

THE TAR LAZIO'S JUDGMENT ON THE NON-HOTEL ACCOMMODATION SERVICES. SOME REFLECTIONS ABOUT THE SHARING ECONOMY

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Keywords: Italian Competition Authority; TAR Lazio; 21-bis; Airbnb; sharing economy; on-line platforms; regulation; competition

1. INTRODUCTION

This article first provides some comments on the judgment of the Lazio Regional Administrative Tribunal (*Tribunale Amministrativo Regionale del Lazio* - "Tar Lazio"), which annulled, on appeal of the Italian Competition Authority ("ICA") under art. 21-bis of the Law n. 287/1990, some provisions of a regulation of the Region of Lazio disciplining non-hotel accommodation facilities. These new forms of hospitality are increasingly in competition with traditional accommodation services, especially thanks to the opportunities provided by platforms such as Airbnb, a peer-to-peer accommodation website which facilitates the entrance into the market and a direct competition with hotels. Drawing from these comments, the article takes the opportunity to reflect on the challenges posed to regulators and competition authorities by the new phenomenon of the sharing economy, pointing out how the difficult task is to stimulate, not impede,

innovation, allowing the introduction of regulation of economic activities only to the extent that they are necessary and proportionate.

Defined a few years ago "*one of the ten ideas that will change the world*"², the sharing economy may be considered as a new economic reality that is transforming key sectors of the economy, outlining a way of meeting needs based on collaborative consumption, that is to say shared access to consumer goods and services. Different forms of shared goods (cars, homes, etc.), and also knowledge and skills, are offered through online platforms and involve more people every day, posing many challenges for the institutions that are coping with this new phenomenon.

In this regard, the judgment commented on here is of great interest not only because it involves the discipline of non-hotel accommodation, a segment of the sharing economy that is expanding rapidly thanks to the extraordinary

² *Ten Ideas That will Change the World*, in Time, 17-3-2011, available at <http://content.time.com/time/specials/packages/article/0,28804,205952120597172059710,00.html>. The European Commission, in the Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda for the Collaborative Economy, published on June 2, 2016, COM(2016) 356 final, defines the concept as "*business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals*".

¹ Italian Competition Authority.

success of platforms such as Airbnb, but also for the centrality in the evaluation of the judge of the impact of the new rules on the market and their justifications from a competitive perspective.

Finally, this case provides an interesting example of the functioning of the new competition advocacy power conferred upon the ICA in 2011 by the Monti government through the *Salva Italia* decree³, which introduced the article 21-bis in the Law no. 287/1990⁴. Through this new instrument, the ICA has more direct powers to promote competition, at the same time strengthening dialogue and administrative collaboration with public bodies. Indeed, this power allows the ICA to intervene, although with the administrative judge's mediation, in the dynamics of the regulation, in order to avoid an excessive sacrifice of competition⁵. It

³ Following the ICA's opinion of January 5th 2012 (Opinion for the Annual Competition Law), regarding pro-competitive measures to increase the competitiveness of the main sectors of the Italian economy, the Government adopted the Law Decree n. 214/2011 ("*Salva Italia*" Decree) and the Law Decree n. 1/2012 ("*Cresci Italia*" Decree) giving the ICA new surveillance, reporting and advisory powers.

⁴ This power grants the ICA standing to take judicial action against legal and administrative acts, regulations and government measures, adopted by any public body that violate the rules protecting competition and the market. In implementing this power, the ICA may issue a reasoned opinion outlining the violations of competition principles, and if the public actor involved fails to comply, the ICA may file an appeal through the State Attorney ("*Avvocatura Generale dello Stato*").

⁵ Fox, Eleanor M. and Healey, Deborah, "WHEN THE STATE HARMS COMPETITION — THE ROLE FOR COMPETITION LAW" (2013). New York University Law and Economics Working Papers. Paper 336. http://lsr.nellco.org/nyu_lewp/336.

is a quite original instrument: in fact, very few competition agencies have similar powers, making the approach in this case among the most novel in competition authorities at the European and international levels⁶.

2. THE PROCEEDINGS

The events giving rise to this proceeding may be divided into three main institutional steps: a first intervention by the ICA through an opinion sent to the Lazio Region in October 2015, followed by a favorable ruling by the Tar Lazio of June 2016, which confirmed the assessments expressed by ICA and was then followed by partial compliance of the Lazio Region. The essential steps of this complex story are briefly recalled in the following paragraphs.

2.1 The ICA's opinion

In the opinion n. AS1239 of October 14th 2015⁷, the ICA suggested the elimination of unnecessary and disproportionate restrictions envisaged by the Lazio Regions' regulation n. 8 of 7 August 2015 for non-hotel accommodation structures ("*Nuova disciplina delle strutture ricettive extra-alberghiere*") ("*the Regulation*"). In particular, the ICA highlighted that certain

⁶ Fox, E. M., and Healey D., cit.; the competition laws of Tunisia, Lithuania and Mexico authorize the competition authority to challenge public anticompetitive measures.

⁷ See ICA's opinion n. AS1239 - Nuova disciplina nel Lazio delle strutture ricettive extra alberghiere, in Bulletin n. 47/2015.

measures limited the access and exercise of non-hotel accommodation services, defining minimum operational requirements, limitations to opening days, minimum floor spaces and maximum numbers of rooms and other requirements; these restrictions could raise barriers to entry and expansion for potential new operators, to the detriment of the competitive dynamics of the accommodation sector and to consumers⁸.

Moreover, the Regulation had introduced a distinction between professional and non-professional accommodation services (based on the level of the activity during the year) and considered the latter not to be economic activity and, therefore, outside the scope of competition law. In its opinion, the ICA had argued that the above distinction was not based on market conditions and could limit economic initiative. In particular, this distinction and the other contested restrictions did not meet the proportionality test introduced in the liberalization interventions in 2011 for all

regulations imposing restrictions on market access (with the exemption of certain sectors): the ICA's view was that they were not justified and necessary for attaining the public interests at play (public health, environment, guest safety).

For these reasons, the Regulation was considered in contrast with the main rules and principles protecting competition, in particular with the articles 10 and 11 of Legislative Decree no. 59/2010 which has implemented in Italy the so called "Services directive", with subsequent interventions of liberalization and also with articles 49 and 56 of the TFEU and articles 3, 41 and 117 of the Italian Constitution⁹. In conclusion, the ICA called on the Region of Lazio to take corrective measures to remove undue restrictions within a specified period.

However, as the Region did not remove such restrictions of competition, the ICA lodged an appeal before the Tar Lazio for the annulment of said measures, being in contrast with laws regulating access/supply of services, as well as with the principles of free competition, equal treatment and non-discrimination.

⁸ Specifically, the Regulation: i) imposed a period of mandatory closing (100 and 120/90 days) on houses and apartments for holidays ("Vacation rental") and Bed & Breakfasts ("B&B") managed in non-professional form; ii) allowed Municipalities to impose specific closing periods only to non-professional accommodations on the basis of evaluations connected to economic needs; iii) gave to the Municipality of Rome the power to identify areas in its territory where new hostels are allowed to be established, so as to avoid an excessive concentration of structures in specific urban areas; iv) defined a minimum duration, not less than 3 days, on Vacation rental contracts; v) imposed restrictions on the structures' sizes in terms of mandatory minimum meters of certain spaces, imposing onerous and sometimes materially impossible adjustment obligations also with reference to existing structures.

⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. The principles recognized by the Services Directive have been recalled and developed by subsequent interventions of liberalization; see Article 3, paragraph 7, of the Law Decree n. 138/2011, art. 34 of the Law Decree n. 201/2011 and art. 1, paragraphs 2 and 4, of the Law Decree n. 1/2012.

2.2 The Tar Lazio's judgment: full convergence with the ICA's arguments

The Tar Lazio, with the ruling n. 6755 of June 13th 2016, upheld the ICA's appeal, deeming unjustified and discriminatory the challenged restrictions, since they constituted limitations not functional to the pursuit of general interests, revealing a spirit of authoritative intervention of regional legislator in the economy, able to exacerbate the administrative burdens on the owners of the accommodation facilities. In particular, the Tar Lazio annulled the Regulation's restrictions on the activity (i.e. the regulation of the closing periods, the power of the municipality of Rome to identify areas of its territory to be allocated to the opening of hostels, the minimum duration of rental contracts for Vacation rental) and which constituted barriers to access (i.e., the minimum required of square footage of some spaces, in conjunction with the provision of structural adjustment obligations).

Preliminarily, the administrative judge, after underling that the promotion of competition in the regulation of economic activities is a crucial instrument also to overcome the long lasting crisis that Italy is going through, confirmed the legitimacy of the guiding principles adopted by the ICA. In particular, articles 10 and 11 of the Legislative Decree n. 59/2010 contain the "guiding principles" according to which *"the access to and the exercise of activities are expression of the freedom of economic initiative and cannot be subjected to unjustified or discriminatory limitations"*, as well as the provisions of the subsequent

decrees of liberalization¹⁰, which also require the regions to regulate access to and exercise of economic activities in such a way as to guarantee competition and the principle of freedom of economic activity. After confirming the ICA's approach in adopting those principles as the appropriate parameters to measure the compatibility with competition rules, the judge examined those provisions on the same base. In particular, the judge shared a first critical objection raised by the ICA related to the differentiation - respectively for Vacation rental and for B&b - of their exercise in a non-professional manner. This distinction appeared to be based on the duration of the period of inactivity¹¹. Leaving on the side the unreasonable asymmetry - able to determine a discrimination between the indication of a double minimum term of inactivity only for B&b - for which it is not offered by the Region a market justification - the judge rejected the Region's arguments justifying this distinction with the necessity for order and clarity and the need to align it to a distinction derived from tax regulations. In fact, these needs cannot be included in the list of imperative reasons of general interest which, where they exist, could justify a limitation on the economic freedom. According to the judge,

¹⁰ See article 3, paragraph 7, of Law Decree N. 138/2011, Article 34 of Law Decree N. 201/2011 and Article 1, paragraphs 2 and 4 of Law Decree N. 1/2012.

¹¹ In fact, a non-professional Vacation rental or a non-professional B&b occur when: i) the first is closed for at least 100 days in the year; ii) the second is closed for at least 100 or 90 days in the calendar year depending on whether it is located within the city of Rome or in the metropolitan area of Rome or in different municipalities and external to the city walls.

to reject is also the Region's argument according to which such a distinction would facilitate, *pro* market and *pro* competition, the fight against irregular activities, since an effective control cannot be based on such a distinction between professional and non-professional activity and on the duration of the period of inactivity, instead of the adequacy of the levels of services provided.

With regard to the time constraints imposed only to Vacation rental of a minimum stay, the judge observed that the measure is not only unjustified but also selective, since it does not apply to the identical form of accommodation services in B&b that could well compete with Vacation rental. The Region did not explain the reasons why these two kinds of structures cannot directly compete in the market.

As for the provision that attributes to the Municipalities of the Region of Lazio the power to identify closing periods for non-professional accommodation services, this provision is in contrast with National and European principles of liberalization. It is clear that the non-conformity with these principles of this provision comes from its selectivity, engraving the further constraint exclusively on non-professional activities. According to the judge, persuasive are also the ICA's objections related to the provisions, only for Vacation rental and B&b, of structural and dimensional constraints, since it is not understandable because, in the Regulation, there is no equal attention for other accommodation facilities, such as for example guest house, hostels, houses for holidays and even mountain lodges, considered that the risk for health - where existing - it certainly does not increase or it

reduces in function of terminological or administrative differences.

Finally, illegitimate is considered the provision allowing the Municipality of Rome to identify areas to be allocated to the opening of new hostels, being in contrast with the primary normative paradigm repealing similar restrictions¹².

2.3 The subsequent events

In April 2017, the Region of Lazio invited the ICA to comment on a new draft legislation on non-hotel accommodation in response to the ICA's reasoned opinion. According to a second opinion adopted by the ICA under art. 22 of the Italian competition law¹³, the new draft regulation introduces further restrictions while only partially complying with the previous ICA's opinion and the related court ruling¹⁴.

In this interaction with the Region, in August 2017, the ICA filed a new reasoned opinion¹⁵

¹² See art. 34 paragraph 2, and, paragraph 3, lett. a), of the Law Decree n. 201/2011.

¹³ See AS1380 - Nuova disciplina nel Lazio delle strutture ricettive extra alberghiere, in Bulletin n. 22/2017.

¹⁴ After the ruling of the TAR Lazio of June 2016, the Region of Lazio published on its website a press release stating that, whilst awaiting the adoption of a new regulation, authorizations for new activities could not be granted and, therefore, the opening of new activities in Rome was thus denied. On this issue, the ICA adopted, under art. 22 of the Law n. 289/1990, the opinion n. AS1351 of February 2017 - Regione Lazio - Ostacoli all'accesso e all'esercizio dell'attività di strutture ricettive extralberghiere, in Bulletin n. 7/2017.

¹⁵ See AS1447 - Regione Lazio - Nuova disciplina delle strutture ricettive extra alberghiere, in Bulletin n. 44/2017.

under art. 21-bis to the Region on the new regulation modifying the previous one¹⁶ (“New regulation”) in which the ICA underlined some new restrictions to the activity, such as the introduction of new dimensional requirements and other functional requirements (i.e. a lower number of rooms allowed in the B&b, daily cleaning obligation, the availability 24h, the composition of the rooms' furnishings, etc..). These are elements that might contribute to differentiate the offer and to guide the consumers' choice and that, therefore, should be freely determined by the operator, also according to the preferences expressed by the demand. The ICA recommended the Region to adopt a comprehensive review of the discipline in a more pro-competitive direction, in order not to preclude or unduly hinder access to non-hotel activities.

Subsequent to the receipt of the ICA's opinion, the Lazio Region adopted clarifications and provided documentation that the ICA considered not sufficient to solve the issues. Given the partial non-compliance to the ICA opinion, the result was an additional action, currently pending against the new regulation in front of the Tar Lazio.

In this context, it is worth underline that during 2017, similar interventions have been adopted by the ICA towards other regional regulations introducing restrictive requirements for non-hotel accommodation, within a broader systematic

¹⁶ Regolamento 16 giugno 2017, n. 14, recante Modifiche al Regolamento 7 agosto 2015, n. 8 - Nuova disciplina delle strutture ricettive extralberghiere.

approach aimed at overcoming forms of public intervention in the economy¹⁷.

3. WHICH CHALLENGES FOR A COMPETITION AUTHORITY? THE CONTRIBUTION OF THE ADMINISTRATIVE JUDGE

So far, the sharing economy has entered the public debate especially for its more immediate consequences: in many European countries, including Italy, we are experiencing a resistance to the sharing economy platforms, which, in offering innovative services, interfere in new ways with traditional ones, such as taxis, hoteliers and intermediaries of various types. Indeed, the explosive growth of this phenomenon is creating conflicts between incumbents in traditional sectors and new economic actors, prompting claims of various kinds and protectionist pressures.

In this regard, if, on the one side, there is considerable “disruptive impact” on traditional

¹⁷ See, *ex multis*, AS1366 - Regione Calabria - disciplina dell'attività di accoglienza ricettiva a conduzione familiare denominata bed and breakfast and AS1367 - Regione Calabria - norme sulla classificazione degli esercizi ricettivi extralberghieri, in Bulletin n. 15/2017; AS1433 - Regione Umbria legge n. 8/2017 - legislazione turistica regionale, in Bulletin n. 40/2017; AS1353 - Regione Friuli Venezia Giulia - Politiche regionali nel settore turistico e dell'attrattività del territorio regionale, in Bulletin n. 9/2017; AS1448 - Regione Piemonte - Legge 13/2017 - disciplina delle strutture ricettive extralberghiere, in Bulletin n. 44/2017; AS1482 - Regione Emilia Romagna - disciplina delle strutture ricettive dirette all'ospitalità, in Bulletin n. 9/2018.

services, as well as critical issues to be handled, such as tax avoidance, (unfair) competition with traditional operators, safety needs, protection of workers, on the other side, there are also significant benefits for consumers, deriving from the efficiencies these platforms might bring to the overall economy. Without doubt, many are the pro-competitive effects: these platforms offer innovative services and new products, allow the use of resources that would otherwise be underutilized, bring lower prices, lower search costs, mitigate the problems of information asymmetry and make markets more competitive, by breaking down barriers to entry, and improving allocative efficiency and consumer surplus. The emergence of new platforms and new services is symptomatic of the existence of an unsatisfied demand of such services and it highlights the need for structural reform of several sectors of the economy, aiming at reducing barriers to entry, even for “traditional” operators and establishing a level playing field between traditional and new economy.

However, despite the regulation of sharing economy platforms had become a highly popular policy topic, in most countries there is still no regulatory framework addressing these problems. Furthermore, the online platforms focus on individual segments of the traditional chain of value and create a new business focus different from that formerly supervised by the regulator. This factor also implies new and critical issues.

In the last years, the ICA had the opportunity, in its advocacy activity, to face some of these issues with regard with two of the most emblematic actors of the sharing economy that

are challenging regulators and competition agencies all over the world, Uber¹⁸ and Airbnb. In particular, the case analyzed in this article - having an impact on platforms such as Airbnb - is a good example of the difficulties involved when confronting markets affected by the sharing economy. Several municipal governments, indeed, are attempting to impose old regulation or defining rules that are not adequate to be applied to these new services, especially because those rule are eventually defined without methods of *ex ante* competitive analysis or a proper evidence-based policy making.

In many cases, new markets may not need any intervention; in other cases, it may be necessary to modify the regulatory framework to eliminate provisions that are obstacles for new comers. In this case, for example, the intervention of the Region introduced new obstacles and restrictions to the access and exercise of the non-hotel accommodation activity. That is not to say that regulation to protect significant public interests is

¹⁸ With regard to Uber, the ICA has issued several opinions addressed to the legislator and government and it has intervened in the Uber case as an *amicus curiae*, for the first time, on the basis of Art.15 (3) of Regulation CE 1/2003. In its most recent advocacy intervention towards the government and the legislator, dated March 2017 (opinion n. AS1354, in Bulletin n. 9/2017), the ICA criticized the current regulatory burdens which could not be viewed as justified and proportionate, and instead they were intended only to limit the number of operators and suggested the introduction of a light regulation, taking into consideration also public policy objectives such as road safety and passenger security. At the same time, to promote a level playing field, the ICA suggested forms of regulatory compensation to the incumbent operators by alleviating the current stringent limits on their activity.

never necessary, but it is crucial to promote a light regulation that does not stop the innovation or the emergence of new business models.

The second action under art. 21-bis of the Italian competition law, currently pending, as well as the difficulties faced in the dialogue with the public administration involved, illustrate a certain resistance by the public administrations to accept ICA's suggestions. The resistance may be attributed to the lack of a strong competition culture in Italy and skepticism or inadequate understanding of the positive aspects of competition, in many important sectors of the economy.

As mentioned, the Tar Lazio judgment discussed on here is particularly significant for the emphasis on competition principles and for the type of analysis conducted, not very usual for the administrative judge, showing parallels with that usually carried out by the ICA. Indeed, the typical reasoning in the exercise of advocacy powers starts from the assumption that a measure capable to restrict the freedom of economic initiative may be introduced by the legislator only when it is strictly necessary to pursuing some general interests and, in this case, that the limitation imposed should be the least restrictive possible. In order for the rules disciplining the economic activities to be legitimate, they must be rationally justified, and their rationality is to be assessed *in primis* considering the impact on the correct functioning of the market. It is not sufficient to invoke a relevant general interest to justify a restriction of competition.

Following these principles, the administrative judge examined the contested provisions of the Lazio Region regulation, evaluating, through a

proportionality test, their compatibility with competitive principles. Another interesting consideration underlined by the judge is the importance of limiting public intervention in the economy, so as to ensure that the economic dynamics of the sector be balanced with the natural interplay of supply and demand, depending on availability, diversity, and quality of services offered. This may be considered the main contribution of this judgment to the sharing economy.

In conclusion, regulating these phenomena is a difficult task: the biggest challenge of the sharing economy, but in general of the regulation of the emerging markets, is to promote the creation of new rules that are proportionate to the general interests to be protected and that do not impede innovation more than necessary to protect those interests. When a regulation interferes with the rules of free market, the balance between the different and sometime opposite interests (in conformity with the principle of proportionality) is a duty of the policy maker: however, the ICA may play an important role in bringing out unnecessary impediments to competition and demanding a regulation that is focused on maintaining competition to the extent possible and that resists any temptation to protectionism. In this respect, the instrument of art. 21-bis, as well as the other advocacy tools, may be useful at stimulating a dialogue with the public administration in order to identify the most appropriate rules to apply to the new entrants. Otherwise, the judge will intervene *ex post* and case by case.

As discussed in this article, the judgment in comment and the convergence of the ICA's and

administrative judge's evaluations constitute a positive development and open new possibilities in the *ex post* fight against unjustified regulatory distortions. The pending judgment in response to the second ICA's judicial action would be an occasion to see whether the position on these principles will be confirmed and we hope for a continued emphasis on competition principles.