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MORAL SUASION AND ANTITRUST LAW[1]

ABSTRACT

As a result of the economic crisis caused by the Covid-19 pandemic, the Italian Competition Authority, following other countries, has increased the use of moral suasion. In the context of antitrust law, this observation allows, on the one hand, to assess the impact of alternative instruments to the classic method that is usually applied in antitrust law: legislation, violation, formal warning, sanction. On the other hand, it suggests shifting attention from rules to behaviour, based on the belief that behavioural dynamics between the logical and mandatory contents of the rules and the actual consequences are underestimated.

KEYWORDS: The financial crisis - behavioural sciences - moral suasion - Authority's powers.

1. The financial crisis and the spread of moral suasion

In a recent press release of 20 October 2020, the Italian Competition Authority announced that, with regard to consumer protection, it conducted 89 investigative proceedings in 2019 for unfair commercial practices, violation of consumer rights provisions, unfair clauses, accessibility of payments and any other non-compliance. Most importantly, thinking of alternative instruments to sanction procedures, 59 cases have been resolved by moral suasion[2]. But there is more. The economic difficulties generated by the

[1]The article is part of an interdisciplinary project "Administration and persuasion" by professors of administrative law of Insubria University, that will be published by Mimesis during 2022.

[2]S. MORETTINI, *Il soft law nelle Autorità indipendenti: procedure oscure e assenza di garanzie?,* in *Osservatorio sull'Analisi d'Impatto della Regolazione;* N. PECCHIOLI, *Consob e poteri commendatori di conformazione e unificazione del mercato, in L'intervento pubblico nell'economia,* Firenze, 2016, 525; M. ANGELONE, *Diritto privato regolatorio, conformazione dell'autonomia negoziale e*

pandemic led the Authority, in the first nine months of 2020, to resort to moral suasion in 110 cases compared to 59 in the year before, while the imposition of sanctions was reduced to 49 cases compared to the previous 89 (for a total of 43.9 million compared to 74.6 million).

These data are relevant to scholars trying to assess the impact of alternative instruments used compared to the classic method usually applied in antitrust law: legislation, violation, formal warning, sanction.

The antitrust authorities of major countries were forced to review their policies and intervention methods with a two-fold purpose: to manage investigative activities during the lockdown phase, and (above all) to identify the enforcement tools to be adopted to protect the competition in markets that had suddenly entered a crisis also as a result of production activities blocked by public measures, the reduction in trade and international commerce, as well as a sudden decrease of the demand in a highly depressed economic context and with significant liquidity problems[3].

The antitrust authorities have shifted their attention to prevention and awareness measures. The UK Competition and Markets Authority (CMA) provides a good example: facing a large number of reports of significant and apparently unjustified price increases, especially in the distribution sector, it has immediately written to the companies concerned, even before starting investigations. On the one hand it asked for detailed information on the causes of such anomalies, and on the other hand it highlighted the possible

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controllo sulle discipline eteronome dettate dalle Autorithies, in *Nuove Autonomie,* 2017.

More generally on moral suasion and "persuasion" policies see J. T. ROMANS SOURCE, *Moral Suasion as an Instrument of Economic Policy The American Economic Review* , Vol. 56, No. 5, 1966, 1220- 1226; S.ONGENA, A. POPOV, AND N. VAN HOREN, *The Invisible Hand of the Government: Moral Suasion during the European Sovereign Debt Crisis,* in *American Economic Journal: Macroeconomics* 2019, 346–379; B. DRUPP, M.A.MEYA, *Moral Suasion and the Private Provision of Public Goods: Evidence from the COVID-19* Pandemic, *in Environ Resource Econ.,* 2020, 76, 1117–1138.

[3]F. GHEZZI- L. ZOBOLI, *L'antitrust ai tempi del coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane,* in *Rivista delle società,* 2020, 625.

reputational and sanctioning risks if such increases were to hide violations of antitrust rules.

In this new scenario, the role and action of the antitrust authorities is fundamental: the authorities can certainly initiate, *ex post*, investigations, condemning companies and even imposing high penalties. These actions risk being ineffective: companies that are already relatively weak financially would in fact have great difficulty in paying the fines. Therefore, the CMA has written numerous open letters to the main business associations, summarising the main problems encountered and competition concerns, and illustrating how companies should behave during and after the health crisis to comply with the competition protection rules. These initiatives also seem functional to better legitimise antitrust action in times of crisis, intervening, though not against companies, to protect consumers and citizens.

One must consider that it is indeed the companies that facilitate the elimination of practices suspected to be anticompetitive, before bringing the procedure. Only in this case, they can avoid the sanction. According to a superficial investigation, failure to impose sanctions appears the only reason for collaboration. On closer inspection, through alternative instruments to the usual method of rule/formal warning/sanction, companies choose the most effective measure to eliminate any anticompetitive profiles, avoiding defamation which is extremely damaging to the credibility of a product and, thus, to the manufacturer.

2. Alternative dissuasion tools to the command/formal warning/sanction method: behavioural sciences

First of all, we highlight a dissuasive tool which, with regard to unfair commercial practices, is explicitly regulated in Article 4, letter d, of the Regulation on investigative procedures in the field of consumer protection by attributing to an administrative authority, endowed with undoubted authority, a power other than the traditional one (obligation/violation/formal

warning/sanction). Such power is capable of inducing supervised subjects to a morally and socially correct behaviour. This paper will analyse only the moral suasion in the antitrust field, although we are aware of its numerous applications before independent Authorities. The phenomenon of soft law, very widespread in the international and European context, has also been present for many years in the domestic one[4]. Specifically, prominent, among the soft regulation acts adopted by national public administrations, are the numerous interventions of moral suasion or dissuasion developed by the various independent administrative authorities (IA). One can think, by way of example, of the instructions of the Bank of Italy, CONSOB communications, interpretative guidelines of ISVAP and COVIP, the answers to questions of the Italian Data Protection Authority, the decisions of the AVCP. These interventions are characterised by a high degree of informality and are placed outside the system of prescribed regulatory sources, giving rise to those that in Anglo-Saxon law are called tertiary rules.

Generally, there can be several causes that lead an IA to resort to soft regulation. In some cases, this choice simply represents a shortcut to fill a gap or to anticipate a subsequent binding act; in others, however, the Authority prefers to adopt a persuasive act so as not to excessively tighten the rules of the reference market. Obviously, this type of act does not create binding rules for economic operators. However, it is equally evident that these interventions are not entirely without legal effect, still containing solicitations from authoritative and particularly qualified institutional parties.

When taking into consideration the AGCM's (Italian Competition Authority) moral suasion, one easily notes that it consists in the Authority's power to invite the company concerned to active repentance before starting an actual investigative procedure; the purpose of moral suasion, which is part of the preventive protection tools to avoid disputes, is indeed to find a solution to

[4]S. MORETTINI, *Il soft law nelle Autorità indipendenti: procedure oscure e assenza di garanzie?, cit.*

protect the consumer without it being necessary for the violation (and its consequent punishment) to occur.

Hence, the ultimate objective of moral suasion is to avoid further restrictions leading to the start of a proceeding, something that can still occur at a later time: indeed, should the suggested guidelines not be observed, the Authority will exercise its unilateral and authoritative power, expressing the decision-making powers granted to it by law.

The companies concerned by the communications are guided by the signalling effect attributed to the proposal indications contained in the moral suasion: the Authority provides a series of indications consisting of actual technical suggestions adapted to the specific case which, if accepted and implemented by the companies, will lead to the correction of the current situation and the removal of the competitive issues raised.

The regulatory reference of our legal system, as has already been pointed out, is contained in the AGCM Regulation (Regulation on investigative procedures in the field of consumer protection) issued by the Authority in 2012 and subsequently updated in 2015. We would like to draw attention to this, since letter d) provides for the possibility of dismissal following the removal by the company of any possible deceit or illegality of an advertisement or of any possible unfair commercial practices (moral suasion), under Article 4, paragraph 5. The Authority can announce the outcome of this intervention, which will be communicated to the company, using adequate information methods and evaluating any confidentiality requirements duly justified by the company.

At this point, it is worth mentioning some cases that the Authority has resolved using the moral suasion approach. The analysis highlights the evolution of the Authority's interest in specific sectors. In other words, the pragmatic approach to the study of the cases resolved by the Authority with moral suasion shows that the recipients of communications aimed at removing

unfair practices harmful to consumers, belong, in a first phase, to companies in the food sector[5]. It then involves the digital technology and innovation sectors, crossing the new frontiers of communication and, more precisely, of social media and the more traditional energy sector. Finally, last year the Authority's attention focused on the consequences of the pandemic and, in particular, on banks and financial institutions.

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[5]Noteworthy are the cases solved with moral suasion, to better tell its story, starting from the numerous communications that the Authority sent to companies operating in the food sector: from the sale of frozen products to the unfair advertising campaign of Danone, and to the solicitations to eliminate improper indications from product packaging. In 2013, based on reports from other administrations as well as on elements the Authority itself acquired, the Authority held that several companies had put in place behaviours aimed at promoting the sale of frozen cod-based products, variously denominated with the name "cod", without the packaging adequately listing the exact indication of the fish species or its catch area. With communications of 19 December 2012, 7 May 2013, and 20 June 2013, the Authority requested these companies to remove any possible improprieties on the packaging, by properly indicating, on each part of the package and in any other means of communication, the species or area where the cod was caught. In response to these requests, the companies communicated that they intended to modify the respective packages by providing such indications on the front of each package, with adequate graphic evidence. That same year, based on reports and elements acquired by the Authority, it emerged that Danone Spa had promoted an articulated advertising campaign relating to Danacol. The protagonist – a man of average weight, presumably in his forties – was filmed in everyday-life situations surrounded by "little men" in yellow overalls (a metaphor for cholesterol), with the aim of oppressing the protagonist. By a communication of March 6, 2013, the Authority requested Danone to remove any possible improprieties of the advertisement, eliminating any generic reference – direct and indirect – to the potential onset of cholesterol, reformulating the wording of the claims made in the commercial, as well as mitigating the represented reduction of cholesterol in the spot. This was to diminish the parts emphasising the increase in cholesterol in the whole population and without specific reference to situations of excess, in compliance with the principle that a marked reference to diseases/risks may not be made to cause alarm – or to trivialise the issue – in order to present the product as a required solution to the problem. In response to this request, Danone interrupted the broadcasting of the spot and promised to use certain precautions in future advertisements relating to the product. In the future, a) the commercials will be aimed exclusively at those who already have excess cholesterol; b) they will not contain expressions such as "threat" and "silent enemy"; c) they will not convey the idea of urgent remedies to be taken against the problem ("Take action now!"); d) they will not emphasise the reduction achievable by taking the product. Therefore, in its meeting of 10 April 2013, the Authority held that the moral suasion intervention led to positive results. Again, in the food sector, this time acting mostly upon receiving reports from a consumer association, the Authority found that thirteen different companies had put in place behaviours aimed at promoting the sale of various and well-known food products (an effervescent digestive aid, a salami and some crackers) reporting incorrect information on the packaging and in the media – being ambiguous or not in line with current EU legislation. The information referred to the actual quantity of salt contained and was conveyed through expressions such as: "*with 30% less sodium*" "*little salt*"; "*unsalted*" and "*unsalted on surface*". With separate communications, on 7

Examples should be considered to highlight the difference between a command and control approach and an approach that involves collaboration by the companies.

The first case taken into consideration concerns Amazon and the suspected anticompetitive nature of the online purchase process on amazon.it, which did not show that the contract is concluded when the consumer receives the email confirming shipment of the goods. Therefore, by communication of 27 October 2016, the Authority invited Amazon to remove any possible improprieties. In response to the invitation, Amazon has undertaken the commitment to clarify the information with regard to this specific contractual provision. More specifically: a) in the phase preceding the one where the consumer places the order, it has replaced the words «*proceed to purchase*» with «*proceed to order*»; b) when the consumer is invited to make an offer, it emphasised the information (in the buy box under the «*buy now*» button), that the contract is concluded upon receipt of the mail confirming shipment of the goods; c) following the offer, it reaffirmed the nature of the communications sent in response to the consumer's order. Therefore, in its meeting of 4 May 2017, the Authority held that the moral suasion intervention led to positive results.

The second case is relevant because it concerns the protection of competition. At the end of March 2017, the Authority resolved to proceed with moral suasion against the *"Associazione Pubblici Esercizi di Roma*" (AEPER).

October 2013, and on 3 December 2013, the Authority invited the aforementioned companies to remove any possible improprieties in the communication concerning the respective products, eliminating or adequately modifying the disputed wording on each part of the packaging and, where used, in other advertising media. In response to the aforementioned request, the companies stated that they have deleted or modified or that they intend to delete or modify the communications concerning said products, thus definitively clarifying the actual nutritional value in relation to the presence of salt. More specifically, with reference to crackers, in addition to the elimination of the wording, some operators adopted the indication «*Salty crackers. Without grains of salt on the surface*», while others used a comparative nutritional claim. The new packages were sold as of the following months, once the current stocks were exhausted, while the disclosure on other supports, where provided, took place in full agreement with the changes made to the packaging. Therefore, in its meeting of 5 March 2014, the Authority held the outcome of the moral suasion intervention successful.

The AEPER Board had decided to publish, through some press articles, a series of data relating to the increase of management costs borne by the merchants over the past 10 years. As such, it "recommended" to all public establishments in Rome and the province a gradual increase in price, of between 10 and the 20 cents, for a cup of coffee to be charged to the consumer. The case was dismissed by the Authority at the end of June as, in response to the moral suasion, AEPER adequately corrected its previous communications which suggested to its associates a price increase per cup. More specifically, the President of AEPER stated in a press release that the data disseminated were aimed at focusing attention on the increases in the operating costs of the businesses recorded by the AEPER Study Centre and assured that «*the Roman establishments are willing to support possible higher operating costs without applying any increase in the price of the cup at the counter*».

It is clear that in both cases the companies operating on the market and the association of public establishments in Rome have chosen to change their behaviour, stopping the initiation of the proceeding. However, it is the third case that has most attracted the attention of antitrust law scholars because it allows a comparison between collaboration (through recourse to moral suasion) and the authoritative alternative (the usual command and control method). Therefore, let us take a look at the case of Apple which, as part of the advertising claims made to promote its iPhone 7, advertised the device's water resistance feature including a warranty limitation for the damage caused by liquids. These elements specifically emerged from information posted on Apple's website and in some commercials. Therefore, by communication of 23 February 2017, the Authority invited Apple to remove any possible improprieties. In response, Apple has collaborated with the Authority to provide more detailed information to consumers. On April 26 of the same year, Apple confirmed that the promotional spots deemed relevant by the Authority would no longer be broadcasted in Italy. In addition, the company

reassured that it had updated, on the apple.com/it website, the references in relation to the "splash, water and dust" resistance of the iPhone 7 as well as amended marketing and support materials by informing that «*the warranty does not cover damage caused by liquids in conditions of use not envisaged by the IP67 rating*». Therefore, the Authority considered that the moral suasion intervention led to positive results.

The benefits of resorting to moral suasion are evident: the deceptive profiles of advertising were eliminated in three months with the company's collaboration; it was not deemed necessary to initiate a procedure; sanctions were not applied; but above all the company's reputation did not suffer discrediting consequences in the eyes of potential customers.

Such positive effects are even more evident if we consider the same case, which was again brought to the attention of the Authority exactly two years later, regarding a different iPhone model, specifically the 11 and 11 pro. The Authority again takes into consideration advertising messages in which the feature of the phones being water resistant was enhanced for a maximum depth varying between 4 meters and 1 meter, depending on the model, and up to 30 minutes. According to the Authority, however, the messages did not clarify that this feature exists only in specific conditions, for example during specific and controlled laboratory tests using static and pure water, and not under normal conditions of use of the devices applied by consumers.

In relation to the conduct described above, the Parties were notified of the initiation of investigative proceedings for the alleged violation of Articles 20, 21 paragraph 1, letters b) and g), 24 and 25 of the Italian Consumer Code (*Codice del Consumo*) on November 29, 2019. In this case, the Authority alleged the deceptiveness of the promotional messages of the different iPhone models regarding the "water resistance" feature of each of the advertised products and the respective limitations expressly indicated therein. More specifically, given the emphasis of the "water resistance" feature used to promote the various

products, the warranty exclusion for all sorts of introductions of liquids appeared capable of misleading consumers with regard to the characteristics of the products themselves and the related service rights that must be granted, in particular the legal warranty of conformity and the warranty of the Apple manufacturer. As such, they could make a purchasing decision that they would not have made otherwise. Following a long and complex investigation, a year later the Authority decided that the commercial practice was unfair under Article 21, paragraph 1, letters b) and g), of the Consumer Code, and prohibited its dissemination or continuation. It furthermore imposed an administrative pecuniary sanction of ten million euros. It also required the company to notify the Authority, within 60 days of receipt of the measure, of the initiatives taken in compliance with the formal warning. Last but not least, it required Apple to publish an extract of the resolution, pursuant to Article 27, paragraph 8, of the Consumer Code, for a period of one 180 days on the website www.apple.com/it/ and specifically on the web page www.apple.com/it/iphone/ through a link called «*Consumer protection information*», taking the shape of an icon of the same size as the various iPhone models and positioned next to them. The Authority claimed that the publication should fully reflect the layout, structure and appearance of the extract from the proceedings and the methods of dissemination should not be such as to frustrate the effects of the publication.

3. The Authority's powers with regard to competition and consumer protection

Why is it impossible to ignore moral suasion when speaking of independent authorities in general and, specifically, of the Italian Competition Authority[6]?

[6]Extensive literature exists on the protection of competition in Italy. See, for all, M. ANTONIOLI, *Mercato e regolazione,* Milano, Giuffrè, 2001; F. BASSI – F. MERUSI (edited by), *Mercati e amministrazioni indipendenti*, Milano, Giuffrè, 1993; S. CASSESE, *Negoziazione e trasparenza nei procedimenti davanti alle Autorità indipendenti*, in *Il procedimento davanti alle Autorità indipendenti*, Torino, 1999, 42; S. CASSESE - C. FRANCHINI, *I garanti delle regole*, Bologna, il Mulino, 1996; M. CLARICH, *Autorità indipendenti. Bilancio e prospettive di un modello*, Bologna, il Mulino,

The answer lies not only in the influence that the Authority has on companies (authoritativeness) and in the purpose of its action aimed at promoting morally and socially correct behaviour, but also in the "mixed" nature of its action, between the public and private systems. This hybridization also derives from the fact that the regulatory provisions are not a rule of conduct for the administration, but for those operating on the market. Its application depends on these parties (and not on a public administration instead), in their interactions with other private parties, establishing a trilateral relationship between regulator, regulated parties and the beneficiaries of such regulation. The role of private parties (companies) and their freedom of action[7] clearly appears with the evolution of the Authority's powers within a

2005; ID. *Per uno studio sui poteri dell'Autorità garante della Concorrenza e del Mercato*, in *Dir. amm.*, 1993, pp. 77 ff.; ID., *L'attività di segnalazione e consultiva dell'Autorità garante della concorrenza e del mercato: un presidio contro le degenerazioni del processo politico- parlamentare?*, cit., 1997, p. 85; M. D'ALBERTI - A. PAJNO (edited by), *Arbitri dei mercati. Le autorità indipendenti e l'economia*, Bologna, Il Mulino, 2010; M. DE BENEDETTO, *L'Autorità garante della concorrenza e del mercato,* Bologna, Il Mulino, 2000; F. GHEZZI, *L'attività consultiva, di segnalazione e "conoscitiva" dell'Autorità garante: una premessa,* in *Concorrenza e mercato. Rassegna degli orientamenti dell'Autorità Garante*, 1994, p. 229 ff.; P. FATTORI, *I poteri dell'Autorità garante in materia di intese ed abusi di posizione dominante: diffide e sanzioni*, *cit.,* 877; A. LASPINA - G. MAJONE, *Lo Stato regolatore*, Bologna, Il Mulino, 2000; P. LAZZARA, *Autorità indipendenti e discrezionalità*, Padova, CEDAM, 2001; M. MANETTI, *Poteri neutrali e Costituzione*, Milano, Giuffrè, 1994; F. MERUSI, *Democrazia e autorità indipendenti*, Bologna, Il Mulino, 2000; AA.VV., *I garanti delle regole*, edited by S. Cassese e C. Franchini, Bologna, Il Mulino, 1996; F. MERUSI – M. PASSARO, *Autorità indipendenti*, in *Enc. dir.*, VI agg., Milano, Giuffrè, 2002; V. MANGINI, G. OLIVIERI, *Diritto antitrust*, Torino, Giappichelli, 2000; M. PASSARO, *Le amministrazioni indipendenti*, Torino, Giappichelli, 1996; S. NICCOLAI, *I poteri garanti della Costituzione e le autorità indipendenti*, Pisa, ETS editore, 1996; A. PREDIERI, *L'erompere delle autorità amministrative indipendenti*, Firenze, Passigli editore, 1997; F. MUNARI, G. PERA, *Concorrenza e antitrust,* Bologna, 2001; M. RAMAJOLI, *Attività amministrativa e disciplina antitrust,* Milano, Giuffrè, 1998, 507; ID., *Il contraddittorio nel procedimento antitrust,* in *Dir. Proc. Amm.,* 2003, 665; C. RABITTI BEDOGNI e P. BARUCCI (edited by) *20 anni di Antitrust. L'evoluzione dell'Autorità garante della Concorrenza e del Mercato,* Torino, Giappichelli, 2010; A. POLICE, *Tutela della concorrenza e pubblici poteri,* Torino, Giappichelli, 2008; G. TESAURO, M. TODINO, *Autorità garante della concorrenza e del mercato,* in *Enc. dir.,* VI agg., 2002, p. 112 ff.; G. TESAURO - M. D'ALBERTI, *Regolazione e concorrenza*, Bologna, Il Mulino, 2000; G. TESAURO -M. TODINO, *Autorità garante della concorrenza e del mercato,* in *Enc. Dir., VI agg.,* Milano, 2002, p. 117; L. TORCHIA, *La nuova costituzione economica,* in *L' amministrazione pubblica in Italia*, a cura di S. CASSESE e C. FRANCHINI, Bologna, Il Mulino, 1994.

[7]See A. LALLI, *La disciplina della concorrenza e diritto amministrativo*, Bologna, 2008, who, in his concluding remarks on the relationship between public powers and private autonomy, points out that «*competition prohibitions make sense only if the broadest legal guarantee of freedom of self-determination on the markets is implied. Without the latter, those rules lose their very raison d'être. Thus, their existence in our legal system, traditionally characterised by pervasive control and management of the economy by the public authorities, also justified the necessary re-evaluation of the role of private autonomy in production*

model in which: a) the company's freedom to act and react on the market is its cornerstone, even in the case of anticompetitive behaviour ascertained by the Authority, choosing the measure necessary to resolve the anticompetitive practice; b) the powers attributed to the Authority are not limited to repressing anticompetitive practices by means of sanctions, but are overall aimed at protecting the market.

The starting point is the finding that within antitrust law, which proposes the same public/private dichotomy as Article 41 of the Italian Constitution, the provisions aimed at recognising the companies' fundamental role in their actions and self-determination have always coexisted with provisions limiting their freedom to protect several public interests. In fact, the protection given to this autonomy by the legal system is not "absolute" and can, therefore, be subjected to limitations and be coordinated «*to allow contextual compliance with several constitutionally relevant interests*»[8].

Article 1 of Italian Law 241 of 1990 clarifies that its provisions are issued «*to implement Article 41 of the Italian Constitution to protect and guarantee the right to economic initiative*».

Companies are allowed to define their organisation and business in such a way as to maximise their economic efficiency and to make profitable investments necessary to introduce the appropriate innovations into production processes.

The freedom to conduct business is thus protected in the original structure of antitrust law in that business activities and conduct are not prohibited per se, but only when its goal or effect is to restrict competition. This topic has been extensively dealt with and we here refer to previously theorised considerations[9]. The objective here is to consider the consumer

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processes ».

[8]Constitutional Court, judgment no. 2797 July 2006, in *Giur. It.*, 2007, 2, 303.

[9]C. LEONE, *Gli impegni nei procedimenti antitrust,* Milano, Giuffrè, 2012.

protection model, based, in terms of powers, along the lines of the protection of competition.

Also in this case, the model is flexible both to ensure that the legislation adapts to changing and complex cases, and to allow effective freedom for companies, whose conduct is not strictly prohibited regardless of an effective assessment of its effects on the market.

The Authority's powers are governed such as to respect this freedom; one can indeed argue that in Italian Law no. 287 of 1990 not only inhibitory and sanctioning logics coexist but also consensual ones (think of commitments). First, the Authority has a power to issue formal warnings, which forces companies to eliminate infringements. The rule simply states that the Authority «*sets the deadline for the companies and entities concerned to eliminate said infringements*». The framework of the powers attributed to the Italian Competition Authority is enriched by the provision of the possible imposition of an administrative sanction[10].

In fact, alongside the power to issue formal warnings, paragraph 1 of Article 15 of Italian Law no. 287 of 1990 provides that the Authority orders a pecuniary administrative sanction in cases of serious infringements, taking into account their seriousness and duration. Such sanctions are determined by the Authority and do not exceed 10% of the company's or entity's turnover in the last financial year closed prior to notification of the formal notice.

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[10]On the importance of sanctioning powers within the Authority's functions see M.A. SANDULLI, *I criteri per l'applicazione e la determinazione delle sanzioni,* in *20 anni di antitrust*, *cit.*, 449.

On *ex multis* administrative sanctions see P. CERBO, *Le sanzioni amministrative,* Milano, Giuffrè, 1999; G. ZANOBINI (*Le Sanzioni amministrative*, Torino, 1924, p. 1), who, in 1924, defined the administrative sanction as "a technical penalty", applied to a public administration when exercising an administrative power; M. A SANDULLI, *Le sanzioni amministrative pecuniarie. Profili sostanziali e procedurali,* Napoli, 1983, Jovene, pp. 2 ff. The Author claims to have been able to identify «*the* proprium *of the sanctioning phenomenon in the primarily afflictive essence that characterizes the provisions expressing it, considering not the – albeit indirect – satisfaction of the specific interest that is allegedly unsettled, but rather the other, more general, (public) interest to comply with the legal system (whether this is the general or the administration's specific system). Yet in no case, in light of a higher need for justice, the interference with the system remains unpunished»;* A. TRAVI, *Sanzioni amministrative e pubblica amministrazione,* Padova, CEDAM,1983.

Similarly, Article 17 b) of the Regulation on investigative procedures for consumer protection, already taken into consideration in the first part of this paper, requires that the decision of deception/illegality of advertising messages or unfair commercial practices be accompanied by a formal warning and a financial penalty, as well as possibly by publishing an extract of the measure and/or an amendment declaration and/or by the deadline to adapt product packaging. But alongside these powers, and as an alternative to them, there is moral suasion, an instrument judged by the Authority to be particularly effective in terms of consumer protection and collaboration with companies.

Moreover, consumers have always had a prominent place within the framework of antitrust protection built on the model of European law, established by the national legislator in Italian Law 287 of 1990, interpreted by constitutional caselaw, applied by the Authority and guided by legal scholars[11].

The latter hold that the protection of competition must aim at improving the offer addressed by companies to consumers, who must be free to choose in the absence of deception or constraint between multiple products offered on the market, which can be purchased at a low price to be set without collusion or abuse.

The Authority aiming to give the consumer a central role in the application of competition rules represents an evolution of the antitrust protection system. The inseparable link between the protection of competition and the protection of consumers is consistent with the Authority's mission to protect competition, since the behaviours affecting the consumer's freedom of choice alter the functioning of the market.

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[11]G. DELLA CANANEA, *Complementarietà e competizione tra le autorità indipendenti*, in *20 anni di Antitrust*, *cit.*, 319; G. GUIZZI, *Consumatori e concorrenza nell'esperienza della giurisprudenza civile, ibidem*, 1149; M. LIBERTINI, *La tutela della libertà di scelta del consumatore e i prodotti finanziari*, *cit.*; A. PERA, *Le relazioni pericolose: antitrust e interesse dei consumatori*, in *20 anni d'Antitrust*, 1165; V. ROPPO, *Regolamentazione del mercato e interessi di riferimento: dalla protezione del consumatore alla protezione del cliente?*, *ibidem*, 1186; M. SIRACUSA - F. CARONNA, *Le competenze in materia di diritto dei consumatori*, in *www.agcm.it.*; S. TORRICELLI, Il *mercato dei servizi di pubblica utilità*, *cit.*, 296, who notes that the criterion for balancing individual freedoms is not competiton, but rather social utility, which is to be achieved through competition.

Therefore, moral suasion fits well into the logic of a protection system that places corporate freedom at the centre of the competition rules' effectiveness together with consumer protection. It fits well as an alternative tool to command and control because it reduces lengthy proceedings, avoids the discrediting of companies and adapts to particularly difficult times, such as those that companies are currently experiencing.

4. Concluding remarks

Considering the reflections above, it is appropriate to place moral suasion in a broader framework. The topic, indeed, is not new and its ancient origins are revealed by the studies of behavioural sciences. Some examples showing this can be taken from the work of D. HALPERN, *Inside the nudge unit How small changes can make a big difference* [12].

Scholars approaching the issue *of moral suasion* in Italy, therefore, cannot ignore the very thorough studies conducted in other countries, which show a high sensitivity towards instruments other than the traditional and applied command/obligation/sanction method. The latter should, in fact, not be the only way to force citizens to act in a certain way, considering that less coercive and sometimes more effective methods can be used.

History is full of examples. The first example to consider concerns Frederick the Great of Prussia who, in the mid-1700s, resorted to the art of persuasion in a time of famine, caused by the scarcity of wheat. The sovereign's intuition was not introducing the potato into the army diet, which would have represented a valid nutritional alternative to wheat, but rather to convince the population to accept it. The population, in fact, was unfamiliar with the flavour, considered as insipid, as well as with the way it grew: the tubers produce a crop underground, unlike wheat and maize that sprout from the earth. At first, Frederick the Great adopted a terror-based strategy: he threatened to cut off

[12]D. HALPERN, *Inside the nudge unit* How small changes can make a big difference, Ebury Publishing, 2016.

the nose and ears of all the farmers who would not plant potatoes. He then adopted a much more refined strategy: he ordered his soldiers to mount a guard in front of the potato fields pretending to protect the tubers in order to pique farmers' interest. So it happened, the local peasants noticed their king's conspicuous admiration for the potato flowers and the tubers themselves, and sneaked in to steal and plant the "royal crop". In a short time, many potatoes were stolen and soon they were widely grown and eaten.

Frederick's interventions provide a striking example of the limits of applying laws and sanctions and the power of a subtler approach to change behaviour. And it paid off. In the years of war that followed, unlike many rival nations, the Prussians did not starve. While passing armies could easily raid granaries, potatoes in the ground were far less likely to be taken. In the medical field, there are numerous examples of behaviours that have influenced the conduct of citizens. For example, a major turning point in the use of anaesthetics came when Queen Victoria decided to use chloroform to facilitate the birth of her eighth child in 1853. In the medical establishment of the time, the use of chloroform was extremely controversial, but the Queen's use of anaesthesia was a more powerful message that even the medical establishment could not argue with. When she also used it for the birth of her last child in 1857, the use of anaesthesia to relieve labour pain became widespread, at least among those who could afford it.

Many years have passed since these first interventions and behavioural sciences have demonstrated the impact of tools that can significantly change behaviour at relatively low cost. Policy makers have more reliable tools at their disposal to be used for "soft" behavioural change (instead of legislation and regulations)[13].

[13]D. Kahneman, *Pensieri lenti e pensieri veloci* (Italian translation), Mondadori, 2012; R. H. Thaler, Cass R. Sunstein, *Nudge. La spinta gentile* (Italian translation), Feltrinelli, 2014; R. H. Thaler, *Misbehaving* (Italian translation), Einaudi, 2018; R. Viale, *Oltre il nudge*, Il Mulino, 2018; R. Sutherland, *Alchemy: The Surprising Power of Ideas that Don't Make Sense,* HarperCollins, 2019; A. Zito, *La nudge regulation nella teoria giuridica dell'agire amministrativo. Presupposti e limiti del suo utilizzo da parte delle pubbliche amministrazioni*, Editoriale Scientifica, 2021.

After all, behavioural insights (BI) have greatly expanded our understanding of how the psychological, social and cultural factors that govern human behaviour affect results. Governments increasingly recognise the value of BI – the most recent OECD research has mapped over 200 government units, initiatives and partnerships around the world applying BI to public policy.

The OECD has been at the forefront of documentation and research on the use of BI in public policy in general and in areas such as consumer protection, the environment, financial education, corporate behaviour, public sector integrity, obesity, and regulatory policy. In conclusion, we would like to draw attention to the 2019 OECD document *Delivering Better Policies Through Behavioural Insights, NEW APPROACHES,* because it contains a part relating to competition law. The question they have addressed, through empirical research, aims at understanding how the antitrust regime influences the behaviour of the cartel.

More specifically, the research focused on the punishment regime when cartels are detected, to assess whether there are significant differences in cartel behaviour when the fines imposed are applied to corporate executives and not levied on corporate revenues.

The research exclusively focused on antitrust sanctions, but it is nevertheless relevant for these considerations because it highlights a growing attention to the understanding, through behavioural logic, of antitrust choices and to avoid collusive phenomena to the detriment of consumers.

The hope is to continue to process data from different countries on the impact of moral suasion with regard to the repression of unfair practices to the detriment of consumers, specifically, and of competition in general. In other words, attention must be shifted from rules to behaviour, based on the belief that the behavioural dynamics between logical and mandatory contents of the rules and the actual consequences are underestimated. Studying the law

alone, as legal scholars are used to doing, is in fact unsatisfactory in order to understand the degree of satisfaction and implementation, which also depends on "emotional states" often unknown to legal scholars. Ultimately, the objective is to identify the "persuasion" capacity of the rules, i.e., the mechanisms through which their recipients are more or less inclined to change their behaviour in the direction desired by the legislator.