The role of competition policy and the new rules on unfair trading practices

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THE FOOD SUPPLY CHAIN

• The divergences in concentration between the different food supply chain levels tend to create imbalances in bargaining power and sometimes in buyer market power at different stage.

• Room for request of intervention to protect the weaker side at each stage of the chain.

• **Buyer market power or bargaining power are not substitutable concepts under European competition law:**
  - Buyer market power affects the whole market while bargaining power affects a specific bilateral relationship between a buyer/seller and a specific (or a category of) seller/buyer.
  - European competition law is concerned only with buyer power and its effects on consumer welfare. Bargaining power in the food supply chain is dealt with unfair trading rules (UTP rules).
Some background/2

- Bargaining power and buyer market has led, in recent years, to approve rules:
- **allowing farmers/breeders to organise cartels to cope with oversupply and stronger buyer**
  - Plans of supply regulation for cheese with a protected designation of origin or protected geographical indication (see *article 150 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013)*
- **granting antitrust immunity, in the form of an exemption from the application of competition rules**, for joint sales carried out by producers in some sectors (olive oil, arable crops, veal and beef meat, see *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013*)
- **creating a level playing field on how to tackle UTP (Directive 633/2019)**
The Italian experience in the enforcement of UTP in the food supply chain

- AGCM’s antitrust toolbox (art. 101 and 102 TFUE but also advocacy) to deal with buying market power and cartels issues
  - I768 - Centrale d'acquisto per la grande distribuzione organizzata
  - AS1381 (Modalità di definizione dei piani di regolazione dell’offerta dei formaggi DOP)
  - AS1598 (Prezzi del latte ovino in Sardegna)

- ...and the national legislation on UTP to deal with bargaining power in the food supply chain:
  - art. 62 DL 1/2012
Article 62

- Mandatory written form in B2B contract in the food supply chain (contracts must show duration, quantity, price etc).
- Late payment rules: 30 days for perishables and 60 days otherwise
- A prerequisite for the enforcement is a «significant imbalance in contractual force» between the parties of a B2B relationship
- Forbidden practices:
  - directly or indirectly imposing unfair contractual or extracontractual terms
  - applying dissimilar conditions to equivalent transactions;
  - making the conclusion of contracts subject to acceptance by the other parties of obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
  - Obtaining undue unilateral obligations unjustified by their nature or according to commercial usage
  - implementing any other unfair commercial conduct given the whole set of procurement conditions which characterize contractual B2B relations
- According to article 4 of the implementing Regulation of article 62 is a forbidden UTP also:
  - unilaterally imposing a purchasing price clearly below average production cost
- Very low deterrence from sanctions: 50.000 euro max
UTP cases/1 «significant imbalance in contractual force»

- we can rank market/bargaining power as follows:
  - «Dominant position ex art. 102 TFUE»:
    - i.e. independence of behaviour of a firm with regards to all its competitors, suppliers, clients
  - «Economic dependence» (e.g. relative market power)
    - when a firm enjoys, in its commercial relation with another firm, a situation of real bargainig power coming from the absence of viable and credible alternative in the market
  - «Significant imbalance in contractual force in the food supply chain»
    - Used by AGCM in art. 62 cases
      - weaker standard of proof required (no «absence of viable and credible alternative in the market»)
      - main task here is the protection of the weaker party in the relationship
UTP cases/2 «significant imbalance in contractual force»

- Symptoms for the existence of an «significant imbalance in contractual force»:
  - Strong dimensional asymmetry in terms of turnover, employees, etc
  - % of the weaker firm turnover tied in with the stronger firm
  - Nature of the product involved: (i) homogeneous; (ii) perishable; (iv) non storable; (iv) unbranded
  - Idiosyncratic investments devoted for the supply of the good to the stronger firm (e.g. supply for private labels of supermarket chains)
Eurospin : «the fear factor»

- **Plaintiff**: an association of firms; **Eurospin**: the Italian leader in the discount retail sector (MS >20%)
- **UTP**: two specific contractual terms in the supply agreement between food processing firms and Eurospin
  - «administrative services contribution» (1% of yearly turnover)
  - «end of year» discount (variable)
- Complaint formally withdrawn by the plaintiff after AGCM sent an RFI asking for the names of the allegedly abused firms; case then opened *ex officio*
- During on site inspections AGCM found the name of all 28 firms to whom the two contractual items was applied («private label» producers)
- AGCM sent 28 RFI, 20 out of 21 respondents said the two new contractual items were «negotiated» with Eurospin and «proportional»
- AGCM closed the case finding no infringement
Coop Italia/Celox: «trade spending»

- **Plaintiff**: Celox trade, a fruit trader which supplied «private label» pears to Coop from 1998 to 2014; **Coop**: N°1 in italian food retailing sector

- **UTP**:
  - Coop unilaterally imposed at each year a contract containing a series of clauses (discounts and trading fees) without defining an ex ante quantity to be bought
  - Coop unilaterally imposed extracontractual obligation to Celox aimed at co-partecipating in marketing and/or promotion campaign on the product (so called *trade spending*)
  - Coop unilaterally did not renew the supply contract in 2014 with Celox with a very short notice

- AGCM found that Coop infringed article 62 DL 1/2012 and fined Coop with a sanction of 50.000 euro
Unsold bread: «commercial risk shifting»

- **Plaintiff**: Assipan, one of the leading Italian bakery association; **Abusing firms**: Coop, CONAD, Esselunga, Auchan; Carrefour, Eurospin
- **UTP**: (i) unilaterally imposing on bakeries an (oral or written) obligation to return all the bread unsold at the end of the day; (ii) to obtain a discount on the sell-in price paid the next day measured on the value of the bread unsold the day before (note of credit)
- Return obligation varies among firms and also among different clients (either as for the % of bread to which it is applied and for the value of the bread unsold to form the note of credit)
- This UTP is one of those contained in the «grey list» of Directive 633/2019 and then is prohibited «unless the relating clause has been previously agreed in clear and unambiguous term in the supply agreement between the parties»
- AGCM demonstrated that no negotiation took place between the retailers and the bakeries as for the obligation to return unsold bread
- AGCM found the supermarkets chains guilty and fined them for around 0.6 million of euro in total
Sheep milk prices in Sardegna: «Below cost purchasing price» (1)

- In February 2019 estimates for the average cost for producing sheep milk in Sardegna (70/eurocent per liter) were found below the price paid to the breeders by pecorino cheese manufactures.
- Sheep breeders reacted violently (road blocks, milk poured in the street....)
- AGCM decided to open an investigation on 31 pecorino cheese producers all belonging to the so called «Consorzio del pecorino romano DOP» (protected designation of origin Consortium).
Strong correlation between the production of pecorino, the wholesale price of pecorino, and the price of sheep milk (1)
Strong correlation between the production of pecorino, the wholesale price of pecorino, and the price of sheep milk (2)
Sheep milk prices in Sardegna: «Below cost purchasing price» (2)

- The price/cost divergence is the result of overproduction of both sheep milk and cheese (with a one period lag)
- Pass through on breeders of the poor conditions in the downstream market for pecorino cheese
- Inability of the Regulation on the supply of pecorino cheese to cope with the situation
- Cheese producers and sheep breeders reached an agreement in March 2019 (under the umbrella of the Ministry of Agriculture) which fixed purchasing prices for all 2019 above 70 eurocent per liter
- AGCM advocacy report to the Ministry of agriculture saying that the agreement between producers and breeders on the price of the milk is a violation of article 101 TFUE but.. tolerated, in an antitrust perspective, only due to the emergency situation in Sardegna and thanks to the its temporary nature (it ends in november 2019.....)
- The UTP case was then closed with a no infringement decision
Grano cappelli: «strong seller»

- **Plaintiffs**: single farmers and one farmer association (Confagricoltura)
- **SIS** (Società Italiana Sementiera) won a 15 years exclusive license for selling the seed of «grano cappelli», an old indigenous durum wheat mostly used for premium «bio» products (legal monopoly)
- UTP: SIS is accused of:
  - (i) imposing a condition to farmers which ties the sale of the seed with the obligation to resell to SIS itself the wheat produced
  - (ii) discriminating farmers to whom it sells the seeds
  - (iii) increasing in an unfair way the price of the seeds of grano Cappelli
- SIS defense: all the alleged unfair practices are in fact meant at preserving the «purity» of the wheat and to comply with the scope of the exclusive licensed granted by the Ministry of Agriculture (CREA)
- Case is still ongoing, due to finish next november
THANK YOU FOR YOUR ATTENTION!

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