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# Better regulation and competition

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- ❑ The criteria for better regulation are also valuable tools for pro-competitive regulation
- ❑ Good quality regulation might enhance competition
- ❑ The objective of improving a competition-friendly regulatory framework is shared by regulators and antitrust authorities
- ❑ Their cooperation in rule-making might help in improving residuality and necessity criteria, as well as by cutting down rule-makers' protectionist arguments

# OECD Economic Surveys: Italy (2017)

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- «The Competition Authority (AGCM, 2015) has highlighted that the proliferation of regulations, administrative complexity and a widespread distrust towards competition have abetted incumbents and hampered competitive pressures by fostering legal uncertainty.
- In many cases, sub-national governments have also resisted efforts to increase competition in sectors dominated by municipal enterprises, such as transport and other locally provided services. (...)
- Approving the annual competition law currently being discussed by Parliament would be a step forward to enhance competition in the services sector and professions.
- Also, as highlighted above, making more extensive use of regulatory impact assessment would help improve the quality of regulation”

# How to enhance pro-competitive regulation?

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**□ Advocacy Activities**

**□ Competition Assessment**

# Advocacy activities (1)

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- ❑ “Private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, **the mandate of the competition office extends beyond merely enforcing the competition law**. It must also participate more broadly in the formulation of its country’s economic policies, which may adversely affect competitive market structure, business conduct, and economic performance.
- ❑ **It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace**”

(World Bank, OECD 1998)

# Advocacy Activities (2)

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Advocacy activities enable competition authorities to act

- in cooperation with of regulators (art. 21- 22 law 287/90), or
- as a supervisor of regulators (art. 21-*bis* law 287/90, art. 47 law 99/2009)

# Traditional Advocacy Tools

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- “The Authority shall **notify** Parliament and the Prime Minister of any distortions arising as a result of legislative measures, and the Prime Minister, other relevant ministers, and the relevant local authorities of distortions arising in any other cases” (art. 21 law 287)
- “The Authority may express **opinions** on draft legislation or regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the government departments and agencies concerned” (art. 22 law 287/1990)

# Limited efficacy of Traditional Advocacy Tools

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- ❑ Opinions and advices are non-binding
- ❑ Opinion and advice activities regard already adopted or previously drafted regulation

# New advocacy tools: legitimitatio ad causam

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- “It is admissible for the Authority to take legal action whenever the general administrative provisions, regulations or measures of any public administration infringe on the laws protecting competition and the market.
- Should the Authority determine a provision issued by a public administration to infringe on the laws protecting competition and the market, a **reasoned opinion** indicating the specific nature of said infringement shall be issued within sixty days.
- Should the public administration fail to comply with the opinion within sixty days of notification, the Authority may lodge an **appeal [to the administrative judge] through the Avvocatura dello Stato** within the following thirty days”

(art. 21-*bis* law 287, introduced by the law decree 201/2011)

# New advocacy tools:

## Annual law on competition

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- ❑ Starting in 2010, the **annual report** submitted by the Italian Competition Authority to the Presidency of the Council (according to art. 23 law 287/1990) **identifies all laws that** hinder competition and that, as a consequence, **should either be eliminated or reformulated**
- ❑ The Government presents Parliament with a draft law that incorporates the Competition Authority's indications and specifies any sectors it has decided not to apply them (art. 47 law 99/2009)

# New advocacy tools: Competition Assessment

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- ❑ CA is a comparative exercise that weighs up impact on competition of the regulatory option of not altering the *status quo* against feasible regulatory options, showing how incremental deviations from the doing nothing option will achieve results
- ❑ CA can be applied widely and is relevant for economic and social regulation
- ❑ CA promotes the use of competition-based concepts

# Why competition assessment? (1)

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- ❑ “Healthy competition between firms in a market can deliver benefits to consumers through lower prices, more choice and innovation and can help increase productivity and growth”

(CMA 2015)

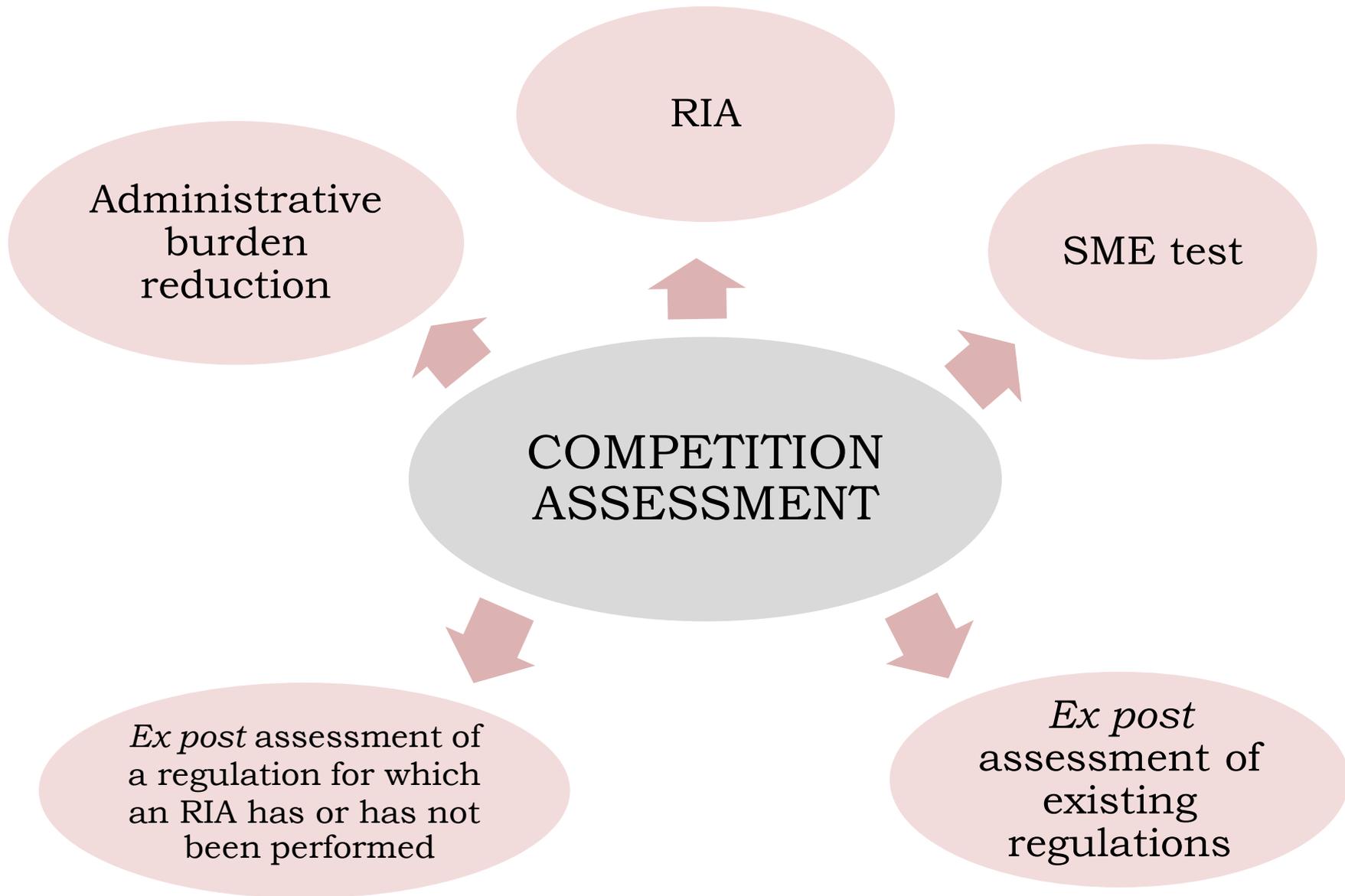
- ❑ Regulations which do not unduly restrict competition are more likely to achieve their objectives and to enhance consumer welfare
- ❑ Competition assessment might improve better quality regulation by preventing unintended consequences on competition or by allowing them where really needed

(OECD, *Competition Assessment Toolkit*, vol. II, 2010)

# Why competition assessment? (2)

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- EC *Better Regulation Toolbox*, 2015, p. 27 ss.
- OCED, *Competition Assessment Toolkit. Operational Manual*, Vol 3, 2015
- Competition Market Authority, *Competition Impact Assessment Guidelines*, 2015
- Australian Government, *Best Practice Regulation Handbook*, 2013
- US Executive Order 12866/1993, *Regulatory Planning and Review* sez. 6(a)(3)(C)
- Decree of the President of the Council of Ministries n. 170/2008



# CA and RIA

- 1 Problems/issues that give rise to the need for action
- 2 Objectives
- 3 Range of options that constitutes feasible means for achieving the objectives
- 4 Assessment of the economic, social, environmental impacts of the baseline and selected policy options
- 5 Consultations
- 6 Preferred option
- 7 Strategy to implement and review the preferred option

# Step I

## Initial assessment

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- ❑ A proposal will have a significant impact on competition
  - by restricting entry
  - affecting the ability of firms to compete
  - reducing the incentive of firms to compete
- ❑ in the relevant market  
(Checklists: OECD 2010; Australian Government Handbook 2013; Decree of the President of the Council of Ministries n. 170/2008)
- ❑ does the proposal limit the choice or information available to consumers? (CMA 2015)

# Step II

## Full CA - Checklists

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Does the proposal:

- restrict entry for new firms?
  - affect the ability of firms to compete?
  - reduce the incentive for firms to compete?
  - limit the choice or information available to consumers?
- in the primary market
- in any related markets

# Example of CIA: implementation of the Directive 2012/34/UE

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## A) Svantaggi e vantaggi dell'opzione prescelta.

la licenza nazionale per i servizi ferroviari passeggeri nazionali non ancora liberalizzati in Europa, tale per cui la norma preserva le imprese ferroviarie nazionali e il settore produttivo nazionale da una concorrenza sleale di imprese ferroviarie terze di paesi non ancora liberalizzati che intendono effettuare business in altri Paesi più aperti a scapito delle imprese ferroviarie di questo Paese;

## **SEZIONE 6 - INCIDENZA SUL CORRETTO FUNZIONAMENTO CONCORRENZIALE DEL MERCATO E SULLA COMPETITIVITA' DEL PAESE**

L'intervento regolatorio che è in atto da parte dell'ART combinato con quanto disposto dal D.Lgs. di recepimento della direttiva recast crea necessariamente benefici e incide sul livello di competitività del Paese, introducendo garanzie di supporto alla libertà di accesso al mercato dei trasporti di merci e di passeggeri per ferrovia da parte delle imprese ferroviarie, anche estere, in conformità alle prescrizioni contenute nelle direttive comunitarie e negli articoli 56 e seguenti del T.F.U.E. Tale accesso viene quindi garantito dalla Recast introducendo:

# CA in SME test

- 1 Preliminary assessment of firms likely to be affected
- 2 Cost-benefit analysis of proposed rules on SMEs
- 3 Mitigating measures to soften their effects on smaller firms, where appropriate

## CA of existing regulations

- 1 Analysis of the stock of regulation through review criteria, such as legality, necessity, efficiency, administrative cost recovery, market-friendliness and (where possible) an assessment of impacts on competition of existing rules under evaluation
- 2 Reform or automatic abrogation (guillotine) of all regulations considered unnecessary according to the above-mentioned criteria

# CA of a specific regulation (1)

	<i>Ex post</i> assessment of a regulation for which an RIA has or has not been performed
1	Verification of whether the rule is still needed and justified, and its effectiveness
2	Possible revision

# CA of a specific regulation (2)

	<b>Administrative burden reduction programmes</b>
1	Measurement of administrative burdens
2	Simplification measures

Good Regulation Tools	Competition Assessment
RIA	<p><u>Initial assessment</u> (checklist)</p> <p><u>Full CA</u>: do-nothing and alternative options impact assessment on competition (checklist)</p>
SME test	<p><u>2<sup>nd</sup> step</u> (cost/benefit analysis): assessment of the impact of proposed rules on competition (checklist)</p> <p><u>3<sup>rd</sup> step</u>: assessment of the impacts on competition of mitigating measures (checklist)</p>
Ex post assessment of existing regulations	<p><u>1<sup>st</sup> step</u>: analysis of the stock of regulation through competition-friendliness review criterion (where possible a CA) (checklist)</p> <p><u>2<sup>nd</sup> step</u>: assessment of the impacts on competition of reforms (checklist) or proposal of competition friendly reforms</p>
Ex post assessment of a given regulation for which an RIA has or has not been performed	<p><u>1<sup>st</sup> step</u>: verification of whether the rule is still needed and justified from a competition point of view (checklist)</p> <p><u>2<sup>nd</sup> step</u>: assessment of the impacts on competition of reforms (checklist) or proposal of competition friendly reforms</p>
Administrative burden	<p><u>2<sup>nd</sup> step</u>: analysis of the impact on competition of</p>

# Advantages of CA <sup>(1)</sup>

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- ❑ Participation in rule-making and transparency
- ❑ Evidence-based decisions

# Advantages of CA (2)

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## □ Giving reasons for rules

- lack of competition worries
- positive effects on competition (attempted quantification)
- costs of impact on competition (attempted quantification)
- competition-restricting options

# Critical issues of CA

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- ❑ CA is a costly procedure: it must be used according to the proportionality principle
  - only major rules with a potentially significant impact on competition might be concerned
  - the depth of the assessment must be proportional to the issues at stake and the resources available
- ❑ Advantages of the CA could be frustrated if done in a ritualistic or formalistic way

# Challenges

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- ❑ How to select rules with a significant impact on competition?
- ❑ How best to balance the role of rule-makers and antitrust authorities in CA?