

ANNEX B to Resolution no. 3/23/CONS

REPORT ON THE REGULATORY IMPACT ANALYSIS

1. Introduction

Pursuant to Resolution no. 125/16/CONS, the Authority applied the Regulatory Impact Analysis (AIR) to the Regulation referred to in Attachment A. The results of this analysis are described in the following.

Given the fact that the AIR Guidelines were adopted with Resolution no. 211/21/CONS, a simplified AIR was carried out, i.e. the analysis focused on the assessment of the intervention options which, in the present case, were essentially implementation options, while the examination of the other constituent elements of the AIR were dealt with in the motivation section of the provision: analysis of the context, definition of the problem and identification of the recipients. In light of this, the contents of this report are to be read in conjunction with the observations made in the Resolution.

The decision to carry out a simplified analysis was motivated by a series of considerations concerning the restrictions to the Authority's action and the nature of the regulatory intervention.

As regards restrictions, the adoption of the Regulation on the identification of benchmark criteria for determining fair compensation is envisaged by Legislative Decree no. 177/2021, which updates the text of the Copyright Law (Law no. 633 of 22 April 1941, LDA) by introducing Article 43-bis in Title I, Chapter IV, Section II. Paragraph 8 of this Article states that "[...] *the Communications Authority shall adopt a regulation in which it sets forth the benchmark criteria for determining the fair compensation referred to in the first paragraph, taking into account, among other things, the number of online consultations of the articles, the number of years in business and prominence in the marketplace of the publishers referred to in paragraph 3, number of journalists employed, and costs incurred for technological and infrastructural investments by both parties, as well as the economic benefits deriving to both parties from the publications in terms of visibility and advertising revenues*". In this regard, the provision leaves the Authority with limited discretion in choosing the macro-options for intervention, since it provides a list of the criteria to be considered and since non-intervention does not appear to be an option. As regards the nature of the regulatory intervention, it is important to underline that, in accordance with the rationale of the European and national legislation, the identification of fair compensation is, on a preliminary basis, the subject of free negotiations between the parties, which can reach an agreement that "may" take into account "also" the criteria indicated by the Authority in the Regulation, while the Authority is assigned a role upon request by a party in the event that an agreement on the determination of the amount is not reached. Consequently, the Authority's task is not to define a regulated price, but rather to "assist" the private negotiation system so that fair and mutually beneficial

agreements can be reached, respectful of copyright and taking account of the asymmetries in bargaining powers and the public law interests involved. Furthermore, the novelty and the potential complexity in applying the provisions of the Regulation make it rather difficult to conduct a thorough *ex-ante* analysis of the expected impacts. For this reason, indeed, once the Regulation is adopted, the Authority will set up a permanent monitoring plan aimed at gathering all the information that is produced as the Regulation is being applied. This will also make it possible to comply with Article 2 of Legislative Decree no. 177/2021 which requires that the impact of the Regulation be verified.

The implementation of the AIR, in particular, is dealt with by Articles 4 and 6 of the Regulation, namely to the part of the provision that describes the model for calculating fair compensation, in consideration of the fact that the latter constitutes the area where the Authority has a greater margin of discretion which it must exercise by carefully balancing the various interests at stake within the confines of the regulatory options.

The methodology adopted for the evaluation is qualitative in nature and follows a multi-criteria approach for a number of reasons: novelty of the subject, need to evaluate aspects that cannot be measured in purely economic terms, difficulty in finding all the information needed, and unavailability of reliable quantitative data.

2. Possible Actions

2.1 *Compensation due by information society service providers other than media monitoring and press review enterprises (Article 4)*

The pre-investigation activity carried out and the positions expressed by the stakeholders during consultations led to the emergence of two main implementation options regarding the application of article 43-bis of the Copyright Law (LDA) for the purpose of identifying benchmark criteria for determining fair compensation:

- **Option A:** application of a “correct” revenue-sharing model;
- **Option B:** application of the criteria without indicating any calculation basis nor rate.

With reference to **Option A**, the way of calculating fair compensation draws on the revenue-sharing model and is based on the application of a rate to the calculation basis, which usually coincides with the revenues of the party that is required to pay the fee. In the case in point, the calculation basis consists of the advertising revenues obtained by the Provider, party to the negotiation, from the online use of the press publications provided by the Publisher, counterparty, net of the revenues that the latter obtains from the redirect traffic generated by the provider through its services in relation to the aforesaid publications. This “correction” compared to a classic revenue-sharing model consists in ensuring that the benefits of both parties are considered. The value of the rate is then defined on the basis of a series of benchmark criteria to be applied cumulatively

in decreasing order of importance. These criteria, based on those identified by Article 43-bis, describe some aspects, measurable through ad hoc indicators, which taken together provide an overall and synthetic snapshot of the value of the publisher's press publications and, through a system of increases (discounts) attributed on the basis of the value assumed by the aforesaid indicators, are used to modulate the value of the rate within a maximum value presumed to be appropriate.

With reference to **Option B**, the amount of fair compensation is determined on the basis of the application of the benchmark criteria, starting with those indicated in Article 43-bis, without a predefined scheme.

In the context of **Option A**, two possible sub-options emerged which envisage different methodologies for applying the revenue-sharing model described above:

- **Sub-Option A1 (one-to-all model):** the determination of the calculation basis defines the amount that the Provider must pay to the entire group of entitled publishers (outright or by applying a rate), while the criteria are applied with the aim of identifying a distribution of the available amount among the Publishers, according to the characteristics expressed through the criteria;
- **Sub-Option A2 (one-to-one model):** the calculation basis is determined in relation to the parties involved in the negotiation (provider and publisher) and the amount of fair compensation is defined by applying to the calculation basis a rate whose value is modulated on the basis of the benchmark criteria.

2.2 Compensation owed by media monitoring and press review enterprises (Article 6)

Regarding the determination of the fair compensation owed to publishers by media monitoring and press review enterprises, the preliminary investigations and the results of the public consultation have highlighted three possible options for implementing the provisions of Article 43-bis of the Copyright Law (LDA) for the purposes of identifying the benchmark criteria for determining fair compensation:

- **Option A:** application of a revenue-sharing model without indicating the values of the rate that are presumed to be fitting;
- **Option B:** application of a revenue-sharing model where the rate is indicated;
- **Option C:** application of fair compensation per article.

With reference to **Option A**, fair compensation is determined on the basis of the turnover of the media monitoring and press review enterprise deriving from these activities, considering a set of criteria identified on the basis of the provision of Article 43-bis of the Copyright Law (LDA) adapted to the specific context of application. The turnover that is actually relevant for the purpose of defining fair compensation is limited to the revenues deriving from all the activities connected to the delivery of press review and media

monitoring services and, in particular, from the activities relating to the production, reproduction and disclosure to the public of press publications¹. In particular, the criteria describe the salient aspects, taken as a whole, of the publisher's production – which provide an indication of the value of the publisher's press publications that can be used to establish the compensation to be paid to the publisher. In particular, for determining the compensation, the criteria are considered cumulatively, following a decreasing order of importance. In this option there is no indication regarding the value of the rate to be applied due to the existence of consolidated market practices in the context of press review and media monitoring services, and to the need to protect freedom of negotiation. Option A, however, does envisage that differentiated rates be applied to different types of articles (online source, article with reserved reproduction rights, article without reserved reproduction rights).

As regards **Option B**, the determination of fair compensation is based on the turnover of the media monitoring and press review company, calculated for the entire range of entitled publishers, to which a single rate is applied. The resulting amount is then divided among the publishers on the basis of the benchmark criteria.

As far as **Option C** is concerned, fair compensation is based on the turnover of the media monitoring and press review company and on its breakdown based on the actual number of articles made available by the publisher, so as to come up with a unit fee. This represents the “amount” to be paid to the publisher for each article he provides.

3. Identifying the Preferred Option

The evaluation process of the options presented in the previous section focused on qualitative parameters deemed suitable for the AIR procedure considering both the difficulty in making a quantitative and sufficiently precise estimate of the expected impacts, and the need to carefully balance the various interests at stake. Indeed, the interests involved come under private law where freedom of negotiation and the achievement of mutually beneficial agreements must be preserved, and under public law where values such as freedom of expression and pluralism of information are to be protected, as well as ensuring adequate incentives for the parties, each in their own field of activity, so as to maintain a high level of investment in innovations, especially technological innovation.

As regards the provisions of Article 4 of the Regulation concerning **the determination of the fair compensation to be paid by information society service providers other**

¹ By way of example but not limited thereto, press reviews (selection, indexing, organisation, collation, retrieval, transmission and making available press publications), monitoring services, media analysis, production, preparing and marketing of newspaper cuttings, data bases, telematic and IT services, software monitoring agencies, providing software and hardware, delivery.

than media monitoring and press review enterprises, the evaluation of the options is based on a multi-criteria approach which considers the following parameters:

- i)* adequacy with respect to the objective of reducing the value gap;
- ii)* mitigation of asymmetry in bargaining power;
- iii)* fairness in relation to the heterogeneity of the recipients;
- iv)* effectiveness in protecting public interests;
- v)* prevention of litigation, if any;
- vi)* certainty of the process for determining fair compensation.

On the basis of the parameters indicated above, the Authority chose option A, in particular **Sub-Option A2**, based on the following assessments:

- we reckon that this option responds more adequately to the goal of bridging the value gap, since the calculation basis considered synthetically reflects the value gap;
- the presence of a rate and the criteria used to determine its value are a tool for mitigating the asymmetry of the contractual powers of the parties, thus constituting guidance for the negotiations;
- the set of criteria identified and the application methods, including the choice to apply them cumulatively and according to a ranking order of importance, meet the need to ensure fair compensation to the various publishers²; the composition of the calculation basis which includes the revenues from the redirect traffic of the publisher also contributes to the heterogeneity of the publishers which is to be considered. Finally, the presence of a rate, for which a cap (maximum limit) is also indicated, confers the necessary flexibility to guarantee fairness, since it allows to consider the differences among the publishers and among the providers;
- the criteria chosen and their sorting are inspired by the desire to reconcile the underlying interests, regulated by public law, in order to guarantee adequate protection (in particular, freedom of expression, pluralism of information, quality of information, innovation)³. The level of detail of the model, based on the hypothesis of bilateral negotiations (one-to-one), also preserves the freedom of negotiation by guaranteeing the possibility of concluding both bilateral agreements and collective agreements or framework agreements – depending on the case at hand;
- the elements of the option calculation model – in particular the choice of the calculation basis and of the criteria – contain clear, objective and effectively quantifiable quantities and indicators, which helps avoid ambiguity and prevent possible disputes;

² Regarding the advantages and disadvantages related to the identification of the criteria and their organisation the reader is referred to the detailed observations made in the Resolution.

³ Please refer to the Resolution for detailed observations.

- the level of detail of the calculation model and of the elements that constitute it offers the parties sufficient certainty with regard to the determination of fair compensation in case of disputes brought before the Authority;

With regard to the provisions of Article 6 of the Regulation, concerning the **determination of fair compensation owed by media monitoring and press review enterprises**, the options are evaluated according to a multi-criteria approach which considers the following parameters:

- i) adequacy with respect to the objective of reducing the value gap;
- ii) flexibility and fairness in relation to the heterogeneity of the recipients and the different types of press publications;
- iii) recognition of established market practices;
- iv) effectiveness in protecting public interests;
- v) prevention of litigation;
- vi) certainty of the determination process.

On the basis of the previously identified parameters, the Authority decided to choose **option A**, based on the following assessments:

- we reckon that this option responds more adequately to the objective of bridging the value gap as the option adopted considers it in very precise terms, by considering the turnover that is important for the calculation basis and through the identified criteria;
- the set of criteria identified and the methods of application, including the choice of applying them cumulatively and in ranking order in terms of importance, meet the need to ensure fair compensation for each publisher. The indication relating to the rate, regarding which the measure suggests that the minimum limit should be that established by consolidated market practice, confers the necessary flexibility to guarantee fairness, since it allows to take into account the differences existing within the group of publishers and media monitoring and press review enterprises, and the different types of press publications (online source, article with restricted reproduction clause, freely reproducible article);
- the recognition of consolidated market practices, relating not only to the definition of a rate, but also to the determination of the parameters aimed at enhancing the right of communication to the public, provides for intervention through a less invasive regulation;
- the criteria chosen and their sorting are inspired by the desire to reconcile the rights of reproduction and communication to the public with the underlying public interests with a view to guaranteeing adequate protection (in particular, freedom of expression, pluralism of information, and quality of information). The option adopted, based on the hypothesis of bilateral negotiations (one-to-one), also preserves the freedom of negotiation by guaranteeing the possibility of concluding

- both bilateral agreements and collective agreements or framework agreements depending on the case at hand;
- the choice of the elements of the calculation basis and of the criteria, contain clear, objective and effectively quantifiable quantities and indicators, which helps avoid ambiguity and prevent possible disputes;
 - the level of detail of the option chosen offers the parties sufficient certainty with regard to the determination of fair compensation in the event of disputes brought before the Authority.

4. Monitoring and *ex post* assessment

In compliance with the provisions of the AIR Guidelines, whenever an *ex post* verification of the regulation is envisaged, a monitoring plan based on specific indicators should be prepared within the AIR. Furthermore, it is also useful to monitor the objectives of measures subject to AIR also where the effects of the regulation are difficult to estimate with reasonable accuracy, for example due to the uncertainty linked to the technological or market context. In this case, it may be necessary to periodically review the regulation and update the AIR.

The circumstances set out above apply to the Regulation referred to in Attachment A, since: *i)* Article 2 of Legislative Decree no. 177/2021 provides that after two years from the date of entry into force of the Decree, the Authority “... shall send a report to the Chamber of Deputies and the Senate, supplemented by a verification of the impact of the regulation, on the application of the provisions contained therein over which it has competence, with particular reference to the criteria and methods for determining fair compensation...”; *ii)* shall make a full assessment of expected impacts at the present time is complex, as stated earlier; *iii)* the novelty of the subject matter and the complexity of its application, as well as the rapid evolution of business models and of the technological and market context may require a revision and updating of the provisions, as provided for under Article 14 of the Regulation.

In light of these observations, **a monitoring plan has been drawn up** for the application of the Regulation, which envisages the periodic collection of quantitative and qualitative data in order to monitor its effects and the problems, if any, associated with its application.

In this regard, relevant information may be retrieved directly from the data held by the Authority, in particular as regards the complaints received and their outcome. Further information may be obtained from stakeholders – for example information about the agreements entered into, appeals to the judicial authority concerning the determination of fair compensation and, more generally, issues that emerge in relation to the determination of fair compensation during negotiations or during the implementation of the procedure set forth under the Regulation.