Regulatory reform and competition: How to push the agenda forward. A European perspective

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Abstract

In recent decades Community institutions have promoted most of the pro-competitive reforms in continental Europe. Liberalizations originating at the national level were seldom successful because they were blocked unnecessarily by general interest considerations arguments (stability, universal service, continuity of supply, consumer protection, employment, etc.). Recently in Italy, also as a result of competition advocacy by the antitrust Authority, the Government has liberalized a number of private service activities. Experience shows that the probability of competition-oriented reforms is greatly enhanced if law making is accompanied by a technical analysis of the objectives of regulatory restrictions, of their necessity and proportionality.

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JEL Codes: L4, L5, F15, D02.

1. Introduction

In most European countries, the 1980s have been a turning point for economic policy, with competition and liberalizations becoming the point of reference of government action. The role of European institutions has been very important both directly and indirectly. In the late 1980's the European Commission started to liberalize public utilities, by adopting Directives and Regulations legally binding for member States. The process was not always smooth and, especially in the early days, many member States legally challenged the right of the Commission to liberalize.

The first EC Directive, which in 1988 liberalized the market for telephone terminal equipment[1], was challenged in front of the European Court of Justice by five very important

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countries (France, Italy, Belgium, Germany and Greece)[2], on the ground that the Commission did not have the legal power to issue such a Directive. The Court upheld the Commission's initiative, but even so the choice to liberalize was not fully accepted at the national level. Many member States delayed as much as they could the adoption of the liberalization measures. For example, Directive 90/388/EEC[3], which liberalized value added telecommunications services (short of voice services), was transposed into Italian domestic law with a three years delay in 1994, at a time when not adopting it would have led to the opening of an infringement procedure against Italy (with the risk of high sanctions).

Also as a result of Community influence, in the course of the 1990s, all European member States adopted a domestic competition law fully convergent with the antitrust provisions of the Treaty. An interesting feature of these laws has been assigning to domestic antitrust authorities the power to advocate in favor of domestic competition oriented reforms. As a result of the involvement of domestic competition authorities in the process of regulatory reform, the arguments in favor of competition have made it in the political debate, a big change with respect to the past for many jurisdictions in continental Europe.

In Italy the antitrust Authority was given full powers to independently advocate for competition, even *ex-oficio*, not like the French Conseil de la Concurrence only at the request of Government[4] or like the German Monopol Kommission, a different body altogether from the German competition Authority and not enshrined in the administrative structure of the country. As a result of these extensive powers, almost 450 advocacy reports aimed at promoting competition were issued from 1990 to 2007 by the Italian Authority, a number unmatched by any other competition authority in the European Union.

An interesting feature of the Italian experience is that these advocacy reports were taken up immediately when they showed that a draft law was contrary to Community obligations. In these cases the Authority's reports served a subsidiary function, avoiding for Italy infringement proceedings in front of the European Court of Justice. The arguments in favor of competition were not very important. The second category of successful interventions was represented by those intended to prevent a weakening of the Authority's powers or a

[1] Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (Official Journal *L 131 , 27/05/1988 P. 0073 – 0077)*

[2] Belgium, France, Germany and Italy were four of the six funding members of the EC, the other two being Luxembourg and the Netherlands.

[3] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (Official Journal L 192 , 24/07/1990 P. 0010-0016)

[4] The new French Competition Authority established in 2008 has the same powers in terms of advocacy as the Italian Authority.

narrowing of the scope of competition law. In such cases the opinion of the Authority was considered valuable and worth following. In most other instances, the Authority's advocacy reports were covered in the press, sometimes with large headlines, but failed to influence reform, at least in the short run[5].

The major benefit of the Authority's advocacy reports was to propose competition as an effective political tool for achieving a higher rate of growth, eliminating rigidities in many markets, especially in private services, a sector traditionally characterized by widespread protections and intrusive controls. The extensive press coverage that accompanied these reports eventually increased the reputation of competition among policy makers. The culture of competition in the country substantially improved as a result. It has been certainly an advantage that, at time reforms were politically mature, the competition-oriented solution was already there and available to be picked up. The advocacy reports of the Authority represented the archive where interested ministers could look for practical ideas of reform.

In 1998, the Minister of industry[6], having the objective to modernize the Italian legislation on retail trade by eliminating unnecessary restraints to competition, relied on the suggestions contained in the report of the antitrust Authority published five years earlier. More recently, in June 2006 and January 2007, the same Minister, this time Minister for economic development, intervened again with far-reaching measures to liberalize many sectors of the Italian economy, from the professions, to banks, insurance companies, cafeterias, restaurants and pharmacies, drawing directly on about thirty of the Authority's advocacy reports, which were cited in the press releases issued by the ministry as having provided a baseline for the Government's action.

In order to enhance the probability that Governments choose the market solution, some institutional/procedural change may be required. In particular, the adoption of regulatory impact analysis (according to which each reform needs to be accompanied by a cost benefit analysis that justifies it)[7] and of competition impact assessment (according to which any disproportionate restrictive of competition solution needs to be justified)[8], by forcing a technical discussion of the different options available, makes it easier to adopt competition oriented reforms or to avoid the introduction of unjustified restrictions.

[5] See on this Parcu (1997)
[6] Pierluigi Bersani
[7] See OECD (1997)
[8] See OECD (2007)

Competition impact assessment shares the methodology followed by antitrust authorities in their competition advocacy reports, but it overcomes some of their weaknesses, providing the market solution at an early stage in the government decision making process, at a time when a political consensus on a given solution had not been found yet. Furthermore, while the opinion of the antitrust Authority is not required in any procedure and is often accompanied by some irritation on the part of policy makers, competition impact assessment is part of the procedure for effective law making. The experience of many OECD countries shows that by requiring that every regulatory restriction be justified, it can be ensured that the market solution is explicitly considered, enhancing the possibility that it be the one chosen.

The paper addresses first the role the European Union has played in the process of market liberalization in Europe. It then gives some examples based on the Italian experience of the benefits provided by an antitrust authority to the process of regulatory reform. It finally discusses the procedures, like regulatory impact analysis and competition impact assessment, that more systematically would promote markets free of unjustified regulatory restrictions.

2. The European Union and liberalization: two examples

The Treaty establishing the European Economic Community, signed in Rome on March 25th 1957, was designed to achieve a unified market across the six founding member countries[9], on the belief that, after two world wars, both of them originated in Europe, economic integration would represent the most effective solution in order to avoid wars and conflicts. Instead of forcing Germany to become an agricultural country, a solution that was briefly discussed after the end of the war, the influence of Kelsen (1944)[10] on the founding fathers of the Community led to the construction of a system that was pursuing integration with a combination of political and legal instruments. A free trade zone was not considered sufficient. The ambition of the founding fathers of the European Communities was to create an institutional setting governed by the rule of law, so as to constrain member States not to adopt protectionist legislation and make sure that the objectives of the Treaty would not be set aside. According to the Treaty, the Commission was the guardian of the Treaty and the European Court of Justice the Supreme Court of the unified market.

[9] Belgium, France, Germany, Italy, Luxemburg and the Netherlands.
[10] See Kelsen (1944). Kelsen proposed for the whole world a very similar system to the one adopted in Europe, a proposal that, given the success of the European Union both internally and as an example for the world, may well be more achievable today than in 1944.

This articulated institutional setting was necessary because, together with the elimination of tariff and non-tariff barriers[11], the Treaty introduced a system of legal obligations, especially designed to discipline the regulatory power of Member States, that would accompany trade liberalization, ensuring that the objective of market integration would be achieved. Competition rules were meant to impede private restraints aimed at segmenting national markets, thus preventing the creation of the common market. Additional provisions prevented governments from maintaining or introducing protectionist regulations insulating national markets from outside competition or from benefiting firms with anticompetitive State subsidies. No other international organization (or for that matter no other country) had a similar portfolio of instruments aimed at achieving an integrated and unified market.

As Olson (1982) argues, stable societies with unchanged boundaries are particularly prone to accumulate over time collusionary structures. Special interests are concentrated and gain substantially from any restriction of competition. As a result, they share a strong drive to unite and block competition, both between them and from the outside. On the other hand, losers from such restrictions are scattered across society, each losing a minimal amount. Only by organizing their own coalitions losers might be able to counterbalance the action of the protectionist lobbies. However such coalitions may be difficult to come about since, contrary to the protectionist lobbies, participants may change depending on the issue involved, so that the organizational cost of coalition formation may be so burdensome as to make the effort not worthwhile. Furthermore, special interests have a dominant interest in one subject, while the rest of society pursues a number of differentiated goals. This is why the voice of consumers is seldom heard in the political debate.

In Olson's (1982) analysis, free trade, the opening of markets, thorough changes in the social order, political upheavals, wars and destructions are all events that tend to eliminate existing distributional coalitions, making it easier for competition to operate to the benefit of consumers and of society at large. However, the problem with these structural shocks is that, except for free trade, they are exceptional and cannot be relied upon as a disciplining device. Furthermore, free trade, which at first glance seems to be quite a general instrument, is not in itself very effective with respect to non-tradables.

This is why the European Treaty goes much further than merely imposing a free trade regime. It guarantees the respect within the Union of the four fundamental freedoms, the free

[11] Non tariff barriers were eliminated with the completion of the internal market in January 1993.

movement of goods, services, labor and capital, and makes sure that regulatory restrictions of competition are strictly justified.

Similarly Hilmer (1992), in his report on how to enhance competition in Australia, suggests that, in order to win the resistance of domestic lobbies, only a constitutional change, constraining regulatory restrictions of competition to be strictly proportionate to the general interests pursued, would be successful. According to Hilmer (1992), a political consensus against such a constitutional provision would be difficult to organize. Of course special interests would lose if their privileges would be eliminated. However they would also gain as buyers of competitively supplied goods and services. Much more importantly each special interest tends to believe that the regulatory restrictions benefitting it are justified. Each protected category would therefore not consider a constitutional provision relevant with respect to its own privileges.

In any case. a law by itself is not sufficient for promoting competition, not even a law of constitutional ranking like the EC Treaty. As Anderson and Heimler (2007) extensively argue, it was the institutional structure that the Treaty created, and in particular the setting up of the Commission as the body responsible for advancing the objectives of the Treaty itself, that allowed for the major competition oriented reforms of the last decades.

The problem is that, especially in continental Europe, the perception of competition by public opinion is not very positive. Whenever there is a proposal of liberalization and of opening up of markets, the resulting greater competition is almost always accompanied by fears of destructions of existing firms and jobs, more than by the confidence of greater growth opportunities. The reason is very simple: contrary to the elimination of existing jobs, the new activities that competition will induce cannot be identified ex-ante, nor would past evidences that competition oriented reforms helped growth and competitiveness be of much value because of the perceived uniqueness of each case.

This is why the role of the Community (and of the Commission in particular) has been important in favoring competition-oriented reforms in Europe, maybe too important. Domestic policy makers could always blame someone else (the Commission) for unpopular decisions and indeed the Commission has over and over played the role of the scapegoat in domestic political debates. National Governments would participate in Community decision-making process, but when EC legislation would be up for domestic implementation, all the blame (not the honor!) would be put on the Commission only. The reason is that Governments

listen regularly to the voice of special interests, while the beneficiaries of greater competition are silent, being widespread across society, each gaining a minimal amount, not enough for being active in promoting reform.

Here are two examples of liberalization originating in Europe, one refers to public utilities (telecommunications) and one relates to private services. They are both interesting because they show how strong the resistance to change can be. In telecommunications, although at the beginning the Commission action was strongly resisted by many member States, a political consensus in favor of liberalization was finally reached. In private services, competition was resisted because of the perceived damages it would cause to the "European cultural and social order", which is a politically correct way to refer to cross border wage competition. An opposition that led to a much weaker EC intervention than otherwise possible and that could have been avoided by a more effective communication strategy on the part of the Commission.

a) Telecommunications

In the late 1980s, the telecommunications sector was characterised by legal monopolies in most member States. A Directive issued in 1988 on the basis of article 86, paragraph 3, of the Treaty introduced competition in the market of telecommunications terminal equipment. Although member States participated fully in the discussions that led the Commission to issue the Directive, as soon as it entered into force, five member States (France, Italy, Belgium, Germany, and Greece), all with State owned monopolies in telecommunications, challenged it before the Court of Justice. The Court ruled conclusively in favour of the Commission. After this decision, the liberalisation process continued. In 1990, the Commission issued Directive No. 388 which liberalised value-added services and data transmission.[12] Only voice telephony was left as a monopoly because a number of member States were strongly against liberalization (even though voice telephony was characterized by high inefficiency in many member States). The Commission needed the political support of member States for going forward. In 1994, after France and Germany offered support for full liberalisation, all member States finally agreed on a timetable for the comprehensive liberalisation of

[12] Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, *Official Journal L 192*, 24 July 1990, pp. 10-16.

telecommunications (Council resolution of 22 December 1994).[13] Only in 1994, when it became clear that liberalization could not be stopped, Italy adopted the 1990 value added service Directive. Starting on 1 January 1998, the telecommunications sector was opened up to full competition.

The interesting feature of this successful process of liberalization is that incumbent monopoly operators (the losers) did not find it necessary to play a public role in opposing the Commission's liberalization initiatives. Member State Governments were their principals and tried to stop the Commission initiatives through legal means, (unsuccessfully) challenging the Commission powers in front of Court of Justice. Why did Member States not stop the Commission before it even took the decision to liberalize? The reason is that the Commission, anticipating the opposition of member States, decided to start the liberalization of telecommunications utilizing a legal instrument that had never been used before for issuing Directives: According to article 86, paragraph 3, of the EC Treaty, liberalization decisions were fully with the Commission itself, without the need of any formal approval on the part of member States. Governments could only intervene to block an already taken decision, challenging the Commission powers in front of the Court of Justice. In this process the Court played a very significant role upholding the Commission strategy (i.e. that the liberalization of telecommunications services could be decided by the Commission and not by the Council, the Community body where all member States Governments are represented), becoming one of the most important allies of the Commission[14].

b) Services

Like with telecommunications, the path to regulatory convergence and greater competition in private services has been full of resistances. The difference has been that in private services it has been easier for the protectionist coalitions to block the Commission's competition-oriented reforms. The reason was that many service providers are individuals, not multinationals. As a result, public opinion perceived liberalization of these services not so much as beneficial for consumers (or a way to punish big and inefficient business like the telecommunications national monopolies), but rather as a cost, almost a punishment, for stakeholders.

[13] Council Resolution 94/C 379/03 of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures, *Official Journal C 379*, 31 December 94, pp. 4-5.

[14] On the important role played by the European Court of Justice in the strengthening of competion policy in Europe, see Gerber (1998)

Articles 43 and 49 of the European Treaty establish the freedoms of establishment and to supply services, prohibiting, according to European case law, not only discriminations based on nationality, but also all national measures that may hinder the exercise of such freedoms. Restrictions are allowed only if they are strictly necessary for achieving a public interest objective.The problem with this requirement of strict necessity, as Barnard (2004) and Amato-Laudati (2002) suggest, is that it is very difficult for the Courts to intervene unless such restrictions are clearly not proportionate or unjustified, which is very rarely the case. As a consequence leaving the removal of regulatory restrictions to the direct application of articles 43 and 49 of the EC Treaty was quite ineffective and in the course of the years very few regulations have been successfully challenged.

This is the reason why the Commission in 2004 proposed the adoption of a Council Directive on services, the so called Bolkenstein Directive, based on a horizontal approach aimed at fully achieving the freedom of establishment and the free movements of services.

As regards the free movement of services, the draft Directive contained a widely criticized "country of origin" principle, according to which service provision in each member State would be regulated by the country of origin of a given establishment, without the need of any formal recognition. The criticism of the country of origin principle was that it would induce social dumping. The criticism came as surprise to the Commission (and it should not have to!). In the presentation of the draft Directive nor in the discussions that followed, no reference was made to the posted workers Directive[15] that ensures that workers on temporary service from another Member State are paid at the conditions established in the host country. In other words the posted workers Directive made sure that the country of origin principle would not lead to cross border dumping on labour costs. The criticism was therefore unfunded, but, as a result of lack of proper information. public opinion remain convinced that the draft Directive would strongly reduce (not increase!) standards of living in member States (especially the old 15).

The opposition to globalization that characterized (and still does) public opinion in Europe was completely ignored by the Commission. In the official communication statements accompanying the draft Directive the Commission insisted that its aim was to introduce the country of origin principle, mentioning only slightly the impact the directive would have on regulatory reform, led the debate astray. First of all, the fear that the country of origin

[15] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

principle would reduce in many member States the quality of services led to a long list of sectoral exclusions from the duties the Directive was imposing. Furthermore newspapers were full of articles that described the Directive as being responsible for "Polish plumbers" to move to richer countries, competing with domestic plumbers at Polish pay[16], a right that is enshrined in the Treaty (free movement of people) and that the new Directive could not touch. Public opinion became convinced that the Directive was the "mother of all evils" with respect to globalization and strongly reacted against it, with widely attended demonstrations in all EU capitals.

The Directive was finally adopted in 2006 (but it will enter into force only on January 1 2010) but, as a result of this strong opposition, is now much weaker and less effective than it could have been. The country of origin principle is gone and the Directive is back to the principle of mutual recognition, which means that each member State has a positive duty to authorize service providers even if authorized to operate in other member States (denying an authorization is possible only under exceptional circumstances strictly defined in the Directive), delaying the entry into domestic markets by more efficient foreign competitors. Also the list of sectoral exclusions is long: finance, communications, transport, temporary work agencies, healthcare, broadcasting, gambling, social services, private security services and notaries. Finally on liberalization, many of the provisions contained in the draft Directive that would have made illegal domestic regulatory restrictions have been eliminated. As argued elsewhere[17], a better communication strategy by the Commission aimed at showing that competition would have not disrupted the "European social order" might have avoided all this.

3. An example of the political economy of domestic pro-competitive reforms: The Bersani reforms in Italy

Being part of the European Union does not ensure that all unjustified restrictive regulations are eliminated. Many regulations continue to be the responsibility of member States. This is where the role of competition authorities as advocates for competition-oriented reforms becomes relevant. In Italy the 1990 antitrust law empowers the Authority to suggest reforms that would make the regulatory restrictions of competition strictly proportionate to the general

[16] See Wikepedia (2009).
[17] See Heimler (2006) and Pelkmans (2007)

interest they pursue[18]. The law allows the Authority to intervene, but does not introduce any obligation on the part of the legislative body to act upon such intervention. And indeed, being competition not very popular, only a few of the almost 450 reports the Authority issued since its establishment have been followed. Heimler (2002) identified three reasons why it is so difficult to introduce competition-oriented reforms:

"First of all there are quite a number of interested parties to any restriction, especially to those restrictions, and there are so many in all our countries, that impede or restrict entry. As a consequence of legal barriers, protected existing producers get higher profits, employees get higher pay, suppliers get better deals, ministries of industry get their national champions. Second, special interests are concentrated and gain substantially from any restriction of competition. On the other hand, losers from such restrictions are scattered across society each losing a minimal amount. This is why it is very difficult for them to organize their own pressure group. Third, special-interests are quite effective in lobbying for protectionist regulations that benefit them, because such regulations get always justified in terms of what are widely perceived as general interest objectives: employment, social cohesion, quality, universal service, market stability etc. With respect to such objectives, competition is often pictured as disruptive. The difficulty for competition advocates is that they have to prove that market failures are not relevant or that they can be addressed with less intrusive solutions. A very difficult task indeed."

Only when there is a strong political drive in favor of competition oriented reforms, then the advocacy reports by the Authority become valuable.

A 1993 report by the Italian competition Authority advocating for the liberalization of the regulation on retail trade was extensively used in 1998 (five years later) by the Minister of Industry[19] to eliminate a number of restrictions in national legislation: elimination of entry restrictions based on an administrative definition of supply and demand; full liberalization of the opening of small shops up to 250 m^2, introduction of a regional authorization for the opening of large surfaces; partial liberalization of opening hours. Incumbent retail traders of all dimensions criticized the draft decree liberalizing retail trade, each category fearing that the new entries induced by liberalization would decrease their profitability. As a result of their

[18] In 1990 only a few jurisdictions in the world had an antitrust law that gave the Authority the power to advocate for competition with the Parliament and Government. Today, as reported by the ICN (2002) most of the Authorities of the world have such powers although very often, for example in France, the Authority could provide suggestions only at the request of Government or separate institutions have been created, sometimes, like in Germany, not enshrined in the administrative system of the country.

[19] Pierluigi Bersani

protests, Parliament, as a partial compensation to small shopkeepers for the increased competition, introduced the prohibition of sales below costs for large surfaces.

The major criticism that the Minister had to face in 1998 was that liberalization affected only retail trade. “Why only us?” asked repeatedly the representative of the retail trade association, sometimes even suggesting that there were strategic (political) considerations in the choice by the Minister to liberalize retail trade, for example that most shop owners would not vote for the center-left party to which Mr Bersani belonged.

When Mr. Bersani joined the government again in 2006, he had learned the lesson and just after a few months in office (June 2006) he issued a decree with the objective of liberalizing a number of activities, not just one, as he had done in 1998. In January 2007 the Minister issued a second liberalization decree.

Besides strengthening the enforcement powers of the competition Authority, the 2006-2007 decrees: 1) abolished mandatory minimum tariffs and allowed informative advertisement and contingency fees in the professions; 2) abolished the legal monopoly of pharmacies in the sale of non prescription drugs; 3) liberalized access to bread making; 4) abolished all cases where commissions of peers were responsible for authorizing entry; 5) eliminated all sorts of limitations to entry/expansion based on minimum distances, on market shares, on the portfolio of products to be carried; 6) abolished exclusive dealing requirements in insurance; 7) abolished closing charges in checking accounts and imposed on banks the obligation to transfer mortgages at no cost; 8) impeded region/municipality owned corporations from operating freely on the market but only for the benefit of the controlling body; 9) liberalized access to the activity of barbers, hair dressers, tourist guides, driving schools; 10) imposed on highways the obligation to inform drivers about gasoline prices along the route; 11) abolished the requirement that taxi licenses be granted only to individuals, doubling the number of taxi licenses in the country.

All these liberalization/consumer protection measures were based on advocacy reports by the antitrust Authority, issued in the course of the years, that were cited one by one by the Ministry’s press releases presenting the decrees, probably in order to underline the technical nature of the decisions.

As soon as the decrees were issued (but before they were approved by Parliament) all categories affected reacted very strongly against them, most using general consideration arguments. Except for taxi drivers, they all said that that greater competition would impede

the attainment of general interest objectives, such as trust in the professional-client relationship, universal service in pharmacies, stability consideration in banking and insurance, etc. No affected category representative declared publicly that greater competition would reduce their income, increase productivity and reduce prices. They tried to gain the sympathy of the public by claiming that these liberalization measures would negatively affect general interest objectives, a claim that could be easily dismissed, but it had a strong appeal.

Contrary to all the others, taxi drivers argued very strongly that liberalization would have imposed on them severe income losses (reduction of prices for taxi service) and capital losses (strong reduction in the value of the medallion). As a result of strikes by angry taxi drivers in major cities (Rome, Milan, Florence), the Minister backed off and gave up the objective of liberalizing the service. He just maintained a few measures aimed at increasing the quantity of supply: greater flexibility in shifts management and increase in the number of licenses to be decided by each municipality.

The case of taxis shows the importance of providing temporary relief to those most affected by greater competition[20]. Failing to do so, may risk blocking the reform. For example, in Ireland the liberalization of taxi services, as reported by OECD (2008), led to a reduction in the value of a Dublin taxi licence from 150000 EUR in 2000, to 6 300 in 2007. In order to provide relief, the Irish government first gave a licence for free to each existing taxi driver and then instituted a reimbursement fund. In Italy the proposal to liberalize taxi services, not having carefully considered the reimbursement issue, rapidly collapsed because of the protests of stakeholders.

Contrary to what happened with taxis, where providing relief to losers was clearly overlooked, the decree anticipated the protests of pharmacy owners (a minority of all pharmacists of the country)[21], allowing the commercialization of non-prescription drugs only at the presence of an established pharmacist. In the two years since the decree entered into force, contrary to what had been expected, it was not supermarkets that opened up a non-prescription drugs section, but 1500-2000 new type of small shops, so called "para pharmacies", almost all run by professional pharmacists, have been established[22]. These pharmacists do not own a regular pharmacy and are becoming an important lobby for the liberalization of the commercialization of all drugs. "We are professional pharmacists and

[20] See on this OECD (2007) and Heimler (2008).
[21] In Italy there are around 17000 pharmacies, their number being capped according to population, while there are over 60000 pharmacisits.
[22] A substantial increase with respect to the 17000 regular pharmacies of the country.

already have a shop where we sell health products, why not let us also sell prescription drugs?", is what they started already to claim.

A reform that was defensive in nature (imposing an unnecessary burden on an activity) has proved to be quite successful in terms of possible future developments (the yet to come liberalization of the pharmacy sector).

The political problem with the pharmacy reform in Italy is that public opinion hardly associates the opening of these "para pharmacies" to the Bersani reform. This is why competition oriented reforms are not so popular among most policy makers: 1) it is very difficult to reach a consensus around them because of the opposition of the affected categories; 2) the benefits of competition take time to come about and are hardly associated by public opinion to the reform itself.

It is interesting, however, that because of their publicity with the media and their wide coverage in terms of categories affected, the Bersani reforms were an exception and have paid off politically, at least in the short run. Opinion polls conducted at the time the reforms were proposed indicate that 70% of Italians were in favor of the Government's liberalization policies. For the Government's other measures the consensus rarely exceeded 40%[23].

4. Competition Impact Assessment

The introduction of domestic procedures for regulatory impact analysis (RIA), reducing political discretion in regulatory reform, favors the adoption of regulations that are beneficial to society. However, RIA in its original form does not verify whether the proposed regulation is actually the least restrictive of competition possible. Most of the checklists developed for RIA simply ask whether the regulatory intervention is justified, and then go on estimating whether overall it is beneficial[24]. In essence RIA is a cost benefit analysis. If benefits are higher than costs, than the regulation is approved, the null hypothesis being doing nothing and maintaining existing regulations.

Traditional RIA does not compare the proposed regulation with a less restrictive alternative. Consequently, in order to determine the best way to achieve the objectives of public intervention, a number of jurisdictions, including the United States, Australia[25], Mexico, the

[23] See Il Sole 24ore (2007)
[24] See OECD (1997)
[25] See Australian Government (2007)

United Kingdom[26] and the European Commission, have introduced another procedure alongside RIA, Competition Impact Assessment. Its purpose is to verify whether the proposed regulation introduces restrictions that are proportional to the objectives pursued and checks whether there are less restrictive options.

This is exactly the approach taken by competition authorities in their advocacy activity. For example article 21 of the Italian antitrust law gives the Authority the power to "identify cases of particular relevance in which the provisions of law or regulations or general administrative provisions are creating distortions to competition or to the sound operation of the market which are not justified by the requirements of general interest". Competition impact assessment makes this type of analysis mandatory for every major new legislation and introduces procedural rules so that such an assessment can effectively contribute to achieve a more market oriented regulatory framework.

The OECD has a project under way, aimed at promoting the adoption of a Competition Impact Assessment procedure in OECD Member Countries. In particular, OECD (2007) has identified a checklist serving to identify measures having the potential to constrain competition. For such measures a more detailed assessment is envisaged to determine the degree of restriction that is optimal in the general interest, with a methodology similar to that adopted by antitrust authorities in their advocacy activity[27].

Regardless of the content of the checklist, for measures identified as a cause for concern in terms of competition, it is necessary to verify whether the restrictions found are really proportional to the general interest pursued. The difficulty of this analysis often lies in the need to hypothesize the probable conduct of operators in response to the restrictions. In this respect antitrust authorities have developed considerable expertise and should be associated to the process of government decision-making[28], providing an advice in the early phases of the process, when political consensus is still to be achieved.

[26] See Office of Fair Trading (2007)

[27] The regulatory restrictions identified in OECD (2007) are as follows. 1) Access restrictions: does the rule/regulation limit the number or range of suppliers of a particular good or service? 2) Restrictions on firms' activities: does the rule/regulation limit the ability of suppliers to compete? 3) Restrictions that facilitate violations of competition law: does the rule/regulation reduce the incentive of suppliers to compete?

[28] For example, in the United Kingdom the OFT is consulted by government bodies as necessary. In Australia the Government has en-trusted the Productivity Commission, a body that for some time has been working on the revision of economic regulations, with the task of systematically analyzing the competitive impact of and suggesting amendments to legislative measures in the making from the standpoint of competition and the market. In Mexico the Competition Authority heads a technical committee that is in charge of competition impact assessment. See Oecd (2007) for details. .

5. Conclusions

In 1999 at a key note address during an antitrust course at the World Bank Joseph Stiglitz, then Vice President of the Bank, emphasized the importance of structural policies for development, suggesting that privatization is not enough and that markets, in order to produce benefits to society, need to be made ready for competition, freeing them from unnecessary restrictions, licensing and alike, that are among the most damaging legacies of both colonial times and socialist experiences.

Indeed, a competitive environment creates the right incentives for promoting innovation and growth. New entrants fight for market share and by so doing they disrupt existing equilibria. Furthermore producers, knowing that their market position can be weakened by competition, will do their best to anticipate it, innovating, reducing prices and operating for the benefit of consumers. But why is it then that the case for competition is so difficult to make?

First of all there are quite a number of well-organized interested parties to any restriction of competition, especially to those that impede or restrict entry. Second, special interests are concentrated and gain substantially from any restriction of competition. On the other hand, losers from such restrictions are scattered across society each losing a minimal amount. Third special interests always picture competition as disruptive, while justifying restrictive regulations in terms of general interests objectives. Finally people are attracted by the opportunities that competition brings, but may be quite scared by the uncertainties that it also provides.

The difficulty for competition advocates is that they have to prove that there is no market failure warranting regulatory intervention or that, if indeed there is one, it can be addressed with less intrusive solutions. Competition enhancing reforms have an effect on existing competitors, making it more difficult for the weakest to remain in the market, creating greater possibilities for the most efficient. The net effect is strongly positive. However what the general public is mostly concerned about is that general interest considerations are attained (market stability, security of supply, universal service, employment, etc.) even at the cost of a lower degree of competition, not envisioning the benefits greater competition may bring about.

As Olson (1982) had suggested, free trade obligations are very important to win protectionist drives of domestic lobbies. However they are not sufficient because there are many non-tradables in our economies. This is why Alfred Hilmer in its 1993 report on how to introduce

a competition oriented reform in Australia suggested that only a constitutional change, imposing that regulatory restriction be proportionate to the objectives pursued, would be effective, since it would be very difficult for special interests to coordinate successfully against it.

Similarly (and more importantly) European experience has taught us that competition can win when the political discretion associated with its introduction is reduced. The EU Treaty goes quite far in that direction, but a number of activities, especially in private services, continue to be subject to domestic jurisdiction only. In this respect RIA and competition impact assessment instruments serve the very important function of forcing policy makers to identify the costs associated with a lower degree of competition, increasing the transparency of political decisions and making sure that choices are made with a full information on alternatives.

An assessment of the competition impact of regulation disciplines the reform process and gives lawmakers an instrument to overcome the corporatist resistance that always tries to obstruct modernization projects and the dismantling of protectionist barriers. As the experience with the two Bersani decrees shows, protests and demonstrations by the categories involved lose all their force and ability to impose a block on the reform proposal only if competition is presented as not being an obstacle to the achievement of widely shared general-interest objectives and above all if the categories involved are numerous.

REFERENCES

Amato, Giuliano and Laraine Laudati (2002, eds.), *The Anticompetitive Impact of Regulation*, Edward Elgar.

Anderson, Robert and Heimler, Alberto (2007), "What has competition done for Europe: an interdisciplinary answer", *Aussenwirtschaft*, 4

Australian Government (2007), *Best Practice Regulation Handbook*, Canberra. Available at: http://www.finance.gov.au/obpr/docs/handbook.pdf, (e.g., p. 30 or 73-74)

Barnard, C. (2004), *The Substantive Law of the EU – The Four Freedoms*, Oxford University Press.

Gerber, David (1998), *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Oxford University Press).

Heimler, Alberto (2002) "How to build a pro-competition culture: A European perspective" intervention at the firs ICN Annual Conference, Naples.

Heimler, Alberto (2006), La politica economica della liberalizzazione dei servizi: alcune riflessioni sulla direttiva Bolkenstein, *Mercato concorrenza regole*, VIII (1).

Heimler, Alberto (2008), "The Attali Report: An Italian point of view", *Concurrence*, 2.

Hilmer, Alfred (1993), "National Competition Policy", Report by the Independent Committee of Inquiry (chaired by Alfred Hilmer), Canberra: Australian Government Publishing Service.

ICN (International Competition Network) (2002), *Advocacy and competition policy*, Report by the Advocacy Working Group, ICN's Conference, Naples, Italy. Available at : http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf

Il Sole 24 Ore (2007), "Sondaggio Ipsos-Il Sole 24 Ore: calo di consensi per Prodi fra i dipendenti pubblici, ma la Cdl non ne beneficia", Available at: http://www.ilsole24ore.com/art/SoleOnLine4/Attualita%20ed%20Esteri/Attualita/2007/08/sondaggio-Ipsos-dipendenti-pubblici.shtml?uuid=e57946d0-47ff-11dc-b85b-00000e25108c&DocRulesView=Libero.

Kelsen, Hans (1944) *Peace through law*, Chapel Hill: The University of North Carolina Press.

OECD (1997) *Regulatory Impact Analysis: Best Practices in OECD Countries*, Paris: OECD. Available at http://www.oecd.org/dataoecd/21/59/35258828.pdf

OECD (2007) *Competition Assessment Toolkit*, Paris. Available at: http://www.oecd.org/competition/toolkit.

Office of Fair Trading (2007) "Completing Competition Assessments in Impact Assessment" August, OFT847. Available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft876.pdf

Olson, Mancur (1982) *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities,* New Haven:Yale University Press.

Parcu, Pier Luigi (1997), "Stato e concorrenza. L'attività di segnalazione dell'Autorità Antitrust: contenuti, efficacia e prospettive". In F. Galimberti. A. Gavazzi, A. Penati e G.

Tabelloni (eds.), *Le nuove frontiere della politica economica 1997*, Milano: Edizioni Il Sole 24 Ore.

Pelkmans, Jacques (2007), "The internal service market: between economics and political economy", *EipaScope*, 2

Stiglitz, Joseph (1999), "Keynote address", 1st World Bank Course on competition law and policy, Washington D.C., mimeo.

Wikipedia (2009), "Polish Plumber". Available at http://en.wikipedia.org/wiki/Polish_plumber