall be defined by the Authority by its own regulation’.*

In this regard, the rule ensures the Authority a limited discretion in the choice of macro-intervention options, since it is not possible to identify an option of non-intervention, and also provides a list of the minimum criteria to be considered so that content can be evaluated as addressed to the Italian public.

Moreover, the novelty and potential application complexity of the provisions of the Regulation make it rather difficult to carry out an *ex-ante* assessment also with the expected impacts. As a result, the Authority intends to provide, following the adoption of the Regulation, a progress monitoring plan, aimed at acquiring additional information in the application.

1. **Legal framework**

Legislative Decree No 208 of 8 November 2021 and, in particular, Article 41(7), (8) and (9).

1. **Reasons for the intervention**

Pursuant to Resolution 125/16/CONS, the Authority intends to apply the regulatory impact assessment to the Regulation referred to in Annex A.

That assessment, in light of the Guidelines on the regulatory impact assessment adopted in Decision No 211/21/CONS, is carried out in a simplified form since the adoption of the Regulation is provided for in Article 41(9) of Legislative Decree No 208/2021, in so far as it provides that the Authority, by means of a specific regulation, lays down the procedure for the adoption of measures to restrict the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose provider is established in another Member State and addressed to the Italian public.

Therefore, the rule ensures the Authority a limited discretion in the choice of macro-options for intervention, since a non-intervention option cannot be identified.

1. **Area of intervention**

Direct addressees of the obligations: providers of video sharing platforms established in another Member State whose content is addressed to the Italian public

Indirect recipients: authorities, users of video sharing platform services, associations for the protection of fundamental rights referred to in points (a), (b) and (c) of paragraph 7 of Article 41 of Legislative Decree No 208/2021.

1. **Objectives and indicators:**
* Firstly, protection of minors, protection of the dignity of the person, combating hate speech, protection of consumers.
* Definition of the criteria on the basis of which it is assumed that a content is addressed to the Italian public;
* Determination of matters of urgency in which the Authority may take measures to restrict the free movement of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and addressed to the Italian public

1. **Definition of alternative options**

- zero option: no regulatory action;

- option 1: implementation of Article 41(7), (8) and 9 of Legislative Decree No 208/2021 and defining the procedure for restricting the circulation of programs, user-generated videos and audiovisual commercial communications conveyed by a video-sharing platform whose supplier is established in another Member State and addressed to the Italian public for the purposes of protecting minors, combating hate speech and protecting consumers.

**6. Identification of the preferred option and justification of the choice**

Regulatory intervention options are limited by the primary legislation and option zero is not feasible.

The regulatory activity, in this case, is provided for by primary legislation, and the Authority regulates the procedure for the adoption of measures to restrict the circulation of programs, user-generated videos and audiovisual commercial communications specifying the objective and subjective areas of application of the primary legislation.

The regulatory action is therefore adopted to implement Article 41(7), (8) and (9) of Legislative Decree No 208/2021.