

[IT] Italy adopts a legislative decree amending the Italian audiovisual media services code following the opinions rendered by the Council of State and the ad hoc committees of the Chamber of Deputies

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The Italian government has recently approved a legislative decree poised to amend the provisions laid down in Legislative Decree No. 208 of 8 November 2021 ("AVMS Code"). The legislative decree at-issue has not yet been published in the Italian Official Gazette and, therefore, this article focuses on the opinion rendered by the Italian Council of State on the amendments proposed.

On 19 December 2023, the Council of Ministers preliminarily approved the legislative decree ("Corrective Decree"), which is poised to supplement and correct the provisions laid down in the AVMS Code. In addition to being passed to the pertinent commissions of the Chamber of Deputies, the Corrective Decree was also presented by the Ministry for Enterprises and Made in Italy (MIMIT) before the Advisory Section for Regulatory Acts of the Council of State for its opinion. The Council of State's opinion was rendered on 27 February 2024 and presents interesting insights, especially regarding the provisions regulating the investment obligations in European works and works of Italian original expression.

At the outset, the Council of State noted that the objective of simplification and certainty of rules has been "*undoubtedly achieved*". Indeed, the Corrective Decree has overcome the excessive rigidity that characterizes the (Italian) sub-quota system by (i) eliminating the regulatory powers attributed to the MIMIT and the Ministry of Culture (MIC) under the AVMS Code, to vary the percentages of the sub-quotas and introduce new sub-quotas; and (ii) establishing fixed investment quotas.

Notwithstanding the above, the Council of State noted that on one hand, the simplification and rationalisation of the investment obligations seem to have been achieved through the new provisions that the Corrective Decree is poised to introduce. On the other hand, the impact analysis seems deficient as it lacks a proper assessment of the proportionality of the investment obligations applicable to on-demand audiovisual media service providers.

At the outset, the Corrective Decree is poised to set a 20% investment obligation for on-demand providers in European works (as detailed in the AVMS Code

starting from 2024). However, the Council of State observed that the documentation currently provided does not account for an assessment of the proportionality of such obligation in relation to the objective of incentivising the market and ensuring, at the same time, the protection of European works.

Moreover, such a measure does not take into account the opinion rendered by the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*) which, on the contrary, suggested decreasing the investment obligation in European works for on-demand providers, also in light of the investment obligations set in other Member States of the European Union which are significantly lower than the one envisaged in the Italian legal framework.

In addition, the Corrective Decree is poised to introduce a 60% sub-quota (i.e. of the 20% quota set for European works) investment obligation in works of Italian original expression. In this respect, the Council of State noted that it would be “*useful to integrate the impact analysis of the regulation with an assessment of the proportionality of such measure in light of the case law of the Court of Justice of the European Union (CJUE, C-222/07) which considers provisions aimed at protecting the linguistic diversity to be compliant with EU Law, thereby justifying a restriction on the freedom to provide services, in as much as they are proportionate*”.

In light of the above, the Council of State invited the government to supplement the impact assessment of the new provisions to properly assess the proportionality of the measures that the Corrective Decree is poised to introduce with the objective pursued.

The Chamber of Deputies has suggested reducing the primary quota for European works (from 20% to 16%) but an increase in the sub-quota for works of Italian original expression (from 50% to 70%) aimed at increasing the overall investments in Italian works.

Whether the Italian government has concretely taken into consideration the opinions detailed above will have to be assessed after the publication of the Corrective Decree in the Italian Official Gazette.

Consiglio di Stato, Sezione Consultiva per gli Atti Normativi, Numero: 00275/2024

https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=consul&nrg=202400118&nomeFile=202400275_27.html&subDir=Provvedimenti

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