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THE SURPRISING CONVERGENCE OF ANTITRUST AND
REGULATION IN EUROPE

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Abstract

This paper examines the progressive steps of convergence of antitrust enforcement and regulation in Europe. As far as competition law enforcement is concerned, both classical essential facilities remedies and recent changes giving to the Commission and to NCAs the power to accept firms undertakings represent clear steps toward a regulatory activity. This legal development is tantamount to a new power of defining the set of positive economic behaviours a firm can adopt, a type of power previously reserved only to legislative or regulatory bodies. Furthermore, in some regulated sectors, like Electronic Communications, the European regulatory framework is more and more based on competition law and economics principles. These evolutions could possibly rise different kind of problem in the enforcement of competition law and economic regulation. Therefore, they also hint to a possible new institutional frameworks for antitrust and regulators maybe more adapt to the present configuration of powers and duties.

Keywords

Antitrust, regulation, institutional design

I. Introduction

Laws can impose or forbid specific behaviour to firms in many different areas of activity. Work safety condition, retirement or severance payments, limits to working hours, and many others aspects of production and distribution are subject to specific obligations imposed by specific laws or regulations. All these rules specify through positive indications, what to do, or through negative indications, what not to do, thus influencing the set of legal acceptable behaviours.

Antitrust law, addressed to firms in order to protect competition dynamics and consumers' welfare from anticompetitive practices, has been for more than a century a part of this general set of economic rules. Historically, antitrust law is about prohibitions, it is a law that defines, forbidding them, negative, i.e., non acceptable behaviours. Antitrust rules essentially delimit the set of choices available to a firm by indicating few forbidden behaviours that cannot be held on the market. In some cases, the prohibition regards all firms in a market, like in the case of competition restrictive agreements, in other cases, it applies only to a subset of firms, those with market power, like for rules against abusive behaviours. This part of the legislation is asymmetric, regarding only firms capable of dominating a market, but again normally it is concerned only with forbidding behaviours to some firms, an indications of what not to do, while leaving freedom of choosing from a full set of behaviours to firms without market power. Consequently, antitrust law is enforced after an illegal behaviour is discovered, sanctioning *ex post* firms which have violated these rules.

Regulatory laws, and even more regulatory activity of administrative bodies (specific rules), traditionally are different from antitrust under this essential respect. They also can prohibit certain types of behaviours, giving indications to firms about some things they are not allowed to do, but generally they are more characterized by the positive rules they impose. One can even suggest that regulation is essentially an *ex ante* activity exactly because it is in the business of indicating positive behaviours to firms and this need to be done "before the facts". Regulations is about what type of actions firms in a certain market are supposed to undertake.

This way of reasoning represents the traditional theoretical approach to the distinction of competition law enforcement and economic regulation. However, this distinction is not so clear as the traditional theoretical approach would imply. First, competition law enforcement within recently liberalized markets, with the aim of enhancing and promoting competition, often informally impose positive prescription (so called antitrust remedies) to former monopolists. Second, this informal approach to "antitrust positive regulation" has been recently defined in a formal fashion by recent important changes in European competition law, which *gives* to the Commission and to NCAs the power to accept firms undertakings and make them binding. Third, in some sectors, like Electronic Communications, regulation is based on competition law and economics principles and seeks competition enhancement as its main objectives, blurring more and more the traditional theoretical distinction. All these factors makes reasonable to start thinking to some form of institutional adjustment in the enforcement of competition law and regulation activity.

The paper is organized as follows: after the introduction, section II proposes a simple example of convergence between antitrust and regulation, such as the case of access to an essential facilities; section III examines the changes introduced by the possibility for antitrust authorities to accept undertakings from firms and their practical consequences and risks, section IV briefly describe the new regulatory framework of Electronic Communications, based on competition law and economics principles; section V discusses possible institutional evolutions coherent with these changes in legislation and evaluates pro and cons, a brief conclusion follows.

II. A clear example of convergence: access to essential facilities

To define, induce, enforce and sanction correct behaviours laws often establish specialized administrative agencies. These can be multi-sector, like Antitrust Authorities, or specialized, like sector regulators. Nonetheless, the proximity between regulation and antitrust in many cases is closer than usually realized.

Let us take a simple but relevant example from network industries: consider the case where some public authority, assume an economic sector regulator, thinks that a former monopolist has a specific obligation to adopt some positive actions in favour of competition. To make it less abstract and more familiar, one can think to an incumbent telecom company which is required to offer to competitors unbundled access to some elements of her network particularly difficult to duplicate. Cast in antitrust jargon this part of the former monopolist network is to be considered an essential facility, necessary for competition to be viable. This represents an access obligation, which represents a clear positive statement about “what to do” and which is very often accompanied by even more detailed regulatory prescriptions. In fact, «forced sharing requires price administration»¹ otherwise a monopolist would fix a monopolistic price.

Within this paper, we want more generally give an understanding whether in such a case the regulatory framework and the competition framework, ex ante and ex post regulation, are truly different. This issue will be assessed by defining two games, a regulatory game and a competition enforcement game.²

a) The regulatory game

Assume that our telecom operator, as is often the case, is an integrated company and has to make the decision to sell or not to sell these essential inputs to a competitor that wants to compete in the retail market downstream. Let finally assume that regulation imposes to the firm holding the essential inputs an effective separation in two different steps of her payoff consideration.

We can interpret this situation as a regulatory game that should be played in two well differentiated steps: a production game and a distribution game. In the first step, the production game, the former monopolist chooses to sell or not to sell its input to the competitor. In the second step, the distribution game, the two firms compete on the retail market. The payoff table in its normal form of the production game could appear as the following:

		Competitor	
		Buy Little	Buy a Lot
Dominant Firm	Sell	3/-1	4/-2
	Not Sell	1/0	1/0

The second step, the distribution game, in our simple example, will not even be a true game, but in fact only as a consequence of the result of the first step, we can have three solutions:

High Competition -3/2 as a consequence of Sell/Buy a lot
Medium Competition -1/2 as a consequence of Sell/Buy little
No Competition 2/0 as a consequence of Not Sell

¹ Hovenkamp (1999), pag. 310.

² This simple game theory representations are based on a previous work of mine: Parcu P.L., European Dominant Position and American Monopolization: A Unifying Approach From Basic Game Theory, BNL Quarterly Review, June, 2006.

The payoffs of the second step of the game can now be added to the payoffs of the first step. It is evident that if the former monopolist could choose his strategy free from any regulatory constraint, his combined dominant strategy will be to play **Not Sell** and obtain a **No Competition** 3/0 cumulated payoff. However, if the two phases of the game are effectively separated by regulation the outcome of the game will be different.

The former monopolist firm should first play his dominant strategy in the production game, i.e. she would play **Sell**, and the competitor, taking into account the second phase competitive payoff, will play a strategy of **Buy little**, with the final result for the two firms of **Medium Competition** and a cumulated payoff of 2/1. This result, given the regulatory constraint, corresponds to a NE in which the former monopolist plays his dominant strategy.

b) The competition enforcement game

Of course if regulation is absent, or ineffectively enforced, a different game will be played. In fact, in this other game the former monopolist, a firm in a dominant position in antitrust language, will “rationally” refuse to sell its inputs to competitors, thus collapsing the two steps of the previous game in one.

Consider the game, in his normal form, without an ex ante regulation imposition on the former monopolist behaviour. The former monopolist firm has a payoff matrix in which her dominant strategy is evident.

		Competitor	
		Buy Little	Buy a Lot
Dominant Firm	Sell	2/1	1/0
	Not Sell	3/0	3/0

The former monopolist, which corresponds to a firm in a dominant position, plays **Not Sell** and the other firm is indifferent between abstract possibilities **I** and **II**, they are both elementary solutions of a NE in which the dominant firm does not sell the strategic input. In a sense, the competition game has already collapsed before to begin.

However, consider if an antitrust investigation examining this second game can demonstrate that the refused input constitutes an essential facility, i.e. that competition in the market is possible and beneficial for consumers if the essential input is sold at the fair price, than the behaviour of the dominant firm, its refusal to deal with competitors on reasonable terms, will appear unlawful under ex post antitrust standards.

It is clear in this framework that the behaviour of a former monopolist, a firm in a dominant position, that violates in a (regulated) production game his dominant strategy, by refusing to sell inputs to its competitors, thus explicitly violating regulation, is analogous to the behaviour of a former monopolist that plays a game, unconstrained by regulation, where it refuses to give access to competitors to an essential facility.

Therefore, as far as antitrust enforcement is concerned, public bodies (both at supranational or national level) can adopt decisions which can be classified as regulatory. This is not formally designed by law, but it is how competition Authorities tend to interpret their power of forbidding anticompetitive behaviours and of removing related anticompetitive effects on the market. This is even more true within recently liberalized sectors, where the competition law enforcement is (also) a competition enhancement and promotion activity. This interpretation of competition enforcement is possible within the application of art. 7 of EC Regulation 1/2003, which gives the Commission, and the National Competition Authorities, applying art. 81 and 82, the faculty to impose on firms any

behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.³

III. How the policy of undertakings further changes the picture

Normally in attempting to define and control the set of acceptable behaviours of firms there is a severe information problem, firms know much more about their possible set of behaviours than parliaments or even specialized agencies. Modern sector regulators, normally specialized in an industry, are essentially an attempt to bridge the information gap. Antitrust Authorities, which are normally multi-sector, unavoidably have a much lower level of information about each specific sector respect to specialized agencies. As a consequence, it is logical that antitrust generally operates identifying and sanctioning only violation of prohibited behaviours. In fact, returning to our initial theme, it is easier to recognize something that should not be done by a firm than to indicate what should be done.

In Europe, quite recently, a new major antitrust (and regulatory activity) has recently developed regarding the acceptance of undertakings by firms in the early stage of an antitrust proceeding, that is, antitrust authorities control and accept positive behaviours proposed by firms previously suspected to have violated antitrust laws. Specifically, art. 9 of EC Regulation 1/2003, gives the Commission the power to make commitments - offered by undertakings - binding on them.⁴ Besides, similar regulatory powers are assigned to National Competition Authorities by art.5 of the same within the application of European law and often by each national legislations⁵.

In these cases the information asymmetry is dealt with two instruments:

- first, the positive behaviour, what to do, is proposed by the firm - that supposedly knows more than the regulator about what is really able to do;
- second, the undertakings proposed by the firm are checked through a market test involving other firms operating in the same market, probably a kind of subjects relatively able to evaluate the relevance and realism of the proposal.

This process is akin to the common regulatory process, where new rules are designed by sector administrative bodies after a detailed consultation of market participants that is fully developed before the final adoption of regulation.

A remaining difference, between antitrust and regulation, at least apparently, is in the starting point: this new kind of antitrust intervention still requires a suspected violation of competition law, thus maintaining an element of ex-post intervention. However, this difference represents a very soft border: most modern regulatory intervention starts from the probability of behaviours of firms that need to be corrected and guided in the public interest, and very often this public interest is to ensure effective competition in the market⁶, i.e., also regulation starts from suspects about questionable behaviours of a firm with market power.

³ Actually, structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

⁴ Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.

⁵ In this regard, Italian competition law (law 287/90) gives to Italian Competition Authority (AGCM) the power to allow illicit anti-competitive agreement because of consumers' benefit (art. 4); to allow undertakings' concentration, imposing (art. 6 (2)); to make undertakings commitment binding on them. (art. 14-ter).

⁶ In the telecom sector, after the 2002 framework, this is the only legal base for regulatory remedies imposed to operators! See below.

Undertakings are a line of activity that allows Antitrust Authorities to enter the business of formally impose positive behaviours to firms, an area insofar essentially reserved to regulators. From the point of view of the definition of the set of acceptable behaviour of the firms the two activities, antitrust and regulation, now overlap more than ever, they both try to forbid negative behaviours and to pick acceptable positive behaviours in the set of all possible behaviours of firms.

Besides, as seen, the well known informational problem for this kind of pervasive interventions, the lack of specific sector knowledge of multi-sector antitrust bodies, has been overcome through procedural expedients that further reduce the difference between the modus operandi of European antitrust and sector regulators.

IV. Regulation of Electronic Communications markets toward competition rules

A further relevant converging dimension is related to markets where regulators have specific and formal duties of competition enhancement. In this regard, very relevant are network industries, such as for instance electronic communications, where a very complex regulatory system has emerged in Europe, after the 2002 reform of electronic communication regulation.⁷

The European regulatory framework is based on NRAs (National Regulatory Authorities) whose main aims are supposed to be the promotion of competition and the enhancement of consumer benefit.⁸

As far as sectoral regulation is concerned, one of the main principles of the 2002 European Electronic Communication regulatory framework is the convergence between antitrust law and sectoral regulation, which implies that ex-ante obligations can be imposed only on operators found to have significant market power (SMP), a concept stated to be equivalent with a dominant position in antitrust analysis. In particular, within the Framework Directive (FD) and the Guide Lines (GL, 2002/C 165/03) are used the concept of relevant market (art. 15(1) FD), dominant position (art. 14 (2) FD), leveraging of market power (point 16 GL). Furthermore, besides basic interconnection and interoperability obligations⁹, in order to regulate undertakings' market power, NRAs can impose on SPM undertakings obligations, which corresponds to typical antitrust remedies to abuse of dominant position [Art 8(1) Access Directive (AD)]. In particular, obligation of transparency (art. 9 AD), obligation of non-discrimination (art. 10), obligation of accounting separation (art. 11), obligations of access to, and use of, specific network facilities (art.12), price control and cost accounting obligations (art.13).

In the framework that was established by the EU ex ante regulation is valid only if it can stand the acid test of competition principles elaborated by the Court of Justice for evaluating ex post behaviours. Within this context it is further evident the convergence between antitrust and regulation.

⁷ It is mainly composed of 5 Directives: Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services, Directive 2002/20/EC on the authorization of electronic communications networks and services; Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Directive (2002/77/EC) on competition in the markets for electronic communications services.

⁸ Article 8 Directive 2002/21/EC.

⁹ Article 5 par. 1 Directive 2002/19/EC.

V. A possible direction for an institutional reform

On the basis of our previous discussion, one should conclude that the distance among ex ante and ex post regulation is probably less essential than previously assumed and with these developments appears now even thinner. However, this convergence creates new issues and new potential problems.

First, the introduction of undertakings, rendering antitrust and regulation even more close, is a new development that has possible non trivial consequences in terms of duplication of interventions and conflicting indications to firms. On the point consider that overlap of negative indications, double prohibition, is far less serious a problem than overlap of positive indication: the mandate of different positive behaviours from different authorities, in case of conflicting views, can result particular confusing and even paralyzing for firms and markets. How can the problem be controlled by an appropriate evolution of institutional assets?

Second, even given the fact that in same markets, as Electronic Communications, public interest in having competition in this market, the conclusion on the regulatory choice the two agencies should reach is analogous. The question of which agency can be more effective in enforcing a regulatory environment that improves economic welfare becomes than only a practical question. However, insofar as separation of the agencies could lead to the use of different criteria in assessing comparable situations, mistakes are always possible.

In this regard, it is worth noting how regulation and antitrust enforcement in Europe are not characterized by a rigid division of application, as it is the case in US legal system. This represented the core of the decision of the U.S. Supreme Court, *Verizon Communication v. Trinko*. The Court, in evaluating the usefulness of the antitrust law intervention in the case, writes: “*One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exist, the additional benefit to competition provided by antitrust enforcement will tend to be small...in certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm*”.¹⁰ At contrary, recent ECJ's decisions have highlighted the possible application of antitrust rules to “regulated behaviors”¹¹.

At European level, the risk of conflicting interventions problem appears minor, in fact, the Commission is already a general purpose regulator. Ex ante and ex post economic regulation are under the same roof.¹² The results of this configuration are interesting because, no matter some differences of emphasis, we are seeing a regulation effort that is coordinated and convergent. The most clamorous example, as already seen, is the electronic communication regulatory framework approved in 2002, a set of converging competition and regulatory rules,.

This reaffirms that ex ante regulation is useful and warranted only if in the end aims to (re)-create a competitive market environment. Internal bodies of the Commission, with regulatory and antitrust duties, coordinates in the management of this set of converging rules.

If this European model of unified and coordinated regulation is efficient could be extended to national situations? A proposition of the European model in its most radical version would imply, at the national level, the merger of all “economic regulators” in an unique body. In Italy, for instance, this would require the creation of a single unified Competition and Regulation Independent Authority,

¹⁰ In this regard the notorious Supreme Court Decision, on the 13 January 2004, *Verizon Communications Inc v. Law Offices of Curtis Trinko*

¹¹ Commission decision of 04 July 2007, case COMP/38.784 – *Wanadoo Espana vs. Telefonica*; Court of first Instance decision of 10 April 2008, *Deutsche Telekom vs. Commissione*, confirming the appelled Commission decision 2003/707/CE of 21 May 2003

¹² Except for financial regulation, where the independence and separateness of the central bank, also in Europe, has been required.

that merges AGCM, AGCOM and AEEG. This merged authority should have the technical duty of organizing and enforcing both ex ante and ex post economic regulation.

A softer version of this idea, aiming to the same type of improvements in coordination over the present situation, could be based on a strictly enforced mandatory mechanism of coordination among existing bodies.¹³ To clarify issues we will concentrate the following discussion on the more radical solution: a list of possible advantages and shortfalls deriving from the merger of ex ante and ex post economic regulators in the same institutional body is our next topic.¹⁴

a) Authorities merger possible advantages

The first advantage of an authorities merger is undoubtedly an improvement in coordination. In the Italian laws establishing regulators there are many instances in which regulatory and competition authorities have to exchange formal opinions about single cases. Having both functions under the same roof would substitute this highly formalized and bureaucratic process with an internal exchange of information and opinions that appears more rapid and efficient. This could also contribute to reduce the time of proceedings, weakening one of the more common criticisms of companies to all types of regulatory activity.

But it is not in the single cases that the coordination advantage of merging should be more important: the key advantage would be the possibility to design a strategy of convergent regulation aimed to re-establish competition in all the special sectors that cannot be left immediately to market forces. Ex ante regulation could then progressively recede, when the time is ripe, to leave space to less invasive ex post controls. All the regulatory structure could be inspired by this fundamental principle, avoiding that independence and autonomy consideration of each single authority plays a braking role on the direction and speed of reform.

A second important advantage would be an immediate improvement in homogeneity of procedures. For companies a substantial unification of methods and forms of proceedings could signify sizable savings in time and cost of the regulatory process, diminishing the weight of another frequent criticism of regulation.

In Italy, and elsewhere, political meddling with technical decisions is always been a very sensitive issue: under this respect it is well possible that a single Competition and Regulation Independent Authority could be in a position to better resist any political threat.¹⁵ Furthermore, is very clear that a larger body would be much less sensitive to single companies' lobbying, a problem that in formerly monopolized sectors has always its relevance for specialized administrative bodies,

Third, one of the most important advantage of establishing a single economic regulator would be to simplify the application of modern regulation to those sectors were the resistance of vested interests has been mantled with consideration about the elevate costs of creation of new authorities successfully delaying innovation. Extension of duties of an existing body is undoubtedly less expensive that the creation of new authorities and, even in perspective, is much less problematic, as personnel could be relatively easily reemployed when a specific regulatory mission is concluded. In the Italian situation,

¹³ From a theoretical model of regulatory attribution emerges the general intermediate position in welfare terms, under different institutional hypotheses, of unified regulation respect to concurrent regulation, see Parisi, Schulz and Klick (2003).

¹⁴ We do not discuss practical matters that a similar merger would imply, but one can reasonably assume that direct costs of regulation, for a given field of activity, in the medium term, would decrease through reduction of duplications of efforts and savings on common services.

¹⁵ To contain political pressure the merged authority should be relieved by other confusing politically charged duties like preservation of pluralism in the media, control of conflict of interest of politicians, or other kinds of improper attributions.

for instance, a similar choice could really help in completing regulatory reforms, finally reaching important sectors like transports, water, port and airports, were the creation of a independent modern regulator has been impossible so far.

Finally, there is the question of constitutional recognition of the values of modern economic regulation. This is an issue that appear difficult to solve effectively distinguishing between economic authorities that defend fundamental rights and authorities that do not deserve such recognition. However, if it is true that a unified “economic regulator” would be stronger, and hence less in danger of political pressure, the importance of the question would be reduced. In this sense the merger of regulators could be a partial substitute for constitutional legitimacy.

b) Authorities merger possible shortfalls

Which are possible counter indications to an authorities merger? We will list now some that appear among the most likely in general terms.

First of all, there is a possible loss of clarity and transparency in tradeoffs. If one thinks to an economic choice that implies the balance of different elements deserving recognition, like, as an example, the creation of immediate competition in a market vs. the incentive to continue to invest for a former monopolist. In such cases, a decision process fully internal to a single authority can certainly balance those elements, but this equilibrium effort will clearly result less transparent, both for the companies involved and for the controlling jurisdictions, than if the different elements could be “represented” by different institutional authors.

A connected but slightly different issue concerns the specificity of mandate of each single regulators. There is a possibility that the multi purpose authority we are envisaging could lose some of the nuances of the mandates of single specialized regulators. This could lead to some “good for all cases cure” that may induce a loss of specific efficacy of the regulatory activity, particularly in very technical questions.

Moreover, when regulators have a limited ability to commit themselves, the separation of regulators – despite its static costs in term of the allocative efficiency and the regulated firm's informational rent - becomes a dynamic benefit. Separation makes renegotiation harder, improves commitment also against the threat of regulatory capture.¹⁶

Finally, there could be an excess of centralization which could have negative consequences if the efficiency of the new authority is not outstanding. If the decisional process is cumbersome, a unique authority, unavoidably with a very heavy workload, could be slow in defining rules and adjudicating cases, thus nullifying the possible time advantages of internalization of information and opinions that we mentioned before.

Everything considered, probably advantages could very likely overcome possible shortfalls.

VI. Conclusion

In a situation were new duties and powers are given to antitrust and regulation, especially toward the creation of a European Common Market, to reconsider all possible means for reinforcing the institutional framework that has to realize those duties is a logical course of action.¹⁷ Recent

¹⁶ Laffont J.J, Martimort D. (1999) ; Martimort D. (1999)

¹⁷ As an example of new difficult duties, we recall the decision of the European Court of Justice that affirms that a national competition authority “Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national

developments that further close the gap between ex ante and ex post regulation are a matter to be attentively reflected upon. We briefly underlined the similarity of problems that ex ante and ex post regulation often have to deal with. If this similarity is widespread, the idea to unify modern regulators under a unique roof, as a mean to push ahead economic reform and sector liberalization contrasted by powerful vested interests, emerges as a possible interesting alternative for national regulatory reforms. After all this is exactly the way in which the European model functions. We briefly discussed some pro and cons of the suggested solution.

The creation of a unified Competition and Regulation Independent Authority, through the merger of existing authorities, with responsibility progressively extended to all sectors in need of modern economic regulation, could be explored as an interesting radical solution to strengthen national models and converge to the European example. As a softer alternative, convergence of strategies and coordination of behaviours of existing authorities, seeking the maximum support from the European Commission, should be pursued with determination.

The idea to reform national economic regulation following a model of organization inspired by the present structure of the European Commission could appear surprising, or even adventurous, in a moment in which Europe is rethinking the efficiency and the degree of accountability of its institutions and sometimes is even considering the usefulness of creating new specialized agencies.

However, it is logical to examine the possibility to converge to the better relevant model that one can observe, and it is difficult to deny that the Commission in terms of antitrust and modern economic regulation historically has given a quite good performance.¹⁸ European antitrust is highly respected as an efficient instrument to check market power and to avoid market distortion by unwarranted State intervention. European regulation of newly liberalized sectors has been a driving force in telecommunication development and an important stimulus in energy liberalization.

Again by this we do not imply that the judgment on domestic results reached so far is negative. For instance, in the past, Italian Antitrust has been widely praised in different international contests as an effective and reliable force of market liberalization and economic discipline and also Italian economic regulation has not been a disappointing effort, as even the OECD examination has recognized in the past.¹⁹

The problem is different: national regulatory reforms have been interrupted too soon and many important sectors have never been reached. The tide has changed quickly and even existing authorities are often under renewed political pressure. One could hope for a more favourable political climate, but a more robust institutional solution would be a better insurance policy. The ideas advanced in this paper would pursue the result, strengthening converging antitrust and regulatory practices, through an organizational change of regulation inspired to the present European configuration.

(Contd.) _____

competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed: has a duty to disapply the national legislation...". In a climate of political hostility toward independent authorities disapplication of national legislation appears an important but very problematic task. See AGCM decision CIF 8491/00 and ECJ C-198/01. The latter - upon request of Administrative Tribunal (TAR Lazio), within art. 234 of the Treaty - confirmed the duty of each national body enforcing European law to "disapply" contrasting national law.

¹⁸ Not surprisingly this is an area where scholars normally agree that Commission powers should be preserved or extended, see Tabellini (2002).

¹⁹ See the encouraging evaluation of Italian regulatory evolution in OECD (2001).

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