[IT] Transposition of the revised AVMSD

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On 4 November 2021, the Italian Government approved Legislative Decree no. 208/2021 ("New AVMS Code") implementing Directive (EU) 2018/1808 of the European Parliament and of the Council that amended Directive 2010/13/EU ("AVMS Directive"). Legislative Decree no. 208/2021 has repealed and substituted Legislative Decree No. 177/2005 ("Previous AVMS Code").

As is customary in Italy, the European Delegation Act 2019-2020 entrusted the Government with the transposition of several EU Directives into national law, with Article 3 dictating the guiding principles to be followed in the implementation of the AVMS Directive. The Government was bound, among other things, to repeal and substitute the provisions laid down in the Previous AVMS Code through the approval of a new AVMS Code; to provide specific measures aimed at ensuring an adequate level of protection for minors in relation to audiovisual content, including user-generated content and commercial communications displayed by video-sharing platforms; and to provide specific measures on the promotion of European works, also vis-à-vis on-demand audiovisual media services.

The draft bill implementing the AVMS Directive was preliminarily approved by the Italian Council of Ministers on 5 August 2021. Thereafter, it was submitted to Parliament for the required (non-binding) opinion of the competent committees of the Chamber of Deputies and the Senate of the Republic. The draft of the New AVMS Code was also forwarded to the Unified Conference for the State and Regions, the Italian Communications Authority ("AGCOM") and the Italian Council of State, all of which delivered detailed comments. The New AVMS Code was published in the Official Gazette on 10 December 2021, making it effective on 25 December 2021. In addition, pursuant to the TRIS notification procedure set forth by the EU Directive 2015/1535, on 22 October 2021, the Italian Government notified the European Commission of the draft New AVMS Code, specifying that the relevant provisions for the purposes of the notification were those regulating video-sharing platforms (Articles 41 and 42) and the promotion of European works (Articles from 52 to 57). Notably, under the TRIS notification procedure, the notification of the draft starts a three-month standstill period, to allow both the European Commission and the other Member States to analyse the notified text and respond appropriately. Article 71, paragraph 4, of the New AVMS Code has expressly provided that the provisions laid down in Articles 41 and 42 (video-sharing platforms), and Articles 52-57 (promotion of EU and Italian works) will be

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applicable from 1 March 2022, whereas the remaining provisions contained in the New AVMS Code are already applicable (albeit, with few exceptions which, however, are not related to the TRIS notification procedure).

The Italian transposition of the AVMS Directive is intricate and presents several novelties compared to the Previous AVMS Code. Below are some very quick insights on the most relevant provisions of the New AVMS Code.

1. Protection of Minors (Articles 37-38 of the New AVMS Code)

The New AVMS Code includes provisions for the protection of minors - namely Articles 37 and 38 - which have respectively replaced Articles 34 and 35 of the Previous AVMS Code.

Article 37 of the New AVMS Code, which transposes Article 6a of the AVMS Directive, lays down a general prohibition on linear providers to broadcast programmes that might seriously impair the physical, mental or moral development of minors (such as adult movies - for the age of 18 years or older -, and programmes involving gratuitous, repeated or brutal violence or programmes involving pornography). Whereas, pursuant to paragraph 2, linear providers may broadcast programmes that are likely to impair the physical, mental or moral development of minors or movies for 14 years or older only, provided that they:

broadcast the programme, alternatively: (a) during the night, between 11:00 p.m. and 7:00 a.m., or (b) adopt technical measures to ensure that minors will not normally watch such a programme; and identify the programme by a visual symbol throughout its entire duration which makes clear to the viewers that the programme is not suitable for children.
Conversely, pursuant to Article 37, paragraph 3, on-demand providers are allowed to make available to the public programmes that might seriously impair the physical, mental or moral development of minors, as long as they adopt appropriate measures to prevent minors from watching or listening to such programmes, including personal identification numbers, filtering, age verification or identification systems. The implementing provisions of such measures must be adopted by AGCOM and the Ministry of Economic Development (“MISE”), upon the opinion of the Authority for Childhood and Adolescence and the Media and Minors Committee.

Of relevance, Article 37 of the New AVMS Code specifically provides that minors’ personal data collected by providers of audiovisual media services may not be processed for commercial purposes and, in particular, for direct marketing, profiling and targeted advertising purposes.

In addition, pursuant to Article 38, paragraph 2, of the New AVMS Code, failure to comply with the provisions set forth under Article 37, can be sanctioned with a

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fine ranging from EUR 30 000 to EUR 600 000. In the most serious cases, AGCOM may also suspend providers' authorisation for a period not less than 7 days nor exceeding 180 days. In addition, in the event on-demand providers violate the rules on programmes that might seriously impair the physical, mental or moral development of minors, AGCOM may order the disabling of their transmission system.

2. Video-Sharing Platforms (Articles 41-42 of the New AVMS Code)

The provisions laid down in Articles 41 and 42 of the New AVMS Code are aimed at transposing Articles 28a and 28b of the AVMS Directive. To recall, the scope of application of the AVMS Directive was extended to encompass video-sharing platforms.

Article 41 of the New AVMS Code lays down the criteria to determine whether a video-sharing platform provider can be deemed established in Italy and, therefore, subject to Italian jurisdiction. Of relevance, paragraph 7 states that the free circulation of programmes, user-generated videos and audiovisual commercial communications conveyed by a video sharing platform provider established in another EU Member States and directed to the Italian public can be limited for the following purposes: (i) the protection of minors from content that may harm their physical, mental or moral development; (ii) the fight against incitement to racial, sexual, religious or ethnic hatred, as well as the violation of human dignity; (iii) the protection of consumers, including investors.

Article 42 of the New AVMS Code lays down the safeguarding provisions applicable to video-sharing platforms under the Italian jurisdiction. Such provisions do not deviate from those laid down under Article 28b, paragraph 1, (a) – (c) of the AVMS Directive.

Of relevance, AGCOM, along with the Media and Minors Committee, shall promote forms of co- and self-regulation through codes of conducts and, along with the Authority for Childhood and Adolescence and the Media and Minors Committee, shall adopt appropriate guidelines for the codes of conduct. In addition, video sharing platforms are required to adopt specific safeguards towards users (e.g. by including specific requirements in the terms and conditions of video sharing platform services, etc.).

Failure to comply with the provisions set forth under Articles 41 and 42 of the New AVMS Code is sanctioned with a fine ranging from EUR 30,000 to EUR 600,000 (or up to 1% of the annual turnover in certain circumstances).

3. Advertising Limitations (Article 45 of the New AVMS Code)

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Article 45 of the New AVMS Code implements the provisions laid down under Article 23 of the AVMS Directive and introduces significant changes to the limits previously imposed on advertising concentrations for linear AVMS providers under the Previous AVMS Code.

In particular, the Public Service Broadcaster (RAI)'s broadcasting of advertising for each channel cannot exceed: (i) 7% (and 6% from January 1, 2023) between 6am and 6pm as well as between 6pm and 12am, and (ii) 12% per hour (any overflow, in any case not exceeding 1% per hour, must be recovered in the preceding or following hour). The Previous AVMS Code provided that RAI's advertising could not exceed 4% of the weekly broadcasting time and the calculation was based on average on RAI's three main channels.

In addition, pursuant to Article 45 of the New AVMS Code the broadcasting of free linear AVMS providers' advertising, telepromotion and teleshopping for each channel cannot exceed 20% between 6am and 6pm and between 6pm and 12am. As to Pay TVs, advertising cannot exceed 15% between 6am and 6pm as well as between 6pm and 12am. Whereas, the Previous AVMS Code provided an 18% hourly limit and a 15% daily limit applied to free-to-air TV channels, while a 12% hourly limit applied to Pay-TV channels.

Of relevance, however, pursuant to paragraph 5, the abovementioned limits do not apply to self-promotion announcements, to sponsorship announcements and product placement, to neutral frames between editorial content and television advertising or teleshopping spots, and between individual spots.

4. Promotion of European Works (Articles 52–57 of the New AVMS Code)

The provisions relating to the promotion of European works are provided in Articles 52 – 57 of the New AVMS Code.

Article 53 of the New AVMS Code, which lays down the programming quotas applicable to linear providers, is not significantly different from the Previous AVMS Code. In particular, it requires linear providers to reserve:

More than 50% of the eligible hours to European works. 1/3 sub-quota to audiovisual works of Italian original expression produced anywhere.
A particular novelty is represented by Article 54 of the New AVMS Code which has expressly extended the scope of application of the investment obligations set forth therein to linear providers who, although established in another EU Member State, target an Italian audience. In particular, Article 54 of the New AVMS Code prescribes that linear providers must reserve:

12.5% of their net annual revenue to the pre-acquisition, acquisition and production of European works produced by independent producers; 50% of the main EU quota to works of Italian original expression, produced anywhere by independent

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producers in the last five years; 3.5% of their annual net revenue to cinematographic works of Italian original expression, produced anywhere by independent producers; 75% of the cinematographic sub-quota to works of Italian original expression, produced anywhere by independent producers in the last five years.

However, it should be noted that the last two sub-quotas do not apply to companies broadcasting cinematographic works in a non-significant and residual manner (according to annual thresholds established by AGCOM).

In relation to on-demand providers, the catalogue and investment quotas are provided for under Article 55 of the New AVMS Code.

In particular, Article 55 prescribes that on-demand providers subject to Italian jurisdiction must comply with the following catalogue quotas:

30% of their catalogue to European works produced within the last five years, to be calculated on the number of titles. The same obligation applies also to transactional video on-demand providers (TVOD), but in this case the works are not required to have been made in the last five years; 50% of the main EU quota to works of Italian original expression, produced anywhere, in the last five years, by independent producers.
Whereas, Article 55 of the New AVMS Code requires on-demand providers to invest:

a quota of their annual net revenue in the production, purchase or pre-purchase of the rights to European works produced by independent producers. This quota amounts to: from 1 March 2022 until December 31, 2022: 17% of the annual net revenue in Italy; from 1 January 2023: 18% of the annual net revenue in Italy; from 1 January 2024: 20% of the annual net revenue in Italy; 50% of the main EU quota in works of Italian original expression, produced anywhere, in the last five years, by independent producers; 20% of the Italian sub-quota on works of Italian original expression in cinematographic works of Italian original expression, produced anywhere, in the last five years, by independent producers.
Of absolute relevance, it should be noted that the scope of application of the investment quotas under Article 55 of the New AVMS Code applies to both on-demand providers subject to Italian jurisdiction and on-demand providers established in another EU Member State who operate services aimed at Italian consumers. Whereas, the catalogue quotas apply only to on-demand providers subject to Italian jurisdiction.

Article 55 of the New AVMS Code provides for a specific exemption from the investment quotas for providers with a low audience or low turnover established abroad and for providers who, in the light of their nature and scope, cannot comply with the quota obligations. Ad hoc derogations may be granted by AGCOM

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under certain circumstances. In addition, providers who earn at least 80% of their net annual revenues from linear broadcasting and provide on-demand services, are required to comply only with the programming and investment quotas established for linear providers and, therefore, are not required to comply with the quotas laid down in Article 55 of the New AVMS Code for on-demand providers.

Failure to comply with the abovementioned quota obligations may still be sanctioned by AGCOM with a fine with a fine ranging from EUR 100 000 to EUR 5 000 000 or up to 1% of the annual revenues in the event such percentage exceeds EUR 5 000 000 and with a suspension of the activity in case the infringement is particularly serious or repeated.

Decreto Legislativo 8 novembre 2021, n. 208 Attuazione della direttiva (UE) 2018/1808 del Parlamento europeo e del Consiglio, del 14 novembre 2018, recante modifica della direttiva 2010/13/UE, relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri, concernente il testo unico per la fornitura di servizi di media audiovisivi in considerazione dell'evoluzione delle realta' del mercato. (21G00231)

https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:DECRETO.LEGISLATIVO:2021-11-08;208!vig=

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