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GOUVERNANCE MULTINIVEAU ET RÉFORME ADMINISTRATIVE AU XXIÈME SIÈCLE

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COMPETITION LAW AND REGULATORY REFORM

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1. TOWARDS THE PRIMACY OF COMPETITION LAW OVER REGULATION

SINCE 1890 - when the *Sherman Act* entered into force in the United States of America - competition law has developed all over the world. Particularly, in the second half of the twentieth century competition rules have been adopted by the Treaty of Rome, by many European and extra-European countries - including some of those which had previously been far from the market economy - and by international organisations or bodies.

Competition rules have traditionally been concerned with the behaviour of undertakings. They forbid collusion between undertakings, monopolisation or abuse of dominant position, mergers or acquisitions that can bring about a substantial lessening of competition.

However, a further aspect of competition law has emerged, particularly in recent years. Competition law not only impacts on undertakings, but also on public regulation, which includes primary and secondary legislation and administrative action concerning economic sectors. Public regulation must respect antitrust law and promote competition. Competition law has acquired a sort of primacy over public regulation.

This means - *inter alia* - that public regulation of crucial sectors such as electronic communications, energy, transport, postal services, media, financial markets, has to be adopted and revised taking the competition criterion in adequate consideration.

Competition law, therefore, models regulatory reform, which is one of the main tasks of contemporary governments and public administrations.

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2. Sources and Tools of Competition Primacy

The primacy of competition law over regulation is based - *inter alia* - on principles and rules of national legal systems, European Union ("EU") law and international economic law.

As to the national level, a number of countries have embarked in recent years on governmental programmes to reduce regulatory barriers to trade and competition, to liberalise markets, to privatise public corporations, to replace monopolies. These national regulatory reform programmes have often stemmed from reactions to specific crises or difficulties, while stable and coherent government strategies have been rare. For example, regulatory reform in New Zealand was launched after the country's decline as to GDP per capita in the early 1980s. Reform of public regulation in Japan has commenced in most recent years after concrete evidence of acute crises in the country's financial sector due to competition from centres in other parts of Asia, Europe and North America. These national programmes, moreover, have mostly been based on piecemeal approaches - concerned with specific sectors - rather than comprehensive initiatives. There have been, however, some exceptions: for example, from 1996 Australian Federal and State governments have undertaken a wide and comprehensive review of public regulations to eliminate unjustified anticompetitive effects: more than 1500 statutes have been reviewed. The United States "*Reinventing Government*" programme, launched in the mid-1990s, has been based on a comprehensive approach in the attempt to eliminate the anticompetitive impact of public regulation.

The national antitrust authorities have developed in recent times their *advocacy* powers, that are aimed at recommending and promoting procompetitive reforms of statutes, rules and administrative procedures in central and local government. In the United States, for example, the Antitrust Division of the Department of Justice has advocated regulatory reforms mainly at the federal level, while the Federal Trade Commission has been mostly concerned with Member States regulation.

Some national statutes have recently provided for regulatory principles and criteria that include promotion of competition. For example, according to the British *Financial Services and Markets Act* (2000) the regulator (the *Financial Services Authority*), in discharging its general functions, "*must have regard to the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions* [and to] *the desirability of facilitating competition between those who are subject to any form of regulation by the Authority*" (sect. 2, para. 3). Moreover, the

rulemaking functions of the *Financial Services Authority* are subject to a rigorous competition scrutiny of the antitrust agencies (sect. 159 and ff.).

There are countries in which the Constitution itself contains clauses that support competition policy. This is the case of the Italian Constitution that, after the constitutional reform of 2001, provides for the protection of competition ("*tutela della concorrenza*"). While economic legislation and regulation largely belongs to the Regions - in fields such as agriculture, commerce, industry, public services - the protection of competition has been attributed to State legislation. This means that the State has legislative power to adopt antitrust rules and to determine competition standards which must be complied with by regional regulation. For example, if State legislation eliminates quantitative restrictions for accessing to commercial activities, Regions may not reintroduce equivalent restrictions.

National courts have been carrying out judicial review of legislation and administrative action that are capable to restrict competition. For example, French and Italian administrative courts have annulled government contracts that had infringed the rules on public bids, or authorisations that had given advantage to incumbent undertakings.

As far as the European Union law is concerned, the primacy of competition rules over regulation is provided for by the EC Treaty: "*the activities of the Member States and the Community shall include* [...] *the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition*" (Art. 4, para. 1). Therefore, the economic policy and regulation of the Community and the Member States must comply with the principle of *open market economy with free competition*.

A number of EU directives have eliminated or reduced substantial restrictions to entry in several sectors, such as banking, insurance, telecommunications, electric energy, gas, postal services. The recent EU directives on electronic communications (2002) have established a system of regulation which is largely based on antitrust criteria. The national regulatory authorities shall apply these criteria to define the markets where regulation is needed and to determine whether operators have *significant market power*: an undertaking shall be deemed to have *significant market power* if it enjoys a position equivalent to dominance, according to antitrust case law (Art. 14, para. 2, directive 2002/21/EC). Dominant undertakings only shall be subject to specific regulatory obligations. Moreover: "*the national regulatory authorities shall promote competition of electronic communi-*

cations networks, electronic communication services and associated facilities and services" (Art. 8, para. 2, same directive).

The proposal for a directive on services in the internal market (the so-called "*Bolkestein directive*") provides for a large reform of the Member States' regulations. Some regulatory measures are prohibited: it is the case of regimes - affecting the access to, or the exercise of, services - that entail discrimination based on nationality. Other regulatory measures, such as quantitative restrictions and determination of minimum prices, shall be reviewed and evaluated by the States: these national measures may be adopted or maintained only if they are necessary, adequate with regard to their objective, proportionate, and if less restrictive measures are not available. This regulatory reform is aimed at eliminating barriers to the free movement of services and, at the same time, is based on pro-competitive criteria.

The Court of Justice has held that national regulatory measures which are incompatible with the EC Treaty rules on competition (Art. 81, 82) shall be disapplied: it is the case of measures that impose or facilitate restrictive agreements between undertakings or abuses of dominant position.

As to the primacy of competition over regulation in international economic law, some rules of the *World Trade Organisation* ("*WTO*") agreements oblige the Member States (nowadays 148 countries) to adopt and maintain laws, rules, procedures, administrative actions that are consistent with free trade and competition. According to the *General Agreement for Trade in Services* ("*GATS*"), for example, each Member State shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with free trade in services and does not abuse its monopoly position (Art. VIII). Moreover, each Member State shall act with a view to eliminating business practices of service suppliers that may restrain competition and thereby restrict trade in services (Art. IX). Finally, in sectors where Member States undertake market-access obligations, each State shall not maintain or adopt statutes, rules or administrative decisions that bring about - *inter alia* - limitations on the number of service suppliers and the total value of service transactions, or limitations on the participations of foreign capital and investment (Art. XV).

Therefore, *WTO* Member States must ensure measures of antitrust enforcement and adopt or maintain regulations that do not lessen competition. The respect of States' obligations is under the review of the *WTO* dispute resolution bodies: the *Panels* in first instance, and the *Appellate Body* in appeal. A *Trade Policy Review Mechanism* is also provided for. The *Council for Trade in Services* carries out periodical supervisions of the Member States' economic legislation and regulation through a multilateral

procedure which consists of a *peer review*. The States examine the legislation and the economic policy of the Member that voluntarily has accepted to be reviewed. The States may formulate observations on the national legislation under review and recommend changes more favourable to liberalisation and competition. Thus, the *peer review* supports pro-competitive regulatory reform.

At the international level, the *Organisation for Economic Co-operation and Development* ("*OECD*") has played a substantial role in supporting the primacy of competition over regulation. In the last decade, the *OECD* has developed an intense programme of regulatory reform. The prior national programmes of reform had mostly reacted to specific crises or external pressures and had followed a piecemeal approach, revealing the absence of coherent government strategies. The *OECD*, on the contrary, has launched a comprehensive programme of reform that encompasses all the main regulated sectors, has addressed guidelines and recommendations to its Member States, and has determined indicators and criteria for better regulation.

One of the criteria that the OECD has deemed to be substantial for enhancing the efficiency and the quality of regulation is the application and promotion of competition principles. The *OECD* guidelines, recommendations and criteria have been supported by *peer reviews* of the national regulatory systems. Each Member State under review has been subject to the observations and critiques of the other States. This procedure and the final *OECD* reports on the States' regulation have brought about a strong pressure on governments to go ahead with their regulatory reforms.

Finally, an *International Competition Network* ("*ICN*") has been instituted in 2001, which is composed by more than seventy national and multinational antitrust agencies from all the continents. The *ICN* is focused on enhancing convergence among competition authorities through dialogue, recommendations, indication of best practices. It is up to the individual authorities to decide whether and how to apply the *ICN* recommendations. One of the first results reached by the *ICN* has been a report on competition advocacy, followed by other documents that have stressed the importance for antitrust authorities to promote regulatory reforms based on a pro-competitive stance.

In conclusion, these are the main tools that provide or support the primacy of competition over regulation, at the national, EU, and international level.

It is clear that the tools are very different as to the impact and effects which they are capable to produce on regulation.

First, there are mere recommendations with direct or indirect impact on legislation and public administration. Thus, the *ICN* advocacy guidelines have an indirect impact on regulation, since they are not addressed to governments, but to antitrust agencies for enhancing their action aimed at suggesting pro-competitive regulatory reforms to the respective national regulators. The recommendations adopted by national antitrust authorities have direct impact on legislators and regulators, with different concrete outcomes.

Secondly, there are recommendations supported by *peer reviews*. It is the case of the *OECD* programmes for regulatory reform, the *WTO Trade Policy Review Mechanism*, the proposal of EC directive on the free movement of services.

Thirdly, there are international obligations for the States to adopt domestic regulations that are compatible with free trade and competitive principles. It is the case of the *GATS*.

Fourthly, there are States' obligations stemming from EU law to adopt or maintain regulatory measures that are compatible with the Treaty competition rules (Art. 81, 82) and do not impose or facilitate restrictive agreements between undertakings, or abuses of dominant positions. There are, as well, EC obligations for the Member States to have public regulators that promote competition, as in the sector of electronic communications.

Therefore, the tools in support of pro-competitive regulation in various cases are persuasive rather than binding. Nonetheless, the primacy of competition over regulation has emerged in legal systems, at least as a "tendency-principle".

4. Limits to the Primacy and Concrete Perspectives

Legislators, regulators, administrative officers all over the world are obliged or recommended to comply with competition rules and principles. However, many difficulties and obstacles are left on the way towards a concrete primacy of competition over regulation.

At the international level, the *ICN* is a very young organisation and has soft and indirect impact on national regulations. The implementation of the *WTO* agreements has encountered many difficulties in recent years: obstacles and discontents sometimes seem to prevail on concrete results. The *OECD* reports have reached important outcomes in terms of regulatory reform, but their impact is very gradual.

At the EU level, the Community regulation itself shows some weaknesses as to the respect of the free competition principle. It is the case of

the EC norms concerning agriculture. The Court of Justice jurisprudence, which has censured the national regulations that have failed to fulfil the obligations under the Treaty, and has established that State measures incompatible with EC competition rules shall be disapplied, has been recently suffering from some substantial drawbacks, for example in the sector of professional services regulation.

At the national level, many countries keep on flanking neo-protectionist or corporatist regulations to the ones that have supported liberalisations and the replacement of monopolies. Frequent restraints of competition are provided by decentralised legislation. State regulations in federal nations or regional regulations in state nations often support collusive co-ordination between undertakings - in the form of consortia or associations -, attribute special or exclusive rights to some economic operators, protect vested interests. The wisdom of the *Federalist Papers* is still fundamental: subnational democracy is a value, but decentralised regulation of markets is often captured by intense "local spirit" and "factionalism" of vested interests. Certainly, local spirit and factionalism can bring about regulatory failures, and are dangerous rivals of competition.

The existence of substantial obstacles does not mean that the primacy of competition over regulation has come to a standstill. How is it possible to cultivate and enhance the primacy of competition over regulation?

International co-operation and co-ordination are quite important tools. The international arena can help reduce resistance and promote reform at the national level. In this perspective, *ICN* guidance on national antitrust authorities should be enhanced. The implementation of the *WTO* agreements should reach a better balance between the international principles aimed at facilitating trade, investment, free market and the social values necessary to protect - *inter alia* - life, health, safety, and public order. *OECD* guidelines and policy recommendations should be more vigorously resumed and reinforced.

The EC contribution has been fundamental for national regulatory reforms based on liberalisation and competition, above all for those countries that had been used to intrusive State interventions on markets. Nowadays, further contributions are possible. The Commission is highly committed in the procedures for contrasting the State aids policies. The specific inquiries recently commenced by the Commission in sectors such as banking, insurance, energy, professional services, are capable to bring about interesting results. The proposal for a directive on services in the internal market needs to be revised with regard to various aspects - such as the country of origin principle, and the scope of application - but is highly

promising for its provisions aimed at reforming the restrictive regulations adopted by the States.

At the national level, a recommendation repeatedly addressed by the *OECD* to its member countries should be complied with: pro-competitive regulatory reforms need a longstanding, comprehensive and, above all, bi-partisan commitment. This is the main task for governments. Adequate institutional mechanisms should be set up to further enhance the quality of national and subnational regulations, and to improve their compliance with competition principles.

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