ARTICLE 21-\textit{bis} OF LAW NO. 287/1990: AN ANALYSIS OF RECENT ADMINISTRATIVE CASE LAW

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Abstract: This writing aims to analyze the recent “competition-advocacy” power conferred upon the Italian Competition Authority by Article 21-\textit{bis} of Law no. 287/1990, in light of the first set of administrative case law on this issue and it aims to present an initial assessment of how the regulation has been applied to facts, while at the same time providing one or more critical observations regarding the procedural and substantive boundaries created by administrative jurisprudence following the first set of administrative complaints filed by the Authority.

This analysis will be set forth in two parts. First, the so-called “preliminary” issues raised by the article will be addressed. Specifically, an attempt will be made to understand whether a pre-complaint phase is required; on what day/date the clock should begin ticking for the purposes of presenting the initial determination; and finally, the deadline for filing the administrative complaint. In the second part the Authority’s goal in filing of the complaint will be examined to determine whether these purported antitrust violations are actually a pretext for more broadly accusing an administrative entity of failing to tailor its rules and regulations to legitimate public interests.

1. Foreword

The present writing aims to analyze the recent “competition-advocacy” power conferred upon the Italian Competition Authority (hereinafter also denoted “ICA” or “Authority”) by Article 21-\textit{bis} of Law no. 287/1990,\textsuperscript{3} in light of the first set of administrative case law on this issue. We therefore aim to present an initial assessment of how the regulation has been applied to the facts, while at the same time providing one or

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\textsuperscript{3} Section 21-\textit{bis} of Law no. 287/1990 establishes that «The Italian Competition Authority has standing to bring suit against ordinary administrative regulations, as well as procedures and provisions issued by any entity of the public administration that violate antitrust provisions.” (Section 21-\textit{bis}, paragraph 1). The second paragraph of the same section sets forth the channels through which such a cause of action be instituted: “The Italian Competition Authority, should it determine that an entity of the public administration has issued a legal document or certificate that violate antitrust provisions, shall issue an initial determination including the legal and factual basis for the same within sixty days, in which the ICA specifies the details of the violations it has discovered. If the entity of the public administration fails to comply within sixty days following, the ICA may file, by and through the Attorney General, an administrative complaint within thirty days thereafter.” (Section 21-\textit{bis}, paragraph 2). Paragraph 3 follows, which states: «For those cases filed under paragraph 1, the provisions of Book IV, Title V of Legislative Decree no. 104 (July 2, 2010) apply». DOI: 10.12870/iar-12424
more critical observations regarding the procedural and substantive boundaries lines created by administrative jurisprudence following the first set of administrative complaints filed by the ICA.  

Before diving into the analysis itself, it is important to present an overview of the results of the ICA’s first enforcement actions under Article 21-bis.

From the date (2011) the law came into force until April 2016, the ICA issued a total of sixty-two (62) initial determinations under Article 21-bis with a “positive-return” rate equal to 40%. The main industry segments affected

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4 Given the stated parameters of this article, we consider the doctrinal debate regarding the issue of standing as permitted under the regulation in question to be well-settled, and as well as any other issue not subject to a holding by the courts. For an overview of the doctrinal debate sparked by the new enforcement power, see: M.A. SANDULLI, Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell’AGCM nell’art. 21 bis l. n. 287 del 1990, in www.federalismi.it, no. 12/2012; F. SATTA, Intorno alla legittimazione dell’Autorità Garante della concorrenza e del mercato a chiamare in giudizio pubbliche amministrazioni, in www.apertacontrada.it, November 26, 2012 issue; G. GRECO, Il modello comunitario della procedura d’infrazione e il deficit di sindacato di legittimità dell’azione amministrativa in Italia, in Riv. It. Dir. PUBBL. COMM., 2010; R. GIOVAGNOLI, Risultati processuali a fronte dell’esercizio dei nuovi poteri rimessi all’AGCM ex art. 21-bis della legge 287/1990. Legittimazione al ricorso ed individuazione dell’interesse alla sollecitazione del sindacato, conference speech at «Att. amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell’AGCM» in art. 21-bis l. n. 287 del 1990 held at the University of Milan on September 27, 2012, published in www.giustimm.it, no. 10, 2012; F. CINTIOLO, Osservazioni sul ricorso giurisdizionale dell’Autorità Garante della Concorrenza e del Mercato (art. 21-bis della legge n. 287 del 1990), in www.giustimm.it, 2012; M. CLARICH, I poteri di impugnativa dell’Agenzia dei sensi del nuovo art. 21-bis l. 287/90, conference speech delivered at «Evoluzioni del ruolo e dello stato delle competenze dell’autorità antitrust», ICA Auditorium, Rome, March 27, 2013, in www.giustiziaamministrativa.it; G. URBANO, I nuovi poteri processuali delle Autorità Indipendenti, in Gior. dir. ammin., no. 10/2012; R. CHIEPPA, Speciale legittimazione a ricorrere dell’Autorità Garante della Concorrenza e del Mercato e patrocinio dell’Avvocatura dello Stato, in Ginr. cost., no. 1/2013; M.S. MARINI, Il ruolo istituzionale dell’Autorità Garante della Concorrenza e del Mercato e l’art. 21-bis della legge 287 del 1990, in www.giustimm.it, year XI - no. 6/2014; F. ARENA, Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell’Autorità antitrust italiana, article for the 10th edition of the conference entitled «Antitrust fra Diritto Nazionale e Diritto dell’Unione Europea», Treviso, May 17-
were transportation (17 initial determinations issued), miscellaneous services (8 initial determinations), large-scale distribution (7 initial determinations), insurance (7 initial determinations), and finally financial services (5 initial determinations).

The types of administrative acts or regulations subject to review were quite varied: resolutions by a municipal, provincial, or regional council or commission; public procurements and requests for proposals; ministerial decrees; management ordinances; and denials of permits or licenses.

Nearly across the board (with the exception of AS908, connected to the COTRAL s.p.a. case), the recipient of the official initial-determination letter was an entity of the public administration. Moreover, in most cases, the affected administrations were local or municipal ones, at a ratio of 47 initial determinations compared to 15 sent to State-level administrations. Furthermore, local administrations also accounted for the highest incidence of compliance with the “Article 21-bis”, initial determinations issued by the ICA. Indeed, compliance was obtained in 24 of the 47 cases, thereby reaching a compliance rate of almost 50% compared to a 33% compliance rate at the State level (5 out of 15 cases).

From a more substantive point of view, it should be noted that the ICA took full advantage of the ambiguity of the term “violation of antitrust regulations,” identifying a violated “regulatory parameter” just as often in EU law (i.e. Articles 49, 56, 101, 102, 106, 107, and 108 of the TFUE, and 2006/123/EC Directive a/k/a “Services Directive”) as in national law. The term was construed variously in the different cases to be aimed at deregulating certain markets, or more simply removing unjustified barriers to entry and/or to the exercise of certain economic activities. In that context, recent reforms relating to local public services had a major impact, as did the current government’s recently enacted “deregelation” laws. In particular we are

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6 For a broader perspective on the issue, please see the speech given by the Italian Competition Authority’s Research and Analysis Department at the conference entitled «I nuovi poteri di advocacy dell’Autorità Antitrust: un primo bilancio», held at the Italian Competition Authority on December 10, 2015. Speeches may be downloaded at the following webpage: http://www.agcm.it/convegni-seminari/7978-i-nuovi-poteri-di-advocacy-dell-autorita%C3%A0-antitrust-un-primo-bilancio.html.


8 See, e.g., AS908, AS926, AS1078.

9 See, e.g., AS913, AS977, AS1027.


11 See, e.g., AS990, AS1037, AS1118, AS1130.

12 Emblematic of this issue is the fact that recent TU diagrams (green-lighted by the State Accounting Office and relating to local public services and public companies) explicitly reference Section 21-bis of Law no. 287/1990 as it relates to the prerequisites (mainly market analysis) required prior to awarding an exclusive public-service contract, or incorporating a public company.

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referring – in addition to Article 4 of Law-Decree no. 138 (2011) which has now been excised from our statutes\(^\text{13}\) - to Article 3, paragraph 9, subpart (h), to Articles 31 and 34 of Law-Decree no. 201 (December 6, 2011), commonly known as the “Save Italy Decree,” to Article 1 of Law-Decree no. 1 (January 24, 2012), commonly known as Grow Italy Decree, and finally Law-Decree no. 59 (March 26, 2010), implementing the “Services Directive” from the EU.

Following this general introduction, we will proceed with a view of the first set of opinions issued by administrative-law judges. In doing so, we will work to determine the aim of a law that, to put it mildly, leaves something to be desired in terms of simplicity and clarity. This analysis will be set forth in two parts. First, the so-called “preliminary” issues raised by the article will be addressed. Specifically, we will attempt to understand whether a pre-complaint phase is required; on what day/date the clock should begin ticking for the purposes of presenting the initial determination; and finally, the deadline for filing the administrative complaint. In the second part we will examine the ICA’s goal in filing of the complaint, to determine whether these purported antitrust violations are actually a pretext for more broadly accusing an administrative entity of failing to tailor its rules and regulations to legitimate public interests.

2. THE CASE FOR THE PRE-COMPLAINT STAGE

The first issue to resolve is whether the ICA can file a complaint directly against an act considered violative of antitrust provisions without going through a pre-litigation stage. Assuming arguendo that it can, such an approach would require reading the first and second paragraphs of Article 21-bis disjunctively, qualifying the instructions in the latter as a mere *modus procedendi* that the ICA could enforce – or not enforce – at will.

We should immediately clarify that the theory most widely shared in this new doctrine identifies an initial determination issued pursuant to Article 21-bis as a necessary precursor to instituting a legal case of action thereafter, and for the court allowing it to proceed.\(^\text{14}\) This particular construction is based on ensuring that at least a preliminary dialogue between the compelled administration and the ICA has taken place. This in turn may be used by the former to evaluate whether to withdraw the contested administrative act, or more simply to provide context to the ICA, which in the complex matrix of competition and antitrust issues raised in the initial

\(^{13}\) Held unconstitutional by the Italian Constitutional Court in judgment no. 199 (July 18, 2012), in that it violates the rule against re-establishing a law abrogated pursuant to a referendum held under Section 75 of the Italian Constitution.

determination might otherwise be missed. By following that procedural route, the parties avoid the secondary stage before the administrative judge altogether. Support for this approach may be found—in addition to the plain text of the statute—in the principle of good-faith dealing among public entities. While not a decisive factor, that principle would doubtless weigh in favour of the chance to have a preliminary “meet and confer” phase.

That approach is not immune from criticism, however. To wit—especially in the more egregious cases—a scenario may arise in which ICA, via a complaint directed to an administrative judge, would be able to achieve an immediate injunctive result that otherwise (where the prior phase of issuing the initial determination is deemed necessary, with the subsequent delay until the deadline) might be totally pointless. Proponents of the approach contend that, in theory, a “plain reading” of the statute would permit that interpretation as well. To be sure, the first paragraph might be construed as an acknowledgment of the possibility of an immediate filing of the case, whereas the second paragraph would introduce an alternative, more collaborative approach. In further support of this alternative reading, one could also cite the fact that Article 21-bis contemplates no consequences (in terms of inadmissibility or dismissal) should the pre-litigation phase be skipped entirely.

Another theory in favour of the direct-filing approach is one that conflates the ICA’s enforcement authority with the authority conferred on public-interest entities to safeguard interests that touch and concern a broad spectrum of the populace. If there were further conditions precedent to the ICA’s instituting a case (even if not expressly contemplated by the law), the effect on the ICA would be discriminatory when compared to private-sector public-interest entities.

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16 See R. GIOVAGNOLI, Ricadute processuali a fronte dell’esercizio dei nuovi poteri rimessi all’AGCM ex art. 21-bis della legge 287/1990. Legittimazione al ricorso ed individuazione dell’interesse alla sollecitazione del sindacato, previously cited work.

17 If, on the other hand, we accept this interpretative reconstruction, a further problem arises with regards to the deadline for filing the complaint. The thirty-day deadline set forth in the second paragraph would only appear to be logical in a situation where ICA has already had sixty days to draft its initial determination, with a further sixty days to await the response from the affected administrative entity. Therefore, if the direct filing of the complaint is allowed, that thirty-day deadline must be replaced with the regular sixty-day deadline. Since Section 21-bis, paragraph 3, incorporates the full text of Title V of Book IV of the Code of Administrative Procedure by reference—which, as already seen, includes two different procedures, the common expedited version pursuant to Section 119 of the same Code, and the special expedited version for public procurement under Section 120 of the same—another problem could be triggered, given that the Section 120 procedure effectively halves the deadline to thirty days. The problem arises where one accepts the construction of
question has only been presented formally in the one case where ICA instituted proceedings against a provision by the Municipality of Rome as Capital of Italy (having made a determination of an egregious antitrust violation). That case was not preceded by a pre-litigation stage that would have commenced with the issuance of an initial-determination letter supported by factual and legal basis.\textsuperscript{18}

The Regional Administrative Court (“T.A.R.”) of Lazio, with their holding on this issue as expressed in judgment no. 2720 (2013), fell on the side of the first two schools of thoughts, supporting the need for a prior initial determination supported by a legal and factual basis. In that sentence, the T.A.R. openly supported the need for a pre-complaint phase, as it would «guarantee a moment of dialogue between the ICA and the administration that issued the purportedly antitrust act or document, which might prompt voluntary compliance with free-market principles». The T.A.R.’s holding was subsequently confirmed by the Council of the Italian State in judgment no. 2246 (2014), wherein the appellate court rejected the appeal filed by the ICA, thereby bringing the debate discussed above to a definite close.

The Lazio T.A.R. began its reasoning by affirming that the need for a pre-complaint phase can be traced back to the inarguable “warning-notice” quality of the enforcement power attributed to the ICA (albeit bolstered by the option of filing a complaint thereafter). The judgment, to wit, places emphasis on how «the “systematic” placement of the ICA’s new enforcement power, with the insertion into the body of the instituting law, between Articles 21 and 22, reveals the legislative intent of promoting the traditional consulting and notice function (a/k/a “competition advocacy”) governed by such regulations, and attributed to the same from the beginning. The legal standing to appear before the administrative-law judge, indeed, imbues that function with true substantive power, albeit in a mediated format under the scrutiny of the ALJ. It is precisely because of this correlation that, in the opinion of this Court, sitting en banc, that the ICA’s filing of suit must be preceded by a proceedings-based administrative operation, as “procedure” is the common

\textsuperscript{18} S1621/Pagamento ingresso ztl. With that complaint, the ICA moved for the cancellation of Resolution no. 282 (October 4, 2012), which sets forth “Regolamentazione dell’accesso dei titolari di autorizzazioni di noleggio con conducente rilasciate da altri Comuni all’interno delle Zone a Traffico Limitato di Roma Capitale (Admission regulations for chauffeured-vehicle permit holders issued by other Municipalities within the Limited-Traffic Zones in Capital City Rome).” On the record, the ICA argued for that choice by stating that «with the insertion of Section 21-bis into the existing Law no. 287/90, the former was vested with a dual set of enforcement powers […]. If, indeed, the legislator had wished merely to give the ICA the authority to file a complaint following a warning notice, the first paragraph of the regulation would be rendered superfluous. In further confirmation of the distinction between the two types of action is the fact that paragraph 3 of the regulation governs – by way of a complete incorporation by reference of Book IV, Title V, Legislative Decree no. 204 (July 2, 2010) – the procedural timeline for only those “cases filed pursuant to paragraph 1,” without creating a similar reference for cases instituted under paragraph 2».\textsuperscript{19}

\textsuperscript{19} See Lazio T.A.R., Division III, judgment no. 2720, dated March 15, 2013.
denominator linking both traditional and independent administrative authorities." The T.A.R.'s judgment continues with arguments including a citation of the Constitutional Court's sentence no. 20 (February 14, 2013), and confirmed that should the possibility remain open to the ICA to file a complaint immediately, the result would be "to subject regional regulatory and administrative acts to a new and generalized audit of their legitimacy, based on a Public Agency, thereby violating the limits discernable in the Constitutional Court Judgment no. 64 (2005), and further violating Article 117, sixth paragraph, as well as Article 118, first and second paragraphs, of the Italian Constitutions." According to the Lazio T.A.R., moreover, there was no merit to claims that only an alternative construction of Article 21-bis, paragraphs 1 and 2 would allow the ICA (at least in the more egregious cases) to request injunctive relief. Indeed, the court noted, "the 'danger in delay' typically assessed in instances of injunctive relief tends to lie in instances of our traditional notion of standing which, in the case at bar, lacks by definition in that the ICA has not sustained a personal, actual injury, but rather acts in the interest of the free-market principle in general. On the other hand, the injury to the free market is not a subjective injury but if anything (as the doctrine on the issue highlights as well) an injury to the competitive structure of the market itself, in an objective sense." As already mentioned, the Lazio T.A.R. judgment no. 4451 (2013) was then appealed by ICA, and the Council of State – in its cited sentence no. 2246 from May 1, 2014 – upheld the administrative-court’s ruling. More specifically, the higher court concurred with the lower court’s decisions by stating that "this court finds […] as a comforting precedent the theory that the legal standing conferred upon the ICA is the exception rather than the rule and predicated on a legal asset to be safeguarded, and the singularity and cohesion of the court action proposed by the same, provided it is preceded by the required pre-litigation phase." According to the Council of State, that

23 See Lazio T.A.R Division II, judgment no. 4451, dated May 6, 2013. In that same decision, the court further highlights that "We do not find, in conclusion, the preliminary procedural phase to be expressly defined by the regulation as a condition precedent to admissibility and/or prosecution of the action, or that the omission and/or improper fulfillment of such phase to be expressly connected to a finding of inadmissibility. In the administrative-law codified system, next to the quintessential dismissal scenario (see, as an example, the last paragraph of Section 40, as replaced by Section 1, paragraph 1, subpart j of Legislative Decree no. 160/2012, relating to a factual and legal basis presented without specificity, which is inadmissible as a matter of law), there is in fact a general provision under which the complaint may be dismissed when an actual interest in the res is lacking, or where there are other impediments to a finding on the merits.” (Section 35, paragraph 2, Code of Administrative Procedure).
24 See, Council of State, Division V, judgment no. 2246, dated May 1, 2014.
necessity springs directly from the legislative intent contained within the provisions of Article 21-bis. The initial determination required by Article 21-bis, paragraph 2, indeed, would have a dual function in that on the one hand, (i) it invites the compelled entity of the public administration to review its own positions and to comply with the ICA’s instructions, thereby allowing the threatened public interest to be protected by a discussion kept within the confines of the public administration, and on the other hand (ii) it serves to de-escalate the dispute, construing litigation as a last resort, «since the legislator may well take an unfavourable view of situations in which public entities turn directly (and exclusively) to the courts to protect a public interest». In light of these arguments, the Council of State, in the judgment under discussion, concluded by emphasizing that «the regulation under review, that is, Article 21-bis of Law no. 287 (1990), [...] even in light of the singularity and cohesion of the legal asset to be protected (competition and the free market) [...], does not contemplate two distinct forms of protection for such asset, one with direct and immediate access to the court, and the other through a pre-litigation phase».

In light of the court judgments discussed above, one can discern on the one hand that the legal standing conferred by Article 21-bis upon the ICA is nothing more than a new example of statutory enforcement authority, and on the other hand, that the preliminary conference stage becomes a veritable and inevitable precursor to litigation.

On the other hand, unlike the T.A.R., the Council of State did not find that qualifying the preliminary conferencing stage as a precursor to litigation precluded the ICA from seeking injunctive relief. In that sense, in fact, the judges at Palazzo Spada confirmed that «there is no logical or system-based reason to prevent (provided certain criteria have been met) the ICA from seeking injunctive relief under Article 61 of the Code of Administrative Procedure prior to the filing of any complaint». That said, the fact that under Article 61 of the Code of Administrative Procedure an applicant who requests preliminary injunctive relief from the Court must serve the opposing party with their complaint within fifteen days thereafter and this would run counter to such a conclusion.

It boils down to the following: either we must agree that the ICA, in order to obtain injunctive relief prior to the filing of its complaint must – within the above-mentioned fifteen-day time period – proceed with the issuance of its Article 21-bis, paragraph 2 initial determination in lieu of serving notice of the complaint; or we must agree that the Council of State has generated a completely atypical, ad-hoc channel for injunctive relief, which would

25 See Council of State, Division V, judgment no. 2246, dated May 1, 2014.

26 Administrative Procedure, contrasts with the timeframe set forth in Section 21-bis. Based on Section 62 of the Code of Administrative Procedure, indeed, if the applicant succeeds in obtaining preliminary injunctive relief, the latter must proceed with serving notice of the complaint within fifteen days thereafter, and regardless, any injunctive relief granted expires sixty days following the entry of the order. That timeframe therefore cannot be reconciled with the procedure under Section 21-bis.
allow for a waiver of the notice requirement within the deadline established by Article 61 of the Code of Administrative Procedure in instances of exceptionally serious antitrust situations.

3. Preliminary issues: The date from which the deadlines for filing begins for purposes of voluntary compliance with the initial determination as permitted under Article 21-nonies of Law No. 241/1990

Another issue tackled and resolved in recent case law involves whether the sixty-day deadline established by Article 21-bis for the issuance of the initial determination is absolute or mandatory in nature and the relevant trigger date from which to count such a deadline.

With reference to the nature of that deadline, the Lazio T.A.R. (Division II-quater), in its sentence no. 9264 (2014), reached the conclusion (later rejected by the Council of State at the appellate stage) in which the sixty-day deadline for issuing the initial determination would either be absolute, or relative, depending on whether it acts as a mere alert that the ICA’s intends to file a complaint. In other words, according to the Lazio T.A.R., that deadline would only assume an absolute nature if the initial determination was in fact followed by a complaint filed in a court of law «with the understanding that the law cannot tolerate, in situations destined to involve significant and high-profile economic interests, that any uncertainty regarding the forming of relationships between public administrations and private subjects involved in administrative operations persists».

The Council of State, in its sentence no. 1171 (2015) rejected the conclusions of the T.A.R of Lazio, emphasizing that a deadline is either absolute, or it is not; that its nature cannot depend on a variable that will be determined only following the expiration of such a deadline. Albeit without taking a definite stance of the nature of the sixty-day deadline, the Council of State nevertheless confirmed that it involved «a per-se administrative operation, not one of instituting a case, and therefore the conditions precedent for extending to it the same the principles set forth in the Code of Administrative Procedure for the prosecution of a legal case have not been met». Thus, Article 41, paragraph 2, of the Code of Administrative Procedure does not apply, especially insofar as it concerns the governance for those «acts for which individual service of process is not required», for which – as is well-known – the term begins to run «from the day in which the deadline for publication has passed, should publication be required by law or pursuant to law». In other words, the sixty-day period within which the ICA must issue its Article 21-bis initial determination begins to run only when the ICA has “full knowledge” of an administrative act that violates the principles of competition, that is from the receipt of «a specific communication (from any source) containing the relevant elements on which the initial determination will be based, since only from

29 See Council of State, Division, V, judgment no. 1171, dated March 9, 2015.
that moment would the ICA be placed in a position to exercise its authority.\textsuperscript{30} As we have noted, to supplement the concept of “full knowledge,” a perception of the existence of an administrative provision and its harmfulness is sufficient, in order to allow the existence of the interest to be perceived, and to take action against the same. In this view, “full knowledge” incorporates the existence of a condition of the action.\textsuperscript{31} The concept of “supplemented knowledge,” on the other hand, consisting of a supplemented, detailed knowledge of the contents of a certain administrative act, impacts not the level of the conditions of the action, but rather the content of the complaint, and the concrete definition of the reasons for summoning the offending party into court, and thus on the cause of action.\textsuperscript{32} Or rather, given that the harm against the subjective legal status of one or more market operators (which might follow from an administrative provision) does not necessarily – in and of itself – infringe upon the free market,\textsuperscript{33} by carrying the court’s note to its extreme, one might even find that a full understanding of the “relevant elements of the administrative act” might require further investigations or acquisition of supplemental data by the ICA. In other words, since the market’s competitive structure is by its very nature a changing one, any particular administrative provision’s actual degree of harm may depend on the acquisition of extrinsic evidence, which transcend both the administrative act in question, as well as the subjective status of the complainant. Since it is not always possible to discern the antitrust effect of a single administrative act directly from the act itself, but rather such an effect may be discerned from the ICA’s investigations, the trigger date for the initial determination-issuance deadline pursuant to Article 21-\textit{bis} might be made to coincide with the conclusion of that inquiry.

The risk of “over-reach” (measured in the progeny of opinions to which the Council of State,\textsuperscript{34} among others, belongs) appears sufficiently counterbalanced by the time limits set forth in Article 21-\textit{nonies} of Law no. 241 (1990), in terms of the exercise of self-help remedies by the interested administrative entity.\textsuperscript{35} A time limit rendered considerably susceptible to excluding from public evidence only certain market operators.

\textsuperscript{30} See Council of State, Division V, judgment no. 1171, dated March 9, 2015.

\textsuperscript{31} On this point – from this perspective – see Council of State, Division IV, judgment no. 4642, dated October 6, 2015.

\textsuperscript{32} It is no accident, then, that Italian statutes expressly allow for the submission of supplemental legal and factual bases, through which the party petitioning for relief may submit further support of its complaint as other offending administrative acts (in existence at the time of the original filing, but unknown to the moving party) come to light, or as the applicant gains a fuller understanding of administrative acts, and those within the (new) statute of limitations of sixty days of such new notice.

\textsuperscript{33} One can imagine the requisites for a public-procurement bid (e.g., entry requirements) that are

\textsuperscript{34} That conclusion, furthermore, seems to have become a staple in recent case law in that it was cited by the Veneto T.A.R. as well in its judgment no. 737 (2015). See Veneto T.A.R., Division 1, judgment no. 737, dated June 26, 2015.

\textsuperscript{35} The ICA, in fact, does not have an unlimited amount of time in which to formalize its Section 21-\textit{bis} initial determination. That is, as can be seen, the Section 21-\textit{bis}
more rigid lately following the amendment to Article 21-<e>nonies</e> of Law no. 241 (1990) in the form of Law no. 124 in 2015 (popularly known as the Madia Decree) which came into effect on August 29, 2015. The previous text of Article 21-<e>nonies</e> defined the deadline by which the entity of the public administration might use a self-help remedy within “a reasonable time.” That “reasonable time” has given rise to an indeterminate and elastic framework that has left interpretation up to the affected party, to be gauged based on the degree of complexity of the interests involved, and their relative consolidation. A framework that has resulted in self-help remedies being utilized even years from the date in which the canceled or reformed administrative act had been adopted. Thanks to the above-mentioned reform, the text of Article 21-<e>nonies</e> was modified; in the new version, “reasonable time” has been replaced with the much clearer and more rigid “eighteen months.” Thus, following legislative amendment, the affected entity of the public administration may implement a remedy within eighteen months of the adoption of the administrative act needing either cancellation or reformation. The flexibility of the deadline in which ICA can take action pursuant to Article 21-<i>bis</i> therefore strikes up against the time limit set forth in the revised Article 21-<e>nonies</e> of Law no. 241/1990, which further narrows its scope.  

4. (CONTINUED) THE STATUTE OF LIMITATIONS FOR FILING AN ADMINISTRATIVE COMPLAINT

A very recent Council of State decision has reformed a line of jurisprudence that had previously been used regarding the deadline for presenting an Article 21-<i>bis</i> complaint, and the specific date from which the timeframe begins to run.

Decisions handed down by numerous Regional T.A.R.’s, in fact, weighing on the one hand the necessity of the pre-litigation phase, and on the other depicting the ICA’s standing to sue as a measure of last resort, had ended with a consensus that a halved timeframe for filing the complaint, i.e. thirty days, could only be justified where the instituting of a case followed a “meet and confer” phase with the purportedly offending administration. Based on those directions, therefore, the courts coalesced in stating that the timeline for filing the complaint could «only begin to run at the expiration of the total timeframe allotted to the administrative law, applies not only to administrative acts adopted following the statute’s being enacted, but applies retroactively as well. In that sense, in fact, the Council of State has affirmed that «even where such provisions (i.e. the new Section 21-<e>nonies</e>) did not apply at the time the act was adopted, they nevertheless apply for purposes of interpretation and reconstruction of the system-framework for the interests at issue.» See Council of State, Division VI, judgment no. 5625, dated December 10, 2015.


initial determination is aimed – at least in the first round – at prompting the receiving administrative entity to seek a self-help remedy.

36 One must further note that the new deadline pursuant to Section 21-<e>nonies</e>, as interpreted by this first set of case
entity — not only that for responding to the initial determination issued by the ICA, but also the time allotted for conforming its operations to the directions provided in such initial determination. From that line of argument, one might discern that the thirty-day timeframe for filing a complaint under Article 21-bis begins to run — in all cases — once sixty days have elapsed from the notice of initial determination to the purportedly offending administrative entity.

As we have noted, that line of decisions was superseded by the recent judgment handed down on January 28, 2016, by the Council of State as sentence no. 323. In that judgment, indeed, the Council of State underscored that neither a plain reading of the statute, nor the logic of the pre-complaint phase, provides support for the conclusion that the end of the sixty-day timeframe (beginning on the issuance of the initial determination) «is in and of itself, or invariably, the trigger date for the ICA to begin to seek relief from this Court». According to the Council of State, in fact, a similar timeframe would be triggered — as in all other cases in which an entity of the public administration is provided a deadline to respond, «either from the definitive, non-conforming administrative act, or by the entity’s silence in instances of a willful failure to act in response to a negative initial determination». If this were not the case — that is, if we were to adopt instead the approach presented by the various Regional T.A.R.’s — in instances where entities of the public administration had manifested an express rejection of an issued initial determination, a complaint could be filed against «the non-existent ‘act’ of refusing to comply to the cited initial determination». In other words, the Council of State argued that where an entity of the public administration openly (and prior to the expiration of the allowed sixty-day response time) expresses its intention to flout the initial determination issued by the ICA, «there is [...] no need to wait for the recipient to reconsider its position in the waning days of the timeframe (i.e., to await the lapse of sixty days); such delay serves no purpose at all, where such a reconsideration of position could just as easily happen over the course of the court case, up until a final judgment is issued». That delay, therefore, is not evidence of the scenario defined by Article 21-bis «not only because the sixty-day deadline is set for the benefit of the putative offending party, but also “awaiting a reconsideration” is, in the end, precisely what any recipient of a harmful act foresees prior to filing suit, in order to avoid it».

In light of that approach, therefore, the thirty-day deadline for filing a complaint under Article 21-bis must begin to run either from an express refusal by the subject entity of the public administration to conform to the initial

41 See Council of State, Division IV, judgment no. 323, dated January 28, 2016.
42 See Council of State, Division IV, judgment no. 323, dated January 28, 2016.
determination, or where the entity is simply failing to act, following the expiration of the sixty days the law allotted to it to conform.

That said, the sentence handed down by the Sicily T.A.R. as no. 676 in 2014 (issued by the Detached Catania Article, Article IV) warrants a reflection. In that decision, the Court en banc dismissed as untimely a complaint filed by the ICA when filed outside the fixed deadline set forth in Article 21-bis, paragraph 2, of Law no. 287 (1990).

The court, sitting en banc, reached that opinion by construing cited paragraph 2 to mean that a total timeframe of ninety days begins to run not from the “service of notice” on the initial determination, but from the “communication” of the same. The T.A.R. provided a legal basis for that opinion by noting that the rules established by Article 21-bis, paragraph 2, intend «mainly to regulate the ICA’s appellate burden»44. Its decision would therefore not conflict with the general rule that «the start date for the subject who sends the legal document begins upon mailing or sending, whereas for the recipient it relates to the date of receipt»45. However, in so arguing, the court en banc pays scant attention to the special nature of the dialogue phase created by Article 21-bis, paragraph 2. If we were to accept the interpretation of the T.A.R. of Catania, indeed, in all cases where the mailing/sending and receipt dates for those initial determinations issued pursuant to Article 21-bis were on different days, then either the administration-recipient would have the timeframe allowed for it to conform to the initial determination effectively curtailed by the ICA (presuming they timely file a complaint), or the ICA would have its thirty-day period in which to file the complaint curtailed (presuming they strictly follow the sixty-day time period allotted for the affected public entity to conform to its initial determination). Both timeframes cannot be preserved under such a reading.

5. LEGITIMACY OF THE ADMINISTRATIVE ACT: VIOLATIONS OF THE PRINCIPLE OF TAILORED INTERESTS

Now that we have addressed the key procedural issues concerning the relationship between the conference stage and the litigation stage, it would be interesting to consider some court decisions that go to the merits of complaints filed by the ICA.

The contours of this legislative instrument are taking shape through judicial interpretation that evaluates whether any antitrust violation by the public administration is based on whether the administration has properly tailored its discretionary authority based on the various public interests involved. In that sense, the legislative instrument becomes a bastion for pro-competition principles – scattered across the various statutes – which all administrative bodies are required to weigh, in their role as regulators, contractors, or as lenders to private organizations, against other public interests. From that perspective, the need for the proper

44 See Sicily T.A.R., Detached Catania, Division IV, judgment no. 676 (2014).
45 See Sicily T.A.R., Detached Catania, Division IV, judgment no. 676 (2014).
Tailoring of the administrative action rises to a level of principle among principles, a way of discerning a potential conflict between the free market and other public interests, thus defining the playing field for interaction between public entities and the ICA, according to the rules set forth in Article 21-bis of Law no. 287/1990. Assessing proportionality or tailoring offers various degrees of intensity of related judicial review, which in turn depend in large measure on the characteristics of the affected sectors, and the antitrust “sensitivity” of the assigned judge. In some cases, in fact, to overcome the purported antitrust issues, a mere allusion to provisions addressing a different public interest (one of equal weight) sufficed, obviating the issue of other less restrictive means to achieve the same result. In other instances, however, the administrative judge scrutinized the public entity’s choice in order to determine whether the restrictive measure was indeed indispensable compared to the other public interests involved.

On that note, the decision handed down in the Lazio T.A.R. in the Postal Service case (on the issue of a public-procurement contract under the Ministry of Transportation for payment-management and accounting services), is of particular note. It is relatively a simple question: The ICA argued that one of the award criteria, namely: «geographic reach of coverage, availability, and number of physical points of service for payment» would have clearly favoured the traditional monopoly (Poste Italiane – Italian Postal Service), especially since extra points were awarded for the points of service being owned by the bidding company.47

The court, even while starting with the completely reasonable notion that entities of the public administration must properly balance special needs relating to a certain contract against the absolute freedom of the

47 With respect to those who could only guarantee the availability of such a network, the bid calculator allots a maximum of 23 points for that criterion (weighing it at over 30% of the 70 total points available pursuant to the technical specifications), thereby creating an unjustified (from a technical standpoint) advantage to those bids offering broad coverage, availability, and PRIME (SFP) payment kiosks, defined as points of service for payment owned by the bidder, compared to those bids that would rely on payment kiosks known as “OPTION” (SFO) kiosks, meaning either owned by the bidder, or available for the bidder’s use throughout the contract period based on a valid license already held at the time the bid was presented, and in which the service is provided by natural persons. The comparison between the points available in the first and in the second case highlights the disproportionate weight of having “SFP” kiosks, thereby providing an advantage to the “Poste,” which thanks to its network of post offices owns a greater number of such kiosks throughout the country (to the tune of 13,676 payment windows), greatly outweighing both in terms of number and in terms of reach any other market operator, with no individual entity owning more than 4,500, and with various geographical reaches.

46 These was the tender announced by the Ministry of Transport for the award of managing and accounting services contract for payments made by users to the Department for transportation, navigation, IT, and statistical systems (published in GUCE 2013/s on July 9, 2013). With judgment no. 7546, handed down on May 27, 2015, the Lazio T.A.R. denied ICA’s complaint. The Council of State, in judgment no. 6675, handed down on November 17, 2015, affirmed the regional T.A.R., albeit on different grounds. The ICA’s initial determination is available at www.agcm.it (AS1078/Gara per l'affidamento in
market,\(^{48}\) did not allow itself to be swayed by ICA’s argument, finding that the granting of permission to smaller entities to join forces for purposes of the bid was sufficient to dispel any doubts about the possible exclusionary effect of the objectionable criteria. Moreover, the court found the points attributed on that criterion to have a relatively modest impact on the technical specifications in their entirety.\(^{49}\)

The court, perhaps, erred on a conservative side in analyzing – in terms of fit – the criterion’s ability to restrict competition, in light of the potential benefits accruing to the same. If the goal had been to guarantee the greatest geographic network of payment kiosks for users, the procedure might simply have included bonus points – proportional to the number and location of the proffered kiosks – without thereby affecting the general sub-criterion of availability. Rather, the use of bonus points to be awarded for proprietary kiosks of the potential competitor (i.e., Postal Service’s competitor) compared to those where only availability (and not ownership) could be guaranteed, only served to heighten the potentially restrictive nature of the criterion, neutralizing the chances of any Postal Service competitor, along with the synergy deriving from a potential aggregation of businesses. Clearly, protecting competition in procurement scenarios does not mean protecting one or more pre-selected competitor. Rather, it means a merit-based selection system that might inure to the benefit of the party issuing the procurement contract. It is wholly within the realm of the possible that the Postal Service, as a monopoly-holder for the postal network, and an exiting operator with regards to the service placed up for bid, would nevertheless have emerged as the winner of the competition. Regardless, the mere risk of even slight competitive pressure would have disciplined the former monopoly holder, forcing it to provide more reasonable conditions of offer, to the clear benefit of the body calling for tenders. The judge was not asked (nor should he be asked) for a market analysis. That said, if the T.A.R. had actually evaluated the pre-selected criterion in light of the interests for which it ostensibly had been created, it could not have missed the disproportionate weight, and thus illegitimacy, of the same, if only in part, since it is evident that, according to the offered contract terms, it would have inevitably

\(^{48}\) More specifically, the TAR noted: «there can be no doubt that by setting the selection criteria, and the parameters for predetermined awarding of points at the maximum level, it is possible to make an ‘upstream’ determination of the ideal bid, but such an modus operandi is legitimate where the selection criteria are connected to the nature and/or technical characteristics of the service contract to be awarded, or where there are particular needs that the service must fulfill. […]Such directions must definitively be tied to the need to guarantee competition in public-procurement processes, as a matter of principle in the field of European law. The institutions of all EU member states must respect such a principle in the exercise of their discretionary authority. This principle implies that provisions that impinge on the free market – as safeguarded under EU law – must be narrowly tailored to the public interest to be served. They must also be unavoidable, meaning no other equally effective but less restrictive means is available.»

\(^{49}\) The official procurement documents, indeed, contemplated the use of Temporary Association of Enterprises (“R.T.I.”), and the pooling of resources.
translated «into a surreptitious formation of a single potential winning bid».

The principle of “fitness” finds broad application in the T.A.R.’s opinion on the “minimum costs of ground shipment”, which centered on a provision by the Ministry of Transportation with which certain “minimum costs of operation” for the road hauler as a guarantee of safety measures were established and adopted. Following a judgment interrupted by a request for preliminary ruling sent to the European Court of Justice, the T.A.R. took

Poste Italiane S.p.A. was awarded the contract, according to information available at http://www.mit.gov.it/mit/mop_all.php?p_id=17078.


The Lazio TAR, in its order no. 4183/2013, made available the reference for a preliminary ruling to the European Court of Justice pursuant to Section 267 of the TFUE, requesting the following from the same: a) whether the freedom of competition, the free circulation of businesses, the freedom of establishing and providing services (pursuant to Section 4, paragraph 3, TUE, Section 101 of the TFUE, and Sections 49, 56, and 96 of the TFUE) is compatible (and if so, to what degree) with the national provisions of EU member states setting minimum operational costs in the field of ground shipment, implicating the heteronomous fixing of a cost-component for the service, and thus of the contractual price; b) whether, and under what conditions, the minimum operational costs according to Section 83 bis of Law Decree no. 112/2008 et seq. might be placed in such context; c) whether setting minimum operational costs, from the perspective mentioned, might then be simply left to voluntary agreements among interested operators, and subordinate to that, to entities made up largely of entities who represent such private-sector operators, absent predetermined criteria established by the legislature. In its judgment of September 4, 2014, on the case consolidated from C 184/13 to C 187/13, C 194/13, C 195/13 and C 208/13, the Court of Justice determined that “Article 101 of TFUE, as read in conjunction with Article 4, paragraph 3 of the TUE, must be construed in a manner that places it counter to an internally inconsistent national regulation and according to which the price of third-party ground shipping of merchandise cannot be less than the minimum costs of operation determined by an entity composed mainly of representatives from interested operators from that economic sector.” In its judgment, the Court acknowledged that Article 83 bis of Legislative Decree no. 112/2008 violated the free-market safeguards of Article 101 of the TFUE, and Article 4, paragraph 2, of the TUE.

Court of Justice judgment September 4, 2014, previously cited.
other more effective and less restrictive measures regarding roadway safety that nevertheless guarantee a minimum acceptable safety level.  

In essence, this was the T.A.R.’s reasoning in not applying Article 83 bis of Law Decree no. 112/2008, the regulatory source of authority for the questioned administrative acts, and ruled in favor of ICA.

Also worth noting is the application by the T.A.R. of Liguria of the referral to the Constitutional Court on the companion case to the one filed by ICA pursuant to Article 21-bis, both concerning the Regione of Liguria’s decision to issue a tender for municipal bus services, which took the form of a single regional bid lot. In its initial determination, the ICA had underscored its natural aversion to excessively broad bid lots, especially in sectors like local transportation, in which the economy of scale deriving from the annexation of contiguous operators is inexistent, or at least quite modest. After having cited constitutional case law leading to antitrust and environmental-protection measures applied to

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54 Including, for example, the EU regulations relating to the maximum workweek, work breaks, time off, night shifts, and technical inspection of motor vehicles.

55 Genoa TAR, Division II, order no. 64, dated January 8, 2016. The ICA’s initial determination is available at www.agcm.it (AS1214/ Regione Liguria-avviso per l’individuazione degli operatori economici per il trasporto pubblico locale).


57 Constitutional Court judgment no. 32 (March 12, 2015), and no. 228 (July 23, 2013).
Law that had been submitted to the Constitutional Court.

Finally, the two companion decisions handed down by the Catania T.A.R. and relating to technical-nautical services merit some attention, especially in light of the ICA’s multiple attempts to raise the port authorities’ awareness of the possibility of opening the door to models managed in a more free market fashion. The issues on which the T.A.R. ruled, in terms of the merits, focused on the port authorities’ refusal to authorize self-provision of mooring and steering services prompted by a request from a high-profile operator. The ICA had found that the objectionable provisions had totally ignored the need to balance the need for safety standards in regulating technical-nautical operations at the port against the need to ensure the greatest degree of competition in the market. Stated plainly, there is no doubt that the operations at issue involve «general-interest services aimed at guaranteeing navigational and docking safety in the port system – where such services are instituted» (Law no. 84/1994, Article 14, paragraph 1 bis). Less obvious is that the mere regulatory reference to navigational safety (a foundation of the related monopoly granted to the corps of pilots or the mooring group, and boaters established in each port) would be sufficient to defeat the objections raised on the merits with regards to the provision that pre-empted the request for self-provided mooring and steering. The judge, in fact, associated the protection of port safety to the existence of a monolithic coordinator, represented by the corps of pilots or mooring professionals, as the only entity able to coordinate the movements of various captains present in any given moment. From this flowed the impossibility that the single operators, «albeit technically capable and with the requisite expertise» should have the proper complete view of the port traffic necessary to manage such operations with perfect safety.

The TAR, in any case, fell into a clear logical contradiction when, in a dramatic development, it depicted a hypothetical situation in which navigational safety and the free market might coexist. Under circumstances where a «regulatory move from a [port] authority, which subjects the action of various operators to the coordination of a central control station», the joint presence of more than one ship-captain organization is within the realm of the possible, where such organizations could discuss rates and the manner of carrying out such service.

58 These are the Catania T.A.R., Division IV’s judgments nos. 946-947 (April 7, 2015). Initial determinations issued by the ICA are available at www.agcm.it (AS1081/Disiego del diritto all'autoproduzione del servizio di ormeggio nel porto di Messina and AS998/Regolamentazione del servizio tecnico-nautico di pilottaggio nello stretto e nel porto di Messina). For a more thorough analysis of the ICA’s notices of noncompliance in the area of nautical-technical services sector, see AS905/Servizi tecnico-nautici e determinazione delle relative tariffe nei porti italiani in Boll. 1/2012.

59 In the T.A.R. judgment “In any case, the different organizations present at the port must be regulated in order to provide their ancillary maritime services in a manner that is accessible to all subjects transiting through the interested areas, and with the diligence, continuity, universality, regulation, and supervision of the public authority, in order to effect the general public service required under the law. For that reason, therefore, one could not for example allow for individuals to provide their own services, meaning for each operator to handle the operations autonomously, for the exclusive benefit of their own navigation company.” That “pluralistic” form of managing piloting...
To follow that train of thought, it would therefore seem that the only impediment to a competitive mechanism (and to the self-provision of such services) in Italian ports is not so much navigational safety per se, as much as the fact that the port authorities do not handle the coordination and control of piloting/mooring ships, having preferred to delegate such responsibility to the private organizations at each port, thereby granting more or less exclusive control to the same. One might therefore imagine that the T.A.R.’s refusal to allow for an individual to provide such services is not based on the need to safeguard “singular” oversight for safety’s sake, as much as to preserve a monopoly. Furthermore, one cannot easily understand why the T.A.R. believes that competition would only be possible among various ship-captain organizations coordinated by the port authority, and not among independent organizations and operators (as in the case of operators providing their own services). The error the court runs into, essentially, is that of taking for granted that in any given scenario, technical-nautical services may only be provided by professional organizations already lodged de jure in the ports. The same opinion, however, shows that the need to ensure port safety would in fact be compatible with operators providing their own ancillary service might actually be realized either by subdividing the Port into distinct areas, to be “assigned” to the exclusive oversight of each organization (which some European ports have actually done); otherwise through the joint coexistence of various operators belonging to different organizations.

technical-nautical services (or more generally with free-market mechanisms), if only the port authority would take back its role as regulator and coordinator for those port operations to be handled in light of the principle of proportionality.

6. Conclusion

The reflections offered above reveal how the Italian Competition Authority’s prerogatives were extended in part, and restricted in part, by the first set of judgments from administrative judges regarding the new “competition advocacy” power derived from Article 21-bis of Law no. 287/1990.

From the first perspective, to wit, in order to identify the timeframe in which to issue the “Article 21-bis initial determination,” the weight of the instrument was significantly broadened, once the Council of State underscored the specifically administrative nature of the activity that takes shape with the issuance of the initial determination, thereby precluding (at least for the moment) the application of the principles set forth in the Code of Administrative Procedure on claim prosecution. Thus, this decision, on the one hand, curtailed the regime established by Article 41 of the Code of Administrative Procedure to the administrative operation set into play by the ICA under Article 21-bis, insofar as it involves administrative acts not requiring individual service of process, but on the other hand, in granted ICA the possibility to benefit from a relatively “elastic” deadline, such as it allows further determinations in instances where,
albeit in the presence of an administrative act requiring publication of a legal notice and/or a qualified report, the assessment of that act’s actual detriment to the free market cannot take place without the acquisition of extrinsic elements.

In the latter sense, those prerogatives are limited to the extent that the Council of State construed Article 21-bis to mean that the thirty-day deadline for the ICA to file its complaint would begin to run, not from the expiration of the 60 days granted by the regulation for the subject entity of the public administration to conform to the requirements of the issued initial determination, but from the date the entity adopts a provision which indicates its intention to flout the initial determination. Such a provision would entail – in those cases in which such an intention is manifested prior to sixty days elapsing – an abbreviation of the timeframe in which ICA might file a case under Article 21-bis, and consequently a difficulty in scheduling the related operations, and the conference with the Attorney General, or with independent attorneys (not belonging to any particular bar).

Furthermore (from the other perspective) it has clarified, contrary to certain doctrine, how the new enforcement power granted to ICA by Article 21-bis is nothing more than a new iteration of a statutorily conferred authority to bring suit. From this point of view, likewise, the same Court underscored the need for the pre-litigation conference phase as an unavoidable phase that ensures a moment of dialogue, and a search for common ground, between the ICA and the entity of the public administration who issued the contested administrative act.

Such a statutory construction has the unarguable advantage of significantly extending the timeframe for a constructive dialogue between the ICA and the entities of the public administration, which until recently would only interact within the boundaries set on the one side by normal “advocacy” activity under Articles 21 and 22 of the antitrust law, and on the other, by criteria set by CIF case law60 in

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those instances where the administrative provision was in fact vulnerable to facilitating or imposing violation of Articles 101 and 102 of the TFUE by businesses.\(^6\)

Finally – to use a metaphor – from the case-law overview conducted thus far, it appears that if Article 21-bis does in fact represent the “dialogue,” then the principle of proportionality constitutes the “language” through which the ICA and the entities of the public administration interact. The ICA, exclusive depository of market knowledge in which a certain administrative provision is destined to hit, should – through its initial determination – propose the best (read: least restrictive) path to the affected administrations in order to balance (through the lens of proportionality) the public interest involved and the protection of the free market. Moreover, they can proffer potential alternative solutions to mitigate the effects, or burdens, of a certain regulatory restriction. The courts, for their part, should then verify that any resistance presented by the affected administrative authority to the correction proposed by ICA be upheld or rejected based on a correct assessment of the proportionality of the administrative action.

The analysis of this first set of Article 21-bis cases has shown that administrative judges are not always “fluent” in this “language”. Besides an isolated case (one related to the minimum costs of self-transport) the merits of which should in large part be attributed to the EU’s Court of Justice, administrative judges have generally held the proportionality test satisfied upon finding a mere allusion within the subject provision to another public interest (of equal level) on the altar of which the principle of a free market might be sacrificed. In the present article, we have tried to demonstrate that – at times – an antitrust provision, albeit prompted by a justifiable government interest – actually goes well beyond what would be strictly necessary to protect other involved public interests, or any particular needs of the principal in a public-procurement situation. Faced with the evidence provided by the ICA regarding the existence of less restrictive but equally suitable alternatives to protect stated public interests, administrative judges should not reserve too great a margin of error to save the contested provision.

\(^6\) On the coordination of the disapplication power with the authority established under Article 21-bis. see H. Simonetti, L’art.21-bis della Legge 287/1990 ed il potere d’impugnazione dell’Agen: è ancora il secolo della «giustizia nell’amministrazione», previously cited work.
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