[IT] With great power comes great responsibility: Italian rulings confirm AGCOM sanctions against Google for gambling advertising violations

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First, the Italian Council of State (through Judgment No. 4277 of 13 May 2024, regarding the Google Search service) and then the Regional Administrative Court (TAR) for Lazio (through Order No. 1940 of 16 May 2024, regarding the YouTube video-sharing platform service, and Order No. 2272 of 31 May 2024, regarding the X service) confirmed the sanctioning measures adopted by the Italian Communications Authority (AGCOM) against Google Ireland Limited and Twitter International Unlimited Company for violating the ban on advertising gambling with cash winnings introduced by Article 9 of Decree Law No. 87 of 12 July 2018, converted with amendments into Law No. 96 of 9 August 2018 (hereinafter referred to as the Dignity Decree).

The significance of these rulings lies in the fact that, for the first time, Italian jurisprudence has recognised the liability of Google and Twitter for their digital services (see IRIS 2019-7:1/21, 2022-8:1/4,2024-1:1/12).

The importance of the Italian Council of State's ruling is that it established the active role of the Google Search service provided by Google. Previously, the Court of Justice of the European Union had not identified any liability on Google's part due to the "merely technical, automatic, and passive" nature of the Google Ads service, which excluded the possibility of knowing and controlling the transmitted data. However, through Judgment No. 4277, the Council of State classified Google as an active hosting provider, thereby holding it responsible.

The aforementioned ruling confirmed the actions of AGCOM, which in its Resolution No. 541/20/CONS demonstrated Google's awareness of the illegal activity committed and disseminated through an advertising service offered to a commercial user via Google Ads. Therefore, the critical aspect to verify is the provider's actual conduct concerning the content disseminated. The measure adopted by AGCOM showed that the provider was fully aware of the illegal activities being carried out. Furthermore, the measures adopted by AGCOM revealed that neither of the conditions for exemption from liability under Article 5 of the DSA (formerly Article 14 of the E-Commerce Directive) had been met.

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This aspect was the focus of the first sanctioning measure adopted by AGCOM against Google, followed by three more for new violations found again with Google through the YouTube video-sharing platform through Resolutions Nos. 275/22/CONS of 19 July 2022, 331/23/CONS of 5 December 2023, and 50/24/CONS of 1 March 2024, regarding the violation committed through the Google Ads service of Article 9 of the Dignity Decree.

Finally, through the recent orders of the TAR for Lazio Nos. 1940 of 16 May 2024, and 2270 of 31 May 2024, the legitimacy of AGCOM's actions concerning provider liability was again confirmed, respectively for Google with its YouTube video-sharing service and Twitter International Unlimited Company with its X service.

AGCOM's recognition of the provider's liability was based not on any illegal video uploaded to a VSP, but on the awareness of the illegal activity due to commercial partnership relationships established between the companies and their content creators. Although these are still orders to be followed by the relevant judgments on the merits, the TAR has already noted that the “notice and stay down order” contained in the contested measure did not concern all content disseminated on a VSP platform but only that content identified therein.

Eventually, the TAR reiterated what was stated by the Council of State in the referenced ruling, namely that global intermediaries that publish a massive amount of advertising daily are required to "equip themselves with adequate organisational systems, including automated ones and using artificial intelligence tools ... to prevent advertisers from publishing advertisements in violation" of Article 9 of the Dignity Decree.

Sentenza 4277/2024 del 13 maggio 2024

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Judgment 4277/2024 of 13 May 2024

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