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THE ROLE OF COMPETITION POLICY AND THE NEW RULES ON UNFAIR TRADING PRACTICES

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INTRODUCTION

- The purpose of this presentation is to address the following issues arising following the implementation of the Directive on UTPs in the agricultural and food supply chain (“**UTPs Directive**”):
 - I. **What interest is protected by UTPs Directive?** Should it be considered only a way of protecting, in a private law perspective, weaker contractual parties or is it aimed also at pursuing the protection of a public interest, namely the market?
 - II. **What is the relationship between UTPs and traditional legal instruments that pursue public interests** (antitrust and discipline to remedy market imbalances) already provided in MSs?

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

- ❑ The legal basis of the Directive is Article 43(2) TFEU, which establishes the Common Agricultural Policy. However, nothing is specified in relation to the UTPs provisions as a tool to **pursue homogeneous conditions of competition** in the agricultural and food supply-chain. Is the protection of market guaranteed, given that public law protection is not clearly and expressly mentioned in the UTPs Directive?
- ❑ Is this approach consistent with national provisions that regulate fair trade in B2B relationships, which create a **link with the protection of competition/competitors and the protection of markets**?



WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

FRANCE

Legal Basis	Level of protection	Enforcement Authority
I. From art. L440-1 to art. L442-11 of the <i>Code de commerce</i> : regulating the commercial relationships between suppliers and distributors	Extensive for <u>weaker contractual party</u> ✓ General sale terms must be laid down in written and explicitly invoiced ✓ Renegotiation of contracts >3 months if they regard products whose price can easily fluctuate ✓ Indication of mandatory terms of payment	<i>Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes</i> of the Ministry of Economy
II. Art. L430-9 of the <i>Code de commerce</i> : regulating UTPs that involve economic dependence	Extensive for <u>weaker contractual party as well as for the market</u> ✓ Stronger party may be obliged to modify, complete or terminate, within a specified period, all agreements and acts by which the concentration of the economic power which has permitted the abuses has occurred	French Competition Authority (<i>Autorité de la Concurrence</i>)



The link between private and public protection is achieved by **entrusting to a public administration the safeguard of competition for the benefit of the market as a whole**

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

GERMANY

Legal basis	Level of protection	Enforcement Authority
Standard competition law provisions: <ul style="list-style-type: none"><input type="checkbox"/> Act against unfair competition<input type="checkbox"/> Act against restraints of competition<input type="checkbox"/> BGB	Low for customers, as the protection leverages on existing legislation on competition against market power	German Competition Authority (<i>Bundeskartellamt</i>)



The link between private and public protection is achieved by sanctioning **abusive behaviours carried out by dominant undertakings** (unilateral practices)

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

ITALY

Legal basis	Level of protection	Enforcement Authority
I. Art. 62, d.l. 1/2012, regulating the vertical supply relationships between the food industry and the supply chain	Extensive for the <u>weaker contractual party</u> ✓ Agreements must in written form ✓ A list of UTPs to be banned at all times (so-called “blacklist”) ✓ Mandatory terms of payment	Italian Competition Authority (<i>Autorità Garante della Concorrenza e del Mercato</i>)
II. Art. 9, l. 192/1998, regulating the abuse of economic dependence	Extensive for the <u>weaker contractual party</u> ✓ The abuse of economic dependence <u>deems the agreement void</u>	Civil judge
	Extensive for <u>the market</u>	Italian Competition Authority <u>if the abuse of economic dependence has relevance for the protection of competition and markets</u>



The link between private protection and public protection of markets is achieved:

- I. By defining “**significant imbalance**”, namely the buyer power that a company can impose independently from the position of the contractual counterparty and linked to the capability of leveraging said position in the market
- II. Entrusting to the Competition Authority the power to review the situation where the economic dependence **affects the whole market**

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

UNITED KINGDOM

Legal basis	Level of protection	Enforcement Authority
<p>Groceries Supply Code of Practice adopted on 4 August 2009 by the Department for Business, Energy & Industrial Strategy, regulating fair and lawful dealing between retailers and their suppliers</p>	<p>Extensive for the <u>weaker contractual party</u> entering into supply agreements with Designated Retailers (<i>i. e.</i> turnover exceeding GBP 1 billion), by which retailers:</p> <ul style="list-style-type: none"> ✓ must deal with supplier fairly and lawfully ✓ must not apply retroactive changes to contracts ✓ must not require a supplier to make any payment in order to secure better positioning ✓ can only de-list a supplier for genuine commercial reasons 	<p>Groceries Code Adjudicator</p>



The link between private and public protection is achieved on the basis of a **threshold**, only on the dimension of the distributor, above which **it is presumed that negative effects on private relationships are likely to generate negative effects also on markets**

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

- ❑ In the main national jurisdictions, protection for the weaker contractual party is connected to the impact on the market of the transaction through different tools:

FRANCE

- I) Case 15-23547, in which the DGCCRF considered that the practices carried out on behalf of Leclerc by its central purchasing entity were unfair because it forced suppliers to lower the prices without any respective counterpart
- II) Case 02-D-44, in which the French Competition Authority fined *Compagnie générale des Eaux* and *Lyonnaise des Eaux* because they exploited their economic dependence vis-à-vis certain common undertakings and consequently abused their joint dominant position

GERMANY

- Standard antitrust tools
- Case B2-58/09, in which the retailer EDEKA exploited its buyer power by imposing certain onerous contractual conditions as well as unlawful terms of payment to its suppliers, in breach of the provisions prohibiting conduct of dominant undertakings

ITALY

- I) Case AL15 *Reso del pane nei supermarket*, in which the specific contractual relationships among suppliers and distributors have been anchored to market dynamics
- II) So far, there are no cases of application of the provisions on the abuse of economic dependence in the agricultural and food supply-chain

UNITED KINGDOM

- Identification of a threshold for the distributor
- Case «Asda Stores Limited» of September 2017, in which the Designated Retailer Asda modified the supply agreements with its suppliers in breach of the principle of the general clause on fair dealing

WHAT INTEREST IS PROTECTED BY UTPS DIRECTIVE?

- ❑ Being the thresholds for the application of the UTPs Directive based on turnover figures identified **simultaneously for both suppliers and distributors**, it could seem that the interest to be protected is only the contractual relationship in itself
- ❑ However, the UTPs Directive's focus is not the individual contractual relationship, but the impact to be generated on the market by **a series** of relationships (based on the imbalance above)
- ❑ Therefore, the UTPs Directive is integrated in the broader system of national provisions on UTPs, although it is formally intended to tackle private relationships, **its final purpose should be the protection of the agricultural and food markets**, which are deserving particular and reinforced legal protection
- ❑ As a consequence, the main interest to be protected is the general market “equilibrium”, which is the final purpose of the competition policy

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

a) UTPs and “pure” antitrust

- ❑ In “pure” antitrust, unilateral conducts become unlawful if the undertaking enjoys a dominant position and if it exploits such dominant position on the relevant market

- ❑ However, not every behaviour by a dominant undertaking is unlawful, in particular if:
 - ✓ competitive conditions on downstream markets are not affected by the behaviour of the dominant undertaking
 - ✓ no reductions or limitations in output/innovation occur
 - ✓ eventual efficiencies are passed-on below the supply-chain

- ❑ **Is the UTPs Directive able to intervene in these cases where “pure” antitrust cannot be enforced** (for instance, because a dominant position cannot be detected or there is no effects stemming from the dominant company’s abuse)?

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

- Abuse of dominance provisions applied in relation to the agricultural and food supply-chain:



A484 – Unilever/Distribuzione gelati

Abusive exploitation of market power consisting in using clauses aimed at maintaining the exclusivity of supplies at the customer base

A224 – Coca-Cola Italia

Abusive behaviour carried out through the imposition of clauses that aimed at imposing the modalities of how the products were displayed in the distributors' sales point



These cases could have been scrutinized also under UTPs provisions for the following reasons:

- ✓ exploitative abuses carried out by stronger parties (suppliers) against weaker parties (distributors)
- ✓ abuses were carried out in the context of a vertical relationship
- ✓ dominant companies' products are must-have products from the distributors' standpoint
- ✓ abuses had relevance not only in the context of the contractual relationship between suppliers and distributors, but for the entire market

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

□ However, the opposite cannot be inferred:



AL15 – Reso del pane nei supermarket
Contractual clauses imposed by retailers to their suppliers of bread were unfair because aimed at imposing excessive and burdensome conditions without any counter performance



AL21 – Sale prices of milk in Sardinia
The price at which processors purchased raw milk from farmers was below the average cost of production



These cases **could not have been scrutinized** also under “pure” antitrust because:

- ✓ certain behaviours have relevance for both UTPs provisions and “pure” antitrust (see for instance below-cost sales occurred in Proceedings AL21), **BUT**
- ✓ **it was not possible to find a dominant position on the relevant market, therefore no harm to competition could have been detected**

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

- ❑ “Pure” antitrust does not cover the full range of behaviours that can be sanctioned under the UTPs Directive. In this regard, the UTPs Directive introduces effective tools, as the new provisions are able to detect cases which would have not been analysed under the abuse of dominance rules
- ❑ Therefore, there is **no substitutability** between the two legal instruments
- ❑ The added value of the UTPs Directive is the protection of the agricultural and food supply-chain by sanctioning a **wider spectrum of behaviours**, namely not only when it is possible to detect an abuse of dominance, but also when a position of dominance cannot be found but there is an unlawful exploitation of market power



Relationship of **complementarity**

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

b) UTPs and unfair commercial practices

- ❑ Unfair commercial practices provisions under the Consumer Code tackle relationships between consumers and undertakings. They are relevant, in B2B relationships, only for micro-enterprises identified on the basis of the size figures provided at European level and namely:
 - ✓ less than 10 employees
 - ✓ turnover below 2 million EUR

- ❑ Is there any overlap between UTPs Directive and unfair commercial practices provisions, in particular when these latter are applied in relation to micro-enterprises ?

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

- ❑ Looking at the national decisional practice related to the application of national UTPs provisions, it is possible to conclude that the weaker contractual parties protected by UTPs provisions **could have likely satisfied also the criteria to be classified as micro-enterprises**:
 - ✓ **AL12 – Eurospin/contractual conditions with suppliers**: suppliers harmed by the distributor had very small dimension in terms of overall size and turnover achieved;
 - ✓ **AL14 – Coop Italia/contractual conditions with suppliers**: tiny turnover achieved by the suppliers
 - ✓ **AL15 – Reso del pane nei supermarket** and **AL21 – Sale prices of milk in Sardinia**: suppliers were very small in terms of turnover, and were mostly comprised of family-managed companies

- ❑ Nonetheless, the test for applying the two is different: UTPs require a higher standard with the **existence of a significant imbalance** and a **link with the protection of market**, whereas unfair commercial practices provisions introduce the general principles of **honest market practice**, **good faith** in the trader's field of activity and **misleading practices**

RELATIONSHIP BETWEEN UTPS AND OTHER LEGAL INSTRUMENTS

- ❑ As for UTPs provisions, the criteria of honest market practice, good faith and misleading practices create the link between private contractual relationships and the public protection of the market:
 - ✓ in France and Italy the enforcement authority with competence on unfair commercial practices is the same of UTPs rules (*DGCCRF* in France and *AGCM* in Italy)
 - ✓ in Germany the *Bundeskartellamt* enforces unfair commercial practices when there are substantial, permanent or repeated infringements of consumer protection law provisions that will harm a large number of consumers, whereas Regional Courts have competence over specific behaviours violating the Act against unfair competition
 - ✓ in the UK the CMA oversees, as a general rule, unfair commercial practices that constitute misleading or comparative advertising

- ❑ Therefore, there is an overlap concerning UTPs and unfair commercial practices provisions with regards to the subjective (companies to which the rules apply) and the objective (interest protected by the body of rules) profile



Relationship is alternative

CONCLUSIONS

- ❑ The interest protected by UTPs Directive is only apparently belonging only to private law. In fact, UTPs provisions introduce rules to be applied with regard to the entire context of the market, and must be implemented and interpreted in line with the provisions already in force in Member States
- ❑ Therefore, the competence to enforce these provisions should be on the Competition Authorities, which are the best-placed public administrations to intervene on contractual relationships between operators in the agricultural and food supply-chain, and consequently are in charge of pursuing also the public protection of the market
- ❑ In this regard, the provisions concerning UTPs and other legal instruments pursuing public protection of the market are in a relationship of complementarity, in relation to “pure” antitrust, or of alternativity, in relation to the application of some unfair commercial practices provisions
- ❑ Accordingly, these different provisions are able to provide a consistent form of protection, having regard to the different burden of proof and the possibility to enforce different, but complementary, bodies of rules

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