THE EFFECTS OF COMPETITION ADVOCACY ON THE PRO-COMPETITIVE REGULATION OF THE MARKETS* 

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1. THE STRUCTURE OF COMPETITION ADVOCACY POWERS IN ITALY

After the most recent reform, which took place in 2011, the Italian Competition Law (Law No. 287/90) now provides the Italian Competition Authority (“ICA”) with a complete set of advocacy powers (set by art. 21, art. 22 and art. 21 bis).

These powers are very broad in scope and: i) allow the Italian Competition Authority to identify and inform the Parliament and/or the Government when laws, regulations or administrative acts determine a distortion of competition or the proper functioning of the market (art. 21); ii) empower the ICA to express opinions on legislation and on issues regarding competition in the market both on the its own initiative and/or on a qualified third party's request (other public administrations), moreover the President of the Council of Minister can ask for the opinion of the ICA on legislative / regulation whose direct effect is: a) to place quantitative restrictions on the exercise of an activity or access to a market; b) to lay down exclusive rights in certain business areas and c) to impose general pricing practices or conditions of sale (art. 22).

In addition, art. 21 bis grants the ICA a new legitimacy to challenge before the Administrative Courts legal and administrative acts adopted by any public administrations, that haven't adapted to the Authority's previously (and mandatory) opinions.

From a general perspective, this set of powers allows the ICA to intervene in a broad scope of cases ex ante or ex post, ex officio or following the request or the warning made by a third party.

According to the ICN Advocacy Working Group, advocacy can be defined as following: “activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition”.2


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2 Advocacy and Competition Policy, Report prepared by the Advocacy Working Group ICN’s Conference Naples, Italy, 2002
As things stand now, it is indeed true that advocacy contributes to increase the quality of the Italian legislation and it also grants an higher degree of compatibility of national law (especially at the local level) with principles and rules set in the EU in the field of competition law.

Advocacy has also a complementary role to the enforcement: advocacy grants the context for the interactions between players, while enforcement focuses more on the interactions themselves. As it is easy to understand, the context provided by advocacy is essential for the interactions to happen in a pro-competitive way.

Therefore, advocacy aims at maintaining a pro-competitive structure where it already exists, and at suggesting the creation of pro-competitive conditions *ex ante*, preparing the field for healthy interactions among market players.

2. THE RECENT PRACTICE OF COMPETITION ADVOCACY IN ITALY

Exercising its advocacy powers, the ICA has intervened in 185 cases during the last two years, while we can count over 1,200 interventions since the 1990.

The most recent 185 interventions can be divided in:

*i)* 48 interventions according to art. 21;

*ii)* 29 according to art. 21 bis (among which 9 ended up contested in the Italian administrative Courts);

*iii)* 78 according to art. 22 (50 of them were brought on following a Public Administration's request, while 28 were initiated ex officio);

*iv)* 24 according art. 22 following the President of the Council of Ministers' request;

*v)* the remaining 6 were based on different legislation.

Interventions often concerned similar situations, even if they were approached through the means of different articles (21, 21 bis or 22). Three of the most notable examples are invitations to tenders, shops' opening hours, and local public transportations.

This shows a practice that has been consolidated and strengthened through time and that can be used as a guide for public administrations of all levels. This is true not only when an *ex post* evaluation is needed, but especially, and more importantly, when there is the need to carry out an *ex ante* evaluation, by checking the practice and tendencies of the Italian Competition Authority before intervening in a certain field.

The ICA's practice plays a key role in directing the legislator to the fields where its intervention is necessary and preventing it from acting where it isn't: as experience at international level shows, the pro-competitive asset of a market is better granted by the lack of strict

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legislation. Hence, advocacy can also have a didactic function.

It can as well work as confrontation field between public administrations, as not all of them conform to the Authority's opinion and hold on their positions, giving detailed reasons as to how their acts do not restrain competition.

In the following paragraphs, we briefly analyse two recent examples of this “confrontation” at institutional level on the way on how protect and foster competition law at local level: the case of the rules on shopping hours and the rules on public transport services. In both cases the ICA has used all its competition advocacy tools to remove possible local distortions on the competition asset of the market and to open up the markets to new entrants.

2.1 Shops' opening rules

The first interventions of the Italian Competition Authority on the matter date back to 2008; and despite the fact that the legal frame has changed since then (back then, the general rule was the regimen of mandatory closing times with possible exceptions, while now the legal context is complete liberalization), the issues addressed are always the same. The ICA has analysed it through the lens of articles 21, 21 bis and 22.

Two cases in particular can be taken as examples of the ICA’s approach to the matter: the first is opinion AS1022 (2013), which was adopted towards the municipality of Bolzano, on the basis of art. 21 bis, the second is opinion AS1147 (2014), which concerned a legislative draft and was adopted on the basis of art. 22.

In case AS1022, the Authority evaluated the timeframe of the shops' opening and closing times during Sundays and holidays, and found that imposing a schedule resulted in a restriction of commercial freedom, because it prevented the normal evolution of competitive dynamics, thus reducing the possibilities of differentiating services and adapting them to the consumers' demand. Therefore, those rules could worsen the conditions of the offer and the freedom of choice of consumers, without any justification in terms of efficiency or safeguard of public interests.

In the second case (AS1147), the legislative draft that was examined provided for exceptions to the general principle according to which commercial activities are led without the obligation to comply with scheduled opening/closing hours at Sundays. In particular, the draft:

i) identified 12 days a year of mandatory closure;
ii) empowered municipalities to define the closing times of shops;
iii) empowered mayors to establish the working timeframe for public exercises and commercial activities, according to the need for social and environmental sustainability, for cultural heritage, for driveability, and for the safeguard of the right of residents to safety and rest.

Once again, the Authority underlined that such impositions would pose an unjustified threat to competition.
2.2 Local Public Transport cases

To exemplify the ICA's approach to Local Public Transportation, we can take three opinions given by the Authority according to art. 21 bis (case AS1184), art. 22 (case AS1117) and art. 21 (case AS1139).

The first case concerned Local Public Transportation in Tuscany. According to the Authority, the invitation to the tender had three main critic points:

i) the winner must replace the incumbent in all their assets;

ii) the object of the tender was undetermined;

iii) there was a relevant lack of information concerning the state of the assets.

The Tuscany Region took into account the opinion given by the Authority and modified the invitation to the tender.

The second case (AS1117) was a recommendation that concerned the Public Local Transportation in Umbria Region. The Authority suggested that the possible availability of the essential infrastructures and of other assets necessary for the implementation of services shouldn't be considered as an element by which to discriminate among the participants to the tender. It also recommended that appropriate deadlines for offers should be provided.

The third case (AS1139) concerned the Local Public Transportation in the Province of Vercelli. The Authority revealed a conflict of interests in the subcontracting subject, as it was potentially a participant in the tender. The Province of Vercelli, which was auctioneer, was also the shareholder of the current services manager. Therefore, the rules laid down in the invitation to the tender could give the incumbent an unjustified advantage.

3. The effect on the regulation of the markets

It is a given that an evaluation of the results of the ICA's interventions in the field of advocacy cannot be done immediately, since public administrations can take some time to adjust to the guidelines set by the Authority.

Another element that comes into play, making advocacy power more difficult to exercise in practice, is the fact that public administrations are still allowed to respond to the ICA's inputs with directionality. The law allows them to decide whether to conform to the Authority's opinion or not, or to conform to it only to a certain extent. The Authority itself will then have to decide whether a partial conformity will or will not be enough to consider competition rules as respected.

Anyway, the data collected so far still allow to consider the first results of advocacy activity as favourable, since a high percentage of the cases ends with compliance to the opinion given by the ICA:

i) out of all the cases raised according to art. 21, 38% ended with compliance from the PAs;

ii) out of the cases raised according to art. 22, the percentage of compliance raises to 66%;

iii) out of the cases raised according to art. 22 and following the President of the Council of
Ministers’ request, the percentage of compliance is 50%;

*iv) compliance hits 69% of the cases raised according to art. 21 bis.*

It can safely be assumed from this data that it is not by chance that the most effective instrument is art. 21 bis, which provides for the possibility of challenging administrative acts in front of a Court.

4. BRIEF CONCLUSIONS

The experience made so far shows that Italy is the ideal country for competition advocacy, as it provides an appropriate field where to test innovative solutions.

It is true that protection of competition is a relatively recent experience in Italy, as it is roughly 25 years old. However, as many studies have already showed, advocacy is most effective in the phase of “consolidation” of competition culture, at all levels (social and institutional), which is the case in Italy.

Moreover, the data collected so far confirm that the Italian Competition Authority has made remarkable efforts in order to surpass the tendencies, both at a national and local lever, that indulge in the protection of localized interests, and to consolidate an institutional approach based on open markets.

Given the lack of *ad hoc* judicial instruments, the means making protection of competition possible are a constant monitoring activity and the constant sharing of results between the scientific community and public opinion.

Last but not least, reputation is a very strong disciplining instrument and the Italian Competition Authority seems to have undertaken the right path, thus collocating itself among the most advanced experiences at the European Union's level.