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Questionnaire – Fragebogen

Commission I – Kommission I

RÈGLES DE CONCURRENCE EN AGRICULTURE

COMPETITION RULES IN AGRICULTURE

WETTBEWERBSREGELN IN DER LANDWIRTSCHAFT

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ITALIAN NATIONAL REPORT

SUMMARY: 1. A brief overview over antitrust law in Italy. – 2. POs and IOs in the new regulation on the common organisation of markets in agricultural products (CMO). – 3. The power to engage in contractual negotiations attributed to some POs under Regulation (EU) No. 1308/2013: a too shy approach by the European legislator? – 4. Antitrust rules in Regulation (EU) No. 1308/2013 and their inadequacy for the purposes of protecting agricultural producers vis-à-vis the market.

A brief overview over antitrust law in Italy.

Before a few critical remarks about the specific EU antitrust discipline for the agricultural sector, it is useful to provide some information with regard to the internal one in Italy.

In our Country we have a general (not specific for the agriculture sector) antitrust law (n. 287/1990), and its enforcement is assigned to the National Antitrust Authority.

Law 287/1990 does not set out any privilege for agricultural producers but it contains the provision that the whole law has to be interpreted in accordance with the EU antitrust rules, so it should be undoubtful that the domestic law has to grant to the agricultural producers the same privileges of the EU legislation. Actually, this conclusion could be object of some concerns, as in the '90 the antitrust Authority opened an investigation about production plans of Grana Padano and Parma ham, both PDO products.

Apart from the legal framework relating to competition, legal provisions on unfair trading practices have been set out with Article 62 of Law Decree no. 1 of 2012 (converted, with amendments, into Law no. 27 of 2012)[1], with specific reference to both the agricultural and food sectors.

Pursuant to Article 62, Law Decree no. 1 of 2012, the contracts concluded between agricultural producers and processors or distributors for the delivery of the agricultural products listed in annex I TFEU (as well as

[1] On contracts for the delivery of agricultural and food products pursuant to Art. 62, Of Law Decree no. 1 of 2012, converted into Law no. 27 of 2012, recently amended by Art. 2 of Law no. 91 of 2 July 2015 converting Law Decree no. 51 of 5 May 2015; see ALBISINNI, *Cessione di prodotti agricoli e agroalimentari (o alimentari?): ancora un indefinito movimento*, in *Riv. dir. alim.*, 2012, n. 2, 33 ff.; ARTOM, *Disciplina delle relazioni commerciali in materia di cessioni di prodotti agricoli e agroalimentari, ibidem*, 42 ff.; GERMANÒ, *Sul contratto di cessione di prodotti agricoli e alimentari*, in *Dir. giur. agr. alim. amb*., 2012, 379 ff.; TOMMASINI, *La nuova disciplina dei contratti per i prodotti agricoli e alimentari*, in *Riv. dir. alim.*, 2012, n. 4, 3 ff.; JANNARELLI, *La strutturazione giuridica dei mercati nel sistema agro-alimentare e l'art. 62 della legge 24 marzo 2012, n. 27: un pasticcio italiano in salsa francese*, in *Riv. dir. agr.*, 2012, I, 545 ff.; TURIN, *La nuova disciplina dei contratti e delle relazioni commerciali di cessione dei prodotti agricoli e alimentari*, in *Contr. e impr.*, 2013, 1425 ff.; sia altresì consentito il rinvio a RUSSO, *I contratti di cessione dei prodotti agricoli e alimentari (e quelli di cessione del latte crudo): nuovi tipi contrattuali per il mercato agroalimentare?* in *Le nuove leggi civ. comm.*, 2013, 199 ff.; ID., *I nuovi contratti agrari*, cit. Concerning the former legislation, see TAMPONI, *Contratti di subfornitura e contratti agro-industriali: due leggi a confronto*, in *Scritti in onore di E. Romagnoli*, Milan, 2000, II, 1303 ff.

food products as per Regulation (EC) No. 178/2002[2], again in business-to-business contracts) are required to be in written form and have a minimum content in terms of the contractual provisions set out therein; this regulatory requirement is backed by administrative penalties. It seems that such provision comply with the similar disciplines provided by Art. 168, together with Art. 125 and 148, Reg. 1308/2013. However, if we take a closer look, the scopes of application of the two pieces of legislation do not coincide completely, since Article 168 (together with Articles 125 and 148) is intended to apply only for the products subject to Regulation No. 1308/2013 (and specified in Article 1 of the same regulation), whereas Article 62 of the Italian Law Decree – as amended by the implementing ministerial decree[3] – extends the scope of application to deliveries of all the agricultural products listed in Annex to the TFEU, as well as the food products specified in Regulation (EC) No. 178/2002: suffice it to say that Regulation No. 1308/2013 does not apply to fishery and aquaculture products, which are included, by contrast, in Annex I, and that the range of food products defined by Regulation 178/2002 is much broader than the one governed by the provisions of Regulation (EU) No. n. 1308/2013.

Moreover, Italian legislation does not appear to be particularly clear as to whether the rules apply only to supply contracts that will remain in force for a given period of time, or also apply to contracts without a duration. Nor does it specify whether the written contract must be concluded in advance of the delivery or deliveries of the product. The domestic law contains no indications regarding the inclusion of termination clauses among the written contractual provisions, or, more generally speaking, cases in which a contract may be cancelled (despite the fact that provisions concerning the possible withdrawal from a contract are of fundamental importance for the party in a disadvantaged position) or the provisions applicable in the event of force majeure, which are instead provided under the EU regulation. It should also be pointed out that Article 62 does not intervene directly in respect of the contract's compliance with formal requirements; it is only concerned with the transparency of the elements that must be formalised in writing, despite containing a number of references to the requirement that the contract for the delivery of agricultural or food products be "fair"[4]. By contrast, Italian legislation implementing the provisions of

[2] Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

[3] Ministerial Decree no. 199 of 19 October 2012, in Official Gazette no. 274 of 23.11.2012.

[4] See the last part of paragraph 1, whereby contracts must be based on principles of transparency, correctness, proportionality and correspondence between the goods supplied and the consideration received, as well as paragraph 2, which prohibits, in principle, some behaviours deemed substantially abusive or unfair. As regards unfair trading practices, it may be noted that Art. 7 of Law Decree no. 1 of 2012, converted into Law no. 27 of 2012, extended the scope of applicability of the relevant rules to embrace – though not in their totality – unfair trading practices between a professional and micro enterprises (as defined in Commission Recommendation 2003/361/EC of 6 May 2003), with a consequent amendment of articles 18 *et seq*. of the Consumer Code (Legislative Decree no. 205 of 2006): for a discussion of the resulting problems, see DE CRISTOFARO, *Pratiche commerciali scorrette e «microimprese»*, in *Le nuove leggi civ. comm*., 2014, 3 ff.

Article 185f, Regulation (EC) No. 1234/07[5] and, at a later time Article 148, Regulation No. 1308/2013[6], concerning the formalisation in writing of contracts for the delivery of raw milk, on the one hand defers – as regards the obligation to use written contracts – to the provisions of Article 62 of Law Decree no. 1 of 2012 as the highest ranking legislation to be applied in generalised fashion to all contracts for the delivery of agricultural products listed in Annex I to the TFEU; but on the other hand, it adds that such contracts must be concluded in advance of delivery and contain all of the elements specified in the referenced EU legislation and that the minimum duration of the contracts in question is now twelve months, unless the supplier refuses this duration.

Previously, our legal system set out the provisions contained in art. 9, law n. 98/1992 (that it is still in force), prohibiting the abuse, in the contractual relationship between professional parties, of the economic dependence by the stronger one. That provision is so far poorly used, because of the limits of its application.

2. POs and IOs in the new regulation on the common organisation of markets in agricultural products (CMO).

The new EU single CMO regulation No. 1308/2013 reaffirms the prominent role that European law attributes to producer organisations (POs[7]) and interbranch organisations (IOs[8]) for the purposes of improving the market competitiveness of farmers and extends the solutions previously envisaged for the milk and milk products sector alone to all sectors of the CMO[9].

[5] Ministerial Decree no. 15164 of 12 October 2012

[6] Cf. Art. 2 of Law Decree no. 51 of 5 May 2015, as converted by Law no. 91 of 2 July, 2015, published in the Official Gazette no. 152 of 3 July 2015. While Ministerial Decree no. 15164 of 2012 implementing Art. 185f of Regulation (EC) No. 1234/07 established a minimum duration of six months, the subsequent law 91/2015 increased the duration to twelve months, a period deemed to be more in line with farmers' demands for protection; however, in this case as well, the latter may waive the minimum duration provided that they do so in writing. Art. 2 of Law no. 91/2015 establishes in any case that the provisions set forth in Art. 148 of Regulation No. 1308/2013 are applicable to contracts for the delivery of raw milk, including, therefore, the requirement that the contracts be concluded in advance of the delivery and contain all the contractual elements listed therein.

[7] Pursuant to Art. 152 of the regulation, POs are constituted and controlled by producers in a specific sector among those falling within the single CMO.

[8] Pursuant to Art. 157(1) a) of the regulation, IOs "are constituted of representatives of economic activities linked to the production and to at least one of the following stages of the supply chain: the processing of or trade in, including distribution of, products in one or more sectors".

[9] The CMO in the fishery and aquaculture products, governed by Regulation (EU) No. 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No. 1184/2006 and (EC) No. 1224/2009 and repealing Council Regulation (EC) No. 104/2000, in *OJEU* L 354/13, lends importance to the role of the POs, so much so that Art. 1(2) establishes that the CMO in question "shall be comprised of the following elements: a) professional organisations; b) marketing standards; c) consumer information; d) competition rules; e) market intelligence".

Further strengthening the role of POs and IOs thus appears to be a sort of necessary choice for the EU legislator, given the hope that the aggregation achieved through such organisations will serve to reduce the existing gap in economic power between the parties in the market for agricultural products[10].

The Italian Ministerial decrees concerning the recognition of POs[11] state that all the recognised POs have to be listed on a national list published on the Ministerial official website.

According to the CEDR questionnaire, it is worth observing that a novelty of no little importance – contained in Reg. 1308/2013 - is the provision granting Member States the option of extending, at the request of the PO or IO concerned, and for a limited period of time, certain rules set by the organisation and the provision concerning compulsory contributions, set forth in arts 164 *et seq*. of the new regulation. This applies for recognised POs and IOs in any sector (as well as for recognised associations of POs), provided that they are sufficiently representative in a given geographical area; more specifically, the regulation uses the expression "economic area", defining it – solely for the purposes of the procedure concerned – as a "geographical zone made up of adjoining or neighbouring production regions in which production and marketing conditions are homogeneous"[12]. The requirement of being sufficiently representative is considered to be met if a PO accounts for 50% of producers in the economic area[13] and, in the case of other organisations or associations, if it accounts for a percentage of the volume of production, trade or processing in the economic area equal to at least 2/3, or 60% in the cases of POs in the fruit and vegetables sector. Finally, Article 164(4) contains a precise indication of the rules for which compulsory extension may be requested; in principle, such rules must not cause damage to other operators and cannot be incompatible with EU law or the law of the Member State concerned; in regard to anti-competitive practices, the extension must not produce any of the effects described in Article 210(4) of the same regulation (in particular, the aforementioned provision establishes that agreements, decisions and practices will be considered incompatible with EU law if they may lead to the partitioning of markets within the Union in any form; may create distortions of competition which are not essential to achieving the objectives of the CAP; entail fixing prices or quotas; may create discrimination or eliminate competition in relation to a substantial portion of the products in question).

Tied to the extension of rules is the option granted to Member States to establish – after carrying out the necessary consultations with all stakeholders – that economic operators who benefit from the

[10] For more details about POs and IOs, please see L. RUSSO, *Contracts in the agri-food supply chain within the framework of the new Common Agricultural Policy*, in *REDUR* (Revista electrònica de derecho Universidad de La Rioja) 13/2015, 177 ff.

[11] Ministerial Decree 3rd February 2016, n. 35, for POs of all the CMO sectors but fruit and vegetables (art. 6), and Ministerial Decree 28th August 2014, n. 9084 for the POs operating in the fruit and vegetables sector (art. 11).

[12] Thus stated in Art. 164(2).

[13] This solution can also be adopted for IOs in the event that it proves difficult to apply the criterion based on the volume of production: see Art. 164(3), second subparagraph.

activities relating to the rules in question must pay the organisation which adopted the rules all or part of the financial contributions paid by its members "to the extent that such contributions are intended to cover costs directly incurred as a result of pursuing the activities in question" (as stated in Article 165).

As noted, this is not a complete novelty, since the provisions of the former Regulation No. 1234/07 – specifically, Articles 125f and 125l – envisaged this possibility, respectively for POs and IOs, though only in the fruit and vegetables sector: according to the current rules, however, this possibility is offered to organisations operating in any production sector, provided that they are recognised organisations considered duly representative as described above. This is consistent with the declared need to strengthen the role of POs and IOs.

It is of course necessary to verify the concrete application of these provisions, which are characterized by numerous conditions and requirements, as is moreover justified by the sensitive nature of the subject, since it implies that rules approved by private organisations will be binding for third parties[14].

The implementation of this discipline has been carried on in Italy by the Art. 3 of the Law Decree n. 51/2015 (converted in Law n. 91/2015) but only for IOs that comply with the representative threshold laid down by the EU Regulation and only for decisions adopted by at least 85% of their members. The domestic rules submit the extension. The infringement of the decisions that have been extended is punished with an administrative fee ranging from a minimum of 1000 euro to a maximum of 50.000 euro, depending on the value of the contracts stipulated in violation of the rules. Moreover, the Italian discipline specify that the not member financial contribution has no nature of a taxation, but has to be considered as a private credit.

In Italy we have had so far two cases of extensions: the first one, with the decree 24.10.2014 which has extended in the whole territory of the Republic some rules laid down in a decision adopted by the recognised IO Ortofrutta Italia for the kiwi sector in the year 2014/15; the second one, with the Decree 7.8.2015, concerning the extension of an agreement adopted by the IO Tobacco for the years 2015 to 2017.

The power to engage in contractual negotiations attributed to some POs under Regulation (EU) No. 1308/2013: a too shy approach by the European legislator?

Regulation EU 1308/2013, in articles 169, 170 and 171, grants some POs (or their associations) – and in particular those operating in the olive oil and beef sectors, as well as those representing producers

[14] On this subject, insofar as Italian law is concerned, see BOLOGNINI, *Il D. lgs. 27 maggio 2005, n. 102 e l'attuale tendenza normativa a riconoscere efficacia* ultra partes *ai contratti di integrazione verticale in agricoltura*, in *La regolazione e la promozione del mercato alimentare nell'unione europea. Esperienze giuridiche comunitarie e nazionali*, Proceedings of the Conference of Udine, 24-25 November 2006, Milan, 2007, 205 ff.

of the arable crops listed in Article 171 (and milk and milk products sector under Article 149[15]) the power to engage in "contractual negotiations" (as per the heading of the cited articles)[16].

In this case as well, the rules are substantially similar to those introduced with Regulation (EU) No. 261/12 specifically for the milk sector[17], despite the shortcomings already clearly noted[18]. Moreover, the issues that had previously been raised with regard to the rules governing contractual negotiations in the milk and milk products sector were left completely unresolved[19].

Under the aforementioned provisions, the POs in the sectors considered (or their associations: see paragraph 3 of the articles in question) that pursue such aims as concentration of supply, placing on the market of the products produced by its members, or optimisation of production costs, can "negotiate", on behalf of members, in relation to all or part of their production, the content of future contracts for the delivery of their respective products. The articles in question make this power subject to the condition that the negotiating activity leads to an integration of activities and that as a result it is probable that significant improvements will be made in the efficiency of the system, so that such activity of the POs contributes to attaining the objectives of the CAP as per Article 39 TFEU.

The negotiations can take place whether or not the ownership of the agricultural products considered is transferred by the farmer members to the PO, and whether or not the price that is negotiated is the same as for the joint production of all members of the PO or only part of them (as per points (a) and (b) of paragraph 2 of the articles in question).

The negotiations cannot regard volumes of products exceeding the percentages established for each product in the articles concerned (see paragraph 2 (c)); however, according to paragraph 5, if the negotiations are such as to exclude competition or undermine attainment of the objectives of Article 39 TFEU, irrespective of whether the thresholds are exceeded, the national competition authority (or the

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[15] On this subject, see recital 207, which explains that the rules provided for the milk and milk products sector with respect to contractual relations and negotiations should be considered temporary in nature and subject to review.

[16] For a broader study on this topic, please see L. RUSSO, *Contracts in the agri-food supply chain within the framework of the new Common Agricultural Policy*, in *REDUR* (Revista electrònica de derecho Universidad de La Rioja) 13/2015, 177-206.

[17] On the origins of the provisions of Regulation 261/2012, see CHAUVE, PARERA, RENCKENS, *Agriculture, food and Competition law: moving the borders*, in *Journal of European Competition Law & Practice*, vol. 5, 2014, 309 ff.

[18] See JANNARELLI, *L'associazionismo dei produttori agricoli ed il "tabù" dei prezzi agricoli nella disciplina europea della concorrenza. Considerazioni in materia di latte e prodotti lattiero-caseari*, in *Riv. dir. agr.*, 2012, I, 179 ff.

[19] Regulation 261/12, in particular, incorporated Art. 126c into Regulation 1234/07; under this provision, recognised POs in the milk and milk products sector (or groups of such organisations) may negotiate, on behalf of members, in respect of all or part of their overall production, the terms of subsequent contracts for the delivery of raw milk by individual farmers to processors: and thus, presumably, to conclude standard contracts, which, being concluded by organisations representing a group of producers (thus endowed with greater bargaining power than a single farmer), should contain provisions less disadvantageous to farmers than would be the case if negotiations were decentralised and conducted individually.

Commission, if the negotiations involve more than one Member State) may, based on the concrete circumstance, decide that the negotiations must be reopened or cannot take place.

The producers concerned cannot be members of other POs that carry out similar negotiations (as per paragraph 2(e) of Articles 169, 170 and 171).

The POs must notify the respective Member States of the volume of products to which the negotiations relate (paragraph 2(g) of the cited articles), and Member States in turn must notify the Commission of the data received from the POs or the intervention of the competition authority (paragraph 6 of the cited articles).

As noted, the aforementioned provisions raise numerous questions[20]. Firstly, it is not clear why the provisions make the power to engage in negotiations conditional on the fact that the POs in the sectors concerned already pursue the aim of concentrating the supply of their members, placing on the market of the products received from the latter. It is difficult to understand the purpose and usefulness of giving such contract negotiating powers to POs that already carry out activities of direct marketing, selling the aggregate production of their members directly to purchasers and thus acting as the sole contractual counterparty of the latter. From an abstract perspective, the POs in sectors in which contractual negotiations are an option can decide to directly concentrate production, selling the products of members in their own name and on their own behalf after receiving them; or else they can decide to limit themselves only to indirect concentration activities, negotiating, precisely, on behalf of their members, the best contractual conditions to be subsequently applied to contracts concluded on an individual basis.

However, it seems difficult to imagine that a same PO can engage both in an activity of direct marketing and an activity of only negotiating on behalf of its members: direct marketing activity requires the presence of an organisation and facilities of a certain size, which could not be justified in the case of a mixed – as it were – activity not entirely dedicated to direct marketing, as the investments necessary for that purpose would not be amortised.

The reference to such tasks as concentration of supply and placing members' products on the market should probably be interpreted in a broad sense, i.e. the aim is to grant the power of carrying out contractual negotiations to POs whose statutes envisage the option of concentrating supply, which can take place in two ways: directly, so that the PO is the seller and operates in its own name and on its own behalf, having procured the products made available by its members; or only indirectly, through the conclusion of framework agreements, i.e. contracts that do not entail a transfer of ownership, but rather whose purpose is to establish terms and conditions that will be binding for purchasers, and from which members may

[20] On the new rules, see JANNARELLI, *"Agricoltura e concorrenza" o "concorrenza e agricoltura"? Gli artt. 169, 170 e 171 del reg. n. 1308/2013 e il progetto di* guidelines *presentato dalla Commissione*, in *Riv. dir. agr.*, 2015, I, 3 ff.

benefit, as negotiations conducted by a PO on behalf of all its members can undoubtedly lead to more favourable terms than negotiations carried out by a single producer.

In either case, empowering POs to engage in contractual negotiations[21] seems a *quid minus* compared to the possibility, already provided for under European legislation, of directly marketing the products of members, thereby achieving what is no less than a concentration of supply[22]: in fact, negotiations carried out by a producer organisation can be considered only an indirect concentration of supply, which is undertaken directly by individual agricultural producers with the counterparties on the basis of negotiations previously conducted by the representative organisation[23].

Moreover, as was observed earlier, the negotiating power is subject to a series of limitations that do not apply in the case of direct marketing. In addition to the restrictions regarding the maximum market percentages that can be covered by negotiations in the sectors considered[24], the rules require, as has already been mentioned, that the contractual negotiations lead to an integration of activities and that this integration is likely to generate significant gains in efficiency[25]. Based on a reading of the provisions, in truth, it does not appear to be sufficient, for the POs concerned, to carry out negotiations, a *quid pluris* being required on the part of the same, since they have to carry out at least one of the following activities: joint distribution, joint promotion (solely for the live cattle and arable crop sectors), joint organising of quality control, joint use of equipment or storage facilities, joint management of waste directly related to the production of olive oil or live cattle, joint procurement of inputs and joint processing of olive oil[26].

The guidelines approved by Commission do not seem a useful tool for interpreting the provisions in question. They have been drafted for the purpose of providing specific indications to the producers involved, particularly as regards defining the requirements laid down by the provisions themselves with

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[21] The role ascribed to POs by the provisions concerned is positively viewed by ALBISINNI, *La nuova OCM ed i contratti agroalimentari*, in *I contratti del mercato agroalimentare*, a cura di Albisinni, M. Giuffrida, Saja e Tommasini, Naples, 2013, 69 ff.; see also ID., *Intervento, op. cit.*, 199 ff., in which the author talks about a "rediscovery of the contractualization of relations on a European level".

[22] Under Art. 152(1)(c)(ii) of Regulation No. 1308/13, the POs recognised in the sectors considered by the article itself (including those operating in the milk and milk products sector) can concentrate supply and directly market the production of members.

[23] Cf. CHAUVE, PARERA, RENCKENS, *Agriculture, food and Competition law: moving the borders*, cit., 310; the authors point out that through the agreements in question, POs sell "on behalf" of member producers, provided that the organisations engage in other joint activities connected to selling activity: "in practice this means that, when farmers wish to negotiate contract terms collectively via POs to gain bargaining power, they are obliged to integrate other activities in order to respond to market challenges in a pro-competitive manner". However, shortly afterward the same authors observe that the new legislation has introduced the concept of efficiency as a prerequisite for enabling "horizontal agreements between farmers": in the case in question, however, it is not a matter of horizontal agreements among agricultural producers, but rather vertical agreements concluded between POs, on the one hand, and purchasers on the other.

[24] Equal to 20% in the olive oil sector, 15% in the live cattle sector and 15% in respect of the arable crops listed in Art. 171; as provided in Paragraph 2(c) of the articles considered.

[25] see Paragraph 1(2) of the articles considered.

[26] as per Paragraph 1(3) of the articles considered.

respect to the integration of activities and significant improvements in efficiency that should ensue from the negotiations[27].

Indeed, a reading of the guidelines reveals that the subject of contractual negotiations is far from having received any actual clarification, since the guidelines provided do not seem to distinguish clearly between the two cases described above, namely, direct concentration of supply and indirect concentration of supply, the latter taking place through the conclusion of framework agreements or collective agreements negotiated by POs. On the contrary, as already highlighted by legal scholars who have examined the draft of the guidelines [28], they sometimes seem to confuse the two cases or treat them as one and the same thing: we need only consider, for example, that in paragraph (4) of the introduction it is acknowledged that articles 169 to 171 authorise POs in the sectors concerned to negotiate, "on behalf" of their members, contracts for the supply of the products in question; further below, in paragraph (13) it is specified that POs, for the purposes of EU competition law, can be considered as associations of undertakings and as an undertaking in their own right, if and to the extent that they conduct, on their own behalf, an economic activity, i.e. an activity involving the supply of goods or services in a given market. In this manner the Commission acknowledges to be fully aware of the possible double role that POs can play in the market, since they can operate as associations and thus negotiate on behalf of their members, or else operate as businesses, marketing the products contributed by their members. Consistently with this notion, paragraph (36) states: "Articles 169, 170 and 171 of the CMO Regulation concern any agreements or decisions or practices taken by the PO when negotiating contracts for supply on behalf of its members".

Against this initial background, a reading of the rest of the guidelines arouses a number of doubts as to the scope the Commission wishes to attribute to the provisions in question: paragraph (39) states that the purpose of the specific articles concerned is to be achieved through "POs effectively concentrating supply and placing products on the market and, *as a consequence* [my emphasis], negotiating supply contracts on behalf of their members"; similarly, in paragraph 57, one reads that the POs concerned must "pursue at least one of the following objectives of: a. Concentrating supply, b. Placing on the market of the products produced by its members; and c. Optimising of production costs"[29]. Moreover, the Italian text includes references to contracts concluded *a nome* (literally, "in the name") of members and *per conto* ("on behalf") of members, with the expressions used apparently interchangeably.

[27] Communication from the Commission, *Guidelines on the application of the specific rules set out in articles 169, 170 and 171 of the CMO regulation for the olive oil, beef and veal and arable crops sectors*, 2015/C 431/01.
[28] see JANNARELLI, *op. ult. cit*.
[29] For a critical view on the Commission's breakdown of objectives into three, where the concentration of supply is separated from placing on the market of the members' products, see JANNARELLI, *"Agricoltura e concorrenza" o "concorrenza e agricoltura"?*, cit., 59.

However, the Commission made no effort to provide any indications as to how the conducting of contractual negotiations on behalf of members can coexist with pursuit of the objectives of concentrating supply and placing members' products on the market, where the PO acts in its own name and on its own behalf. Not only: notwithstanding the fact that, as we have seen, in paragraph (57) the guidelines acknowledge that in order to be able to engage in negotiations the POs must pursue at least one of the specified objectives (concentrating supply, placing on the market of the products produced by its members, and optimising of production costs), in the very next paragraph the Commission clarifies that, in actual fact, a PO that pursues solely the objective of optimising production costs will not be entitled to engage in contractual negotiations: this may very well go beyond the intended meaning of the provisions concerned, which do not seem to support such an affirmation.

Therefore, it is in some respects paradoxical that the Commission's guidelines, which are supposed to guide operators and ensure a uniform, correct interpretation of the regulatory provisions, contain a series of ambiguous affirmations, such as to raise doubts about the scope of the new legislation[30].

Among the provisions that are difficult to interpret, we may also include paragraph 2(a) of Articles 169, 170 and 171[31], according to which negotiations by the PO may take place whether or not there is a transfer of ownership of the agricultural products by members to the PO: the rule, therefore, is that contractual negotiations can also be carried out by a PO after it has acquired ownership of the products received from member producers. However, it is not clear why a PO that has become owner of the products to be marketed should only engage in a pre-contractual negotiating activity (or conclude a framework contract) rather than directly marketing the product it is now owner of to purchasers[32].

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[30] Cf. JANNARELLI, *"Agricoltura e concorrenza" o "concorrenza e agricoltura"?*, 63; according to the author, given the ambiguities of the articles of the regulation, together with the equivocal indications contained in draft guidelines prepared by the Commission, there is a risk that articles 169 to 171 will be considered applicable not only to collective structures that perform a simple role of intermediation in negotiating contracts on behalf of their members, but also to those that actually concentrate the supply and sell the products they have acquired from members through a transfer of ownership; in such a case, the latter will also be subject to the requirements laid down by the articles considered; on this point, see also p. 75 ff.

[31] Similar considerations apply for Art. 149(2)(a) of Art. 149, Regulation No. 1308/2013, which specifically regards the dairy sector.

[32] On this point, see JANNARELLI, *"Agricoltura e concorrenza" o "concorrenza e agricoltura"?,* cit., 57; according to the author, negotiations make sense only in situations where ownership of the products is not transferred to the organisation. In the event of a transfer of ownership, there would be no reason for the organisation to conduct negotiations on behalf of its members; it would negotiate with third parties and sell the products its members have pledged to contribute within the framework of the organisation; for a previous discussion, see JANNARELLI, *L'associazionismo dei produttori agricoli ed il tabù dei prezzi agricoli nella disciplina europea della concorrenza*, cit., 200; the same author seems to draw confirmation from the text of the provision that the entirety of the rules concerning "negotiations" is nothing else but a confirmation of the direct marketing power ascribed to the POs by their members; paradoxically, this power would be decreased with respect to the majority of cases, given the restrictions imposed by the provision.

Furthermore, the legislation does not contain any provision as to which effects the outcome of the negotiations will have for the parties; this aspect concerns not so much the members of the PO – since the fact of belonging to the association in itself implies compliance with what the latter has committed to – as the contractual counterparties, given that the scope of application of a framework contract resulting from negotiations conducted by the PO on behalf of members cannot but be limited solely to the undertaking or undertakings involved during the negotiation stage[33]. There is no indication, in fact, as to the consequences of a deviation of an individual contract from the provisions of the collective agreement or the possible remedies available to the affected party.

In short, the rather muddled – to put it mildly – nature of the provisions considered clearly suggests that they are a product of compromise. Among other things, the receptiveness of the EU legislator to the idea of contractual negotiations being carried out by organisations and associations of agricultural producers touches a raw nerve in EU legislation, in particular as it seems in contradiction with the rule – dating back to 1962 and left untouched even after the reform of 2013 – whereby such organisations may not establish identical prices binding for their members.

As will be amply discussed in the section that follows, there is no doubt that the contractual negotiations carried out by POs can also establish the subsequent selling prices and that, as a consequence, the legislation in question has for the first time expressly addressed what has been referred to, precisely, as the "taboo" issue of prices[34].

Therefore, the ensuing result, with all its contradictions and ambiguities, should not be surprising. Numerous indications of such contradictions have come not only from the different European institutions involved in the legislative procedure, but also – and above all – among the different levels or departments of the same. Here there is a clear reference to the ever enduring conflict within the Commission between the Directorate-General called upon to apply and oversee the enforcement of competition rules and the Directorate-General responsible for planning initiatives with the framework of the CAP.

The result of this internal dialectic is there for everyone to see: provisions containing references that are uncertain or confused to say in the least and which risk undermining their actual effectiveness. As has often been the case with other legislative provisions, articles 169 to 171, together with article 149 for the dairy sector, are likely to represent only a first - and inadequate - approach to the subject matter. They will hopefully receive full implementation over time, once the initial disconcertment and scepticism have

[33] The effectiveness of a contract may be extended to the benefit of producers who are not members of the PO that has negotiated it under the provisions of Art. 164 ff. of Regulation No. 1308/2013, to the extent that this is concretely possible.

[34] Again see JANNARELLI, *L'associazionismo dei produttori agricoli ed il tabù dei prezzi agricoli nella disciplina europea della concorrenza*, cit.

been overcome[35]. We must therefore hope that the EU legislator will go back to review the provisions in question as soon as possible, so as to more precisely clarify their scope and content, attenuating the precautions provided for and in any case extending their application to all sectors of the CMO.

Similar considerations have been done by the Agricultural Markets Task Force in its recent Report [36], in which has been stressed "the lack of clarity concerning the rules which apply to collective action by producers"; at the same time, "the new provisions may have exacerbated the legal complexity", so that "the Commission should unambiguously exempt joint planning and joint selling from competition law if carried out by a recognised producer organisation or association of producer organisations" (par. 14, Executive summary).

Antitrust rules in Regulation (EU) No. 1308/2013 and their inadequacy for the purposes of protecting agricultural producers vis-à-vis the market.

Given the theme of the work of the Commission I and the annex questionnaire, it is necessary to include in this national report some brief considerations concerning the relationship between the rules governing supply contracts and agricultural associations and EU competition law, in particular as regards the specific antitrust provisions applicable to the agricultural sector following the reform of 2013.

In particular, as regards the agricultural products covered by the CMO, the special rules (derogating from the general ones contained in the TFEU) designed to protect competition are contained in Part IV of Regulation (EU) No. 1308/2013 (Articles 206 to 218)[37], as well as in Article 222, which, among the general provisions in Part V, falls within the "exceptional measures" defined in Chapter I. As a result, the Commission can declare the temporary (for a period of up to six months[38]) non-application of Article 101(1) TFEU to some types of agreements and decisions of recognised POs, associations of POs, and IOs "during

[35] See, e.g., *European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain*, par. 51, that highlights how "strenghthening and establishing producer organisations must go hand in hand with strenghthening farmers' bargaining power in the food chain, in particular by giving them the right to have their contracts collectively bargained".

[36] *Improving market outcomes. Enhancing the position of farmers in the supply chain*, Brussels, November 2016.

[37] For a discussion of the former legislation, as per Art. 175 *et seq.* of Regulation (EC) No. 1234/2007, see JANNARELLI, *Commento agli art. 175-179*, e COSTATO, *Commento agli art. 180-182*, in *Il regolamento unico sull'organizzazione comune dei mercati agricoli*, a cura di Costato, in *Le nuove leggi civ. comm.*, 2009, 181 ff.

[38] Period likely inadequate and too short to face the "severe imbalance" in the agricultural markets referred in Art. 222.

periods of severe imbalance in markets", provided that they do not impair the proper functioning of the internal market and are exclusively aimed at stabilising the affected sector[39].

Therefore, it is necessary preliminarily to describe, albeit briefly, and to the extent that it is useful for the purposes of this paper, how the relevant legislation is presently structured; this summary analysis must be limited to the rules concerning behaviours of business undertakings; without considering, therefore, the rules concerning state aid, contained in Article 211 *et seq.*[40]. It must also be noted that Part IV of Regulation No. 1308/2013 is applicable to products falling within the scope of the CMO, whereas rules concerning the other remaining agricultural products are laid down in Regulation (EC) No. 1184/2006[41]. The latter was in turn amended following the adoption of Regulation (EU) No. 1379/2013[42] on the common organisation of the markets in fishery and aquaculture products: Article 1 of Regulation No. 1184/2006 now clarifies, in fact, its own non-applicability not only for the products covered by the single CMO, but also for those falling within the scope of Regulation No. 1379/2013 (i.e. the in fishery and aquaculture products listed in the annex to the Regulation itself, which lays down the pertinent competition rules in Article 40 *et seq*.).

Reiterating what was already provided for in the former legislation, Article 206(1) of Regulation No. 1308/2013 establishes that, in principle, article 101 *et seq*. TFEU shall apply to all agreements, decisions and practices referred to in Article 101(1) and Article 102 TFEU which relate to the production of, or trade in, agricultural products, unless otherwise provided in the Regulation itself. The following paragraphs provide for the establishment of close cooperation between the EU Commission and national competition authorities, and that Commission may publish guidelines to assist both the national authorities and undertakings in the sectors concerned.

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[39] On this basis, the Commission adopted the implementing regulation 2016/559 of 11 April 2016, authorizing agreements and decisions on the planning of production in the milk and milk products sector, for a period of six months. In particular, recognized POs, their associations and recognized IOs in the dairy sector have been authorized to conclude voluntary joint agreements and take common decisions on planning the volume of milk to be produced during a period of six months. Afterwards the Commission, adopting the implementing regulation 2016/1615, has extended the validity of such agreements on 12 April 2017 at the latest. With the delegated regulation 2016/558 – adopted on the basis of Art. 219, par. 1, reg. 1308/2013 - the Commission has applied the regulation 2016/559 to cooperatives and other forms of producer organisations that have been established by milk producers in compliance with national law and are active in the milk and milk products sector. On these regulations, see JANNARELLI, *L'associazionismo dei produttori agricoli e la pianificazione della produzione lattiera nei regg. nn. 558 e 559/2016 della Commissione Europea*, in *Riv. dir. agr*., 2016, , I, 340 ff.

[40] Chapter IV contains no specific rules concerning abuse of dominant position.

[41] Council Regulation (EC) No. 1184/200 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products.

[42] Regulation (EU) No. 1379/2013 of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No. 1184/2006 and (EC) No. 1224/2009 and repealing Council Regulation (EC) No. 104/2000, in *OJEU* L 354/13.

Articles 207 and 208 introduced broadly applicable definitions[43], respectively, of "relevant market" and "dominant position", previously provided by the Commission[44] and case law of the Court of Justice[45], whereas Article 209 (under the heading "Exceptions for the objectives of the CAP and farmers and their associations") represents the "heart" of the legislation, as it outlines a special regime for the agricultural sector, together with Article 210, dedicated to "agreements and concerted practices of recognised interbranch organisations". Such a draft has been criticized by the Agricultural Markets Task Force that, in its Report, notes "we are surprised that EU laws does not feature a general and explicit derogation from the prohibition on cartels enshrined in Article 101(1) TFEU in favour of agricultural cooperatives or producer organisations" (par. 144).

In particular, Article 209(1), echoing a solution that had been adopted since Regulation (EEC) No. 26/62, establishes the non-applicability of the prohibition under Article 101(1) TFEU to the agreements, decisions and concerted practices "necessary for the attainment of the objectives set out in Article 39 TFEU". The subjective qualification of the parties who conclude such agreements is irrelevant, so it is not necessary, for the purposes of the derogation, that they all be "agricultural" parties. What is relevant is whether the agreement, decision or concerted practice is essential for attaining the objectives of the CAP; this has been clearly affirmed on more than one occasion in the interpretations of the Court of Justice, which has always judged it necessary to demonstrate the indispensability of the agreement whose admissibility is in question with respect to the pursuit of the objectives set out Article 39 TFEU[46].

As mentioned above, paragraph 1(2) affirms the non-applicability of Article 101(1) TFEU to agreements, decisions and concerted practices of farmers, farmers' associations, or POs recognised under Article 152, or associations of POs recognised under Article 156[47], which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural

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[43] BLOCKX and VANDENBERGHE, *Rebalancing commercial relations along the food supply chain: the agricultural exemption from EU competition law after Regulation 1308/2013*, cit., 400; the authors note that the European Parliament had requested that specific definitions of relevant market and dominant position be introduced for the agricultural sector, but the request was eventually rejected.

[44] See, for example, the Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C 372/03, in OJEC C 372 of 9 December 1997.

[45] In this regard see the decisions discussed in POCAR-BARUFFI, *Commentario breve ai Trattati dell'Unione europea*, II ed., Padova, 2014, *sub* Art. 102 TFEU.

[46] Cf. Court of Justice, 15 May 1975, in case 71/74, *Frubo*; Id., 16 December 1975, *Suiker Unie,* in joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73; Court of First Instance, 13 December 2006, in joined cases T-217 and 245/03, *Fédération nationale de la coopération bétail et viande.*

[47] The second subparagraph of Art. 209(1) of Regulation No. 1308/2013 expressly clarifies, unlike the previous legislation, that the exemption from the prohibition under Art. 101 TFEU also applies for agreements, decisions and concerted practices of recognised POs or recognised associations of POs. However, even before this explicit wording, there was no doubt that even the previous legislation was applicable to the POs where this point was concerned; the same applies for the agreements, decisions and practices as per Art. 2.1(2) of Regulation 1184/2006, though there is no express reference to POs (CANFORA, *La disciplina della concorrenza nel diritto comunitario*, in COSTATO, GERMANÒ, ROOK BASILE, *Trattato di dir. agr.*, vol. 3, Turin, 2011, 209 ff.

products, unless the objectives of Article 39 TFEU are jeopardised. As regards this second specific case, the subjective qualification of the parties to the agreement, decision or concerted practice clearly takes on essential importance; again, the legislative provisions are in line with what has been established by Community law since Regulation (EEC) No. 26/62, with the introduction of an explicit reference to recognised POs and their associations as negotiating entities[48].

However, the third pre-existing exception related to agreements falling within the framework of a national market organisation was finally formally removed, given that such organisations have no longer existed for some time, having been replaced by the European market organisation.

Once again, it is established (third subparagraph of Article 209(1)) that the whole of paragraph 1 will not apply to agreements, decisions and practices which entail an obligation to charge identical prices or have the effect of excluding competition: consequently, agreements that lead to such effects are to be considered in any case prohibited[49].

It is difficult to understand the persistent prohibition (also in the new regulation) concerning prices, which continues to apply both for the agreements and decisions of farmers or farmers associations and the agreements necessary for the attainment of the objectives of the CAP; it is also seemingly not compatible with the power granted to POs in certain sectors to conduct contractual negotiations, which could result in a price being set for subsequent sales transactions.

Moreover, there seems to be no doubt as to the fact that the negotiations conducted by POs can also define the prices of subsequent sales: besides considerations of a systematic and logical character, both recital 139[50] and paragraph 2(b) of article 149 articles 169 to 171, in which there is an express reference to a "negotiated price", imply the possibility of setting prices.

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[48] Cf. JANNARELLI, *"Agricoltura e concorrenza" o "concorrenza e agricoltura"?,* cit., 25; the author notes that the explicit mention of recognised POs as being among the entities that may conclude agreements and engage in concerted practices is also consistent with the fact that now POs can also have members who are not agricultural producers, provided that they do not control the organisation.

[49] The fact that the prohibition against fixing identical prices is starting to feel the impact of centrifugal forces, amplified by the opening of the market as a result of the new orientations underlying the CAP, clearly emerges with the "*endives*" issue in France: the Court of Appeal of Paris overturned the decision of the national competition authority, which had imposed penalties on a dozen or so producer associations judged guilty of entering into agreements that were against the law because essentially aimed at fixing minimum selling prices for products; the decision of the Court of Appeal was challenged, so the case is likely to be referred to the Court of Justice for a preliminary ruling: for a discussion on the whole issue and the legal arguments supporting the judgment on appeal, see DEL CONT, *L'arret de la Cour d'Appel de Paris du 14 mai 2014, "l'affaire endives": quels enseignements pour l'avenir de la "relation speciale" entre agriculture et concurrence*?, in *Riv. dir. agr.*, 2015, II, 83 ff.

[50] Which, on the subject of the bargaining power of POs in the beef and veal and olive oil sectors and for producers of some arable crops, provides that the purpose of such negotiations is to establish, albeit subject to quantitative limits, the terms of (subsequent) delivery contracts, including prices. Recital 128 affirms likewise in regard to the milk and milk products sector, specifying that in order to ensure a fair standard of living for dairy farmers, their bargaining power needs to be strengthened; in order to achieve this objective, POs should be allowed, in accordance with Art. 42

In any case, the specific provision, contained *expressis verbis* in the new regulation, with respect to the setting of prices in the sectors in which POs are authorised to carry out contractual negotiations, necessarily implies a derogation from the general prohibition against charging identical prices which is established by the same regulation[51]. The reason lies also in the principle of speciality, as the special rule is destined to prevail over the general one. This is clarified by Article 206 of the regulation: after establishing the applicability of Article 101 *et seq.* TFEU, it reaffirms, precisely, the rules laid down by other provisions of the same regulation. This seems, finally, also the opinion of Advocate General in the Case C-671/15 recently delivered[52], though he had examined the former provisions laid down in Reg. 1234/2007 (which ignored the provision granting the power to engage in "contractual negotiations" for some PO's), where he observes that agreements, decisions or practices of PO's, associations of PO's and professional organisations escape from prohibition laid down in Art. 101 TFUE when that behaviour is necessary or permitted for the accomplishment of the tasks assigned to such organisations and has been adopted in the context of and in accordance with the regulations on the CMO of the markets considered.

However, it would not have been inappropriate to define this derogation with more clarity, especially as the negotiations for the adoption of the new text dragged on for two years, with the involvement of all institutions taking part in ordinary legislative procedures[53].

It thus appears necessary to coordinate the provisions of Article 209 with those dealing with contractual negotiations conducted by POs, interpreting them to mean that it is prohibited to conclude binding agreements giving rise to an obligation to charge identical prices, with the exception of the specific cases for which the same regulation attributes bargaining powers to the POs (and with the exception of the

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and Art. 43 TFEU, to negotiate the contract terms, including price, for some or all of their members' production, subject to quantitative limits so as to maintain effective competition in the market.

[51] As rightly pointed out by JANNARELLI, in *L'associazionismo dei produttori agricoli ed il tabù dei prezzi agricoli nella disciplina europea della concorrenza*, cit., 190, the prohibition against agreements that may oblige members to charge identical prices presupposes that POs only have regulating functions, since direct marketing of the products contributed by members – also envisaged for several production sectors under EU legislation – is incompatible with such a prohibition, whether it takes the form of marketing undertaken by the organisation on behalf of its members, or the organisation itself operates on behalf of its members.

[52] See the Opinion of Advocate General Wahl, in Case C-671/15

[53] It is worth noting that the agreements arising from the contractual negotiations carried out by POs in the sectors where this is allowed, irrespective of the aspect connected to the fixing of prices, could moreover not benefit from the derogation pursuant to the second subparagraph of Art. 209(1), since such agreements also concern parties other than farmers; thus they should be considered as prohibited, as they do not fall within the scope of the so-called agricultural exception previously provided for under Art. 176 of Regulation (EC) No. 1234/07 for products covered by the CMO and now by the second subparagraph of Art. 209(1) of Regulation No. 1308/2013. Nor could the latter be invoked to legitimise agreements concluded as a result of contractual negotiations: in fact, though on the one hand the EU legislator specifies that contractual negotiations carried out by recognised POs in the sectors specified in articles 169, 170 and 171 of Regulation No. 1308/2013 are to be considered instrumental to attaining the objectives of the CAP, as described in Art. 39 TFEU, once the requirements set out therein have been complied with, the same Art. 209 clarifies that the derogation provided for agreements necessary for the attainment of the objectives of the CAP cannot be applied where the agreement, decision or practice implies the obligation of charging identical prices.

cases in which the POs – or, where possible, the IOs[54] – directly sell, in their own name and on their own behalf, the products they receive from members)[55]. Similarly, the Task Force's Report deemed that "ambiguity of rules also risks giving rise to diverging approaches by national competition authorities thereby undermining the internal market" (par. 147), and that neither POs nor farmers can afford the risk of incurring a fine or specialised legal advice so as to navigate the applicable rules (par. 148).

It must be highlighted that the written contract as an instrument for combating the inequalities between agricultural producers and purchasers in terms of information and bargaining power, equally disciplined by Reg. 1308/2013, does not seem to assume relevance for the purpose of applying antitrust legislation. The latter enters into play, for example, in order to prevent horizontal agreements among purchasers, as well as in the above-described cases regarding agreements among agricultural producers or supply chain agreements; to prevent abuses of dominant position, where the potential exists; and to control concentrations between undertakings that intend to expand their size and thereby gain undue strength in the market. The inequality of bargaining power and the possible abuses by the party with greater power (whenever – as in the majority of cases – the latter does not have a dominant position in the market) are not generally taken into consideration by European competition law[56].

In fact, the protection of the weak contracting party against possible abusive behaviours of the counterparty is substantially left up to the Member States, given that, at least as regards business-to-business relations, EU law only ventured a first timid approach with Regulation (EU) No. 261/12 in relation to formal written contracts with first purchasers of milk and milk products, later extending that solution to all sectors of the CMO with Article 168 of regulation (EU) No. 1308/2013[57].

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[54] Art. 210 addresses the agreements and concerted practices of recognised IOs.

[55] In this regard, see recital 131, according to which POs and their associations can play useful roles in concentrating supply, improving marketing and adjusting production to demand, optimising production costs and stabilising producer prices.

[56] It is a well-established opinion that the aspects related to contracts concluded between parties with unequal bargaining power are not normally relevant for EU antitrust law, which rather focuses on situations of so-called buyer power: the latter is considered to exist if and to what extent a market is so concentrated "that a particular buyer has not only power over a particular supplier but over suppliers in general" (as stated in par. 73 of the *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, issued by the ECN – European Competition Network, May 2012; on this point see also the Commission working document *Competition in the food supply chain*, accompanying the Communication *A better functioning food supply chain in Europe*, in http://ec.europa.eu/economy_finance/publicatyions/publication16065_en.pdf, as well as, among others, CHAUVE, PARERA, RENCKENS, *Agriculture, Food and Competition law: moving the borders*, cit., 306, in which the authors distinguish between situations in which there is an unequal bargaining power between the parties to a contract and those concerning cases of buyer power, since only the latter constitute, as a rule, cases that are relevant for competition law, where "buyer power normally concerns situations in which the power of a buyer can affect the whole market" (pg. 311).

[57] In reality, some provisions, despite being fragmentary and inadequate, can be used in an attempt to combat the phenomenon; for example, those concerning late payments in commercial transactions (on this theme, see the Report

Lacking any direct intervention on the part of EU law, this aspect is thus substantially left up the Member States, some of which have taken initiatives in this regard, exploiting the possibility of being able to address abusive conduct through regulatory provisions, even where the individual or entity that engages in such behaviour does not hold a dominant position[58]. A prime example in this respect is the legislation, present in some Member States, which is designed to repress abuse of economic dependence[59]. Recital (9) of Regulation (EC) No. 1/2003[60] is very clear on this point, as it states explicitly that "this Regulation … does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law"; by way of example, the recital mentions legislation that "prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual … irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration" [61].

However, as pointed out by the Commission itself, though on the one hand the rules established by a number of Member States in this regard highlight how widespread the problem is, not being confined within one or more Member States, but rather common to all undertakings operating throughout EU territory, on the other hand they lack uniformity[62] – nor could it be otherwise, in the absence of any harmonising legislation[63] – both as far as the identification of abusive conducts is concerned and with respect to penalties. It would thus certainly not be inappropriate to address the issue within the framework of EU law, also because, as pointed out previously, the present situation implies a patchwork of national

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26.8.2016 from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU on combating late payments in commercial transactions, COM (2016) 534 final) and those aimed at protecting not only consumers, but competitors as well, against deceptive and comparative advertising.

[58] However, the Agricultural Markets Task Force, in its Report, has advised the Commission to introduce an EU framework legislation and a harmonized baseline of prohibited Unfair Trading Practices in Member States to be laid down in the CMO (par. 113), as well as the European Parliament, in its resolution of 7 June 2016, par. 31.

[59] For an examination of national legislation on this point, see International Competition Network, Special Program for Kyoto Annual Conference, *Report on Abuse of Superior Bargaining Position*, http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf.

[60] Council Regulation (EC) No. 1/2003 of 16 December 2002, in OJEC L 1 del 4.1.2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[61] The *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, cit., highlights that "national rules may have a different perspective" from EU competition law (note 65).

[62] Cf. *Libro verde sulle pratiche commerciali sleali nella catena di fornitura alimentare e non alimentare tra imprese in Europa*, cit.; see also HENNING-BODEWIG (ed.), *International Handbook on Unfair Competition*, Munchen, 2013; HELLWEGE, *It is necessary to strictly distinguish two forms of fairness control!*, in *Journal of European Consumer and Market Law*, 4/2015, 129 ff..

[63] For an overview of the measures adopted by Member States to fight UTP, see the *Report from Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain*, 29.1.2016, COM (2016) 32 final.

provisions which inevitably affect transnational contractual relations as well, not to mention the proper functioning of the internal market[64].

With specific reference to the agri-food sector, a few reservations, however, should be expressed in respect of the affirmation made by antitrust law scholars that unfair or abusive practices regarding individual contractual relations and resulting from the inequality between the parties in terms of bargaining power are irrelevant for the purposes of competition legislation. That is because such cases, notwithstanding the presence of aspects that are pathological in some respects, allegedly do not affect the structure of the market as a whole, being limited to the single contractual relationship concerned, which involves parties – businesses in this case – having different bargaining power.

Yet in the case of relations in the agricultural and food supply chain, the existence of a marked difference in bargaining power cannot be considered an isolated phenomenon, limited to a number of specific contractual relations or characterising only a few specific businesses. On the contrary, the situation in question has relevance at a system level, as it concerns a whole set of contracts between sellers, on the one hand, and purchasers, on the other. Therefore, although from a theoretical perspective the distinction between aspects tied to unequal bargaining power and buyer power[65] is clear and precise, if we examine the contractual relations among businesses operating in the agricultural and food products supply chain as a whole, we can easily understand that the distinction becomes fuzzy, to the point of disappearing, since the undisputed greater bargaining power of purchasers in general implies – if and to the extent that it enables abusive or unfair practices – a serious risk of undermining the proper functioning not only of

[64] On this subject, see GONZÀLEZ VAQUÉ, *Unfair Practices in the Food Supply Chain*, in *EFFL*, 5/2014, 293 ff. HILTY,HENNING-BODEWIG, PODSZUN, *Comments of the Max Planck Institute for Intellectual Property and Competition Law, Munich of 29 Aprile 2013 on the Green Paper of the European Commission on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, available at the website http://www.ip.mpg.de/fileadmin/templates/pdf/MPI_Stellungnahme_Gruenbuch_B2B_2013-04-30_01.pdf, believe that the concerns raised by the Commission in *Green Paper of the European Commission on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain*, cit. in relation to the implications of distinct national legislation on transnational trade, are to be considered excessive. In this regard, it should be noted that Art. 86 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11.10.2011, COM (2011) 635 envisages the possibility of considering the terms of contracts between traders to be unfair; the proposal does not seem likely to be approved, however, as the Juncker Commission recently declared that it wanted to withdraw it and intends to submit new proposals on the subject of e-commerce and the supply of digital content (on this point see SCHULZE, *The New Shape of European Contract Law*, in *Journal of European Consumer and Market Law*, 4/2015, 140.

[65] What is more, the existence of situations that may be associated with buyer power is not always in contrast with antitrust rules, particularly when such situations imply benefits for consumers: Cf. the Commission working document *Competition in the food supply chain*, cit.

individual contractual relationships, but of the entire market[66]. Unexpected and/or retroactive modifications of contract terms and conditions, abrupt withdrawals devoid of any real justification and penalising price policies not only impose a severe burden on a business that falls victim to them, but, if they occur on a large scale, they can induce sellers to make fewer investments in the absence of adequate certainty about the profit they can expect. This means less product innovation and less choice for consumers; furthermore, it has been clearly shown that although the greater bargaining power of distribution or processing companies means lower prices for suppliers, it does not always imply that the benefits obtained by the stronger contracting party will trickle down to consumers.

Therefore, although it is undoubtedly correct to say that the agricultural market cannot be considered devoid of rules when it comes to the protection of competition, and that oversight is required to ensure the proper application both of antitrust law in general and the exceptions provided for the agricultural sector, it is likewise indisputable that the attention of the Commission, and particularly of Directorate-General for Competition, cannot not focus only on the anti-competitive implications of the activity of organisations of agricultural producers or interbranch organisations, or on the contractual negotiations conducted by POs, where – with many ambiguities and uncertainties – the EU legislator has established numerous requirements and conditions that must be met in order for such negotiations to be considered legitimate. The Commission should rather start asking itself whether the aspects concerning bargaining power in the agricultural and food products sector, given their systemic nature, might not actually have a relevant bearing on the concerns tied to buyer power, one of the central aspects of EU competition law[67].

[66] The EP resolution of 7 June 2016, cit., stresses that action to combat UTPs will help, inter alia, to ensure the proper functioning of the internal market.

[67] CHAUVE, PARERA, RENCKENS, *Agriculture, food and Competition law: moving the borders*, cit., 312; the authors note that, following reports received from the parties concerned and some national competition authorities, in which it was deduced that the "network of bargaining power practices (of operators which do not individually have buyer power and are not linked) would ultimately have the same detrimental effect as buyer power", the Commission commissioned a study to assess such possible effects.