Remarks on the Note and Final Agenda of the Paris Workshop

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On behalf of the Italian delegation, we would like to express, first of all, our appreciation of the method adopted in formulating the project of the *Integrated Checklist on Regulatory Reform*: it seems to us that equal attention to the three *policies* (*regulatory*, *competition* and *market openness*) not only enables each country to perform the desired action of *self-assessing country implementation of regulatory reform* in a comprehensive manner, but also assures the possibility of measuring and evaluating the experience and capacity of the *OECD members* of making progress with the *development of good regulatory practices.*

SESSION 2

As far as Session 2 is concerned, we undoubtedly share the view that consumers are rarely aware of the advantages that derive for them from the introduction of a truly competitive system: in this connection it might perhaps be desirable to include in the *Integrated Checklist* a question designed to verify whether and what instruments are being used in the individual countries to promote awareness among the public of the benefits – in terms of prices and rates and improvement of the quality of products and services – that derive from an unaltered interplay of competition. It should also be borne in mind that the consumers, once they are aware of the advantages that derive from *effective* competition, would be able to make an effective contribution to checking the functioning of the system.

SESSION 3

3.a- As regards Session 3, and recalling what we have already said about the need for constant action intended to inform consumers about the advantages they derive from an effectively competitive system, we deem it important to guarantee access to the acts and documents of the *Competition Authority:* and this not only to respect the general principle of transparency of administrative action, but also because it represents a precondition for the best exercise of the *due process rights*.

In Italy – following a first period of uncertainty due to doubts as to whether the Competition Authority could or should be assimilated to a Public Administration – Parliament amended the law about the general principles of administrative procedure by making express provision for the possibility of exercising the right of access vis-à-vis all the Independent Authorities and therefore also vis-à-vis the Competition Authority.

In this connection, too, we would suggest that a specific question be included in the *Integrated Checklist*.

3.b – Concerning another matter within the ambit of Session 3 and, more particularly, in connection with the theme of *independence*, we think it might be desirable to make explicit mention of the elements that are "symptomatic" – from the structural point of view – of the *independence* of the *Competition Authorities*. According to our approach, these elements are composed of:

- a juridical personality;
- the procedure and the fulfillment of the prescribed criteria for appointing the top officials of the Authority;
- financial autonomy;

- accountancy autonomy and management or organizational autonomy.

As regards the nature and the characteristics of the appointment, in particular, it seems to us that if the *independence* of the *Competition Authority* is to be really assured and its members are to be put beyond the reach of influences that could in some way affect them in the impartial exercise of their mandate, we shall have to think of a *status* that:

- envisages a medium-to-long term appointment (but without possibility of re-appointment);
- excludes all possibility of revocation for reasons due to political interference;
- regulates potential situations of conflict of interest.

3.c – Once more in connection with Session 3, but with reference to the theme of *accountability*, we want to underscore that the fact that the *Competition Authority* in Italy, just like the other Independent Authorities, is detached from the traditional administrative organization (it is not accountable to any Ministry, so that there is no Minister who has to respond to Parliament for what the Authority is or is not doing) does not by any means imply a lack of accountability and controls.

Indeed, our system contains a series of institutional checks and balances that can be described as follows:

a) as I have mentioned, there exists an (ex ante) control by the interested parties (enterprises and consumers) who can intervene in the decision-making process by submitting comments, reporting violations, making proposals and, in any case, making a contribution of their own within the ambit of the procedure. From this point of view, we deem it to be important that the *Competition Authority* should prove capable not only of rendering known any decisions about to be adopted in a complete and transparent manner, but also of listening to the interested parties by arranging for appropriate hearings at both the private and the general level;

b) there exists an (ex post) control of a jurisdictional character that is subdivided into two judgment levels before the administrative courts, *i.e.* the Regional Administrative Court (*Tribunale Amministrativo Regionale*) and the State Council (*Consiglio di Stato*). It should be noted that the efficacy of the control exercised by the administrative judge increases in direct proportion to the participation of the interested parties in the administrative procedure: in that case, indeed, the judge will be able to assess the logic and the appropriateness of the decision reached by the *Competition Authority* also in the light of the contributions (in terms of proposals, observations, opinions) made by enterprises and consumers in the course of the procedure and during the hearings. Judiciary control undoubtedly represents the principal safeguard against the independence and autonomy of the *Competition Authorities* becoming an arbitrary exercise of power;

c) there exists an accountancy control, inasmuch as the law instituting out *Competition Authority* that both the annual budget and the final management accounts have to be submitted to the Court of Audit (*Corte dei Conti*);

d) lastly, there exists control by Parliament; indeed, the law requires the *Competition Authority* to submit to Parliament an annual report about its activities. The existence of this requirement makes it possible to verify whether the objectives of the Authority are being attained and enables Parliament – which in the absence of a responsible Minister disposes of no specific powers of orientation or sanction – to arrange fact-finding inquiries and hearings, not least with a view to possible modifications of the legislative framework.

SESSION 4

As regards *competitive neutrality*, we think that the questions very rightly highlight and stress that the lack of competitive mechanisms can affect both state-owned enterprises and other enterprises.

As far as state-owned enterprises are concerned, there can be no doubt that the non-competitive situation is aggravated by the fact that the public manager – and I fear that this is a very common experience – inevitably ends up by superposing and confusing his functions as a political subject on those of an entrepreneur when he allows his entrepreneurial choices to be driven by political criteria rather than by rigorous economic ones: we need only think of the sector of public utilities, where management entrusted to public enterprises often leads to results that are incoherent from the point of view of rate policy (independent of costs and subsides from the State), and monopoly returns that inevitably exert a negative effect on the level of efficiency and service quality and undoubtedly discourage investments and innovation.

It may therefore be useful to supplement the questions regarding this particular theme with others intended to verify:

1. whether there exist (or it is proposed to introduce) mechanisms that, taking due account of technological evolution, will make it possible to maintain the areas of legal monopoly within the field of natural monopoly by means of the continuous updating and redefinition of the areas that can be technically defined as natural monopolies and the consequent opening to the market of all the areas that cannot be so defined (both upstream and downstream of the natural monopoly);
2. as regards the areas not included among those of natural monopoly, whether there exist (or it is proposed to introduce) competitive mechanisms for access purposes that will assure selection criteria capable of rewarding entrepreneurial initiative and innovation.

4.a – As regards the question "*Do state-owned enterprises enjoy advantages over privately-owned enterprises? If so, what are they? How significant are they*?", we would suggest that this question could be split up, asking respondents to check a series of indicators.

In particular – quite apart from whether the juridical form of the enterprise is public or private (inasmuch as from a substantial point of view one cannot hold an enterprise in the form of a public corporation to differ from an enterprise set up as a joint-stock company with either the whole or a majority of the shares in public hands) – the following further questions could be asked:

- Was the initial capital of the enterprises conferred by the State? Do the enterprises enjoy special funding for their investments?
- Do the enterprises – by virtue of a law or some administrative act – enjoy a monopoly position?
- Are the debts of the enterprises made good by the State? Are the debts or the obligations guaranteed by the State?
- Can the entity become bankrupt?
- Are the enterprises subject to the same fiscal/taxation regime as (private) enterprises?
- (in case enterprises that are public corporations) Are the directors (executive officers) appointed and revoked solely and exclusives on the basis of criteria of transparency and entrepreneurship or does the logic of political expediency also come into play?

- (in the case of companies whose equity is wholly held by the public, on the other hand) Does the governance discipline (appointment of the Board of Management and the Supervisory Board and the relations between them) differ with respect to the situation in the *generalità* of other enterprises.

4.b – As regards the question "*Do other categories of enterprises, e.g. foreign or domestic enjoy advantages? If so, what are the advantages?*", recalling the comments we have already made in this connection, it might be useful to introduce a distinction between situations in which a complete opening is made possible by the market ("competition *in* the market") and situations that – concerning areas that can be technically defined as natural monopolies – make competitive mechanism possible only as regards the phase of selecting the enterprise or the enterprises to whom that market will be adjudicated ("competition *for* the market"). With this end in view, it becomes important to verify whether the system employed for granting access to this closed market is of a competitive nature (and therefore implies a procedure that requires enterprises to compete with each other) or is not so (as happens, for example, every time an enterprise is entrusted with the exclusive management of a public service on the basis of private negotiations, with and entrustment – often continued for several decades – that makes it possible for the beneficiaries to utilize public infrastructures at a limited cost without the provision of special powers that would make it possible to check and control the results achieved by the service providers).

It might therefore be useful to verify:

- whether there are *other categories of enterprises*, apart from the *state-owned enterprises*, that enjoy monopoly positions either de fact or by law;

- whether these enterprises were granted access to the closed market by means of competitive procedures or by means of direct grant (private negotiations or concessions);

- whether these enterprises avail themselves of publicly owned networks and infrastructures that were conferred upon them at non-remunerative rentals.

SESSION 5

As regards the question "Should regulation be least distorting of competition and how should a 'market failure' or a ' legitimate public interest' be defined?", we note that mere presence of a general interest in relation to a particular activity cannot be deemed to be sufficient to justify the attribution of a right on an exclusive basis and therefore the consolidation of a monopoly situation: the existence of this interest –although it undoubtedly permits interventions of regulation and control – does not necessarily lead to non-competitive choices. The condition for the creation of an area not subject to the market cannot be anything other than an assessment of the capacity of the monopolist to satisfy the demand (for a public service, for example) that qualifies him as an effective alternative to the market. This is, in any case, a founding principle of the "European constitution": in fact, the European Community Treaty establishes that, as regards economic activities of general interest, it is permissible to impose restrictions on competitive freedom only when these are necessary for the attainment of the entrusted "specific mission" (Article 86 of the Treaty). Such a choice is underscored by the consideration that competition must be considered an instrument not only of acceleration of economic development and innovative capacity, but also of optimal allocation of the productive reserves: the competitive mechanism has a multiplier effect on the efficiency and quality of the services offered to the collectivity and enhances the margin for adapting the services to the needs of the consumers.