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COMPETITION IN PUBLIC SERVICES AND PUBLIC PROCUREMENT: THREE DECISIONS FROM THE CONSTITUTIONAL COURT

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1. TWENTY YEARS OF COMPETITION LAW IN ITALY

Just over twenty years have passed since the Italian Competition Authority (*l'Autorità Garante della Concorrenza e del Mercato – AGCM*) was established by the Italian anti-trust legislation (Law no. 287 dated 10th October 1990).

Commentators have emphasised how a competition culture that was formerly foreign to our legal order, encumbered as it had been by anti-competitive practices for more than half a century, has developed in the peninsula during these last two decades. It has also been noted that, in line primarily with European influence but also, to a lesser extent, with that of the United States[1], the criteria for interpreting the rules on competition have increasingly felt the influence of economic analysis.

It has likewise been observed how a first decade (from 1990 to 2000), with a happy experience of competition-fostering policies and independent authorities in Italy, has been followed by a second, darker decade (from 2001 to the present day) during which the independent authorities' beneficial role within the legal order has been undermined. This state of affairs has been created mainly by the return of an aggressive form of politics, which has emptied competitive practices of their innovative impact from the inside, and by an impenetrable wall erected by the courts, which have contained the role of the authorities from the outside and influenced the way in which competition is understood in our country[2].

[1] G. Amato, *La legge antitrust venti anni dopo*, in *Rivista trimestrale di diritto pubblico*, 2010, No. 4, 923 et seq.

[2] S. Cassese, *L'Autorità garante della concorrenza e del mercato nel "sistema" delle autorità indipendenti*, in *Giornale di diritto amministrativo*, 2011, No. 1, 102 et seq.

In this context, it may be interesting to examine how the Constitutional Court has contributed to the debate during the last year and a half with three significant and controversial judgements. Through these decisions, the Court has influenced the way competition is conceived in our legal order[3] (particularly with regard to public services and procurement), although it seems to have helped instil new doubts rather than allay already existing ones.

Before examining the orientation of the Constitutional Court's decisions, however, it is necessary to clarify a preliminary point. In all three cases, the Court had been called to adjudicate applications made by the State or one/some of the Regions regarding attribution of the legislative competence to protect competition. In this respect, the reform of Title V of Part II of the Constitution effected in 2001 provided for the division of legislative power between the State and the Regions as follows: some expressly listed subject-matters have been attributed to the exclusive legislative power of the State (under article 117(2) of the Constitution); other subject-matters (also expressly listed), have become the object of concurrent legislative power (the State establishes the basic principles and the Regions are responsible for the detailed legislation: article 117(3) of the Constitution) and legislative power pertaining to the subject-matters not listed lies residually with the Regions (article 117(4) of the Constitution).

[3] For a reconstruction of the national rules on competition, with particular reference to the relationship between competition and public services, see, by way of example from amongst the most recent works, A. Police, *Tutela della concorrenza e pubblici poteri*, Giappichelli, Turin, 2007; F. Giglioni, *L'accesso al mercato nei servizi di interesse generale. Una prospettiva per riconsiderare liberalizzazione e servizi pubblici*, Giuffrè, Milan, 2008; A. Lalli, *Disciplina della concorrenza e diritto amministrativo*, Editoriale Scientifica, Naples, 2008; F. Cintioli, *Concorrenza, istituzioni e servizio pubblico*, Giuffrè, Milan, 2010, and D. Gallo, *I servizi di interesse economico generale. Stato, mercato e* welfare *nel diritto dell'Unione europea*, Giuffrè, Milan, 2010.

The protection of competition is one of the subject-matters falling within the exclusive legislative competence of the State (art. 117(2) of the Constitution), although it is not a subject-matter proper but, rather, a legal regime. As such, it cuts transversally through many subject-matters, making the Constitutional Court's work of interpretation a complicated one and ending up creating pockets of exclusive state legislative power even in areas apparently falling within the concurrent or residual power of the Regions.

Not by chance, the number of constitutional disputes regarding the division of legislative competence between the State and the Regions has grown exponentially during the last few years. It is fair to say that, at present, the Constitutional Court is principally being called to decide issues concerning the boundaries between state and regional legislative competence (raised in applications brought directly, challenging legislation).

2. UNIFORMITY AN „ESSENTIAL CHARACTERISTIC" OF COMPETITION

The Constitutional Court's first significant ruling is its Judgement no. 283, dated 6th November 2009. Under this ruling, some provisions introduced by the Region of Puglia in relation to procurement contracts below the EU threshold were declared to be constitutionally unlawful.

According to the Court, «the entire regulation of public procurement procedures is ascribable to the protection of competition, and legislative competence consequently lies exclusively with the State». For such purposes, it is irrelevant whether the contract is above or below the threshold or whether the content of the contested provision fosters competition. This, in the Court's opinion, insofar as the Constitution has provided that it is to be exclusively the State that regulates the protection of competition, in order to ensure the same regulation throughout the national territory.

Unlike the subject-matter of environmental protection (where regional legislative interventions providing for a higher level of environmental protection than the State's are permitted), in the case of competition protection «uniformity constitutes a value in itself because different regional regulatory provisions are liable to result in regulatory inequalities which produce territorial barriers». In the Court's opinion, «the protection of competition cannot be achieved area by area: of its very nature, it cannot tolerate territorial differentiations that would end up restricting or even neutralising the effects of the rules that guarantee it».

The Constitutional Court has adopted a highly statist position with this ruling. As has been noted, such a position ends up penalising regional regulatory power even in the cases where measures fostering competition have been introduced[4].

It is precisely this last point that would seem to constitute the heart of the matter. Measures that apparently foster competition can end up creating great hardship to undertakings and therefore harm the process through which competition develops. The Court thus seems to have meant to say that whilst, on the one hand, competition law must be contextualised within the legal system in which it is applied, on the other, if it is to catch on and produce results, undertakings must be able to count on a competition law that is particularly "robustly" uniform throughout the national territory.

On the whole, the criterion thus established by the Court may be viewed favourably but it lays itself open to potential criticism (criticism that disregards the object of the Court's decision, however): precisely on account of the environmental framework, not always are all the areas within the national territory "culturally" equipped to sustain the competition-fostering measures that have been introduced.

[4] E. Carloni, *L'uniformità come valore. La Corte oltre la tutela della concorrenza*, in *Le Regioni*, 2010, 670 et seq.

3. COMPETITION AND THE „SOCIAL USEFULNESS“ LIMITATION

The Constitutional Court's second important ruling is its Judgement no. 270, dated 23rd June 2010. This declared the rules permitting the merger between Alitalia and AirOne, undertakings operating in the air transport sector, to be lawful.

In this case, the Court had been called to evaluate the constitutional legitimacy of a decree-law that effectively permitted the merger of Alitalia with AirOne, in derogation from the anti-trust law governing mergers. This was for the purposes of saving Italy's national airline (in crisis) and resulted in a constriction of the freedom of competition.

The Court reached the conclusion that the *"norma-provvedimento"*[5] was lawful. It considered that, in certain particular circumstances, it is reasonable and proportionate to weigh the interests of competition against those of social usefulness: especially, in this case, in the light of sub-clauses (2) and (3) of article 41 of the Constitution, which expressly refer to social usefulness and social purposes.

[5] Translator's note: the Court used the term "*norma-provvedimento*" to refer to the specific decree-law issued by the Government in this particular case. The instrument normally used in such cases is a *"legge-provvedimento"*: a law adopted by Parliament that has the *form* of an Act of Parliament (*Legge)* but the *content* of an administrative measure (the content is not addressed to a general category of citizens but, rather, to one or more specifically identified parties: in this case, Alitalia and AirOne). In the case in point, the peculiarity was that the measure relating to Alitalia and AirOne was not adopted by way of a law of Parliament's but by a governmental decree-law (*decreto-legge*). Decree-laws are measures that have the value of an Act of Parliament but are adopted by the Government in cases of urgent necessity. They have to be converted by Parliament into a *"Legge"* within 60 days, failing which it is as if they had never been adopted.

The Court held that article 41 of the Constitution, «by establishing that private economic initiatives cannot be conducted contrary to the principle of 'social usefulness' or in a manner that is harmful to security, freedom or human dignity, and by providing that public and private-sector economic activity may be directed and co-ordinated towards social ends, permits a form of regulation that also ensures the protection of interests other than those pertaining to the protected competitive market». Such a form of regulation, however, is permitted by way of derogation and only in absolutely exceptional cases.

And, in the Court's opinion, such a situation existed in the case under examination, since the legislator was facing the very serious crisis of a provider of an essential public service and had to guarantee the activity's continuation in a sector of strategic importance for the national economy. This also for the purposes of preserving the enterprise's value and averting a serious employment crisis.

So, «the balancing of a multiplicity of interests imposes a choice that is atypical of anti-trust investigations but effectively characterised by economic-policy and market-regulation connotations that are imposed by an exceptional situation».

On the basis of such premises, the Court applied the proportionality test to the measure adopted by the Government. It concluded that the contested provision passed the test and was constitutionally lawful, partly because the Italian Competition Authority enjoys the power to intervene *ex post* and sanction possible abuses of a dominant position deriving from the merger.

The Constitutional Court's judgement has delivered a serious blow both to the material "economic constitution" and to competition culture, fuelling as it does the State's dirigiste policy of interfering to protect indigenous interests. As has been noted, the thesis that

competition law gives way in the face of other interests gains credit, whilst the statement that the competition principle will be extended further appears to remain pure theory. [6]

Indigenous interests that are mainly private, moreover, in relation to which the constitutional reference to social usefulness does not appear to have been made in a wholly convincing manner. In short, an unsatisfactory judgement in many respects, not least of which the obscure application of the proportionality test, which the Court enunciated but did not carry out with sufficient rigour.

4. COMPETITION AND THE ECONOMIC IMPORTANCE OF PUBLIC SERVICES

The third significant judgement issued by the Constitutional Court on the subject of competition and public services is Judgement no. 325, dated 3rd November 2010. This ruled that the state measures governing modes of action for entrusting local public services (section 23-*bis* of Decree-Law no. 112, dated 25th June 2008) were lawful.

The measures provided that: a) local public services are to be entrusted by way of competitive public procurement procedures; b) direct awards to hybrid companies the private partner of which is chosen by way of a competitive public procurement procedure shall constitute an "ordinary" conferral of the management, on condition that the tender competition procedure regards not only the partner's legal status but also the attribution of «specific operational tasks connected to the running of the service» and that the private partner is allocated a shareholding of not less than 40%; c) direct awards must «be made

[6] L. Stecchetti [L. Prosperetti] e G. Amaretti [G. Amato], *Il ventennale dell'antitrust e la Corte costituzionale*, in *Mercato concorrenza regole*, 2010, 459 et seq.

in observance of the principles of Community law», with the further prerequisite that there exist «circumstances that, by virtue of the distinctive economic, social, environmental or geomorphological characteristics of the territorial context of reference, do not permit an effective and useful recourse to the market», and d) direct awards may be made with in-house forms of management, in observance of the conditions required by Community law, after seeking the opinion of the AGCM and with the further prerequisite that there exist «exceptional circumstances that, by virtue of the distinctive economic, social, environmental and geomorphological characteristics of the territorial context of reference, do not permit an effective and useful recourse to the market». Through recourse to competitive procedures, the Italian Parliament has thus clearly inclined towards a competition-fostering solution, to be applied uniformly throughout the national territory.

The Constitutional Court's judgement is long and complex.

The Court took the relationship between national law and European law as the starting point for its reasoning and assessed whether European law has imposed such an advanced solution on the national legislator in the context of competition in local services. The Court clarified that the national law is compatible with European law but that it does not constitute «an application required by the Community and international law referred to, (…) choosing as it does one of the various ways of regulating the subject-matter that the legislator could lawfully have adopted without breaching the cited sub-clause (1) of article 117 of the Constitution». Thus the Italian legislator could have opted for less advanced solutions as far as competition was concerned.

The judgement analyses the Italian concept of a local public service of economic importance and the European concept of services of general economic interest, identifying their common profiles and the differences between them.

Referring to the judgement given by the Court of Justice of the European Union on 21st September 1999 in case C-67/96 (Albany International BV), the Italian Constitutional Court held that the two concepts comprise the same elements, since in both cases the service «a) is provided through an economic activity (in the form of a public or private

undertaking), understood in the broad sense as any activity that consists of offering goods or services in a specific market» and «b) provides services considered necessary (i.e. directed at achieving objectives that are also "social") *vis à vis* an undifferentiated universality of citizens, irrespective of their particular circumstances».

In the Constitutional Court's opinion, the differences between the two concepts are the following.

In the first place, the Community provisions allow the direct running of a local public service in cases where an individual Member State considers that application of the competition rules would obstruct a public body's "particular tasks" (article 106 TFEU), censuring state decisions only in cases of manifest error. The national measures, on the other hand, chose to prohibit the direct management of local public services by the local body concerned. Thus the Italian Parliament, in exercise of its discretionary power, chose not to make use of a possibility conceded by the European provisions.

In the second place, the Community provisions allow the service to be entrusted directly to hybrid companies that have carried out a public tender competition to select the private partner. They require the partner to be an industrial partner but do not set any minimum or maximum levels for the private party's shareholding. As currently formulated, however, section 23-*bis* departs from the Community law in the part where, for the purposes of the abovementioned direct award, it imposes the further condition that the private partner is to be allocated «a stake of not less than 40 per cent». This has the twofold effect of reducing the number of cases where a service is entrusted directly and extending the general Community rule requiring awards to third parties by way of public tender competitions. In this case, too, the result is achieved through exercise of the legislator's discretionary power, but in a manner that is compatible with the Community provisions.

In the third place, the Community provisions permit "in-house" awards but only on certain conditions that are to be interpreted restrictively: the entire share-capital must be publicly owned, the awarding authority must exercise the same form of control over the awardee as it exercises over its own offices and the awardee must carry out the most

important part of the activity for the awarding authority. This exceptional form of award is justified by Community law on the basis that the existence of the abovementioned conditions prevents the "in-house" contract effectively constituting a genuine contractual relationship between the awarding authority and the awardee, since their effect is to ensure that the latter is, in reality, no more than the *longa manus* of the former. In addition to the three conditions indicated, the Italian measure lays down others that limit the circumstances in which recourse to in-house management of a service is permitted. In this way, the possibility of derogating from the Community competition rules governing awards of a service by way of public competition is limited even further. Even the Italian Parliament's derogation option does not result in the national law being incompatible with the European law, however, since it favours solutions that foster competition.

The Court then proceeded to examine whether competence to govern the modes of action for entrusting local public services lies with the State or with the Regions. It held that, in the case in point, the competence was an exclusive state competence, pursuant to article 117(2) of the Constitution, because such area of intervention falls within the "competition protection" category of subject-matter, «considering its structural and functional aspects and its direct impact on the market».

The Court went on to find that the Italian Parliament's solution (designed to restrict the cases of in-house awards even further than the Community law does) was not unreasonable or disproportionate, even though it was not required by the Constitution.

Finally, in the Court's opinion, «for the national legislator, as for the Community one, 'economic importance' also exists where, in order to overcome the particular difficulties of the territorial context of reference and guarantee quality services even to a group of users who are disadvantaged in some way, automatic market mechanisms are not enough and it is necessary to intervene publicly or provide financing that compensates an operator's duties to provide a public service, provided that it is concretely possible to create a market upstream, i.e. a market in which undertakings negotiate with public authorities the supply of these services to users». Thus the thesis that «economic importance exists only on the twofold condition that a market for the service actually exists and that the local body

decides at its discretion to finance the service with the proceeds deriving from the business activity in that market» cannot be confirmed.

That stated, the Court concluded that, «The determination of the conditions constituting economic importance is reserved to the exclusive legislative competence of the State, by virtue of the fact that such issue falls within the subject-matter of competition protection».

On the basis of the arguments set out above, the Constitutional Court held that the state legislation was constitutionally lawful. It also declared the constitutional unlawfulness of some regional laws, including one enacted by the Region of Campania which had provided for regional competence «to regulate the regional integrated water service as a service without economic importance and to establish autonomously both the legal status of the parties to be entrusted with the service and the timeframe for expiry of the contracts currently in force».

Through this judgement, the Constitutional Court has applied the rules on competition rigorously and extensively and, by adopting an objective test of a service's economic importance[7], has considerably reduced the scope for regional legislative intervention in the field of local public services. The competition-fostering solutions adopted by Parliament have placed Italy in an extremely advanced position regarding the formulation of competition rules for the market in the area of local public services. They are, however, solutions that are perhaps more advanced than the Italian legal order and sociological context (in some areas in the South, above all) are currently capable of sustaining, impacting as they do, what is more, on the management of services of extreme social importance, such as water services.

[7] On this point, see V. Cocozza, *Una nozione oggettiva di "rilevanza economica" per i servizi pubblici locali*, shortly to be published in *Munus*, No. 1, 2011.

It has recently been noted how, in the field of local public services, the legislator has inclined towards competition measures for the market, rather than concentrating on seeking a competitive relevant market[8]. On the other hand, such an attempt would have been fruitless in many cases, on account of both the history and the nature of local bodies in Italy: it is hard to find a relevant market in the majority of the peninsula's small and medium-sized municipalities.

5. CONCLUSION

The Constitutional Court's recent decisions highlight at least two significant inconsistencies both in the Italian legislation and in the Court's own consequential journey in interpreting the topic of competition in public services and contracts.

On the one hand, as far as relations between the State and the Regions are concerned, one has the impression that the "protection of competition" parameter has sometimes been used to erode the Regions' legislative powers in economic matters, including in sectors (such as local public services) in which it would be natural to think of creating a role of primary importance for the regional law-maker. Thus, in comparison with the considerable increase in regional legislative autonomy following the constitutional reforms of 2001, the Court has taken a retrograde step. A step that may be partly justified by the shoddy quality of regional legislation during the last few years.

[8] F. Merusi, *La tormentata vita della concorrenza nei servizi pubblici locali*, shortly to be published in *Munus*, No. 2, 2011.

On the other hand, in the face of a push towards competition for the market in sectors in which it is difficult to identify a relevant market, significant restrictions on competition in the market may be noted in sectors in which a substantial relevant market does exist. Thus the national regulation of competition appears rhapsodic and inconsistent, being expansive in some cases and protectionist and restrictive in others.

In this sense, if it is true that competition cannot be regulated area by area, it is equally true that it cannot be regulated by way of derogations and exceptions. Not if competition is to be taken seriously and is to be capable of producing socially advantageous results.