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INFORMATION

From:	General Secretariat of the Council
To:	Audiovisual Working Party
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Subject:	Comments from the Italian delegation - Proposal amending Directive 2010/13/EU (AVMS)

Delegations will find attached the comments from the Italian delegation concerning the proposal for a Directive of the European Parliament and of the Council 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 in view of changing market realities.

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Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 in view of changing market realities - AVMS

January 2017

Introduction

The Italian Government appreciates the proposal of revision of the Audiovisual Media Services Directive, recognising the Commission's commitment to modernising the regulatory framework in the new digital habitat and responding to the profound changes which have occurred in the market, consumption practices and technology in recent years, with the ever-increasing convergence of broadcasting and services delivered via the Internet.

The need for a revision and not merely a “refit” – as urged by Italy during its six-month EU Presidency - arises from the aim of supporting the economic and cultural growth of the audiovisual sector and providing an appropriate, more effective legal framework for audiovisual services in the new market context.¹

It is crucially important for the European regulatory framework which governs the industry in the coming years to include "future-proof" measures capable of strengthening European firms' competitiveness and increasing cultural diversity and the transnational circulation of works, while ensuring a satisfactory level of consumer protection, especially for minors.

The following comments arise from a joint analysis of the guidelines put forward by the departments involved with regard to the main topics under discussion.²

1. Promotion of European audiovisual works

1.1 We welcome the Commission's proposal to foster the promotion and transnational circulation of European audiovisual works.

On-demand audiovisual media service providers must promote the production and distribution of European works by ensuring that their catalogues contain a minimum quota of European works and that these works are given due prominence.

¹ During Italy's Six Month Presidency, a major step forward was taken with the unanimous approval of the Conclusions on European Audiovisual Policy in the Digital Age produced during the meetings of the AVWP (Audio Visual Working Party) and adopted in Brussels on 25 November 2014 See text of the Conclusions by the Council of Culture Ministers on Audiovisual Policy in the Digital Age:

<https://ec.europa.eu/digital-agenda/en/news/council-conclusions-european-audiovisual-policy-digital-era>

² The Italian Parliament has already issued two separate measures relating to the Commission's proposal. On 28 June 2016 the VIIth Commission (Education and Heritage) expressed its approval of the proposals with two reservations, both concerning article 20: the first concerned the increase in the permitted frequency of interruptions in films (with the interval reduced from 30 to 20 minutes), which could be prejudicial to the work's integrity and continuity, and the second related to the removal of the time-limit for spots, in view of the reduction in quality of service suffered by users if spots are all crowded into the most sought-after slots in the schedule. On 27 July 2016 the VIIIth Permanent Commission (Public Works, Communications) of the Senate passed a resolution on the EU measure under discussion, stating its approval with regard to the principles of subsidiarity and proportionality. In its resolution, the Commission pointed out the need to guarantee a regulatory level playing-field for all suppliers of audiovisual media services, in order to allow fair competition between operators.

We are in favour of the introduction of a 20% quota, provided this is calculated on the basis of catalogue hours and not the number of works. After examining the impact analysis data (which already indicate a "physiological" average share of 27%), we maintain that the threshold recommended by the Commission will not hinder the development and growth, in innovation, quality and other terms, of on-demand video services in Italy.

1.2 With regard to the faculty granted to Member States of also taxing on-demand audiovisual services directed at consumers in the country of destination, the need is pointed out for a clearer definition of a number of technical and procedural aspects, in order to make this option feasible in practice if a Member State should decide to adopt it. In particular, the criteria for the calculation of revenues need to be specified, partly in order to avoid burdening Member States with disproportionate administrative costs, and clarification is required as to how the fiscal obligations imposed by a Member State on an operator based in the State (i.e. using the Country of Origin principle) are to be reconciled with those imposed on the same operator by the other States in which the service is provided, but in which the operator does not have a permanent organisation (in derogation of the Country of Origin principle).

Moreover, effective coordinating measures must be guaranteed to allow the accurate calculation of taxable revenues, in order to avoid double taxation: this presupposes a detailed knowledge of the revenues which the service generates in the other States, and any regimes put in place to tax them.

1.3 With regard to derogations, in view of the positive experience of the last few years (co-regulation with VOD providers), it is considered that these should be applied in cases of small turnovers and audiences (i.e. small or micro-enterprises), or in cases when the application of the regulations is not feasible or justified due to the type or subject of the on-demand media services. This would avoid stifling the growth of the video on demand market and allow new operators access to the sector in Italy.

2. Independence of the Regulatory Authorities and Formal Recognition of the ERGA

We welcome the addition to the Directive of the new chapter IX, "Regulatory Authorities of the Member States", which specifically requires the regulatory function to be performed by independent national regulatory authorities.

We also take a positive view of the increase in the role of the ERGA, which is assigned the task of providing the Commission with consultative technical opinions in order to increase the level of harmonisation and legal certainty with regard to jurisdictional questions related to the correct adoption of the Country of Origin Principle.

Far from overlapping with the political functions of the Contact Committee, the technical-consultative work of the ERGA could also make a valuable contribution to the adoption and circulation of good practices relating to the implementation of self- and co-regulation procedures, as well as in the verification of compliance with the codes of conduct encouraged by the Commission with regard to consumer protection and safeguards for minors.

3. Protection of minors

The new article 12 requires the Member States to adopt the most appropriate measures to guarantee that the programmes made available by a supplier of audiovisual media services under their jurisdiction that may impair the physical, mental or moral development of minors are only made available to the public in such a way as to ensure that minors will not normally hear or see them.

In the attempt to render the provision for linear and on-demand services more uniform, while the proposed amendment raises the level of protection and the severity of the rules with regard

to on-demand services, for linear services it reduces the protection with regard to the most harmful contents, which are now permitted, although with the strict requirement for technical safeguarding measures (parental control, PIN and so on).

4. Regulations governing advertising

4.1 A number of critical factors are identified with regard to the limits on overcrowding for linear audiovisual media services, product placements, sponsorships and commercial breaks.

Although we are in agreement with the draft directive's general aim of increasing flexibility in order to benefit television broadcasters - with the secondary objective of increasing revenue and thus investments in the production of national and European works - the abrogation of the time limit, replaced by a daily limit (period from 7.00 and 23.00), runs the risk of triggering a shift in advertising resources from the print media to television. We therefore suggest that the Member States should be left the option of setting stricter limits during peak viewing times.

4.2 We welcome the exemption from overcrowding regulations of the broadcaster's trailers for its own programmes and the collateral products directly derived from them, and the extension of this exemption to the television programmes of "other entities belonging to the same media group", while the regulation concerning the undue prominence of product placements should stand.

4.3 Although it is intended to reinforce the protection provided to minors, the concept of programmes with a significant children's audience, introduced by the Commission, is neither clear nor legally sound, since programmes not initially intended for children, such as sporting events or television talent shows, might fall within this category.

A programme "mainly intended for children" can be fairly easily identified, also by means of qualitative audience monitoring systems; on the other hand, audience composition is a factor potentially unrelated to audiovisual content, leaving the article open to vague and possibly arbitrary application. Audiovisual media service providers would have to be aware in advance, before broadcasting, of whether the audience will contain a significant number of minors, enabling them to avoid selling advertising slots to unhealthy food products or including product placements in the programme.³

Advertising of alcohol, tobacco and medicinal products should continue to be restricted.

The limits set for nutrition-related advertising should be set in the codes of conduct, in order to raise the level of protection.

However, we fail to see the rationale of applying these rules only to commercial communications broadcast on audiovisual media services, while still not extending them to commercial communications on the video sharing platforms referred to in art. 28b.

We therefore propose that some measures relating to advertising should be extended to video sharing platforms, in order to apply the level playing field to this article (art. 9 subsections 2-4 - Codes of conduct concerning commercial communications relating food products which may be harmful to the health of minors).

5. Video Sharing Platforms

5.1 We welcome the extension of the Directive's scope to include the new category of Video Sharing Platforms and the provision of specific measures to protect minors from harmful contents and consumers from contents which incite violence and hatred.

³ A ex post analysis by the national regulatory authority would still not achieve the aim of protecting minors from prohibited advertising, while media service providers would be unable to obtain certainties as to how the legislation would be enforced in practice.

The regime which exonerates them from all the Directive's other obligations and achieves the highest possible level of harmonisation by maintaining the provisions of the E-Commerce Directive, which dates from 16 years ago (under which providers are exempted from all responsibility for illegal contents stored on platforms, since they are mere organisers of the content, and the Member States are unable to oblige them to perform active surveillance) is not appropriate and risks creating an imbalance between players competing in the same market segments for advertising revenues and broadcasting rights.

5.2 In general terms - as indicated in the Italian positions with regard to platforms - the entire current regulatory framework (Directive 2000/31/EC on e-commerce, Directive 2001/29/EC on copyright in the information society and Directive 2004/48/EC on the enforcement of intellectual property rights) requires review in order to give due consideration for the differences between platforms, for example by means of a classification by "type" (on the basis of the service/contents offered and the access and distribution procedures), which bears in mind the dynamic evolution of the market for services and evolutions in technology, as well as the various channels and the growing economic and social role being acquired by the intermediaries. In fact, the introduction and spread of these platforms has led to profound innovations in the business model in many sectors of the economy, breaking down many traditional barriers between specific businesses area. The need is therefore felt for regulation which gives due value to the entire production chain of creative contents, starting from the authors of the content themselves.

5.3 Specifically, greater care and a gradual approach must be used to consider the definition and concept of editorial responsibility, and to adapt it to the new context. The platforms' current operating mode places them halfway between the role of audiovisual media services, which have full editorial responsibility (programme selection and organisation) and that of hosting providers pursuant to Directive 200/31/EC, whose business is purely technical. By introducing the new VSP category into the draft Directive, the European Commission itself recognises that the platform provider decides the organisation of the contents distributed, even if automated systems and algorithms are used, and therefore it must be obliged to adopt appropriate measures to protect minors.

One working hypothesis - the practical application of which would require careful consideration - might be to separate out all the relevant activities which imply ex post editorial responsibility (content selection, organisation, classification, offering to the public, recommendations and remuneration) in order to quantify a range of responsibilities and constraints proportional to the number of single activities performed.

5.4 Alongside the faculty of the Member States to identify these clusters, with obligations proportional to the extent of the editorial operations carried out (for example, by extending the qualitative rules concerning commercial communications to these players), a clearer distinction is also required between user-generated contents and professional contents uploaded by users, and between contents uploaded by users for commercial purposes and contents uploaded for other purposes, such as education, instruction or information.

With regard to the safeguards currently provided by the Commission's text, it appears advisable also to envisage the use of technologies for the automatic recognition of harmful contents, similar to those used by on-line platforms with regard to intellectual property.

The Member States should guarantee that copyright holders subject to their jurisdiction describe their audiovisual contents as European works in their metadata and make them available to service providers, to enable the latter to easily establish whether the works are European.

5.5 Specifically, the Italian Government proposes the establishment of a European digital register of European audiovisual works, with digital identification of audiovisual contents

protected by copyright.⁴ Technical systems of this kind could would cut the notice and take down times for illegal contents and ensure that they stay down. From this point of view, it is necessary to encourage the adoption of codes of content and self-regulation and the use of technologies to guarantee that content that has been taken down stays down, thus introducing permanent ex post surveillance measures.

5.6 Although there is a Court of Justice ruling on the subject, the subjection of the video parts of on-line newspapers to the Directive could have problematical implications since these are often merely supplementary to the editorial content, even though they are organised in specific sections. Here again, greater coordination by the Member States is advisable, with the indication in a recital of a list of examples to which reference can be made.

6. Media literacy

We request the restoration of the topic of media literacy, which has been completely removed from the new version of the Directive. We believe that the promotion of media literacy projects can make a significant contribution to more aware, responsible use of audiovisual media services, and in particular increase the level of protection minors enjoy against harmful and violent contents.

7. Accessibility

The rules concerning Audiovisual Media Services should be removed from the EEA (European Accessibility Act, now being approved) and be returned to the new text of the AVMS Directive. The deletion of article 7 is therefore unjustified, and the regulations governing accessibility should be restored, in view of the specific nature of the audiovisual sector, which is able to assure users appropriate safeguards.

Therefore, in this case "horizontal" regulation could be detrimental to the effectiveness of the accessibility requirements relating to audiovisual media services, which - it is worth repeating - are playing a more and more crucial role in the promotion of cultural and linguistic diversity and the protection of information pluralism.

We suggest that the new text should refer to co-regulation (or as an alternative, self-regulation), which in other countries (e.g. the UK) has yielded very good results in terms of access for people with sensory disabilities.⁵

⁴ See Italian Position on the Regulatory Framework for platforms, online intermediaries, data and cloud computing and the collaborative economy, July 2016.

⁵ In Italy, although they are under no specific obligations, private broadcasters (the obligations on public service broadcasters are tighter) already adopt subtitling systems in a high percentage of programmes (almost 80% for recent works) and sign language in some news bulletins (improvement is required here). They would therefore already be capable of complying with a provision of this kind in the directive.