

Dear Sirs,

Windtre is an Italian Telco Player and it is going to submit some elements that could be useful to define a common framework in the Sanctioning Procedures.

We would like to focus onto two aspects that could help to design a common frame to simplify processes and procedures before (or in substitution of) a sanctioning procedure completion by national DPAs:

- a. The need of introduction of the “Moral Suasion” instrument
- b. The “Undertakings” instruments.

MORAL SUASION INSTRUMENT

This tool consists in a pre-proceeding instrument that is a “signaling” activity that could be performed by a DPA when there are significant elements that could be immediately be removed by the player with immediate effect and benefit of third parties eventually involved (i.e. final users) adapted and adopted in a general frame in a specific country. This type of instrument could be an added instrument that could reduce the administrative burden of opening a long sanctioning proceeding if the required measures are immediately adopted by the player. If there are still doubts of the approach followed by the player after the moral suasion proceeding, the formal sanctioning proceeding starts.

The Italian NCA introduced in 2015 the Moral Suasion instrument whose goal and process is below described in the art 4 of the NCA Procedures (<https://www.agcm.it/dettaglio-ricerca?id=e9eb44a7-8151-4195-89aa-c71c30a64737>).

Such an approach (pre-proceeding) could allow, with the exception of cases of particular seriousness, the person in charge of the procedure, after having informed the Board, may invite the professional, in writing, to remove the profiles of possible deceit or illegality or of possible incorrectness of a commercial practice (moral suasion).

Through moral suasion, in fact, the NCA exercises the power to call on the trader to repent, prior to the initiation of proceedings. The purpose is to find a solution to protect consumers without necessarily reaching the punishment of the violation. Such an approach could be useful not only for other Authorities but also for a DPA: the pandemic and the lockdown have shifted attention to prevention and awareness measures. The soft power generated by moral suasion could impact and stop immediately potential misconduct by reducing or avoiding further restrictions leading to the start of a proceeding, something that can still occur at a later time.

UNDERTAKINGS

Another useful instrument that the DPA could have in order to faster the number of proceedings without arriving to a fine could be the Undertakings proceeding.

Such an instrument has been adopted in Italy by the NCA and by the NRA.

The principle derives from the fact that the regulatory provisions are not just a rule of conduct. Its application depends by the trilateral relationship between regulator, regulated parties and the interested subjects who are beneficiaries of such regulation. Undertakings determine how concretely the investigated Party could cooperate and act.

The article 9 of the Process of the NCA states that within a specific time interval of 45 days since the opening of a sanctioning proceeding the investigated Party can propose some undetakings that, if considered satisfactory by the NCA Board, become effective end enter into force closing the sanctioning

processing with no fine, but with potential re-opening if some details included in the undertakings are not applied by the proposing party.

There are specific requirements and processes (both for abuse of dominant position or misleading advertising in the NCA commitments/undertakings process) and if adopted these can also be diffused to third parties to get their opinion to be used in the final decision of acceptance or reject:

1. Within and no later than forty-five days from the receipt of the notice of sanctioning procedure, the professional party may present commitments such as to eliminate the illegitimacy or commercial practice.
2. Commitments are presented using a specific form (Annex 1 to these Regulations).
3. In the event of integration, the professional is required to submit a consolidated text of the commitments to the NCA.
4. It is the professional's responsibility, should he assert confidentiality requirements, to also submit a non-confidential and non-confidential version of the commitments.
5. The Authority assesses the commitments:
 - a. if it deems them suitable, it orders their acceptance by making these mandatory for the professional, closing the procedure without ascertaining the infringement;
 - b. if it deems them partially suitable, it sets a deadline for the professional for a possible integration of the commitments themselves
 - c. in cases of serious and manifest deceptiveness / illegality or unfairness of the practice or in the event of unsuitability of the commitments to remove the disputed profiles in the initiation of the investigation, it decides to reject them, promptly communicating it to the Party.
6. Following the decision to accept commitments, the procedure may be reopened ex officio, where:
 - a. the professional does not implement the commitments undertaken;
 - b. the factual situation changes with respect to one or more elements on which the decision is based;
 - c. the decision to accept commitments is based on information submitted by the parties that is incomplete, inaccurate or misleading.

The NRA practice is similar and has been adopted since 2006 (<https://www.agcom.it/regolamento-in-materia-di-impegni>).

In brief:

1. in the procedures referred to in the Regulations, the operator concerned can formulate, in accordance with the methods and within the limits indicated in the Regulations, proposals for commitments aimed at improving the procompetitive conditions of the sector in line with the aforementioned objectives.
2. This proposal, published on the Authority's website and subject to a public consultation with the proponent company's right of reply, is approved by the Authority if it is suitable for improving the conditions of competition in the same sector, through suitable and stable measures.
3. The Authority revokes the provision approving the commitments when the decision is based on information sent by the parties which has proved to be incomplete, inaccurate or misleading, if the factual situation has changed considerably with respect to an element on which the decision is based, for reasons of public interest arisen, or in the case of non-implementation of the same commitments.

4. The same proposal for commitments can be presented in the context of several proceedings, including those of a different nature.
5. In the event that the proposal is presented in the context of several proceedings having some regulatory nature and others of a sanctioning nature, the investigation on the commitments focuses entirely on the only procedure which, among those concerned, has a regulatory nature, or, in 'hypothesis of several proceedings of this nature, in the context of the proceedings having the broadest object, while the suspension of the other proceedings is ordered by resolution of the Council body.

APPEAL PROCEEDING

On top of the above it could be underlined that in Italy against the decision of the DPA an appeal can be filed in front of the Ordinary Court, while other Regulatory Authority(NCA, NRA) decisions can be appealed in front of the Administrative Court (named TAR – Regional Administrative Court) with other two levels of potential appeal, if previously rejected: Council of State and Cassazione. It is suggested to identify, for consistency with the other Authorities, a common appeal frame and process for appealing final decisions.

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