**COMPETITION AND SOCIAL COHESION**

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**Abstract:** "Competition" and "social cohesion" are both protected by E.U. and Italian laws. The author moves from the analysis of the meaning of these two concepts, in order to reflect on their compatibility and the way to conciliate them. The central problem - in the opinion of the Author - is to abandon the myth of spontaneous markets' order and to rebuild a political order able to maintain and support, as far as possible, the competitive market economy, but also to govern economic processes in critical moments and situations.

1. **"COMPETITION" AND "SOCIAL COHESION" ARE BOTH LEGAL VALUES**

A reflection on the topics mentioned in the title requires us to move, albeit cautiously, to a historical and philosophical level. But I would hasten to add that these issues also have a direct relevance to the law, in the sense that, at present, both "competition" and "social cohesion" are concepts that are expressly protected by the law.

As far as competition (i.e. competition between undertakings) goes, there are no longer any doubts that this is a legally protected good – even at constitutional level – both under European and under Italian law².

However equal importance must be attributed to the value of "social cohesion" in the law. Article 3 of the TEU says expressly that: "The Union shall promote economic, social and territorial cohesion, and solidarity among Member States", and one should read into this (as we will see below) a general principle of the protection of "sustainable development" (so that, still in Article 3 TEU, we read: "The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy..." )³.

The Italian law also notes the same phenomenon. The Republic protects competition (Articles 41 and 117 of the Constitution), but "The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled" (Article 2 of the Constitution). In the Italian government we has been developed, by the Constitutional Court, as a general principle of “liberalization of economic activities”: in this sense the principles of liberalization, stated by the d.l. 1/2012, have been judged conform to the Constitution and binding for the Regions and the local government (s. Constitutional Court, 16 gennaio 2013, No. 8; Constitutional Court, 27 febbraio 2013, No. 27; Constitutional Court, 11 marzo 2013, No. 38).

In the European law, where the Lisbon Treaty has officially “downgraded” the protection of competition from a fundamental goal to a “tool”, prevails the opinion that the normative value of the principle has not been substantially changed (i.e. B. Van Rompuy, The Impact of the Lisbon Treaty on EU Competition Law: a Review of Recent Case Law of the EU Courts, in CPI Antitrust Chronicle, Dec. 2011, 1 ss.; see also M. Libertini, A “highly competitive social market economy” as a founding element of European economic constitution, in Concorrenza e mercato, 2011, 491 ff.).

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2 See, on this point, M. Libertini, Concorrenza, in Enc.Dir. – Annali, III, Giuffrè, Milano, 2010, 551 ff. In Italian law the principle of protection of the competition is by now in force (Art. 117 Cost.) and

3 A. Vigneri, Coesione sociale e tutela della concorrenza in un sistema multilivello, in Le virtù della concorrenza, a cura di C. De Vincenti and A. Vigneri, Il Mulino, Bologna, 2006, with reference to the former Art. 16 TEU.
therefore have a Ministry of Economic Development and a Ministry for Territorial Cohesion, and we also have a Department for Development and Economic Cohesion. Even in the legislation there is a growing tendency to use, in hendiadys, the phrase "economic development and social cohesion" (see, for example, Article 27, paragraph 2, Law Decree 6.12.2011, No. 201 converted in Law 22.12.2011, No. 214).

2. THE RECONCILIATION BETWEEN THESE TWO VALUES MUST BE SOUGHT ON THE BASIS OF "HORIZONTAL SUBSIDIARITY"

One must therefore reflect on the compatibility, and on the ways of balancing, of these different values and goals. One can immediately observe that what, at first glance, looks like "squaring the circle" can be done with a fairly common regulatory solution, in terms of complementarity and "horizontal subsidiarity". European law allows as much competition as possible, but guarantees the presence of services of general economic interest and the social rights of individuals. I would add that, in my opinion, this "first impression" is also the right impression, in the sense that competition between enterprises is not, in itself, conducive to social cohesion, but is necessary for the efficiency of the economic system and for overall well-being: it must therefore be protected, but within a framework of values that sees it (together with others) as a tool and not as an end in itself.

The problem lies rather in how the complementarity between the two values can be realized. Here one must certainly recognize that the coexistence of the two values is neither simple nor straightforward. It would be easy to get gripped by the Courbertinian idea that competition cements overall solidarity (as it is traditionally said to happen with the joint participation in competitive sports). However this would be a false idea: apart from the consideration that it does not work well either for racing or for competition between individuals within a stable organization, this idea is much less likely to work for competition between firms. This is a race where the losers are normally destined to disappear, and the defeat of a losing company brings with it not only the loss of capital but also the sacrifice of the stakeholders (workers, in the first place), who had focused on that company, by will or by necessity.

It is true that a well-functioning competitive market economy produces results of allocative efficiency, but this kind of efficiency measures the satisfaction of individuals in terms of goods and services purchased in the market—which is certainly a key component of "well-being"—but does not fully measure the collective well-being (which is also formed from the use of public goods), much less happiness or social cohesion.

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4 This is a current approach in the legal doctrine. See, in addition to Vigneri (Fn. 3), L’Europa a rete. Il modello delle reti tra concorrenza e coesione sociale, edited by C. Buzzacchi, Giuffrè, Milano, 2011. This is also the official position of the European Commission: see J. Almunia, How competition policy contributes to competitiveness and social cohesion, Lisbon, 14 Jan. 2011 (EU COMM., Speech 11/17), who states a connection between the two principles on the basis of the traditional assumption “as much market as possible as much state as necessary”.

5 The idea that, besides some level of development, the economic growth as such (measured in terms of GDP) does not increase the happiness of people, is by now a
3. THE DIFFICULTY OF BALANCING THE CONCEPTS, AND AN IN-DEPTH ANALYSIS OF THE TWO TERMS

Therefore, if social cohesion has value, the competitive market economy is not the most suitable environment to make it happen. There must be other social and legal mechanisms that support the value of cohesion.

My thesis is that the balance between these two ideas is possible, in the sense that there is a complementarity between competitive markets and public action to ensure a high level of public goods and public services, but that this is not simple nor straightforward and requires conscious choices on philosophical and political grounds. These are difficult choices because they should engage an awareness (which is usually censored or missing) of the difficulties in our basic economic and legal systems.

To argue this thesis, we will move on from an attempt of analytical exercise, that will consider separately the concepts of "social cohesion" and of "competition".


Starting therefore from the first term, I believe that "social cohesion" can be defined as the mutual recognition of a common membership of a society, which may be closed or open but is linked by common values, a common heritage and ties of solidarity, despite the possibility that there are differences, which may also be substantial, in the roles and living conditions of individuals. In its broad outlines, the history of human civilization (understood as the history of ideas, not simply the history of law and institutions) shows a process of expanding horizons of solidarity, which is marked by the following ideal or typical steps:

1) cohesion of the herd (based on stable coexistence and a recognition of internal hierarchies);
2) tribal cohesion (based on common bonds of kinship, i.e. bloodline);
3) community cohesion (based on religious ties, language and customs, and usually linked to residence in a certain territory);
4) feudal cohesion (based on relational constraints, on a voluntary basis, of loyalty or protection).

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6 The concept of “social cohesion”, that is today law in force, origins in the sociological theory (in particular, the first conceptualization is usually attributed to E. Durkheim).

Among official definitions see A new Strategy for Social Cohesion – Revised Strategy for Social Cohesion approved by the Committee of Ministers of the Council of Europe on 31 March 2004: “social cohesion is the capacity of a society to ensure the welfare of all its members, minimising disparities and avoiding polarisation. A cohesive society is a mutually supportive community of free individuals pursuing these common goals by democratic means”.

While our definition, used in the text, is descriptive, this one is normative; therefore, it could be used in the interpretation and application of legal texts.

7 It is obviously impossible to supply analytical quotations on this point. I only acknowledge that, in building the scheme above reported (in the text) I was based, first of all, on F. Fukuyama, The Origins of the Political Order: From Prehuman Times to the French Revolution, Profile Books, London, 2011.

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5) cohesion of the state or nation (monarchies, republics and empires; this should not always be seen from the point of view of monolithic religious patriotism);

6) humanitarian universalist cohesion (Christianity, human rights and, up to a certain point, even Islam);

7) altruistic universalist cohesion (cohesion that is extended to the protection of vulnerable people: intergenerational solidarity and the recognition of environmental and animal rights)

The progress described in the previous list was, and is, by no means a linear process: the transition to a more advanced stage never implies the termination of the previous bonds of solidarity. The move to wider horizons of solidarity is the result of the action of elites, sometimes armed and sometimes unarmed, who never fail fully to impose their vision of the world as a replacement for the vision that was previously in place. Historical experience also shows well-known and frequent phenomena of regression (such as racist movements and regimes, and various types of sectarianism) that reverse the trend towards the affirmation of universal forms of social cohesion.

The history of the forms of social cohesion is therefore not made by the replacement of wider horizons of solidarity with other smaller horizons, but by the layering of different horizons, and hence there are conflicts of loyalty, even in the lives of individual people, and uncertainties in communication (consider the contrasting ideas about the "law", which is sometimes used as a means to affirm the strong over the weak, and at other times is used as an instrument of defence for the weak against the strong, or the full translation into reality of the principles of the “Rechtsstaat”, which has never been perfectly accomplished, or the permanence of quasi-irreducible forms of feudal ties of loyalty, protection, nepotism and influence peddling).

The experience, which has lasted for centuries, of the layering of different horizons of solidarity means that the central issue becomes one of balance and reconciliation between these different horizons. Balancing is always difficult, because every view of cohesion requires the construction of several hierarchical orders in the group’s internal reference system, and therefore of different "powers" that in turn tend to put themselves in competition with each other for control of the lives of individuals.

Western civilization has, for thousands of years (at least since the advent of Christianity), seen the coexistence, with a weighting that has varied over time and space, of all the different forms of social cohesion listed above (although this can only be said of the seventh form for more recent times). However, in the actual historical experience, the situations in which one or other form of cohesion (and related internal power) prevailed were very different; the sociological analysis of these situations and the ways in which conflicts were solved is far from clear, and is increasingly complicated by the difference between professed ideas and actual behaviour.

Without any claim to draw lines of uninterrupted progress, I still believe that a
change consisting of a fundamental shift from narrow forms of cohesion (relationships with herd, tribe, community, sect and fiefdom) to broader forms of organized cohesion (state, nation, humanity and universality) can be recognized in the history of human civilization. This shift weakens the weight of direct interpersonal relationships and strengthens that of other elements of cohesion that were already present, but in embryonic form, in the organizations of the tribe and the micro-community: symbols, functional powers, rules and institutions. Above all, it assumes that a certain weight is given to an established central authority, detached from the everyday life of people (families, markets, etc.), and recognized as a political authority.

Compared to the age-old problem of the coexistence of different horizons of solidarity, this step is accomplished "permanently" with the formation of the modern state: the aspiration of the state to the "monopoly of legitimate violence" is associated, in terms of the history of ideas, with the affirmation of the primacy of the value of loyalty to the state and the law (patriotism, "sense of state" and legality) over any other constraint.

This argument does not deny the existence in practice of other simpler forms of cohesion, but, with a cultural choice that marks a Copernican revolution with respect to medieval pluralism, relegates all that are qualitatively different from the first, that is, all that are grounded on "private" life, as distinct from "public" life. The liberal ethic, which is accompanied by the construction of the modern state of law, has as its backbone the distinction between the public sphere and the private sphere and, at the same time, the location of the latter (including the two phenomena of belonging to small social groups and belonging to a society of a larger or universal dimension, as is often the case with religious experience) in a space of freedom for individuals that is large in size, but is still subject to a compatibility constraint with respect to prior obligations arising from the former⁹.

In terms of socially recognized customs and values, this phenomenon is reflected in the affirmation of a "spirit of citizenship", which places respect for the law at the top of the list of duties for each individual. In classical liberalism, in the Post-Risorgimento ideology that lay beneath the construction of a unified Italy, and in the German Ordoliberalism that inspired the construction of the European treaties, the idea of a public sphere, which is in turn limited by respect for the law but which contains strong guarantees of and limits on individual freedoms, has been a fundamental structure of civil organization and policy.

This model, based on a public / private dichotomy or on the identification of individual freedom on the one hand and state sovereignty on the other (from the perspective of the rule of law) as pillars of civil life, has historically constituted the modern answer to the problem of social cohesion: one of several horizons of political or institutional solidarity is made absolute with respect to the others, and creates a social morality, a "civic duty" ("spirit of citizenship"); it also provides parameters for compatibility with other social constraints on individuals.

⁹ I think that quotations on this point are unnecessary. It could be sufficient to recall the idea of M. Walzer on the “art of separation” as fundamental structure of the liberal thought (where the public/private dichotomy has a primary role).

This response, however, has never acquired a socio-cultural position of full and general acceptance by individuals (subject, perhaps, to a few exceptions in some European contexts). I am not referring only to the inevitable persistence of the behaviour and customs of pre-modern forms of solidarity. The difficulty of achieving a hegemonic position clearly affects even the history of ideas. The public/private dichotomy and the supremacy of public ethics and public law were, at first, opposed in the nostalgia of the intermediate societies and traditional community values, as well as the primacy of religion, and then suffered the attack of Marxist thought, that was intended to assert the primacy of the ethical-political international class solidarity against the statist "bourgeois" ideology. In the last half century, liberal ideology has also suffered the attack of neo-communitarian political philosophies (although little of this has been seen in Italy). All of these criticisms have in common an aversion to liberal individualism, which is seen from one side of the divide to have values that are destructive of community life, and from the other to be an ideological abstraction, designed to hide the true dynamics of social life.

In the last quarter of a century, the most penetrating attack on public ethics and the liberal central dimension of the "public" as just came "from the inside", in the neoliberal hegemony that has, following the fall of the communist regimes, created a widespread anti-state attitude that has been accompanied by confidence in the ability of self-regulation of the markets. Against the background of this free-market ideology wave (which saw economic liberalism take, for the first time in history, a real hegemonic position in the political culture of the Western world) is a kind of ontological individualism: the individual is seen as the only reality and the only value, so that the function of the public sphere should only be to ensure the preservation of individual liberty; at the same time social cohesion becomes a private matter, normatively irrelevant (and in any case to be seen as a result of the spontaneous coexistence of individual choices).

The crisis of 2008 (which is still in progress) has shaken the foundations of this edifice, without having given way to the construction of a new synthesis, in terms of ideas and current policies.

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11 Maybe some connection with the communitarian ideology there is in the “common goods” movement (see U. Mattei, Beni comuni. Un manifesto, Laterza, Bari-Roma, 2011; A. Lucarelli, Beni comuni. Dalla teoria all’azione politica, Dissensi, ed., Viareggio, 2011). Nevertheless, this movement, in its Italian version, is permeated by radical anticapitalist approach. For a rebuttal of these ideas s. E. Vitale, Contro i beni comuni. Una critica illuminista, Laterza, Bari-Roma, 2013.

12 The free market (or “free commerce”) ideology, proclaimed by most of Western political regimes in the XIXth and XXth, was always tempered by many measures in favour of national firms (G. Amato once proposed the term “liberal protectionism” in order to define this type of economic system).

In order to construct my argument, I gave a definition of "social cohesion" as well as discussing its value, and it is now necessary to carry out daring raids in the field of political philosophy, but also to move to an area in which the evolution of the history of ideas does not seem to offer any fixed point. With this caveat, however, I attempt to follow a path that ends with a defence of the liberal conception of social cohesion, based on respect for the public/private dichotomy.

At the base of the evaluative reasoning is an assumption that does not require any special proof because it belongs to the foundations of Western culture: political order is preferable to anarchy and is necessary for the very existence of human civilization. Once you accept this first step, the second step is the basic choice between two fundamental myths in the world that are still present in Western civilization.

On the one hand there is the myth of a golden age that has been lost but can somehow be reconstructed. This myth leads to the mental construction of ideal societies living in perfect balance that brings with it, to put it very briefly, a political ideology that is totalitarian or, at least, fundamentalist. There is usually also the recognition of charismatic leaders and the (necessary) demonization of an enemy (the destroyer of the free and perfect order that could be built in the world and that only the dark forces of evil prevent from being created). Despite significant structural differences (on the one hand the lack of charismatic leaders, and on the other hand the illusion of a possible “spontaneous” equilibrium of individual lives), economic extreme liberalism (anarcho-capitalism) can be seen as part of this series of fundamentalist and absolutist political ideologies.

On the other hand, there is constructive relativism, which sees in the social and political sphere an artificial construction, imperfect and always with the possibility of change, of human civilization; this comes from the Greek culture of relativism that is the thread that binds the mainstream political ideas of Western civilization. In this perspective, the construction of the political order is seen as a fundamental task of civilized man, but the established political order will always be imperfect and perfectible. Once one accepts this basic assumption, an evolutionary path that can lead in different directions is required: on this path are some of the great achievements – sovereignty, the rule of law, the separation of powers, the recognition of the fundamental rights of the person, controls on the lawfulness of the exercise of power, etc.

Into this framework, the perennial dialogue on the construction of constitutional rules to improve the political organization (such as the debate on the

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13 The above assumption is perhaps too self-confident (see, A. Mingardi, Tesi anarchiche di buon senso, in Il Sole 24 Ore, 4 Aug. 2013, where is favourably reviewed a book of the American philosopher Michael Huemer, who exalts a model of anarcho-capitalist society).

14 I take the liberty to quote, for some developments on this topic, M. Libertini, Attualità dello stato sociale di diritto, in Stato di diritto e trasformazione della politica, edited by B. Montanari, Giappichelli, Torino, 1992, 205 ff. (obviously there reasoning should be updated for a globalized world).
different models of electoral rules, etc.) must be inserted.
At this point it is appropriate to make a jump, and treat as accepted the values and principles that are at the basis of the constitutional documents on which rest our laws (the Constitution of the Italian Republic, the European Treaties and the other international standards to which Italy adheres), while leaving aside those problems, always open to constitutional debate, which would lead us away from the central point of the argument. This point is that the acceptance of a political order as complex as that which characterizes contemporary societies, with the outline of the choices of civic education, requires that civil society is in a basic condition of receptivity and is willing to recognize a spirit of citizenship and solidarity, or even something greater, as a value to be respected.

This raises radical questions: if the type of liberal political order that Western civilization has built, with its points of principle and its continuous prospects for reform, can still find acceptance and compliance in a society accustomed to live in a globalized world (basically) "opulent"? This type of society is still willing to recognize, on the one hand, the pre-eminent value of rule of law, and on the other hand those horizons enlarged solidarity that we can read in the official constitutional texts? Or rather you have to think that ideas become dominant in a globalized world condemn the existing constitutional texts that envisage advanced forms of solidarity and universalism to become (or remain) a dead letter?

7. **The idea of irreversible social disintegration in the globalized world. Critics**

There are numerous complaints concerning individualism and social disintegration in contemporary society: from the "lonely crowd" of the sociologist D. Riesman (from the middle of the twentieth century)\(^\text{15}\) to the "death of the neighbour" of the psychologist L. Zoja\(^\text{16}\). There are also numerous descriptions of the phenomena of "social disintegration" that characterize our time: youth gangs, fanatical religious sects, football hooligans, and urban violence in general. Even apart from these severe phenomena, it is common (and also basically convincing) to describe the post-1968 period (i.e. the time after the anarchist wave that shook the Western countries in the decade that began in 1968) as a general "wishful individualism", that has nurtured illusions that lie at the root of every act to undermine an enlarged social cohesion\(^\text{17}\).

It also appears weaker that for a long time had been seen as a counterforce to the apparently fundamental contemporary social disintegration, acting in the trade unions and, more generally, in the "intermediate societies"\(^\text{18}\). For Marxists, then, trade unions were the embryo of the future communist society (and in some ways this was, at the beginning, true). However traditional unions and associations – apart from the fact that they

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do not always and do not necessarily express ideas of solidarity, but often encourage separation (as well as the phenomena of authoritarianism within the various private sector organizations) – are in crisis, even in the United States. This happens also for political parties and mass membership trade unions.

It is important to consider, however, that today’s interpersonal communication has become network communication. Many believe that this will lead to an increasing isolation of individuals. In fact, I believe that this amplifies an even more general phenomenon, which was already present before, that is working in the opposite direction. On the one hand, there are phenomena of group communication that tend to be closed (although, we must add, they are almost always peaceful). These phenomena lead to the recovery of actual forms of neighbourhood cohesion, even though they are based on electronics, with a potential separation from the rest of the world. On the other hand, however, there are phenomena of universal solidarity, among which are the spontaneous formation of databases that socialize knowledge (Wikipedia, etc.) without satisfying the selfish interests of contributors. The latter phenomenon shows the same relativistic worldview and constructiveness (but also confidence in the overall advancement as the result of a myriad of individual efforts) which has made Western civilization great.

In addition, there is no denying that sensitivity is increasing the advance of solidarity in the contemporary world: the suffering of humans and animals – once accepted as an inevitable component of reality – is becoming more and more intolerable, and this is a widespread feeling that is reflected in the existing laws. Environmental awareness is growing, as are voluntary activity and the "third sector". So again, the assertion now seems unstoppable – even if not always sincere – of "corporate social responsibility"19 (which is in contrast to the extreme free-market ideology and to the dominion of finance).

In essence, I do not think that at the present time social cohesion is hopelessly undermined by the evolution of ideas and customs: some constraints weaken it, and others strengthen it, but the willingness to have an enlarged horizon of solidarity is, in my view, stronger and not weaker than in the past20 (even if it is offered by the globalized society that allows strength

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More recently, the CSR had further institutional developments, both at the national (see the *Piano d’azione nazionale sulla responsabilità sociale d’impresa 2012/2014*, jointly approved by the Ministry of Welfare and the Ministry of Economic Development and at the European level (see the European Parliament resolution of 6 February 2013 on *Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery*, Jan. 28, 2013).

The scholar discussion about CSR continues to be intense, although – in my opinion – less constructive. Limiting to Italian books and articles, there are, during 2013, some forgettable monographs which attempt to describe the relevance of CSR in the positive law; in the general political debate can be critically quoted S. Zamagni, *Impresa responsabile e mercato civile*, Il Mulino, Bologna, 2013, who theorises a general progress of Corporate “Civil” (not simply “Social”) Responsibility. It seems me an example of mere wishful thinking.

20 According to a line of thinking (R. Inglehart and aa.), postmodern values, emphasizing self-realization and individual quality of life, enhance also relational profiles, as essential part of individual satisfaction. It could be compatible – in my opinion – with an advanced civil ethics, but only if the sociocultural context offers incentives to the achievement of this potentiality.
and efficiency to be given even to regressive phenomena, as we mentioned above).
This spontaneous orientation of common sense, however, is likely to be offset by the weakening of what has been the foundation of modern political order, that is, respect for the "public" (with its symbols, its rules, and its institutional roles) and its distinction/supremacy with respect to the "private". If this distinction/supremacy is not (or, rather, is not reconstituted as) a fixed point, movements and social formations appear as mere factual situations regardless of the values they profess (so an association for the defence of animal rights or of volunteers to assist prisoners will count less than an association of football hooligans who act as the mafia for a football club).

A recovery of the centrality of the public institutional view would bring social phenomena back to their right (and differentiated) sizes, would provide a framework of certainty to guide people's behaviour, and would strengthen the feeling of belonging to a common civic dimension (which today tends to be universalistic).

In other words, in my opinion the critical point today is not a general trend towards negative ideas and customs, as such, but the growing weakness of the political order. There is now a gradual deterioration in the selection of political elites and the efficiency of public organizations\(^\text{21}\). The evolution of ideas and customs did not lead – as is often thought – to a general crisis of values of solidarity, but to an imbalance between the public sphere and the private sphere, with a system of incentives that oriented the best individual talents to the private sector, impoverishing the public sector, and with the spread of anti-state and anti-bureaucratic sentiments, which in turn reduces the incentive for those who act within public institutions to work well.

I think, as if seeing in a mirror the famous Weberian hypothesis on the decline of the Chinese empire, who experienced a massive weight of incentives that sent all the best talent to the imperial bureaucracy (the "mandarins"), and gave insufficient incentives for the formation of modern industrial entrepreneurship, that contemporary Western democracies are experiencing the opposite phenomenon.

Compounding the situation is the fact that many of those who experience this crisis think naively when proposing to overcome it with an internal reincarnation of the "world of politics" and with unhistorical or impossible resurrections of old mass parties. The crux of the democratic crisis should be dealt with using proper democratic criteria of "elitism" (Schumpeter etc.)\(^\text{22}\). The general dissatisfaction with the current ruling elite is overcome not by asking for "more democracy", but by pointing to a different system of rules and incentives for the selection of the ruling elite.

I believe that the central problem of our time is that of re-building a strong and independent public organization, both in its political component and in its administrative component. This requires a reconstruction (and sometimes a restoration) of a system of incentives for virtuous individuals, as well as a

\(^{21}\) On this immense topic s., for example, the recent pamphlet of S. Romano, *Morire di democrazia. Tra derive autoritarie e populismo*, Longanesi, Milano, 2013.

\(^{22}\) In this sense is the conclusion of the book of Amato and Graziosi, quoted supra cit. (Fn. 17).
culture and civic education designed to recognize and enhance the role of public functions and institutions as essential parts of social life.

This statement is likely to remain at the level of wishful thinking, because at the moment one cannot see the cultural movements (and interest groups) being oriented in this direction. The statement is therefore currently a distant goal (at least in appearance), but it remains a rational expectation on which it would be desirable to hold a broader dialogue.

8. THE POSSIBILITY OF THE RECONSTRUCTION OF A LIBERAL PUBLIC ETHICS IN A GLOBALIZED WORLD

In conclusion, I would say that "social cohesion", as well as being legally protected, should be understood as a socio-cultural condition that has, as its pivot, respect for the public sphere and the value of the law and its contents, and the recognition of the duties of enlarged universal solidarity, even in its altruistic dimension, put at the top of the list referred to in § 4.


I propose now to attempt to carry out the same analytical exercise with regard to the term "competition", or rather the economic ideologies and the recognition of the current state of competition (between firms), as a value, and otherwise as a legally protected concept as well.

In this regard one should move away from the conviction that there has been in history, and continues to exist, profound differences in the understanding of the notion of "competition". On this point I have tried for some time to stimulate a debate\(^\text{23}\), but unfortunately this does not seem yet to have developed in all its importance.

The more traditional concept (which I would call the "competition of the ancients"), identifies competition with the freedom of trade, i.e., with the individual freedom to buy and sell, and identifies the social utility of the system of competition (which ideally coincides with the "freedom of competition") by the contribution that this system makes to the formation of a "just price," and then, to a proper balance in the market. (the neoclassical theory of perfect competition and the whole "traditional"\(^\text{24}\) economic analysis of law are theoretical descendants of this ancient conception, even if the ancient notion of the "justice" of price is translated as the more modern "allocative efficiency").

This ideal of balance became problematic when, at some point in the economic history of Europe, the dominant policy objective became

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\(^{24}\) I use the term "traditional" in order to distinguish between the analytical approach grounded on the hypothesis of rational choice of informed people and the "post-Chicago" approach, which moves from the postulate of the limited rationality and uses, as main analytical tool, the repeated game theory. On this topic s. the fine analysis by A. Cucinotta, Mercato Regole Conoscenza. L’analisi giuridico-economica tra neoistituzionalismo e market process, Giuffrè, Milano, 2009 (still using an internal approach to EAL).
“economic development” instead of a defence of the "natural order of things" (which also included the competitive "just price" and market equilibrium, even ahead of social stability). From the age of mercantilism on, economic development has become a political-economic objective and competition has increasingly been conceived in a way different than in the past: There was no longer the free play of exchanges between individuals, but rather, hard competition among firms in which the winner is also the most efficient and the most innovative. The competition for efficiency and innovation is, by definition, a process in which those who cannot "keep up" succumb.

In this way, that game of "creative destruction" that has characterised capitalism and its historical success was born. K. Marx, who first described the real functioning of the capitalist economy in a very impressive way, carved a picture of it using some lapidary phrases (which deserve to be mentioned more often): "The business logic is the logic of necessity"; "For the entrepreneur every day is the day of judgment."

Marx was right, at least in this. In the long term, there is no tendency toward equilibrium in a capitalist economy. In addition, the competition between enterprises is not a spontaneous composition of the interests of free men who exchange goods and services, but a merciless competition between productive organisations designed to profit, in which the losers cannot hope for consolation prizes, but are simply destroyed, that is, they fail and disappear from the market (Proudhon, thinking as a good socialist utopian, described economic competition as a war in which you do not take prisoners).

This is the competition of modern times, i.e., the dynamic and effective competition among undertakings, which is legally well-protected in Europe and Italy (in fact, we can say, practically all over the world).

10. **THE LEGITIMACY OF DYNAMIC COMPETITION: THE SUPPORT OF DEVELOPMENT AND WELL-BEING, IN A FRAMEWORK OF CONSUMER SOVEREIGNTY. COMPETITION BETWEEN UNDERTAKINGS IS A TOOL AND NOT AN END IN ITSELF**

Reflecting on the economic system that we have built and recognise as better than all of the others tested throughout history, we must ask ourselves why we consider fair and worthy of protection such hard, and, at first glance, even unfair, results, such as the expulsion of certain businesses from the market, the end of certain products (even at the expense of nostalgia for some consumers), the occasional ruination of entire territories (which is these days the shock resulting of the depopulation of Detroit, which was one of the capitals in world industry) and that, in any case, also involves irreversible environmental alteration?

The answer is intuitive in the sense that these results are politically and ethically justified only by the fact that they are not caused by the will of a single despot, nor by that of a collective political decision-maker, but rather, by that of a "jury" of anonymous consumers (who are not aware, at the time of their choice, of the overall result that their choice will further), so it is a result that is intuitively perceived as "democratic", and as such, justified.
In other words, the legitimacy of the protection of competition is still utilitarian, in the broad sense: the sacrifice of certain interests (manufacturers, but also workers and consumers) is justified by the increase in public welfare. The latter assumes, in turn, a positive value in terms of collective ethics, as "well-being" is the sum of people's met needs, and therefore, greater prosperity means greater numbers of people who see their needs being met.

At this point, I think we can all agree with the assumption that competition is not an end in itself, but rather, a tool that must be governed so that it will produce the maximum well-being for the people and does not result in its opposite. It must be governed as free competition, because there is not a “natural” free competition between undertakings: the regulation by only Private Law can develop (and normally develops) the formation of cartels and monopolies. Furthermore, it must be governed because competition between undertakings, and the market supply of goods and services, can offer the solution to all the problems of humanity.

There was a long period in the history of European law (roughly from 1850–1950) in which this peculiarity of the "competition of the modern" was clearly felt in the prevailing culture (in the social sciences and in law): This led to the affirmation of the idea that the central objective of economic policy should be not so much free competition between undertakings, but the overall progress of the national economy and the public regulation of economic process (in terms of economic growth, but also in the redistribution of wealth and social justice). According to this perspective, the "excesses of competition" appeared to be a factor in social disintegration and the loss of economic welfare.

Various currents of European thought in the nineteenth and twentieth centuries are placed within this orientation: from economic institutionalist schools, unsuccessful in the face of the triumph of neoclassical economics, to Catholic thought (from the corporatism theorised by G. Toniolo a century ago to recent papal encyclicals; even in the spring of 2012, Benedict XVI, during his visit to Milan, stigmatised the "extreme competition" that characterises the current economy).

This orientation of thought was, in turn, strongly influenced by the expansion of the challenge of Marxist socialist ideology, which saw competition among firms as "capitalist disorder" (or "capitalist anarchy") and saw, in the workers’ associationism, the germ of a new society and a new state (the transition towards the ultimate goal, which remained, indeed, anarchist).

In this context, competition among firms appeared until the eighties of the last century – at least in Italy – to be, as a matter of fact, a residual, not worthy of special protection by the legal system, whose goal continued to be the active public management of the economic

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25 This sentence is referring to the “effective competition” among undertakings, that is the legal good, protected by the EC law. On the other hand, the “freedom of competition”, as freedom of personal economic initiative, is also a legally protected good, but is different from the “effective competition”. 
process, which was to be directed towards the result of collective well-being and social justice.

11. THE RADICAL CRITIQUES OF COMPETITION AS A VALUE: ECONOMIC COMPETITION AS A FACTOR OF SOCIAL DISINTEGRATION

More generally, in terms of the history of ideas, there is also a long line of nineteenth-century and early twentieth century thought that emphasises the "immorality" of economic competition and its effects of social disintegration. On this line is grafted a small line of thought, that today especially survives in current ecological (or better: anarcho-environmentalist) ideas, and that theoretically connects the arm's length principle (and the competition as such) to a death instinct, which would permeate our contemporary civilisation.

However, these are a very small minority in economic thought. The mainstream is completely different; the principle of the protection of competition is now advocated practically all over the world. The decisive factor was the emulation of the American experience. However, even more important, all things considered, was the idea that competition between firms leads to development, and that economic development results in greater prosperity for the people; that greater well-being involves, in principle, additional freedom for people (an idea that it would be foolish to denounce, however, groundless).

With this, it is often forgotten that the first statement of the principle of freedom of competition was linked to the discovery that private vices could become public virtues, and so it was structurally linked to the idea of the protection of "private vices" and trust in the "invisible hand". Subsequently, as is well known, A. Smith theorised that self-interest would be tempered by a natural inclination toward empathy among men. However, it would never be forgotten that our economic system is, at least, grounded in an "aporia".

Furthermore, there is a different ambiguity that covers the same conceptual approach to the problem of the protection of "competition". This has become a fundamental principle, but few people study how "competition," as a legal interest, is to be built and many keep their eyes fixed on the past (and perhaps still simplistically identify capitalist competition and freedom of contract).

26 This line of thinking is well described by J. Wolff, The Ethics of Competition, in The Legal and Moral Aspects of International Trade - Freedom and Trade: Vol. 3, eds. G. Parry, A. Qureshi and H. Steiner, Routledge, New York, 1998, 82 ss., who concludes that, in a persuasive theory of justice, the competition should have less value than the solidarity.


28 I like to recall a book which had influence, a half century ago, in order to promote this idea in a cultural environment permeated by anti-capitalistic mentality, as the Italian one: F. Alberoni, Consumi e società, Il Mulino, Bologna, 1964.
12. **The Unsolved Problem of the Control of Capitalist Development**

In this sense, historical reflection can be enlightening. The United States antitrust law was conceived as a criminal anti-monopoly discipline designed to defend small businesses against the tyranny of bigger ones. In its long history, antitrust has had many evolutions, but during the last few decades, the economic-analytical approach, which claims to base its solutions on a scientific analysis of economic facts, seems to have prevailed, although different approaches remain in existence. Further, and most importantly, it essentially repeats the myth of the "invisible hand": the belief in a spontaneous salvific order that leads to the maximisation of welfare.

In fact, the neoclassical economic analysis is based on an unrealistic hypothesis (an "ontological individualism": the idea of a world that is made up only of individuals who rationally calculate what is in their own welfare by deciding whether or not to fulfill certain acts of exchange). A more sophisticated economic analysis, based on game theory, presents complications that make its direct use inadvisable on a legal level. The dominant economic approach to competition policy is, in fact, at an impasse. The jurists have not been up to the challenge of economists (or have accepted the primacy of EAL, with a view to strengthening the professional and academic specialism in the field).

Today, a rational approach to policies for the protection of competition must move from the recognition that competition should be protected as a tool, and not as a value in itself, and should be protected just as a dynamic process of creative destruction. However, for this, the protection of competition must incorporate corrective limitations. The problem is to "govern capitalist development", but the identification of a model of balance within this system is an unsolved problem. Several times, a happy metaphor has been used in this regard: "Grab Proteus."

Over the past thirty years, Proteus has soared, and for some time, he was also the object of uncritical adoration. In recent years, the worship has generally ceased, but it continues to lack the tools and ideas that are needed to drive economic processes. The financial events of recent years, and those of today, confirm this thesis.

To reflect on the importance of the latter assumption, it is necessary to reflect on the aporia of the fundamental economic ideologies of the contemporary age. These ideologies place the goal of economic development (in purely quantitative terms: "growth") at the centre of their vision of the world. Economic growth is seen as the only possible means of improving living conditions for all (although it is recognised that this will always occur unevenly). And so it has been, historically. The protection of competition fits into this perspective, as a tool that is key to the support of permanent economic development.

The problem is that the goal of permanent and unlimited economic growth is contradictory and untenable: the economy, in all of its greatness, cannot expand indefinitely in the finite system that is the planet Earth. In 2012,

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29 In my knowledge, this metaphor was used, for the first time, by some economists (A. Boitani, C. De Vincenti, G. Rodano and aa.), as title for a special issue of the Rivista trimestrale, No. 62-63, Jan - June 1980.
we celebrated the fortieth anniversary of the famous (at the time: today, it is almost forgotten) study at MIT that is entitled the "Limits to Growth". All of the forecasts in that study have turned out to be – analytically – wrong. What remains indisputable, however, is the premise of the analysis: the impossibility of eternal and unlimited growth in the economy as we know it today. This means that it will, at some point, reach a breaking point; growth in the population, energy transformations and toxic waste cannot increase indefinitely. At present, these risks are substantially bequeathed to future generations.

Moreover, the prophets of "decline" (Latouche et al.) are utopian in the worst sense of this word: Not only do they not have the slightest idea of which organised interests should be in support of this radical transformation of the economy and of the firm, but they also have no idea how society in a stationary economy, which is boldly advocated, should work.

The principle (that is already the law in force, Art. 3 TEU, and not purely utopian) of sustainable development offers only a partial solution: It can be immediately translated into technical requirements and is operational only when it refers to the use of renewable resources (in this sense, the principle is only a modernised translation of the traditional principle of the "rational use of resources" that is also present in art. 44 of the Constitution, a principle that has traditionally inspired the legislation regarding forestry, hunting, water, etc.). The same principle cannot, however, be immediately translated into technical and legal requirements when it is related to the use of non-renewable resources (i.e., oil, uranium, territorial spaces). In this perspective, the principle can (tend to) be implemented through discretionary policy choices relevant to the use of limited resources and the search for alternative resources. In fact, the principle is reflected in the need for public programming regarding the use of these resources and public choices of industrial policy (what the free market ideology, dominant in recent decades, has decided to ostracize.

The problem of "grabbing Proteus" is, therefore, theoretically unsolved.

In thinking about this problem, Rosa Luxemburg comes to mind ("socialism or barbarism"). However, this slogan is impractical in a time after the inglorious collapse – political and cultural – of "real socialism" and of Marxist thought, which had supported it. Equally untenable is the revival, which sometimes appears in the debate, of "state capitalism" as a solution to the problem. It is a capitalist system characterised by strong public interventionism for the protection of existing undertakings and the stabilisation of existing economic arrangements (and perhaps no longer having antitrust protections or having very little protection of competition). This idea also meanders, in the form of anti-Europeanism, from the right or the left.

It is, in my opinion, a currently unworkable idea in an already globalised world. Furthermore, it is contrary to a vast horizon of solidarity; the return of state capitalism could only accentuate the inequalities between different national communities that are in competition with each other.
13. THE BEST ANSWER IS NOW PRESENT IN THE CONSTITUTIONAL PRINCIPLES OF EUROPEAN LAW: SUBSIDIARITY (INCLUDING HORIZONTAL SUBSIDIARITY) AND THE SOCIAL MARKET ECONOMY

Personally, I am convinced that the only real alternative to free market thought is already present in the "constitutional" principles that have been carried into European law and are still only partially implemented. On the one hand, there is the principle of subsidiarity, with the charge that it is universal and that its outlet must logically also involve the construction of a global political order. On the other hand, with regard to concerns about the relationship between the competitive market and political power, there is the legacy of ordoliberal thought and the doctrine of the social market economy (SME).

The idea that is at the basis of SME doctrine is that the market economy, which is characterised by competition among firms that are selected by the free choice of consumers, is the best system that mankind has ever experienced because of the resulting economic well-being and freedom of individuals. However, the competitive market economy, presents – according to the SME doctrine – two structural and functional limits:

(i) The first limitation is the fact that competition among undertakings is a mechanism that tends to be self-destructive in the sense that the mechanisms of the market, if left to free negotiations, tend to strengthen the positions that have been acquired, which leads to the creation of cartels and monopolies. The moment when the competition stiffens and strengthens market power with its social alliances is also the moment when the “wonderful” machine of the market loses its essential function of progress and also its democratic legitimacy. Hence, there is the need for a public authority, which has to be able to put into place an effective antitrust policy that is aimed at ensuring the proper functioning of the market in time and places controls on private economic power;

(ii) The second limitation is the fact that, the market, albeit the main tool to ensure that people are able to acquire the goods and services that they actually need, is not able to ensure that people can acquire all the goods needed for a high quality of life. Some of these goods (which can be included in a list that can range from clean air to personal and social security, or perhaps even to health care and basic education, but can never be exhaustively defined) will still be ensured by the public power in the form of goods or public services because the market is not able to produce them in the form of goods that are sold individually and are characterised by a fair price.

Hence, the other fundamental idea of the SME concerns the role of the state (or, rather, the current public institutional power in a globalised world). The SME doctrine postulates the existence of a strong and efficient public power that is not influenced by organised private interests, but is independent and neutral with respect to them. In other words, the SME posits a strong role by the state, but also a role that is completely different from that of the dirigist states: the State's duty is not to protect

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30 For some further information and bibliography I refer to my writings, see at Fn. 2 and 19.
and guide this or that private undertaking (it should rather completely abstain from doing so), but to enable the markets to work well and to ensure a high level of the provision of public goods and services according to a criterion of horizontal subsidiarity.

14. A RETURN TO THE ARGUMENT OF THE NEED TO REBUILD STRONG AND INDEPENDENT PUBLIC POWER

Now, we return to the central theme, which I tried to address in the middle of the previous reflection on solidarity and social cohesion. The central obligation of our time is – in my opinion – to react to the mythology that there is a spontaneous order and to rebuild a political order that is able to maintain and support, as far as is possible, a competitive market economy, but also to govern economic processes when they encounter moments or points of crisis.

The above reasoning leads again, however, to the central point of a need for a strong political order that is able to make structural decisions when they are necessary. This is quite the opposite of the thesis that there is "competition between jurisdictions", which had an ephemeral prominence a decade ago and reduced the function of public power in the economic sphere to that of an auxiliary tool with respect to the free unfolding of the functioning of financial markets.

It is therefore necessary to rebuild a democracy that is obviously characterised by the free election of governments, but also by a strengthening of the functions of government (at various levels) with a high degree of independence from interest groups; and parliaments of a small size that possess the primary functions of control, apart from legislative power.

I do not want to continue in a speech that could easily fall into the mists of wishful thinking and would lead us too far from the main theme.

I will add, however, two final remarks: the first is that the principle of competition as a means for the selection of the best persons, groups and organisations should not be confined to the level of competition among firms (which is a type of competition; as we have seen, it also presents the risk profile for the maintenance of high levels of social cohesion). It should also apply with regard to competition on the merits among individuals within public organisations (schools, offices) and with regard to competition between non-profit organisations (e.g., Universities). This is a kind of nonexclusionary competitive selection that can produce the effect of social cohesion if the equality of starting points and effective competition on the merits in general are guaranteed and accompanied by the passing of the feudal customs that today govern most selections of people and organisations.

In my opinion, an efficient competition among universities needs (almost in Italy) a regulatory regime creating a new, rational system of incentives (while the present regime produces perverse selection: s., on these topics, M. Libertini, *Competizione fra università e valore legale del titolo*, in Federalismo.it [internet review], 11 Feb. 2009).

Incidentally, it can be underlined that a regression toward feudal customs has happened, almost in Italy, in the academic environment, with detrimental effects both on the ethics and the efficiency of scientific research.
the second consideration is the final call to the fundamental role that, at the end of the construction and maintenance of high levels of social cohesion, has the value of the legality, and therefore, the respect of the principles and rules laid down by the legitimate authorities in the political organisations in which we live and which recognise citizens.

On this point, I must also say a word of friendly, though radical, dissent against the anti-positive law theories. The current issue of our time is to build a stronger political order that can meet the challenges of the current globalised market economy. The thesis that is now more widespread, according to which the law must also be a "spontaneous" global law, leads right to the primacy of market policy and the inability to counteract the forces of the market, even when they are unjust or inefficient.

If you want to build a better political order, the goal of legal scholarship must be to act as a tool for the construction and defence of an established political order that can be accepted (the famous "internal approach" of Hart) and not as an activity for the discovery of arcane essences or even the discovery and rationalisation of a spontaneous order.

I understand that much of the legal positivism of the past, with its preference for formalistic interpretations of the law and statements about the ideological neutrality of the jurist, is now unacceptable. However, the highest positive law theories (Scarpelli, who sees the positive jurist as a manufacturer of rules in a fair and efficient order that has been given and accepted) must be defended with determination in the face of recurring myths that offer a self-referential jurisprudence (but, in fact, function as a rationalisation of a "spontaneous" equilibrium).
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