DEMOCRACY, INEQUALITY AND ANTITRUST

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Does capitalism need to be reformed to preserve democracy? Does this reform process involve the Antitrust Authority? What is the relationship between democracy and the protection of competition? Such questions are very much present in the public debate that accompanies the lengthy process of selecting candidates for the presidential elections in the United States, and find their place in the Western media, especially following the article published in the Financial Times by Martin Wolf, whose title posed a huge problem: is “rigged capitalism” destroying democracy?

Concentration of economic power, particularly in the hands of "tech companies", stagnation of productivity, growth of inequalities, delegitimization of political and economic elites affect most capitalist economies, but what does this have to do with competition and antitrust? In fact, since its origins with the Sherman Act of 1890, Antitrust has been at the intersection of the market, democracy and social cohesion. The first Antitrust laws were not only based on concerns about the functioning of the markets, but equally on strong concerns about the negative influence that the concentration of economic power had on democracy, political freedom and equality of citizens. The political dimension of the protection of competition was underlined by one of the protagonists of the fight against monopolies, Louis Brandeis who, in 1911, stated that freedom should be seen as freedom not only from state coercion, but also from private powers.

These multiple aims of competition law were abandoned in the USA after two of the most influential books on competition law were published at the end of the 1970s. I refer to Robert Bork's "The Antitrust Paradox" and Richard Posner's "Antitrust Law", both of which marked an epoch-making theoretical change, which has then been fully implemented in US antitrust enforcement since the Reagan presidency. "A policy at war with itself" was the subtitle of Bork's book, which effectively summarized the thesis that the practice of competition law was based on a set of contradictory premises that sometimes produced pro-competitive effects, but more often protectionist effects. The prescription was clear: to eliminate these contradictions and the excessive objectives both economic and political and remove the inefficiencies that arose, in order to achieve a loosening of the antitrust rules.

Since then, the only objective of antitrust practice has become consumer welfare - identified with economic efficiency - and efficiency considerations have made it possible to justify behaviour that would once have fallen into the narrow scope of competition law. Loosening its rigour - according to the authors

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cited - would have allowed companies to increase efficiency, reduce costs and possibly transfer this reduction on prices with obvious advantages for the consumer. This would encourage innovation, the creation of new products and economic growth. The main consequences were the weakening of antitrust law on mergers and exclusionary behaviour and the almost exclusive focus on prices, the reduction of which was considered to be the real and tangible result assigned to competition law.

The economy of the platforms with the enormous concentration of economic power favoured by economies of scale, by "network effects", "lock-in" effects and by the control of big data, has led to questioning the continuing validity of the approach of Bork and the Chicagoans. New monopolies are emerging in these markets and it no longer seems true that there is "competition for the market", so that after a while a monopolist would be replaced by another monopolist. Rather, many are now convinced that the current monopolists are able to block the entry of new innovators, for example through "chilling acquisitions", that is, through the systematic acquisition of those companies that could become the competitors of tomorrow. The growth in the concentration of economic power has not been limited to the giants of the network, but has characterized virtually all sectors of the U.S. economy, as evidenced by a now very extensive literature.

Today, many authors, such as Baker in "The Antitrust paradigm", observe that, contrary to the precepts of Bork and Posner, together with the growth of "market power", productivity has declined while inequalities have increased considerably. Stiglitz, in turn, highlights the increase in annuities of position also favored by a "market power" without effective limits.

Enjoying an income means appropriating more of the resources produced without contributing to their growth, with the consequence of determining an increase in inequalities. Not only do inequalities increase, but do distortions in the democratic process, because the holders of such strong economic power are able to influence the outcomes of the political decision-making process, obtaining rules favourable to them which, by fueling a vicious circle, consolidate their economic power. Therefore, more inequality, less democracy, less productivity. These reflections are increasingly intertwined with those concerning the economy of the platforms and its consequences on democracy. Among these, the analysis of Shoshana Zuboff on the new "surveillance capitalism" stands out, according to which the "technology firms" have created a new form of power capable of modifying the behaviour of individuals, operating outside of any individual awareness and public responsibility. This immense power should be opposed in the name of personal freedom and democracy.

In all the above analyses, together with new regulatory interventions, there is a strong call to strengthen the protection of competition by returning to the original antitrust. This proposal is being developed today by the "Neo-Brandesian Movement". One of its most authoritative representatives, Tim Wu, sets the agenda for this movement in the following points: 1) reforming merger control so as to prevent excessive growth in market power; 2) making it possible once again to practice "breakups" of large groups, as has happened in the historical cases of Standard Oil and AT&T;
3) such structural remedies should take into account not only reasons of economic efficiency, but also concerns about the concentration of too much power in favor of a single platform, such as Facebook, which has assumed an impressive ability to affect the freedom of information; 4) overcoming the objective of consumer welfare by encouraging greater interventionism of the Antitrust.

But what exactly does it mean to review the objectives of competition law? Loading the Antitrust Authority with many heterogeneous tasks can bring too much uncertainty. This issue was raised, among others, by the authoritative judge Douglas Ginsburg, according to whom in such a case the competition authorities and the courts would be free to choose among multiple, incommensurable values, often in conflict with each other. Tim Wu responds to these concerns as follows: the standard "consumer welfare" asks judges and competition authorities to achieve something impossible, i.e. to measure the effects in terms of the welfare of transactions or very complex conduct; the "neo-Brandesians" propose a simpler and more suitable standard for judicial reasoning, because it would be a question of assessing whether a conduct promotes competition or whether it damages it. The competition protection test is focused on the protection of a process, while the consumer welfare test refers to a value whose measurement is excessively difficult, if not impossible.

All this means one very important thing: Antitrust should not be charged with political objectives, rather its purpose remains economic and should be to keep the competitive process open by countering the accumulation of market power. The protection of democracy and the fight against inequalities are not, therefore, objectives which can be pursued directly by the Competition Authorities, but constitute indirect effects which can be created as a consequence of a strengthened antitrust enforcement which addresses its original problem, namely the abnormal growth and the abuse of "market power".

All this brings American thinking closer to the practice of European competition law. In fact, Tim Wu himself writes that Americans should look at the European experience that has never abandoned the practice of opening "big cases" and that today is at the forefront of scrutinizing the "big techs", as demonstrated by the cases decided by the Commission with regard to Google. In fact, the protection of competition in Europe has always been vigorous and - despite frequent references to the standard of consumer welfare - has always paid attention to ensuring the open and pluralistic nature of the competitive process, being concerned about abuses favored by an excessive concentration of economic power (it is precisely in this perspective that the recent cases concerning Google seem to be placed). In this way, one can grasp the continuing influence of the ordoliberal theories that have animated the intellectual debate that was at the very origin of European competition law.

The ultimate goal of the competition policy of ordoliberalism - set forth in the pages of Eucken, Rüstow, Röpke, Böhm - was to preserve a free society. In order to achieve this objective, the systematic elimination of the concentration of private economic power must be pursued by ensuring effective competition in the market. The pluralistic structure of the market was to serve not only the purpose of
achieving the efficient allocation of resources, but also to ensure a free society in which the State did not fall prey to the interests of large concentrations of economic power. But, all this being said, it is necessary to avoid the danger of the politicisation of the Antitrust, which could lead to the protection of competition being subdued for partisan purposes, to protectionist objectives or, worse, to the support of the government or of the dominant political forces (a particularly intense danger in a period of crisis of liberal democracy). The protection of a free society is not the direct aim of the protection of competition, but is the indirect consequence of an antitrust practice that pursues an economic purpose - the openness of the competitive process - and uses strictly technical evaluation standards.