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Section I: Articles

STATE AIDS BETWEEN PUBLIC FAIR AND UNFAIR COMPETITION

Valeria Falce

1. The infringement of public rules and unfair competition

The ongoing "administrativization" process of the legal system and of the market relations, together with the growing of legislative intervention (both European and national) designed to, in several respects, safeguarding the competition and protecting the market have renewed the debate on the cooperation on the enforcement of the relevant regulation.

In this context, the strengthened constitutional significance of the competition, combined with the importance of the codified provisions, in particular on unfair competition, suggest we should return to reflect on the assumptions in which the violation of a public provision in general, and specifically the violation of the provisions dedicated on State aids, constitutes a conduct affecting the professional correctness paradigm in contrast with the repressive rules on unfair competition pursuant to Article 2598 and following of the Italian Civil Code.

In order to provide a correct framework of the debate it should be approached from a dual perspective: firstly, a conduct may violate at the same time different legal assets, thus being subjected to as many grounds of censorship; secondly, a conduct may violate a legal asset that is protected in several ways by the legal system, in which case the operator, in identifying the applicable rules, is led by the criterion of the precedence of the special provision over the general provision, which withdraws.

Once the general principles are pointed out, the challenge is now to apply them to the particular case, in order to verify: i) if and to which extent the viola-

tion of a provision of public law, including the one which provides State aids, constitutes, at the same time, an act of unfair competition pursuant to Article 2598 of the Italian Civil Code; ii) if and to what extent the conformity of a conduct with a provision of public law, and furthermore with the provision on State aids, may represent an act of unfair competition.

In the first case *i)*, and as a first approximation, the issue must be resolved by using the theories on the cumulation of the disciplines and liabilities, in which respect there are three different interpretative lines: the first one, invoking the ethical concept of professional correctness, identifies an act of unfair competition in every violation of the public requirements by an entrepreneur [1]; the second one, by applying the corporate concept of fairness, rejects the cumulation of liabilities on the presumption of the takeover on the competitive impact of the conduct contrary to a public provision by the administrative or criminal impact of the same conduct which has been already punished under another title; the third one, enhancing the regulatory concept of professional correctness, is placed in an intermediate position since it states that the conduct contrary to a public provision may constitute a type of unfair competition or not, depending on the impact that the public provision and its violation will have on the proper functioning of the market and of the competition.

Unlike the first two lines of interpretation, the third one is prevailing because of its flexibility and inherent capacity to capture the complexity and structure of each individual case in such a way as to permit a suitable balancing. Following this strand, the challenge is to identify the cases in which the public provisions are directly addressed to the protection of competition, because in such case the same public framework provides the interpretative instruments useful in order to decode the loyalty principles which must lead the conduct of the entrepreneurs, in such a way that the violation of these provisions will represent an act of unfair competition. Should the public provisions not have the aim to protect competition, in such case, the conduct contrary to the public provisions may constitute an act of unfair competition pursuant to Article 2958 of the Italian Civil Code, but only if suitable to affect competition.

Furthermore, also this theory is immune from critics, given that, the most authoritative Italian doctrine, it appears *"proper to assume that, save in exceptional and duly justified circumstances, the violation of laws of the Member State is always in conflict with the principles of correctness"* [2]. Therefore, in or-

[1] This approach is criticized by C. Alvisi, *Concorrenza sleale, violazione di norme pubblicistiche e responsabilità*, 1997, p. 127, according to which in order to comply the unfair conduct with the breach of a mandatory rule the unfairness loses his autonomous legislative significance and represents a type of fault.

[2] For details see A. Vanzetti, V. Di Cataldo, *Manuale di Diritto Industriale*, 7ª ed., 2012.

der to discern the licit conducts from those illicit the infringed public provisions should first be distinguished depending on whether they provide restrictions to the business activity, costs or fees. In the event that the first category of provisions will be infringed, in this case a competitively illicit will occur. With regard to the possibility of an infringement of costs rules, the violation will consist in a complex legal matter which includes a competitive offence in the event that the violation is associated to a competitive damage. Lastly, where the infringement will regard fee provisions, even if the difficulty to see in this violation a competitive behavior has been invoked by various parties, this possibility cannot be excluded. In the same way as the infringement of costs rules (such as public employees' provisions), also the fees rule (such as license and authorizations) can lead to savings and in turn to a competitive advantage which, where taken, will cause a competitive damage.

As regards to the second case *ii)*, the question is where the compliance of a conduct with a public provision may facilitate an evaluation in terms of illegality: the answer, far from being unequivocal, involves different disciplines. In general terms, the compliance of a conduct with a provision, also if mandatory, does not automatically entail its compliance with a different legislative corpus. Furthermore, in order to establish the violation of competition law, one has to go back to the aim of the public provision, and only if this pursuits a competitive aim and the conduct realizes only that objective, it would seem reasonable to stop any other evaluation on the relevance of the conduct pursuant to Article 2598 of the Italian Civil Code.

2. Unfair competition and tort law

Against a behavior adopted by a company in breach of a public provision which, in light of the above evaluation, is also breaching competition law, the affected competitors or the relevant professional associations shall be entitled to protect their interests in the competent judicial offices and in particular to claim before the civil court: *i)* an action for an injunction and for removal of effects caused by the illicit conduct, for which is sufficient to provide only the evidence of the act of unfair competition, but not the misconduct or fraud of the infringer, and neither the actual economic damage, given that it is sufficient that the damage is potential; *ii)* an action for damages, for which it is necessary to provide the evidence of the subjective state of the infringer (misconduct that, in any case, is presumed if the act of unfair competition is verified) and of the financial loss.

In the course of this action the court may order the publication of the judgment in the press as a sanction.

Indeed, where the competitor believes that he has been affected by an act of unfair competition, he can take advantage, at least at the level of principle, of Article 2043 of the Italian Civil Code to safeguard its interests.

According to the case law, the relationship between the two provisions has been solved by considering the breach of competition law as a type of tort [3]. Particular attention is paid to the peculiarity of the unfair competition with respect to the tort, which should be identified by reference to the legitimacy (active and passive) requirements and also to the reaction capability against the violation; with regard to the conditions and compensations the two categories coincide [4]. In so doing, the Aquilian liability pursuant to art. 2043 of the Italian Civil Code plays a subsidiary role such that this provision is applied whenever there aren't the subjective and objective requirements for the implementation of Article 2598, n. 3 of the Italian Civil Code [5].

3. State aids provisions and unfair competition

In the light of the above framework, it is now appropriate to examine the existing relationship between the public provisions on State aids and the repressive rules on unfair competition, which promotes, as stated above, at private level, the protection of competition between companies which are competitors on the market [6].

The relationship between the beneficiary company and the Member State, on one side, and the relationship between the Member State that grants aid and the competitors of the beneficiary company, which in claiming the incompatibility or the unlawfulness of the measure request to the State the compensation for the damage caused by its concession, on the other side, remain outside the sphere of this analysis.

What is relevant to assess the existence of an unfair competition conduct before the court is the autonomous legal significance of the act of unfair competi-

[3] Cass., n. 1829, 26 June 1973, in *Foro it.*, 1973, I, c. 3371. See in the opposite sense, Cass, n. 2106, 6 July 1971, in *Riv. dir. comm.*, 1972, p. 108, according to which «the unfair competition remains an autonomous category and doesn't constitute a type of tort». See in doctrine, A. Genovese, *Il risarcimento del danno da illecito concorrenziale*, 2005, p. 23; C. Alvisi, *Concorrenza sleale, violazione di norme pubblicistiche e responsabilità*, 1997, p. 125.

[4] A. Genovese, *Il risarcimento del danno da illecito concorrenziale*, cit.

[5] For details see, A. Vanzetti, V. Di Cataldo, *Manuale di Diritto Industriale*, 7ª ed., 2012.

[6] See for an updated view on the pursued values, V. Falce, *Appunti in materia di disciplina comunitaria sulle pratiche commerciali sleali*, in *Riv. dir. comm.*, 2009, p. 423.

tion put in place by the company receiving State aid over a direct competitor, where the conduct is: *i)* fundamentally against the competition law and incompatible with State Aids framework, or direct to lead to specific commercial results due to the unfair exploitation of an aid [7], *ii)* directly or casually attributable to the aid received.

For the purposes of point *ii)* the question arises is evidentiary, since the competitor shall be required to prove the casual link between the measure criticized and the conduct that implies a breach of competition law, while for the purposes of point *i)* the starting point is that the rules on State Aids are directly and specifically designed to ensure that the competition between companies is not distorted by aids that unduly benefit some companies or some manufacturing over their competitors. Therefore, the above provisions provide the notion of professional correctness pursuant to Article 2598 of the Italian Civil Code, in such a way that the assessment of compliance between practice and State Aid provisions means the compliance of a conduct with the correctness paradigm.

2. *(Following) The liability of the beneficiary company receiving the aid towards its direct competitors.* – Even though it is debatable whether a company is obliged to verify the regularity and, in the last resort, the legality of the aid granted (all based on the assumption that the above obligation of notice and standstill have only vertical effects and so that are applicable exclusively to Member State [8]) the European case law rejects the suggestion that the beneficiary of an unlawful State Aid, according to the European Union law, may be held liable for the injury suffered by a competitor [9].

Disregarding the range of action of the general duty of care that lies with the *accipiens* [10], and the risk effectively run by the *accipiens* taking advantage of an

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[7] A. Genovese, *Tutela urgente della concorrenza e inibitoria della condotta dell'impresa beneficiaria di aiuti di Stato*, in *Corr. giur.* 2007, 6, p. 845.

[8] C. Giust., 11 July 1996, *Syndicat français de l'Express international (SFEI) e a. c. La Poste e a.*, C-39/94, in *Racc.* 1996, I-3547. See in the opposite sense A. Saggio, *La responsabilità dello Stato per violazione del diritto comunitario*, in *Danno e* responsabilità, 2001, 3, 223, which criticized this approach considering it overly formalistic and capable to neglect the direct effect of the European Union law on individuals.

[9] C. Schepisi, *Aiuti di Stato e tutela giurisdizionale. Completezza e coerenza del sistema giurisdizionale dell'Unione europea ed effettività dei rimedi dinanzi al giudice nazionale*, Giappichelli, 2012.

[10] See F. Ferrero, *Risarcimento dei danni e aiuti di Stato alle imprese: recenti sviluppi*, in *La "Modernizzazione" della disciplina sugli aiuti di Stato. Il nuovo approccio della Commissione europea e i recenti sviluppi in materia di public e private enforcement*, (a cura di) C. Schepisi: according to the author to admit that a beneficiary of a State aid could ignore its unlawfulness or not compliance with respect to the European regulation is increasingly difficult, because of the presence of abundant case law and guidance acts which codified the use of the Courts and of the European Commission.

aid not previously notified and assessed favorable by the European Union, the possible future action for the unfair competition, filed by the competitor against the beneficiary, may follow not the European Union law (that is only relevant for the Member States), but rather the principles and requirement on liability set forth by the national law [11].

Therefore, the competitor can file the action pursuant to Article 2598 of the Italian Civil Code only where he is able to give evidence of the casual link between the unlawful measure and the unfair conduct carried out according to the measure (in the event of incompatible aid) or of the autonomous unfair conduct in breach of the Articles 101 and 102 of TFEU (or of the corresponding national provisions) or carried out in an illicit way [12] (in the event of unlawful aid), because the solution of the regulatory "coverage" given by the measure that grants an aid in breach of the European Union law can hardly be applicable and the related legitimate expectations by the beneficiary can be hardly laid down. In both the circumstances above, the national Court carries out a subsidiary and complementary function to the European Commission, as, in addition to several preliminary assessments, the Court is called upon to ascertain whether an adopted strategy not only is directly attributable to the aid granted, but also if this strategy has resulted in an act of unfair competition, which consequences has not been absorbed by the measures adopted to restore the *status quo ante* in terms of competition conditions on the market. Because of the need for coordination, in the event that the European Commission has not expressed an opinion on the compliance of the aid with the European Union law, the national Court shall be empowered to adopt, if so requested, the suitable protective measures. Lastly, if the national Court comes to a conclusion about the compliance of the aid after the European Commission, must necessarily take into consideration the European Commission's decision.

Moving on the issue of whether the realized conduct results in compliance with the State aid provisions (as legitimate because it has been notified regularly to the European Commission, and compatible because it has been authorized by the European Commission) but, is however unfair pursuant to Article 2598 of the Italian Civil Code, the procedural compliance – which since doesn't imply any assessment on the merits, doesn't ensure the compliance of the company's conduct on the market with the competition law – needs to be distinguished

[11] Court of Justice, "SFEI", cit; European Commission, Commission notice on the enforcement of State aid law by national courts, in Official Journal of the European Union, 2009, C-85 11, § 44 e 53. In doctrine, please see, C. Schepisi, *Aiuti di Stato e tutela giurisdizionale*, cit.; A. Genovese, *Tutela urgente della concorrenza e inibitoria della condotta dell'impresa beneficiaria di aiuti di Stato*, cit.

[12] C. Schepisi, *Aiuti di Stato e tutela giurisdizionale*, cit.

from substantial compliance, which can lead to a concurrence of provisions. In this event, the assessment of the national Court, that must take as a basis the regulatory framework and take into account the primacy of the European law over national law, cannot assess the implementation of the benefit derived by the State aid and the conducts that are required by the beneficiary of the measure, as contrary to the principle of professional correctness, because, within these limits, the safeguard of competition and correctness is ensured by the European provisions on State Aids.

Conversely, the national Court outside of this area can freely assess the correctness of the conduct pursuant to Article 2598 of the Italian Civil Code [13] and where appropriate the Court can use the instruments of private enforcement. This, on the assumption that the *accipiens* has a privileged position from which derives the special responsibility of not exploit the competitive advantage granted over the limits, margins, aims permitted causing a further and unjustified damage to the market and to the competitors.

4. Evolution of the case law

The abundant case law on State aid matter has rarely worked on interferences and intersections with the repressive rules on unfair competition [14]. The main cases which signed the evolution are the following:

Grandi Traghetti di Navigazione Case

In this case Grande Traghetti di Navigazione (hereinafter GTN) claimed Viamare di Navigazione (hereinafter VDN) before the Court of Genoa arguing its unfair behavior consisted in the application of tariffs below-costs and unfair customer solicitation. GTN in particular argued that the application of tariffs below-costs for the navigation services from Genoa to Termini Imerese was not the result of an autonomous business policy, but was the immediate and direct result of the State aid granted by the Italian Government to Finmare, parent company of VDN. For this reasons GTN asked to the Court the adoption of a protective measure towards VDN pursuant to Article 700 of the Italian civil procedural code, and sought a preliminary ruling from the Court of Justice in

[13] A. Genovese, *Tutela urgente della concorrenza e inibitoria della condotta dell'impresa beneficiaria di aiuti di Stato*, cit.

[14] The case law shows that the actions filed by the beneficiary to oppose to an internal execution order are far more numerous than those carr*ied out by the competitor based on the mere illegality of the aid, or than those which follows a negative decision by the Commission*. For details see C. Schepisi, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 206.

order to assess whether the State measures in question could be considered as State aid with reference to the relevant legislation.

The Court of Genoa has recognized, in principle, that a State aid that infringes the European regulation represents an act of unfair competition, with the result that the beneficiary may be concerned by a protective measure. However, the Court of Genova in the merit of the case excluded the application of State aid rules as regards the navigation services (see Reg. EC 3577/92, art. 6) and secondarily denied that the financing granted to VDN could constitute State aid because were resources raised on the market.

Alitalia/Airone Case [15]

In this case, the European Commission in 2004 authorized, as a form of individual aid from the Italian State to the national Italian airline, the provision of a guarantee for the bridge loan granted by several credit institutions to Alitalia in March 2005 for a period of twelve months in order to ensure the coverage of the cash requirements and avoid the risk of insolvency for the company. The European Commission had considered the aid in compliance with the European regulation provided that two conditions were met: *i)* that the delivery of the aid was related to the adoption of a suitable restructuring plan and *ii)* that during the granting of aid was avoided an increase of capacity of the Alitalia fleet. In November 2005, Alitalia had expressed its interest in participating to a tender procedure for the acquisition of the Volare Group under special administration. Airone, also interested in the procedure had asked to the Court of Rome to inhibit, as a precautionary measure, the participation of Alitalia arguing that the Italian airline would use the competitive advantages of the aid for aims different from those inherent to the aid granted. By order dated January 27th, 2006, the Court of Rome had embraced the Airone's position in the belief that on the date of the expression of its interest Alitalia benefited of the aid, which was granted to ensure only the functioning of the company and not also the increase of capacity of the fleet.

Alitalia had claimed against the decision of the first instance court and the Court, assessed the facts and the arguments, had upheld the complaint and revoked the precautionary measure. According to the Court, Alitalia before returning the bridge loan had only expressed its interest in participating to the tender for the acquisition of the company unit on sale. Alitalia had only realized a preliminary and preparatory conduct that was inappropriate to affect the functioning of the market, the competitors and the results of the procedure until the irrevocable purchase offer, that was then released on December 2005, and so

[15] Court of Rome, Order 27 January 2006 and Court of Rome, sez. II, Order 14 March 2006.

after the recapitalization and the (early) reimbursement of the bridge loan. In other words, Alitalia had released the irrevocable purchase offer after the termination of the efficiency of the State aid and so of the commitment of Alitalia toward the European Commission to don't increase the fleet. To conclude, the Court had denied the existence of the *fumus boni iuris* in the claim of Airone because, considered the timing of facts and acts, Alitalia had not disregarded the European regulation on State aids and had not implemented any act of unfair competition.

This case has been the subject to doctrine criticisms [16] because in the first order the Court applied the cumulation of liabilities criteria without having assessed incidentally the violation of any European requirement and without a motivated opinion on the anti-competitive consequences of Alitalia's conduct in a well-identified market.

The order that decided on the action brought by Alitalia, on the other hand, based its decision on the legal and property consequences of the conduct of Alitalia, without taking into account the restrictive effects deriving from the business strategy of the company. Otherwise, the Court should have first and foremost identified the limits to the conduct of Alitalia imposed by the Commission decision which authorized the aid, and subsequently the Court should have assessed the lawfulness of the conduct realized with respect to the more rigid requirements of the competition law. From this point of view might have been argued that the relevant market was affected, in competition terms, by the presence of aid to a company but at the same time was protected by initiatives of the beneficiary company that amplified the distortive effects of the aid. Following this orientation, the Alitalia conduct could have been considered, notwithstanding the fact that is complying with the State aid rules, unfair and suitable, likely to harm competitors and therefore detrimental to the repressive rules of unfair competition.

Traghetti del Mediterraneo Case [17]

In this case, Fallimento Traghetti del Mediterraneo claimed the company Tirrenia Navigazione, a competitor on the maritime services market in Sicily and Sardinia, for having carried out conducts as unfair as realized as a consequence of the State aid granted under the law 684/74 which would have allowed the company to apply prices below cost. The claim, rejected by the Court of Naples and, subsequently, by the Court of Appeal, has been filed before the Su-

[16] A. Genovese, cit.

[17] Cass., n. 5087, 19 April 2000, Fallimenti Traghetti Mediterraneo S.p.A. c. Tirrenia di Navigazione S.p.A.

preme Court of Cassation which, confirming the correctness of the decisions of the Courts of merit, emphasized that: *i)* the State aid is, in principle, prohibited because not in compliance with competition law; *ii)* the distortive effect generated by the State aid is irrelevant in the assessment of the compatibility of the state measure with the European regulation as this effect is an essential component of the aids and shall be admissible if it is directed to the protection of interests that would not otherwise find satisfaction [18]. In this case, the Supreme Cassation Court stated that the tariffs applied by Tirrenia were not the expression of their own business decisions, but represented the implementation of a specific national regulation and, for this reason, there was no autonomy to constitute an act of unfair competition.

5. Conclusions

The exploration of the areas of intersections and interferences between the rules on aid and the provisions of competition law leads to a wider question, such as whether, when and under what conditions the breach of the public provision in general and in particular the ones on aid constitutes an act of unfair competition, independently regrettable pursuant to and for the purposes of Article 2598 of the Italian Civil Code. If, in legal point, the private enforcement road, aimed at outline an unfair behavior, is open to use every time that the beneficiary undertaking exploits the competitive advantages achieved beyond the aim in respect of which and for the time within the measure is granted, or with exorbitant, excessive and disproportionate methods, on the other hand, in point of fact, the evidence of the illicit and its autonomous relevance is very hard, thus drastically restricting not only the number of actions filed but above all the chance of success.

[18] For a critical remark of the judgment please see L. Arnaudo, *Aiuti di Stato, tariffe e concorrenza: tra competenze chiuse e questioni aperte*, in *Riv. it. dir. pubbl. com.*, 2000, 6, p. 1368.