

Newsalert

IP, TMT and Data Protection Department

The new AGCom competences for the enforcement of the European Regulation
Platform to Business

Law no. 178 of December 30, 2020 (*Legge di Bilancio 2021*) granted new powers to the Italian Communications Authority (AGCom) for the enforcement of Regulation (EU) 2019/1150, which established new obligations for online intermediaries/search engines. At the same time, the legislator extended to these entities the obligation to enrol with the Register of Communication Operators (ROC) kept by AGCom and to contribute to the financing of the Authority itself, if these entities offer services in Italy, even if they are not established in the national territory.

In particular, the European Regulation - also known as the Platform to Business (P2B) Regulation - aims to promote fairness and transparency for *business* users who make use of online intermediation services and the services offered by online search engines. With this regulatory act, the EU legislator has introduced a set of measures aimed at specifically protecting professional subjects (especially small and medium-sized enterprises), whose use of online intermediation services and “listing” on search engines has increased exponentially over the last few years. Consumers and end users, who for decades have been the beneficiaries of multiple protection measures identified by European and national legislative policies, are in this context indirectly protected by the new rules identified by the Regulation.

The obligations imposed by Regulation 1150/2019 are specifically aimed at increasing clarity in the drafting of the terms and conditions of online intermediation services and the appropriate communication of any changes to these contractual provisions. It is also required the implementation of appropriate communication mechanisms for any restriction, suspension or termination of services; the prior identification, and justification, of the parameters that determine the ranking of a certain product or service, as well as the reference to the reasons underlying any differential treatment applied to some of the products or services offered. The set of measures established at EU level is completed by further obligations of fairness, good faith and transparency in the relationship with commercial users, as well as the provision of mediation and dispute resolution mechanisms.

In the identification of the subject institutionally entrusted to ensure “*adequate and effective enforcement*” of Regulation 2019/1150 (Article 15) - formally entered into force on July 12, 2020 - the legislator decided to entrust AGCom with this task by focusing on the skills gained by the Authority in relation to continuous developments of the digital ecosystem. Specifically, the legislative technique chosen was to intervene directly on the law establishing the Authority - Law



no. 249/1997 - now integrated by paragraphs 515 and 517 of art. 1 of the Law 178/2020. The Authority will therefore be required to enforce the European Regulation through the adoption of guidelines, the promotion of codes of conduct (between providers of online intermediation services and business users) and the collection of relevant information. Among the changes made, as mentioned above, is the inclusion of providers of online intermediation services and search engines in the subjective scope of the obligation to register with the ROC, which is maintained by the Authority itself.

Furthermore, in the event of non-compliance with an order or warning from the Authority relating to the application of Regulation 1150/2019, AGCom may impose a pecuniary administrative sanction in an amount not less than 2 percent and not more than 5 percent of the turnover achieved by the infringing party in the last financial year ended prior to the notice of infringement.

These new powers of the Authority are also linked to the new obligations to contribute to covering the administrative expenses necessary to carry out the new institutional functions. The rate of the contribution has already been set, for 2021 (the year of first application) at 1.5 per thousand of the revenues relating to the value of production made in Italy, even if they appear in the financial statements of companies based abroad. For subsequent years, the Authority will have the option of varying this percentage, without exceeding the limit of 2 per thousand of revenues. The provision at hand is likely to cause discussion, like the similar provisions on the contribution obligations towards the AGCom (subject of multiple and current pending disputes at national and EU level), as it would set the financing charge at the entire value of production, without further distinctions and exclusions referred to the underlying costs, as well as determinations aimed at averting possible risks of double taxation.

Finally, with paragraph 516, the legislator intended to specify that the new AGCom powers do not impact on the competence of the Italian Competition Authority (ICA) to sanction any unfair commercial practices pursuant to art. 27, paragraph 1-bis, Legislative Decree 206/2005 (Consumer Code). This last rule also raises some questions on its inclusion in the Law due to the diversity in the perimeter of the subjects that intend to protect Regulation 1150/2019 (business users) as opposed to the Consumer Code (consumers), diversity from which there should be no risk of “interference” between the competences of the two authorities.

The intervention of the legislator has left unanswered, *inter alia*, the described questions regarding the new powers of the AGCom and the related contribution obligation, which the Authority will have to face during the first application of the new legislation.

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