Food waste and unfair commercial practices

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Abstract

The paper, after an initial introduction to the theme of Unfair Trading Practices in the agrifood chain contracts, highlights the existing link between certain unfair commercial practices in the sector and food wastes; in fact, besides being detrimental to the agricultural or food producer, a few of such practices can contribute to the formation of food waste, like the cancellation of the order of perishable products without notice or with particularly short notice, or the provision of a guarantee for the purchaser that all unsold goods will be deducted from the purchase price and that the costs of removal will be borne by the selling parties.

Le document, après une première introduction au thème des pratiques commerciales déloyales dans les contrats de la chaîne agroalimentaire, met en évidence le lien existant entre certaines pratiques commerciales déloyales du secteur et les déchets alimentaires ; en effet, outre le fait qu'elles portent préjudice au producteur agricole ou alimentaire, quelques-unes de ces pratiques peuvent contribuer à la formation de déchets alimentaires, comme l'annulation de la commande de produits périssables sans préavis ou avec un préavis particulièrement court, ou la fourniture d'une garantie pour l'acheteur que tous les invendus seront déduits du prix d'achat et que les coûts d'enlèvement seront supportés par les parties vendeuses.

Bargaining within the agri-food market often takes place between parties endowed with very different bargaining power, to the complete disadvantage of the sector of the supply of agricultural and food products, so that very often agricultural and food producers are forced not only to suffer the economic content of the contract but also to have to endure the inclusion in the contractual discipline of clauses that are clearly favourable to the protection of only the strong contractor, or having to suffer, more generally, practices - not necessarily reflected in contractual clauses - of the counterparty based on opportunistic or *unfair* behaviour, against which there is no remedy other than the drastic remedy of not concluding the contract or withdrawing from it.

The EU legislator has recently implemented a - still timid - approach, aimed at protecting the weaker contracting party in contracts in the agricultural and foodstuffs supply chain, in particular to prevent the adoption of contractual clauses or unfair commercial practices to the detriment of the person who places agricultural or foodstuffs on the market, in order to prevent disparities in bargaining power from enabling the stronger contracting party to introduce clauses or allow him to adopt unfair practices to the detriment of the other party, the latter being forced to be subjected to the determinations of the purchasing party, including with regard to contractual technicalities, or, more generally, to be subjected to unfair conduct both before and after the conclusion of the contract.

Doi 10.5281/zenodo.6327127

After repeatedly arguing that there was no need for EU legislation in this area[1] to combat the phenomenon, the Commission was forced to revise its thinking, following calls to the contrary from the European Parliament.

In fact, still in the conclusions to the Report to the European Parliament and the Council of 29 January 2016[2], the Commission did not see any added value in an harmonising intervention by the EU on the issue of combating unfair commercial practices.[3] In the report under review, however, the Commission acknowledged that the phenomenon of unfair practices in the sector was widespread, since at the time as many as 20 Member States had already adopted rules to combat them or planned to do so in the immediate future. Moreover, precisely because state interventions were intended to respond to needs for which there was no EU regulation, it was inevitable that the rules adopted at domestic level, although intended to tackle the same phenomenon, would be heterogeneous in content and would thus lead to fragmentation and distortion of the internal market, especially whenever commercial transactions concerning agricultural products or foodstuffs took place at transnational level.[4]

Already in June 2016, on the contrary, the European Parliament, replying to the above-mentioned Communication, invited the Commission to present a legislative proposal on unfair commercial practices in the agri-food sector[5], and the EU Council[6] and the European Economic and Social Committee[7] came to similar conclusions.

[1] An initiative taken on the input of the High-Level Forum for a better functioning of the agri-food chain has been, since 2013, the *Supply Chain Initiative* (SCI), operating on an exclusively voluntary basis: this initiative, besides having a limited impact on the territory of the Union, has not produced, in reality, great and appreciable results, due, in essence, to the lack of adequate sanctions. Moreover, the organisations representing agricultural producers have not joined the scheme, partly because of the alleged lack of confidentiality - in the scheme in question - for the person denouncing an unfair practice to their detriment.

[2] The Report referred to in the text was classified as COM (2016) 32 final, Unfair Business-to-Business Commercial Practices in the Food Supply Chain. Previously, and of similar tenor, see Commission Communications COM (2009) 591 final, A *better functioning food supply chain in Europe*, and COM (2014) 472 final, *Addressing unfair trading practices in the business-to-business food supply chain*.

[3] For a critical stance, towards the Commission's position, see. L. GONZALEZ VAQUÉ, *Unfair Practices in the Food Supply Chain*, in "EFFL", 2014, 293 ff. ; against a direct intervention of EU law in the sector, see, instead, HILTY, HENNING-BODEWIG, PADSZUN, *Comments of the Max Planck Institute for Intellectual Property and Competition Law, MUnich of 29 April 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 Dated 31 January 2013, Com (2013) 37 final*.

[4] For a meritorious study of national regulations aimed at countering the phenomenon of unfair trading practices also, but not only, in the food sector, CAFAGGI and IAMICELI, *Unfair Trading Practices in the Business-to-Business Retail Supply Chain, An overview on EU Member States legislation and enforcement mechanisms*, EC Commission JRC Technical Reports, Publication Office of the European Union, Luxembourg, 2018.

[5] Thus European Parliament Resolution 2015/2065(INI) of 7 June 2016 *on unfair trading practices in the food supply chain*.

[6] See Council Conclusions of 12 December 2016 *on strengthening the position of farmers in the food supply chain and combating unfair trading practices*.

[7] See COM (2016) 32 final of 30 September 2016.

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The Commission thus presented a proposal for a directive in April 2018:[8] which, in the light of the attention, including in the media, that this legislation generates, was then with unusual speed transfused into Directive 2019/633 of 17 April 2019, so that the directive saw the light just before the closure of the legislature due to the European elections in May 2019.[9]

The directive proposes to create a unitary regulatory framework on the subject, even though the harmonization resulting from the adoption of the directive appears to be of a minimal nature, Member States remaining free to implement and strengthen the discipline by reinforcing - or maintaining, if already existing - the protections for the party affected by the *unfair*[10] behaviour. Member States, in particular, are given the possibility of maintaining or introducing stricter rules compared to those provided for by the directive, as well as of regulating cases which do not fall within the scope of the directive (thus the 2nd paragraph of art. 9).[11]

The minimalist approach can indeed be understood in the light of the Commission's own scepticism, which has been mentioned, and of the fact that this is essentially the first organic intervention on the subject[12], and as such is susceptible to verification and integration over time.

The enterprises potentially benefiting from the protection offered by the directive are both agricultural enterprises, i.e. those engaged in the production of products defined as such and listed in Annex I to the TFEU, and enterprises producing foodstuffs, i.e. not only products for food use listed in Annex I to the TFEU, but also "products not listed in that Annex, but processed for use as food using products listed in that Annex"[13]; and, finally, enterprises which simply market agricultural products or foodstuffs.

The directive, moreover, is intended to intervene only in contracts which are likely to allow the transfer of ownership of foodstuffs: consider Article 1(1), which refers to the prohibition of contracts 'between buyers and suppliers'; references to such positions are, moreover, contained several times in the articles of the directive, and specific definitions are offered to identify both 'buyer' and 'supplier'.[14]

Moreover, in addition to these objective requirements, the directive contains further, equally important, subjective requirements: it limits its action to supply relationships concluded between pro-

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[8] Of 12 April 2018, (COM) 173, on unfair business-to-business commercial practices in the food chain.
[9] In Italy at the state, the Directive has been subject to partial transposition, with the European Delegation Law 2019-20: Law 22 April 2021, no. 53, in OJ no. 97 of 23.4.21.
[10] See Art. 9, according to which "in order to ensure a higher level of protection, Member States may maintain or introduce national rules for combating unfair commercial practices which are more stringent than those laid down in this Directive". Nor does the Directive purport to do away with the *Supply Chain Initiative,* mentioned above in n. 10, which may thus be maintained, operating on a different footing from that of the Directive.
[11] Provided that the internal rules are compatible with those relating to the functioning of the internal market: see Article 9(1) and (2).
[12] In fact, it has already been pointed out that EU law does not lack interventions on specific aspects, such as the regulation on interest on arrears in commercial transactions, or such as the possibility of written formalization of contracts of first sale of agricultural products subject to EU regulation no. 1308/2013.
[13] Thus, Article 2(d) of the proposal, entitled *Definitions*.
[14] Within the framework of those relationships, certain services may also be sanctioned as commercial services, provided that they are included among the prohibited conduct referred to in Article 3 of the directive: see Article 1(2)(5).

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ducers and traders in agricultural products and foodstuffs, on the one hand, and purchasing companies, on the other, which do not exceed (as far as the supplying companies are concerned) and do not exceed (as far as the purchasing companies are concerned) certain annual turnover thresholds.[15]

In particular, the solution chosen provides that, in order for the relative discipline to apply, the maximum threshold of annual turnover of the transferring company (agricultural or food) must be lower than the annual turnover of the purchasing company. In substance, the application of the discipline is subordinate to the presence of a situation characterized by a dimensional disparity of the contracting companies, such as to entail - with a sort of absolute presumption - asymmetries of negotiating power between them such as to justify the normative intervention in question.

It should also be noted that the text of the directive in question does not contain – unlike Directive 2005/29/EC on unfair business-to-consumer[16] commercial practices – a general definition of unfair commercial practice: there is, therefore, no definition or general concept of unfair commercial practice, characterised by the presence of characteristic elements or indices denoting its unfair nature, but only[17]an exhaustive list of typical cases.

On the contrary, the directive identifies - in Article 3 - fifteen types of unfair conduct of which nine, listed in paragraph 1, are considered always prohibited, and the remaining six, listed in paragraph 2, are prohibited only under certain conditions.[18]

Among the practices which are always prohibited is Article 3(1)(b), which prohibits the cancellation by the purchaser of “orders of perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products; notice of less than 30 days shall always be considered as short notice; Member States may set periods shorter than 30 days for specific sectors in duly justified cases”.

The second paragraph of the same Article 3 identifies further prohibited practices, "unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer".

The presence of the above condition for the applicability of the prohibitions in question thus makes the actuality of the prescriptions and prohibitions themselves merely residual. It will, in fact, be sufficient to take care to include clear and detailed contractual provisions at the time of the conclusion of the contract or in a subsequent agreement to avoid the application of paragraph 2. The presence of clear and unambiguous clauses does not seem to be an effective deterrent to the inclusion of such clauses in the contract, since the inequality of bargaining power is likely to make suppliers willing to accept clauses such as those under consideration.

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[15] The rules do not apply to sales to consumers, as they are reserved for business-to-business relations only.
[16] On which see, for all, M. Bertani, *Pratiche commerciali scorrette e consumatore medio*, Milan, 2016; G. De Cristofaro (edited by), *Le "pratiche commerciali sleali" tra imprese e consumatori. La direttiva 2005/29/CE e il diritto italiano*, Torino, 2007; Id., *Le pratiche commerciali scorrette e il codice del consumo*, Torino, 2008; E. Minervini e L. Rossi Carleo, (edited by), *Le pratiche commerciali sleali,* Milano, 2007.
[17] A list of prohibited practices is also contained in Directive 2005/29/EC, and in particular in its Annex I, but it is not the only instrument for the identification of p.c.s.
[18] The original Commission proposal listed a total of eight types of unfair conduct, four of which were considered to be always prohibited and the remaining four prohibited only under certain conditions.

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Among these clauses, paragraph 2(a) provides for the case where “the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both”.

Coming to the topic of the meeting, it is thus evident how certain unfair commercial practices, besides being detrimental to the agricultural or food producer, can contribute to the formation of food waste: in the first of the two hypotheses considered, the cancellation of the order of perishable products without notice or with particularly short notice means that the supplier cannot reasonably market or in any case use the production subject to cancellation, which thus risks becoming waste; in the second, the guarantee that all unsold goods will be deducted from the purchase price and that the costs of removal will be borne by the selling parties suggests that the large retailers will certainly not mind limits on the quantities of product supplied in order to offer a wide range of products in quality and quantity, regardless of the remainder. The latter return to the availability of the suppliers who theoretically have the possibility of allocating the waste to other uses, but probably, also in view of the daily nature of such an event and the quantities of product involved, they may prefer to simply dispose of them.

We point out here that in Italy Directive no. 2019/633 is still in the implementation phase, only the delegated law having been adopted (with the 2019/20 European delegation law) but not yet the delegated decree; however, the Italian legal system has already equipped itself with a discipline of contrasting u.c.p.’s substantially with greater protection for the weaker party than that offered by the directive, and such as to prohibit, inter alia, the imposition of contractual clauses "unjustifiably burdensome", with a general provision aimed in any case to prohibit any "further unfair commercial conduct that is such also taking into account the complex of commercial relations that characterize the conditions of supply" (so the art. 62, 2 co, Decree Law No. 1 of 2012).

On this regulatory basis, the Italian Enforcement Authority (the Competition and Market Authority: AGCM) has dealt with a case of certain interest for the purposes of the fight against food waste: in the Bulletin of the Authority No. 28 of 15 July 2019, in fact, a number of measures of the AGCM taken at the conclusion of several investigative proceedings[19] concerning a series of entirely similar conducts held by several operators of the large-scale retail trade in relation to the supply relationships of fresh bread have been published. Such being, according to the definition of the Ministerial Decree of 1 October 2018 of the Ministry of Economic Development no. 131 ("Regulation governing the denomination of "bakery", "fresh bread" and the adoption of the wording "preserved bread"), the "bread prepared according to a continuous production process, without interruptions aimed at freezing or deep-freezing, except for the slowing down of the leavening process, devoid of preservative additives and other treatments having a preservative effect" (so art. Ministerial Decree no. 131 does not set a time limit within which fresh bread must be put on sale: however, according to the interpretation of the regulations in force on the preservation of foodstuffs, this time limit is assumed to be 24 hours after manufacture, given the nature of the product.

The AGCM order states, verbatim, that “Given the rapid perishability of fresh bread, it is normally produced at night and consumed within 24 hours of production. Accordingly, bread that remains unsold by the time retail outlets close in the evening is removed from the shelves at the end of the

[19] With AL numbers 15A, 15B, 15C, 15D, 15E, 15F.

evening and is not offered for sale again the following day. Unsold fresh bread can be used for animal feed, other food production, charitable donation or - more frequently - disposal as organic waste (...). However, because of the limited commercial advantages of selling it for animal feed and reusing it for other food purposes, unsold bread is mostly a disposal item for bakers and retailers alike and, therefore, waste to be disposed of, or donated to charity".

Well, it has emerged, in fact, that in a generalized way many big retailers imposed to almost all of their suppliers of fresh bread (and therefore to be consumed in the day) to provide for the withdrawal of fresh bread remained unsold in the day, involving the disposal of the returned goods at the expense of the suppliers themselves[20], and the re-credit to the distribution chain of the price paid for the purchase of goods returned.

At the end of the investigation, and after having invariably ascertained the existence of a significant imbalance of bargaining power between the parties concerned[21], the Authority considered that such commercial conduct took the form of the imposition of unjustifiably onerous conditions to the detriment of suppliers of fresh bread, such as to transfer, moreover, unjustifiably to the latter a commercial risk typical of distribution activities, with a consequent breach of letters a) and e) of paragraph 2 of Article 62.

Thus, the defensive arguments of the distribution operators aimed, inter alia, at arguing that the sale price included a specific remuneration for the activity of withdrawal and disposal of unsold goods and that the obligation to return goods was the subject of effective negotiation (rather than imposition) between the parties were not accepted.

The Authority has not dealt with the consequences of such practices on daily wastage of large quantities of bread, as this is not the purpose, but there is no doubt that a finding that the practice is unlawful may lead not only to an economic benefit for suppliers of fresh bread, but also to a better balance between the daily quantities of fresh bread delivered and the daily returns and thus to a not insignificant saving of production and delivery factors (energy, ingredients and raw materials, labour, transport).

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[20] The destination of unsold food is to be used as animal feed, to be used in the production of other foodstuffs, to be donated to charity and to be disposed of as organic waste.

[21] Although there are no agricultural producers involved, the AGCM has also noted the presence of a high fragmentation of supply in the bread-making sector, in the light of the presence of more than 20,000 small businesses (an average of 5 employees per business), mostly set up as one-man businesses. The Authority also found that, in the face of a general decline in demand in recent decades, there is an excess supply of fresh bread, a rapidly deteriorating product. A further weakness of the producers is the lack of recognition of individual producers by consumers, which makes it easy for suppliers to be substituted.

Doi 10.5281/zenodo.6327127