«Competition on the merits»: a pseudo-concept?

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A specter is haunting the debate on competition law, both in Europe and the US. It is the specter of «competition on the merits». It mirrors the alleged assumption – originally framed by certain German scholars with reference to unfair competition – according to which the competition «model» privileged by the legal order – and, as such, the watershed between the legal and the illegal in the interpretation and application of both unfair competition and antitrust law – is that of «performance competition» *(Leistungswettbewerb*)[1].

That concept was, and still is, proposed as an expression of an assumed general imperative of «working with one's own means, without encroaching upon the other's land»: without «misappropriation», in short, of the results of another's activities – of the «results obtained with toil and expenses» (*«mit Muehe u. Kosten errungenen Arbeitsergebnisse»*), as evoked by the above-mentioned German jurists[2].

Now, it seems to me self-evident that, in juridical terms, «misappropriations» are such only because of prohibitions laid down by the legal system – whether in respect of the infringement of IPRs, or the implementation of 'unfair' competitive practices. That assumption, thus, results

[1] This was the term originally coined in the '30s of the last century by aforehinted German jurists precisely on the subject of unfair competition. See R. ISAY, *Das Rechtsgut des Wettbewerbsrecht,* Berlin, 1933, 59 ff.; H.C. NIPPERDEY, *Wettbewerb und Existenzvernichtung, Eine Grundfrage des Wettbewerbsrechts,* Berlin, 1930.

[2] On these lines (whose founder, O. MAYER, *Die "Concurrence déloyale",* in *Zeits. ges. Handelsrecht,* 1891, 377 ff., spoke of *"Schlechtmachen der fremden Leistung"*) see particularly H.C. NIPPERDEY, *Wettbewerb und Existenzvernichtung,* cit., 16 et seq.; in German jurisprudence, RG December 18, 1931, RGZ, 134, 342 (350 et seq.). In European Court law, see e.g. ECJ, *Case Michelin I,* N.V. Nederlandsche Banden-Industrie-Michelin versus Commission of European Communities, 9 November 1983, C - 322/81, referring to "*normal competition in products or services based on traders' performance*").

The academic partisans of the legal theory of "Leistungswettbewerb" included, amongst the best known representatives, Y. Saint Gal in France, R. Callmann in the USA and, in Italy, M. Rotondi and R. Franceschelli – up to the more recent, and more sophisticated contributions by Cesare Galli including. As this theory basically serves the interests of *beati possidentes,* it should be kept separate, beyond any lexical affinity, from the work of the 'ordoliberals' of the School of Freiburg (see below, fn 5 and accompanying text).

in nothing more than the obligation to respect the limits posed by the law(s) on unfair competition and antitrust regulation(s).

I do agree, then, with OECD's deep scepticism about the concept of «competition on the merits», labelled as one that «has served too often as a shortcut that glosses over the difficult work of defining clear principles and standards that embody sound competition policy»[3]. I would be harsher, and define it a void concept, i.e. one without any legal consequences *of its own*: a ghost, yes – or, borrowing Benedetto Croce's expression, a *pseudo-concept*. A pseudo-concept that, by the way, serves the widespread rhetoric of the «fight against parasitism»: thus, in particular as a proxy for protectionist approaches aiming at prohibiting even non-confusing nor IPR-infringing imitations (so called «look alikes»)[4].

Nor could the aforesaid 'concept' be defended by referring (in the wake of a different presentation, of Ordoliberal flavour)[5] to a way of competing that should serve the general interest(s). Here, any misunderstanding must be avoided vis-à-vis the fact that in the capitalistic legal order each enterprise is guided by *its own* interests: and lawfully so, as the 'social utility' (as reconstructed from the whole set of mandatory norms intended to safeguard the collective interests) represents not a regulatory directive of business activity, but rather a *limit* of 'respect': of 'non conflict', as literally stated in Article 41.2 of the Italian Constitution ("Private economic initiative is free. But it must not be exercised in contrast with social utility or human freedom, safety, and

[3] OECD, *What is Competition on the Merits?*, in *Policy Roundtables*, 2005, p. 17 ff., available at: *www.oecd.org/competition/abuse/35911017.pdf*

[4] Non confusing imitations should not be judged as unlawful as consistent with the axiom 'no misappropriation without misrepresentation' (in UK Court law see in particular, Jacob J. in *Hodgkinson & Corby and Roho v. Ward*, 1995; see as well the famous US SC decisions in Graham v. John Deere, 1996, *Bonito Boats,* 1989*, Compco, 1964*).

[5] On this topic, also with particular reference to the thoughts of Walter Eucken and Franz Bohem, see O. BUDZINSKI, *Monoculture versus Diversity in Competition Economics*, in *Cambridge J. of Econ.*, 2007, 295 et seq.; and more broadly W. MOESCHEL, *Competition Policy from an Ordo Point of View*, in A.T. PEACKOCH, W.WILLGERODT (ed. by), *German Neo-Liberals and the Social Market Economy,* Chapter 17. And, of course, see D.J. GERBER: from the classic *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, Oxford U.P.,1998, to *Europe and the Globalization of Antitrust Law*, in *Connecticut J. of Int'l L.*, 1999, 15 et seq. Lastly, for an acute brief reconstruction, see M. VATIERO, *Ordoliberal Competition*, in *Concorrenza e mercato*, 2010, p. 371 et seq.

dignity").

This is precisely the perspective that is confirmed by positive law, which indeed rejects the «functionalization» of private entreprise's activity[6]. Just think of how «socially useful» it would be if advertising practices should provide a wealth of information, also by way of comparison, as opposed to others which, viceversa, focus strictly on wholly fanciful contents. But these latter cannot be legally discriminated against *as long as* they just do not cause misleading impressions and/or confuse the customer. Thus, in other words, even aforesaid advertising practices, although void of any social utility for utter lack of informative content, insofar as they do not exceed the limit of «falsehood» or «passing off» (confusion), can be classified *on the merits* as the lawful expression of the enterprise's own interest in increasing its profits. (By the way, isn't the dominant «enterprise culture» inspired by the axiom that the company's mission is to «create value» for investors?)[7].

Quite analogous considerations can be addressed to the practices overall designed as «Corporate social responsibility» (CSR), by which the firm, going beyond its profit-making commitment, projects itself also to the satisfaction of societal goals such as environment and health protection, enhancement of workers' dignity, and the like[8]. Useful and praiseworthy practices indeed, and legitimate source of increased social prestige. But, again, 'neutral' vs the separation of 'right' from 'wrong' in the juridical qualification of competitive behaviours – even in comparative terms vis-à-vis strictly and solely profit-oriented business conducts.

These same conclusions basically apply to antitrust law: a firm which charges very high prices in order to achieve a higher profit margin, operates – legally – just as *on the merits* as one which sells at more affordable prices to the

[6] For all of the above, G. MINERVINI, *Contro la "funzionalizzazione" dell'impresa privata*, in *Riv. dir. civ.,* 1958, I, 618.

[7] See A. Renoldi, *Valore dell'impresa, creazione di valore e struttura del capitale* cit.

[8] *Ex multis*, see the seminal contributions by MARRIS, *The Economic Theory of Managerial Capitalism*, and CYERTH AND MARCH, *A Behavioural Theory of the Firm*. In Italy, the best historical example of actually pro-social entrepreneurial commitment is (also) in my view represented by the work and 'teaching' of Adriano Olivetti.

general public – just provided that the former, in charging higher prices, does not violate the specific prohibition of abuse of dominant position[9].

In short, that ‘concept’ is devoid of any normative meaning beyond the simple reference to the various prohibitions and limits imposed by regulations (unfair practices, antitrust) of competitive activities.

Exit ghost.

[9] H. ULLRICH (*European Competition Law, Community-wide Exhaustion and Compulsory Licenses - Disintegrating the Internal Market in the Public Interest,* in C. Godt, *Differential pricing of pharmaceuticals inside Europe: exploring compulsory licenses and exhaustion for access to patented essential medicines,* Baden-Baden, Nomos, 2010, p. 89 et seq.) acutely observes that the antitrust prohibition of «excessively high» prices charged by the holder of a dominant position relates to an abnormal excess of the latter compared to levels which are still compatible with – and supported by – the 'game' of competition. The perimeter is, ultimately, that defined by the 'market'. Said prohibition cannot therefore be used to achieve pro-social, 'off-market' results, such as, for example, the adoption of pharmaceutical price levels that are within the reach of the populations of the poorest countries. This calls for an *administrative regulation*.