

**THE PRINCIPLE OF COMPETITION: PROPERTIES AND FOUNDATIONS. ITS IMPACT ON ITALIAN LAW**

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**1. THE RATIONALITY OF MARKET ORDER**

Political objectives and operational means lie on different levels, so that the relations between the two do not generally raise questions of compatibility, but rather of appropriateness of means to the end. Things are different when the economic competition is at issue. In the current mainstream opinion, economic competition is not one of several ways to organize the economic system: competition ensures the maximum level of economic growth and with it the maximum of aggregate wealth, provided that occasional "market failures" are corrected. As the means par excellence to increase the national product, economic competition is identified with the increase of collective wealth –that is to say, with its end. In this view the "principle" of competition operates like a super-principle, apt to oppose a particular resistance when confronted with other competing principles. As

such the principle of competition may conflict with substantial principles, such as that of the autonomy of the territorial entities that are constitutive parts of the Republic (art.5, Const.).

The peculiar authority of competition as a principle is based on economic and legal grounds as well. On economic grounds, reasons of strictly economic character converge with the behavioural assumption of utility maximization as being the motor of rational action -which is the basis of a large part of the analyses and proposals concerning public administration. The stress laid on the incentives underlying the performance of organizations is not new and it still inspires the separation between politics and management as the model for the provision of public services of economic interest. Management, appropriately incentivized, is seen as the true driver of the good results of the enterprise, provided that its decisions are not influenced by the so-called private agenda of the politicians<sup>1</sup>.

From similar assumptions and in the same direction proceeds the so called economic theory of democracy: the axiom of rationality, identified with the pursuit of self-interest, when applied to the conduct of government, implies a distinction between the social function of government and the private incentives that operate within the government as an institution made up of individuals<sup>2</sup>. In its most obvious applications, the economic

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<sup>1</sup> The view that focuses on the principal-agent relationship and on the incentives operating in it, inspires the current model for the organization of public services, where the political responsibility is separated from the management of the service, see Boitani-Petretto, *I servizi pubblici tra governance locale e regolazione economica*, in Robotti(ed.), *Competizione e regole nel mercato dei servizi pubblici locali*, Bologna, 2002, 38; A. Petretto, *Privatizzazione*, *Enciclopedia Italiana XXI secolo*, Settima appendice, Roma, 2007, 53.

<sup>2</sup> A.Downs, *An Economic Theory of Democracy*, New York, 1957, 282-284.

theory of democracy focuses on the potential conflict between the pursuit of the common interest and the private reasons of politicians.

The principle of competition seems a good answer to the crisis of the concept of law as the concretization of the collective will, expressed by representative assemblies. The fragmentation of interests and their weight upon public policies suggests that the remedy might be found on the same ground that originates the crisis: in a system governed by the principle of competition the pursuit of self-interest may promote the efficient use of given resources and at the same time has the positive effect of minimizing the interferences with the markets' rationality and the deviations generated by the "private agenda" of the politicians.

On the legal ground, the safeguard of competition is elevated to the rank of "principle" of EU law, which endows it with the authority and the supremacy of the European order. Law and economics unite in promoting a system governed by the principle of competition.

The present cultural climate revives the thesis of the scholars who, in the second half of the past century, set the rationality of markets against the arbitrariness of social legislation. According to Hayek the "rules of just conduct", concerning the conduct of a person towards others, give rise to a stable and spontaneous order<sup>3</sup>, unlike the changing government's commands for the attainment of specific purposes, that are usually dictated by powerful pressure groups<sup>4</sup>. The end-independent character of the rules of just conduct, such as private law rules, confers to these rules the universal and stable character that is missing in the unpredictable and changing legislation, which troubles the rationality of the market order in view of the achievement of so called social ends, or even of social justice,

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<sup>3</sup> Hayek, *Law, Legislation and Liberty*, London 1982, Vol.I.50; Vol.II, 31, 126, 131.

<sup>4</sup> Hayek, Vol. III, 7.

which is the label that masks the claims of well-organized pressure groups<sup>5</sup>. The market order increases the aggregate wealth without taking into account distribution problems; such problems are a matter of equity, that should be dealt with by means of measures of assistance, that operate outside the market<sup>6</sup>.

In a way, the view of Hayek is in line with the thesis of those German scholars who rejected the concept of *sozialer Rechtsstaat*, as inconsistent with the certainty of rules, considered as an indefectible character of the State under the rule of law. “Social”-so Forsthoff argues-is an indeterminate concept and subject to be identified with what is seen as such by the majority of the moment<sup>7</sup>. Besides, the pursuit of social aims involves questions concerning values, and the commitment of the Constitution to the pursuit of values generates conflicts the solution of which, ultimately, is in the hands of the constitutional court. The judge is thus charged with a political responsibility which goes beyond his proper role. Mixing the rule of law with social values generates instability in the constitutional system<sup>8</sup>.

Rationality of the market economy and legal rationality –in the meaning of predictability of the rules that can be derived from constitutional precepts- joined in recommending a legal system governed by rules of procedural character. Such are the rules of competition<sup>9</sup>.

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<sup>5</sup> Hayek, Vol.II,67; on the deceitfulness of the so-called social justice, Vol. III,13.

<sup>6</sup> Hayek, Vol.II, p.85 ss.

<sup>7</sup> E. Forsthoff, *Begriff und Wesen des sozialen Rechtsstaates*, in *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1954-1973*, 2.Auflage, Muenchen 1976, 80.

<sup>8</sup> E. Forsthoff, *Zur heutigen situation einer Verfassungslehre*, in *Rechtsstaat im Wandel*, specially 205-207 and 223-224.

<sup>9</sup> In the meaning of Hayek, Vol.II, 70-71.

## 2. THE QUESTION AT STAKE

Our recent legislation declares the promotion of competition as the main objective of various measures<sup>10</sup>.

The Corte costituzionale, in turn, when assessing the respective legislative powers of the state and the regions, supports such legislation even to the point of paradoxes: the judge states that the “planning activity” set up by the administrative reform of the water service, pertains to the exclusive competence of the State for the “safeguard of competition” (tutela della concorrenza) in the meaning of art.117, par.2, letter e) of the Constitution, because it is “strictly functional” to the unitary management of the service, aiming to overcome the fragmentation in the management of the hydric resources and to insert such management in “a broader legal framework aiming at the rationalization of the sector’s market”<sup>11</sup>.

The endorsement of the market economy and the confidence in its benefits are not the subject matter here: both have reasons that go beyond the scope of a legal analysis, which aims to answer the question whether a certain legislation and the support given to it by the judge are the application of binding provisions, of constitutional or European origin. The question arises when the “principle” of competition, in its broad and indeterminate meaning, interferes with constitutional principles, such as the autonomy of local collectivities, or when it is challenged by the popular will, as is the case of the referendum on the organization of local public services, held in June 2011.

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<sup>10</sup> Examples in art.13, dl 223/2006; art.3, c.27, l.244/07; art.4, c.1, dl 138/2011; artt.34, 37, dl 201/2011; dl 1/2012; artt.22, 34-quater, 34-octies, dl 179/2012.

<sup>11</sup>CC 246/2009, par.13.1; 142/2010, par.2.1.2.

The provision of public services is a good example of this kind of problem: is the “competition for the market” a rule of European law? Should the direct provision of public services by local authorities be prohibited, unless the conditions that justify a derogation from the rules on competition under art.106(2) TFEU are met? Moreover, should the relationship between the private and the public sector be governed by the rule of subsidiarity, so that the second should operate only as a substitute for a lacking or insufficient private initiative? Is there in the European law a principle of competition that dictates the answer to such questions?

As we shall see, the current opinion about the Union’s law as intended to build an economic system shaped by the principle of competition, provides a positive answer to the aforementioned questions. Nevertheless, there are reasons for doubting the ground of such an answer. The doubts are justified by the analysis of the European law, which is the object of the considerations that follow.

### **3. THE NOTION OF COMPETITION AND OF ITS SAFEGUARD**

The word competition is open to misunderstandings; more so when competition is elevated to the rank of “principle”. The current classification of public procurement procedures as rules on competition may illustrate such misunderstanding and its implications.

The settled case law of the Corte costituzionale states that the notion of competition within the meaning of art.117, par.2, letter e) of the Constitution, reflects the Union’s law notion. On these grounds the Court qualifies the procurement procedures (and the national rules enacted to comply with the European provisions as well) as measures

that safeguard competition<sup>12</sup>. As we shall see<sup>13</sup>, this assumption has important consequences for the interpretation of Art.106(2) of the TFEU.

Certainly, the procedures for the award of public contracts give rise to competition among the enterprises bidding for that contract. Following the current trend and using the language of economics, we may talk about “markets of contracts” that the public procurement procedure opens to competition. This language does not change the function of artificial markets that are set up in order to ensure that the contracting authorities do not discriminate among the applicants on the basis of their nationality or on any other ground. Sometimes we find this language even in decisions of the Court of Justice, but the reasons of the judgments show that the rationale of procedures for public procurement is the effectiveness of the right of establishment and to provide services within the internal market, that the TFEU (articles 49 and 56) grants to EU citizens<sup>14</sup>.

Public procurement procedure is the technical device that, predetermining the requisites for participation in the competition and the parameters for the evaluation of the offers, gives transparency to the choice made by the contracting authority<sup>15</sup>. The

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<sup>12</sup> CC 199/2014, par.2.1.; 325/2010, par.7; 314/2009, par.4; 160/2009, par.3; 401/2007, par.6.7.

<sup>13</sup> In paragraph 7.

<sup>14</sup> C-360/96, par.41. It must also be borne in mind that the case-law of the Court of justice according to which a minimum level of transparency had to be ensured in the award of public services concessions, notwithstanding the fact that those concessions were excluded from the scope of directives on the award of public contracts, derives from the same provisions of the Treaty, that is to say from the rights of establishment and to provide services (C-410/04, par. 18-20; C-458/03, par.46-47).

<sup>15</sup>Recital 1 in the Preamble to Directive 2014/24 points out that the reason for coordinating national legislations on procurement procedures is to ensure the practical effect of the principles of TFEU and in particular of “free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency”.

competitive procedure is mandatory not in view of the benefits of the competition as a technique that ensures the choice of the best, but rather to avoid the risk of discrimination. This is the reason why the public procurement procedure is not requested when there is no choice to be made. It is the case of the so called in-house providing, where the authority who is responsible for the service awards it to an entity which, albeit distinct, is assimilated to the internal structures of the authority in view of the fact that it is subject to a control “similar” to that exercised over such structures.

It is doubtful that public procurement procedure has to do with the economic competition that takes place in real markets, under the rules on competition provided in the articles 101-109 of the TFEU. When the 5th Recital in the Preamble to Directive 2014/24 on public procurement points out that “nothing in this Directive obliges Member States to contract out or externalize the provision of services that they wish to provide themselves”, the clarification sounds like a warning against the interpretation of the rules of public procurement according to which those rules are the expression of a European principle of competition, requiring that public services should be run by enterprises chosen through public procedures. A warning that well applies to the Corte costituzionale, whose judgments on the matter are guided precisely by this sort of inference<sup>16</sup>.

The same objective to counteract elusions of the principle of non-discrimination is pursued by the Directive 2006/123 on services in the internal market. In the Preamble to the Directive it is pointed out that the compliance with such principle cannot rely on the direct application of the pertinent articles of the Treaty, on a case-by-case basis<sup>17</sup>. This is the reason why, without setting the almost impossible target of harmonising the national legislations, the Union promotes the simplification of administrative procedures the costs, uncertainty and delays of which discourage the service providers willing to offer their

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<sup>16</sup>The question is discussed in par.7.

<sup>17</sup> Recital 6.



services in other Member States. In this perspective, the Directive does not aim at the “liberalisation” of economic activities, but rather at the suppression of burdensome bureaucratic formalities, not justified by the safeguarding of substantial interests. Aim of the Directive is to ensure effectiveness of the freedom of providing services, without prejudice to the restrictions that the national legislation sets down in order to protect the interests involved in the activities in question. The matter is one of simplification, and such a simplification is required “only to the extent that the activities in question are open to competition, so that they do not oblige Member States to liberalize services of general economic interest or to privatize public entities which provide such services”<sup>18</sup>.

The prohibition of authorization schemes that state some specific requirements (art.14) is justified by the potentially discriminatory effect of such requirements; the same aim is pursued by art.10, which requires authorization schemes that prevent the competent authorities from exercising their power of assessment in an arbitrary manner. These and other similar provisions do not impact on the administrative regime of economic activities as such, as is suggested when the measures in question are labeled as measures of liberalization<sup>19</sup>.

#### **4. UNION LAW AND THE ”PRINCIPLE” OF COMPETITION**

The setting up of the internal market -that is to say a market where economic operators can move freely - is one of the objectives of the Union (art.3 of the TEU); such a market implies “a system where competition is not distorted” (Protocol n.27 annexed to the TFEU). The implementation of the internal market is functional to the broader objective of

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<sup>18</sup> Recital 8.

<sup>19</sup> As in the writing of N.Longobardi, *Liberalizzazioni e libertà d’impresa*, *Rivista Italiana di diritto pubblico comunitario*, 2013, 603.

the “social market economy” (art. 3(3), TEU). The concept of social market economy is indeterminate: the proportions of the politically defined sociality and the spontaneity of impersonal entities such as markets open to competition is not specified. The Treaty does not attempt a definition, but as far as the national economies are concerned, the legal framework of the TFEU combines the two elements by laying down a system where the political decisions of Member States pursuing social and economic objectives, prevail on the rules of competition.

The potential conflict which is inherent to the clause of “social market economy” is solved within a system in which sectors that are open to competition coexist with sectors that the Member States may reserve to public authorities in order to implement their own policies. This coexistence authorizes doubts about competition as *a principle* of European law. In some sectors that are of particular importance for trans-European exchanges (electricity, gas, transportations), the secondary law of the Union requires the liberalization of markets, but this is by no means a general rule which should direct the action of Member States in their economic systems.

In constructing the European legal framework, a distinction should be made between the concept of competition as referred to rules that prohibit conducts of the undertakings and of the states that might distort competition, and the concept of competition as referred to the structure of markets and to the relationship between the private and the public sector.

The first concept applies to antitrust rules and to the rules on state aid, that are provided in articles 101-109 of the TFEU under the title “Rules on competition”. These rules do not impair the possibility for Member States to close specific markets in view of the implementation of their own policies. The first paragraph of art.106 implies such a possibility when it states that “undertakings *to which Member States grant special or*

*exclusive rights* are subject to the rules of the Treaty....”<sup>20</sup>. Since the exclusive rights put the undertakings in a monopolistic position, the text of art.106(1) allows to draw the conclusion that Member States may close some markets to the competition<sup>21</sup>. Not only the TFEU does not prohibit monopolies, in so far as they do not abuse their market power(art.102), but it also allows national authorities to create legal monopolies in so far as such measures aim to implement Member States’ policies. The grant of exclusive rights is contrary to the rules on competition only when the undertaking, by the mere exercise of such rights, is led to abuse its dominant position.<sup>22</sup> But even exclusive rights that are contrary to the rules of the Treaty are justified when they are necessary to enable the undertakings entrusted with services of general economic interest to perform their tasks under economically acceptable conditions<sup>23</sup>.

## 5. THE SERVICES OF GENERAL ECONOMIC INTEREST

The coexistence of areas open to economic competition and areas where economic activity is regulated by different rules that are functional to the implementation of the social and economic policies of the national authorities, has its most clear illustration in the provisions on the services of general economic interest. The general terms of the matter are well-known; for our issue it should be recalled that Member States can freely provide

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<sup>20</sup> Emphasis added.

<sup>21</sup> The case law of the Court of justice confirms this interpretation: see C-159/94, par.44, “That provision necessarily implies that Member States may grant exclusive rights to certain undertakings and thereby grant them a monopoly”; see also C-340/99, par.44; C-209/98, par.66.

<sup>22</sup> C-475/99, par.39; C-209/98, par.66.

<sup>23</sup> C-159/94, par.49, 54-56 (derogation from prohibition of exclusive import and export rights); C-393/92, par.51 (derogation from rules on competition).

(public) services, including those of economic interest, as they think fit. Services of general economic interest are by no means an exceptional category, subject to particular conditions, under the control of the European institutions<sup>24</sup>. The special regime takes place if and when Member States enact measures that exempt the undertakings entrusted with the operation of services of general economic interest from complying with the rules of the Treaty, in particular with the rules of articles 101-109 (the rules on competition). Only in this case the Union's law requires the demonstration that the application of these provisions would obstruct the performance of the particular tasks assigned to the undertakings (art.106(2)).

With regard to the qualification of services of general economic interest for the purpose of derogations from rules of the Treaty, it is note-worthy that the Commission, which according to art.106(3) must watch over the compliance with the rules of art.106(1-2), considers its task to ensure that “there is no manifest error as regards the definition”<sup>25</sup>. As for the derogation from the rules of the Treaty, the settled case-law of the Court of Justice states that such derogation is also justified to the extent to which the national measures are necessary to enable the undertaking to perform its tasks under economically acceptable conditions.<sup>26</sup> That is to say that economic reasons may be sufficient to justify measures that allow conducts that are contrary to the rules of the Treaty, and in particular to the rules on competition. The Court points out as well that the “need” for the measures in question does not imply that the undertaking could not survive without such measures: it is sufficient that in their absence it would not be able to perform its tasks under economically

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<sup>24</sup> “This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organized and financed.. and what specific obligations they should be subject to.” (art.4, Directive 2014/23 on the award of concession contracts).

<sup>25</sup> Recital 7, Preamble to Decision 2005/842.

<sup>26</sup> C-475/99, par.57; C-340/99, par.54; C-209/98, par.77-78.

acceptable conditions.<sup>27</sup> This case law complies with the provision of art.14 TFEU according to which “the Union and the Member States ... shall take care that such services operate on the basis of principles and conditions, *particularly economic and financial conditions*, which enable them to fulfil their missions”<sup>28</sup>.

We may conclude that the *rules* of TFEU, as interpreted by the Court of Justice, lay down a system where markets can be regulated in ways other than those of competition, in view of the implementation of national policies. Against this background, art.120 of the TFEU according to which the Member States “shall act in accordance with the principle of an open market economy with free competition” does not attain the force of a legal principle, apt to operate as a parameter of the legality of Member States’ measures that are relevant for the structure of their economic system. This character of art.120, is shown by the subsequent TFEU provision which refers to the EU Council the “draft of the broad guidelines of the economic policies of the Member States and of the Union” (art.121(2)).

The inaccuracy of the current reference to a European principle of competition operating as a binding framework for national markets in general, may be illustrated by the following judgment of the Court of Justice<sup>29</sup>. The Italian judge, doubting that the internal provision which prescribed a minimum distance between roadside service stations might be incompatible with the European “principles of competition, freedom of establishment and freedom to provide services”, refers to the Court for a preliminary ruling. The Court reformulates the question, suppresses the reference to the *principle* of competition, and substitutes it with the reference to the *rules* on competition contained in the articles 81-89

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<sup>27</sup> C-340/99, par.54.

<sup>28</sup>Emphasis added.

<sup>29</sup> C-384/08.

(now articles 101-109 ) of the Treaty<sup>30</sup>. This question is then declared inadmissible because the order of reference had not explained the connection between the legal restrictions concerning the location of service stations and the Treaty rules on competition<sup>31</sup>. The decision can be read as follows: a) in the light of the european law the question at issue is one of rules not of principles; b) the european rules on competition are those written in articles 101-109 of the Treaty, and those rules have nothing to do with the structure of specific markets.

## **6. THE PRINCIPLE OF COMPETITION IN INTERNAL LAW**

### *6.1 Scholars' opinions*

The current opinion about the principle of competition as a general legal principle of the Union law is brought to its consequences by those scholars who suggest that the constitutional provisions on economic relations (Title III) should be interpreted in accordance with that principle. In its extreme expression the aforementioned opinion suggests that the European principle of competition has “ abrogated” the provisions not compatible with it, that is to say art. 41 (3)<sup>32</sup>. European law –so goes the argument- raises the private economic initiative (art.41(1)) to the rank of fundamental right, so that markets open to competition currently replace the measures provided for by art.41(3) of the

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<sup>30</sup> “...in so far as the question submitted seeks an interpretation of what the national Court describes as the Community principles of freedom of competition and non discrimination, that question ...should be understood as seeking an interpretation (i) of the competition rules contained in Part Three, Title VI, Chapter 1, of the Treaty, which comprise Articles 81 EC to 89 EC, and (ii) of art.12 EC...” (par.20).

<sup>31</sup> “The order of reference does not provide the Court with the factual and legal informations necessary for it to determine the conditions under which State measures such as those at issue in the main proceedings might fall within the scope of the Treaty provisions on competition” (par.33).

<sup>32</sup> F. Merusi, *Giustizia amministrativa e autorità indipendenti*, *Annuario AIPDA 2002*, Milano 2003,176.

Constitution in order to “guide and coordinate both public and private economic activities to social ends”.

What is of interest here about these opinions is not the implicit evaluation of the benefits of competition and of the shortcomings of public economic activity, but rather their legal ground. On these grounds the coexistence, in the European legal framework, of sectors open to competition and sectors regulated by the national authorities in ways that are functional to the implementation of their socio-economic policy, has already been shown in the previous paragraph. It has also been pointed out that such coexistence is in accordance with “the social market economy”, that is one of the objectives of the Union (art.3(3) of the Treaty on E.U.). In such a context, the claim to shape the national economic system in compliance with a supposed European principle of competition, according to which the public sector should play the role of substitute for a lacking private initiative<sup>33</sup>, contradicts the rules of European law. Of course Member States are at liberty not to make use of the freedom that the Treaty grants them in view of the implementation of their policies, but this choice and the subsequent responsibility should not be disguised as an obligation under European law.

The ultimate implication of opinions like those mentioned here is the privatization of the public sector<sup>34</sup>. Such privatization is not without ambiguities: should the tasks of the public authorities be suppressed or should they be maintained provided that they are accomplished through private enterprises? The debate about the interpretation of the amendment to art.118 of the Constitution, dedicated to administrative functions, illustrates the ambiguity.

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<sup>33</sup> G.Corso, *Le privatizzazioni e i servizi pubblici*, in F. Roversi Monaco (ed.), *Sussidiarietà e amministrazioni pubbliche*, Rimini 1997, 185.

<sup>34</sup>F. Merusi, *La nuova disciplina dei servizi pubblici*, in *Annuario AIPDA 2001*, Milano, 2002, 64.

The text of the amendment reads as follows: the State and the local authorities “favour the autonomous initiatives of citizens, individually or associated, for the exercise of activities of general interest, on the basis of the subsidiarity principle”. This text raises several questions, first of all the question of the meaning of the subsidiarity clause when applied to relations between subjects that are not included in a framework defining their respective competences. For our purpose it may be enough to point out that the provision of art.118(4) aims to realize “active citizenship”, as is shown by the wording of the text. The “general interest” that citizens and their associations are apt to promote is different from the “public interest”, which in the administrative language implies the competence of public authorities. Besides, the word “citizen” qualifies the subjects in question as members of the collectivities that constitute the basis of territorial bodies, thus pointing out the value of their initiatives as expression of a commitment in the interest of the collectivity. Finally, the text qualifies as “autonomous” the citizens’ initiatives; the adjective indicates that these initiatives do not turn the citizens into instruments of the administration, operating within public programmes for the attainment of objectives of public interest for which the public authorities are responsible.

The trend in favour of the privatization of economic activities shifts the provision of art.118(4) from the ground of active citizenship to the ground of private economic initiative, and suggests that the amendment in question obliges the administration to provide the public services by means of private enterprises<sup>35</sup>. This interpretation converges, via a different route, with the view of the Corte costituzionale, which derives from the so-called European principle of competition the general rule according to which local authorities should run the services of economic interest by means of enterprises chosen through public procurement procedures –as we shall see in the next paragraph.

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<sup>35</sup> D. Sorace, *Diritto delle amministrazioni pubbliche*, Bologna 2007, 129; G.Salerno, *Servizi di interesse generale e sussidiarietà orizzontale fra ordinamento costituzionale e ordinamento dell’Unione europea*, Torino 2010, 244-247.



## **7. THE CASE-LAW OF THE CORTE COSTITUZIONALE**

The broad case-law of the Corte costituzionale concerning competition has been occasioned mainly by disputes between the state and the regions about the areas of their respective legislative competence. Since the competence for the “safeguard of competition” pertains to the exclusive competence of the State (art.117, par.2, letter e), of the Constitution.), the core of such disputes is the meaning of the word competition. As already pointed out, the settled case-law of the Court states that the notion of competition in the meaning of art. 117, Const. cannot but coincide with that of European law. The necessity of the coincidence is given as self-evident, so that the statement is not supported by argumentation<sup>36</sup>. The assumption has a double effect: 1. it endows this part of the Court’s judgments with the authority of supranational law, and 2. it contributes to consolidate the current opinion about competition as a principle of the European law.

The coincidence is contradicted by the broad notion of competition actually employed by the Court, which has no equal in European law. The Court’s notion covers not only the rules on competition within the meaning of Title VII, TFEU, but also any measure which, in the view of the judge, aims to foster competition. The “dynamic” character of the concept<sup>37</sup> originates a generic notion that is employed in support of state legislation, the incursions of which into areas pertaining to the competence of the regions are legitimated under the label of the promotion of competition.

Setting aside the number of judgments that refer to the promotion of the competition measures that aim at the development and the competitiveness of various

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<sup>36</sup> See CC 325/2010, par.7; 45/2010, par.4.1.; 401/2007, par.6.7; 430/2007, par.3.2.1; 14/2004, par.4.

<sup>37</sup> CC 14/2004, par.4; 272C2004, par.3.

sectors<sup>38</sup>, for our issue it is important to focus on the judgments where the supposed European principle of competition brings its authority in support of the state legislation that requires to externalize the running of local public services of economic interest, unless the conditions of Art.106(2) are met<sup>39</sup>. As we shall see, these judgments are the consequence of the misunderstanding on the European concept of competition in its legal meaning<sup>40</sup>.

In deciding the dispute arisen on this matter between the state and the regions, the Court takes the opportunity to present a catalogue of the different types of measures that are included in the notion of competition within the meaning of art.117, Const. (which, as it is once more stressed, is the “reflex” of the European notion). According to this notion the competition can be safeguarded by three classes of measures: 1. legislation on competition *stricto sensu* (antitrust provisions); 2. legislation that opens the markets to competition ( i.e. that promotes the competition “in the market”); 3. legislation that prescribes competitive procedures for the award of publi contracts (i.e. that promotes the competition “for the market”)<sup>41</sup>.

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<sup>38</sup> Examples in CC 175/2005 (promotion of the made in Italy); CC 14C/2004 (incentives for investments in disadvantaged areas ); CC 336/2005 (measures for the improvement of the electronic communications network).

<sup>39</sup> CC 325/2010, par.6.1. and 199/2012, par.5.2.1.

<sup>40</sup> See par.3.

<sup>41</sup> CC 325/2010, par. 7.

The class of measures that is of interest for our issue is the third. The classification of the “competition *for* the market”<sup>42</sup> as a European rule on competition originates from the misunderstanding on the rationale of public procurement procedures: qualified as rules aiming to ensure non-discrimination of choices, those rules must be complied with when the contracting authority has to make a choice; qualified as rules on competition, those rules require that the public services of economic relevance should be run by a third party, so that a choice must be made and the public procurement procedure must take place. The Court states that the second qualification is the proper one<sup>43</sup>.

The consequence of this construction is that the so-called in-house providing is allowed only when the award of the service through a public procurement procedure would obstruct the fulfilment of the “mission” of the service, that is to say under the same conditions that, according to Art.106(2) of the TFUE, allow derogations from the rules on competition (i.e. from articles 101-109)<sup>44</sup>. The Corte costituzionale presents this consequence as having its ground in Union law, notwithstanding the case-law of the Court of Justice to the contrary. The European case-law on the matter makes it clear that the in-house providing is precisely intended to ensure the freedom of the Member States to

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<sup>42</sup> The expression indicates the competition which takes place when the exercise of an activity having a monopolistic character is the object of a competitive procedure. In such cases, if several undertakings take part in the procedure and the competition is not distorted by collusive agreements between the participants, the undertaking that will be chosen shall exercise the activity under the conditions resulting from the competition and will be thus deprived of the possibility to make use of its monopolistic power (Demsetz, *Why regulate utilities?* in *Journal of Law and Economics*, 1968,55).

<sup>43</sup>This qualification has been reiterated in the judgment concerning the legislative provisions enacted to substitute those abrogated by the referendum held in June 2011: CC 199/2012, par.5.2.1.

<sup>44</sup> The competitive procedure is mandatory –states the Corte costituzionale- unless “the national State considers that the application of the rules on competition (*therefore also the rule that prescribes the award of services to third parties through a competitive procedure*) should obstruct, in law or in fact, the special mission of the public entity” (CC 325/2010, par.6.1., emphasis added).

organize their services in the way they think fit, and the provision of services by an in-house provider is included in such a freedom<sup>45</sup>. This intent is made explicit in the judgment that broadens the notion of in-house providing by including in it the cases where a “similar control” on the external entity is exercised jointly by the public authorities which are responsible for the service: “To require the control exercised to be individual would have the effect of requiring a call for competition in the majority of cases where a public authority seeks to join a grouping.... Such a result, however, *would not be consistent with the Community rules on public procurement and concession contracts*. Indeed, a public authority has the possibility of performing the public interest tasks that are conferred on it by using its own administrative, technical and other resources without being obliged to call on outside entities not forming part of its own departments”<sup>46</sup>.

Indeed, the European rules on competition, that must be complied with unless they obstruct the accomplishment of the services of general economic interest (art.106(2) TFEU), are those set out in articles 101-109 of the Treaty, under the Title “Rules on competition”. The competition for the market –i.e. the supposed European rule on competition according to which the services of general economic interest must be run by third parties chosen through a competitive procedure<sup>47</sup>- simply does not exist.

## **8. CONCLUSION**

The opinions of legislature, judges and scholars each have their own reasons, even when the conclusions are the same. For the subject at issue here the coincidence is favoured

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<sup>45</sup> C-26/03, par.49.

<sup>46</sup> C-324/07, par.47-48, emphasis added. See also C-573/07, par.56-59.

<sup>47</sup> CC 325/2010, par.6.1; CC 199/2012, par.5.2.1.

by the common commitment to comply with the prescriptions of Union's law. This commitment takes the form of compliance with the principle of competition, regarded as a principle of the European law. This principle operates as a shield against different opinions, which is employed to avoid the discussion on the merits of the underlying reasons. The considerations above raise doubts concerning the legal ground of such a principle and its relevance for the construction of our constitutional framework. These doubts concern the very existence of a principle of competition that should direct the economic system as a whole. The written law of the Union and the case-law of the Court of Justice as well, show to the contrary the coexistence of different rules the application of which generates a sort of mixed economy, not so far removed from the model which is still at the basis of the Italian constitutional provisions on economic relations.