

ANTITRUST AND INEQUALITIES

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It is not surprising that Baker and Salop's recent intervention on the relationship between antitrust and inequality has raised a great interest among scholars. Indeed, the inverse relationship between inequality and democracy has been recently explored and supported by a growing number of academic papers and essays (among others, Piketty's essay is one of the most successful).

Interactions between inequality and democracy involve a series of conceptual and theoretical issues that are not meant to be addressed (neither to be solved) in this foreword, the purpose of which is to provide a further and small contribution on the relevant issue raised by the two American scholars.

Firstly, it is remarkable to note how, one of the assumption underlying the debate is that antitrust policy – mainly devoted to safeguard the freedom of enterprise (a positive freedom according to some classifications of constitutional law) – may also impact on (in)equality. Such approach moves from the implicit assumption according to which the current prevailing idea is that greater freedom corresponds to greater equality. However, this is not entirely undisputed within a theoretical debate which, having dismissed contrasts characterized by obsolete

views, is still in search of possible points of balance so as to demonstrate either one or the other thesis.

To this regard, it is the Authors' view that there are no insurmountable obstacles for a quest for broader forms of freedom to be compatible with larger spaces for equality. In other words, we agree with Weber's renown Conference lecture, "*Science as a Vocation*," according to which the indisputable present-day polytheism of values can be resolved not through a war among gods, but by ascertaining the irreducibility of values and, therefore, their necessary coexistence. The principles on which a society is founded are not placed in a hierarchical scale, but in a relationship of greater or lesser extension, and it is necessary to find a way to synthesize them (Silvestri).

Therefore, protecting the freedom of economic initiatives can also entail, at least theoretically, an expansion of equality.

However, moving from abstract to concrete terms, the unavoidable question concerning the suitability of competition authorities' enforcement powers has to be posed: how can inequalities be reduced with the antitrust authorities' "tool box"?

The idea that implementing competition law leads to lesser inequality is not recent: it was a path already invoked in 2012 (Stiglitz). Baker and Salop's step forward lies in the effort to identify the actions to be carried out for this purpose. Without entering into a close examination of each proposal, it is worth noting

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that some of them do not seem capable to obtain the desired result. In fact, the option of prosecuting conducts which actually harm the wealthiest or those that primarily benefit the less affluent does not take into due consideration the remark of who (Amato) correctly observes that the unlawfulness of a conduct, under competition law, is not qualified by the category of the damaged parties. Moreover, it also overlooks the equally correct observation according to which it appears very difficult to identify illicit conducts that cause selective damage, *id est* that involve only a part of the population (Nicita).

Even if some of the proposals do not reach the objective pursued, some others deserve a more serious consideration, in order to verify the existence of a sound possibility for competition authorities to affect (i.e. reduce) the degree of inequality. Indeed, the verification has a positive outcome.

Focusing on certain economic sectors (such as those related to convenience goods) rather than on others (related, for example, to goods reserved for a segment of high-income consumers due to cost) is not objectively neutral. This antitrust policy could have the effect to extend the range of consumers that can access a specific essential good or can buy it at a lower price than that, for example, fixed as part of a prohibited agreement or as the result of an illicit exploitative abuse. Widening the possibility to access essential goods (for example, in the agricultural and food sector and the pharmaceutical sector) for those who were excluded beforehand, or even providing the possibility to have access at a lower price (which, in a low-income person, results in liberalization of the resources necessary to purchase other

additional goods, but equally necessary) has the effect – albeit under a limited economic profile – of reducing the gap between those who could already purchase said goods and those who instead were unable to do so. Therefore, narrowing the gap between less and more affluent citizens leads to a reduction in inequality.

Moreover (as mentioned), exploitative abuse interventions regulated by Art. 102(a) of the TFEU have remained for quite some time unimplemented: it is rather complex (and time consuming) to prove the unfairness of terms and prices, it drains resources (often limited), and risks to result, in regulated areas, as a "pitch invasion" of the field of expertise of the regulatory agencies by the antitrust authorities.

However, it still remains a typical case of competition law, recently revitalized – we might say – due to the relevance assumed by consumers' welfare among the competition policy goals. There is no doubt that investigations focused on abuses of dominant position, *sub-species* exploitative abuses, would have effects resulting (also) in increasing the level of equality among citizens.

The examination could proceed further. It is not necessary. In our opinion, these two exemplifications already highlight how an antitrust authority may contribute to the reduction of inequality.

After having verified the existence of tools (and therefore possibilities), it is necessary to verify whether fighting against inequalities should be an explicit competition policy goal.

In this specific regard (although the authors are oriented to believe that the implementation of

competition law can play a role in supporting an increasing equality), the answer cannot be positive.

In fact, a certain level of inequality is inherent in a market economy. In a competitive environment, undertakings are inclined to search for efficiency and to pursue innovative paths to obtain profits. The natural consequence is that companies with inefficient production units and less skilled entrepreneurs are destined to exit the market in the long run.

The economic players' search for efficiency, pursued through competition on the merits, is the process that an antitrust authority is called to protect, even if it results in the creation of "new" pockets of inequality.

It is likely that these are not actual inequalities; or rather, it needs a clarification: competition on the merits leads to non equal positions, but this is a positive value to defend against any form of automatic egalitarianism that penalizes merit. After all, substantial equality protected by the second paragraph of Art. 3 of the Italian Constitution requires the removal of hindrances and to make the starting points equal (Ainis: "*L'eguale libertà di diventare diseguali, però partendo da uguali*").

We agree that the main task of a competition authority is not to fight against inequalities, as such.

Nevertheless, often the search for revenues does not take place following the natural competitive process. In particular, this occurs when who holds market power does not improve its position by producing new wealth, but by taking away part of it from others. In these cases, as stated by President Pitruzzella in

his presentation to the Parliament of the Annual Report on the activities carried out in 2015, the search for rent curbs innovation and economic growth and at the same time increases inequalities.

The relationship between the State and the market, however, must always be shaped in such a way to guarantee a balanced interaction between the two. In fact, State intervention must stop when the market is capable of ensuring economic equality and collective welfare autonomously, on the basis of its own rules and of the initiatives of each economic operator. Conversely, the market shall accommodate for public interventions when it does not have the capability to ensure adequate satisfaction to social requests and the principle of equality.

Within this framework of relationships, the role of an antitrust authority is, in one case, to ensure that the spontaneous order of the market is restored after its intervention; and, in the other one, to ensure the correct balance between economic values and social values in order to prevent market forces from being unduly sacrificed.

In any case, there has to be a balanced relationship between competition and efficiency, on the one hand, and equity, on the other, not leading to the dangerous prevalence of economic interests on social values or *vice versa*. In fact, just as the market's needs cannot be sacrificed wherever this is not necessary for pursuing overriding needs of general interest, likewise social values must not be crushed by views inspired by a sort of "market fundamentalism."

For this delicate balance to be achieved and maintained over time, a synergic and complementary intervention of economic regulators and public institutions is needed, including antitrust authorities, of course within the limits of their powers. The balance, and thus the synergic pursuit of both economic interests and social values, needs to be at the core of economic policies of a genuinely democratic State. The State, in fact, should constitute the place where the different requests can be compared and composed, so as to avoid degenerations leading to the prevalence of the “law of the jungle” and to the intolerable sacrifice of pluralism in all its economic and social manifestations.

As mentioned, the fight against inequality cannot be the guiding principle of antitrust interventions. Nevertheless, the Italian Competition Authority’s actions in recent years highlight the fact that a competition authority’s intervention can contribute in affecting equality, by increasing it (even on the basis of a scrutiny based upon the criteria outlined by Baker and Salop).

For instance the Italian Competition Authority’s interventions in the pharmaceutical sector have been numerous, ascertaining and severely repressing agreements and abuses of dominant positions involving undertakings – often international colossuses – operating in this sector (*Pfizer, Roche/Novartis, and Aspen*).

The pharmaceutical industry, certainly, constitutes a vital sector for citizens’ health. It is also a strategic sector from an economic viewpoint, both for market value and for the fact that pharmaceutical expenditure is one of the items that weighs the most on the

composition of health expenditure. Therefore, it is of the utmost importance for this market to function at its best so as to protect not only public health, but also to ensure the financial sustainability of the health care system and to provide innovative, safe and affordable medicines to all citizens.

In 2014, the Italian Competition Authority found a restrictive agreement in the market of the drugs used in the treatment of ophthalmic diseases (particularly widespread among the elderly). intended to prevent the use of a less expensive drug in favour of a drug about 50 times more expensive, with a greater disbursement for the National Health Service of tens of millions of euros and repercussions on the access to treatment of less affluent persons.

Another case mentioned and recently concluded by the Italian Competition Authority appears to match two of the proposals contained in the paper from which the debate on the topic of this foreword is began: the particular case (exploitative abuse) and the sector (pharmaceutical). Last year, the company Aspen was sanctioned for having exploited its market power at the detriment of consumers. By implementing an aggressive strategy and with no economic justification, Aspen made illicit pressure on the Italian Medicines Agency (AIFA) to obtain extremely high price increases (ranging between 300% and 1500%) for life-saving drugs intended for particularly vulnerable patients – such as the elderly and children –, actually threatening to interrupt the direct supply of the drugs on the Italian market.

In both cases, the Italian Competition Authority pursued its antitrust enforcement

action against practices suited to create not just any kind of inequality, but inequalities in accessing health care at affordable costs, affecting one of the most important constitutional values (the right to health).

The Authority has also given equal importance to behaviours aimed at altering public tendering procedures. In this respect it should be noted that, in ascertaining such illicit conducts, the Authority not only promotes the restoration of effective competition in public tendering procedures, but also achieves, as indirect result, the reduction of costs that burden public budgets, thus saving resources. Instead of fuelling position rents, these savings can be allocated by Public Administrations to services that benefit citizens. Once again, this results in a significant increase in consumers' surplus, with particular advantage especially for the weakest segments of the population.

In these cases, the Italian Competition Authority did not neglect its powers as an antitrust authority, but used a criterion based on the priority selection of the cases to be handled favouring interventions towards conducts that can penalize to a greater extent the weakest subjects of society, those "less equal to the starting blocks." Every Competition Authority adopts priority criteria in selecting interventions, and such criteria may well include fighting inequalities, whenever anti-competitive conducts mostly create conditions for inequalities, even indirectly.

Antitrust interventions can be a valid tool for fighting unfair costs of primary goods, both when these costs burden public finances and when they affect the weakest people of society. Such action, of course, is subordinated to

finding the existence of behaviours designed to alter free competition, which – as mentioned – can consist in abuses of market power and in restrictive agreements. This enforcement is to be certainly preferred over regulatory interventions aimed at fixing artificially specific price levels and penalizing competition on the merits as well as innovation that brings benefits to consumers and to the society as a whole.

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According to the data provided in OECD's latest report, the current gap between the richest and the poorest has reached the highest levels ever in the last thirty years, with 10% of the richest population earning almost ten times more than the 10% of the poorest. Indeed, not only developing countries (such as Brazil and China) are affected by the phenomenon of growing inequality, but also developed countries. In fact, the United States are characterized as being one of the countries with the highest inequality levels in terms of income distribution (where the super-rich, making up 1% of the population, earned "*the lion's share of income growth*" to the detriment of the remaining 99% of the population), and Italy is well below the average of OECD countries.

Is market power (and its abuse) the main cause of this situation? No, it is not. Therefore, interventions aimed at enforcing the rules of the game in sectors crucial for citizens' lives, certainly are not the answer for solving problems linked to the increasingly accentuated inequality that constitutes "*l'anticamera della frattura della coesione sociale*" (Amato), perhaps in part already severely damaged.

Nevertheless - and it also emerges from the brief examination provided - an antitrust enforcement attentive to the issue of inequality can help reduce their extension, including through the specific policy choice to investigate competitive concerns in certain sectors, as well as to give priority to cases aimed at eliminating hindrances to innovation and which can lead to (greater) benefits for the middle class and the less-privileged.

All this can be achieved without distorting competition authorities' mission.

There are no reasons for which this path should not be pursued or a contribution should not be given, however small, for the creation of a better society. In fact, the Italian Competition Authority intends to pursue this path and has already begun to do so: its ambition is to contribute in laying the foundations for a society with increasingly less inequalities and a healthy competition based on the merits, in which everyone can participate on equal terms.