

COMPETITION ADVOCACY: THE ITALIAN EXPERIENCE

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Abstract: *Competition advocacy is considered, together with enforcement, the core business of an antitrust authority. Broadly speaking there are at least three main tasks regularly performed by most, if not all, antitrust agencies that are amenable to the advocacy function: addressing laws and regulations in order to remove unnecessary impediments to competition; engaging in sector enquiries to understand markets behavior and identify critical issues; explaining the benefits of open competitive markets to the public opinion. This article examines these three main tasks and outlines the challenges for competition agencies, with references to the experience of the Italian Competition Authority (ICA) and the initiatives undertaken at international level.*

1. INTRODUCTION

The advocacy function of antitrust agencies, consisting in a broad range of activities aimed at fostering a “competition-friendly” environment, is expanding significantly; today it is considered, together with enforcement, the core business of an antitrust authority.

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While this can be expected from well-established competition authorities, it is likely the case that the advocacy function is increasingly at the fore of activities in younger agencies.

The long standing importance of such activity is testified by the fact that when the International Competition Network (ICN) of antitrust agencies was created in 2001, competition advocacy, together with merger review, were the two main priorities the network decided to focus on.² Today, within the ICN, the Working Group dedicated to advocacy is among the most busy, with ample participation of member agencies to its activities (workshops, teleseminars) and a copious production of guidelines and recommendations. In December 2013, the Italian Competition Authority hosted the ICN workshop on “Advocacy as a driver for change”, with more than 120 participants from 57 countries discussing strategies and tools to

² ICN established a dedicated working group which presented, at the first ICN annual meeting in Naples, its *Report on Advocacy and Competition Policy*, the first ICN work product setting the basic principle for competition advocacy. The *Report* is available on the [ICN website](http://www.internationalcompetitionnetwork.org/). Over the years ICN has produced a variety of tools which can be used by agencies in setting their advocacy actions: for instance, the [Advocacy Toolkit](#) aimed at all those engaged in competition advocacy, which includes elements on promotion mechanisms, educating decision makers, media relations, plain language, internal communications, websites, and research and consultation. For information on other products of the ICN Advocacy Working Group: <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx>.

promote a more competition-friendly environment.³

Other international organizations, such as the OECD⁴ and the World Bank⁵, have come to recognize the importance of advocacy in promoting competition and liberalization measures to improve the performance of market based economies.

Overall, advocacy is considered complementary to the enforcement function. While the latter promotes allocative and productive efficiencies, by repressing anti-competitive behavior, advocacy aims at eliminating unnecessary restraints on market activities, thus fostering innovation and the creation of new enterprises (i.e., dynamic efficiency). Complementarity works both ways: a good enforcement track record may give more weight and credibility to the advocacy activities of competition agencies, and the other way round, an advocacy initiative can facilitate an enforcement action, as the result of in-depth understanding of the functioning of the markets.

This article examines the content of advocacy, considering its three main tasks and outlining the challenges for competition agencies, with references to the advocacy activities carried out by the Italian Competition Authority (ICA).

³ Workshop agenda and presentations are available at: <http://www.agcm.it/component/content/article/12-convegna-e-seminari/6861-icn-workshop-2013.html>

⁴ See for instance the [OECD's Competition Assessment Toolkit](#), first published in 2007 and then updated in 2010.

⁵ The World Bank has entrusted to the Investment Climate Department the task to promote the elimination of anti-competitive regulation and unnecessary barriers to competition imposed by government policies, and to encourage effective enforcement of competition rules.

Broadly speaking there are at least three main tasks regularly performed by most, if not all, the antitrust agencies that are amenable to the advocacy function: addressing laws and regulations in order to remove unnecessary impediments to competition; engaging in sector enquiries to understand markets behavior and identify critical issues; explaining the benefits of open competitive markets to the public opinion.

The recipients of the advocacy efforts include a broad group of stakeholders - with differentiated status, requirements and sensitivity - ranging from the economic and social establishment (e.g., enterprises, unions, media and the public at large), to the institutional and legal system (e.g. government entities, legislative bodies, judicial courts). Advocacy is performed differently, according to which of the relevant stakeholders it is aimed at.

2. ADDRESSING LAW AND REGULATION

This is the most relevant and demanding task of the advocacy function. Numerous laws and regulations restrict competition in the marketplace, many of them going further than necessary to achieve their policy objectives. The elimination of unnecessary restraints on market activities requires a full-time engagement with government, legislators and regulators. Competition agencies have at their disposal a variety of tools: non-binding opinions; formal involvement in the drafting of laws and regulation; parliamentary hearings; informal dialogue through workshops, seminars and the press. Since its establishment in 1990, the ICA has delivered around 1,100 non-binding opinions to the Parliament, the

Government and public administrations at all levels and nearly half of these advocacy interventions occurred in the last five years.

Careful consideration of the type of addressees is essential when designing the advocacy intervention. Generally, when interacting with policymakers such as the Parliament and the Government the approach appears to be more similar to that of an independent advisor offering different options and recognizing that the ultimate decision rests upon the other party. In these cases, competition authorities should clearly state the competitive implications, especially those of long term nature, and leave to the political authority the evaluation of the necessary trade-off.

Conversely, the approach appears to be more “hands on” and confrontational when dealing with public administrations or local authorities, because the advocacy intervention often comes ex-post. When the addressee is another independent authority (e.g., regulators), competition advocacy intervention occurs in the form of dialogue among peers, based on technical and more focused discussion.

Another crucial aspect of the advocacy intervention is the timing. When agencies are able to assess legislation or regulation before it is introduced and suggest alternatives or mitigation measures, policymakers are more likely to conform, in particular if the unanticipated adverse effect of the draft legislation on competition was not understood beforehand. Obviously advocacy on the production of new legislation and regulations requires constant monitoring in order for the agency to provide a timely opinion on the competition impact.

On the other hand, the ex-post assessment, i.e., reviewing existing laws, is intrinsically less effective than the advocacy intervention on draft legislation. The process for amending or removing an existing law generally requires time and the political consensus built around the enacted legislation is more difficult to change given the vested interests that have been created, unless a competition agency presents convincing evidence on the anticompetitive effects of the law.

This appears to be supported by the evidence at hand. The share of the opinions which prompted the recipient to amend draft legislation/regulation to account for the ICA’s suggestion was 36% in 2013, compared to the 12% for opinions formulated in 2013 on existing laws and regulations.

Given these difficulties, the “ex-ante” competition assessment of law and regulation is becoming a widespread practice among OECD countries, as a part of the Regulatory Impact Assessment (RIA), and an international benchmark is also now available from ICN: last April the network released its *Recommended Practices for Competition Impact Assessment*.⁶

Italy is yet to enact a systematic recourse to the competition authority’s assessment of rules restricting economic activity. Although a recent reform has introduced the requirement on government departments to seek a binding opinion of the ICA when introducing restrictions on access to economic activity,⁷ in

⁶ Available at:
http://www.icnmarrakech2014.ma/pdf/RPs_circulation_SG_2014-04-10.pdf

⁷ See article 34, comma 5, d.l. 201/2011 (l. 214/2011).

practice the norm has never been applied, due to the lack of initiative of the relevant entities.

Notwithstanding the importance for competition agencies to offer their opinion on legislation at national or central government level, the possibility to address secondary legislation or legislation at regional and local level remains vital for promoting effectively a “competition friendly” environment.

Monitoring these levels of legislation and regulation plays a crucial role in ensuring the success of liberalization measures through an effective implementation. In the Italian institutional framework, legislative and regulatory powers in many important sectors are exclusive competence of regional and local authorities or, at the best, shared with the central government with unclear boundaries. In this context, the social and economic benefits of liberalization reforms passed by the Parliament might never be fully displayed because secondary legislation and regulation at local level are often needed to make reforms fully operational. In some cases, liberalization reforms have been watered down by local administrations.⁸

To address this problem, the Italian competition law was amended and advocacy powers have been strengthened. Thus, pursuant to Art. 21 *bis* of l. 287/1990, the ICA can issue an opinion requesting public local entities or administrations to repeal any

administrative act that, in ICA’s view, is contrary to competition law and principles. In case of non-compliance to its opinion, the ICA may challenge the act before the Administrative Tribunal.

Not surprisingly, the effectiveness of such advocacy interventions is significant: for opinions delivered in 2013, compliance occurred in nearly 70% of the cases. More generally, since its introduction in 2012 the ICA has used this power in 43 cases: the recipient has aligned the act with the ICA opinion in 20 cases; in 23 cases the recipient failed to comply but only in 12 of these cases the ICA requested the Administrative Tribunal to repeal the administrative act (see Table in the Annex).

Another interesting trend among antitrust agencies is to conceive of their advisory function as a pro-active approach whereby opinions are issued not only to eliminate unduly restrictive measures, but also to stimulate the Government to liberalize and open market to competition.

The ICA, for instance, has taken a pro-active approach in the context of the Annual Law for Competition. According to this law, enacted in 2009, every year the Government is asked to present to Parliament a liberalization bill, taking into account the opinions and the recommendations delivered by the ICA over the years. To facilitate this task, on several occasions the ICA compiled a broad comprehensive report containing a menu of advocacy proposals covering different sectors, selected on the basis of ICA’s evaluation of

⁸ As an illustrative example, a recent academic paper has empirically analysed the implementation of a liberalization reform in the retail distribution sector (d.l. n. 114/1998) in terms of new retail outlets. See: Fabiano Schivardi & Eliana Viviano, “Entry Barriers in Retail Trade”, *Economic Journal*, Royal Economic Society, vol. 121(551), pp. 145-170, March, 2011.

their potential impact on competition and growth.⁹

These comprehensive reports represent an opportunity for stimulating the debate on pro-competitive reforms. By addressing many different sectors, these proposals may be perceived as more equitable and help mobilize public opinion support for the reforms and counter the inevitable opposition of vested interests. Moreover, they allow the ICA to take stock of its opinions submitted over the years and monitor their implementation.

Another interesting trend is the increasing reliance on the international organizations such as the ICN, the OECD and the World Bank to convince the legislative body of the soundness of proposed reforms, because they conform to international standards. For example, some agencies have cited the ICN Recommended Practices in official documents for the legislature as a rationale for change and to build support with the private sector, by showing how proposed changes would measure up to best practice.¹⁰

3. MARKET STUDIES

The use of market studies as a tool for advocacy by competition agencies is now widespread. According to the ICN, at least 40

competition agencies regularly perform market studies under different legislative provisions, for different purposes, using different processes.

The international practice shows that market studies are useful instruments for advocacy because they help to identify specific pro-competitive proposals for removing unwarranted restrictions and opening markets to competition. Moreover these type of studies enhance the enforcement capacity as they provide understanding about the market structures and composition (number of players, barriers to entry, substitute markets). For instance, in 2005 the ICA started an enquiry on local public transport, which prompted a proceeding ascertaining several bid-rigging infringements.¹¹ More recently, the ICA launched an investigation against a buying group in the grocery trade sector shortly after closing the enquiry related to the sector in question.¹²

The advocacy function is also increasingly addressed to undertakings, with the aim of enhancing their awareness of antitrust misconducts and improve compliance. The adoption of formal antitrust compliance

⁹ The advocacy reports prepared for the Annual Law for Competition are available at: <http://www.agcm.it/segnalazioni/legge-annuale.html>

¹⁰ For instance, the consultation document launched by the Italian Competition Authority in January 2014 in relation to setting merger notification thresholds was inspired by the ICN recommended practices and reports which were expressively mentioned. Besides, the analysis of the different thresholds options took into account ICN benchmarks.

¹¹ The sector enquiry is IC29 - *Trasporto Pubblico Locale* while the proceeding is I657 - *Servizi Aggiuntivi di Trasporto Pubblico nel Comune di Roma*, October 2007.

¹² See AGCM, IC43 - *Settore della Grande Distribuzione Organizzata*, July 2013, available at: <http://www.agcm.it/indagini-conoscitive-db/open/C12564CE0049D161/973E4D42D69C4A11C1257BC60039BBA0.html>. The antitrust case I768 - *Centrale d'acquisto per la Grande Distribuzione Organizzata* was launched in December 2013 and it is still on-going. The decision for opening proceedings is available at: <http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/5FA0C2E4B49AC7DDC1257C4A00505642.html>

programs is promoted and actively encouraged by many competition authorities. The ICA, on the basis of the UK precedent, is envisaging the possibility of considering a compliance program a mitigating factor in the quantification of sanctions.¹³

Advocacy can play a decisive role in markets where the lack of competition primarily stems from frictions on the demand-side which may not be tackled through enforcement action. Indeed, in these instances competition can be increased by enhancing consumer mobility and awareness by advocating for measures to lower switching costs, reduce consumer inertia, and increase transparency and information. In July 2013, a report monitoring the evolution of the costs for operating personal banking accounts concluded with proposals to lower switching costs and enhance client mobility.¹⁴

This role of the advocacy is particularly important in the context of procurement. Guidelines for helping procurement agencies to spot collusive behavior have been actively promoted by competition agencies, as an advocacy tool to strengthen enforcement against cartels. In 2013 the ICA launched an initiative to assist contracting entities in identifying behavioral anomalies which might

indicate bid-rigging in public procurement sector. A handbook, including tips and hints drawn from international best practices and the OECD Guidelines, was made available to the general public and to major procurement agencies in Italy.¹⁵ A positive feedback immediately ensued, and ICA opened an investigation on the basis of a complaint received from a procurement agency which used the ICA handbook to spot an abnormal behavior.

As the process of conducting market studies can be costly and time consuming they need to be performed with a clear view of what the objective of the study should be. They are also more effective in terms of advocacy when they are carried out in conjunction with the relevant sectorial authorities and if they are able to involve the stakeholders inputs and reactions through public hearings or consultations. In 2009 the Italian Competition Authority, in conjunction with the sector regulator, carried out a market inquiry on the Gas Storage sector¹⁶, identifying several liberalization measures that were enacted the year after with a Government decree. More recently, a market study on the issues related with the roll-out of and access to the new generation broadband

¹³ The consultation document and the proposed guidelines are available at:
<http://www.agcm.it/component/content/article/173-consulotazioni-pubbliche/6933-consultazione-pubblica-sulle-linee-guida-relative-alla-modalita-di-applicazione-dei-criteri-di-quantificazione-delle-sanzioni-amministrative-pecuniarie-irrogate-dallautorita-in-materia-di-concorrenza.html>

¹⁴ See AGCM, IC45 - *Indagine Conoscitiva sui Costi dei Servizi Bancari*, July 2013, available at:
<http://www.agcm.it/indagini-conoscitive-db/open/C12564CE0049D161/FA002E867704F7DCC1257BE9003A77B3.html>

¹⁵ The Handbook is available at:
http://www.agcm.it/trasp-statistiche/doc_download/3955-delibera-e-vademecum.html

¹⁶ See AGCM, IC38 - *Mercato dello Stoccaggio del Gas Naturale*, May 2009, available at:
<http://www.agcm.it/indagini-conoscitive-db/open/C12564CE0049D161/C5B94738F86C4B12C12573B10051247B.html>

networks in Italy has been jointly launched by the ICA and the sector regulator.¹⁷

4. EXPLAINING THE BENEFITS OF COMPETITION

This strand of advocacy has gained prominence since the recent economic crisis has shaken faith in markets, protectionist pressures have increased substantially, legislators are more prone to grant competition law exemptions as there are accusations that competition has contributed to the crisis. Thus, advocacy becomes even more indispensable in these circumstances and antitrust agencies can play a lead role in explaining the benefits of a truly competitive environment for consumer welfare and growth, and recalling the importance of rigorously applying competition law even at times of economic downturn.

An effective example of advocating the benefits of competition is contained in the 2011 report of the Office of Fair Trading on Competition and Growth. This report collects the general evidence on the relationship between competition and growth and describes the economic impact of a number of specific interventions carried out by the OFT.¹⁸ The ICA also considers it very important to advocate the benefits of an open, competitive market economy and this regularly occurs in at

least two occasions: at the time of the official presentation of its Annual Report before the Parliament and when releasing the report for the Annual Law for Competition. These two documents typically contain a general introduction which accounts for the economic context, its evolution and the status of reforms, illustrates examples of successful liberalizations and estimates the potential benefits in terms of growth of pro-market reforms.

Other opportunities for delivering a message on the benefits of competition arise in the context of hearings before the Parliament on specific issues or sectors. To reach out a wider audience, the ICA also organizes seminars or conferences in partnership with think-thanks, research institutions and universities.¹⁹

At global level, the ICN has been actively supporting its members in advocating the benefits of competition. The main message spread by ICN in these recent years is that competitive markets sustain economic growth, provide lower prices and better deals for consumers and firms, foster entrepreneurial innovation; in addition, open markets are a precondition for social upwards mobility.²⁰

It is fundamental for antitrust agencies to select appropriate means and messages when approaching government, legislators, media, business and consumers. There are various means of communication, formal and informal,

¹⁷ See Agcm, IC48 - *Mercati di Accesso e Reti di Telecomunicazioni a Banda Larga e Ultra Larga*, January 2014, available at:

<http://www.agcm.it/stampa/news/6713-antitrust-e-agcom-avviano-indagine-conoscitiva-congiunta-su-banda-larga-e-ultra-larga.html>

¹⁸ See:

http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/economic_research/of1390.pdf

¹⁹ For instance, every year the ICA hosts the Intertic Conference on issues concerning innovation and antitrust policy.

²⁰ See for instance, ICN “*The case for competition policy in difficult economic times*” available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc818.pdf>

direct and indirect. The messages should concern the principles and benefits of competition, and agencies should be ready to clearly indicate the trade off between competition and relevant public policy objectives (such as industrial policy, employment issues and environmental and health protection) that policy makers will have to resolve.

Finally, advocating the benefits of competition also requires highlighting case studies and successful examples from international organizations and agencies around the world. In 2013 the World Bank organized the Competition Advocacy Contest,²¹ to showcase the role of agencies in promoting competition in developing and emerging markets. Also, the ICN “Explaining the Benefits” Project of the Advocacy Working Group is currently collecting messages and examples to provide knowledge, strategies and arguments for explaining the benefits of competition to support advocacy efforts with government and non-government stakeholders.

5. CONCLUSIONS

Over the years the advocacy of antitrust agencies has proven to be an important complement to their enforcement activities in the drive to promote open, competitive markets that ensure an efficient allocation of resources, innovation, social mobility and economic growth.

In Italy, the ICA has steadily supported the government’s reform efforts through its advocacy function by indicating priorities and policy options, addressing the arguments of vested interests, monitoring the implementation of the reforms.

The ICA’s support has been increasingly recognized by policy makers and the Courts. Recently, the Italian Government has declared, in the context of the National Reform Program of the European Semester,²² that it will utilize the Annual Law for Competition, based on the advocacy report prepared by the Antitrust authority to introduce further liberalization measures. Spillovers from the advocacy carried by ICA can also be found in courts’ judgments. Economic reasoning and principles delivered in ICA’s opinions are often used by the courts to assess the arguments of the case at stake. A further proof of the useful interplay between enforcement and advocacy.²³

²¹ More information is available at: <https://www.wbginvestmentclimate.org/advisory-services/cross-cutting-issues/competition-policy/winners-2013-competition-advocacy-contest.cfm>

²² See: http://www.dt.tesoro.it/it/analisi_programmazione_economico_finanziaria/documenti_programmatici/sezione1/pnr.html

²³ Rebecchini S., *Competition Advocacy: the Italian Experience*. DOI: 10.12870/iar-10194.

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ANNEX

The status of Art. 21bis opinions as of May 2014

Opinion Description		Year of opinion	Compliance	Decision to appeal
1	S1571 – Roseto degli Abruzzi – Spiagge	2012	Yes	-
2	S1530 – Monza Brianza Grandi strutture di vendita	2012	Yes	-
3	S1519 – Concessione impianti fune Terminillo	2012	Yes	-
4	S1473 – Strutture di vendita Sicilia	2012	Yes	-
5	S1389 – Gara fornitura ricambi Cotral	2012	Yes	-
6	S1862 – Genova somministrazione bevande e alimenti	2013	Yes	-
7	S1836 – Veneto Aiuti alle imprese artigiane	2013	Yes	-
8-12	S1812 – Consorzi difesa produzioni agricole (5 opinions)	2013	Yes	-
13	S1784 – Provincia di Bergamo, requisiti Albo cooperative	2013	Yes	-
14	S1769 – Storo esercizi commerciali	2013	Yes	-
15	S1741 – Catania esercizi commerciali	2013	Yes	-
16	S1738 – Merano esercizi commerciali	2013	Yes	-
17	S1735 – Bolzano esercizi commerciali	2013	Yes	-
18	S1917 – Lerici impianto Ciccirolla	2014	Yes	-
19	S1743B – ATO MB Brianzacque	2014	Yes	-
20	S1963 – Gallarate servizio erogazione acqua	2014	Yes	-
Subtotal		20 compliance cases		
1	S1621 – NCC Z.T.L. Roma	2012	No	Yes
2	S1577 – Rimorchio Milazzo	2012	No	Yes
3	S1358B – Normativa autotrasporto	2012	No	Yes
4	S1366 – Confidi Abruzzo	2012	No	Yes
5	S1851 – Gara Ministero dei trasporti diritti motorizzazione	2013	No	Yes
6	S1811 – Ormezzano Messina	2013	No	Yes
7	S1732 – Pilotaggio Venezia	2013	No	Yes
8	S1720 – Atac	2013	No	Yes
9	S1672 – Roccaraso impianti di risalita	2012	No	Yes
10	S1634 – Pilotaggio Messina	2012	No	Yes
11	S1925 – Venezia CitySightSeeing	2014	No	Yes
12	S1933 – Scontrini Lotto MEF	2014	No	Yes
Subtotal		12 non-compliance cases with appeal		
1	S1570 – Cremona Tariffe di facchinaggio	2012	No	No
2	S1561 – Castrignano del Capo noleggio da	2012	No	No

	ricmorchio			
3	S1555 – Venezia ristrutturazione gruppo ACTV	2012	No	No
4	S1529 – Trento/disciplina dell'attività commerciale	2012	No	No
5	S1486 – Orari Farmacie in Puglia	2012	No	No
6	S1413 – Gara TPL Regione Molise	2012	No	No
7	S1348 – Lucca/divieto di seduta negli esercizi di vicinato	2012	No	No
8	S1663 – CAREMAR	2012	No	No
9	S1286B – Strutture sanitarie Saint Peter	2013	No	No
10	S1936 – Scuole nautiche Rovigo	2014	No	No
11	S1918 – AAMS Tabacchi	2014	No	No
Sub total		11 non-compliance cases with no appeal		
TOTAL		43 opinions pursuant to art. 21 bis		

Source: Italian Competition Authority