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Bargaining power and unfair trading practices in the agri-food chain

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1. *Introduction*

The Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter referred to as the 'Dir. 2019/633') is explicitly intended to «*combating practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another*» (art. 1, par. 1).

According to the EU legislators' position, on the basis that «[w]*ithin the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence*» (recital n. 1), «[t]*hose imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction*» (recital n. 1). EU legislators intend to combat such unfair business practices as these «*are likely to have a negative impact on the living standards of the agricultural community*» (recital n. 1).

In basic terms, in order to safeguard and support the standard of living of the agricultural community, Dir. 2019/633 prohibits those unfair trading practices identified by the same directive and regarded to have as a genetic

requirement a difference in bargaining power between the supplier (who is presumed to have less bargaining power than his counterpart) and the buyer.

For the EU Legislators, the assumption of a discrepancy in bargaining power between the supplier and the buyer is an essential element of an unfair trading practice.

Indeed, recital 9 expressly states: «*The number and size of operators vary across the different stages of the agricultural and food supply chain. Differences in bargaining power, which correspond to the economic dependence of the supplier on the buyer, are likely to lead to larger operators imposing unfair trading practices on smaller operators. A dynamic approach, which is based on the relative size of the supplier and the buyer in terms of annual turnover, should provide better protection against unfair trading practices for those operators who need it most. Unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain. Enterprises larger than SMEs but with an annual turnover not exceeding EUR 350 000 000 should also be protected against unfair trading practices to avoid the costs of such practices being passed on to agricultural producers. The cascading effect on agricultural producers appears to be particularly significant for enterprises with an annual turnover of up to EUR 350 000 000. The protection of intermediary suppliers of agricultural and food products, including processed products, can also serve to avoid the diversion of trade away from agricultural producers and their associations which produce processed products to non-protected suppliers*».

From this assumption derives a European discipline that requires, as an essential element for the application of the directive itself, a significant difference in economic size between the seller and the buyer of the agri-food product, which must be on the lower and upper ends of a given yearly turnover threshold (2, 10, 50, 150, and 350 milions), introducing a so-called «*staggered mechanism*».

By making use of the option to maintain or introduce national rules stricter than the European rules, as allowed by Article 9 of the Directive, in implementing the Directive into the Italian legal system, the Italian legislator has decided to make no distinction and to apply the provision of Legislative Decree 198/2021 to all commercial relations of the agri-food supply chain, without requiring a different economic dimension between seller and buyer and, presumably, a different negotiating power.

In light of the above, the purpose of this essay is to determine whether the Italian legislator's decision to eliminate the so-called «*staggered mechanism*» renders irrelevant the different economic size and bargaining power of the two parties in a commercial relationship, or whether the assessment

of such profiles nevertheless finds a way to influence the application and interpretation of the Italian implementing legislation, at least in certain hypotheses.

Therefore, I will examine the so-called «*staggered mechanism*» outlined in the European directive, including its characteristics and potential limitations (par. 2); examine in detail the cases of unfair trading practices contemplated by the Italian implementing regulation in order to identify, where applicable, any general or specific reference that highlights – for the purposes of the prohibition – the different economic dimensions and bargaining power of the various parties in the commercial relationship (par. 3 et seq.); and provide some final remarks regarding a possible improved Italian discipline interpretation (par. 4).

2. *The so-called european «staggered mechanism» and the presumption of bargaining power imbalance*

Article 1, paragraph 2, of the Directive states the following in determining the scope of the European directive based on the evaluations outlined in Recital 9:

> «*This Directive applies to certain unfair trading practices which occur in relation to sales of agricultural and food products by:*
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> suppliers which have an annual turnover not exceeding EUR 2 000 000 to buyers which have an annual turnover of more than EUR 2 000 000;
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> *suppliers which have an annual turnover of more than EUR 2 000 000 and not exceeding EUR 10 000 000 to buyers which have an annual turnover of more than EUR 10 000 000;*
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> *suppliers which have an annual turnover of more than EUR 10 000 000 and not exceeding EUR 50 000 000 to buyers which have an annual turnover of more than EUR 50 000 000;*
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> *suppliers which have an annual turnover of more than EUR 50 000 000 and not exceeding EUR 150 000 000 to buyers which have an annual turnover of more than EUR 150 000 000;*
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> *suppliers which have an annual turnover of more than EUR 150 000 000 and not exceeding EUR 350 000 000 to buyers which have an annual turnover of more than EUR 350 000 000*».

In a nutshell, a trading practice can be deemed unfair in accordance

with the European directive only if the provider and customer demonstrate a disparity in their respective turnovers. Specifically, given the turnover stagger in which the supplier is placed (e.g., the second stagger provides for a supplier's turnover between EUR 2 million and EUR 10 million), the buyer's turnover must exceed the upper limit of the supplier's stagger (i.e., EUR 10 million in the example) in order to apply the directive.

According to the apparent reasoning of the European legislator, recital 14[1] establishes that the aforementioned gap in revenues is regarded as adequate proof of different and substantial negotiating power.

However, it should be noted that the directive's «*staggered mechanism*» appears to be unduly rigid, mechanical, and not always adapted to fulfilling the directive's objective of targeting commercial relationships in which significant differences in bargaining power may lead to abuse.

First, the mechanism is designed so that the closer the supplier's and buyer's turnovers are, the less (assuming the turnover equals bargaining power equation is valid) the application of the directive is consistent with the stated objective, resulting in the Directive's application when the «*economic size*» of the two parties to the commercial relationship is nearly identical or very close. I will just present one example: the Directive applies even if the supplier has a turnover of 9.999.000,00 euros and the buyer has a turnover of 10.000.001,00 euros. In these instances, it is evident that the turnover cannot be used as a trustworthy indicator (the EU legislators use – Whereas 14 – the term «*suitable approximation*») of a different negotiating power.

Second, the mechanism does not appear to be less stringent when it eliminates the application of the Directive if the supplier and buyer are in the same staggered but have significantly different annual turnover. Let me give you another example: the directive does not apply if the supplier's turnover is 150 million euros plus 1,00 euro and the buyer's turnover is euros 349.999.999,00. Contrary to the apparent intent of the EU legislators, in this instance a difference of 200 million euros would not be considered to indicate a considerable disparity in negotiation power.

Consequently, as a preliminary conclusion, I share the concerns over the

[1] Recital n. 14 states: «*This Directive should apply to the business conduct of larger operators towards operators who have less bargaining power. A suitable approximation for relative bargaining power is the annual turnover of the different operators. While being an approximation, this criterion gives operators predictability concerning their rights and obligations under this Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or are significantly less vulnerable than their smaller partners or competitors. Therefore, this Directive establishes turnover-based categories of operators according to which protection is afforded*».

aforementioned «*staggered mechanism*» established by the EU legislators, as well as the relief that it has not been applied in Italian law, due in part to my personal aversion to mechanistic and merely algebraic legal solutions, which do not allow the legal rule (*ius positum*) to adapt to the concrete reality of the facts (properly subsumed and within the limits granted by the legal system) and to be implemented taking into account features that are typically ambiguous and cannot be framed in precise mathematical terms. The measuring of turnover (and the mere comparison of numerical data) for the purpose of opposing the (potential) illegal prevarication of one entrepreneur over another is, in my opinion, a striking indication of the death of the legal rule's vital capacity to adapt (in order to be correctly applied in accordance with its underlying rationale) to the particular case.

3. *Objectively unfair trading practices, unfair trading practices if not agreed upon and unfair trading practices as imposed*

Legislative Decree 198 of 2021 (which implemented Dir. 2019/633 in Italy) states that it lays down provisions for regulating business relationships and combating unfair trading practices between buyers and suppliers of agricultural and food products, defining the prohibited trading practices as contrary to good faith and fair dealing and unilaterally imposed by one trading partner on another, rationalising and strengthening the existing legal framework towards greater protection of suppliers and operators active in the agricultural and food supply chain in relation to the aforementioned practices (Art. 1, par. 1)[2].

The trading practices listed in Articles 3 (Principles and essential elements of sales contracts), 4 (Unfair trading practices), and 5 (Other unfair trading practices) are therefore prohibited under Legislative Decree 198 of 2021 if they a) violate the principles of good faith and fair dealing and b) are unilaterally imposed by a contracting party on its counterparty.

Leaving aside the question of whether the lists and cases referenced

[2] The Italian original text is the following one: «*Il presente decreto reca disposizioni per la disciplina delle relazioni commerciali e per il contrasto delle pratiche commerciali sleali nelle relazioni tra acquirenti e fornitori di prodotti agricoli ed alimentari, definendo le pratiche commerciali vietate in quanto contrarie ai principi di buona fede e correttezza ed imposte unilateralmente da un contraente alla sua controparte, razionalizzando e rafforzando il quadro giuridico vigente nella direzione della maggiore tutela dei fornitori e degli operatori della filiera agricola e alimentare rispetto alle suddette pratiche*».

in Articles 3 to 5 of Legislative Decree 198/2021 are exhaustive or not, it must be assumed that the lists and cases referenced in the aforementioned articles of the Italian legislative decree have been identified to facilitate interpretation by providing a number of predefined cases in which the trading practice may be regarded as contrary to good faith and fair dealing (nonetheless, some of these cases are so «open» that the interpreter must examine them from the standpoint of breach of good faith and fair dealing).

Beyond the objective content of the unfair trading practice (which is fairly well defined by the Italian legislature), the question remains as to whether the trading practices affected by unfairness and, therefore, prohibited and sanctioned, must also be characterized by a specific genetic mode, i.e. the unilateral imposition of one party on the other or, at the very least, the ability of one party to (unilaterally[3]) impose itself on the other

To address this question, it is necessary to analyse and understand the relationship that our legislator intended to establish between Article 1 of Legislative Decree 198/2021, which defines prohibited trading practices as those «*unilaterally imposed by a contracting party on its counterparty*», and Articles 4 and 5 (although, sound reasons can suggest that the evaluation should also include Article 3), which provide lists of prohibited trading practices without reference to one party's ability to impose itself on the other. In other words, one wonders whether the imposition of the unfair trading practice (which frequently takes the form of a specific contractual phrase or a specific action in the performance of the contract) is a prerequisite for the application of the Articles 4 and 5 lists; thus, before any of the practices on the aforementioned lists could be deemed unfair and prohibited, it would be essential to examine and identify the presence of this prerequisite.

In this regard, whereas with regard to the repealed Article 62 of the Decree-Law of 24 January 2012, regulating the matter before the implementation of the Dir. 2019/633, the position of the legislator and the supervisory authority was clear in requiring greater commercial strength, Legislative Decree 198/2021 is silent, so it is up to the interpreter to determine the relationship between Article 1's general requirements and the listings in Articles 4 and 5.

To comprehend their core and rationale, I deem it necessary to analyse in depth the numerous cases of unfair trading practices identified by Italian law.

[3] I employ the adverb «*unilaterally*» one last time since I believe the imposition can only be unilateral and, therefore, the Italian legislator's use of the adverb seems unnecessary.

3.1. *Objectively unfair trading practices*

As previously mentioned, despite the language provisions of Article 1, Legislative Decree 198/2021 identifies and deems unlawful a number of unfair trading practices from a purely objective standpoint, without permitting an evaluation of the negotiating power relationship between the parties and without any agreement from the parties establishing the legality of such practices.

First, according to Article 3 of Legislative Decree 198/2021, the oral conclusion of sales agreements, the absence of a written agreement prior to the transfer of products, the omission of key terms in the sales contract, and the duration of sales contracts lasting less than one year are unquestionably unlawful.

Second, any objectively specified and identified trading practices referred to in Paragraph 1 of Article 4 of Legislative Decree 198/2021(such as inability to meet specified payment deadlines or certain conducts typically attributed to the agri-food products purchaser), for which the legislator does not appear to require a specific strength-weakness relationship between the parties, must be considered unlawful (and sanctioned).

Certain trading practices objectively identified in Article 5 of Legislative Decree 198/2021 are prohibited (and sanctioned) as well. Specifically, these are the practices mentioned under a, b (with particular reference to the sale of agricultural and food products below production costs), c, j, and k. In each of these instances, the restriction appears to exist on the basis of the business practice's sheer occurrence.

Article 5 of Legislative Decree 198/2021 also prohibits other trading practices that may only be objectively determined, albeit with less clear interpretative and applicability boundaries. I am referring to the prohibition of:

a) applying objectively dissimilar conditions to identical services (sub-paragraph e), Article 5 of Legislative Decree 198/2021);

b) conditioning the conclusion and execution of contracts as well as the regularity of commercial relations to the performance of contractors that, by their nature and according to commercial usage, have no connection to the subject matter of each other (sub-paragraph f), Article 5 of Legislative Decree 198/2021);

c) obtaining unilateral advantages that are not warranted by the nature or content of the commercial relationships (sub-paragraph g), Article 5 of Legislative Decree 198/2021).

Since it is evident that, with respect to the aforementioned collection of practices, no consideration is given to whether or not one party imposed the practice on the other (without regard to the parties' potential differences in negotiating power), it is reasonable to assume that all of these practices share the legislator's prior and conclusive (irreversible) view that they violate the norms of (objective) good faith and fairness that the law imposes as a prerequisite for the formation of a contractual relationship and its performance.

The mechanics of the legislative stigma with which such business practices are definitely and irretrievably branded renders them of little consequence with respect to the analysis of the rationale behind the prohibition as it exists in the Italian legal system.

3.2. *Unfair trading practices if not agreed upon*

From the perspective of comprehending the rationale behind the prohibition of certain trading practices, it is more interesting to consider those trading practices in which the agreement between supplier and purchaser renders valid certain conducts that the legislator would otherwise deem unfair.

In fact, in addition to objectively unfair practices mentioned in the Directive (Article 3, paragraph 2), the Legislative Decree 198/2021 also identifies certain trading practices whose validity is «saved» by the parties' agreement despite being abstractly unfair. These are the trading practices described in Article 4(4) that, if previously agreed upon by the supplier and customer in clear and unambiguous terms, cannot be considered unfair and are therefore neither prohibited or sanctioned.

Regarding these practices, the Italian legislator (as well as the European legislators) accords significance to the parties' common will, which is formalized in the agreement, and retrieves one of the two profiles that, according to Article 1 of Legislative Decree 198/2021, represent unfair trading practices: the imposition of the trading practice. Indeed, the parties' agreement must be construed in a substantial and not only formal meaning. Moreover, upon closer analysis, given that all of these practices involve a request by the buyer and an adherence by the supplier (which may suffer a greater financial burden as a result of the practice he agrees to), the mutual agreement between the parties finally results in the supplier's ability to make the practice fair or unfair based on its voluntary and unquestionable assent.

Now, as a reasonable supplier would not agree to a trading practice

that (when evaluated individually) would amount to nothing more than a financial burden for him, a supplier-buyer agreement regarding such practices could only be reached if the buyer proposes a contractual condition to the supplier (e.g. a higher price, a larger commitment to purchase, etc.) that guarantees the supplier to be fully compensated (at least in theory) for the additional economic burden that he/she will have to bear.

There is, of course, the possibility that a particularly powerful buyer (in terms of bargaining power) could effectively compel the supplier to give his/her consent; for instance, by convincing the supplier that any future (or other) commercial relationship with the buyer (who may be a buyer of paramount importance to the supplier, verging on indispensability for the supplier's company survival) would be severed if the unwanted condition is not accepted.

Nevertheless, in my opinion, even in the aforementioned instance (in accordance with the general principles of the law), the burden of proving the imposition of an unfair trading practice will always rest with the supplier, in conformity with the customary principles and procedures of evidence. In this regard, given that the Italian legislator did not want to replicate the European «*staggered mechanism*» that emphasized the different economic power of the parties, it seems illogical to assert that a buyer's strong bargaining power would automatically lead to the imposition of the trading practice. In other words, a reversal of the burden of proof appears inadmissible in the case of a trading practice that has been previously defined in writing using clear and unambiguous terms; the party claiming its consent was coerced must demonstrate the form and manner of the compulsion that led to the imposition of the practice.

3.3. *Unfair trading practices as imposed*

A third category of prohibited trading practices can be enucleated by examining the hypotheses in which the Italian legislature, by expanding the number of unfair trading practices considered by the Directive, demands an extra criterion regarding the relationship between the supplier and buyer of agri-food products to determine unfairness: the imposition of the practice (i.e., of the contractual clause) by one party on the other party.

In particular, Article 5 of Legislative Decree 198/2021 provides that:

a) in one instance (letter b), the imposition should be to the seller/supplier's detriment;

b) in other instances (letters m, n, o, and p), the imposition should be to the purchaser's detriment;

c) in three instances (letters d, i, and l), the imposition may be equally detrimental to the supplier or the buyer.

In these instances, since the unilateral imposition of the trading practice is a defining characteristic of the trading practice's unfairness (consequently, if there were no imposition, the trading practice would not be unfair), the precise content of this characteristic must be defined.

According to one of the most popular Italian dictionaries, the verb 'impose' means to rule or to command, by virtue of a legal or moral authority or an acquired position of strength, sometimes with a more or less explicit sense of constraint or overwhelming[4].

Therefore, imposition requires a dominant position of one contracting party over the other. In other words, imposition requires that one party has a status (in the sense of a *de facto* condition) that enables such party to impose its will on the weaker party in the event of a conflict (i.e., when a party does not freely agree to a particular contractual provision or business partnership stipulation), leaving the weaker party with the following options: accept the proposed contractual condition or be forced to reject the contract and the commercial relationship.

The '*de facto* condition' that places one party in a 'position of strength' or a specific 'position of weakness' relative to the other party is variable and oscillates between two extremes that must be evaluated in light of precise and particular circumstances.

At one extreme is the inevitable necessity for one party (the 'weaker party') to establish a certain contractual and commercial relationship that enables it to attain (otherwise unattainable) objectives. In the context of the agri-food chain, for example, the producer of fruit and vegetable food must sell his harvest before it spoils and becomes unsellable, resulting in the irretrievable loss of economic resources employed to generate the harvest. In a similar fashion, it is essential for the operator in the chain to stock those «must-have» food products in the store, as they are essential to the spending of virtually every consumer. Otherwise, the consumer will immediately turn to a competing operator, resulting in the progressive loss of customers and the eventual closure of the business.

[4] G. Devoto, G.C. Oli, *Il dizionario della lingua italiana*, ed. 2000-2001, Firenze, 2000, p. 997. The Italian definition in the dictionary is the following one: «*prescrivere o comandare, in virtù di un'autorità giuridica o morale o di un'acquisita posizione di forza* […] *talvolta con un senso più o meno esplicito di costrizione o sopraffazione*».

At the opposite extreme is the party's lack of need to enter into a particular and specific contractual and commercial relationship in order to achieve its objectives, which it may do through other alternative contractual and commercial relationships. Continuing with the examples from the preceding paragraph, such is the situation for the producer of fruit and vegetable food who has many and differentiated options for selling his products, allowing him to theoretically pick between several purchasers based on the contractual and economic connection that best suits his preferences (economic and contractual in general); similarly, the purchaser of fruit and vegetable foods has the capacity to select from a number of producers of his preferred food, all of whom are theoretically willing to offer him their products.

In most cases the relationship between the supplier and the buyer (and their conflicting interests and needs) will fall somewhere between the two extremes described above. Thus, a concrete and careful analysis is required to determine which of the two parties has the real and effective power to impose itself on the other and to «wrest» acceptance of the trading practice (of the contractual clause) that is in theory unfair to the other party.

Regarding the first profile, I believe that the assessment of the bargaining power relationship (and, consequently, the ability of one party to impose itself) cannot be reduced to a simple numerical comparison of the two parties' respective turnovers. Rather, as previously indicated, it will be important to determine globally (and not mechanically) which of the supplier and the buyer has the greatest need and urgency to enter the commercial partnership in order to sell or acquire the agri-food products, leaving him unable to negotiate and ultimately unable to reject the contractual clause as presented by the other party.

Regarding the second profile, it should not be forgotten that a clause that objectively falls under the unfair trading practice at issue here (e.g., an apparently unjustifiably onerous contractual condition, theoretically prohibited under Article 5(d) of Legislative Decree 198/2021) may not have been imposed, but properly signify the mere concession of one party to the other in exchange for another contractual condition favourable to the former, which thus achieves the perfect contractual balance.

4. *Final remarks*

Despite what is stated in the provision governing the scope of application of Legislative Decree 198/2021 (the imposition of the unfair trading practice or, at the very least, the capacity of one party to impose itself on the other), the Italian law creates a split in the fight against unfair trading practices, in my opinion and in light of the direction the actual application of the rule appears to be taking.

The mentioned split occurs between trading practices that can be defined as «*objectively unfair*» and trading practices that can be defined as «*subjectively unfair*».

Former practices are prohibited regardless of the relative negotiating power of the parties and, hence, regardless of the imposition of terms or manner of the commercial partnership by one party on the other (see paragraph 3.1). The second category of unfair business practices are those in which one party (due to its dominant negotiation position and overwhelming bargaining power) imposes itself on the other party (see paragraph 3.3) compelling this party to accept undesirable clauses and/or modalities of the contractual relationship. I believe this second category should also include those trading practices whose possible unfairness is neutralized by the parties' agreement (see paragraph 3.2).

According to this reconstruction, therefore the interpretation that the unilateral imposition is not a 'constitutive fact' (but rather an 'impeditive fact') of the unfair trading practice has to be rejected; also rejecting the conclusion that the burden of proving that any unfair commercial practice has not been imposed would definitively be on the buyer[5]. Actually, if this interpretation can be accepted respect to the practices I have identified as «*objectively unfair*», it appears to lack sufficient grounds with respect to «*subjectively unfair*» practices. Indeed such interpretation disregards the Italian regulation's textual data and the rationale of the European and implementing Italian regulation. Regarding these latter practices, in my

[5] According to an Italian scholar (S. Pagliantini, *L'attuazione della direttiva 2019/633/UE e la* toolbox *del civilista*, in *NLCC*, 2/2022, 397-398) «*scartata la differenza dei fatturati* […n]*ell'economia dell'art. 1, insomma, la dipendenza* economica *dell'impresa vessata, eletta a* fatto costitutivo*, nell'art. 9 L. n. 192/98,* non è *un co-elemento di applicabilità per la ragione che l'impresa subalterna è tutelata quantunque* non versi *in un difetto di alternative economiche soddisfacenti* […] *il d.lgs. n. 198/21 non fa quindi dell'imposizione unilaterale un fatto costitutivo bensì impeditivo, con il risultato che è la GDO ad avere l'onere di fornire la prova che il venditore, o per la quantità dei prodotti forniti o per il suo potere economico, era nella condizione di negoziare e di ottenere la soppressione delle clausole inique*».

opinion the party asserting the unfairness of the trading practice must continue to carry the burden of proving that it has been subjected to the imposition by producing sufficient factual and/or legal evidence.