

Centre for Law, Economics and Society

Research Paper Series: 1/2016



Image [bugphaj](#) © 123RF.com

**Superior Bargaining Power and the Global
Food Value Chain. The Wuthering Heights of
Holistic Competition Law?**

Ioannis Lianos and Claudio Lombardi

Centre for Law, Economics and Society

**CLES
Faculty of Laws, UCL**

Director: Professor Ioannis Lianos



**CLES Research Paper Series
1/2016**

**Superior Bargaining Power and the Global
Food Value Chain. The Wuthering Heights of
Holistic Competition Law?**

Ioannis Lianos and Claudio Lombardi

January 2016

Centre for Law, Economics and Society (CLES)
Faculty of Laws, UCL
London, WC1H 0EG
The CLES Research Paper Series can be found at
www.ucl.ac.uk/cles/research-paper-series

All rights reserved.

No part of this paper may be reproduced in any form without permission of the authors.

Pre-published version of Ioannis Lianos & Claudio Lombardi, Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?, Concurrences I-2016, pp. 22-35.

ISBN 978-1-910801-08-6

© Ioannis Lianos and Claudio Lombardi 2016

Centre for Law, Economics and Society

Faculty of Laws, UCL

London, WC1H 0EG

United Kingdom

Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?

Ioannis Lianos & Claudio Lombardi

Abstract

In this paper we analyse the role of superior bargaining power in competition law and policy in the agri-food value chain. Conventional approaches to competition law based on a neoclassical price theory perspective tend to neglect or to stay opaque on the role of bargaining power in competition law. However, national competition authorities and national legislators seem to be less biased by specific theoretical approaches and have increasingly engaged with the application of the concept of bargaining power in competition law. In this paper we discuss both positions and set a general theoretical framework, the global value chain approach, to better understand the interactions between suppliers and retailers in the food sector. Finally, we observe the framing of new tools of competition law intervention at national level, in order to deal with situations of superior bargaining power in specific settings related to the food value chain.

Keywords: bargaining power, global food value chain, food retail, joint purchasing agreements, abuse of economic dependence, mergers, waterbed effects, agricultural markets

JEL Classification: K10, K21, L4, L40, Q10

Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?

Ioannis Lianos & Claudio Lombardi¹

I. Introduction

The social and economic importance of the food sector has always put in the spotlight of competition authorities.² As Chauve et al. remark “*the food supply chain accounts for 5 per cent of E.U. value added and 7 per cent of employment, bringing together the agricultural sector, the food processing and manufacturing industry, wholesale trade, and the distribution sector,*” also noting that the “[f]ood spending represents about 15 per cent of the average EU household budget.”³ Two subsequent developments have ensured that food issues have recently gained prominence in the work of competition authorities. First, the considerable rise of the price of commodities, including food, in 2008, led to increasing demands for intervention from public authorities in order to curb the phenomenon of food inflation.⁴ Food inflation trends seem, however, to have since been reversed, the

¹ Ioannis Lianos is professor of global competition law and public policy at the Faculty of Laws, UCL, Director of the Centre for Law, Economics and Society at UCL, Chief Researcher of the Skolkovo Institute for Law and Development, HSE (Moscow) and Principal Investigator of the Multi-jurisdictional project “Competition law and policy and the global food value chain”. Claudio Lombardi is postdoctoral research fellow at the Higher School of Economics, Skolkovo Institute for Law and Development, Moscow. Many thanks to Florian Wagner von Papp for comments on an earlier draft of the paper and to Philipp Hacker and Daniel Schlichting for excellent research assistance. Any errors or omissions are of the sole responsibility of the authors. Ioannis Lianos acknowledges the support of the Leverhulme Trust. Any errors or omissions are of the sole responsibility of the authors.

² For a description of antitrust decisions in the agribusiness sector in Europe, see P. Buccrossi, S. Marette and A. Schiavina, Competition policy and the agribusiness sector in the European Union, (2002 29(3) *European Review of Agricultural Economics* 373-397; ECN, Report on Competition Law Enforcement and Market Monitoring Activities by European Competition Authorities in the Food Sector (2012), available at http://ec.europa.eu/competition/ecn/food_report_en.pdf, noting that in the period 2004-2012, European national antitrust authorities have brought in total 180 antitrust cases and 1,300 merger cases. To this, one may add the market monitoring actions launched by the national antitrust authorities in the same period, which according to the report amount to 102. A similar trend may be identified with regard to the competition authorities of emergent economies.

³ P. Chauve, A. Parera and A. Renckens, Agriculture, Food and Competition Law: Moving the Borders, (2014) 5(5) *Journal of European Competition Law & Practice* 304-313, 304. See also, L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 6-8.

⁴ It was reported that inflation from 2005 to 2011 saw food prices increase by around 22% on average across OECD countries. However, there has been substantial variation: relatively low levels of food

prices of commodities decreasing sharply the last few months of 2015.⁵ Second, additional concerns have been raised by the perception that retailers have gained considerable power over the upstream parts of the supply chain, in particular processors but also farmers. Individual or collective retailer power has been at the centre of the attention of public authorities in Europe,⁶ with certain investigations being recently carried out at the national level.⁷ As a recent study commissioned by the European Commission shows, the top 10 European retailers have seen their market share grow from 26% of total EU grocery in 2000 to almost 31% in 2011, the overall concentration of retailers increasing in virtually all Member States.⁸ The international expansion of some retail brands across Europe, but also in non-European markets, has led to a general decrease in the importance of home markets for top European retailers in terms of the domestic share of European grocery banner sales.⁹ Retailer power also manifests itself increasingly with the use of private labels, which compete directly with leading manufacturers' brands and other national brands and illustrate this shift in the balance of power between retailers and suppliers.¹⁰

inflation in the US (14%) through to higher levels in Turkey (67%) and Mexico (48%). These variations even occur within countries participating to more homogeneous (from a trade perspective) blocks (e.g. EU): OECD, *Competition in the Food Chain*, vol. DAF/COMP(2013)15 (OECD 2013).

⁵ The FAO Food Price Index averaged 155.7 points in August 2015, down 8.5 points (5.2%) from July, the sharpest monthly drop since December 2008: FAO, Food Price Index, available at <http://www.fao.org/worldfoodsituation/foodpricesindex/en>.

⁶ See the study commissioned by the OFT: P. Dobson, M. Waterson and A. Chu, *The Welfare Consequences of the Exercise of Buyer Power*, OFT, September 1998, *Research Paper* 16; OECD, *Buying Power of Multiproduct Retailers*, 1999; European Commission, *Buyer Power and its Impact in the Food Retail Distribution Sector of the European Union*, 1999; UK Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*, 2000, Cm. 4842.

⁷ UK Competition Commission, *The supply of groceries in the UK market investigation*, April 2008; OFT, *Grocery Market – Proposed Decision to Make a Market Investigation Reference*, March 2006, at 42-49; A. Svetlicinii, *The Croatian Competition Authority issues a report on competition on the food retail market in 2008*, 16 July 2009, *e-Competitions*, No. 28749, www.concurrences.com; H. P. Nehl, *The Austrian competition authority concludes general inquiry in the highly concentrated food distribution sector while highlighting indications of strong buyer power (Branchenuntersuchung Lebensmittelhandel)*, 18 June 2007, *e-Competitions*, No. 13981, www.concurrences.com;

⁸ European Commission, DG COMP, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 50-52. This is driven by higher concentration of modern retail.

⁹ European Commission, DG COMP, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 55.

¹⁰ D. R. Desai, I. Lianos and S. Weber Waller, *Brands, Competition Law and IP* (CUP, 2015); A. Ezrachi and U. Bernitz, *Private Labels, Branded Goods and Competition Policy: The Changing Landscape of Retail Competition* (OUP 2009); A. Ezrachi, *Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law*, (2010) 33(2) *World Competition* 257-274;

Concerns over the rising power of retailers in the food sector have led many competition authorities to use existing rules or adopt new rules on superior bargaining power, these rules either forming part of competition law statutes or of other functional equivalents.¹¹ These different rules stay relatively opaque as to the definition of the concept of superior bargaining power, the common characteristic (and presumably) advantage of these provisions being that they may potentially impose competition law related duties to undertakings not disposing of a dominant position or a significant market power, for unilateral conduct, which would have otherwise not been subject to competition law related duties under the traditional rules of abuse of a dominant position. The concept of superior (or unequal) bargaining power is also a well-known concept in the fields of contract law and unfair competition law,¹² where it has given rise to a considerable literature attempting to unveil its theoretical underpinnings.¹³ Authors usually contrast the use of this concept in these areas of law, where the focus is on the unfairness of the process of exchange, with the efforts to integrate this rule in the field of competition law, where the emphasis is usually put on outcomes, such as efficiency or consumer welfare. The underlying objective of contract law or unfair competition statutes consists in regulating the contest between contracting parties and ensuring a relatively equalized landscape of bargaining capacity, bargaining power being interpreted as

A. Foer, Introduction to Symposium on Buyer Power and Antitrust, 72 Antitrust L.J. 505 (2005); L. Vogel, Competition Law and Buying Power, 19(1) ECLR 4 (1998).

¹¹ For a comparative analysis of rules on superior bargaining power, see ICN, Report on Abuse of Superior Bargaining Position (2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>.

¹² See, for instance, for contract law, at the EU level, Article 4:109 (ex -art. 6:109) of the Principles of European Contract Law 2002 on excessive benefit or unfair advantage because at the time of the conclusion of the contract “was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill”; Principle 10 of the Draft Common Frame of Reference (DCFR) concerning restrictions to the principle of the freedom of contract because of inequality of bargaining power (even in the context of B2B relations) and the contract law sub-doctrines that explicitly or implicitly incorporate bargaining power such as unconscionability, duress, undue influence, the parole evidence rule and public policy. On unfair competition, again at the E.U.E.U. level, see Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe COM(2013) 37; Communication of the Commission, Tackling unfair trading practices in the business-to-business food supply chain, COM(2014) 472 final.

¹³ See in particular the seminal cases *Lloyds Bank Ltd v. Bundy* [1974] EWCA Civ 8 (EWCA (Civ)); *Macaulay v. Schroeder Publishing Co Ltd* [1974] 1 WLR; and the following critical and explanatory appraisal by S. N. Thal, Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness, (1988) 8 *Oxford J. Legal Stud.* 17; M.J. Trebilcock, The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords [1976] *University of Toronto L. J.* 359; L. A. DiMatteo, Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law (1998) 33 *New Eng. L. Rev.* 265; and more recently A. Choi and G. Triantis, The Effect of Bargaining Power on Contract Design [2012] *Va. L. Rev.* 1665.

the interplay of the parties' actual power relationship in an exchange transaction.¹⁴ On the contrary, competition law defines bargaining power more generally, in terms of the ability of an undertaking to introduce a deviation from the price or quantity obtained from the competitive situation in the market in which the transaction takes place. In this context, buying power denotes the ability of a buyer to achieve more favourable terms than those available to other buyers or what would otherwise be expected under normal competitive conditions. This approach emphasizes the gain resulting from the presence of bargaining power relative to a situation in which it is absent (not necessarily that of perfect competition),¹⁵ focusing on market structure and concentration.¹⁶

It is usually thought that superior (or unequal) bargaining power may constitute a competition law problem as long as it leads to negative welfare effects in terms of pricing, choice or innovation, these "competition law concerns" being carefully distinguished from "non-competition" law concerns.¹⁷ Two views are usually advanced with regard to the interaction of provisions on superior bargaining power and competition law. First, considerable effort has been spent in order to mould the concept of superior bargaining power into the competition law and economics traditional framework by bringing adjustments to traditional competition law concepts such as relevant market and market power¹⁸ or focusing competition law enforcement on "buying power." Second, new provisions on superior bargaining power or economic dependence, introduced in the competition law statutes by some jurisdictions, are typically examined from the perspective of efficiency and consumer

¹⁴ Yet, it is important to note that regulatory interventions in order to rebalance contractual inequality are still designed as exceptions to the principle of the freedom of contract and the certainty of the contract, especially in B2B contracts, where a very limited power to rebalance the contractual arrangement is generally left to the discretion of the judge.

¹⁵ See, R. Clarke, S. Davies, P. W. Dobson and M. Waterson, *Buyer Power and Competition in European Food Retailing* (Edward Elgar 2002).

¹⁶ J. T. Dunlop and B. Higgins, Bargaining Power and Market Structures, (1942) L(1) *The Journal of Political Economy* 1, 4-5; R. G. Noll, "Buyer Power" and Economic Policy, (2005) 72 *Antitrust Law J.* 589.

¹⁷ Recent empirical work has relativized the impact of the superior bargaining power of retailers, as this is exemplified by rising consolidation and increasing concentration levels, on price: see E. Ciapanna and C. Rondinelli, Retail Market Structure and Consumer prices in the Euro Area, *ECB Working Paper Series*, No. 1744, December 2014 (observing that larger concentration of retailers on the purchasing side of the procurement market is associated with lower consumer prices). See also, European Commission, DG COMP, *The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector*, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf> (noting that consumer choice was not affected by the rise of concentration levels at retail, although innovation may have been).

¹⁸ See, for instance, § 20 of the German Act against Restraints of Competition on "relative and superior market power" (*relative und absolute Marktmacht*).

welfare and usually relegated to the outer boundaries of competition law provisions on abuse of a dominant position, for instance on the basis of an error cost analysis,¹⁹ or the perception that fairness concerns have little role to play in modern competition law.²⁰ Provisions on superior bargaining power are examined from a public choice perspective as a by-product of the political pressure of organised interests of small and medium undertakings or farmers, leading to the adoption of mainly redistributive statutes that restrict competition and presumably economic efficiency. From this angle, the existence of a superior bargaining power of retailers in the procurement markets does not necessarily give rise to market power at the selling side, harming final consumers.

Price transmission from producer to consumer prices seems to have worked so far in favour of final consumers, as producer price increases during the period of the recent rise of commodity prices in 2008 have been partially absorbed by the food retail sector through a reduction of profit margins, at least in the old Member States.²¹ It remains to be seen if the most recent decrease of food prices will also be passed on to consumers or if we will face a situation of asymmetric price transmission from producer to consumer food prices.²² Similarly, the recent Modern Retail Study of the European Commission noted that the increase in the overall retail concentration has been counter-balanced to a certain extent by consolidation in the

¹⁹ See, for instance, F. Wagner von Papp, Unilateral conduct by non-dominant firms: a comparative reappraisal, ASCOLA Tokyo Conference (2015), (on file with the author, shortly available at the SSRN) conducting an “error cost analysis” and advancing the view that dominance, and consequently the definition of a relevant market, is a necessary condition for a superior bargaining power to be considered as a competition law problem and recognising the countervailing impact that subsidiary contract law enforcement would have on error costs. An error cost analysis conducted *in abstracto* may underestimate the transaction costs associated with the use of the specific legal process, which may vary from jurisdiction to jurisdiction and in some cases may be less important in the context of competition law enforcement than other alternatives. Error cost analysis may also lead to the “*sin of single institutional analysis*” see, K. N. Komesar *Law’s Limits*, (Cambridge: Cambridge University Press, 2001) as it will emphasize the defects of one institutional alternative (e.g. competition law) on some aspects to argue for an expansive role of another, probably equally defective in some other aspects, institutional choice: contract law or unfair competition law statutes.

²⁰ See, for instance, P. Akman, *The Concept of Abuse in EU Competition Law* (Hart Pub. 2012), Ch. 4.

²¹ L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 14.

²² Asymmetric transmission is often linked to the existence of market power at a level of the value chain: OECD, Food Price Formation, October 2015, available at <http://www.oecd.org/site/agrfcn/meetings/agrfcn-7-food-price-formation-paper-october-2015.pdf>; in a 2009 report for the European Commission, L. Bukeviciute, A. Dierx and F. Ilzkovitz, The functioning of the food supply chain and its effect on food prices in the European Union, (2009) *European Economy, Occasional Papers* 47, 18, noted that for the euro area, “*the magnitude of the transmission is similar in the case of a price increase and a price decrease.*”

processing and manufacturing industries for certain products, such as coffee, frozen ready cooked meals, baby food²³. Finally, critics of the concept of superior bargaining power usually explain that the complexity of the problems raised by unequal bargaining power between retailers and suppliers cannot be solved by competition law and a more integrated framework is needed, combining the enforcement of competition law, when there is conduct that enters its scope, but also unfair trading practices laws, provisions of contract law and more generally civil law (tort law, European sales law), which aim to deal with abusive use of unequal bargaining power, and finally, soft law and self-regulatory initiatives by the industry that have emerged in several Member States.²⁴ The argument is often made that competition law may be less effective in dealing with the problem than these other areas of law, without, however, that conclusion being based on a thorough comparative institutional analysis that also examines the institutional and social norms related constraints that may limit the remedial potential of other areas of law to deal with the problem.²⁵

This paper aims to question this quick dismissal of superior bargaining power from the traditional competition law framework. First, from a normative perspective, the role the concept of superior bargaining power may play in competition law enforcement becomes particularly significant, should one abandon a narrow neoclassical price theory (NPT) efficiency or consumer welfare driven perspective for an approach that would seek to preserve the competitive process or even one that will be inspired by political economy considerations and a “holistic” competition law

²³ European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 218, 304-377.

²⁴ On a discussion of the possible combinations between these different tools across Member States, see Final Report, Study on the Legal Framework Covering Business – to Business Unfair Trading Practices in the Retail Supply Chain, Final Report (26 February 2014), available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf.

²⁵ These may, for instance, relate to inefficient judicial systems with few capabilities to engage with the economic underpinnings of superior bargaining power, in comparison to the more expert competition authorities, entrenched power relations that make it difficult for suppliers to bring contractual disputes against retailer networks and raise a contract law point based on economic duress or unconscionability against a partner with superior bargaining power, a complaint to the competition authority offering in this case a better option, in view of the far-reaching remedies that a competition law violation may give rise to and that neither contract law nor unfair competition law offer. Even if private enforcement of competition law is more frequently used in these instances, competition authorities focusing on cartels as their enforcement priority, it might still be preferable from the point of view of the parties, in view of the general hostility of contract law judges to legal intervention in order to rebalance contractual inequality.

model.²⁶ In our view, the global value chain approach, developed by political economists and economic sociologists, provides the appropriate theoretical framework in order to better understand the interaction between suppliers and retailers in the food sector and enable us, on this basis, to design competition law interventions (II.). Second, from a descriptive perspective, we note that legislators and competition authorities do not share the antitrust law pessimism usually displayed by authors inspired by the NPT paradigm towards the concept of superior bargaining power, and have increasingly engaged with it, in the context of traditional competition law enforcement with regard to retail consolidation through buying alliances or mergers (III.). Finally, we observe the framing of new tools of competition law intervention in order to deal with situations of superior bargaining power in specific settings related to the food value chain (IV.).

II. The Global Value Chain Perspective

The structure of the food value chain and the relationship between the firms operating in it has changed drastically the last two decades.²⁷ Agriculture and agri-food production has taken advantage of technological innovation becoming more industrialised²⁸ and globalised.²⁹ Modern information systems enable suppliers to receive directly signals over the preferences of consumers for higher quality products, the private sector responding by creating “value chains” with the aim to reduce, through the exercise of control, the uncertainty emerging out of their interaction with a number of economic actors present in different market segments (and for which they do not dispose sufficient information). The globalisation of the economy has also led to the development of a transnational mode of production, with

²⁶ On the perils and advantages of “holistic” competition law, see I. Lianos, Some Reflections on the Question of the Goals of EU Competition Law, in *Handbook in EU Competition Law: Substantive Aspects*, I. Lianos and D. Geradin (eds.), (Edward Elgar, 2013), 1-84.

²⁷ J.F.M. Swinnen, Global Supply Chains, Standards and the Poor How the Globalization of Food Systems and Standards Affects Rural Development and Poverty (CABI 2007) 1.

²⁸ J. Humphrey and O. Memedovic, Global Value Chains in the Agrifood Sector [2006] UNIDO 5, available at <http://agris.fao.org/agris-search/search.do?recordID=GB2013202293>.

²⁹ G. Gereffi and M. M. Christian, Trade, Transnational Corporations and Food Consumption: A Global Value Chain Approach, in *Trade, Food, Diet and Health Perspectives and Policy Options* (2010), C. Hawkes, C. Blouin, S. Henson, N. Drager, L. Dubé (eds.), 3, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564948.

a number of production facilities dispersed in various jurisdictions, thus increasing the need to put in place transnational value chains reducing the resulting uncertainty of dealing with foreign economic actors.

One may also trace the development of value chains in the expansion of national and international regulations regarding consumer protection, food safety and quality, for instance regulation imposing the traceability of food, feed, at all stages of production, processing and distribution (e.g. EU Regulation 178/2002,³⁰ the WTO sanitary and phytosanitary standards, *Codex Alimentarius*). The private sector complies with such regulations by establishing standards and specific codes of conduct managed by industry associations or non-governmental organizations. Being at the one end of the value chain, retailers develop strategies with the aim to build store loyalty, thus enabling them to extract a more significant part of the total surplus value. Because of this direct interaction with consumers and the need to preserve store loyalty, retail networks have more incentives than suppliers to control potential risks at the various nodes of the supply chain (e.g. in order to guarantee product safety).³¹ For this reason, “buyer-driven” chains develop private food standards, which operate on top of public regulations. As a result of these developments, the food value chain is increasingly structured around “global value chains” (GVCs), which permit the simultaneous and coordinated production and distribution of a very large array of products that each stage of the supply chain has to manage effectively, without this involving vertical integration by ownership.³²

The GVC approach provides a theoretical framework enabling us to understand how the global division and integration of labour in the world economy has evolved over time and, more importantly, how the distribution of awards, from the total surplus value, is allocated between the various segments of the chain.³³ The starting point for the development of this framework was the growing importance of new

³⁰ Regulation 178/2002 of the European Parliament and the European Council 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 [2002] OJ L 31/1.

³¹ J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326-12331, 12328.

³² K. De Backer and S. Miroudot, Mapping Global Value Chains, European Central Bank, *Working Paper Series*, No. 1677, May 2014.

³³ On the GVC framework and its predecessor Global Commodity Chains, see G. Gereffi and M. Korzienenicz (eds.), *Commodity Chains and Global Capitalism* (Westport: Praeger, 1994); G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104.

global buyers (big retail) constituting “*buyer-driven global commodity chains*.” The framework also shares Michael Porter’s emphasis on “*value systems*” a concept that has been used in order to describe a set of inter-firm linkages through which different economic actors (and their value chains) are interconnected.³⁴ Hence, contrary to traditional NPT analysis, and more in vogue with transaction cost economics (TCE) and economics of organization, the GVC approach does not mainly focus on issues of horizontal market power and concentration at each segment of the chain, but engages with the vertical links between the various actors with the aim to understand how and whether “lead” actors can capture value. Hence, its focus is on the distribution of the value generated by the chain, rather than the maximization of the surplus (efficiency) as such. GVC’s “holistic view” of global industries focuses on the governance of the value chain, that is, how some actors can shape the distribution of profits and risks in the chain. Taking a political economy perspective, the GVC approach explores the way economic actors may maintain or improve (“upgrade”) their position in the global value chain, “*economic upgrading*” being defined as “*the process by which economic actors—firms and workers— move from low-value to relatively high-value activities in GVC.*”³⁵

A typology of GVC governance structures was elaborated with the aim to describe and explain the driving forces for the constitution of global value chains. According to Gereffi et al., there are “*three key determinants of value chain governance patterns: complexity of transactions, codifiability of information; and capability of suppliers.*”³⁶ His framework is broader than the framework often employed by TCE in order to explain the prevalence of certain forms of organization (hierarchy versus the market system), as the latter focuses only on the determinants of asset specificity and the frequency of the transactions as the driving forces for organizational choice.³⁷

The GVC framework draws inspiration from the resource-based or competences-based view of the firm,³⁸ according to which firms as path-dependent entities

³⁴ M. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press, 1985).

³⁵ G. Gereffi, Global value chains in a post-Washington Consensus world, (2014) 21(1) *Review of International Political Economy* 9-37, 18.

³⁶ G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104, 84.

³⁷ In a nutshell, the more there is asset specificity and the interaction is long-term, the more it is justifiable to invest resources in order to build a hierarchy form of organization.

³⁸ G. Gereffi, J. Humphrey and T. Sturgeon, The governance of global value chains, (2005) 12(1) *Review of International Political Economy* 78-104, 81.

characterised by heterogeneous competence bases and operating under conditions of genuine uncertainty, their existence being justified by the development of productive competencies and learning for a specific cognitive community that forms the firm's core. Contrary to what TCE predicts, firms will not necessarily develop specific capabilities and learning in order to engage in certain value activities, because for instance of economies of scale and the frequency of transactions, as they may be unable to develop the capabilities which are necessary for them to participate in certain value chain activities; they will be thus obliged to appeal to external resources.³⁹ Contrary to the contract theory of the firm, pioneered by TCE, the competence-base view of the firm enquires into the sources of the competitive advantage and the path-dependent process of accumulation of such capabilities. Although the GVC framework adopts the markets and hierarchy categories of TCE, it perceives them as part of a continuum, the network category, which it then analyses as three distinct types of governance regime. In a nutshell, the GVC framework advances the following five governance categories:


- Markets where the costs of switching to new partners is very low;
- Modular value chains where suppliers make products to a customer's specifications, without however making transaction-specific investments that will generate a situation of mutual dependence or just dependence;
- Relational value chains in which complex interactions between buyers and sellers often create mutual dependence and high levels of asset specificity;
- Captive value chains where relatively small suppliers face significant switching costs and are "captive" to large buyers, such networks being characterized by a high degree of monitoring and control by lead firms;
- Hierarchy which denotes situations of vertical integration with the exercise of managerial control.⁴⁰

³⁹ The competence or resource-bases view of the firm draws on work by E. Penrose, *The Theory of the Growth of the Firm* (Oxford University Press: Oxford, 1959). See, more generally, N.J. Foss, *The Theory of the Firm: Contractual and Competence Perspectives*, (1993) *Journal of Evolutionary Economics*, 3, 127-144; G. M. Hodgson, *Evolutionary and competence-based theories of the firm*, (1998) 25(1) *Journal of Economic Studies*, 25-56.

⁴⁰ G. Gereffi, J. Humphrey and T. Sturgeon, *The governance of global value chains*, (2005) 12(1) *Review of International Political Economy* 78-104, 84.

The operation of the key determinants of global value chain governance is described in the following table.

Table 1: Governance types in GVC⁴¹

Governance type	Complexity of transactions	Ability to codify transactions	Capabilities in the supply-base	Degree of explicit coordination and power asymmetry
Market	Low	High	High	Low
Modular	High	High	High	
Relational	High	Low	High	
Captive	High	High	Low	
Hierarchy	High	Low	Low	High

Of particular interest for the purposes of examining superior bargaining power is the category of captive value chains where power is exercised by “lead firms,” in most cases these being modern retailers and supermarkets who drive the agri-food chain, linking daily groceries’ consumers with small farmers around the world. In this context, supplier’s capabilities are relatively low, the complexity of product specifications being high and amenable to codification. In the face of complex products and specifications, the “lead” firms have important incentives and abilities to intervene and to control the chain, thus building up transactional dependence and locking in suppliers. The latter are confined to a narrow set of tasks (for instance, provide raw products or simple assembly) and are dependent on the “lead firm” for complementary value adding activities, such as branding, marketing, commercialisation, advertising. As a consequence of this configuration, “lead firms” are able to reap the overwhelming part of the total surplus-value of the chain. In contrast, in relational value chains the power balance between retailers and suppliers is more symmetrical, as suppliers' capabilities are high, thus each firm is contributing key competencies leading to a situation of mutual dependence. Trust

⁴¹ Gary Gereffi, John Humphrey & Timothy Sturgeon, The governance of global value chains, (2005) 12(1) Review of International Political Economy 78-104, 87.

rather than power constitutes in this case the main mechanism of coordination of the value chain.

This classification of various forms of organization of the value chain highlights the importance of conducting a careful analysis of the power relations along the supply chain, the aim being to unveil value extraction bottlenecks affecting the distribution of the total surplus value.⁴² This analysis cannot be undertaken by the traditional NPT framework which mainly focuses on horizontal competition and its effects on consumers or total welfare and assesses the competitive interactions between firms within a specific relevant market. In contrast, the GVC perspective has a purely distributive focus and may be particularly helpful if one aims to understand real business strategies and how the design of the value chain may determine who profits from the collective innovation and other surplus value generated, the inter-country distribution of the total surplus value, in the case of transnational networks, if one takes a political economy perspective, and more broadly the impact of value extraction bottlenecks on the competitive process, the latter concept being intrinsically related to an evolutionary perspective on economic change. GVC analysis may question the mechanistic view of the countervailing bargaining theory argument, claiming for instance that the consolidation and increasing concentration at the supplier level may curtail the rising power of retailers, by emphasizing the risk of the development of “bilateral oligopolies” of consolidated producers and retailers and subsequently of double marginalisation that may harm consumers and the competitive process.⁴³

We consider that such an approach is particularly helpful, and this not only in the context of global value chains affecting developing or emergent economies⁴⁴, which is a topic that has attracted some attention, in view of the necessity to promote a political economy framework that will enable local firms to participate to global value

⁴² R. L. Steiner, *Intrabrand Competition-Stepchild of Antitrust* (1991) 36 *The Antitrust Bulletin* 155, has also emphasized the role of “vertical competition” and “vertical market power” in his “dual-stage model” of competition law assessment. However, he does not offer an analytical competition law framework which will go beyond the classic NPT focus on horizontal concentration and the possibility of vertical market power to transform itself to horizontal market (selling or procurement) power.

⁴³ J. Lee, G. Gereffi and J. Beauvais, *Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries*, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326-12331, 12329.

⁴⁴ See, for instance, R. Kaplinsky, *Competitions Policy and the Global Coffee and Cocoa Value Chains*, Paper prepared for the United Nations Conference for Trade and Development (Institute of Development Studies, Sussex, Brighton, 2004), available at <https://www.ids.ac.uk/files/RKaplinskycocoacoffee05.pdf>.

chains and thus to capture value, or to “upgrade” existing capabilities and to create “domestic” added value. It may also be relevant in the context of a developed countries’ club, such as the EU, in view of the heterogeneity of productive capabilities that one may observe between the North and the South/East part of the Continent and the establishment of value chains with “lead” firms (mostly based in the North of Europe) extracting an important share of the total surplus value. Article 3(3) of Regulation 1/2003 offers some policy space by explicitly authorizing Member States to adopt and apply provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU, for instance, legislation that “*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.*”⁴⁵ Hence, Member States dispose of the necessary policy space to implement rules that aim to curtail superior bargaining power and its distributional consequences, if they judge that this is justified from a political economy perspective (for instance, because of an unbalanced inter-country distribution of the total value chain surplus). Although, no authority has for the time being relied on the GVC framework, the concepts and measurement devices they have developed so far may gain in clarity if some effort is spent in integrating the GVC learning in competition law assessment.

III. The rising interest of competition authorities in superior bargaining power

Several national antitrust authorities have recently delved into the concept of superior bargaining power in the food-retail sector and commissioned studies in order to better operationalize superior bargaining power in competition law enforcement and develop measurement tools.⁴⁶

⁴⁵ Recital 9 and Article 3(3) of Regulation 1/2003.

⁴⁶ See, for instance, Competition Commission, *The Supply of Groceries in the UK Market Investigation*, available at http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf; Italian Competition Authority, *Indagine Conoscitiva Sul Settore Della GDO* (2013) IC43, available at <http://www.agcm.it/indagini-conoscitive-db.html>; Bundeskartellamt, *Sektoruntersuchung Nachfragemacht Im Lebensmitteleinzelhandel* (2014) B2-15/11 BKartA, available at http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7; Autorité de la concurrence, *Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the*

The attention of the competition law enforcers historically lingers on size and market share or concentration of the negotiating parties in order to define their power relations.⁴⁷ However, scholarly studies on contracts and negotiations take a game/bargaining theory approach arguing that, for the outcome of negotiation, even more important than market shares or the size of negotiating parties is the existence of “threat points” enabling one of the parties to seek a “*best alternative to a negotiated agreement*” (BATNA).⁴⁸ Indeed, the negotiating party holding a BATNA has the possibility to resort to a valid alternative to the negotiation in progress or to the contract concluded, preventing hold-up and threats to cease negotiation. In conceiving the bargaining model one may take a Nash cooperative bargaining solution as the axiomatic starting point,⁴⁹ or resort to a non-cooperative or sequential bargaining model which will attempt to factor in the costs of the delay to agreement, and extend this analysis from bilateral bargaining to n-person bargaining.⁵⁰ Although it is not clear if the results will be the same under each of these models, their common feature, in contrast to industrial organization theory, is that bargaining power is perceived as a concept that can be measured with reference to a specific bargaining relation in a specific context and it is not dependent on structural analysis (for instance the existence of monopsony or oligopsony). Bargaining power may also impact on price as well as on non-price terms.⁵¹ Measuring bargaining power is a difficult exercise that scholars and law enforcers have tried to engage with, adopting diverse approaches.

Food Retail Sector, available at <http://www.autoritedelaconurrence.fr/pdf/avis/15a06.pdf>; Finnish competition authority, Study on Trade in Groceries – How Does Buyer Power Affect The Relations between the Trade and Industry? (2012) 1 FCA reports, available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/selvitykset/2012/en/fca-reports-1-2012-study-on-trade-in-groceries.pdf>.

⁴⁷ This is for instance the approach by the Commission in its last report for the HLF, European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector: Final Report, available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>.

⁴⁸ A. Renda and others, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, Final Report (2014) DG MARKT/2012/049/E 25, available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf; I. Ayres and B.J Nalebuff, Common Knowledge as a Barrier to Negotiation (1996) 44 *UCLA L. Rev.* 1631.

⁴⁹ Most of these studies have relied on this type of model so far.

⁵⁰ See, for instance, J. Sutton, Non-Cooperative Bargaining Theory: An Introduction, (1986) *LIII Review of Economic Studies* 709-724; K. Binmore, M.J. Osborne, A. Rubinstein, Non-Cooperative Models of Bargaining, Chapter 7 in *Handbook of Game Theory with Economic Applications* (Elsevier, 1992), 179-225.

⁵¹ A. Choi and G. Triantis, The Effect of Bargaining Power on Contract Design (2012) *Va. L. Rev.* 1665.

Measuring superior bargaining power

For instance, in 2014, the Bundeskartellamt concluded an in-depth study in the food retail sector, where it attempted to measure superior bargaining power (“demand side power” – “*Nachfragemacht*”) econometrically by exploring the conditions of its existence.⁵² The conditions of bargaining power were converted into independent variables used for the econometric assessment. The selection of the independent variables was performed on the basis of a survey. In particular, the Bundeskartellamt looked into the procurement market of branded products for several reasons, including the fact that they form the core business of retailers, they are at the center of the majority of competition complaints and they are easier to compare and identify.⁵³ The authority initially divided the products object of negotiations into four categories: “product category,” “must-stock items,” “items listed at a discounter” and “high-turnover items.” Furthermore, they identified seven procurement markets with different market structures. In order to identify and order the branded products forming the statistical population belonging to the sample, the authority used the European Article Number (EAN). The authority then interviewed the retailers and manufacturers about the results of their negotiations on each EAN article. In particular, the Bundeskartellamt inquired about the switching possibilities to alternative negotiating partners and about the overall competitive environment. The authority noted that negotiations between producers and merchants take place once a year. In these negotiations producers and merchants bargain over the conditions for the business relationships of the following year. Yet, the Bundeskartellamt also acknowledged that the sole focus on procurement volumes is not sufficiently differentiated to provide valid conclusions for the definition and measurement of

⁵² Bundeskartellamt, Sektoruntersuchung Nachfragemacht Im Lebensmitteleinzelhandel (2014) B2-15/11 BKartA, available at http://www.bundeskartellamt.de/Sektoruntersuchung_LEH.pdf?__blob=publicationFile&v=7 (hereinafter Bundeskartellamt Food Retail Report)

⁵³ The other market identified by the Bundeskartellamt is the one of private labels, which the authority describes as characterized by a different “*bargaining logic*,” although deeply influencing the negotiations for branded products. Private labels are usually bargained through tenders, while branded products are traded with annual negotiations. However, in its econometric study the Bundeskartellamt states that “private labels are actually considered in the assessment of the “competitive environment” of the branded products,” see Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 8. In this connection the Bundeskartellamt observes that private labels are often considered as part of a different market with respect to branded products. However, they can be often used in negotiations to put pressure on manufacturers of branded products, at 11.

demand-side bargaining power. For its econometric assessment, the Bundeskartellamt considered different determinants in order to describe the individual bargaining position of each party and did not base itself only on market concentration and the existence of a monopsony or an oligopsony. The bargaining model construed on the basis of this theoretical approach can be summarized as following:

K [conditions of superior bargaining power] = $f(x$ [amount ordered]; D^{1-6} [bargaining determinants, which indicates the “*Drohpunkte*” (threat points), that is, the best alternative to negotiate])⁵⁴.

- These are the following:
- Alternative distribution paths for producer p (other than with retailer r) or even alternative production paths (switching to different product) = outside options of producer;⁵⁵
- Outside options of retailer: importance of the product for the retailer (is delisting a credible threat?);⁵⁶
- Brand strength: if consumers expect certain brands, then delisting is improbable;⁵⁷
- Competition by other producers/brands which creates opportunities for r to circumvent p ;⁵⁸
- r 's own brands (“*Handelsmarken*”): these must be substitutable for brands of p , and p must not be (by chance) the actual producer of r 's own brands;

⁵⁴ Hence, the Bundeskartellamt especially focusses on the walk-away point in the specific negotiation and how it is influenced by different factors for each party.

⁵⁵ Bundeskartellamt Food Retail Report, 321.

⁵⁶ Bundeskartellamt Food Retail Report, 322.

⁵⁷ Bundeskartellamt Food Retail Report, 323.

⁵⁸ Bundeskartellamt Food Retail Report, 324. However the Bundeskartellamt states that this is only true if two conditions are assumed. Firstly the other brand has to pose a sufficient substitution to the article which is the subject of the negotiations and secondly that the producer of the relevant article is not also the producer of the alternative trade brand. The Bundeskartellamt measures the value of this influence with the help of a survey in which the undertakings were asked to assess the importance of alternative brands. Furthermore the survey asked for an assessment of the substitutability of the specific article through the alternative on a scale from 0% to 100 %.

the Report notes the trend towards private labels even in the premium segment,⁵⁹

- Buyer cooperation: bundling buying power⁶⁰.

The conditions adopted for this analysis were not only price terms but also non-price terms, such as deadline for payment and agreements on delivery. A fundamental stage of the Bundeskartellamt's assessment was the reckoning of the importance of a retailer for its suppliers and the evaluation of the "outside options" of both parties. The definition of "outside option" given by the authority resembles closely to the one of the BATNA, "*the better a party's outside options, the better the conditions that party is able to negotiate.*"⁶¹ Not surprisingly, the Bundeskartellamt concluded in this study that the purchasing volumes "*have a decisive impact on the negotiating conditions,*"⁶² and therefore constitute one of the main advantages of major retailers vis-à-vis their smaller competitors in negotiations. Furthermore, the authority determined that the well-known branded products "*the delisting of which would most likely result in a disproportionate decline in turnover for that retail company, has the effect that its manufacturer is able to achieve better conditions.*"⁶³ In such cases, the producer is in a stronger bargaining position, since the retailer has no BATNA.⁶⁴

In a 2012 sector inquiry, the Italian Competition Authority studied the bargaining power of retailers and suppliers on the basis of three different "clusters" of undertakings, reaching comparable results.⁶⁵ These "clusters" were obtained by comparing several data, including the overall turnover, the number of retailers supplied, the "strength" of the brand (especially in the specific geographic area). In

⁵⁹ Bundeskartellamt Food Retail Report, 324-325.

⁶⁰ Membership in a buyer group reduces the outside-options of the supplier and thereby may lead to better conditions for the demand side. The impact of the membership is measured by adding a variable which is 1 for "yes" and 0 for "no". In a second step it is measured whether an undertaking is a "big" or a "small" member of such a group. Thereby a variable only gets the value one, when the undertaking is not the one with the highest turnover in the group.

⁶¹ Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

⁶² Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

⁶³ Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 10.

⁶⁴ However, these so-called "must-have" products accounted only to 6% of the sample adopted by the authority that, according to the same authority, can be reasonably taken as representative of the whole food-retail national market.

⁶⁵ Italian Competition Authority, Market Investigation in the Retail Sector (2012).

particular, these three groups or “clusters” were: i) undertakings with high bargaining power; ii) undertakings with medium bargaining power and iii) undertakings with low bargaining power.⁶⁶ The data published by the ICA relatively differs from that of the Bundeskartellamt, but still shows a situation of prevalence of retailers’ superior bargaining position, irrespective of market concentration levels. On the basis of their clusters, the ICA concluded that in the 23.4% of their sample, the supplier holds a strong bargaining position (not necessarily stronger than the retailer) and is not economically dependent on the retailer. In the 48.8% of cases, the suppliers showed an intermediate degree of dependence from the retailers. Finally, the 27.8% of the sample highlighted a high level of dependence.⁶⁷ It is worth observing that both the Italian and German retail sectors are moderately concentrated, if compared to others such as the Finnish, Latvian or Swedish.⁶⁸

Both studies by the German and the Italian competition authorities engage with what may be considered as captive value chains in the GVC approach terminology and attempt to develop appropriate measurement tools for superior bargaining power. Competition authorities have also attempted to gauge with superior bargaining power in exploring certain conduct that reinforces retail power vis-à-vis farmers or processors.

Purchasing cooperation agreements and superior bargaining power

NCAAs have increasingly looked into buying alliances and joint purchasing agreements concluded between major retail chains, these agreements becoming more common following the food crisis of 2008. Group purchasing organisations (“GPOs”) may take different forms of governance structure depending on the level of integration they select, spanning from jointly controlled companies to looser forms of cooperation, collectively referred to as “*joint purchasing arrangements*”⁶⁹. From the point of view of the size of retailers, group purchasing organisations are generally of

⁶⁶ Italian Competition Authority, Market Investigation in the Retail Sector (2012), 162.

⁶⁷ Italian Competition Authority, Market Investigation in the Retail Sector (2012), 162.

⁶⁸ European Commission, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, 131.

⁶⁹ European Commission, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements, vol OJ [2011] C 11, 194, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>.

two types. The first type consists in a multilateral agreement formed by retailers of the same size which by bundling their purchase volumes intend to increase their bargaining power vis-à-vis the suppliers. Recently, however, antitrust authorities registered a tendency to form purchasing groups where there is one dominant retailer and several smaller retailers.⁷⁰ In this type of agreements, the smaller retailers generally issue mandate contracts to the “head” of the purchasing cooperation in order to negotiate the conditions of procurement for the whole organisation. These forms of cooperation generally include several other conditions in order to coordinate selling practices and share information, especially about procurement costs.⁷¹

The findings of the national competition authorities corroborate the view that these purchasing cooperation agreements have, in many cases, an almost negligible effect on the bargaining power of the major retailers, while, in the short term, they improve the bargaining position of the smaller retailers.⁷² This is true even when, as it is apparently the case, the head of the purchasing organisation does not pass on the benefit of the bargain in whole.⁷³ Yet these agreements may also lead to long-term forms of cooperation, including the sharing of sensitive information, and may create the conditions for the economic dependence of the smaller retailers that often structure their business model to the one dictated by the cooperation agreement.⁷⁴ In addition, the coordination of the selling practices may cause the "homogenization" of the assortments and of the services offered by the undertakings participating to the buying alliance, thus dampening competition.⁷⁵

In analysing these agreements the competition authorities had departed from a strict application of the concept of dominance and adopted a broad understanding of market distortions. Bargaining power does not necessarily depend on the market share owned by a specific firm in the relevant market, neither on the level of

⁷⁰ See, for instance, Italian Competition Authority, Case I768 *Centrale Italiana S.c a r.l.*; Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 5; Autorité de la concurrence, Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector.

⁷¹ This is for instance the situation described by the ICA in the Case *Centrale Italiana S.c. a r.l.*

⁷² Bundeskartellamt Food Retail Report; Italian Competition Authority Case *Centrale Italiana S.c. a r.l.*; Autorité de la concurrence, Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector.

⁷³ Bundeskartellamt Food Retail Report; Case I768 *Centrale Italiana S.c. a r.l.*

⁷⁴ Bundeskartellamt, Summary of the Final Report of the Sector Inquiry into the Food Retail Sector, 19.

⁷⁵ Case I768 *Centrale Italiana S.c. a r.l.*

concentration. If a producer owns an important share of the market but, nonetheless, has to bargain with retailers disposing of valid alternatives to the negotiation, such as other substitutable brands or private label products, the bargaining power of that producer will most probably be limited. On the other hand, a concentrated local retail market, where a retailer holds an important share, may still be open to balanced negotiations, if the producers have valid “outside alternatives,” both nationally and internationally, instead of negotiating with that retailer. For instance, the extent of the geographic presence at national and international level of the retail chain is able to considerably influence the negotiations, since its demand is difficult to be substituted and it is particularly relevant to reach economies of scale, possibly creating a situation of economic dependence of the supplier.⁷⁶ In France, the Autorité de la concurrence explored allegations of abuse of superior bargaining power when examining three different cooperation agreements among the six most important French retailers (Système U/Auchan, ITM/Casino, Carrefour/Cora).⁷⁷ The Autorité pointed out that these agreements may fall within the scope of the prohibition of anticompetitive agreements, in view of the exchange of sensitive information between competitors and/or can be addressed according to abuse of economic dependence provisions. With regard to the latter, the Autorité found that the narrow approach adopted so far with regard to the definition and measurement of economic dependence led to under-enforcement of these provisions and called for “*an amendment to the procedure aimed at establishing the existence of abuses of economic dependency in order to make it more effective.*”⁷⁸

Abuse of economic dependence provisions

Competition authorities also focus on the implementation of specific provisions on abuse of economic dependence, which may emerge in various situations. In the first scenario, two firms bargain the contract in power parity and in a competitive market, but nonetheless the investments made by one of them put this firm into a situation of

⁷⁶ Italian Competition Authority, Market Investigation in the Retail Sector, 212.

⁷⁷ Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector.

⁷⁸ Autorité de la concurrence, Press Release: Opinion 15-A-06 of 31 March 2015 Concerning the Joint Purchasing Agreements in the Food Retail Sector, 7, available at <http://www.autoritedelaconcurrence.fr/pdf/avis/15a06.pdf>, xxxin French.

economic dependence, exposing it to hold-up from its business partner. In the second scenario, the economic dependence may result from market conditions pre-existing to the stipulation of the contract, which forced one of the parties to accept the terms imposed by the other party and to undertake specific investments. With regard to its causes, the situation of economic dependence may derive from the absence of “outside options” for one of the business parties, or from high switching costs.⁷⁹ The food market presents plenty of opportunities for hold-up and anticompetitive conduct engendered by situations of economic dependence.⁸⁰ Farmers generally undertake specialized capital investments to provide the products at the local and international standards, under contractual arrangement with buyers. In particular, in markets of perishable products with few buyers, this contractual relationship easily turns into an economic dependence of the farmer to the buyer. Moreover, the particular conditions of the market of perishable products may be the cause of hold-up due to lack of alternatives for logistic reasons. Indeed, some products, such as chicken or sugar beets, have to be marketed locally, as they cannot be shipped far without losing much of their value. Processors and local buyers can therefore use this opportunity to impose low prices on farmers or non-favourable conditions.

Focusing on the relations between supplier and buyer, the Italian competition authority identifies four broad categories of economic dependence: i) dependence on assortment of the retailer, typically linked to branded products, which defines the lack of alternatives to a particular product or group of products; ii) dependence for shortage of supply sources, where the economic dependence originates from a situation of temporary lack of the specific product on the market; iii) dependence of the supplier, due to the fact that the supplier produces a significant share of its sales with a single buyer; iv) dependence on trade relations, in which the dependence originates from the significant asset-specific investments made by a contractor in order to fulfil its commitments and the difficulty to redeploy those investments for other purposes.⁸¹

⁷⁹ Italian Competition Authority, Market Investigation in the Retail Sector, 200.

⁸⁰ J. M. MacDonald and P. Korb, Agricultural Contracting Update: Contracts in 2008 (2011) EIB-72. U.S. Dept. of Agriculture, Econ. Res. Serv. *Economic Information Bulletin* No. 72.

⁸¹ Italian Competition Authority, Market Investigation in the Retail Sector, 201.

The French authority, instead, considers four different criteria for determining a situation of economic dependence: i) the importance of the share of revenue generated by that supplier with the distributor; ii) the importance of the distributor in the marketing of the products concerned; iii) the absence of deliberate choice of supplier to concentrate its sales from the distributor; iv) the absence of alternative solutions supplier.⁸²

However, both authorities conclude that this situation of economic dependence often gives rise to opportunistic hold-ups from the party enjoying superior bargaining position. In particular, these authorities observe that often retailers request contract modifications or additions to dependent suppliers, threatening to delist the supplier's product or to impose other forms of retaliation.⁸³ In its sector inquiry, the ICA observed that the 67% of the respondent suppliers reported requests of modifications or additions to the supply contracts during their executions.⁸⁴ In several cases, the request of the retailer to modify or add contract terms also regarded discount terms and expenditures, which were already been negotiated, having therefore a retroactive effect.⁸⁵ From the sample adopted, the authority stressed that the 74% of the respondents who refused to modify the contract accordingly to the retailer's request, reported having suffered retaliation, either by delisting (62% of respondents), or by "*clear and unjustified worsening of contract terms for the following procurement period*"⁸⁶ (59% of respondents), or by adoption of both delisting and worsening of contract terms (47% of respondents). Moreover, according to this study, framework procurement contracts are often stipulated after

⁸² Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 72.

⁸³ Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 81; Italian Competition Authority, Market Investigation in the Retail Sector, 200.

⁸⁴ Italian Competition Authority, Market Investigation in the Retail Sector, 163. In detail, the respondents replied that this coercive modification of the contract happens: for the 45% "*sometimes*," for the 18% "*often*," and for the 4% "*always*."

⁸⁵ In this regard, the ICA points out that "[i]t is particularly interesting to note that the majority of respondents (74%) perceive, always or sometimes, these requests for unilateral modification of contract terms as binding for the supplier, which is exposed in the event of rejection, to specific retaliation, such as 'delisting' (that is, the exclusion from the list of suppliers), total or only for some products, or an unjustified worsening of the conditions for the following procurement period" (our translation). The ICA, therefore, acknowledges that 20% of respondents stated that they accept the requests "always," 37% "often," 38% said they accept them "sometimes," and only 5% said they accept them "never," at 163.

⁸⁶ These procurement contracts were generally annual and subject to renegotiation every year.

the start of the supply period,⁸⁷ and the following contracts detailing the procurement agreement are almost always negotiated during the supply period,⁸⁸ leaving therefore ample margin for the integration of the contract by the dominant party.

These findings seem to support those studies claiming that the adoption of incomplete agreements (such as framework contracts), which parties detail during the execution, exposes the economic dependent undertaking to opportunistic hold-ups.⁸⁹ In 2011, the Spanish National Commission for Competition (now “CNMC”), published a report on the relations between manufacturers and retailers in the food sector, with the aim to describe the status quo of the relations between retailers and suppliers and analyse the impact on competition of the alleged bargaining power of large distributors.⁹⁰ The CNC found that the contracts linking suppliers with retail chains were occasionally left incomplete as for the consideration required, thus producing uncertainty, inefficient transfer of risk on the suppliers and a reduction of intra-brand competition.⁹¹

⁸⁷ In their sample, the 35% of respondents always negotiate the framework agreement before the start of the supply period, the 19% declared that this happens “often,” and the 45% admitted that this happens only “sometimes”; see Italian Competition Authority, Market Investigation in the Retail Sector, 162.

⁸⁸ Italian Competition Authority, Market Investigation in the Retail Sector, 163.

⁸⁹ O. E Williamson, Transaction-Cost Economics: The Governance of Contractual Relations (1979) *Journal of law and economics* 233; B. Klein, R. G. Crawford and A.A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process (1978) *Journal of law and economics* 297. Based on this theory, Klein, Crawford and Alchian designed an economic model explaining that the intention of an opportunistic behaviour does not necessarily preexist to the formation of the contract, as it may also result from an asset-specific investment of the business partner.

⁹⁰ Comision Nacional de la Competencia, Report on the Relations between Manufacturers and Retailers in the Food Sector, available at:

<http://www.cncompetencia.es/Inicio/Informes/InformesyEstudiossectoriales/tabid/228/Default.aspx>.

⁹¹ OECD, Latin American Competition Forum, Competition Issues in the Groceries Sector: Focus on Conduct – Contribution from Spain, 3, available at

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2015)5&docLanguage=En). In the wake of the CNC’s recommendations, the Spanish Parliament approved the Law 12/2013 on measures to improve the functioning of the food supply chain (LCA), with the threefold aim to detail the conditions and characteristics of contracts between retailers and suppliers, lay down a “black list” of prohibited “abusive” practices, and empower the newly created Food Industry Information and Control Agency (AICA) to fine undertakings that fail to comply with these requirements. The Spanish Competition authority is highly critical of this new system where its competence overlaps in some cases with that of the Ministry responsible in the specific sector and with the new competences of the AICA, alleging that this has created a futile duplication of norms and institutions.

Mergers and effects-based analyses

The criterion of a “*significant impediment of effective competition*” in merger control also offers some flexibility in order to assess unilateral effects that may be provoked by superior bargaining power. In the *Edeka* case, concerning the proposed acquisition of Kaiser’s Tengelmann by Edeka, the Bundeskartellamt observed that although the target company had low market shares at the national level, in some districts, it was the strongest and closest competitor of the two major groups, Edeka and Rewe.⁹² For this reason, the acquisition of Kaiser by Edeka would have created a significant impediment to effective competition (“SIEC”), because it would have significantly lessened the competitive pressure on Edeka in those markets where also Kaiser was present. Although it only accounted for 2-5% of the procurement market, Kaiser was found to be the only real alternative to Edeka and Rewe.

The SIEC test does not require market dominance, thus allowing the authority to impede a merger also in cases of non-coordinated or unilateral effects resulting from the dissolution of an important competitor. These effects have to be evaluated for both the downstream and the upstream markets. With particular reference to the procurement sector, the U.K. Competition Commission considered that the further imbalance of the bargaining positions created by the merger may lower the “*levels of investment in new products or manufacturing techniques*” and produce “*adverse effects on product innovation and diversity*.”⁹³ Moreover, in more than one occasion, the EU Commission has warned against the possible anticompetitive effects that superior buyer power may create in the downstream sector, due to the discounts that the new merged entity is able to obtain to the detriment of competitors.⁹⁴

European antitrust authorities have engaged with several other potentially anticompetitive effects following an abuse of superior bargaining power, such as “*waterbed effects*” or “*spiraling effects*,”⁹⁵ or the foreclosure and collusive effects

⁹² Bundeskartellamt, Case B2-96/14 *Edeka/Kaiser’s Tengelmann*, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2015/B2-96-14.pdf?__blob=publicationFile&v=3.

⁹³ UK Competition Comm, Safeway plc Inquiry, 2003, § 1.22(d).

⁹⁴ See, for instance, EC Commission, *Carrefour/Promodes*, COMP M/16847, 2 December 1999; *Kesko/Tuko IV/M.78420* November 1996.

⁹⁵ Both analysed by the Bundeskartellamt Food Retail Sector Inquiry, 25; Autorité de la concurrence, Opinion Concerning the Joint Purchasing Agreements in the Food Retail Sector, 56. The “*waterbed effects*” may result from a merger downstream which leads to marginal costs reductions and lower input prices for the merged entity, which sees its output rising, while at the same time raising the input

caused by category management⁹⁶ or by slotting allowances.⁹⁷ The recent study commissioned by the European Commission on The Economic Impact of Modern Retail also raises the possibility that retail concentration at local level may produce negative aggregate dynamic effects, through the reduction of the incentives of suppliers to innovate.⁹⁸

In conclusion, distortion of negotiations via abuse of superior bargaining position may happen at any node of the value chain and may take different forms. The NCAs have started to analyse how and to what extent superior bargaining power can distort competition and to develop tools and methods for its measurement.

prices of the merged entity's competitors, leading to an adverse effect on final consumers. On the "waterbed effects," see, R. Inderst and T. Valletti, Buyer Power and the "Waterbed Effect" (2011) 59(1) *Journal of Industrial Economics*, 1-20; P. Dobson and R. Inderst, Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers? (2007) 28(7) *ECLR*, 393-400; A. Majumdar, Waterbed Effects and Buying Mergers, *CCP Working Paper 05-7* (2007).

⁹⁶ Finnish competition authority, Study on Trade in Groceries, 26.

⁹⁷ Italian Competition Authority, Market Investigation in the Retail Sector, 133.

⁹⁸ European Commission, DG COMP, The Economic Impact of Modern Retail on Choice and Innovation in the EU Food Sector, (2014), available at <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, 36. However, the study also found that "a large imbalance away from suppliers and towards modern retailers was generally found to be associated with more innovation, reflecting in particular the finding that greater supplier concentration was associated with less innovation," although it was also noted that the Member States in the sample did not include those with the highest level of national retailer concentration. The methodology of measuring the level of innovation followed in this study was also quite narrow as innovation essentially referred to the introduction of "new EAN products" (EAN being European Article Number).

IV. A Different Kind of Competition Law

The atomistic nature of agricultural markets and the consolidation of the processing and the retailing part of the food value chain have brought attention to the issue of bargaining power in agricultural markets. As the following table shows, the agricultural/production segment of the chain is populated by a significant number of economic actors, their size varying generally from smallholders to agroholdings.

Table 2: Key profitability metrics for the agribusiness value chain⁹⁹

Sector	Input	Farmers	Traders	Food companies	Retailers
Sales: US\$bn (approx.)	400	3,000	1,000	3,500	5,400
Number of players	100s	450 million	Tens	Thousands	Millions
EBIT %	15%	Variable	2–5%	10–20%	5%
R&D % sales	<1% (fertilizers) – 10% (seeds)	0%	<1%	1–2%	<1%
R&D spend: US\$bn	10	–	Low	8	Low
Composition / Sub-sectors	<ul style="list-style-type: none"> • Seed • Fertilizer • Crop protection • Machinery • Animal health and nutrition • Crop insurance • Food ingredients 	<ul style="list-style-type: none"> • Grains • Fruit and vegetables • Meat • Dairy 	<ul style="list-style-type: none"> • Handling • Primary processing • Secondary processing 	<ul style="list-style-type: none"> • Bakery • Meat • Dairy • Snacks • Ready meals • Beverages 	<ul style="list-style-type: none"> • Multiples • Discounters • Wholesalers • Independents
Range	R&D-based majors to generic manufacturers	Smallholders to agroholdings	Global agribusinesses to local middlemen	SMEs to multinationals	Corner shops to hypermarkets

⁹⁹ Source: KPMG International, The agricultural and food value chain: entering a new era of cooperation (2013), 5.

Despite the increasing trend to larger agricultural exploitations,¹⁰⁰ farmers are generally small economic actors that face considerable pressure from the concentrated upstream segment of factors of production (i.e. seed companies, fertilizers, herbicides) and the concentrated retail level, thus observing their share of the total surplus value diminishing. A classic response to the exercise of such superior selling power upstream, and bargaining power downstream, is the creation of agricultural cooperatives, or other farmers' organizations, as it is thought that such pooling of resources will enable farmers to preserve, or even gain, a larger share of the total surplus of the value chain.¹⁰¹ Agricultural cooperatives benefit from antitrust immunity in the United States,¹⁰² and have generally been assessed positively under Article 101 TFEU.¹⁰³ However, in addition to the quite liberal antitrust approach followed in this area, the EU has instituted specific competition law derogations for producer organizations, on the basis of the Common Agricultural Policy (CAP) provisions of the EU Treaties and related secondary legislation.¹⁰⁴ According to Article 42 TFEU, the EU legislator determines the extent of the application of competition rules to the agricultural sector, taking into account the objectives of the CAP set out in Article 39 TFEU.¹⁰⁵ These aims take precedence over the objectives

¹⁰⁰ Boston Consulting Group, *Crop Farming 2030 – The Reinvention of the Sector* (April 2015), available at <https://www.bcgperspectives.com/content/articles/process-industries-innovation-crop-farming-2030-reinvention-sector>.

¹⁰¹ These can be state-run institutions, such as the Ghana Cocoa Board. One may also note the emergence of international traders that serve as intermediaries between farmers and retailers. See J. Lee, G. Gereffi and J. Beauvais, *Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries*, (2012) 109 (31) *Proceedings of the National Academy of Science* 12326-12331, 12328.

¹⁰² See the Capper-Volstead Act, 7 U.S.C. §§ 291-292. This immunity is narrowly construed by the US courts. For a recent commentary, C. A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives and Antitrust Immunity*, (December 2010) *The Antitrust Source*, 1-9.

¹⁰³ The CJEU held that constituting cooperatives does not itself constitute an anti-competitive conduct, however agricultural cooperatives do not fall outside the scope of Article 101(1) TFEU, as they may influence the trading conduct of their members so as to restrict competition in the market: Case C-399/93, *H. G. Oude Luttikhuis and others v. Verenigde Coöperatieve Melkindustrie Coberco*, [1995] ECR I-04515, §§ 10-16.

¹⁰⁴ Articles 169, 170 and 171 of Regulation No 1308/2013 of the European Parliament and of the Council establishing a Common Organisation of the Markets in agricultural products, [2013] OJL347/671 (hereinafter CMO Regulation) allowing Producer Organizations (POs) and Associations of Producer Organisations (APOs) to negotiate, on behalf of their members, contracts for the supply of the products concerned under a number of conditions?

¹⁰⁵ These are "(i) to increase agricultural productivity (...) and the optimum utilisation of the factors of production, in particular labour; (ii) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (iii) to stabilise markets; (iv) to assure the availability of supplies; and (v) to ensure that suppliers reach consumers at reasonable prices."

pursued by EU competition law.¹⁰⁶ Article 206 of the CMO Regulation declares Articles 101 and 102 TFEU applicable to the production and trade in agricultural products, but the CMO Regulation also provides a general derogation for certain types of agreements from the scope of Article 101(1) TFEU (although not from Article 102 TFEU) if these collusive practices are necessary for the attainment of the CAP objectives.¹⁰⁷ This derogation also applies to all POs and APOs entering into agreements for the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, although it does not apply to collusive practices involving an obligation to charge an identical price excluding competition. In addition to the general derogation, there are specific additional derogations from which benefit the sectors of olive oil, beef and veal and arable crops, as set out by the CMO Regulation and some impending Commission Guidelines.¹⁰⁸ According to the Commission, “[t]he purpose of the Derogation is to strengthen the bargaining power of producers in the sectors concerned vis-à-vis downstream operators in order to ensure a fair standard of living for the producers and a viable development of production (...) The Derogation’s purpose is to be achieved through POs effectively concentrating supply and placing products on the market and, as a consequence, negotiating supply contracts on behalf of their members.”¹⁰⁹

The Derogation is subject to a number of conditions, including consideration of how the practice contributes to the objectives of the PO, a “significant efficiency test,” notification obligations and a production cap, which is 15% of the total national production of each product covered by the contractual negotiations for the sectors of beef and veal and of arable crops and less than 20% of the relevant market in the

¹⁰⁶ Case 139/79, *Maizena GmbH v. Council*, [1980] ECR 3393, § 23; Case C-280/93, *Federal Republic of Germany v. Council*, [1994] ECR I-4973, § 61.

¹⁰⁷ See Articles 207 to 210 of the CMO Regulation.

¹⁰⁸ Articles 169, 170 and 171 of the CMO Regulation; Draft Commission Notice, Guidelines on the Application of the Specific Rules Set out in Articles 169, 170 and 181 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, (2015), available at http://ec.europa.eu/competition/consultations/2015_cmo_regulation/draft_guidelines%20_en.pdf.

¹⁰⁹ Draft Commission Notice, Guidelines on the Application of the Specific Rules Set out in Articles 169, 170 and 181 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, (2015), §§ 38-39.

sector of olive oil.¹¹⁰ As indicated above, this new kind of competition rules is justified by the significant unbalance of bargaining power between farmers and retailers.

Other public-interest oriented competition law regimes may provide further illustrations of the increasing importance of distributive concerns and bargaining power in competition law enforcement, thus building the case for adopting a GVC framework.

The public interest test in South African merger control has provided South African competition authorities the opportunity to examine bargaining power and its effects on local suppliers in the *Walmart-Massmart* merger. Following the announcement of Walmart's interest to acquire a controlling share in Massmart, the South African Competition Commission examined and unconditionally cleared the merger between the world's largest retailer and one of South Africa's leading retail chains, finding that it was not likely to lead to a substantial prevention or lessening of competition. Massmart is a wholesaler and retailer of groceries, liquors and general merchandise and operates through 10 subsidiaries scattered on the African continent. On the basis of the public interest provisions of the South African Competition Act,¹¹¹ the labour unions seized the Commission, arguing that the clearing of the merger would have caused significant job losses for South African workers in the retail sector, in view of Walmart's established value chain, which involved imports of foreign products. Consequently, the Commission revised its position, suggesting a conditional approval of the merger.

Both the Competition Tribunal¹¹² and the Court of Appeal,¹¹³ found that the merger was not expected to result in a substantial lessening of competition. Walmart, indeed, was only indirectly present in South Africa through an exporter of fresh produce, International Produce Limited, which did not operate as a retailer.

¹¹⁰ According to the Commission, if the negotiation by a PO on behalf of its members concerns supply in more Member States, the production volumes in each Member State should not exceed 15% of the national production for beef and veal and arable crops and of 20% of the relevant market for olive oil.

¹¹¹ Section 12A of the Competition Act No. 89/1998 disposes that the Tribunal must "determine whether a merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)." This subsection (3) limits the public interest consideration to four conditions related to the effect that the merger will have on:

- A particular industrial sector or industry;
- Employment;
- The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- The ability of national industries to compete in international markets.

¹¹² Walmart Stores Inc and Massmart Holdings Limited (2011) 73/LM/Nov10.

¹¹³ SACCAWU and Massmart Holdings Limited (2012) 110/CAC/Jun11.

Moreover, Massmart had a market share of 25% in the South African retail sector, therefore raising no direct concerns about the existence of a substantial prevention or lessening of competition. Finally, on the basis of the economic evidence available, the Court agreed that the merger would have brought lower prices to consumers.

The Court was however concerned by the effects that the merger would have had on Massmart's local suppliers, especially SMEs, which could have been substituted by Walmart's international suppliers. The Court had thus to gauge between the positive effect of price reductions for consumers and the negative effect of possible job displacements in the local supply market. The Court acknowledged that Walmart operates a global value chain and that protecting domestic suppliers by prohibiting the merger would have been "futile." However, the Court felt that it had to balance the positive price effects to consumers with a remedy that would take into consideration the public-interest related condition laid down in Section 12A. For this reason, it ordered the establishment of a supplier development fund by Massmart, aiming at minimizing "*the risks to micro, small and medium sized producers of South African products caused or which may be caused by Massmart's merger with Wal-Mart.*"¹¹⁴ The fund would provide an incentive to Massmart to purchase products from South African producers, thus guaranteeing the access of local suppliers to Walmart's supply chain in South Africa and eventually to its global network. Although the SA Court has not engaged directly with the concept of GVC, this has undoubtedly exercised some influence on the design of the remedy/merger conditions in this case.

Competition authorities may also be entrusted specific duties with regard to the regulation of superior bargaining power in the food sector. For instance, in Italy, the legislator has intervened through two different instruments, the traditional abuse of economic dependence laws and some new rules on the regulation of the contractual relationships between agricultural producers and business buyers when it is not possible to use the traditional tools of the prohibition of anticompetitive agreements and abuse of a dominant position. Article 62.8 of the law 27/2012 provides the Italian Antitrust Authority (ICA) the power to punish a conduct resulting in "*an unwarranted exercise of bargaining power on the demand side at the expense*

¹¹⁴ SACCAWU and Massmart Holdings Limited (2012) 110/CAC/Jun11.

of suppliers."¹¹⁵ Therefore, in addition to its power to intervene in cases of abuses of dominant position, the ICA can now intervene in commercial relationships of a vertical nature in the agro-food industry, even in the absence of a dominant position, provided that the contract produces an appreciable adverse effect on the market. Article 62.8, prohibits the stronger contracting party from imposing unfair conditions on the counterparty. On July 9, 2015, the ICA concluded the first procedure based on the application of Article 62.8, against the retailer Eurospin, for allegedly imposing upon its suppliers the half-yearly payment of two unjustifiably large sums which did not correspond to any service provided to them by the group.¹¹⁶ The ICA concluded, however, that the business conduct put in place by Eurospin did not constitute an infringement of Article 62.8. The contested contractual terms were indeed fairly negotiated and not imposed. Moreover, the ICA observed that the relative costs were proportioned to the service offered by Eurospin.

¹¹⁵ ICA, Agri-foodstuffs: according to the Antitrust, the market power of the organized mass distribution getting stronger, conflicting relationships with suppliers and uncertain effects on consumers, IC43, available at <http://www.agcm.it/en/newsroom/press-releases/2101-ic43-agri-foodstuffs-according-to-the-antitrust-the-market-power-of-the-organized-mass-distribution-getting-stronger-conflicting-relationships-with-suppliers-and-uncertain-effects-on-consumers.html>.

¹¹⁶ Italian Competition Authority Eurospin Italia S.p.A. decision No. 25551 of 9 July 2015.