

[IT] AGCOM closed the proceeding to identify positions harmful to pluralism in the online advertising sector

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With its decision no. 24/22/CONS of February 17, 2022, AGCOM has declared the procedure for determining the relevant market and the dominant position of companies in online advertising to be closed. This procedure started with Decision No. 356/19/CONS of 18 July 2019 (see IRIS 2019-9).

The proceeding was established under Article 43, paragraph 2 of Legislative Decree No. 177/2005 ("the consolidated law on AVMS" or "TUSMAR") in force until 2021: according to this, the AGCOM had the power to investigate sectors of the so-called *Sistema Integrato delle Comunicazioni* (Integrated Communications System, SIC) including the online advertising sector with the goal of guaranteeing the media pluralism principle.

In particular, the proceeding was conceived in two phases: the first, with the purpose of identifying the relevant markets, according to the methodologies and criteria of competition law.

Once the relevant markets were defined, the second phase was aimed at ascertaining the presence of any dominant positions by holding into account, amongst others, indicators such as the revenues, the level of competition within the system, the barriers to entry, the size of the economic efficiency of the company; if so, Article 43 gave the AGCOM the power of assuming behavioural or structural measures, so as to preserve the media pluralism.

According to decision No. 24/22/CONS, the proceeding has been closed without completing any of the above-mentioned phases, with regards to the implementation of the Directive (EU) 2018/1808 and to the resulting new Legislative Decree No. 208/2021 ("the new consolidated law on AVMS" or "TUSMA").

Indeed, The Authority observed that the provisions of Article 43 of TUSMAR has been replaced with the rules of the new Article 51 of TUSMA, which settles a new methodology of investigations.

In particular, the existence of positions potentially harmful to the media pluralism has currently to be ascertained, taking into account some criteria directly set up by Article 51 (amongst others: the revenues, the level of static and dynamic competition within the system, the barriers to entry, the convergence between

sectors and markets, the vertical and conglomerate integration of companies, the availability and control of data), according to the methodology given in specific Guidelines and to the new rule of procedure, both in the remit of the AGCOM and still under drafting.

Therefore, the AGCOM considered it to be appropriate closing the proceeding and carrying it out under the new legislative and regulatory provisions in light of the *tempus regit actum* principle, according to which the legitimacy of the acts of the administrative proceeding must be assessed, with reference to the regulations in force at the time in which the final act is adopted.

However, with the aim of not losing the set of information acquired under the proceeding, the Authority specified that it will converge in the preliminary file of the proceeding, that will begin pursuant to Article 51 of TUSMA, once the above-mentioned Guidelines and rule of procedure are approved.

Autorità per le garanzie nelle comunicazioni Delibera n. 24/22/CONS "Chiusura del procedimento volto all'individuazione del mercato rilevante nonché all'accertamento di posizioni dominanti o comunque lesive del pluralismo nel settore della pubblicità on line, ai sensi dell'art. 43, comma 2, del decreto legislativo 31 luglio 2005, n. 177"

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Italian Communications Authority Resolution no. 24/22/CONS "Closure of the procedure aimed to identifying the relevant market and ascertaining dominant positions or position detrimental to pluralism in the online advertising sector, pursuant to art. 43, paragraph 2 of the legislative decree 31 July 2005, n. 177 "

