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*The «fair price» in agri-food chain*

SUMMARY: 1. Introduction – 2. Farmers fair price and regulation of market relationship in the CAP reform 2014-20 – 3. The role of Producer Organizations in agricultural sector – 4. Contractual schemes for the sale of agricultural products and price formation – 5. Regulatory action to ban unfair commercial practices – 6. Intervention on prices and market balance in the implementation of Member States.

1. *Introduction*

The topic of the fair remuneration of farmers shall be considered the basis of the special regulation of agriculture in the Treaty, founded on the general goals laid down in Art. 39 of the Treaty of Rome (and currently, without any change, in the Treaty on the functioning of the EU). Indeed, Art. 39 TFUE mentions the «fair standard of living of the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture» as one of the five objectives of the Common Agricultural Policy (CAP), related to the first one, «increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour».

Legal tools to join the CAP objectives changed among the years, starting with a price policy, that supported farmers through the withdrawal of unsold products at an administrative price system defined by the EU Commission, gradually replaced by the decoupling payments<sup>1</sup>. Direct payments system has been remarkably weakened, mainly in the latest years, in the perspective to address agriculture to the market, face to the international obligation in the framework of WTO.

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<sup>1</sup> J. MacMahon, M. Cardwell (eds), *Research Handbook on EU Agricultural Law*, EE Cheltenham, 2015.

At the same time, as consequence of the MacSharry agricultural policy reform the EU introduced, in the '90, a very relevant set of rules aimed at enhancing quality products, with the goal to promote the competitiveness of agricultural products and at the same time support farmers income, considering the higher prices of PDO and PGI as well as organic products on the market. Until today, the Regulation 1151/2012, on quality systems pointed out the role of these special trademarks as a tool to increase the earnings of farmers<sup>2</sup>.

From this point of view, European rules on quality products of geographical origin, in accordance with CAP objectives declared in Art. 39 TFUE, achieves a synthesis between the interest of agricultural producers (to the profitability of products with quality added value, linked to the origin of a specific territory) and the growing consumers expectation on quality agricultural products.

The relevance of profitability of the use of denomination of origin for farmers and first processors, located in the territorial area interested by the sign, is clearly highlighted by Regulation 1151/12 by specifying the goals to achieve with the establishment of PDO and PGI signs, based on the *ratio* of the legislation on quality schemes.

Indeed, the quality scheme based on PDO and PGI represents a way to achieve the goals through a competitive tool reserved to the producers and directly managed by themselves, as expressly stated by Art. 4, laying down that the use of signs guarantees a fair return for the quality of their products (besides the protection of names as intellectual property right within the EU, and the clear information to consumers).

In the last years, as far as the financial measures by direct payments decrease and the EU opens to the external market, the question of the balance of value and of the need to ensure profitable price for the supply of agricultural raw materials, become the *leitmotif* of the structural interventions for market governance since the CAP regulation of December 2013, until the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain and finally with the amendments to CMO regulation laid down by Regulation 2021/2117.

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<sup>2</sup> I. CANFORA, *La politica della qualità dei prodotti agroalimentari dell'UE*, in P. Borghi-I. Canfora-A. Di Lauro-L. Russo (eds), *Trattato diritto alimentare e dell'Unione Europea*, Giuffrè, Milano, 2021 p. 425 ff.

## *2. Farmers fair price and regulation of market relationship in the CAP reform 2014-20*

In order to understand the tools aimed at ensure a fair price for agricultural producers, it is necessary to start from the analysis of the legal framework about the supply chain relationships.

For this purpose, it will be useful to summarize the stages leading to the CAP reform 2014-20, considering that it produced a substantial break with the past «legal instrumentarium» as regards to the structure of supply chain relations at the European level.

A significant effect on agricultural productions prices, especially commodities, may be determined by various causes: the liberalization of markets, the ability of processors and distributors to acquire raw materials on foreign markets at lower prices than the European ones, the elimination of domestic quota measures, the reshaping of support measures in terms of the distribution of funding between the first and second pillars of the CAP (in the relationship between direct payments and rural development measures). Moreover, this scenario mainly affected the farmers resilience, particularly in relation to small enterprises.

The European Union dealt with the price crisis by an experimental regulatory model, in dairy sector. Indeed, in this sector, the cancellation of milk quotas – a protectionist mechanism that ensured guaranteed outlets for production and consequently an adequate remuneration of the sale price of milk at the barn – strongly affected the situation of producers supplying raw milk to buyers.

The pilot experience of Regulation 261/2012 (called «milk package») laid down special rules defining a new discipline for agrifood chain relationships and gave rise to an innovative experience for CAP regulation, since it identified a set of regulatory tools. In particular, Regulation no. 261/2012 included regulatory tools later taken up in the text of the CMO of December 2013: by defining the role of producer organizations in managing contractual relations, the functions of interbranch organizations, the transparency in price monitoring, later transformed into systems for calculating average European prices, futures market measures, and finally by reporting risks of unfair trade practices affecting agricultural producers.

The relevance of the Milk sector regulation lies in the fact that this set of rules was the basis of the CAP 2014-20. Indeed, it was extended to other sectors by the Common Market Organization (CMO) Regulation no. 1308/13, and later consolidated as a model of market regulation by

the mid-term reform, laid down in 2017, by Regulation no. 2393/2017.

In order to grasp the perspective of development of the regulatory system, it is useful to go back over the economic context, from which the Commission is moving to propose the new market regulation framework, as summarized by the recitals to the act.

Indeed, the reform is intended to the price stabilization in the face of falling prices «to the lower safety net level» (recital 2 Reg. 261/2012).

A first piece of evidence, consisting of the low concentration of supply (size and fragmentation of farms in relation to buyers of raw materials) is identified as the cause of the «imbalance in bargaining power in the supply chain (...) that can lead to unfair commercial practices», particularly in relation to the time of the price determination: «farmers may not know at the moment of delivery what price they will receive for their milk because frequently the price is fixed much later by dairies on the basis of the added value obtained, which is often beyond the farmer's control» (recital 5 to Reg. 261/2012).

Moreover, goes on the preamble to Regulation 261/12: «There is thus a problem of price transmission along the chain, in particular as regards farm-gate prices, the level of which generally does not evolve in line with rising production costs. (...) value added in the dairy chain has become increasingly concentrated in the downstream sectors, especially dairies and retailers, with a final consumer price that is not reflected in the price paid to milk producers» (recital 6).

It can be seen, therefore, how the issue of price formation of agricultural products, related to the persistence of farms in the European territory, is a crucial topic in the legal thought about the new regulation of agri-food markets<sup>3</sup>.

Acknowledged that the dispersion of value affects the food chain in milk sector (extended to the whole Common Market organization by Reg. 1308/13) shall be identified legal instruments aimed at strengthening producers association to concentrate supply and obtain more competitive prices, as well as establishing interbranch relations between business operators and transparent contractual relations. Actually, the update of regulatory framework of contractual relationships in terms of formal transparency, it is not in itself a guarantee to reduce the abuse of buyer power, since it is the imbalance of bargaining power between enterprises

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<sup>3</sup> See L. Russo, *La sostenibilità economica delle imprese agricole tra dinamiche di mercato e rapporti contrattuali di filiera*, in *La sostenibilità in agricoltura e la riforma della PAC*, S. Masini-V. Rubino (eds), Bari, 2021, p. 91 ff.

which affects the value of the exchange<sup>4</sup>.

Indeed, the significant imbalance in bargaining power between farmers and buyers is answered in the instruments listed above, mainly by the (voluntary) establishment of groups of farmers in the form of producer organizations (PO). Indeed POs are theoretically more incisive in negotiations; however they may not, always be found to be adequate or sufficient, in any context, to determine the proper functioning of the agrifood supply chain.

Therefore, firstly in milk sector emerged the need for a European-based regulation of the functions assigned to the players involved in the supply chain, as well as the framework of contractual relations and supply contracts.

The reason that guided this path was both the need to ensure the functioning of the agricultural supply, as well to guarantee a uniform framework of supply chain relations in the interest of farmers, with the final goal to obtain a fair return from the supply of agricultural products.

All these aspects are grounded on the fundamental objectives enshrined in the Treaty, related to the need to preserve agricultural activities in the whole territory of the European Union; moreover they reappear in the farm to fork strategy outlined by the Commission in 2020 based on the establishment of «sustainable food systems».

As discussed over, such interventions are decisive in ensuring an adequate income for agricultural producers, in the light of the objectives of the CAP, defined by Art. 39 TFEU and unchanged in their enunciation since the wording of the 1957 Treaty of Rome, insofar as they aim – in the context updated to the post-2020 reform – to ensure a fair standard of living for the agricultural population, linked to increase in agricultural productivity.

It is, moreover, a perspective that increasingly tends to highlight the competitiveness of agricultural enterprises as economic players active in market dynamics, precisely because they are linked to the regulation of the supply chain, as outlined in the Common Market Organization.

After all, the objective laid down by Art. 39, «to ensure a fair standard of living for agricultural producers», can be broadly interpreted, referring

<sup>4</sup> About the opportunities and limits of the new trend, inaugurated by EU law on negotiations carried out by producer groups consult A. JANNARELLI, *L'associazionismo dei produttori agricoli e il tabù dei prezzi agricoli nella disciplina europea della concorrenza. Considerazioni critiche sul reg. n. 261 del 2012 in materia di latte e prodotti lattiero caseari*, in *Riv. Dir. Agr.*, in particular p. 191 ff. See also: I. CANFORA, *Raggiungere un equilibrio nella filiera agroalimentare. Strumenti di governo del mercato e regole contrattuali*, in *Cibo e diritto. Una prospettiva comparata*, V. Zeno Zencovich-L. Scaffardi (eds), vol. 1, Roma, p. 237 ff.

to the whole context in which agricultural production activities are located: for the aspects here discussed, it undoubtedly affects the supply chain as the place where contractual relations for the supply of agricultural products, but also the territorial sphere in which agricultural enterprises themselves are located. This perspective emerges significantly in the legislative drafting of the Directive 2019/633 on unfair trading practices in the agricultural and food supply chain, that represents the last act among the regulatory instruments related to the CAP 2014-20<sup>5</sup>.

Furthermore, the distorting effect of unfair behavior of processing and distribution agribusiness operators in the supply chain, causing detriment in particular to agricultural producers, has long been reported. In this regard it is not surprisingly that a EU Commission study summarized the development perspective of agriculture outlining the need to increase aggregations between producers as well as to correct distortions in the supply chain, with regard to the different stages of supply<sup>6</sup>.

The regulatory framework arising from the adoption of the CAP 2014-20, definitively increased the role of producers organized into groups as an integral part of the agrifood system, as proactive part of its regulative framework. Indeed, producers organizations as subjects empowered with the functioning of supply relationships governance, as far as groups of producers enhancing quality products, have been progressively assigned functions of governance of the system of supply chain relations. At the same time, new special competition rules have been defined, aimed at strengthening the bargaining power of the recognized organizations of agricultural producers<sup>7</sup>.

Indeed, the role of producer organizations is focused primarily on the purpose of increasing supply concentration functions and price bargaining; but also on the related goal to define rules of conduct that affect profiles not exclusively related to the mere supply of goods on the market: this other goal, not secondary in the functioning of the market, complete the role given to the producers organizations in the agrifood system, since it can contribute to improve the value of products and the internal organization of groups of farmers, with the effect to improve the efficiency and

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<sup>5</sup> To recap the political framework about the adoption of the Directive, read P. DE CASTRO, *La direttiva UE contro le pratiche commerciali sleali nel settore agroalimentare. Cosa cambia per le imprese e i consumatori italiani*, Bruxelles, European Parliament, 2019.

<sup>6</sup> Agricultural Markets Task Force *Improving market outcomes. Enhancing the position of farmers in the supply chain*, European Commission, November 2016.

<sup>7</sup> See Art. 152 of Regulation 1308/2013, as amended by Regulation 2017/2393, as discussed in I. CANFORA, *Organizzazione dei produttori agricoli*, in *Digesto, priv. Civ. agg.* XI, 2018, p. 355.

making them more competitive.

In this framework, the provision of interbranch organizations, as the conjunction ring between the recognized organizations of agricultural producers and the organizations of processors and/or distributors is designed to contribute to the achievement of objectives of the functioning of the supply chain, among which are highlighted, according to the amendments of Regulation 2021/2117, also the initiatives related to sustainability, becoming a justifying cause of the special discipline on competition (Art. 210bis Regulation 1308/13, introduced by Regulation 2021/2117).

Overall, the abovementioned market instruments represent the ordinary set of rules aimed at the governance of the supply chain, in accordance with CAP 2014-20 (and currently with CAP 2023-27), based on the role of business operators and on a new framework of contractual relations<sup>8</sup>.

### *3. The role of Producer Organizations in agricultural sector*

The organizations of agricultural producers (POs), subjects whose constitution is entrusted to the voluntary choice of aggregation by agricultural producers belonging to the same production sector, in a specific geographical area, play an important role in regulating the agri-food market, which can affect in the sense of strengthening the bargaining power in the formation of the price with the buyer, a processing or distribution company (Reg. 1308/13, Art. 152 ss). These are in particular the functions related to the marketing of products and the placing of production on the market, ranging from production planning, to the optimization of production costs, to the concentration of supply up to the possibility of negotiating contracts for the offer of agricultural products. Carrying out contractual negotiations on behalf of the members represents one of the key functions of the POs. It is not a binding condition for recognition – except for certain sectors (dairy, fruit and vegetables and oil and table olives) in which the concentration of supply is considered strategic. In any case, for all POs that undertake to place the products of the members on the market, the European legislation provides for some significant advantages in terms of the applicable legal rules, related to the exemption from the application of the competition rules, an essential

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<sup>8</sup> I. CANFORA, *Rapporti tra imprese e ripartizione del valore nella filiera agroalimentare*, in *Riv. Dir Alimentare*, 2022.

perspective for strengthening the role of POs as intermediaries in the agri-food chain. In fact, the POs recognized «by way of derogation from Article 101 par. 1 TFEU» can legitimately «plan production, optimize production costs, place on the market and negotiate contracts concerning the offer of agricultural products, on behalf of the members»<sup>9</sup>. The negotiation activity includes the definition of the sale price of the agricultural production of the members: circumscribing its contents and methods significantly affects the application of the general competition rules, without prejudice to the rule according to which the agreements cannot have the effect of applying identical prices (Art. 209, par. 2 Regulation 1308/13)<sup>10</sup>.

Moreover, depending on the sectors and types of market, and also in relation to individual national experiences, the role of groups is an important, although not decisive, tool for responding to the imbalance of power in negotiations on the formation of the sale price of products. In fact, the possibility to establish recognized groups is left to private autonomy, albeit encouraged by incentive legislation. So, we can expect, in the future, a wider use of such legal schemes even in Member States or regional areas less interested in their implementation until now<sup>11</sup>.

#### 4. Contractual schemes for the sale of agricultural products and price formation

Another regulatory instrument aimed at improving the functioning of the agri-food chain, introduced by the CAP reform 2014-20, is represented by the provision of a uniform regulation, at European level, of contracts for the first sale of agricultural products, as per Art. 168 of reg. (EU) 1308/13.

Indeed, the legislative choice to apply a binding contractual framework

<sup>9</sup> Art. 152, par. 1 *bis* Regulation (EU) 1308/13.

<sup>10</sup> On which see the interpretative position of the Court of Justice in the judgment of 14 November 2017, case C-671/15. On this point, cf. A. JANNARELLI, *Dal caso "indivia" al regolamento omnibus*, *Dir agroalim.* 2018, p. 115 ff. An amendment or the declaration of nullity of agreements entered into by POs (if a violation of the competition rules is ascertained, in contrast with the objectives of agricultural policies) will produce effects only after notification to the companies, without prejudice to the effects already produced. Refer to I. CANFORA, *La cessione dei prodotti tramite le organizzazioni di produttori*, in *Trattato di diritto alimentare italiano e dell'Unione Europea*, P. Borghi-I. Canfora-A. Di Lauro-L. Russo (eds), Milano, 2021, p. 147; I. CANFORA, *Organizzazione dei produttori agricoli*, in *Digesto, priv. Civ. agg.*, XI, 2018, p. 355 ff.

<sup>11</sup> As discussed in: I. CANFORA, *La PAC 2023-2027: un nouvel équilibre dans les relations contractuelles au sein de la filière agroalimentaire*, in *Revue de droit rural*, 3/2003, dossier 17.



in all member countries has remained incomplete, for a number of reasons<sup>12</sup>.

In this regard, a consideration must be made. The rules that affect contractual transparency, in a situation where the imbalance between parties does not depend on the simple information gap on the conditions of the contractual structure, as happens for consumer contracts, have limited effects in themselves. In fact, the imbalance in the agri-food chain concerns the different power between the parties, mainly concerning the ability to support negotiations that lead to an adequate economic result, as regards the conditions of the supply contract and the profitability of the sale price.

Therefore, in the absence of provisions that actually affect the formation of prices, an issue to which we will return shortly, provisions of a formal nature, which guarantee the transparency of the contractual content, do not appear to be decisive for the underlying issue highlighted above<sup>13</sup>.

That said, the weakness of the initial regulatory framework should also be considered: the introduction of a uniform contractual scheme for all contracts for the sale of agricultural products was originally left to the choice of Member States; the obligation to standardize the content of the national legislative framework to the provisions of the European regulation occurred in the event that the State had chosen to regulate contracts for the first sale of agricultural products within the national territory. Subsequently, as a result of the 2017 CAP mid-term review, the provision was corrected by introducing the possibility, for individual agricultural producers or producer organizations, to directly enforce the obligation of form and content provided for by Article 168 of the Regulation (EU) 1308/13.

A step forward, in terms of effectiveness with respect to the need to intervene on the balance of value in the agri-food chain, was recently taken with a new amendment to the provision, provided for by Regulation (EU) 2021/2117. The regulation intervenes, albeit with caution, on the methods of forming the price and determining indicators that make the value corresponding to what can be expected from a transfer contract that meets parameters of fair remuneration for agricultural producers.

In fact, the latest version of the standard now provides that the price

<sup>12</sup> Refer to I. CANFORA, *Raggiungere un equilibrio nella filiera agroalimentare. Strumenti di governo del mercato e regole contrattuali*, in *Cibo e diritto. Una prospettiva comparata*, V. Zeno Zencovich-L. Scaffardi (eds), vol. 1, Roma, p. 237.

<sup>13</sup> On this topic, see L. COSTANTINO, *La problematica dei prezzi dei prodotti agricoli: strumenti normativi tra antichi problemi e nuove crisi*, in *Riv. Dir. agrario*, 2020, p. 783 ff.

(resulting from the written supply contract) is alternatively: fixed and established in the contract and / or «calculated by combining various factors established in the contract, which may include *objective indicators*, which can be based on prices and relevant production and market costs, as well as indices and methods of calculating the final price, which are easily accessible and understandable and which reflect changes in market conditions, quantities delivered and the quality or composition of agricultural products delivered: *such indicators can be based on relevant prices and production and market costs*; to this end, the Member States may establish the indicators, according to objective criteria and based on studies concerning production and the food chain; the contracting parties are free to refer to such indicators or to any other indicator they deem relevant» (emphasis added).

The provision reaffirms the principle of freedom in the formation of the price, specifying that it is the faculty of the parties to use or not indicators in the formation of the price and the choice of which of them to use in the transaction; just as it provides for an option – and not an obligation – for the Member States to set such indicators, with the consequence that the application of these parameters is left to a choice of internal legislative policy.

Having said that, the introduction of this provision may represent an opportunity to intervene in correcting imbalances in the distribution of value along the supply chain, not only in the interest of equitable remuneration of agricultural producers, but also in the perspective of intervening on critical factors, for example through the valorization of the costs linked to wages and duly declared work. In this regard, the link between low remuneration of the price of agricultural products and the risk of increasing illegality in employment relationships in agriculture, as highlighted most recently in the Italian National Plan against work exploitation and gang-master system (2020-2022)<sup>14</sup>, can be mentioned.

##### 5. Regulatory action to ban unfair commercial practices

The regulatory framework for business relationships in the agri-

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<sup>14</sup> Cfr. I. CANFORA-V. LECCESE, *Lavoro irregolare e agricoltura. Il Piano triennale per il contrasto allo sfruttamento lavorativo, tra diritto nazionale e regole di mercato nella nuova PAC*, in *Dir. agroalim.*, 2021, p. 39 ff.

food sector, defined by European regulations through the instruments for the functioning of the common organization of the market, finds its completion with the Directive on unfair trading practices in the agricultural and food supply chain, no. 2019/633, implemented by Italy through Legislative Decree 8 November 2021, no. 198, issued on the basis of the criteria defined by Art. 7 of the law delegation 22 April 2021, no. 53.

Indeed, if we take into account the need to intervene on the balance of relations in the supply chain – especially in a regulatory framework in which private economic actors play a decisive role in the governance of the market – the simple attention given to instruments aimed at strengthening, through the establishment of groups and the contractual rules mentioned above, the first segment of relations in the agri-food chain (agricultural enterprises–first buyer) may be insufficient on its own to correct distortions of downstream economic operators, such as large-scale organized retailers, which have a much greater economic and contractual power than even producers associations.

Price decisions are generally made by large retailers, not only regarding the price fixing to the consumer, but also regarding the price of the supply of goods. The discounts on consumer prices end up being «discharged» on economic operators who do not have the ability to impose themselves in bargaining: firstly on agricultural enterprises, as a result of organizational decisions in the relationships of the supply chain that are beyond their control, as well as small and medium-sized enterprises processing agricultural products, which are included in Directive no. 2019/633, which covers the whole context of business relations in the agri-food sector.

Directive no. 2019/633 intervened, in fact, to establish balancing rules in the market for the agri-food chain as a whole, with the aim of hitting the distortions that mainly affect agricultural producers: it is stated in recital 10 that «The protection provided by this Directive should benefit agricultural producers and natural or legal persons that supply agricultural and food products, including producer organizations, whether recognized or not, and associations of producer organizations, whether recognized or not, subject to their relative bargaining power». From the list of subjects representing the agricultural part (including the POs themselves, which up to now we have seen as the main response of European law in order to ensure a balance in the negotiations for the supply of agricultural raw materials), it therefore appears that the level of distortions that may occur in the agri-food chain, because of the presence of subjects with bargaining power such as to impose unfair conditions on economic operators upstream of agri-food production, is able to neutralize even the «ordinary» tools

introduced and implemented by Regulation no. 2013/1308 over the years.

The Directive provides for a minimum list of prohibited practices to be transposed into the laws of the Member States, some of which are still prohibited (such as: payment beyond the terms of the law, abrupt cancellations of orders, unilateral changes to the terms of the agreement, request for payments for services not related to the sale, attribution of payments for loss of products, etc.), other prohibited if they have not been the subject of negotiations between the parties (see Art. 3 of the Directive).

Since this is a minimal corrective action, Member States have been allowed to intervene in their national legislation and to introduce further cases to be prohibited *ex lege*.

This choice, although it may appear to be a desire not to impose excessive restrictions on competition, is undoubtedly an important element in the context we are examining. In fact, in addition to the list of expressly prohibited practices, the Directive provides for a uniform system of reaction to unfair practices, which requires, for example, the definition of a law enforcement authority at national level, as well as the protection of the complainant's confidentiality, to avoid commercial retaliation by economic operators sanctioned for violation of the rules.

In addition, in providing for the extension to further cases by the Member States, if they are compatible with the rules relating to the functioning of the internal market, Art. 9 par. 2 allows to prohibit at national level specific unfair commercial practices that may be more or less relevant depending on the market areas in the European Union.

Such a rule represents an important opportunity for States, which leads them to identify specific situations in national markets and to adapt their law enforcement tools to national reality, allowing stricter national rules (provided they are compatible with the functioning of the internal market) to be maintained or introduced.

If we look at the Italian experience, in fact, it is immediately evident that the choice of the national legislator has been oriented towards adopting specific and additional provisions that have an immediate impact on the economic balance in the sector, aimed at counteracting the dispersion of value to the detriment of weaker companies in the chain of contractual relations.

In the Italian experience, as far as the case is concerned, if we examine the text of the delegated law and the subsequent D. Lgs. no. 2021/198 that has implemented it, the innovations introduced at national level are in fact the prohibition of double-down auctions, the classification of sales below production costs as an unfair commercial practice and the introduction of specific rules on sales below cost in the food sector: cases corresponding to

recurrent practices which had been denounced by several parties at national level and which, not surprisingly, have a direct impact on price formation and therefore on the distribution of value in the sector<sup>15</sup>.

In particular, the definition, among unfair trading practices, of the sale of agricultural and food products at prices below production costs – as species of the genus of unfair practices consisting in imposing contractual conditions that are excessively burdensome for the seller – refers, together, to the need for a transparent determination of production costs, as well as the identification, at national level of average production costs: aspect, the latter, which in Italy is entrusted to ISMEA (“Istituto di Servizi per il Mercato Agricolo Alimentare”) and which acts as a parameter in assessing the violation of the prohibition<sup>16</sup>.

In this regard, it is appropriate to stress the importance of these aspects in the balance of contractual relations. Indeed, the consideration of production costs related to the fair price is referred to both as a criterion for determining the price clause at the stage of the negotiations, in the aforementioned amendment of Art. 168 of Regulation no. 2013/1308 (directly applicable in our legal system), as well as an element useful to qualify unfair conduct of business operators in the agrifood chain (for the purpose of art 5 lett. b, Legs. Decree 2021/198).

As for the definition of the law enforcement authority, the choice to concentrate in the *Ispettorato centrale qualità repressione frodi* (ICQRF) of *Ministero dell'agricoltura, della sovranità alimentare e delle foreste* all the functions of intervention against unfair commercial practices in the agricultural and food sector, as a designated law enforcement authority at national level (Art. 8, D. Lgs. 2021/198) is reflected in the choice to carve out a new space for the competition rules of the agri-food sector. This is in line with the choice made by the European Union Directive, based on Art. 43 TFEU<sup>17</sup>, that outline the peculiarity of the functioning of agricultural

<sup>15</sup> For a more precise analysis of d.lgs. no. 2021/198, see I. CANFORA-V. LECCESE, *Pratiche sleali, equilibrio del valore e legalità dei rapporti di lavoro nella filiera agroalimentare*, in *Dir. Lav. Rel. Ind.*, 2022, p. 135 ff.

<sup>16</sup> I. CANFORA-V. LECCESE, *Pratiche sleali, equilibrio del valore e legalità dei rapporti di lavoro nella filiera agroalimentare*, *cit.*, p. 146. Regarding the relevance of the price determination and the criteria for setting average production prices, following the first definition of average production cost, in accordance to Art. 10-*quater* of l. no. 2019/44, A. JANNARELLI, *Prezzi dei prodotti agricoli nei rapporti di filiera e rispetto dei costi medi di produzione tra illusioni ottiche ed effettiva regolazione del mercato*, in *Riv. Dir. Agr.*, 2019, p. 559.

<sup>17</sup> See F. ALBISINNI, *La Direttiva (UE) 2019/633 tra PAC e mercati*, in *Riv. Dir. Alim.* 2021, p. 7

and food markets, by adopting regulatory measures against unfair acts of business operators affecting the entire agri-food sector.

#### *6. Intervention on prices and market balance in the implementation of Member States*

The measures aimed at a fair distribution of value which affect price formation do not therefore deny private autonomy in the free determination of the content of the contract, so far as they are intended to adapt the market balance or to correct abuses in terms of the economic value of trade, in situations of structural inequality between the parties in the contractual relations<sup>18</sup>.

Even before the entry into force of Directive no. 2019/633, this aspect was also clarified by the Court of Justice with the judgment of 13 September 2019 that dealt with Lithuanian antitrust law, to protect farmers in price formation<sup>19</sup>. The Lithuanian national legislation introduced measures aimed at modulating the setting of prices in the milk sector in order to combat unfair practices by purchasers who imposed lower purchase prices on farmers, unable to engage in effective negotiations in the supply of raw milk, for reasons of size and also for the concrete difficulty of aggregating in groups: in this situation, the price negotiation process did not appear to be developing in the free play of competition, but was imposed by dominant buyers who took advantage of the fragmentation of producers and product characteristics, highly perishable, to impose excessively low purchase prices. Indeed, as the Court of Justice states, the principle of free pricing applies under conditions of effective competition; if, on the other hand, situations of imbalance arise, Member States are also entitled to intervene by means of provisions which may influence the functioning of the internal market, provided that such measures are appropriate to ensure the objective and do

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<sup>18</sup> See S. MASINI, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, in *Dir. Agroalimentare*, 2019, p. 259 ff.; I.CANFORA, *Le pratiche commerciali sleali nella filiera agroalimentare alla luce della giurisprudenza della Corte di Giustizia dell'UE*, in *Dir. agroalimentare*, 2023, p. 43.

<sup>19</sup> EU Court of Justice, 13 November 2019, C-2/18, *Lietuvos Respublikos Seimo*. Regarding the judgement, see the observations of S. PAGLIANTINI, *Dal B2C al B2B: una prima lettura della dir. (UE) 2019/633 tra diritto vigente e in fieri*, in *Nuove leggi civ. comm.*, 2020, p. 220 ff.

not exceed what is necessary to achieve it<sup>20</sup>.

Similarly, our *Autorità Garante della Concorrenza e del Mercato* (ACGM), in a case involving recurrent unfair practices in the milk market for the production of Pecorino Romano cheese, also prohibited practices which resulted in the payment of below-cost prices to agricultural producers. This against a market contingency that evidenced an imbalance in the system of the chain, with immediate repercussions on the profitability of prices, with reference to the same coverage of production costs by farmers<sup>21</sup>.

The imbalance in value may indeed depend on contingent situations, as evidenced by the intervention on the crisis of national PDO production, but also practices rooted in certain market segments.

It is clear, anyway, that circumstances which complement the criteria of unfair practices are more easily identifiable and codifiable as prohibited practices at a national level, with regard to the types of situations encountered in market practice and which are brought about by economic operators, situations that would be complex to identify and to regulate in a uniform way at Union level.

Therefore, the real disruptive factor of Directive no. 2019/633 is given by Art. 9, which provides for the adoption of stricter rules and a catalogue of further prohibited practices to enhance the functions of the institutional structures specifically identified in implementation of the Directive. This provision, in the context of a dialogue between national experiences, could lead to a gradual widening of cases, both at national and European level, also in view of the transnational nature of trade in the agri-food markets.

<sup>20</sup> Principle thus reaffirmed in the subsequent judgment of Court of Justice of the European Union, 11 March 2021, in Case C-400/19, *European Commission/Hungary*, paragraphs 36 and 37: «In that regard, it should be noted at the outset that, although the Commission does not allege infringement of a specific provision of Regulation No 1308/2013, but infringement of that regulation as a whole, the fact remains that, in the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of that regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 37 and the case-law cited). However, the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, provided that those rules are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraphs 30 and 56, and the case-law cited)».

<sup>21</sup> ACGM, AL21 – *Prezzi del latte in Sardegna, Provvedimento* n. 27805 of 12 June 2019.

Nor is it to be assumed that such a rule would lose the unity of the vision of the agri-food market.

As has been said, in fact, situations of market imbalance can come to the attention of law enforcement authorities, in particular economic areas evaluated at national level, within the framework outlined by Directive no. 633/2019. Moreover, the national importance of the market also emerges in the provisions of Regulation no. 2013/1308 as amended by Regulation no. 2021/2117, which recalls criteria for pricing in first-sale contracts based on relevant production and market prices and costs, to be determined by the Member States.

Proper price formation and value balance in the agri-food chain therefore become the subject of a growing plurality of interventions, in the future organization of the agri-food market: they are important aspects of the public interest in the face of a structural imbalance, which threatens to produce distortions both to the detriment of the weakest operators, and ultimately of the operation of the production chain in its complexity, not being able to renounce to a fair and sustainable organization of the agri-food chain that requires the presence of productive agricultural enterprises in the European territory.