

**ECONOMIC FREEDOM, FREEDOM OF ENTERPRISE AND THE
PROTECTION OF COMPETITION**

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1. ECONOMIC FREEDOM AND FREEDOM OF PRIVATE ENTERPRISE IN THE ITALIAN CONSTITUTIONAL EXPERIENCE

In the Constitution of the Italian Republic the guarantees relating to the economic sphere revolve around two basic principles: the freedom of private economic enterprise (Article 41) and the protection of private property (Article 42). On these principles the Constituent Assembly has built the idea of economic pluralism (meaning enterprises and property can be private, public or subjected to public controls) and have emphasized the social dimension of economic guarantees (see the limit of “social usefulness” and the safeguard of “security, freedom and human dignity”, in Article 41 It.Const., and the limit of “social function” for the private property, in Article 42 It.Const.). The social dimension of economic guarantees can justify forms of restraint of economic freedom and private autonomy even in the economic sphere. The debate on the basic principle inspiring the notion of “Economic Constitution” has developed in the Italian constitutional experience around the interpretation and implementation of these parameters¹.

The Constitutional Court has clarified the role and extent of the freedom guaranteed by the first paragraph of Article 41 It.Const. that includes not only the freedom to start up a business, but also the ability to carry out and to dismiss it freely and also includes the freedom of economic agents to compete in the marketplace.

The Court was also able to define the boundaries of the “values” included in the general notion of “social usefulness”, a concept which must be related to the protection of common goods (environment, health, other social interests). As for the limits derived from respect for “the freedom, dignity and security of persons”, they can justify regulations that affect the launch and development of economic activity (permits, licenses, concessions

¹ For a complete analysis of the European debate, especially on the origins of “Wirtschaftsverfassung” in German constitutional history, see L. CASSETTI, *Stabilità economica e diritti fondamentali. L'euro e la disciplina costituzionale dell'economia*, G.Giappichelli, Turin, 2002; more recently, F. PIZZOLATO (a cura di), *Libertà e potere nei rapporti economici. Profili giuspubblicistici*, Giuffrè, Milan, 2010.

etc.). To these limits must be added the “public controls” that allow both private and public economic activities to be directed and co-ordinated towards social ends (Article 41, par.3 It.Const.).

The choice regarding the tools that may limit the freedom of enterprise and the establishment of controls for social purposes are the result of the decision of parliamentary law to which the Italian Constitution reserves the right to define in practice the solutions that cannot however degrade, up to the point where it is functionalized, the guarantee of economic freedom codified in Article 41 It.Const.².

1.1 Public controls to avoid the formation of monopolies: antitrust rules in the service of the national market

The perception of the substantial difference that separates the direct intervention through the public regulation and the control of respect for competitive rules in the national market and therefore the maintenance of equal conditions for all economic agents was ingrained in the Italian system with the establishment of the national Antitrust Authority (Autorità Garante della Concorrenza e del mercato) created in 1990 by the Law No. 287 to implement the guarantee of Article 41 It.Const. and in line with the European antitrust rules and practice (Article 1, Law n.287/1990).

The activity of the Antitrust Authority is not limited to the control and sanction of abusive acts and behavior that distort competitive rules (abusive agreements, abuse of a dominant position, anti-merger control), but has also highlighted, in the development of

² A wide analysis on constitutional judgements on economic freedom is available in the volume edited by V. BONOCORE, *Iniziativa economica e impresa nella giurisprudenza costituzionale*, ESI, Naples, 2006, 10 (for further references, see the doctrine mentioned in footnote no. 1).

consultative powers, the negative effects and distortion of competition in the internal market due to State or regional legislation and, occasionally, local regulation³.

Twenty years of antitrust decisions have not only outlined abusive formations of private economic power that damage the competitive market, but have also put into question the kinds of regulation (state, regional and also local rules) that impede the development of business in fair market conditions by the introduction of restrictions, reserves and conditions for opening economic activities.

Ultimately, the national antitrust legislation and its enforcement operate for purpose of the constitutional guarantee of economic freedom by imposing (in the private sphere as well as the public) compliance with those conditions that make the market an area of social and economic relationships based on the principles of freedom and equal opportunities.

2. “THE PROTECTION OF COMPETITION” AS A “TRANSVERSAL” SUBJECT-MATTER INTRODUCED IN THE REFORM OF ITALIAN REGIONALISM (CONST.LAW NO. 3/2001). THE “UNILATERAL” DEFENSE OF STATE REGULATION

With the constitutional reform of Italian regionalism (Const.Law No.3/2001) the constitutional discipline of the economy is enhanced by rules which grant legislative powers to the State in subject-matters relating to economic policy instruments. The reformed Article 117, para.2, let.e) It.Const. has assigned to the Parliament the task of legislating on “competition protection” as well as other key functions for the management

³ Article 21, Law n.287/1990 has attributed to the Antitrust Authority the power to make reports to the Government and Parliament on laws, regulations and general administrative measures which may distort competition or the proper functioning of the market. According to Article 22 the authority may express advisory opinions on legislative and regulatory proposals and on the problems relating to competition and the market.

of the economy (such as currency, savings protection, State taxation, fiscal system and the regulation of financial markets) .

With the aim of strengthening regional autonomy, the reform of 2001, after having stated the exclusive legislative power of the State, has in reality given a range of responsibilities in certain strategic sectors of the economy (industry, commerce, tourism, crafts) to the regional legislative powers (the so called “potestà legislativa regionale residuale) (Article 117, para.4 It.Const.) and has given the concurrent legislation of State and regions the discipline of “incentives and support for production activities” (Article 117, para.3 It.Const.).

The idea of transforming the regional system into a “federal” one was originally based on the pillar of “fiscal federalism”, in the sense of real autonomy of revenue and expenditure for regions and local entities according to the reformed Article 119 It.Const., which only recently has been implemented due to the entering into force of Law No. 42/2009. In the framework of new fiscal powers and new responsibility for the regions Article 119, para.5 It.Const. has introduced a single clause on the direct intervention of State regulation: this rule permits the adoption of “special” State measures (funding and incentives) addressed to individual local realities and based on “specific” socio-economic conditions (e.g. to deal with economic and social imbalances).

The text reformed in 2001 did not include a general clause that would justify, in the name of national interest and uniformity of regulation, the action of State laws to govern and correct, especially in adverse economic conditions, the balances of the national economy, based on the model of the *Commerce clause* in the U.S.A. Constitution (according to Article I, Section 8, para.3, the Congress shall have powers to regulate commerce with foreign nations and among the several States and with the Indian tribes).

The Italian Constitutional Court has “created” a similar clause in its jurisprudence through the judicial review of legislation that resulted from the complaint of the State and

regions (giudizio sulle leggi in via d'azione)⁴. According to the fundamental Judgement No.14/2004, the exclusive legislative competence of the State on the “protection of competition” is not a traditional subject-matter, but a legal regime. State legislative powers may introduce not only measures that prevent the formation of private monopolies (antitrust rules), but can also introduce a whole range of measures aimed at reducing imbalances and the promotion and improvement of conditions, for the sufficient development of a competitive market, or to establish competitive assets⁵.

As such, the “protection of competition” may cut transversally many subject-matters attributed to the legislative powers by the reformed Constitution, especially those regarding economic policies. This result, however, is lawful only if the intervention of the State laws has “macro-economic impact” meaning that it regards profiles and economic interests which must be treated in order to ensure uniform regulation throughout the national territory. When these conditions are met the transversal interpretation of “competition protection” may have the effect of limiting the area of economic matters in which influence is conferred to the regions in terms of legislative power (concurrent, with State laws, or residual)⁶.

⁴ According to the reformed Article 127 It.Const., “The Government may question the constitutional legitimacy of a regional law before the Constitutional court within sixty days of its publication, when it deems that the regional law exceeds the competence of the region. The region may question the constitutional legitimacy of a State or regional law or measure having the force of law before the Constitutional court within sixty days from its publication, when it deems that said law infringes upon its competence”.

⁵ In this case the Constitutional Court has interpreted the State’s function in protecting competition with reference to the experience of European antitrust policy which includes not only the application of antitrust rules by the EU Commission, but also involve the possibility of direct State intervention in the economy (in the EU law aids granted by the States are forbidden because they may distort competition, but are allowed under certain specific conditions: See Article 107 of the Treaty on the Functioning of the European Union): on this comparison see critically, R. CARANTA, *La tutela della concorrenza, le competenze legislative e la difficile applicazione del titolo V della Costituzione*, in *Le regioni*, 2004, 1007; L. CASSETTI, *La Corte e le scelte di politica economica: la discutibile dilatazione dell'intervento statale a tutela della concorrenza*, in *federalismi.it*, n.5/2004, 6; A.PACE, *Gli aiuti di Stato sono forme di “tutela” della concorrenza?*, in *Giur.cost.*, 2004, 262.

⁶ See Const.Court Judg. No.14/2004: for a complete overview of the debate raised by this important decision See, R. Bifulco, *La tutela della concorrenza tra parte I e parte II della Costituzione (in margine alla sent.14/2004 della Corte costituzionale)*, in *Le regioni*, 2008, 791 ss. and here for other bibliographical references.

However, the premise of the test on the reasonableness, proportionality and adequacy of State measures, in the name of protection and “active promotion” of competition, have not been applied in a linear and coherent way in the constitutional jurisprudence of the last seven years.

In fact, based on a wide interpretation of the State function in defense of competition, the Court declared unlawful State laws containing sectorial regulatory mechanisms lacking any significant macro-economic impact or protectionist measures related to specific areas of the national market, or legislative action to boost employment in some deprived areas of the country⁷.

In conclusion, the promotion of competition also resulted in those State measures which, taking care to promote growth and employment, sometimes result in the direct intervention of public authorities in a specific productive sector or in a specific region of the country, that can affect, in the name of specific economic and social needs, the competitive functioning of the market.

Decidedly more episodic are the decisions by which the constitutional judges, upholding the complaints of the regions, have declared unconstitutional or censored State measures because of the lack of a truly overall impact on “the general economic equilibrium”⁸.

⁷ On this constitutional jurisprudence, see critically, M. LIBERTINI, *La tutela della concorrenza nella Costituzione italiana*, in *Giur.cost.*, 2005, 1429 ss.; R. CARANTA, *Mercato e autonomie*, in A. VIGNUDELLI (a cura di), *Istituzioni e dinamiche del diritto. Mercato amministrazione diritti*, G. Giappichelli, Turin, 2006, 107 ss.

⁸ Const.Court Judg. No.77 and 107/2005.

3. WHAT PROSPECTS FOR ECONOMIC DEVELOPMENT BASED ON A SYNERGY BETWEEN DIFFERENT LEVELS OF GOVERNMENT?

What are the consequences of the interpretation offered by the Constitutional Court as regards the objective of the reform of 2001 to develop decision making autonomy of local government in order to stimulate economic development that is built and maintained responsibly at a regional and local level?

In the first application of the test on the adequacy of State laws on the matter of competition protection, the Court has effectively safeguarded the regional regulation of local public services: in the Judgement No.272/2004, the reasonableness of the rules on the participation of public enterprises in the public competitive tendering procedure has led judges to declare unlawful those norms as they contain self-application rules, which are overly detailed and therefore able to infringe unjustifiably on the regional powers in the organization of local public services.

However, this initial orientation was contradicted by more recent jurisprudence. In 2007 the Court judged as lawful State rules on public contracts (Codice dei contratti, appalti e furniture – Legislative decree no.163/2006) which contain an extremely detailed discipline on public procurement in the name of the prevalence and supremacy of the interest to protect competition among economic operators: this interest would be only satisfied by State regulation that guarantees uniformity and equal conditions among enterprises in the national market. The regions could not claim any competence in order to discipline local procurement procedure.

The balancing test of these rules was carried out in very summary terms: “the need for uniformity”, considered as an essential characteristic of competition, in the field of public procurement prevents the Court from judging the true reasonableness of State measures and their eventual impact on the “general economic equilibrium”.

The uniformity of the rules laid down to ensure competitiveness in tendering procedures is in no manner balanced with other constitutional interests or values. That means the uniformity of discipline in the field of public procurement becomes an absolute value bound to prevail on any instance of differentiation proposed by the regional legislature that would adapt the discipline of the Code of public contracts to the need of local business (see Const.Court, Judg. No. 401/2007; Judg.No 283/2009).

The same criteria applies to decisions regarding the State rules for the liberalization policies related to some economic sectors that have recently been opened up to full competition between private traders: also in this case the solution taken by the national Parliament was deemed an expression of the State's role in protecting competition. In particular, the rules governing liberalization must respect single, uniform State regulation and cannot be outlined at local level, even assuming that regional solutions in the field of trade were inspired by a more efficient policy to promote the competitiveness of the local market⁹.

Even recently the Court has reaffirmed that regional pro-competition rules are admitted, but only if their impact is marginal and indirect and they do not conflict with the goals of State standards that govern the market and protect competition and production.

On this basis, the regional norm including the liberalization of Sunday opening tied to the setting of a midweek day for being closed for business has been withdrawn. This kind of restriction (imposing midweek closing) was considered unconstitutional by the Court because of the risk of jeopardizing trade liberalization policies carried out by the Legislative Decree No.114/1998, which provides for a more strict regulation of business hours (Const.Court, Judg. No.150/2011, para. 7.1.).

⁹ See L. BUFFONI, *La "tutela della concorrenza" dopo la riforma del titolo V: il fondamento costituzionale ed il riparto di competenze legislative*, in *Le istituzioni del federalismo*, 2003, 383; C. MARZUOLI, *La tutela della concorrenza*, in G. CORSO e V. LOPILATO, *Il diritto amministrativo dopo la riforma costituzionale, Parte speciale*, Milan, 2006, vol.I, 3 ss.; L. CASSETTI, *Potestà legislativa regionale e tutela della concorrenza* (10.12.2001), in *federalismi.it*.

The idea of a State which shows the “high road” to the regional autonomies as the best guarantee of competitive markets, while at the same time closes concrete possibilities to adapt State rules to the local productive system, is justified in part by the tendency of the regional legislator to reduce competition, sometimes by means of protectionist measures, in clear contradiction with the value of economic freedom expressed in Article 41 It.Const. (Const.Court, Judg. No. 124/ 2010) ¹⁰.

It cannot be denied, however, that constitutional jurisprudence has created a new “State centralism” on behalf of uniformity and absolute prevalence of pro-competitive State measures. This appears to be in stark contrast with the spirit of federalism that would be based on differentiation and the empowerment of the powers and responsibilities of local government.

In conclusion, in the uncertain Italian federalism the clause on the protection of competition has definitely put in the hand of central government choices and policies that do not always have a real impact on economic equilibrium and that often preclude the ability to process a local policy shared with central government.

Without an effective and coherent judicial review of the Constitutional Court on the proportionality of State rules, regional and local regulations are losing spaces, even where the latter have sometimes attitude to introduce better instruments for the protection of competition.

¹⁰ In this Judgement the Const.Court held as unconstitutional the provisions of the Calabria region in reserving a share of 20% of authorization for renewable resources to local firms or to companies that spend part of their investment in the same region.

4. DELAYS AND RELUCTANCE IN APPROVING THE “ANNUAL LAW FOR MARKET AND COMPETITION” (ARTICLE 47, LAW NO 99/2009)

In reality, the legal interpretation of the constitutional clause on the exclusive power of the State in the protection of competition trusts the central government with an important task in which State power also does not seem to excel.

The delay and reluctance of the Parliament to approve the first annual law on competition and the marketplace reveal this paradox: the trust placed by the Constitutional Court in almost positive virtues of the uniformity that affects State rules on the regime of competitive market does not seem well placed.

Two years after the entering into force of the Law No. 99/2009 there is still no sign of the “annual law for market and competition” to be adopted in implementing Article 47 of the above mentioned law.

An annual law would have the task of bringing to the attention of the political agenda every year a range of measures necessary to open up to competition fields still largely subject to authoritative regulation and to administrative praxis that do not facilitate the conduct of business activities.

The basic norms of the annual law for market and competition will have their immediate application in the light of the numerous reports and advisory opinions given by the Antitrust Authority in the last twenty years.

It is easy to imagine how such instrument, once it has come into force, may have positive impact on the market of public utilities (where is necessary complete the liberalization of gas and start up the liberalization of local and regional railways) and on the balance of energy resources (liberalization in the field of fuel distribution), equally strategic for the economic development.

As the national Antitrust Authority has promptly pointed out in its latest Annual Report (2011), over the last five years there has been a standstill in the liberalization policies launched by the government in 2006-2007 and it is clear that “the absence of high profile pro-competition measures reflects on the current legislature”¹¹.

In particular, in the regulation of professions, the opening of the market for the distribution of pharmaceuticals, and the liberalization of regional railways, the signals coming from Parliament are far from clear: there prevails a substantial reluctance to open these key strategic markets to revitalize the national economy .

Therefore, there is the need for a renewed and effective commitment of the State legislature in order to truly make effective the guarantee of competition which supports the effectiveness of constitutional principle relating to economics.

It is now also essential to restore institutional spaces for a debate on the fair cooperation between different level of government for a better and more efficient protection of market and competition , possibly through the strengthening of dialogue between the regions and the advisory powers of the national Antitrust Authority, or through the active involvement of the regions in the preparation of the annual law on competition and the marketplace¹².

5. RECOMMENDED WEB SITES

www.agcm.it (National Antitrust Authority-Autorità Garante della concorrenza e del mercato)

¹¹ AGCM, Relazione annuale sull’attività svolta, Rome, 31 March 2011 (report available at www.agcm.it).

¹² As suggested by B. CARAVITA, *Tutela della concorrenza e regioni nel nuovo assetto istituzionale dopo la riforma del titolo V della Costituzione*, in *federalismi.it*, n.20/2010, 9.

www.giurcost.org e www.cortecostituzionale.it (Judgments of the Constitutional Court)

For an update on laws and jurisprudence (national and european), analysis of doctrine on freedoms, law and economics, regionalism and federalism, see the following online journals:

www.federalismi.it Rivista di diritto pubblico italiano, comunitario e comparato

www.associazionedeicostituzionalisti, Rivista telematica giuridica dell'AIC (Association of Italian Constitutional Law Professors)

www.apertacontrada.it (Riflessioni su Società, Diritto, Economia)