SUCCESS RATES OF COMPETITION ADVOCACY BY ITALIAN COMPETITION AUTHORITY: ANALYSIS AND PERSPECTIVES

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Abstract: This article contains a comprehensive review of competition advocacy powers and interventions adopted by the Italian Competition Authority over recent years with their relative success rates. Namely, the article first describes the set of traditional advocacy tools available to the Authority in order to fight the public restrictions of competition, and notes that it has been strongly strengthened in recent years as a result of important legislative innovations. Second, it analyses and elaborates on the success rates of advocacy decisions issued over the period 2013-2014. In this analysis, outcomes are considered positive (or partially positive) when the public administrations or legislators, national or local, have decided to comply (fully or partly) with the advice given in the opinions. On the whole, the analysis shows levels and figures of success rates outperforming the negative responses, especially when the Authority intervenes while the decision processes - of administrative or legislative acts - is ongoing, in particular when the Authority is asked for opinions, rather than issuing guidance on its own. A consultative role in competition matters can be clearly drawn for the Authority, which can provide interesting cues for competition advocacy policies in the future. Third, the article pays special attention to the new competences introduced by the legislature in 2011 and 2012, with regard respectively to Article 21-bis of the Law No. 287/90 which assigned to the Authority the power to take legal action against general administrative provisions, regulations or measures of any public administration which unreasonably restrict competition; and to art. 4 of the Decree-Law n. 1/2012 under which the Authority can issue opinions to the Presidency of the Council of Ministers with respect to regional laws that unduly restrict competition, aimed at challenging them before the Constitutional Court. Also in this case, the success rates of the implementation of such articles show results encouraging the Authority to continue its pursuit of this goal.

1 Italian Competition Authority. The article is the result of common analysis and reflections within the monitoring of the advocacy activity conducted under the supervision of M.G. Montanari, responsible for the Studies and Legislation Analysis Directorate. A. Argentati wrote the initial Section “Competition advocacy and the underlying rationale of the survey” and, within Section II “The new power”, the part relating to the opinions issued to the Presidency of the Council of Ministers over the 2012-2015 period and to the relationship between these opinions and the judgments of the Constitutional Court. R. Coco wrote Section I “Outcomes of ICA’s Competition Advocacy in the period 2013-2014 and, within Section II, the part relating to the opinions under art. 21-bis in the period 2012-2015. Section III with the “Conclusions” is the result of joint work. The Authors wish to thank Giulia Filosa for the valuable cooperation in the collection, analysis and elaboration of the dates. The views expressed are those of the Authors and do not represent the position of the Authority nor do they commit in any way the Institution.

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1. **COMPETITION ADVOCACY AND THE UNDERLYING RATIONALE OF THE SURVEY**

Law No. 287/90 not only deals with business conduct through the provisions on restrictive agreements, abuse of dominant position and mergers, it also pays special attention to the public regulation of the economy. The reason is due to the fact that the 1990 legislature expressly took note of the large existence in the Italian system of public measures that determined distortions to competition without any justification in terms of general interest and entrusted the Competition Authority (hereinafter, also ICA) with a key role in removing them.

In particular, the tools against normative and administrative restrictions are provided by art. 21 and 22 of the Law No. 287/90. Under article 21 of the Law, the Authority is called to identify cases of particular relevance in which the provisions of law or regulations or general administrative provisions create distortions to competition or to the sound operation of the market which are not justified by general interest considerations. In this case, the Authority reports those situations to the Parliament and the Prime Minister or, depending on who has the regulatory powers, to the President of the Region, and, in the case of administrative acts, to the Prime Minister, to other relevant Ministers and to the local authorities involved. Finally, the Authority may issue an opinion on any measures needed to remove or prevent distortions.

Under art. 22 of the Law, the Authority may express opinions on draft legislation or regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the government departments and agencies concerned.

Despite a number of lexical inaccuracies, it is common ground that the powers provided under art. 21 are used by the Authority against the restrictive or distortive effects of existing rules on the correct functioning of the market. On the other hand the powers provided under art. 22 are used in respect of proposed rules for the effects that those rules will likely determine on the market. These powers, as a whole, have been introduced with the aim to promote competition principles in the exercise of the legislative or administrative function. For this reason, they constitute the necessary completion of the Authority’s competences in the field of the control over restrictive business practices.

The set of advocacy tools available to the Authority in order to fight the public restrictions of competition and to promote the competitive development of the regulatory framework have been strongly strengthened in recent years as a result of some important legislative innovations, specifically:

i) Article 47 of the Law No. 99/2009 introduced into the Italian legal system the Annual Law for Competition. According to this provision, every year the Government is asked to present to the Parliament a liberalization bill (Annual Law for Competition), taking into account the opinions and the recommendations of the ICA. It aims “to remove legislative and administrative obstacles to the opening of markets, promote the development of
competition and ensure consumers protection”. This relevant innovation has the merit to induce the Government and Parliament to a detailed periodical scrutiny of the Authority’s competition advocacy interventions. It contributes to promote a wider institutional awareness of competition principles, in order to ease and foster an effective modernization of the national regulatory framework.

ii) Article 21-bis of the Law No. 287/902 assigned to the Authority the power to take legal action against general administrative provisions, regulations or measures of any public administration which unreasonably restrict competition. This instrument also significantly contributes to strengthening action against administrative measures restricting or preventing competition among economic operators. The administrative acts challengeable by the Authority may be the most diverse: Regional Governments’ or municipal Councils’ decisions, calls for tenders and letter of invitation to tenders, ministerial decrees, management orders, refusals of authorization and licensing, etc.

iii) Article 4 of the Law Decree No. 1/20123 introduced a fruitful cooperation mechanism between the Italian Presidency of the Council of Ministers and the Competition Authority, aimed at challenging restrictive regional laws before the Constitutional Court. Particularly, after receiving requests for opinions, the Authority timely informs the Presidency about regional laws that unduly restrict competition. If the Presidency adheres to the assessment of the ICA, it submits the laws to the Constitutional Court.

This wide range of tools allows the Authority to act against several unnecessary standing restrictions in the Italian legal system and to promote the pro-competitive development of the regulatory framework, at both national and local level. With reference to the criteria under which these powers are to be exercised, it is important to underline that not all constraints on business conduct constitute undue restrictions of competition, but only those rules which are not strictly necessary for the protection of relevant general interests. In this respect, the verification currently carried out by the Authority, according to the European requirements, concerns the fundamental principle of proportionality of the restrictive measure compared to the general interest pursued. The ultimate aim is to identify the most appropriate regulatory frameworks to achieve the general interest through measures that have the minimum negative impact on the functioning of the market.

In this general context, the monitoring of the advocacy activity’s results which is presented in this article can assume great importance for a multitude of reasons.

On political and legislative grounds, an important objective of the investigation is to assess the degree of openness of the national

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2 Introduced by Section 35 of Law Decree No. 201/2011, which was converted with modifications by Law no. 214 of 22 December 2011 on the “Conversion to law, with modifications, of Decree Law no. 201 of 6 December 2011 on urgent measures for the growth, equity and consolidation of public finances”

3 Converted with modifications by Law No. 27 of 24 March 2012 on the “Conversion to law, with modifications, of Decree Law no 1 of 24 January 2012 on urgent measures for the competition, liberalization and infrastructures”.

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system to the competition principles and therefore to appreciate what level of maturity the competition culture has reached in the Italian legal system.

At institutional level, the survey provides insights into the degree of visibility and reputation that the ICA has been able to achieve vis-à-vis the legislature and the public administration, as well as useful information to address strategically the advocacy’s decisions: in terms of accountability, therefore, the verification of the extent to which the Authority’s recommendations have been accepted represents a relevant indicator of the effectiveness of its action. In a different perspective, the survey provides a set of accurate information that could also be used for further studies. From an economic point of view, for instance, information on the effects determined by the actual implementation of the suggested measures may significantly improve the analysis of the expected outcome of a reform program on a country’s economic growth or the dynamics of specific markets.

As better clarified in the following section, the assessment of the effectiveness of the advocacy activity has been conducted in an exclusively legal perspective. In this sense, the attention has been focused on the outcomes that the Authority’s different types of intervention have produced in the national and local system with the aim of determining certain characteristics and trends of the system resulting from the initiatives taken. Effectiveness has thus been interpreted as the addressees’ compliance with the recommendations of the Authority.

The article consists of three sections.

In section I the results of advocacy activity under art. 21, 22 and 21-bis of the Law 287/90 will be shown for the period 2013/2014 on the basis of a monitoring updated October 2015.

In section II the outcomes of the opinions expressed under art. 21-bis and upon request by the Presidency of the Council of Ministers are considered as whole, up to year 2015. In this last case, the article provides a complete overview about the corresponding judgments issued by the Constitutional Court and the principles stated therein. This part of the monitoring exercise is also updated October 2015.

In section III the conclusions of the survey will be drawn.

2. Outcomes of ICA’s Competition Advocacy in the Period 2013-2014: Methodology of the Analysis and Success Rates

2.1 Introduction

In 2015 the Italian Competition Authority (ICA), in order to measure the efficiency and effectiveness of its advocacy activity, instituted a program to monitor the outcome of its advocacy decisions issued, as provided for by competition act n. 287/90, in the period 2013 – 2014.

This section describes the work done within the Studies and Legislation Analysis Directorate of ICA which carried out the research and outlines the success rates emerging from the survey, together with the pertinent methodology.
The collection, analysis and processing of data are updated as of October 2015.

Preliminarily, it is important to note that in the context of this research, “effectiveness” of advice given by ICA refers to the requesting party’s compliance with ICA’s recommendations, as well as the practical outcomes of the advocacy carried out by ICA. An additional goal was identifying the subsequent features and trends in the legal system, at national or local level.

2.2 Methodology of the analysis

Advocacy interventions issued by ICA in the period 2013-2014 have been reviewed with the aim of assessing the outcomes, split by opinions under art. 21 of competition act n. 287/90; opinions under art. 21 bis of the same law; and opinions under art. 22 of the same law. Opinions under art. 22 have been further divided among opinions issued on ICA’s own initiative, opinions issued upon requests of public administrations or legislative bodies (national or regional), opinions given to the Presidency of the Council of Ministers (PCM), and opinions issued under competition act n. 287/90 applied jointly with different laws.

Subsequently, we assessed the level of compliance by opinion recipients with what ICA recommended, on the basis of several sources of information, either available (such as, documents in the files or received by investigating Directorates following the decisions) or in the public domain, or sought on purpose through direct contacts with the referents of administrations or legislative bodies time to time involved.

The outcomes of the interventions have been classified as “positive” when the addressee of the decision has exactly met the requirements; “partially positive” when the addressee of the decision has met the requirements only partially; “negative” when there has been no compliance with what was recommended; and finally “not evaluable” when the assessment of the outcome has not been possible for any reason.

Notably, partially positive outcomes identify those cases when administrations or legislative bodies have not solved all competition concerns but they have acted or are acting to meet the target, such as in cases when: (a) legislative initiatives consistent with ICA’s decision are in process; (b) local administrations are undertaking actions matching ICA’s requests but the procedures are ongoing; (c) there is more than one recipient of the decision, and only some of them have endorsed the advice; or (d) there are more competition concerns in the relevant ICA’s decision, just some of which have been solved by the addressee. Those cases with no possible positive or negative assessment include, for example, ICA’s decisions: (a) providing guidance for administrative acts not adopted yet; (b) providing advice in the context of procedure pending before other public bodies; (c) providing policy guidelines rather than specific measures to be taken; or (d) grounded on legal rules which subsequently have been repealed and

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4 See, respectively, AS1165 e AS1137; AS1122; AS1135; AS1116.
which are no longer valid at the time of the monitoring. This survey outlines first of all the overall summary data for the period 2013-2014 and then detailed data divided by instrument, with further subsections when appropriate. The update of the analysis dates back to October 2015, i.e. to a period of ten months from the last decision considered (December 2014), allowing a lapse sufficient to consider the results of the survey to be stable. In this respect, in order to fully evaluate the outcomes of ICA’s actions, a certain time has to be given to public institutions for subsequent initiatives, either for complying or to choosing not to follow the advice given by ICA.

2.3 Summary data on the success rates of ICA’s initiatives in the period 2013-2014

The monitoring has considered on the whole 185 decisions issued by ICA, under articles 21, 22 and 21 bis of competition act n. 287/90, including decisions applying jointly special laws (in the IT sector), in the period from 1 January 2013 to 31 December 2014 (109 in 2013 and 76 in 2014).

Among the 185 decisions, 103 have had positive outcomes (85 positive and 18 partially positive), 63 have had negative outcomes, and 19 cases have resulted not evaluable. This data corresponds to 56% in positive outcomes (46% positive and 10% partially positive), 34% in negative outcomes, and a 10% not evaluable, as shown in the graphic which follows.

![Success rate of competition advocacy 2013-2014](image)

*Source: Data processing by ICA on data 2013 and 2014 (last update October 2015)*

As regards the sectors concerned by the advocacy decisions, the following table and the graphic, showing numerical data and rates, respectively, highlight the sectors where the ICA has mostly focused its efforts.

<table>
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<tr>
<th>Table with the split of decisions by sector (2013-2014)</th>
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<td>General services</td>
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<td>Transports</td>
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<td>Energy and environment</td>
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<td>Large-scale retail distribution</td>
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<td>Beverage and food</td>
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<td>Local public services</td>
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See AS1117 and AS1133; AS1054; AS1098 and AS1099; AS1031 and AS1032, respectively.
As shown by the image, most of the advocacy interventions are focused on “general services”, with a share of 22%, followed by “energy and environment” and “transports”, with shares of 14% and 15%, respectively, and by “large-scale retail distribution” with a share of 9%, which can be considered, from this standpoint, the economic sector drivers of the advocacy.

As regards the distribution depending on the legal basis, out of a total of 185 decisions:

i) 48 adopted under art. 21,
ii) 78 adopted under art. 22, among which 50 upon requests and 28 ex officio,
iii) 29 adopted under art. 21 bis,
iv) 24 adopted under art. 22 upon requests of PCM,
v) 6 adopted under laws different by competition act n. 287/90.

In the following, the charts with the success rates referred to each of the legal instrument are considered.

### 2.4 Success rates for the interventions under art. 21 in the period 2013-2014

Regarding interventions issued under art. 21, out of 48 decisions taken, the results highlight a share of success amounting to 38% of positive outcomes (27% positive and 11% partially positive), compared with 60% negative outcomes and 2% not evaluable, as shown by the graph which follows.

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6 These regard 6 opinions issued under laws different from competition act n. 287/90 (4 cases under art. 4 of decree-law n. 95/2012, converted with law n. 135/2012 on obligations to dismiss public instrumental undertakings (declared unconstitutional for violation of principles of shares of competences between State and Regions); in the remaining 2 cases, the legal basis has been art. 19, par. 1, of legislative decree n. 259/2003 containing the Code of electronic communication.
These figures are in line with the trends seen in the past, according to which the advices based on art. 21 entail, on the whole, a relatively low success rate. It should be noted that these advices are usually issued by ICA ex officio and address definitive legal measures; consequently, recipients of these advices are less inclined to modify decisions already taken and reflected in adopted legal acts.

For the sake of completeness, comparing data in 2013 and in 2014, there was a drop in the number of interventions (from 28 to 20) and in the negative outcomes (from 21 and 8, i.e. from 75% to 40%), while positive outcomes remained almost stable (7 compared to 6), to which for 2014 have to be added 5 cases partially positive and one not evaluable case.

2.5 Success rates for the opinions under art. 22 in the period 2013-2014

As regards the opinions issued under art. 22, out of the 78 opinions issued in total (net of the opinions to PCM, see below), the results are more satisfying. The success rate goes up to 66% (49% positive, 17% partially positive), with 14% negative outcomes and 20% not evaluable cases, as shown by the chart below.

Comparing data in 2013 and in 2014, differently from what is seen for the other instrument under art. 21, the figures remained stable for the two years 2013 and 2014, for numbers of opinions issued (39 for both 2013 and 2014), positive outcomes (19 for both 2013 and 2014), partially positive outcomes (7 and 6), negative outcomes (6 and 5), and not evaluable cases (7 and 9).

The same data can be split depending on whether the initiative for the actions undertaken was ICA’s own (28 cases) or rather the opinions were asked for by public administrations (50 cases), as shown by the charts below.

2.6 Success rates of opinions issued under art. 22 on ICA’s own initiative in the period 2013-2014

Out of the 28 opinions issued on ICA’s own initiative, the success rate equals 39% (7% positive, 32% partially positive), as shown by the graph below.

Considering separately the addressees of opinions issued under art. 22 depending on whether they are local or central administrations, it can be noted that local
administrations attract most of the opinions highlighting competition concerns and are also the ones more inclined to comply with the guidance provided for in ICA’s decisions.

2.7 Outcomes of opinions issued under art. 22 upon requests in the period 2013-2014

As regards opinions issued under art. 22 upon requests by public administrations or legislative bodies, ICA has issued 50 opinions with a success rate of 80% (72% positive, 8% partially positive), as shown by the graph above.

In this case, most of the requests come from central administrations, which are also more relatively inclined, compared with local administrations, to solve the competition concerns highlighted in the opinions.

On the whole, ICA’s opinions under art. 22 seem to be better received than art. 21 interventions in terms of efficacy and willingness of addressees to comply with the guidance provided in them. ICA is perceived as a “consultant” for competition matters by public administrations and legislative bodies. This conclusion would be further confirmed by observing the trends, stable for 2013 and 2014.

Considering the origin of the requests, central administrations are the most aware of ICA’s role as a specialised institution for competition advice and therefore their requests are, generally speaking, more precise and technical in the drafting, they apply more frequently and most of the times they are available to comply; conversely, local administrations submit fewer requests and are relatively willing to comply.

2.8 Success rates of issued under art. 21 bis in the period 2013-2014

In the period at issue, 29 decisions were issued under art. 21 bis (7 to central administrations, 22 to local administrations). The global success rate amounts to 69%, corresponding to the share of cases in which the administrative acts being challenged were modified following ICA’s interventions (i.e. 20 positive outcomes), with a difference between central and local administrations, the latter being more responsive to the advice. These figures do not include ongoing judicial disputes. The graph below shows the data referred.
cases) and large scale retail distribution (4 cases), financial services, health services, and food (each with 2 cases), water and entertainment (one case each).

Comparing data in 2013 and in 2014, there was a drop in the number of interventions (from 22 to 7), with a flexion on the positive outcomes, from 73% to 57% (from 16 to 4).

Among negative outcomes, central administrations have had the main role, compared to local ones. The appeals filed for the negative outcomes are pending at first instance (Regional Administrative Tribunal); the results registered and shown, as regards the instruments under art. 21 bis, must therefore be considered partial and a definitive assessment will be possible only when the judicial disputes are closed.

2.9 Success rates of opinions to PCM (under art. 22) in the period 2013-2014

In the same period 24 opinions to the Presidency of the Council of Ministers (“PCM”) were issued, in half of which the PCM has appealed the regional legislative act before the Constitutional Court.

Comparing data in 2013 and in 2014, the requests for opinions have decreased (from 87 in 2013 to 64 in 2014), as consequently the opinions issued (from 15 in 2013 to 9 in 2014) and the appeal filed by PCM (from 9 in 2013 to 3 in 2014).

2.10 Success rates of opinions issued under competition act n. 287/90 and different laws in the period 2013-2014

ICA has issued 6 opinions under laws different from the competition act n. 287/90, 2 with positive outcome, 2 with negative outcome, 2 not evaluable.

Notably, the interventions falling in this category refer to cases in which ICA has applied art. 22 of competition act n. 287/90 jointly with other different laws, in particular legislative decree n. 259/2003 containing electronic communication Code. The opinions at stake raise critical issues for competition in the sector considered, but the number of opinions does not reflect the amount of requests dealt with by ICA in this field, which is much higher.

As already mentioned above, in the recent years the national legislature has given ICA more competition advocacy powers by conferring on ICA new powers to act against regulations which unduly restrict competition. Among these powers, it is worth mentioning, in particular, the legitimacy to appeal those administrative acts which violate competition rules as provided for by art. 21-bis of competition act n. 287/90 and the possibility to issue, upon request of the Presidency of the Council of Ministers, opinions on regional laws entered into force, in order to decide whether they can be challenged before the Constitutional Court.

Since these powers were granted, almost four years ago, the experience of ICA in their exercise provides several elements for assessment as regards their concrete application and the results they have had in terms of efficacy.

3.1 Success rate of opinions under art. 21 bis (2011-2015)

Since December 2011 when art. 21 bis of competition act 287/90 was enacted, to October 2015, ICA has issued 62 opinions for which a success rate of 40% can be registered, corresponding in absolute term to 25 cases.

Such rate is provisional, since most of the cases considered are under appeal, and in order to fully appreciate the efficacy of the instrument the final result of the judicial phase is essential. The graph below shows the outcomes of the opinions at stake.


The sector most concerned by ICA’s interventions under art. 21 bis of competition act 287/90 are transport (17), general services (8), large-scale distribution (7), insurance (7), and financial services (5).

As to the public administrations to which the opinions are addressed, most are local administrations (47 opinions) compared to the central ones (15); the first are also the ones with a higher rate of success, 24 cases (out of 47), i.e. around 50%, whilst the latter have complied in only 5 cases out of 15, i.e. around 33%.

3.2 Outcomes of opinions to the Presidency of Council of Ministers (2012-2015)

As mentioned above, art. 4 of decree-law n. 1/2012 has triggered a fruitful mechanism of cooperation. In fact, PCM regularly asks ICA for opinions on regional laws newly adopted in order to decide whether to appeal them before
the Constitutional Court for competition profiles. In its role of independent technical advisor, ICA underlines the critical issues which may directly affect the competition on the market.

Since January 2012 (date of the first request for opinion) up to now ICA has issued 39 opinions to PCM out of 244 requests received; in 23 cases, i.e. 59% of the total, PCM has followed ICA’s opinions by opposing the regional law before the Constitutional Court.

Since January 2012 (date of the first request for opinion) up to now ICA has issued 39 opinions to PCM out of 244 requests received; in 23 cases, i.e. 59% of the total, PCM has followed ICA’s opinions by opposing the regional law before the Constitutional Court.

Out of the 23 challenged laws, the Constitutional Court has defined 15 cases and among these the Court has declared 11 regional laws against the Constitution for competition profiles; in 3 cases the appeal has been declared inadmissible; one case has been rebutted for errors in law; besides the 11 cases of regional laws considered unconstitutional, two other cases have been positively resolved in that the regional legislator has changed the rules following ICA’s opinion.

It can be considered, therefore, that from the first exercise of the new power to now, the success rate of ICA’s opinions before the Constitutional Court amounts to 73%. In four years, the outcome of the cooperation between ICA and CPM is very successful, considering both the attention given by PCM to the criticisms highlighted and to the decisions by the Court, which tend to adhere to the principles time to time outlined in ICA’s opinions.

3.3 The ICA’s opinions and the Constitutional Court’s judgments

In many cases, the opinions given to the Presidency of Council of Ministers by the ICA concerned regional laws in conflict with a national law of liberalization and more generally with the competition principles. This happened in the case of the first opinion delivered to the PCM in January 2012 (S1406), on the basis of which the PCM challenged the regional law before the Constitutional Court. The Court issued two distinct judgments of unconstitutionality (No. 27/2013 and No. 65/2013) both regarding shop opening and closing times, regulated by regional legislators (Toscana and Veneto) in contrast with article 31 of Decree - Law No. 201/2011 (so-called Salva-Italia). In both judgments, the Court states that “the conflict is clear between the challenged regional regulation and article 3 of the Decree Law No. 223/2006, falling within the exclusive competence of the State in the field of competition, which has liberalized the shop opening and closing times”. For this reason, it declared both the regional laws unconstitutional.

The Authority followed the same approach in other three opinions: in one case, it suggested to challenge a law approved by the Region Veneto, which had imposed a territorial limitation on the opening of shops on Sundays, in contradiction with article 2 of Decree - Law No. 223/2006...
restriction to the business run by license applicants. This involved, in particular, the license for street trade in some special areas of the public property (judgment No. 49/2014). In this case, the regional provision, under which no undertaking is permitted to obtain the license in more than one municipality, was deemed to be in conflict with article 19 of the Legislative Decree n. 59/2010. This Decree provides that the street trade authorization covers the entire country. The Court considers that the Decree, implementing the Directive 2006/123/CE, falls under the State competence in the field of competition, on the basis of a well-established jurisprudence, which has underlined the goal of liberalization pursued by the Decree.

In another case, the Authority released its opinion against a law of the Region Valle d’Aosta, which had introduced various restrictions on business, such as i) an appropriate authorization for the opening, change of registered office and enlargement of the sale space; ii) the exclusion of the liberalization of the opening and closing hours for commercial activities performed on public ground; and iii) the complete ban of opening and changing registered office in historic centers for large scale commercial distribution. The critical remarks of the Authority were shared by the Government, which appealed the case before the Court.

In the judgment n. 104/2014, the Courts considered unlawful the provision which entitled the regional government to set up, after consulting business associations, the guidelines to achieve a balance within the distribution network with regard to the different categories and sizes of the retailers. The Court rules that article 31, par. 2 of the Decree-Law No. 201/2011 has to be considered part of the State regulatory power in the field of the competition: that rule of law sets up a regulation which liberalizes and eliminates restrictions on trade, providing, as a general principle, the freedom of opening new shops without any quantitative and territorial limitation nor other restrictions of any kind, apart from those concerning the protection of health, workers, environment, including the urban environment, and the cultural goods.”

Furthermore, the Court declared unconstitutional the provision that excluded business done on public property from the liberalization of the opening and closing hours. Also in this case, the Court mentions article 3, co. 1, lett. d-bis of the Decree-Law n. 223/2006, as amended by article 32 of the Decree-Law No. 201/2011, and state that it “implements a liberalization principle, by removing restrictions and obstacles to running business (…)” and that “removing constraints on the opening and closing days for the retail shops promotes the creation of a more dynamic market and the access of new owners and increases the consumer choice. This is, therefore, a regulation consistent with the goal of promoting competition, being proportionate to the objective of ensuring the competitive dynamic in the commercial distribution”.

Lastly, the Court stated that the ban of opening and changing registered offices in historic centers for the large scale commercial distribution conflicts with the competition principles because it “constitutes a restriction of the freedom of opening new retail shops and, therefore, it introduces a limitation for the freedom of providing services”. On this point, moreover, the Court expressly mentioned the specific opinion issued
by the Antitrust Authority on December 2013 to the PCM.

By another opinion, the Authority suggested to the PCM the appeal against a law of Region Toscana because i) it had increased the administrative burdens for large and medium size traders in cases of requests for opening, expanding or transferring a sales structure; ii) it had introduced the requirement of displaying only the final selling price for the outlet store; iii) it had provided for minimum distances among the stores; iv) it had limited the possibility of installing a petrol station equipped only with self-service facility, requesting the presence of an adequate surveillance. The Presidency of the Council shared the ICA’s comments and appealed the law before the Court.

The judge, with judgment No. 165/2014, declared all the mentioned provisions unconstitutional, noting, first of all, that the administrative burdens and the additional activities requested by the law represented an obstacle for an effective competition in the Region Toscana both at interregional and intraregional level. Consequently, the Court assessed the infringement of the art. 117, par. 2, Cost. since “even if art. 31. co. 2, of the Decree-Law No. 201/2011 provides for the possibility of balancing the liberalization of trade with the need for a stronger protection of public health, employment, environment and cultural goods, however it has to be interpreted in a systemic sense”, considering that the promotion of competition, because of its horizontal nature, is predominant and operates, therefore, as a limit for the regional laws in the trade sector.

In addition, in the same judgment the Court declared unconstitutional the requirement that outlet stores display only the final selling price because “such an imposition restricts the freedom of communicating the charged prices, preventing competition in the breach of art. 117 Cost”. Similarly, the Court considered the provision that requests an adequate surveillance in case of installing a petrol station equipped only with self-service facility to be contrary to the Constitution. Such a provision conflicts with the article 28, pa. 7, of the Decree-Law n. 98/2011, which is expression of the exclusive State regulatory power in the field of competition.

In two other cases, although there was not a clear contrast with a measure of liberalization, the Court nonetheless found an infringement of the State competence on competition, as currently interpreted in its case law. In particular, by its opinion, the Authority expressed its remarks against a law of the Region Toscana, which had established an extension of the contract assigning public local services, without setting any time limit. In the sentence, the Court states that “the regulation regarding the award of local public services of economic interest falls within the field of competition, which is the object of an exclusive State competence, considered its direct impact on the market”. The judge concludes that “the appealed provision creates a distortion of the competition, contrasting with the general principles provided by State legislation”.

In a different case, a law of the Autonomous Province of Bolzano was criticized by the Antitrust Authority because the law subordinated the assignment of financial contributions in favor of radio and television stations to the requirement of having the
registered office in the territory of Province of Bolzano (judgment n. 190/2014). In this case, the Court, sharing the PCM’s position, stated that the law discriminated against the economic operators registered outside the Province of Bolzano and for this reason declared the law unconstitutional.

In two other cases, lastly, the ICA gave its opinion against two regional laws conflicting with the European regime in the field of State aid. In the first case, the Authority criticized a law of the Region Abruzzo because of a State aid for the development of a local airport without any prior notification to the European Commission, as required by the relevant regulations. A similar law adopted by the Region of Marche was censured by the Authority. In both cases the Court shared the remarks of the Authority and declared the regional law unconstitutional.

Finally, two positive outcomes are noteworthy despite the absence of a judicial ruling because of the amendment of the laws consistent with the Authority’s opinion.

In the first case, the complaint before the Court was not filed because of the dialogue among the Presidency of the Council, the Region Abruzzo and the Antitrust Authority, which ended up determining the modification of the disputed law before the appeal. In the other case, the regional law was appealed to the Court; however, subsequently, the provision was amended and for this reason the Presidency of the Council abandoned the appeal.

The cases of failure after the appeal before the Court on the basis of the ICA’s opinion have been negligible, only 4 cases. In three of those cases, the appeal was declared inadmissible for procedural reasons. In only one case, the Court rejected the appeal because of the wrong interpretation of the regional provision.

4. CONCLUSIONS

Outcomes of the monitoring activity appear successful on the whole, considering the substantially positive result in 56% of cases in the period 2013-2014.

However, differences can be noticed across instruments; moreover, the result varies depending on whether the opinions are given upon request or on the Authority’s own initiative.

In this respect, the success rate for the opinions under art. 21 of competition act 287/90 in the period 2013-2014 was not completely satisfying, whilst the success rate for opinions under art. 22 have had better results, in particular when the opinions were issued upon request, either central or local. A different analysis applies to opinions under art. 21-bis and under art. 22 upon request by the Presidency of the Council of Ministries.

In particular, opinions under art. 21 of competition act n. 287/90 in the period 2013-2014 showed a success rate of 38%. This result can be explained by the fact that in such cases the Authority issued decisions on its own initiative or upon complaint by third parties, and generally speaking the complaints target measures which are already in force. Thus, any resulting change in the status quo was
more difficult, both substantively and procedurally.

Better results come from the opinions under art. 22 of competition act n. 287/909 for which the success rate on the whole was 66%. This success rate increases substantially when the Authority issues the decision upon request of a public administration -- in these cases the success rate increases to 80%. From the analyzed data it appears evident an emerging trend of administrations, especially the central ones, to get an early opinion from the Authority, before taking regulatory measures, confirming again the role awarded to the Authority as a preferential consultant of administrations, both central and local, in competition matters. This role seems rather important in order to support the reform process and to guide the choices of institutional bodies involved. In contrast, available data suggests that local administrations may be less inclined to apply for opinions, although when an opinion is issued they seem willing to comply with the recommendations.

With regard to the 2013-2014 interventions under article 21-bis of the Law 287/90, the outcomes can be considered encouraging, with a success rate of 69%. This rate does not take into account the outcome of judicial review, so a detailed assessment of this new tool will only be possible after the conclusion of the litigation process.

In the same period, the opinions issued under article 22 of the Law 287/90 upon request by the PCM have led, in 50% of cases, to appeal before the Constitutional Court: this rate should be seen as particularly significant if one considers the consequences deriving from them.

As regards the new competences, on the basis of a comprehensive review of the interventions made since the new power under Article 21-bis was granted to the Authority on December 2011, it results that, considering 62 opinions, in 40% of the cases public administrations complied with the Authority’s suggestions. In these cases, therefore, there was no need to appeal before the administrative judge. The survey also demonstrates that local administrations proved the most compliant; however, since judicial review is the most innovative aspect of the instrument, a complete evaluation of the effects produced by the new competence will only be possible after the definition of the judicial review process. It should be noted in fact that, at present, 17 appeals are pending before the administrative judge, accounting for 32% of all interventions.

Lastly, the relevant rate for compliance with the opinions issued to the Presidency of the Council of Ministers with respect to regional legislation is of particular interest. On the basis of an overall examination of all interventions made since January 2012, when the Authority was entrusted with this new competence, in 59% of the cases (23 out of 39) the Presidency shared the Authority’s opinion, appealing the law before the Constitutional Court. The analysis of the Court’s judgments in turn reveals a high degree of consensus with the remarks of the Authority, with a success rate of 73%.

In conclusion, since 2009 the Italian legal system was endowed with the Annual Law for Competition; this was implemented for the first
time in April 2015 through the presentation by the Government of a draft law, now under consideration by Parliament. New and more effective powers have been granted to the Authority, significantly reinforcing its advocacy role. The survey revealed that, through the opinions issued to the Presidency of the Council, the Authority was able to bring to the Constitutional Court’s scrutiny the infringements of the competition principle (whose constitutional roots are generally recognized) contained in regional laws. Finally, as regards the power under Article 21-bis, the possibility to take action before the administrative judge not only generates incentive for public administrations to comply with the Authority’s suggestions; it can also become a useful instrument to convince the tribunals to trigger the Constitutional Court’s scrutiny over those legislative provisions upon which the restrictive administrative act is based. Of course, it is too early to test the effectiveness of these new competences; however, the outcomes of the monitoring exercise appear encouraging and reveal an increasing awareness, by legislators and administrative bodies, of competition as a primary value of the system, which the Authority has the mission to protect and promote.
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