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The role of courts in reconciling competition, non-competition and constitutional imperatives: the Italian experience [1]

CONS. ROSA PERNA
Administrative Judge in Rome
Member of EAAJ – European Association of the Administrative Judges

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SUMMARY

Abstract

In the field of competition law various elements in fact and in law may concur in giving cause to conflicts or at least contrasts among different legal rules not always of the same rank.

In this sector, which is considered devoid of moments of discretionary power, the application of legal provisions and/or administrative acts is deemed wanting in any degradation effect on the juridical positions of those subjected to antitrust measures: such individual positions represent rights, often of a constitutional rank, expressing values and protecting interests that occasionally may not coincide, or can even collide, with those underlying the antitrust regulation.

The pharmaceutical sector is the one in which the reasons of law competition have found the biggest difficulties to penetrate into the Constitutional Court's consideration. In fact the Court has stated tat the right to health legitimates the rationing of pharmacies and the limits to the opening hours.

Under art. 41 the Italian Constitution had explicitly recognized the freedom of economic initiative of individuals but, at the same time, has enabled public powers to submit the right of enterprise or its exercise, where inherent, to the pursuit of a public interest. This twofold provision voices an inner ideological tension of the Constituent Assembly which in terms of practical applications can bring to situations of conflict between the right of enterprise of individuals and the exercise of public powers, for an interest inherent to the market but transcending the interest of individuals.

The dialectic comparison among competition and individual rights of economic initiative, on the other hand not neglecting the reasons of consumers, has been faced in a more resolute way and formally reconciled in the sectors of professional tariffs and taxi services, on rejecting the questions of constitutional legitimacy of some provisions laid down in decree law 4 July 2006, n° 223 (the so-called "Decreto Bersani") aimed at promoting more competitive market structures and at the same time the freedom of choice of the consumer: in fact the decree abrogated the provisions of fixed or minimum tariffs for liberal professions.

From another prospective a position of legally protected interest may not be incompatible with the notion of fundamental rights (such as the freedom of economic initiative) when the exercising of power is - as in the antitrust proceedings - bound to use indeterminate juridical concepts.

The interpretation of such general clauses may represent a tool offered to the judge for solving a conflict between two rules of law by moulding the economic concepts implied in the legal text.

The constitutional affirmation of the principle of competition has given a clear and distinct constitutional basis to the antitrust law in Italy. Antitrust provisions of national source are therefore direct expression and application of a constitutional principle; for this reason, their legitimacy can be justified and must be scrutinized according to the constitutional principle, whereas, in case of conflict with other national laws, the same principle should back the former up and steer the interpreter towards a solution respectful of the constitutional values.

Moreover recent economic liberalizations have realised the passing from rationed or closed markets to markets more open to competition; this has required the adoption of pro-competitive measures in order to make the access of new operators not only possible but also profitable.

A new administrative function, the regulation of markets, is then emerged, aimed at promoting conditions of competition on the liberalized market but primarily bent on reaching the specific public goals assigned to it.

If theoretically there should be neither contrast nor overlapping in aims and scope of action between antitrust and regulatory legislation, in practise some unclear situations of conflict may occur.

I. The antitrust law in E.U. and Italian legal systems

1. The European Treaties

As it has been efficaciously remarked, the tutelage of free competition and of the connected public and private interests is impressed in the genetic code of the European Law, considering that the antitrust legislation, since the institution of the European Community, has represented the polar axis and the primary exclusive legislative competence of the Community law system (2).

The basic idea of the antitrust regulation is that the competition of enterprises helps enhance progress and general welfare, aids the consumer as well as the efficiency of the economic system, whereas a lack of control on the market might cause a progressive reduction in economic pluralism.
The protection of the consumer has long been seen as an additional and derived effect of the tutelage of competition and free market.

As a matter of fact with the Treaty of Rome, which as from 1958 created the European Community, the European Union endowed itself with a common and uniform regulation, as successively modified and implemented, for the protection of competition.

In the Treaty of Rome competition was the object of a community policy, like a standard to be reached; in 1992, with the Treaty of Maastricht, instead, it has risen to an informing principle of the Community antitrust law (3). Afterwards, through the Treaty on the European Union (Amsterdam 1996), the objectives and values of the Community have been even more consolidated and, as a result, the market has proved itself to be the preferential instrument for the pursuit of those objects.

2. The Italian legal system : a*) the right of enterprise*

On the other hand, in 1947 the Italian Constitution under art. 41 had explicitly recognized the freedom of economic initiative of individuals (4); by accredited

[2] We willingly borrow these figurative expressions from R. CAPONIGRO, *Interessi e regole di tutela negli ambiti nazionale e comunitario*, in the Seminar "L'Europa del diritto: i giudici e gli ordinamenti", Lecce 27-28 aprile 2012.
[3] In this sense, M. DE BENEDETTO, *Il principio della concorrenza nell'ordinamento italiano*, in Rivista della Scuola Superiore dell'economia e delle finanze, n. 12/2004, p.2, who has made a thorough and diachronic analysis of the principle of competition in the Italian law system.
[4] Art. 41Constitution –" 1 - Private economic enterprise is free.
2 - It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity.

opinion, the first paragraph of the disposition gave constitutional guarantee to the right of enterprise as an individual right, whereas the third paragraph offered constitutional guarantees to public powers in order to submit the right of enterprise or its exercise, where inherent to a public interest (5). In art. 41, therefore, there was not a culture or, at least, an ordering or organizing idea of market but the mere need of protecting the market itself from the possible realization of collective ideologies having a negatory attitude towards it (6). So the concept of competition as such in the Italian Constitution was initially absent.

In the academic doctrine (7) it has been distinctly pointed out that the freedom of economic initiative (i.e., the right of enterprise) does not contain the principle of competition, as the first one has a "vertical" extension insofar as it indicates spheres of action of the individual protected towards the State; the competition, instead, implies an horizontal relationship among entrepreneurs, i.e. the individuals who exercise the freedom of economic initiative.

The relation between art. 41 of the Constitution and the Treaty provisions on competition has also been described as the connection between a subjective and an objective phenomenon, considering that the constitutional rule founds a subjective situation of individual freedom, whereas the European law expresses a model of economic and juridical relationships.

More precisely, the first one guarantees tutelage to the right of enterprise but does not entrust itself with the choice of the system held necessary for the process of liberalization and the model of market to be put at the ground of the economic relationships; the second one, instead, takes the opening of the market and the freedom of competition as the necessary premises for the operation of those relationships (8).

b) the principle of competition

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3 -The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes".

[5] See M. DE BENEDETTO, *Il principio della concorrenza nell'ordinamento italiano,* in Rivista della Scuola Superiore dell'economia e delle finanze, n. 12/2004, p.1, recalling M.S. GIANNINI, *Diritto pubblico dell'economia,* Bologna, Il Mulino, 1992, p. 175.

[6] M. DE BENEDETTO, quot.

[7] Again M. DE BENEDETTO, quot., recalling N. Irti, *Iniziativa privata e concorrenza (verso la nuova Costituzione economica*, in "Giurisprudenza italiana", IV, 1997, col. 226.

[8] The lucid exam is due to F. CINTIOLI, *L'art. 41 della Costituzione tra il paradosso della libertà di concorrenza e il "diritto della crisi", in* Diritto e società, *2009, 373 e ss.*

Meanwhile law n° 287/1990 has eventually introduced provisions into the Italian legal system, corresponding to the Community antitrust ones, aimed at contrasting the alteration of competition inside the domestic market or in a relevant part of it. Oddly enough, art. 1, 1st paragraph, of the law states that the provisions of the law itself are adopted in accomplishment of art. 41 of the Constitution for the protection of the right of economic initiative. Art. 1, 4th paragraph, adds that the interpretation of the provisions of the law shall be made in accordance with the principles of the European Community law in the matter of antitrust regulation.

Considering that art. 41, as recalled by law n° 287/90, did not contain any provisions in the matter of competition, ascertained that the same law remanded to the Community principles for its own interpretation, a large part of the Italian doctrine has envisaged the risk of conflicts between the two legal systems, i.e. the constitutional and the antitrust provisions, and has therefore proposed different theoretical solutions for their reconciliation.

Nevertheless the issue has lost its relevance since constitutional Law n° 3/2001 has reformed Title V of the Constitution and, reshaping the distribution of competences among the State and the Regions, under art. 117, 2nd paragraph, lett. e), has explicitly acknowledged the principle of competition, inscribing the "competition protection" inside the list of matters reserved to the exclusive legislation legislative power of the former.

Moreover, according to art. 117, 1st paragraph, as resulting from the reforming intervention, legislative powers shall be exercised – both by the State and the Regions - in compliance not only with the Italian Constitution, but also with the constraints deriving from European Union legislation and from international obligations.

The constitutional affirmation of the principle of competition has given a clear and distinct constitutional basis to the antitrust law; in addition to this, all constraints of European derivation in the matter must be respected for constitutional precept by national and regional legislator. As a consequence, all antitrust laws and regulations that the national judge is required to apply, both of inner and of European source, have a direct origin or recognition from the fundamental law of the State.

This relevant aspect must be kept in mind when facing the topic of possible conflicts of laws and principles.

As a consequence of the introduction of the Community principle of competition, "the market" has entered the Constitution as a positive value for promotion of economic and organizational efficiency (9).

[9] See G. AMATO, *Il mercato nella Costituzione*, in Quaderni costituzionali, 1992, as rec. in M. DE BENEDETTO, quot.

The Constitutional Court has then intervened on the new distribution of competences (10), extensively qualifying the notion of competition protection so as to encompass the competition relations on the market and not to exclude, at first, the State intervention of promotion; to Regions has been left the possibility of providing more favourable pro-competitive measures.

c) economic liberalizations and regulations of market

Recent national legislation in the matter of economic liberalizations must be taken into account as expression of a general tendency, on the one hand to a strong reduction of public measures restrictive of the access to markets, on the other hand to a softening of the administrative discretion in the adoption of those measure still in force (11).

Liberalization is the passing from a rationed or closed market to a market more open to competition among economic operators.

In the first case there is the mitigation of certain quantitative or numerical parameters imposed in a certain economic sector; to this purpose, we can recall the recent Decree 6 December 2011, n° 201 (the so called "Decreto salva-Italia): art. 34, 3rd paragraph, by means of a general provision abolishes previous prescriptions or restrictions concerning geographical areas or minimum distances among enterprises. The provision has been explicitly adopted in order to guarantee free competition under conditions of equal opportunities, the correct functioning of the market and a uniform access for consumers to goods and services in the national territory.

In the second case a market is open to competition, but this intervention requires that the access of new operators be made not only possible but also profitable by the adoption of pro-competitive measures.

As a consequence, the process of liberalization has determined the emersion of a new administrative function, i.e. the market regulation, committed to neutral subjects (the independent administrative authorities) and aimed at promoting conditions of competition on the liberalized markets.

There is no conflict or overlapping with the scope and aim of action of the antitrust authority, however. These different authorities in fact pursuit certain other specific public interests such as the granting of certain standards in public services, the supervision on tariff rates, the transparency of markets, the sound and prudent

[10] Constitutional Court, dec. n° 14 of 18 December 2003-13 gennaio 2004.
[11] For a coincise but complete analisys of the issue, consult R. GIOVAGNOLI, *Liberalizzazioni, semplificazioni ed effettività della tutela*, in the Seminar for the giving of Premio Sorrentino 2012, Roma, Palazzo Spada, 12 giugno 2012.

operation of the intermediaries, the freedom and secrecy of communications, and so on.

II. The judicial review on the acts of the Antitrust Authorities

1. Introduction

In the Italian legal system where, as in other European countries, the prevailing opinion does not recognize the judicial character to independent Authorities, among which the Antitrust authority is to be accounted, the activities of such institutions are subjected to the jurisdictional control ([12]).

The involvement of judges in the matter of competition law has virtually occurred more in relation with the measures of the Authorities than with the disputes between individuals.

To perform such control the Judge has had to "specialize" very rapidly in the subject, trying not to be conditioned, on one hand, by a sort of diffidence towards a brand new authority and, on the other hand, by a certain deference in controlling acts qualified by a high level of technicality.

In this framework public interest has been placed in the protection of competition itself without claims for directing the activity of private citizens([13]).

2. The European prospective on the judicial review

Of course, the analysis of the judicial review on the acts of an antitrust Authority cannot be reasonably confined within the boundaries of a single legal system.

The analysis must necessarily reckon with the process of harmonization of E.U. law of competition, which - started in the past – has seen the Commission and the Court of Justice, by means of a constant interaction, performing a leading role in the growth of the national antitrust authorities and of the relative jurisdictions within the member States. The national judges, then, have become part of a system comprehending the jurisdictions of all member States, which uses the case law of the European Union as a reference frame.

[12] Consult E. GALANTI, *Discrezionalità delle Autorità amministrative indipendenti e controllo giudiziale,* in Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, giugno 2009.
[13] RAMAJOLI, *Attività amministrativa e disciplina antitrust*, Milano, 1998. 356.

This process of harmonization has fallen into a wider phenomenon of strict interaction among the single national administrative legislations, intended as a permeability of the various systems to stimulations and exchanges with the others ([14]).
In a sort of circular causation, the comparison among different models pertaining to member States contributes in creating the E.U. rule, which in turn affects the interpretation of domestic rules, in a process of reciprocal harmonizing integration.

The E.U. jurisdictional institutions perform a control of legality on the act of the Commission, which is extended to the merit for the fines ([15]).
The Treaty on the Functioning of the European Union does not contain any rules on the kind of judicial review that can be performed by the 1st instance Tribunal and by the Court of Justice on the acts adopted by the Commission in the matter of competition and on the underlying economical evaluations.

E.U. case law has opted for a type of judicial review which, without limiting itself to a formal verification of the procedural rules, comes to a full verification of the fact and of the requirements for the application of the antitrust rules (i.e. rules prohibiting agreements restricting free competition and abuses of a dominant position); whereas, in case of complex economical evaluations, the Judge must restrict himself to reconsidering the evaluation performed by the Commission, verifying the respect of the proceeding rules and of the motivation, the material exactness of facts and the lack of an abuse of power or of a gross error in evaluation, but without substituting its own evaluation ([16]).

The Court of Justice expressly denies the possibility of a substitutive control of the judge on complex technical evaluations carried out by the Commission ([17]).

3. The jurisdictional control in Italy

A uniform E.C. case law leaves to the national law of each member State the choice of the competent judges and the procedural conditions of the jurisdictional appeals aimed at protecting the individuals' rights based on the E.U. precepts, as long

[14] On the issue of judicial review on the antitrust measures we cannot but referring to the ample and rich report by R. CHIEPPA, *Jurisdictional control over the decisions of the antitrust Authorities*, in Antitrust between EC law and National Law, Giuffreè-Bruyant, 2005; inter alia, the Author recalls: G. FALCON, *Giustizia comunitaria e giustizia amministrativa*, in L. VANDELLI, C. BOTTARI, D. DONATI, *Diritto amministrativo comunitario*, Rimini, 1991, p. 271; C. D. CLASSEN, *Die Europäisierung der Verwaltungsgerichtsbarkeit*, J. C. Mohr (Paul Siebeck), Tubingen, 1996, M. P. CHITI, *L'effettività della tutela giurisdizionale tra riforme nazionali e tutela del diritto comunitario*, in Dir. proc. amm. 1998, 499; L. TORCHIA, *Developments in Italian Administrative Law through cross-fertilization*, in J. Beatson – T. TRIDIMAS, *New directions in European public law*, Hart Publishing, Oxford, 1998, p. 137.
[15] Art. 229 of the Treaty and art. 31 of the reg. n° 1/2003.
[16] E.U. case law on the subject is broadly recalled in M. Moretti, *Valutazioni economiche complesse in material antitrust e self restraint dei giudici dell'U.E.*, Dir. Un. Eu., 2009.
[17] Court of Justice, decisions of 15-6-1993, C-225/91, *Matra*, in *Racc.* 1993, I-3203, and 5-5-1998, C-157/96, *National Farmer's Union*, 1998, I-2211.

as these conditions are not less favourable than those concerning analogous internal appeals (principle of equivalence and not discrimination), and that they don't make impossible or excessively difficult the tutelage of the rights conferred by E.U. law (principle of effectiveness) ([18]).

The Italian legislator allocates the review of antitrust Authority's acts to the Administrative Judge, in its capacity of a specialist having exclusive (and therefore excluding) jurisdiction on the matter (art. 133, par. 1, lett. l, Legislative Decree 2 July 2010, n° 104), and concentrates all the litigation at the 1st instance into the functional competence of the Administrative Tribunal of Rome (art. 135, par. 1, lett. b), Legislative Decree 2 July 2010, n° 104); while the actions in contract and for compensation of damages (19) are attributed to the ordinary judge. Two different jurisdictions, administrative and ordinary, are therefore respectively competent for the public and the private enforcement.

In the field of competition juridical and economic knowledge is so intermingled that the judge is required to be legally correct and economically proper at the same time. In fact, considering that the administrative power performed in the matter of antitrust law is basically marked by the so called "technical discretion" ([20]), the judge has to interpret the rules even in fields where he lacks the specific competence.

Needless to say that the lack of technical knowledge on the part of the judge may also occur in other fields, namely in those left to the (regulatory) competence of (other) independent administrative Authorities ([21]); in the case of antitrust law, however, a further difficulty arises owing to the use, at a legislative and at an administrative level, of plenty of the so-called "indeterminate juridical concepts", like those implied in the definitions of "abuse of dominant position", "relevant market" and "restrictions of competition", since E.U. and national antitrust rules give juridical relevance to concepts belonging to economics.
As a consequence, also in European countries the competition law is basically of jurisprudential source.

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[18] Consult R. CHIEPPA, quot.; Among all, Court of Just., 21-1-1999, C-120/97, Upjohn Ltd vs The Licensins Authority established by the Medicines Act, commented by R. CARANTA, *Tutela giurisdizionale effettiva delle situazioni giuridiche soggettive di origine comunitaria and incisività del sindacato del giudice nazionale (Kontrolldichte),* in Riv. It. Dir. Pubbl. com., 1999, p.503.

[19] The requests for damage compensation vis-à-vis the Authority are included in the exclusive jurisdiction of the administrative judge.

20 The technical discretion is connoted by the application of rules of a non-exact science having a certain degree of disputability; it therefore differs from the "technical verification", which is found on the application of an exact science in order to attain a sure outcome, as well as from the "administrative discretion", in which the Public Administration aims at a public purpose attributed to its care by law, by means of an activity of selection, acquisition, comparison and evaluation of public and private interests implied in its action.

21 Consult E. GALANTI, *Discrezionalità delle Autorità amministrative indipendenti e controllo giudiziale,* in Quaderni di Ricerca Giuridica della Consulenza Legale, Banca d'Italia, giugno 2009.

As for the limits of the national judge's review on the acts of the antitrust authority, it has been pointed out that the administrative judge can with a full cognition check the facts considered in the antitrust proceedings as well as the evaluation process through which the Authority has come to apply the very rule of law, undisputed being however that, where the legitimacy of the action and the correct use of the underlying technical rules have been ascertained, the jurisdictional review cannot go beyond so as to substitute the judge's evaluation to the one already effected by the Administration, who remains the sole subject in charge of the exercised antitrust powers ([22]).

In process of time, the national courts have definitely come to affirm the lawfulness of a stronger, more incisive review of the judge on acts of the antitrust authority, oriented to a full and effective tutelage of the individual juridical situations deducted in litigation. This intrinsic review has lately been deemed as comprehensive of a re-examination of the technical evaluations made by the Authority as well as of the economic principles and the indeterminate juridical concepts applied by the Authority (23); and it is to be conducted by the judge by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration ([24]).

In this way the judge can both reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy ([25]).

In particular the previous distinction between "strong" and "weak" judicial review has been abandoned, while underlining the search for a review aimed at a common model of European level: not that the judge has the task to exercise antitrust powers in the first person, but he has the power to verify, without any intrinsic limitation, whether the power attributed to the antitrust Authority has been exercised correctly.

The principle of jurisdictional protection of the individual juridical situations is eventually conjugated with the specialty of controversies.

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[22] *Ex multis*: Cons. Stato, VI, 12 February 2007, n° 550; Cons. St., VI, 10 March 2006, n° 1271; TAR Lazio Roma, I, 24 agosto 2010, n° 31278; TAR Lazio, Roma, I, 29 December 2007, n° 14157; TAR Lazio, Roma, I, 30 March 2007, n° 2798; TAR. Lazio, Roma, I, 13 March 2006, n° 1898.

[23] Cons. Stato, VI, 8 February 2007, n° 515.

[24] Cons. Stato, VI, n. 23 April 2002, n° 2199.

[25] Cons. Stato, VI, 2 March 2004, n° 926.

4. The judicial control and the protection of individual juridical situations

The Italian legislator's choice for the exclusive jurisdiction of the administrative judge upon antitrust measures, has undergone a lot of criticism in the context of the ample debate come about within the academic literature.

In the Italian system, under the conditions of exclusive jurisdiction the administrative judge has jurisdiction not only for the protection of legitimate interests, for which he is ordinarily competent (art. 103 of the Constitution), but also for the tutelage of individual rights.

Legitimate interests, or legally protected interests, can be defined as the advantages granted to an individual who is subject to the administration's public power, and involve the attribution to the owner of the interest of the possibility of influencing the proper exercise of the administrative power.

Generally speaking, the choice for the exclusive jurisdiction aims at realising the concentration and certainty of the juridical means in matters in which it is hard to define a sure and definite boundary between rights and legitimate interests ([26]).

In the field of competition law, however, which is considered devoid of moments of discretionary power, the application of legal provisions and/or administrative acts is deemed wanting in any degradation effect on the juridical positions of those responsible of infractions; as a consequence, such individual positions represent rights, often of a constitutional rank, whose cognition should be attributed to the ordinary judge, the latter being the natural judge of the rights ([27]).

On the other hand, it has been pointed out the abstract compatibility of legitimate interest with formally restricted structures of power, any time the exercising of power depends on an evaluation implying technical discretion; eventually, the legitimate interest would not be incompatible with the notion of fundamental right (such as the freedom of economic initiative) when the exercising of power is bound to indeterminate juridical concepts, as in the antitrust proceedings ([28]).

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[26] Consult I. MARINO, *Autorità garante della concorrenza e del mercato e giustizia amministrativa,* in Dir. Econ., 1992, 578.

[27] R. CHIEPPA., quot; The Author recalls GHIDINI - FALCE, *Giurisdizione antitrust: l'anomalia italiana,* in Merc. Conc. Reg., 1999,317 foll..

[28] R. CHIEPPA, quot, recalling F. MERUSI, *Giustizia amministrativa and autorità amministrative indipendenti,* in Dir. Amm., 2003, 181 foll. On indeterminate juridical concepts consult R. CAPONIGRO, *quot*., recalling S. VENEZIANO, *Il controllo giurisdizionale sui concetti giuridici a contenuto indeterminato e sulla discrezionalità tecnica in Italia,* in www.giustizia-amministrativa.it, 2005. This Author holds that the category of indeterminate juridical concepts relates to a particular legislative technique – prone to the need of the legal system's flexibility - in which the legal provision, in order to identify a fact as productive of juridical effects, does not describe the fact itself in a precise and exhaustive manner but makes a remand to an integrative operation of the interpreter, by using

Besides, as it has been acutely noticed, at times the antitrust Authority exercises real discretionary powers, as in the case of measures of operations for forbidden concentrations, adoptable by the Authority for relevant interests in the national economy (art. 25 of the law n° 287/1990) ([29]).
Furthermore, a position of legitimate interest is to be recognized to the complainant who has an opposite substantial interest vis-à-vis the anticompetitive conduct and contests the unaccomplished enforcement of repressive powers by the Authority.

In the E.U. field, the distinction between rights and legitimate interests is unknown. The national qualification of subjective juridical situations however constitutes a matter to which the E.U. law system is indifferent, being the target of the latter the effectiveness of the jurisdictional protection albeit in the enhancement of the single national models.

The provision of the administrative judge's exclusive jurisdiction does not constitute therefore any "E.U. contradiction" ([30]), considering the similarities between the appeal of annulment provided for by art. 230 of the Treaty (art. 263 TFEU) and the Italian action of annulment which can be experienced against the administrative acts ([31]).

The qualification of individual positions of European derivation in terms of legitimate interest and the assignment of their cognition to a jurisdictional institution different from the ordinary judge, i.e. the administrative judge, is then proper and justifiable whereas, in accordance with the principles of a full and effective jurisdictional protection of those positions, it would not be admissible a contraction of their jurisdictional tutelage (32).

To this purpose it isn't pointless to recall that the Court of Justice, on pronouncing upon general provisions in force in different fields, such as competition and environment, has had the chance of underlining the importance of the

undetermined concepts that will be completed and specified with extra-juridical elements or criteria to be inserted into the legal paradigm. The problem of the extension and scope of the indeterminate concepts is that such juridical concepts are first interpreted and applied by the Administration and only later, upon appeal against the administrative act, possibly known by the administrative judge.

[29] Again,R. CHIEPPA., quot.

[30] In this sense, GHIDINI - FALCE, quot., 326.
[31] In this sense, R. CAPONIGRO, quot.

[32] Ad. Plenaria, Cons. St. 29 luglio 2011, n. 15 admits, as an indefectible inference of the principle of effectiveness of the tutelage, admits the recourse to an atypical action for ascertainment - not provided for by the Italian Code of administrative proceedings – if sustained by an actual and present interest, any time the codified actions do not satisfy properly the need for tutelage, and this in accordance with the constitutional and European precepts recalled by the Code itself under art. 1.

effectiveness of tutelage, this being one of the fundamental objectives of the E.U., as such enabling limitations to the principle of free circulation of goods.

III. Reconciling competition, non-competition and constitutional imperatives

1. The issue at a glance

At this point of the study some reflections are called for.

In the field of competition law, which is considered devoid of moments of discretionary power, the application of legal provisions and/or administrative acts is deemed wanting in any degradation effect on the juridical positions of those subjected to antitrust measures: such individual positions represent rights, often of a constitutional rank, expressing values and protecting interests that occasionally may not coincide, or can even collide, with those underlying the antitrust regulation.

From another prospective, as it has been inferred, a position of legally protected interest may not be incompatible with the notion of fundamental rights (such as the freedom of economic initiative) when the exercising of power is - as in the antitrust proceedings - bound to use indeterminate juridical concepts.

The interpretation of such general clauses may represent a tool offered to the judge for solving a conflict between two rules of law by moulding the economic concepts implied in the legal text.

Under art. 41 the Italian Constitution had explicitly recognized the freedom of economic initiative of individuals but, at the same time, has enabled public powers to submit the right of enterprise or its exercise, where inherent, to the pursuit of a public interest. This twofold provision voices an inner ideological tension of the Constituent Assembly which in terms of practical applications can bring to situations of conflict between the right of enterprise of individuals and the exercise of public powers, for an interest inherent to the market but transcending the interest of individuals.

The constitutional affirmation of the principle of competition by means of Law n° 3/2001 (art. 117, 2nd para, lett. e), has eventually given a clear and distinct constitutional basis to the antitrust law in Italy.

Antitrust provisions of national source are therefore direct expression and application of a constitutional principle; for this reason, their legitimacy can be justified and must be scrutinized according to the constitutional principle; whereas, in case of conflict with other national laws, the same principle should back the former up and steer the interpreter towards a solution respectful of the constitutional values.

Conversely, all constraints deriving from EU legislation and international obligations must be complied with by national and regional legislator, owing to the constitutional precept laid down in art. 117, 1st para.

It follows that antitrust law of European source have risen to a constitutional rank so as to bind the exercise of the legislative power both at a national and at a regional level. And so, as the Constitutional Court has stated (33), in direct actions for constitutional review of national and regional legislation just enacted, the provisions of EU legislation serve as interstitial rules through which the conformity of that legislation with the Constitution must be tested; in other words, EC legislation makes it possible in practice to apply the limits laid down in the first paragraph of Article 117 of the Constitution, with the result that a national or regional provision held to be incompatible with such EU provisions will be declared unconstitutional because it infringes art. 117, par. 1, that is the obligation, on the part of the Italian legislator, to comply with the duties deriving from EU legislation.

All in all, antitrust laws and regulations that the national judge is required to apply have a direct origin or a direct recognition from the fundamental law of the State.

Moreover recent economic liberalizations have realised the passing from rationed or closed markets to markets more open to competition; this has required the adoption of pro-competitive measures in order to make the access of new operators not only possible but also profitable.

A new administrative function, the regulation of markets, is then emerged, aimed at promoting conditions of competition on the liberalized market but primarily bent on reaching the specific public goals assigned to it.

If theoretically there should be neither contrast nor overlapping in aims and scope of action between antitrust and regulatory legislation, in practise some unclear situations of conflict may occur.

2. The Principle of competition as defined by the Constitutional Court

In process of time the Constitutional Court **(** [34]), often required of a scrutiny of constitutional legitimacy of regional laws suspected of invading the scope and competence of the national legislation under art. 117 of the Fundamental Law, has

Formattato: Giustificato

[33] Decision 13 February 2008, in Case C-169/08 of 17 November 2009.

[34] The investigations made in this paragraph follow the organic and complete survey on the Constitutional judgements after the 2001 reform, conducted by A. ARGENTATI, *La giurisprudenza della Corte Costituzionale in materia di "tutela della concorrenza"a dieci anni dalla riforma del Titolo V della Costituzione*, Roma, Studio Centrone S.r.l., ottobre 2011, to which we remand.

been settling the object of the tutelage of competition, stating that the protection of competition has to encompass both a static (or conservative) dimension, prearranged to maintain existing competitive markets however exposed to distortive strategies of enterprises or public subjects; and a dynamic (or promotional) profile, aimed at liberalizing markets and promoting the institution of competitive market structures (dec. 13 January 2004, n° 14).

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According to the Court the protection of competition is only one of the instruments of the State economic politics and the concept of competition can't help reflecting the notion operating at a Community level, which comprehends regulatory interventions, antitrust regulation and measures prearranged to promote an open and competitive market.

Under the latter profile, decision 16 December 2009, n° 339 – recalling a precedent decision (n° 336/2005) - legitimates the State legislation (d.l. n° 112/2008) ([35]) regulating the promotion of strategic infrastructural intervention in **energy and communication sectors,** having recognized the incidence of strategic infrastructures and of an efficient network on the economic development of the nation and on competition. To this aim the realization of programs for the access to the energetic source turned out necessary to develop a free competition on the market. Analogous remarks have been made in decisions 24 July 2009, n° 246 and 23 April 2010, n° 142 in the field of **water management**, where a planning activity of the State conducive to an integrated water management, is admissible as strictly functional to the overcoming of fragmentation in the management of water resources in the framework of the realization of this sector market.
In the referred cases the highlighted importance of values such as integration and planning in strategic fields may have found a counterpart in the individual right of enterprise, whose protection is nevertheless guaranteed by a constitutional precept as well (art. 41 quot.).

The dialectic comparison among competition and individual rights of economic initiative, on the other hand not neglecting the reasons of consumers, has been faced in a more resolute way and formally reconciled in the sectors of **professional tariffs** and **taxi services,** on pronouncing on questions of constitutional legitimacy raised by some Regions for alleged invasion of regional legislative competence by means of some provisions laid down in decree law 4 July 2006, n° 223 (the so-called "Decreto Bersani"); with decisions 21 December 2007, n° 443 and 21 December 2007 n° 452 the Court has declared the questions not grounded.
The provisions were aimed at promoting more competitive market structures and at the same time the freedom of choice of the consumer.
In detail, art. 2 of the decree abrogated the legislative and regulatory provisions of fixed or minimum tariffs for liberal professions; art. 6 allowed the allocation of new

[35] Law decree n. 112/08 had been contested by Regions on the assumption that it could violate regional concurrent legislative competences in the matter of energies and government of the territory.

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taxi licenses and even the combination of more of them in the hands of the same subject.
It must be noticed that the abolition of fixed tariffs, deemed as a sort of agreement among professionals damaging the consumer, and the increase in the number of the operating licenses, in fact pursued the effect of clearing the market of a sort of "protection" and of widening it, for the benefit of competition, while at the same time encouraged the freedom of choice on the part of the consumer.

The matter of **shops' opening and closing time** has also been scrutinized by the Constitutional Court. Decision n° 21 April 2011, n° 150, having recalled that the regulation of shops' opening time forms part of the matter "commerce", of regional competence according to art. 117, 4th para., of the Constitution, has considered that it was nevertheless necessary to evaluate if the regulation itself, in its content, was able to inflict a wound on the tutelage of competition; so much as, having in mind that in sectors left to their competence, Regions are in a position to lay down legislative provisions indirectly producing pro-competitive effects.
In the specific case (Regional Law of Abruzzo, 12 May 2017, n° 17), according to the Court, the scrutinized regional "regulation on Sunday and holiday opening of retailers", not only pursued the same objective envisaged by Legislative decree n.° 114/98 (which had first liberalized the market) – open the market and eliminate barriers and constraints to the free explication of economic activity - but even broadened the scope of the liberalization, increasing the number of days in which "Sunday and holiday opening" was allowed, in this way widening the area of free choice of consumers and enterprises as well. As a consequence, the Region had exercised its competence in the matter of commerce by way of a regulation that not only did not impinge upon the aforesaid State objectives but also produced pro-competitive effects, although in a marginal and indirect way.

Of major relevance in the matter of competition is the scrutiny conducted by the Court on regional legislation imposing **higher charges**, both economic and administrative, than those provided for by the "Code of Electronic Communications" upon private operators (i.e. law n. 259/2003, implementing E.U. directives in the matter of **electronic communications**).

On the issue, a regional tax (Regional Law of Toscana 6 April 2000, n° 54), in contrast with art. 93 of the Code, had imposed on the owners the charges for verifications and controls of installations of mobile phone telephony in the regional territory. With decision n. 272 of 22 July 2010, while declaring the illegitimacy of the contested provisions in relation with art. 117 Cost., the Court has nevertheless stated that art. 93 expresses a fundamental principle in the legal system of communications, since it prohibits the imposition of (other) charges on operators in order to grant a uniform and not discriminatory treatment to all of them, the end of the provision being also the protection of competition in the form of equality of treatment (compl. Decision n° 336/2005).

The field of **medicine distribution** is the sector in which the reasons of competition have found the most difficulties to penetrate into the Court's consideration as far as a major interest has been reserved to the right to health.

In decision n° 27 of 4 February 2003 the Court, called upon the legitimacy of restraints to opening periods of pharmacies established by a regional law (Regional Law of Lombardia 3 April 2000, n. 21) has stated that the legislative choice aims at pursuing public health to which the limits to competition among pharmacies are of instrumental nature; considering that the restraints to opening periods have the same reason as the numerical rationing of pharmacies (the plant), and having ascertained that the numerical rationing aim at a better performance of the public service, the Court concludes that restraints to opening periods can be seen as a complexion to the same rationing, as they share the same end (ensure the territorial and time continuity of the service to citizens and a certain body of users to retailers).

As it has been remarked ([36]), the Supreme Judge has not made an evaluation of adequacy and proportionality of the measure but has expressed a judgement of the inner consistency of the legal set of rules in force, not without adding that a remoulding of the legislative wording – which the changed conditions of fact and law would admit - fall out of the scope of the Court.

With decision n° 275 of 24 July 2003 the Court has been called upon the different application of the incompatibility provided for by Law 8 November 1991 n. 362 between wholesale and retail activity for private pharmacies (at that time subject to the principle) and public ones (not subject to it).

The Constitutional Judge does not enter into the ratio of the incompatibility and the proportionality with the aims declared by the legislator.

Ascertained that such incompatibility was established for private pharmacies, the Court restraints itself to ask for the elimination of inequality of treatment, by extending the constraint also to municipal pharmacies.

In this way the action of the Court aids at removing an inequality of treatment among citizens and between professionals and workers, out of respect of the intentions of the legislator: if that incompatibility had been established for a merit end, it was then correct that it could concern all pharmacies, without regard to the private o public nature ([37]).

In a more recent judgement (decision n° 76 of 28 march 2008), in direct relation to art. 32 of Constitution which protects the right to health, the constitutional illegitimacy of a State law in the pharmaceutical sector (Royal decree 27 July 1934, n° 1265) has been excluded, where it conditioned the opening of a pharmaceutical seat in derogation to the demographic criterion "to the verification of sole objective

[36] SALERNO N. C., *Le farmacie nel diritto dell'economia*, ne Il diritto dell'economia, 1-2011.

[37] Again, SALERNO N.C., quot.

requirements linked to topographic conditions and practicability" (compl. decision n° 295/2009).
After recalling the considerations already made in the preceding decisions on the matter, the Court has stated that the right to health legitimates the planning in order to guarantee the broadest and most rational coverage of the whole territory in the interest of the citizens' health.

A final overview of the decisions rendered in the pharmaceutical sector has brought ([38]) to point out that the Court hadn't ask itself whether the legal constraints scrutinized were necessary and proportionate and the general interest underlying the public pharmaceutical service would not be better granted by less restrictive measures of regulation, such as the introduction of a minimum, and not a maximum, limit to the pharmaceutical seats admitted to operate in a territory. Competition has been perceived more as a risk than as an opportunity for the general public.

Coming to an end with this survey on constitutional pronouncements of the last decade, we can conclude (among all, see decision n° 235 of 22 July 2011) that the matter "protection of competition" has been enriched of contents, eventually resulting of the following profiles:

a) legislative provisions of protection whose object are behaviours of enterprises negatively influencing the competitive structure of markets (antitrust measures);

b) legislative provisions of promotion, aimed at opening a market or at consolidating its opening through elimination of barriers to access, reduction or elimination of constraints to the free of explication of entrepreneurial capacities and to competition (tutelage of competition in the market);

c) legislative provisions pursuing the objective of structuring competitive procedures to realize the amplest opening of the market to all economic operators (tutelage of competition for the market).

All in all the protection of competition encompasses not only the application of antitrust regulations, provisions on liberalization of markets and competitive procedures for public procurement, but also all initiatives aimed at supporting the competitiveness of the system and the development of the market, considered as an essential infrastructure for the achievement of a real competition ([39]).

3. The national Judge between Constitutional precepts and European constraints

a) National judges and national laws

[38] We continue to take notes from A. ARGENTATI, quot.
[39] Here again we make reference to A. ARGENTATI, quot.

Even in the field of competition, where the EU Treaty and the EU jurisdictional institutions determine most of the substance of the applicable law, national judges apply, first and foremost, national laws.

Although we are talking about a possibly coherent and almost uniform application of the antitrust regulatory framework across Europe, we have to keep in mind that the starting point for a judge typically is the national legal framework ([40]), at least when checking whether the formal requirements of an appeal are met.

In addition, it must be considered that national procedural rules, both for the antitrust authorities and for the Courts, and the organizational set up of the authorities as well as the judicial review system are given by the national legislator.

It is of course commonplace that judges have to consider and respect the requirements of EU law, even in applying national procedural law: that may well mean accepting an appeal of an operator that, according to national law, would not have legal standing to bring an appeal, but nevertheless by European standards has to be considered as an "undertaking" affected by a decision of the national antitrust.

Going to the core of the Italian antitrust regulation, Law n° 287/1990 has introduced provisions into the domestic legal system, corresponding to the Community antitrust ones, aimed at contrasting the alteration of competition inside the domestic market or in a relevant part of it.

According to the wording of art. 1 of the Law, the provisions are adopted in accomplishment of art. 41 of the Constitution for the protection of the right of economic initiative, and the interpretation of the same provisions shall be made in accordance with the principles of the European Community law in the matter of antitrust regulation.

Here a first task for the judge comes into sight, when he is called to conjugate the content of the constitutional precept (which the national antitrust law is explication of), with the substance of E.U. antitrust law (that must be recalled when he comes to the interpretation of the national law), that's to say when he uses his judicial discretion to review the use of technical discretion made in the antitrust acts contested**.**

When dealing with national rules, the judge is subject (only) to law (art. 101 of the Constitution) and he must therefore abide by law.

[40] See H.P. LEHOFER, *National Judges and EU Institutions*, in the Seminar "Implementing he revised regulatory framework in electronic communications. The role of national judiciary", European Commission, Brussels, 28 November 2011

In fact, a legislative provision, even though it is contrary to the principles set out in the Italian Constitution, must be repealed or declared to be unconstitutional by the Constitutional Court.

As a consequence, Italian Courts haven't a "power not to apply" where they have a doubt about a law's compatibility with Constitution; when it occurs, the judge has to deliver a preliminary ruling to the Italian Constitutional Court, in which he asserts that the Italian rule is allegedly inconsistent with one or more provisions or principles laid down in the Italian Constitution.

If the Constitution Court declares that the rule is unconstitutional, the rule is repealed from the legal system with general effects since such a judgement of unconstitutionality does not apply only *inter partes* of the case concerned, but *erga omnes*, being binding for all national courts.

b) Attaining a European dimension

As judges, we touch on the European dimension in different ways.

First of all, there is the straightforward task to apply EU regulations and, generally speaking, national laws implementing EU directives, and in the course of this exercise to put questions to the European Court of Justice if issues arise that are not "acte clair" or have not been answered yet by the European Court of Justice (41).
In the preliminary ruling procedure under article 267 of the Treaty on the functioning of the European Union , a preliminary issue is therefore referred to the European Court of Justice (hereinafter also ECJ).

In other cases, when a Court deems that Italian law doesn't comply with Community law (42), and has no doubts about the interpretation of European provisions, the Court itself cannot apply the Italian law inconsistent with European law but must disregard it by virtue of the principle of "the precedence of Community law" ([43]), i.e. "the supremacy of Community Law" ([44]): this is the so called "power not – to – apply" (45), and is available solely for incompliance of Italian law with European law.

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[41] Again H.P. LEHOFER, quot.

[42] For a concise and rich survey of the relations among national, E.U. and ECHR rules, we cannot help remanding the reader to R. DE NICTOLIS, *An overview of administrative justice in Italy*, at the Meeting with the President of the European Court of Human Rights, Council of State, Rome, 2 May 2012.

[43] ECJ, 15 July 1964 C-6/64.

[44] ECJ, 9 March 1978, C-106/77.

[45] ECJ 9 March 1978 C-106/77: "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. (…)a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".

As a result, the Courts have a power "not to apply" the inconsistent national rule, because the E.C. rule has a direct effect and prevails over conflicting national law and must be applied in place of the latter; but in this case, the judgement has effect only for the specific litigation, and not *erga omnes*; as a consequence, the inconsistent national rule is disregarded in the specific case but is not repealed, and remains valid and effective.

c) Antitrust regulation and regulatory provisions

As we have already mentioned (sub par. III, 1), although not contrasting in aims and scope of action, in practise some situations of conflict between antitrust and regulatory legislations might arise.

This is so true that recent law provisions (art. 35, 1st para., of Decree law 6 December 2011, n° 201) have attributed to the antitrust Authority a special capacity in judiciary proceedings to lodge an appeal against general, regulatory or particular administrative acts of other public administrations violating rules aimed at the protection of competition and market.

c.1) ***Concurrent rules*****.** To the same purpose, we point out some recent pronouncements of Council of State in Plenary Assembly (decisions n° 11-13 and 15-15 of 11 May 2012) stating the prevalence, in the field of electronic communications, of the special provisions for the consumer protection laid down in the sector legislation on the general provisions laid down in the Code of Consumer.

The Court notes that in the field in comment the legislation provides also for rules aiming at the consumer protection; those provisions are special for the sector, complete in their content and establish the competence of the Authority for the Guarantees in the communications to sanction possible violations; for these reasons, the Court concludes that the system of electronic communication has no lack of protection for the consumer so as to make it necessary for the antitrust Authority to intervene in a supplementary way.

Besides, the Community Directive n° 2005/29/CE (transposed into the Code of the Consumer) establishes that special provisions laid down in other regulations for the consumer protection must prevail on its own provisions; as a consequence, according to the Council of State such principle of specialty would be applicable not only in case of effective conflict between the two systems but also where the special provisions adds further elements to the general one.

It follows that the *ex ante* regulation laid down by the sectoral Authority does not allow *ex post* interventions by the antitrust Authority, because the sanctioning

activity requires the presence of a sole authority without distinction, and the prevalence of the Authority for the guarantees in the communications (hereinafter: Agcom) would grant the good functioning of the Administration.

We can conclude that, in this case, the antinomy and the possibility of contrast between regulations have been overcome on the basis of the "principle of specialty" of the *courpus juris* pertaining to the sectoral regulation and of the concurrent "principle of good functioning of the Administration" which, in its turn, is a constitutional principle, expressed by art. 97 of the Fundamental Law.

And by saying this, we have also mentioned the topic of the consumer protection, which has long been considered as an additional and derived effect of the tutelage of competition and free market and, in process of time, has finally become the object of an autonomous attention by the legislator and, consequently, by the Judge.

c.2) *Conflicting rules*. On the other hand, the electronic communications offer a brilliant example of a matter subject to a regulatory power and characterized by a high degree of technicality as well.

In this sector the judge may thus be confronted with the necessity of reconciling different and conflicting rules, not only when an antitrust decision is contested, but also in the case of **a** regulatory act being challenged.

While performing this task, moreover, the judge can count on a peculiar "tool", i.e. his discretionary power to mould the economic concepts implied in the legal texts; by so doing, the judge can reassess the technical choice of the Administration and apply the correct interpretation of the relevant indeterminate juridical concepts to the factual controversy (sub par. II.3).

And so, in price control matters, we can recall the case n. 1239/09 H3G versus Agcom (46): the plaintiff contested deliberation n. 667/08/Cons of 26 November 2008, concerning wholesale services of termination of fixed-line and mobile phone voice telephony, owing to the fact that it imposed a scheduled reduction of tariffs for the operator in question as from 1 July 2010 in order to reach a total symmetry among operators in a reasonable time.

[46] For a wide review of the Italian case law in the field of electronic communications, we allow ourselves to remand to R. PERNA, *Interim measures and retroactive effect of remedies*, at the Seminar "Implementing the revised regulatory framework in electronic communications" organized by ERA in Bruxelles, 28 November 2011.

The 1st instance Court rejected the claim on the basis of the recognized full legitimacy of the contested deliberation, arguing that Agcom had made a correct use of the indicator of the costs borne by an efficient operator ([47]).

In similar cases, the main issue for the Court is what a cost-oriented price exactly is; a second question, however, which may be prospected to the judge, is whether the model of cost adopted by the Authority can exercise an anticompetitive effect on the relevant market.

As for the first topic, the BU-LRIC (bottom up long-run incremental costs) model, which has been used by the national regulatory authorities, is the model of a hypothetical, efficient operator's costs and - as stated in the relevant Commission Recommendation – by means of a so-called symmetric price control, it leads to the same price for each operator.

It means that at the beginning of the regulatory cycle the biggest, ex incumbent operators have the lowest termination rates, while the smallest operators who are also the last entrant into the market, have the highest termination rates. These rates should steadily converge until they become symmetric after a certain programmed number of years.

Coming to the second topic, we observe that, in a general economic approach ([48]) the cost-oriented price, in a rough simplification, is the equilibrium price on the competitive market at which the price is equal to the average cost and marginal cost.

Nevertheless not all regulatory-economics argues in favour of the cost-oriented price regulation and moreover exact mathematic methods have even deduced that the cost oriented price regulation does not ensure long term competitiveness, whereas an incentive regulation should be necessary ([49]).

To this purpose it is easy to consider that, in an industry like the telecom sector, where the fixed (constant) costs are high, the marginal costs are heading towards zero, and the competitive market's condition, i.e. the negligible market share, is not met, the unit cost - which is the per-minute cost in the mobile termination rates – shall necessarily depend on calls' volume and traffic. In such a situation each

[47] Tar Lazio, III ter, 11 February 2011, n° 1336; the decision was also confirmed by the judge of appeal (Cons. Stato, 23 May 2011, n° 3106).

[48] For a deeper analysis, consult G. A. KOVACS, *The assessment of the merits, the appropriate expertise and the deference to NRAs* , at the Seminar "Implementing the revised regulatory framework in electronic communications" organized by ERA in Bruxelles, 28 November 2011.

[49] Again G. A. KOVACS, quot.

operator's cost oriented price is different and decreases with the increase of the market share.

As a consequence, when evaluating the consistency of a regulatory act establishing symmetric tariffs with the principles of the competition law, a judge could come to hold that converging to the symmetric prices would be a consistent and logical process only if it could be assumed during an *ex ante* examination that the development of the operator's market shares might trend towards equalization, so that by the time the termination rates become symmetrical the operator's market share and turnover will be the same as the others'.

This was in effect the focal point of the argument from H3G, the smallest Italian operator, against the symmetric charges.

d) Final remarks

It is time we drew our conclusions.

The introduction into the national legal system of a legislation on competition protection of European derivation has had the effect of inserting the pre-existent regulation of the economic enterprise into a market contest: the provision of art. 41 of the Constitution has nevertheless been considered able to host a more adjourned conception of the economic constitution ([50]).

Although the market was initially deemed by the Constituent Assembly as a negative value ([51]), thanks to the introduction of the Community principles on competition it has been taken within the formal Constitution in its positive meaning of promotion of the economic and organizational efficiency ([52]).

The Constitutional reform of 2001, on recognizing a wide legislative competence to Regions, on one hand has shown the dangers of an economic regulation geographically parcelled out; on the other hand has pointed out the necessity of reshaping all state, regional and local regulation in a pro-competitive direction.

To this latter purpose even a possible cooperation between the Constitutional Court and the Antitrust Authority has been envisaged ([53]), in the sense of enabling the

[50] See again M. DE BENEDETTO, quot.
[51] See again G. AMATO, as quoted by M. DI BENEDETTO.
[52] See above.
[53] M. CLARICH, *Servizi pubblici e diritto europeo della concorrenza: l'esperienza italiana e tedesca a confronto*, in Rivista trimestrale di diritto pubblico, 2003, p. 113, as reported by M. DE BENEDETTO, quot.

Administration to raise directly before the Court the questions of constitutional legitimacy of legislation violating the constitutional principles on competition.

And so it seems clear that the process of interpretation and application of laws and regulations circling round the principle of competition will get a nodal importance.

Moreover it must be considered that the principle is a rule characterized by a higher degree of abstraction and flexibility than a legal provision; this implies that, in practical cases, the principle is not susceptible of being derogated but it can only be applied or, in the concurrence of conflicting principles and values, discarded.

Considering the abstract possibility of recession as a consequence of the judicial balance among principles of the same constitutional rank, we can conclude that the effective affirmation of the principle of competition will then depend also on the importance that the Courts will have become inclined to recognize to other values in conflict or in contrast with it.