

ANTITRUST ISSUES IN THE LARGE-SCALE FOOD DISTRIBUTION SECTOR

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Keywords: Antitrust, Large Scale Distribution, Italian Competition Authority, Alliances of food retail chains, Abuse of dominant position, Merger control

Abstract: *In light of the slow modernization of the Italian large-scale food distribution sector, of the fragmentation at national level, of the significant roles of the cooperatives at local level and of the alliances between food retail chains, the ICA during the recent years has developed a strong interest in this sector.*

After having analyzed the peculiarities of the Italian large-scale food distribution sector, this article shows the recent approach taken by the ICA toward the main antitrust issues in this sector.

In the analysis of such issues, mainly the contractual relations between the GDO retailers and their suppliers, the introduction of Article 62 of Law no. 27 dated 24th March 2012 is crucial, because, by facilitating and encouraging complaints by the interested parties, it should allow the developing of normal competitive dynamics within the food distribution sector, where companies should be free to enter the market using the tools at their disposal, without undue restrictions.

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1. INTRODUCTION

The increasing concentration of the retail sector in Italy and the consequent strengthening of the market power of the major chains, as found in the recent inquiry into the large-scale food distribution sector (“*grande distribuzione organizzata*” in Italy, hereinafter also “GDO” or “*large scale food distribution sector*”, or “*large-scale retail trade*”) carried out by the Italian Competition Authority (hereinafter Competition Authority or ICA)¹, have led to a widespread imbalance of bargaining power in the purchasing phases, in particular in the food sector.

This article aims mainly to highlight the special nature of the large-scale retail trade in Italy and the main related antitrust concerns, through the analysis of problems with reference to the contractual relations between GDO and their suppliers, highlighted by the most recent case law.

In particular, the relationship between GDO and suppliers will need to be considered especially after the introduction of the concept of “*significant imbalance*” in commercial relations, included in the recent Decree implementing Article 62 of Law no. 27 dated 24th March 2012², which is crucial for the ICA when

¹ ICA, *Inquiry into the large-scale food distribution sector* (IC43), published on 13th August 2013 on the ICA's website.

² Ministerial Decree no. 199 dated 19th October 2012 on the *Implementation of Article 62 of Decree-Law no. 1 dated 24th January 2012, converted, with amendments, into Law no. 27 dated 24th March 2012.*

dealing with the strong bargaining power of retailers towards the suppliers. This is the most recent regulatory intervention in the GDO sector, which has long been the subject of major regulatory action.

2. THE SLOW MODERNIZATION OF THE LARGE-SCALE FOOD DISTRIBUTION SECTOR

Nowadays, the GDO sector³ in Italy is the outcome of a slow process of modernization⁴,

³ Technically it is necessary to distinguish between large-scale distribution chains or “*Grande Distribuzione*” (GD) and smaller scale distribution organisations or “*Distribuzione Organizzata*” (DO). In particular, GD includes large central facilities which are managed by a single undertaking and directly govern stores: for example, Carrefour, Esselunga, Auchan etc. On the other hand, DO refers to the grouping of small retailers seeking to obtain greater efficiency: this is the case, for example, of Despar and Sisa. In order to simplify, it could be said that the DO encompasses retail business associates under a single sign, while in the GD companies are governed by a single ownership (Amoroso M., *Il sistema della distribuzione in Italia, in Il sistema franchising in Italia: la tenuta delle reti alla prova della crisi*, Sinergie Rapporto di ricerca no. 34, December 2011). For antitrust purposes, the term “Distribuzione Moderna” (or large-scale food distribution sector - GDO) refers to “*a collection of stores managed on a self-service basis, covering large surface areas and which are generally members of an organization or a group that manages various stores marked by one or more common sign (the “distribution chain”)*” (ICA, *Sector Inquiry into large Food Retail Distribution*, IC43, 2013, pp. 9 ff.). In particular, businesses in the large-scale distribution sector are divided into four types, which differ from each other in the “*size, range (number of products) and depth (number of references for each product) of the goods on offer, displays, price positioning, the number of cash desks, the presence of fresh-produce shelves, availability of parking and additional services provided to the consumer.*” They are divided into: i) Supermarkets: operate in the retail food sector, mainly self-service with payment at exit, a sales area of over 400 square metres and a wide range of consumer products, mostly convenience goods, and possibly some non-food items for domestic use; ii) Hypermarkets: retail outlets with sales area of over 2.500 square metres, divided into sections (food and non-food), each of which

started mainly by a severe regulation, which for a long time resulted in an increase of consumer prices and in a reduction of the efficiency of many of the chains involved⁵.

As correctly observed, it is not easy to quantify the price that Italy has had to pay for the slow development of the commercial sector as will be described below. Of course, for a long time the direct and indirect benefits of modern distribution were denied to consumers⁶.

having, respectively, the characteristics of a supermarket and a department store; iii) Superette: retail stores of food products operating on the same basis as a supermarket, with self-service and payment on exit. They differ from supermarkets with regard to their area, which is between 200 and 400 square metres; iv) Discount stores: retail outlets organized entirely on a self-service basis with an area generally between 200 and 1.000 square metres and with a very limited range of products (typically less than 1.000) which, in most cases, do not include fresh products or brand products. Finally, according to the ICA Inquiry, there is the “mini-market” category, consisting of stores ranging in size between 100 and 200 square metres, “*managed on a self-service and in many cases belonging to a larger distribution chain. However, neither market research organisations nor the operators or others active in the sector are consistent as to whether they include mini-markets under the large-scale distribution sector (GDO) rather than under the traditional distribution sector*” (ICA, IC43, cit., pp. 9 ff.).

⁴ The term “modernisation” “*does not usually mean mere rationalisation of commercial activity, but also a radical change which involves the distribution activity as a whole to replace the former traditional distributive arrangements which had remained stuck in modes of behaviour divorced from the requirements of the market*”. Sarti D., *Modelli di competenza nella grande distribuzione alimentare. Il caso Coop Estense*, Milano, 2005, p. 15. Modernisation in the grocery industry consists in “the advent and the steady growth of self-service stores which not only offer consumers the best quality at the best price but also improves efficiency in the sector as a whole” (Ravazzoni R., *Liberare la concorrenza. Lo stato dell'arte delle liberalizzazioni nel terziario in Italia*, Milano, 2010, pp. 34 ff.).

⁵ Pellegrini L., Zanderighi L., *The Italian distribution system*, 2013, pp. 14-15.

⁶ One of the most important advantages of modern distribution for the consumer is the reduction of purchase costs. However, “*the benefits of an advanced market in terms of price differentials that it is able to transfer compared to*

Although there are various estimates⁷ which take into consideration different factors, they agree that the price paid by consumers for the delayed modernization of modern distribution is very high. In this respect, they are of great interest the findings of the study undertaken by the *Osservatorio sulle Liberalizzazioni* (Observatory on Liberalisation), under the auspices of CERMES-Bocconi and promoted by Federdistribuzione⁸, on the tertiary sector in general, which includes the food retail industry. In particular, this investigation has shown that if the cumbersome system - characterized by entry barriers, protectionist systems, various restrictions and slow development - had been overcome more quickly, it would have produced an efficiency gain of 1.4 percent of the GDP of Italy for year 2008⁹.

traditional commerce are not to be taken for granted but depend on the level of business efficiency and the level of competition to which they are subject. Both the one and the other are inevitably limited by barriers which impedes their development” (Pellegrini L., Zanderighi L., *cit.*, 2013, pp. 16 ff.).

⁷ See for example the estimate made by Ravazzoni R., *La distribuzione alimentare* in Ravazzoni R., *Liberare la concorrenza. Lo stato dell’arte delle liberalizzazioni nel terziario in Italia*, Milano, 2010. In order to estimate the extent of the delay affecting Italian distribution, in particular, what has been taken into account is the development of the supply of commercial services since 1995, comparing the Italian data with that of other major European countries (France, Germany, UK and Spain). This comparison showed that Italy would not have reached a degree of modernization in distribution equal to the average of the countries considered as calculated for 2008 until 2014 (in other words, a gap of six years).

⁸ Available on the Federdistribuzione website at http://www.federdistribuzione.it/studi_ricerche/files/Osservatorio_sulle_liberalizzazioni_in_Italia_2010.pdf.

⁹ Ravazzoni R., Fabbi E., Pancioli A., Sosio M.A., *Liberalizzazioni e concorrenza nel terziario italiano*, in *Economia dei Servizi* no. 3/2010, pp. 451 ff. The sectors analyzed by the Observatory on Liberalization are the following: food retail, non-food retail, fuel distribution, pharmaceuticals distribution, banks and insurance companies.

In order to demonstrate the development of regulation in the retail sector, it is essential to go back to 1971¹⁰, when Law no. 426¹¹ greatly fettered business decisions by requiring that, for the opening of a retail business it was necessary, in addition to compliance with the urban regulations on hygiene and health care, to be included in the relevant Trade Register (REC)¹². Moreover, it was necessary to obtain an administrative permit issued on the basis of a certain predetermined list of goods, in accordance with detailed business plans¹³.

It was a remarkably restrictive regulatory policy which clearly needed - in particular for the development of large-scale retail chains - urgent modernization. Such a policy had in fact led to a structure of the retail distribution

¹⁰ It should however be noted that the need to modernise the retail sector had already been noted prior to 1971: the national economic programme for 1966-1970 stated the need to correct the serious obstacles posed by the fragmented nature of the national distribution network, giving rise to the “*natural expansion of medium and large-scale businesses (supermarkets, department stores, budget stores, etc.)*”. According to “Project 80” (relating to the five-year period from 1971 to 1975, published in 1969), among other things “*large-scale distribution retail is growing, though it has not reached the scale of other advanced European countries*”. This project contained a clear warning: “*This trend should not be hampered by administrative obstacles of a restrictive nature*” (Sandulli A.M., *I problemi giuridici della grande distribuzione. Relazione generale*, Quaderni ISGEA, Giuffrè 1977).

¹¹ Law no. 426 dated 11th June 1971 on the *regulation of commerce*, Official Gazette of the Italian Republic no. 168, dated 7th June 1971.

¹² This registry was intended not only to ensure standards of professionalism, but also to prevent the entry into the market of marginal operators, with low income expectations.

¹³ These plans, drawn up from time to time at the level of the municipal authority, laid down, on the basis of a structural supply plan, the maximum surface area of the sales network broken down by sector: if these limits were exceeded, there was no scope for granting additional permits to open shops.

market which was much more fragmented than in other major European countries (in 1988, there were 17.1 stores per 1000 inhabitants as against 7.1 in France, 5.9 in the United Kingdom and 5.4 in Germany)¹⁴. Furthermore, the limited availability of supermarkets helped to make Italy an expensive country both in terms of prices and time required to make purchases.

Consequently, the restrictions introduced by Law no. 426/1971 have slowed down modernisation rather than facilitated it, resulting in distortions the effects of which may still be seen even after many years¹⁵.

Since above cited Law, over the years there have been attempts at liberalization which have sought to modernise Italian commerce by facilitating the development of large retail chains in Italy.

These interventions soon led to a substantial reform of the organisation of the commercial distribution sector. To this end, Legislative Decree no. 114/1998 (*“the Bersani Decree”*)¹⁶, which aimed to simplify the bureaucratic requirements, abolished the Trade Register and the lists of goods, keeping only the distinction between food and non-food¹⁷. In addition, the

Bersani Decree divided stores into three types: local shops, medium and large stores, simplifying the procedures for establishing, enlarging and transferring them¹⁸. It was certainly a major reform, which enabled the development of large stores¹⁹.

However, although limits to the development of large retailers have mostly been removed, urban and regional planning regulations have frequently been used to impose on the large retailers unwarranted barriers to entry²⁰.

However, the Law has kept an authorization scheme for medium and large shops. And whether by entrusting to the Regions matters concerning commercial distribution, or by identifying certain aspects of the general interest which they were called upon to deal with (for example, street furniture, traffic, transport and the balance between various types of shops), this system has prevented the development of large retailers, to the detriment of consumers.

¹⁴ In particular, the opening, expansion and transfer of small stores (up to 150 square metres or 250 square metres depending on the number of inhabitants of the municipality), referred to as “local shops”, were liberalized and subject only to informing the local Mayor (so called “*Sindaco*” in Italian) (opening, expansion and transfer of this type of outlet could be carried out 30 days from the date of receipt of such communication) (Article 7(1) of Legislative Decree no. 114/1998). Now, the opening, expansion or reduction of the size of the shop, a change in the line of goods sold, transfer of the registered office or taking over the tenancy of local shops (which are not located within large retail outlets or medium-sized businesses as referred to in Article 18(2) of Regional Law no. 50/2012), are subject to the submission of a SCIA (so called “*segnalazione certificata inizio attività*”), pursuant to Article 19 of Law no. 241 dated 7th August 1990. The activity notified can begin from the date of submission of the SCIA.

¹⁵ In a recent interview which appeared on the “*Corriere della Sera*”, the founder of Esselunga, Mr. Caprotti, stated that the Bersani Decree “*has enabled us to open large supermarkets, from 2.500 to 4.500 square metres, thus increasing supply. In the past, the number of fruits and vegetables on display in a supermarket did not go beyond fifty; today there are 450*” (Corriere della Sera, 30 July 2014).

¹⁶ For example, according to the OECD report on regulatory reform in Italy, Lombardy and Piedmont

¹⁴ Heimler A., *Distribuzione commerciale*, Dizionario di economia e finanza, Treccani, 2012.

¹⁵ The barriers to entry, in particular, have affected Italy differently in different regions, being more intense in the south. See Ravazzoni R., *Liberare la concorrenza*, cit., pp. 47 ff.

¹⁶ Legislative Decree no. 114 dated 31st March 1998 on reform of the legislation relating to the trade sector, pursuant to Article 4(4) of Law no. 59 dated 15th March 1997, Official Gazette of the Italian Republic no. 95 dated April 24th 1998 - Ordinary Supplement no 80.

¹⁷ Likewise, also opening hours have been made more flexible and municipal authorities are now responsible for deciding whether shops are open on holidays.

The development of anti-competitive regional regulations was impeded from the outset by the Italian Competition Authority²¹, the Constitutional Court²² and the Italian Supreme Administrative Court²³.

“require medium-size stores above a certain limit to submit an impact analysis setting out in detail their effects on the existing transport network, the environment and also on the system of stores of the dominant operators. The first two requirements are in line with an economic approach, but the latter, which is typical of regulation in all the regions, in particular with regard to the authorization of department stores, reintroduces a measure of supply planning.” OECD Reviews of Regulatory Reform Italy: Better Regulation to Strengthen Market Dynamics, OECD Publications, Paris 2009. Nonetheless, as correctly observed (Ravazzoni R., *Liberare la concorrenza*, cit., pp. 49 ff.), the approach of the Bersani Decree was right. However, although it was right to leave commercial development to the competent bodies, at Regional level there has been an increase in pressure from local authorities contrary to business realities (where a lower “centre of gravity” allows decision-making efficiency gains). In fact, the authorities affected by the pro-competition measures have exerted particularly intense pressure in those sectors and markets by imposing strong limits on area expansion (as is the case in many service sectors), “strait-jacketing” the relevant policy maker in a stifling and complex network of special interests. The result have been centrifugal dynamics in neighbouring areas or spread actions across the country, at times resulting in what are best described as business fiefdoms.

²¹ In 2004, the Competition Authority has expressed its opposition to the reference “to a concept of relevant market and a maximum market share”, contained in legislation of Sicily. Furthermore, in 2007, with regard to the new Consolidated Law on trade adopted by Liguria, it took the view that it was contrary to the principles of competition in some of its points (reclassification of the types of distribution and sales promotions). Again, in 2007 it found that the rules on special sales, promotions and seasonal sales adopted by Sicily were unlawful. For further information, see Viviano E. and Others, *La grande distribuzione organizzata e l'industria alimentare in Italia*, in *Economia e Finanza* (Banca d'Italia), no. 119/2012, pp. 52 ff. Subsequently, as it will be explained below, the Competition Authority has also intervened on restrictions on opening hours of shops.

²² Judgment of the Constitutional Court in Case no. 63/07, which declared Article 10 of Umbria Regional Law no. 26/05 unconstitutional inasmuch as “it includes,

The attempt to remove the constraints that remained in relation to the development of the free market led to Law no. 248 dated 4th August 2006²⁴, according to which it is no longer a requirement to have any particular personal qualifications for carrying on a business (with the exception of businesses related to the food industry and the handling of food and drink) and commercial plans have been abolished²⁵.

among the preferential criteria for granting authorisation to carry on business or to expand commercial activity, the criterion of prior ownership of another large store in the region, thereby establishing a protectionist barrier ... which is contrary to the principle of equality and to Article 41 of the Constitution”. The Constitutional Court has delivered a judgment even more recently in which it has found to be unlawful regional measures which are more restrictive than those contained in Decree 114/98 where they can produce effects that hinder competition; measures considered “pro-competitive” are those which extend the number of opening hours or the number of days when shops are open on holidays (Cases 150/11 and 288/10).

²³ According to Supreme Administrative Court, Judgment no. 2808/09, “restrictions on the opening of new businesses are theoretically possible, provided they are not based on a predefined market share or calculated on the volume of sales or, in other words, on an assessment by an authority as to the extent to which the supply matches the presumed size of the demand”. Furthermore, “restrictive interventions are connected to the protection of values (...) economic freedom, (...) but these values cannot include the conservation of market share of existing businesses.” More recently, the Supreme Administrative Court has stated (in judgment no. 1975/11) that “the principles of the Treaty and of our constitutional system require that public authorities do not interfere with the free play of competition, but refrain from establishing a mandatory maximum number of operators to be authorized in a specific area.”

²⁴ Law no. 248 dated 4th August 2006, “Conversion into law, with amendments, of Decree-Law no. 223 dated 4th July 2006, containing urgent provisions for economic and social recovery, containment and rationalization of public spending, and enforcement in relation to income and fighting tax evasion”, Official Journal of Italian Republic no. 186 dated August 11th 2006 - Ordinary Supplement no. 183.

²⁵ Pellegrini L., Zanderighi L., cit., pp. 25-26. With the removal of the control over business plans the distribution sector has become a component of urban planning, which has the task of managing the balance between spontaneous and planned commercial concentrations.

Furthermore, the prohibition on promotions has been removed²⁶.

Over the years, then, Italy has started to progress further and further: as in most developed countries, greater changes in the retail industry have been closely connected with the deep changes that have affected the structure of consumes and buying patterns, which have in turn had an impact on the demand for goods and commercial services. Some extraneous factors have contributed to accelerate this process of modernization: the increase in disposable income and the differentiation of consumer needs; the marked urbanization of the population, with the creation of large residential suburbs close to the city; a greater propensity to mobility by the consumer; the increased numbers of working women; the greater presence of the means of mass communication and the related consolidation of branded products; and finally, the reduction of the average size of the families²⁷.

However, this process of modernization was so slow that it prevented the early appearance of successful large retailers²⁸.

Recently, the “*Salva Italia Decree*” (Decree Law no. 201/2011, converted into Law no.

214/2011)²⁹ introduced further aspects of trade liberalization.

In particular, that Decree, which concerned the regulation applicable to all commercial enterprises as part of a long process of liberalization, left opening hours to be freely decided by commercial companies³⁰; at the same time, such restrictions on opening times were particularly opposed by the ICA which expressed its opinion on the rules that govern opening times in recent reports with the aim of enhancing the pro-competitive nature of the Decree and removing the discrepancies between competitors³¹. Furthermore, Articles

²⁹ Decree Law no. 201 dated 6th December 2011 on urgent provisions for growth, equity and consolidation of public finances, Official Journal of Italian Republic no. 284 dated December 6th 2011 - Ordinary Supplement no. 251, converted, with amendments, by Law no. 214 dated 22th December 2011 (in Ordinary Supplement no. 276 of the Official Journal of Italian Republic no. 300 of December 27th 2011).

³⁰ The limit on the extension of the daily opening hours (previously 13 hours), the compulsory midweek half-day closing and the obligation to close on public holidays unless specifically allowed have been removed.

³¹ In recent years, the ICA often gave its opinion on the rules governing business opening hours and days. In particular, the Competition Authority specified that some regional regulations and local authorities' decisions have made opening on bank holidays subject to providing special reasons and have required them to close on other days in compensation. Sometimes, regional regulations introduced different provisions for Sunday and holiday opening for small, medium and large retail stores. In this regard, the Competition Authority determined that the power conferred by Decree no. 114/98 to the municipalities when defining the areas and zones where there is liberalization of opening times and days “*must be interpreted in light of the economic and social changes that have occurred and new competitive dynamics that are emerging, giving importance to the pro-competitive nature of the Decree and removing any disadvantage and unequal treatment between competing commercial operators*” (Notice AS480 dated 16th October 2008, in which the Competition Authority asked the local authorities that adopted unduly restrictive rules to review their regulations insofar as they did not

²⁶ It should also be noted that in 2006, in the context of liberalization, limits on the production of bread and the number of bakeries have been abolished.

²⁷ Ravazzoni R., *Lo sviluppo della distribuzione al dettaglio grocery in Italia*, in Ravazzoni R. (ed.), *Il rilancio dei consumi in Italia*, Milano, 2004, pp. 195 ff.

²⁸ Caprotti B., *Nascita e sviluppo della distribuzione alimentare moderna*, Relazione all'Accademia dei Georgofili 2014, p. 15.

allow stores to be free to decide how to carry on their own business activities). Furthermore, again referring to the removal of obstacles to the liberalization of shop opening hours the Authority sent four opinions, in February and in April 2013, pursuant to Article 21-*bis* of Law no. 287/1990 to the Mayors of Bolzano, Merano, Catania and Storo, against their various decisions and orders determining opening and closing times of stores in their respective municipalities. In particular, the Competition Authority specified that these provisions infringed the rules concerning the protection of competition inasmuch as they limited the carrying on of economic activities, in clear conflict with the provisions liberalising opening and closing hours of stores pursuant to Article 31(1) of Decree Law 201/2011 (known as “Decreto Salva Italia”). The Competition Authority pointed out that the restrictions on freedom of access or on the modalities of exercising economic activities constitute restrictions of competition which are not justified by imperative needs of general interest. Therefore, the Competition Authority asked to the said municipalities to communicate, within sixty days from the receipt of the opinions, the measures adopted to remove the competition infringements, while reserving to itself the right to bring an action within the next thirty days in the event of non-compliance. After the receipt of the abovementioned opinions, the municipalities complied with the opinions issued by the ICA, which - giving notice in its Bulletin - held that there was no longer any grounds for bringing an action pursuant to Article 21-*bis* of Law no. 287/1990. Subsequently, in July 2013, the Authority sent a report, as required by Articles 21 and 22 of Law no. 287/1990, to the President of the Senate of the Italian Republic, the President of the Chamber of Deputies, the President of the Council of Ministers, the President of the Permanent Conference for relations between the State, the Regions and Autonomous Provinces of Trento and Bolzano, containing issues related to the effective implementation of the liberalization of opening and closing hours of stores pursuant to Article 31(1) of Decree Law no. 201/2011. It should also be considered that, following the constitutional reform, both concurrent and exclusive legislative powers have been attributed to the regions over significant sectors of the economy and this regionalization of legislative competence created extremely difficult problems with regard to the relationship between “protection of competition” and regional legislative power (for more details see. Caravita B., *Tutela della concorrenza e regioni nel nuovo assetto istituzionale dopo la riforma del titolo V della Costituzione*, in Rabitti Bedogni C. - Barucci P. (a cura di), *20 anni di Antitrust*, Torino 2010, pp. 229 ff.

31 and 34 confirmed some general principles aiming at safeguarding competition³². All of the restrictions contained in the applicable regulations (prohibitions and restrictions on the exercise of an economic activity and the imposition of minimum distances) were repealed with immediate effect and, simultaneously, the powers of the ICA were extended³³.

As it is known, this Decree also mentions the tools available to the ICA when examining restrictions of competition attributable to administrative acts. In fact, Law no. 287/90 has been expanded with the introduction of Article 21-*bis*³⁴, pursuant to which the ICA is entitled

³² In particular, according to Article 31(2) of the Salva Italia Decree “...it is a general principle of National law that the opening of new stores should not be subject to territorial limits or other restrictions of any other nature, except those related to protection of the health of workers, the environment and cultural heritage”; according to Article 34(4), “4. The introduction of an administrative system aimed at making the exercise of an economic activity subject to prior authorization must be justified on the basis of the existence of a general interest which is constitutionally significant and compatible with European law, while observing the principle of proportionality”.

³³ The Competition Authority, in particular, is required to deliver a mandatory opinion within thirty days from the receipt of the order, in relation to the principle of proportionality on Government law proposals and regulations that introduce restrictions to the access and to the exercise of economic activities. The Regions must ensure that the laws they issue within their competence are compatible with the abovementioned principles and regulations.

³⁴ Article 21-*bis* of Law no. 287/1990: “1. It is admissible for the Authority to take legal action whenever the general administrative provisions, regulations or measures of any public administration infringe the laws protecting competition and the market. 2. Should the Authority determine that a provision issued by a public administration to infringe the laws protecting competition and the market, a reasoned opinion indicating the specific nature of said infringement shall be issued within sixty days. Should the public administration fail to comply with the opinion within sixty days of notification, the Authority may bring an action/initiate court proceeding through the “Avvocatura dello Stato” within the following thirty days. 3. Decisions enacted

to challenge administrative acts that infringe the rules protecting competition and the market.

The process of regulatory and legislative development has culminated with the introduction of Article 62 of the “*Cresci Italia Decree*” (Decree-Law no. 1 dated 24th January 2012)³⁵. In addition, in order to introduce specific requirements for contracts which have as their object the sale of agricultural and food products, with the exception of those concluded with final consumer (*i.e.* the written form and an indication of the duration, quantity and characteristics of the product sold, the price and the terms of delivery and payment – in the absence of which the contract should be considered null and void), the aim of the introduction of that Article, which bans the adoption of unfair practices in the relationships between operators in the food and agriculture sector, was to set up a specific body of rules ensuring balance and transparency of the relevant contractual arrangements, with the main objective of protecting the suppliers³⁶.

pursuant to sub-paragraph 1 are subject to the rules and regulations in Chapter IV, Title V of Legislative Decree no. 104 of 2 July 2010”.

³⁵ Decree Law no. 1/2012 on urgent provisions for competition, infrastructure development and competitiveness, Official Gazette of the Italian Republic no. 19 dated 24th January 2012 - Ordinary Supplement no. 18, converted with amendments by Law no. 27 dated 24th March 2012 (Ordinary Supplement no. 53 to the Official Gazette of the Italian Republic no. 71 dated 24th March 2012).

³⁶ Rabitti Bedogni C., *Le problematiche antitrust nel settore della grande distribuzione*, in “*Antitrust between EU law and National law*”, Raffaelli E.A. (ed.), Bruylant, 2012, p. 121. In its sector inquiry into retail distribution (IC43), concluded in August 2013, the Competition Authority, with regard to Article 62, specified that “*the reason for deciding to attribute to an administrative authority, whose duty is to safeguard the general interests, the ability to control the way in*

It should be noted that, as provided for in Ministerial Decree no. 199 dated 19th October 2012 (“*provision implementing Article 62 of Decree Law no. 1 dated 24th January 2012*”), Article 62 applies “*with particular reference to the relationship between economic operators in the sector characterized by a significant imbalance in the respective positions of bargaining power*” (Article 1 of the Ministerial Decree). The concept of “*significant imbalance*”, in particular, is an open-ended problem: it has been observed that this concept may be interpreted as ruling out a general application of Article 62, “*which disregards the existence of an asymmetry between the parties, because of their different bargaining power*”³⁷. According to other commentators, however, this concept is to be interpreted as a mere priority indication intended as “*guidance for the assessments to be carried*

which companies relate with an administrative authority depends on whether the conduct is socially significant, i.e. whether they are sufficiently widespread and/or may affect some general interest”. In particular, in commercial relations between economic operators the following behaviours are prohibited: (a) the direct or indirect imposition of conditions on the purchase, on the sale or other conditions unduly burdensome or retroactive; b) the application of substantially different conditions to different counterparties for the provision of comparable goods and services; c) the subjecting of continued business relations to the performance of obligations which have no connection, by nature or by commercial practice, with the object of the contracts or relationships; d) the request for undue and unilateral performance obligations, not justified by the nature or content of the business relations; e) any other unfair commercial practice considered so taking into account the complex business relationships that characterise the food supply.

³⁷ Rabitti Bedogni C., *Il controllo del potere di mercato nella filiera dei beni di consumo*, Relazione all’assemblea annuale di Centromarca 2012, available at <http://www.centromarca.it/sala-stampa/lopinione/2012/06/il-controllo-del-potere-di-mercato-nella-filiera-dei-beni-di-consumo.aspx>.

out by the Competition Authority and not as an assumption of unfair conduct”³⁸.

Despite the interpretative uncertainty, Article 62 of the Decree Law should allow the developing of normal competitive dynamics within the distribution sector, where companies should be free to enter the market using the tools at their disposal, without undue restrictions³⁹.

The question that has been validly raised is whether, in order to impede the infringements indicated in Article 62, *ad hoc* legislative intervention would have been necessary, or if it would have been sufficient to resort to the rules on competition. In this regard, the view is that in Italy legal protection against unfair contract terms is guaranteed only to consumers; nor can the imposition of unduly burdensome conditions “that relieve on the relative weakness of one of the parties to a contractual relationship (...) be easily impeded (...) with the traditional tools of antitrust law”⁴⁰.

³⁸ Petrelli L., *L'art. 62 dopo le ultime decisioni*, in *Rivista di diritto alimentare*, Year VIII, no. 1, January – March 2014, pp. 10 ff.

³⁹ Pellegrini L., Zanderighi L., *cit.*, pp. 7-8. This is an important result taking into account the Italian regulation governing the distribution sector. In fact, in Italy the delay in the distribution sector has been ascribed, *inter alia*, to the constraints imposed on companies, which have slowed down and altered the merger and maturing process of the system, that – instead - have occurred in other countries.

⁴⁰ Rabitti Bedogni C., *Il controllo del potere di mercato nella filiera dei beni di consumo*, *cit.* Moreover, the provision prohibiting the abuse of economic dependence, “which also appear in theory to provide the most appropriate legal basis for dealing with the *de qua* situation, limits the Competition Authority to intervening only in situations that might harm the functioning of the market. The provision has been interpreted narrowly, with the result that it has not been applied in practice. The new provision, therefore, is more specific than the general rules on abuse of economic dependence, and prohibits precisely the imposition of

Although it is still too early to assess the impact of the introduction of this important provision on the market, recently the Authority has already made it clear that it is important to act “within the scheme of the system giving priority as to the infringements to be pursued according to their significance and their impact on the market”⁴¹.

The effects of said rule could be potentially disruptive. It should however be borne in mind that these effects will depend on the ways according to which the Authority will apply such provision in accordance with its own procedures⁴². Indeed, responsibility for the application of Article 62 of the aforementioned Law has been attributed to the ordinary courts for disputes between private parties and to the ICA for the protection of the public interest in maintaining a proper competitive structure of the market. Any economic subject may report a suspected infringement to the Competition Authority, and the Authority may also act of its own initiative⁴³.

If Article 62 (preventing the abuse of economic dependence or of imbalances in the bargaining power and/or the contractual relationship between stakeholders in the food and agriculture sector), is to become an effective tool for the protection of the latter, it will

conditions that create a significant imbalance between the rights and the obligations arising under a contract?”.

⁴¹ ICA, IC43, *cit.*

⁴² ICA, Resolution no. 24220 dated 6th February 2013 - *Regulation on procedures for investigating commercial relations in the supply of food and agricultural products* (Official Gazette of the Italian Republic, no. 154 dated 9th March 2013).

⁴³ For this reason, the Competition Authority made available a specific form by means of which the interested parties can submit a report, containing the minimum information necessary to enable the Authority to go through the case (<http://www.agcm.it/moduli-tutela-della-concorrenza/formulario-articolo-62.html>).

depend on the efforts of the institutions and of the ICA to minimize any uncertainty in the application of the new rules.

In this regard, the principles of good practice and unfair practices identified by the European Commission and representatives of the food and agriculture sector at European level within the *High level Forum for a Better Functioning of the food supply chain*, (approved on 29th November 2011) will be of great importance for the ICA⁴⁴.

3. SPECIFIC FEATURES OF LARGE-SCALE FOOD DISTRIBUTION SECTOR IN ITALY

The slow modernization of the large-scale distribution is shown by the structural differences in this sector in Italy compared to other European countries.

As it is known, in industrialized countries the commercial distribution sector has long been an area of increasing competitiveness and innovation. The development of this sector is reflected in how much it contributes to wealth and employment in each country⁴⁵.

⁴⁴ The failure to comply with these principles was included in the conduct referred to as “*unfair trade practice*” by Article 4 of the Decree no. 199 of the Ministry of Agricultural, Food and Forestry Policies dated 19th October 2012.

⁴⁵ If, more generally, we consider the contribution of the tertiary sector to GDP, employment and economic development at present, it is clear that this contribution is the most prevalent. It has been observed that, at the level of competition between systems and between countries, whoever has the more modern and more competitive tertiary sector, and therefore a more efficient one, will grow more than competing countries which have a less developed and less dynamic (because more protected) tertiary sector. In Italy, as in most advanced economies, this is the trend. With regard to the impact on public administration, in 2008 the Italian tertiary sector accounted for approximately 67 per cent of

The Italian agro-food sector, in particular, has a significant role in the Italian economy, employing 13.2% of the working population (3.3 million workers) and being responsible for 8.7% of GDP, a figure that rises to 13.9% when compared to losses in other productive sectors⁴⁶.

The significant role that the agro-food sector has acquired as a result of environmental, socio-economic and regulatory changes that have taken place over the years, has contributed to the creation of a new demand for goods and services characterized by greater complexity and heterogeneity. This allowed the entry into the Italian market of firms engaged in “modern” distribution which are characterized by a larger dimension, as well as by the greater capital available, by the large range of the products and services offered, and which keep prices lower, to the consumers’ benefit⁴⁷.

With reference to the operators of the Italian GDO sector, it has to be noted that the distribution structure reflects a variety of organisation and business models. In some

employees and 71 per cent of the added value; in 2007, the contribution of commerce and business services to GDP was 40 per cent and, again in 2008, for the first time, the amount that Italian families spent on services overtook the amount spent for products (Ravazzoni R., Fabbi E., Pancioli A., Sosio M.A., *Liberalizzazioni e concorrenza nel terziario italiano*, in *Economia dei Servizi* n. 3/2010, pp. 451 ff.).

⁴⁶ Nomisma Research, “*La filiera agroalimentare italiana – Formazione del valore e dei prezzi alimentari lungo la filiera*”, 2014.

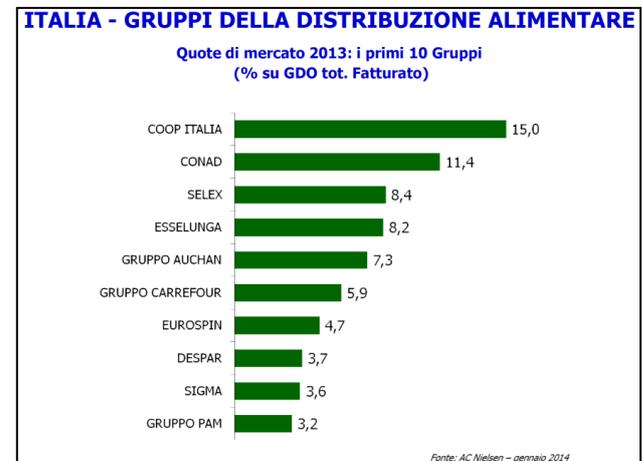
⁴⁷ Cozzi S., *La distribuzione commerciale in Italia: caratteristiche strutturali e tendenze evolutive*, Istat 2006, pp. 3 ff. It should however be considered that the growth of modern distribution in Italy happened mainly thanks to the presence of large undertakings with large stores, which reduced the typical extensiveness of the distribution system.

cases, they take the shape of economic groups; in other cases they are cooperatives of consumers or retailers with a relatively autonomous local bases, but which are headed by united and coordinated structures.

In particular, in addition to the two large cooperative groups Coop and Conad, which together hold 25% of the total sales volume of the sector, there are a dozen retail chains with a significant presence on a large part of the national territory; there are also several other chains with a marked local presence, but with a percentage of sales at a national level of less than 1%⁴⁸.

As shown in the following table, the major French distribution groups have also strengthened their position in the Italian market⁴⁹.

Table no. 1: GDO groups in Italy (⁵⁰)



[Legend: Italy - GDO groups
Market shares 2013: the top ten Groups
(% GDO total turnover large-scale distribution)
Source: AC Nielsen - January 2014]

Between 2009 and 2012, the GDO sector as a whole continued to experience the positive trend registered in previous years, while the process of modernization continued to be slow. However, as it is clear from the survey on GDO sector carried out by the Ministry of Economic Development in collaboration with Confcommercio⁵¹, after years of continuous growth of all types of distribution structures in 2012 there has been a setback for the hypermarkets⁵².

The reason is that the distribution system is characterized by an high structural

⁴⁸ ICA, IC43, *cit.*

⁴⁹ Indeed, around the mid-nineties, in addition to the internal growth in size of GDO sector, there has been, in some European countries (including Italy), the entry of foreign undertakings that, after reaching a competitive equilibrium in their own countries, have turned to the most backward countries in terms of distribution (such as Italy), in order to gain market share easily. The entry of foreign companies induced the central authorities to proceed to a less restrictive application of Law no. 427/1971 fearing that, being a large gap with the more advanced countries, Italy could have been victim of an uncontrolled colonization. Despite this, in 2000 foreign distribution undertakings in Italy controlled 18.2% of the total supermarket area, 51.8% of that of hypermarkets, and 24.7% of the area of discount stores (data from Cermes 2000, taken from Lago U., *Grande distribuzione e piccola e media industria*, Milano, 2002, pp.18 ff.).

⁵⁰ Table drawn up by Federdistribuzione, *Mappa del sistema distributivo italiano*, 2013, available at: http://www.federdistribuzione.it/studi_ricerche/files/Dati_2013_Mappa_del%20sistema_distributivo_italiano.pdf.

⁵¹ Ministry of Economic Development, *Rapporto sul sistema distributivo. Analisi economico-strutturale del commercio italiano*, 2012, pp. 237 ff., available at: http://osservatoriocommercio.sviluppoeconomico.gov.it/Rapporto_2012web.pdf

⁵² Pellegrini L., Zanderighi L., *cit.*, pp. 85-93.

fragmentation and, at the same time, by a high concentration of the economic power in the hands of two operators (Coop and Conad). These factors have led the industry to a situation of economic dependence on the large retailers.

Such economic dependence, which impedes suppliers to continue their business without the most significant operators in the market, since they do not have any feasible commercial alternatives (due to the lower economic power held by other operators in the large-scale food distribution sector and especially due to the smaller commercial efficacy that characterizes the other operators in the GDO sector), is made worse by the fact that the products offered by GDO retailers often overlap each others, and by the growing role played by alliances of food retail chains which arise, as will be seen below⁵³, from the tendency of large retailers to seek purchasing economies of scale.

3.1. Alliances between food retail chains

As mentioned above, the Italian food distribution system is characterized by the strong presence of alliances of food retail chains. Indeed, over the years, factors like the complexity of the organizational models, the fragmentary nature of the authorisation systems, the diversity of distribution formats and the degree of concentration in the sales markets, as well as the research for economies of scale and synergies in negotiation, encouraged the rise of national alliances of food retail chains⁵⁴.

Born in order to hinder the bargaining power, that large producer and processing undertakings had over the large-scale distribution sector which was too fragmented, and in order to recover managerial effectiveness quickly at a time when the markets were unsteady (during the nineties)⁵⁵, the alliances of food retail chains (so called “centrali d’acquisto” or “supercentrali” in Italy) are associations of companies or of medium or large consortia of the retail sector with the aim of increasing their bargaining power towards the producers⁵⁶.

In the European context, and especially in France, the alliances of food retail chains arose as a response to an urgent need created by the intensity of price competition on leading branded products in the retail market, facing

⁵⁵ *Mappa del sistema distributivo italiano [Map of the Italian distributive system]*, drawn up by Federdistribuzione, *cit.*, 2013.

⁵⁶ As it is clear from the ICA Annual Report 2013, since their first appearance, alliances of food retail chains (“supercentrali”) developed constantly, both in terms of composition and size of each one and in terms of the numbers. In 1996, there were only 5 *supercentrali* (Intermedia '90 with 11.8%; Euromadis with 10.3%, MECADES with 9.8%, Supercentrale with 9.6%; and Rinascente/Finiper with 7.6 %), with an overall market share that did not go beyond 50%. Ten years later, in July 2006, there were 6 centralised purchasing organisations (Centrale Italiana, Intermedia 90, ESD Italia, Mecades, Centrale Carrefour e Sicon – before Centrale Conad) including 21 retail chains, with a market share of about 90% of the total sales at national level in the GDO sector. The largest alliance, in terms of market shares, was Centrale Italiana, with 20.2% market share, while the smallest was Centrale Conad, with a share of 11% of the market. Since 2006, there have been various and frequent changes of composition of the alliances, as there was also movement of various undertakings and groups of retail chains from one alliance to another in the GDO sector. This resulted in a continuous rearrangement of the existing structures of the alliances in terms both of undertaking members and in bargaining power (ICA Annual Report 2013, p. 93 ff.).

⁵³ See Section 3.1.

⁵⁴ Amendola V., “I nodi concorrenziali nel settore della GDO in Italia”, in “Antitrust between EU law and national law”, Raffaelli E.A. (ed.), Bruylant 2013, p. 160.

the intense and growing competitive pressures that have led to the spread of the below-cost selling phenomenon.

In those countries, alliances of food retail chains were born due to competitive necessity, given the efficiency of the competitive environment in the retail market: retail distributors have joined forces to improve their resources in order to reduce consumer prices.

On the contrary, in Italy the alliances of food retail chains are more tactical and opportunistic alliances in order essentially to make “burdensome purchases”, with the aim of taking advantage of the effect of combined volumes, and to respond to large and unexpected changes in the retail market. Furthermore, the peculiar development of the alliances of food retail chains in Italy was due to a competitive interdependence (that characterizes many developed commercial markets, including the Italian market), in which the industry is more economically dependent on the large-scale distribution sector than in other more concentrated distribution systems (such as in France or the United Kingdom) This economic dependence may bind large multinational brands in concluding contracts with large retailers and, above all, it creates a situation where all producers are obliged to deal with the large retailers⁵⁷.

⁵⁷ Ravazzoni R., *Le supercentrali abbassano i prezzi?*, cit., p. 71. In the Italian context, where competition is “locked”, the dependence of producers is likely to be more pronounced and distributors allied in alliances are aware of this. In such a scenario, these distributors are therefore not obliged to pass on to consumers the benefits and the best conditions obtained. See also Ravazzoni R., *Il potere non porta dipendenza*, Mark Up, September 1998, cit., p. 79: “it could happen that the big brand multinational companies may suffer from this different

Moreover, it should be considered that in Italy the alliances of food retail chains came into being at a particularly difficult moment in order to face a crisis quickly: in these circumstances, therefore, the purpose of the alliances of food retail chains was to create an alliance at the purchasing stage in order to buy the products under the best conditions. In view of the highly articulated structure in terms of negotiation, the large retailers sought to achieve this objective by exchanging information on the market conditions, even if such information were not entirely related to purchases.

In this context can be included the recent “*alliance waltzes*”⁵⁸, which led to various changes of the structures of said alliances. These constant changes and moves from one alliance to another by the distributors have facilitated the exchange of information on sales conditions.

For this reason, in the early nineties the creation of such alliances of food retail chains led to the formation of a strong oligopsony⁵⁹ (caused by the continuous systematic exchange of members among the various alliances of food retail chains, which has led to a significant

market situation and, when dealing with the same brand producers, may encounter greater difficulty and bear higher costs concluding contracts in Spain compared to France, because of the fact that in Spain it is not possible to renounce to “made in France” hypermarkets”.

⁵⁸ “In recent years there has been a “*waltz of the alliances*”: some alliances which were operative only three years ago no longer exist, others have been created and others have continued to exist, changing their structure and their memberships” (Ravazzoni R., *In Italia le supercentrali sono soprattutto tattiche*, Mark Up, January/February 2002, cit., p. 57).

⁵⁹ Oligopsony refers to a market characterized by the presence of few buyers and many sellers for a given good or service. The oligopsony becomes collusive when buyers agree to adopt the same conduct and obtain the best conditions from the market.

exchange of information), together with the desire of the GDO sector to strengthen its own negotiation power and to be able to buy at more favourable conditions.

These coalitions have produced adverse effects on the market. The litmus test of the disadvantages produced by the alliances of food retail chains is the fact that one of the most efficient distributors, Esselunga, now is no longer a member of any alliance of food retail chains, since it is a distributor that is efficient and keen to maintain stable and balanced relations with its own suppliers⁶⁰.

At present, framework agreements are negotiated through the alliances of food retail chains with the “major suppliers”⁶¹, although some products (e.g., purchases related to private label products) are excluded from such negotiations⁶².

These agreements, which normally last one year (with a limited possibility to be reviewed within that period), are related to prices and discounts,

and part of the contributions paid by suppliers to retailers for promotional services and/or distribution⁶³. Indeed the aim of grouping several undertakings together in an alliance is to improve the organization of purchases and obtain cost savings in the process of negotiation with suppliers through a critical mass of orders to obtain the most favourable purchasing conditions.

The purpose is also to compete adequately with operators increasingly organized in large multinational companies that operate in multiple markets/countries⁶⁴.

Once the agreement is concluded, the obligations provided in the contract (including the terms and conditions of payment), instead, fall to the individual distributors which are members of the alliances of food retail chains⁶⁵.

The membership of the alliances of food retail chains can be either direct, through shareholding, or indirect, by entering into a contract with one of the members, that will negotiate the conditions⁶⁶.

As shown in the table below, the most important Italian alliances of food retail chains in January 2014 were the following: (i) Centrale Italiana⁶⁷, (ii) Sicon, (iii) ESD Italia, (iv)

⁶⁰ This choice, according to the ICA Inquiry, is intended to “overcome the function of mere negotiation of the conditions of purchase carried out by the alliances, resulting in homogenization of such conditions between the chains, with the advantage of being able to establish long-term relationships with suppliers, concluding “alive contracts” for the continuous monitoring of the sector.... In the long run, this allows the distributor to review more favourable terms with the main long-term supplier, since [ed] it is easiest for a chain acting on its own to agree with suppliers conditions of purchase and contributions which meet the specific promotional plans and policies of the chain” (ICA, IC43, *cit.*, p. 104).

⁶¹ Viviano E. and others, *cit.*, p. 72.

⁶² In particular, the purchases of private label products are excluded, together with “first price” products, most fresh products, local products and the majority of non-food products. For this reason, it is estimated that the weight of the impact of the alliances between retail chains on the total supply of the GDO retailers which are members of such alliances does not exceed an average of 50% (*Mappa del sistema distributivo italiano*, drawn up by Federdistribuzione, *cit.*, 2013).

⁶³ Amendola V., *cit.*, p. 162.

⁶⁴ Amendola V., *cit.* p. 160. The achievement of economies of scale which are shared, and that allow a reduction of costs is very important. Indeed, such reduction could be passed on to the consumer through a decrease of the final prices (Castronovo C., Mazzamuto S., *Manuale di diritto privato europeo*, Vol. 3, 2007, p. 226).

⁶⁵ Viviano E. and others, *cit.*, p. 32.

⁶⁶ ICA, Annual Report, published 31st March 2013.

⁶⁷ Pursuant to a recent decision, taken by the ICA, Centrale Italiana should be broken up since 2015 (ICA, Decision no. 25090, 17th September 2014, *Centrale d'acquisto per la Grande Distribuzione Organizzata*, I768). See Section 5.1.

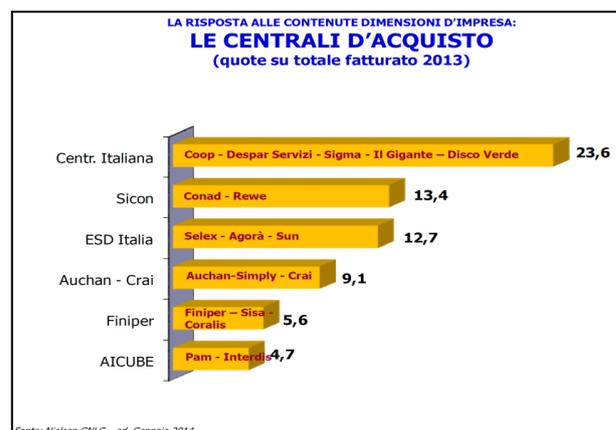
Auchan-Crai, (v) Gruppo Finiper, and (vi) AICUBE⁶⁸.

The only major Italian supermarket chain that has not joined an alliance of food retail chains is Esselunga, which in January 2009 left ESD and now is not a member of any alliance in Italy, although it is a member of Ams Sourcing, one of the main alliances of food retail chains in the European food and non-food sector,

⁶⁸ Most alliances of food retail chains have a central structure in the form of a consortium (Centrale Italiana and Cieffea), of "srl" (società a responsabilità limitata - limited liability company) (ESD and Sicon), or of an association (Aicube), but there are alliances of food retail chains whose members are bound together only by a collaboration and/or agency contract (e.g. CRAI / Auchan and Centrale Finiper). As stated above, alliances between food retail chains landscape have been subject to constant changes for some years. This situation is confirmed by the recent creation of the alliance between Auchan-Sma and Sisa, which - from January 2015 - will co-sign commercial contracts in the GDO sector (Scarci E., *Nasce la supercentrale di acquisto tra Auchan-Sma e Sisa. Un matrimonio da 9 miliardi*, *Il Sole 24 Ore*, 15th October 2014, available at <http://www.ilsole24ore.com/art/impresa-e-territori/2014-10-15/nasce-supercentrale-acquisto-auchan-sma-e-sisa-matrimonio-9-miliardi-183922.shtml?uuid=ABx7UQ3B>). Furthermore, it has been recently created an alliance between Conad and the Finiper group which is likely to have a significant impact in the retail sector (Lonardi G., *Conad-Finiper, Una coppia per sorpassare Coop*, *La Repubblica - Affari&Finanza* October 6th, 2014). Finally, it should be noted that Coop Italia has recently joined "Coopernic", an alliance established in 2006 on the initiative of the French giant Leclerc and which also includes Colruyt (Belgium), Coop Switzerland and Rewe (Germany). In addition to Coop Italia, which joined Coopernic at the end of September 2014, the Belgian group Delhaize has also become a member (Pagni L., *I supermercati Coop sbarcano in Europa con Leclerc (Francia) e Delhaize (Belgio)*, *La Repubblica - Affari&Finanza*, 29th September 2014, available at http://www.repubblica.it/economia/finanza/2014/09/29/news/i_supermercati_coop_sbarcano_in_europa_con_leclerc_francia_e_delhaize_belgio_-96959489).

consisting of over 15 distributors operating in 22 European markets⁶⁹.

Table no. 2: alliances of food retail chains⁷⁰



[Legend: Reply to the small size of undertakings: Alliances of food retail chains (Shares of total turnover 2013)
Source: Nielsen GNLC – January 2014]

In view of the strong presence of these (negotiating) associations in the Italian distribution system, as it will be explained below⁷¹, the ICA has not only increased its interest in the large-scale distribution sector in general, but recently it has been also particularly focused on the alliances of food retail chains⁷².

Their role, indeed, continues to strongly characterize the negotiating methods in the GDO sector⁷³, raising antitrust problems⁷⁴

⁶⁹ Pellegrini L., Zanderighi L., *cit.*, p. 92.

⁷⁰ *Mappa del sistema distributivo italiano*, drawn up by Federdistribuzione, *cit.*, 2013.

⁷¹ See Section 4.

⁷² ICA, I768, *cit.*, 2014: the role played by the ICA was important in leading the investigated parties to propose the break-up of Centrale Italiana (a commitment accepted by the ICA, see Section 5.1 below).

⁷³ Amendola V., *cit.* p. 164.

because of their size, their composition, which is highly variable due to frequent moves of the operators in and out of membership, and the complexity of the negotiations with suppliers⁷⁵.

These features, that have led the Competition Authority to adopt a restrictive approach since the first cases concerning alliances of food retail chains⁷⁶, will continue to draw the particular attention of the ICA, which will need to prevent the formation of commercial fiefdom, already present within the Italian distribution sector, which, together with the alliances of food retail chains, impede healthy competition aimed at applying lower prices to the benefit of the consumer.

3.2. The cooperative system

In this context, in addition to the highly fragmented nature of the distribution system at national level and the strong presence of alliances of food retail chains, it is important to underline the particular role that consumers' cooperatives play in the Italian distribution system.

At a National level, *Coop Italia* is the most important Italian retail group, with a market share in the field of modern distribution of food and personal and home-care products of approximately 15.3% (strongly increased from 12% in 2001)⁷⁷. *Coop Italia* owns a sales network characterized by a multi-channel structure and consists of nearly 2.000 stores, mainly supermarkets and hypermarkets, spread throughout Italy⁷⁸.

In particular, among the consumers' cooperatives associated with Coop, there are 9 large co-operatives, which cover about two thirds of the total turnover of the chain, 14 medium-sized co-operatives that operate mainly at the provincial or inter-provincial level, and more than a hundred small co-operatives with a single outlet or a limited number of outlets⁷⁹.

Particularly indicative of the influence of the Coop within the Italian distribution system is the trend in the turnover of the group in recent years:

⁷⁴ In Italy, in fact, the alliances in the GDO sector have a role that has been referred to as a "tactical" role, unlike other European countries, where they constitute "a strategic resource for member undertakings which, by means of long-term collaboration agreements, influence the key marketing and development strategies in the retail network". All historic brands in the Italian distribution sector tend to retain their autonomy and see alliances between GDO retailers as "a tool that, through a greater bargaining power, may enable recovery of profitability in the short term, without commitments on other aspects, such as the joint purchasing. All analysts believe that this "Italian version" of alliances in the GDO sector is a distortion of the original idea, but it is now an established practice from which operators do not appear to withdraw" (Unioncamere, "Il sistema agro-alimentare dell'Emilia-Romagna. Rapporto 2012", 2012, pp. 208-209).

⁷⁵ See Section 5.1.

⁷⁶ See Section 5.1.

⁷⁷ *Mappa del sistema distributivo italiano*, drawn up by Federdistribuzione, *cit.*, 2013.

⁷⁸ ICA, IC43, *cit.*, pp. 49-50.

⁷⁹ Sarti D., *Modelli di competenza nella grande distribuzione alimentare. Il caso Coop Estense*, 2005, p. 79.

Table no. 3 – Coop Turnover⁸⁰

	FATTURATO (MILIONI DI EURO)	SUPERFICIE DI VENDITA	NUMERO PUNTI VENDITA	DIPENDENTI
Unicoop Firenze	2.301,0	169.296	102	8.539
Coop Adriatica	1.873,4	269.911	160	9.676
Coop Estense	1.219,0	203.320	54	5.690
Unicoop Tirreno	1.085,4	147.611	111	5.321
Nova Coop	932,5	160.078	64	4.669
Coop Nord Est	837,9	155.222	85	4.368
Coop Lombardia	929,7	131.756	49	4.587
Coop Liguria	663,4	82.770	38	2.756
Coop Centro Italia	527,8	82.467	66	2.622
Sviluppo Discount	454,9	147.988	241	1.662
Ipercoop Sicilia	141,9	34.100	5	887

Fonte: nostre elaborazioni su dati R&S-Mediobanca e Ancc-Coop.

[Legend: Consumer cooperatives and Coop system: main economic figures (2011)

Col.1 “Turnover (millions of EUR); Col. 2 “sales’ surface area”; Col. 3 “number of shops”; Col. 4 “employees”

Source: drawn up on the basis of data from R&S-Mediobanca and ANCC-Coop]

The Coop system is mainly divided into three levels: consumer members of Consumer Cooperatives, Consumer Cooperatives associated with Coop Italia, and Coop Italia itself⁸¹. Coop Italia is also entrusted with the

⁸⁰ Table extracted from Pellegrini L., Zanderighi L., *cit.*, p. 124.

⁸¹ Relations within Coop Italia are regulated by the Statute of the Consortium Coop Italia and by the rules on the use of Coop brands. Moreover, as observed in the ICA’s Inquiry, Coop Italia carries out a number of activities on behalf of and in the interest of its members, including the negotiation of purchase conditions with domestic and multinational suppliers (Coop Italia in fact negotiates the terms and conditions contained in the national contract - price lists, discounts, promotional contributions, timing and method of payment), while the members, either directly or through their own local consortia, conclude national contracts laying down the so-called “decentralized conditions” which contain, without making changes, the general conditions of the national agreement, thus preserving the principle of single-interlocutor negotiation. The decentralised

entire management of the branded products (the *private labels*), on the basis of which the national Consortium not only determines the development plans, takes care of the selection of the suppliers to whom subcontracts the production of goods, and lays down the production standards and specifications (so called “capitolati produttivi”), but also implements purchasing policies and defines the range of the offering of each associated cooperative.

In addition, also the promotion of the signs and trademarks of the chain (promotional activities on branded products, the use of signs of the chain or advertisements at national level) is essentially defined by the members of Coop Italia⁸².

The importance of Coop at local level, together with the role of the alliances in the GDO sector, is a factor that contributes to making the Italian system a very particular one, characterized by the strong leadership of an operator in terms of turnover and market share, and the consequent risk of abuse of a dominant position.

In this regard, as specified below⁸³, recently the ICA has fined Coop Estense, one of the cooperatives which are members of the

conditions in general consist of discounts related to logistics’ conditions and possible commitments on ranges of products and promotions in addition to those already agreed (ICA, IC43, *cit.*, pp. 52 ff.).

⁸² Coop also carries out many other activities of common interest for the members, including: national communication of institutional nature, quality control activities of both private label products and not private label products, the “direct” commercial activities, consisting on purchasing, including the import, and the re-invoicing to the members at cost price (ICA, IC43, *cit.*, p. 53).

⁸³ See Section 4.

consortium Coop Italia, for abusing its dominant position on the market for supermarkets and hypermarkets in the province of Modena, preventing, or at least greatly delaying the entry or expansion of Esselunga, a competitor, in this province⁸⁴.

Indeed, the system of cooperatives raises specific antitrust concerns, in particular considering that the system through which such cooperatives operate is characterised by a combination of coordination, control and monitoring carried out by the consortia of the cooperatives as the result of specific organisational decisions taken centrally. An effect of such coordination is, for example, the territorial division of the markets between the cooperatives of the Consortium, which means that none of them has to suffer, in the market reserved to each of them, any competition from any of the other members of the Consortium.

In this regard, the ICA in its Inquiry specified that in recent years “a process of rationalization and centralization of functions among the members of the cooperatives has been started”⁸⁵. The consequence has been “a rather precise distribution of territory between each of them: currently there is a very limited number of cases where there are overlaps between the areas of the various cooperatives which are, moreover, extremely limited geographical areas”⁸⁶. Furthermore, according to the ICA, “even an initiative to enter into areas where the group is not active is, as a general

rule, taken by several cooperatives acting in a coordinated and joint manner”⁸⁷.

In view of this special characteristics, while in almost all its decisions⁸⁸ except one⁸⁹, the ICA considered that the members of the consortium are independent undertakings, it validated the organization of the cooperatives which are members of the Coop Italia consortium, sharing commercial and promotional policies and strictly dividing the territory among themselves.

In this regard, in the Case *Esselunga v. Coop Estense*, explained in more details below, the ICA found that the geographical integration of Coop Estense, together with its reputation and market power are factors which support the finding that *Coop Italia* holds a dominant position (“the market power of *Coop Estense* also derives from other structural factors, including the strong integration [radicamento] of the cooperative in the province. The Cooperative has more than 250.000 members and it makes more than three-quarters of its sales within the consortium. It should also be considered that *Coop system* has organised itself in such a way that each cooperative operates within a well-defined national territory”)⁹⁰.

⁸⁴ ICA, Decision no. 23639 dated 6th June 2012 “*Esselunga v Coop Estense*” (A437) and Decision no. 23640 dated 6th June 2012 “*Esselunga v Unicoop Tirreno-Unicoop Firenze*” (A437B).

⁸⁵ ICA, IC43, *cit.*, p.50.

⁸⁶ ICA, IC43, *cit.*, p.51.

⁸⁷ ICA, IC43, *cit.*, p.51.

⁸⁸ See *inter alia* ICA, Decision no. 12054 dated 29th May 2003, *Coop Adriatica v Rami d'azienda*, C5868; ICA, Decision no. 14481 dated 6th July 2005, *Coop Estense v. Società di persone*, C7105; ICA, Decision no. 14653 dated 25th August 2005, *Unicoop Firenze v Ramo di Azienda di Società di persone*, C7213.

⁸⁹ In one case, the Authority considered the question as to whether Coop Italia could be described as a single undertaking, and expressly stated that the evidence in its possession did not support the conclusion that the undertakings which were members of Coop Italia, taken as a whole, “constitute a single economic entity” (ICA, Decision no. 4786 of 12th March 1997, *Unicoop Firenze v. Consorzio Coop Consumo Pisa*, C2607).

⁹⁰ ICA, A437, *cit.*

3.3. The peculiarities of the Italian distribution system compared to the systems of other European countries

The characteristics of the Italian distribution system described above - that is, the highly fragmented nature of the distribution system as a whole, in which traditional retail is still present, the growing and increasingly significant role of the alliances of food retail chains and the importance of Coop Italia at local level - contribute to making this system different from the systems of other European countries.

As specified above, the Italian food distribution structure, created through the voluntary aggregation of small and medium-sized retailers, usually associations or consortia, has all the hallmarks of a restructuring that has come later than in other European countries. It is thus clear that in countries such as Italy, suppliers have a greater economic dependence on the large-scale distribution chains compared to the other modern countries, as France or the United Kingdom⁹¹.

In this regard, a comparative study in order to better understand the large-scale distribution sector in Italy is necessary and helpful for the analysis of the antitrust approach adopted by the European competition authorities in the GDO sector.

Indeed, as mentioned above, the Italian distribution system is more fragmented than the systems of France, Germany, and the United Kingdom⁹² (in which the economic

situation over the years has been more prosperous and more favourable to the mass market and to the development of large stores) or even the United States⁹³. However, there are some similarities with the structure of the Spanish distribution: in fact, in Spain, too, the development of the modern distribution has taken place only recently due to the previous economic underdevelopment and the delayed start of the modernization process⁹⁴.

One of the main indicators of this fragmentation, namely the density of the distribution sector⁹⁵ in Italy, compared with the density of the above mentioned European countries, highlights the strong presence of traditional retail.

Cotterill R.W., *The food distribution system of the future: convergence towards the US or UK model?*, *Agribusiness* Vol.13, Issue 2, pp.123–135, March/April 1997. “By contrast, Austria and Germany appear to be countries where the food processing industry is mostly composed of small and medium-sized suppliers with a narrow national or even regional focus and often only minor market relevance. In those two countries the buying power of retail (or discount) chains does not seem to be matched by the exercise of market power on the selling side by food processors” (F.Jenny, *The food distribution market: is antitrust efficiently handling this market? (merger, restrictive practices, abuse of dominant position)*, International Report, International League of Competition Law (LIDC), Kiev 2013, pp. 4 ff).

⁹³ In the USA there are 20 retailers which hold 63.7% of the market, and 4 operators which hold 37% of the same. A crucial role is played by Wal-Mart Supercenters. Sales of food and non-food products in 2011 reached a total of 109.4 billion dollars, making Wal-Mart the largest retailer of food products in the United States (v. Jenny F., *cit.*, Kiev 2013, pp. 2 ff).

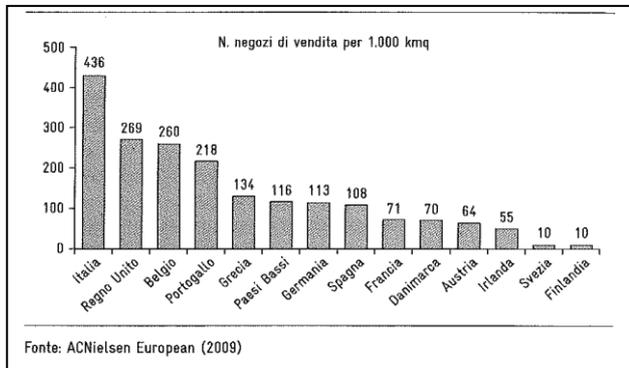
⁹⁴ Pellegrini L., Zanderighi L., *cit.*, p. 65.

⁹⁵ This value can be calculated by relating the total stock of the stores (whether modern or not) to the number of inhabitants or to the territorial area. The higher the fragmentation of distribution and the presence of traditional retail (made up of small shops) are, the greater is the result.

⁹¹ Ravazzoni R., *Il potere non porta dipendenza*, *cit.*, p. 79. See Section 3.1.

⁹² On the advantages of the UK distribution market and on the difference between it and the Italian market, see

Table no. 4 – Density of distribution in Europe ⁽⁹⁶⁾



[Legend: Number of retail stores per 1.000 square kilometres.

Italy, UK, Belgium, Portugal, Netherlands, Germany, Spain, France, Denmark, Austria, Ireland, Sweden, Finland

Source: ACNielsen European (2009)]

More specifically, in France, the large-scale distribution sector has gained considerable importance firstly in the food market and later in other sectors, being about 60% of total turnover in the retail sector⁹⁷. Moreover, the trend in the large-scale food distribution sector in France, which sells more than 2/3 – against 1/3 in Italy – of food products, is slowly changing: supermarkets are moving more and more towards smaller stores and they are less

often out-of-town, in particular in urban centres, and retailers in the GDO sector are adapting their offer by creating retail chains with different price ranges⁹⁸.

The structure of the German food market, instead, is highly concentrated in large groups or multinational companies, which, in almost every case, are both wholesaler and retailer. This allows them to have a significant impact on the prices, quality and range of the products they market not only in stores of their chains, but also in those of their client independent retailers⁹⁹.

There are also differences between the distribution system in Italy and in the United Kingdom. In the UK food distribution is highly centralized: the four largest supermarket chains, Tesco, Sainsbury's, Asda and Morrison, represent approximately 75% of total expenditure on consumer food products, and they have replaced the small independent retailers¹⁰⁰. In addition, as a result of the challenging economic situation, small independent retailers are increasingly grouping together: they are therefore setting up associations whose purpose is to provide assistance to members to help them in carrying on their business activities¹⁰¹.

⁹⁶ Table extracted from Ravazzoni R., *Liberare la concorrenza*, cit., p. 38.

⁹⁷ Di Via L., Marciano L., “Le relazioni tra industria alimentare e GDO tra tutela della concorrenza e contemperamento di interessi economici”, *Rivista di diritto alimentare*, Year II, Number 3, July – September 2008, p. 7. The main French distribution market operators are: Carrefour (Carrefour, Champion, ED, Shopi, 8 à Huit, Marché Plus); Leclerc; Intermarché (Les Mousquetaires, Ecomarché, Netto); Auchan (Auchan, Atac, Simply Market); Casino (Casino, Géant, Monoprix, Franprix, Leader Price); Système U (Hyper U, Super U e Marché U); Cora (Cora, Super Match, Ecomax, Record) (Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute), *Il mercato dei prodotti agroalimentari in Francia*, May 2012, pp. 4 ff.).

⁹⁸ Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute), cit., May 2012, pp. 4 ff.

⁹⁹ Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute), *La Grande distribuzione organizzata in Germania*, September 2007.

¹⁰⁰ Independent retailers have experienced a strong reduction of their own market shares because of the recession and of the competition by the large retail groups.

¹⁰¹ Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute) “*Regno Unito: Grande Distribuzione*”, 2012.

In Spain, on the contrary, the significant changes in consumers' habits as a result of the economic instability that has affected said country have forced the operators of distribution sector to reorganize their commercial structures. Organizational agility has become essential in this context in order to be able to respond immediately and effectively to competition within the sector and to the needs of the market¹⁰²; consequently, the franchise model is now a significant feature of the Spanish distribution system¹⁰³.

In light of the above, the fragmented nature of the Italian distribution system at national level, together with the considerable importance of Coop system at local level, the increasing role of alliances of food retail chains in the GDO sector (and the related antitrust issues), and the economic dependence of the suppliers on large retailers, constitute a fertile context for the ICA, whose interest in the GDO sector has increasingly grown in recent years.

4. THE GROWING INTEREST OF THE COMPETITION AUTHORITY IN THE LARGE-SCALE FOOD DISTRIBUTION SECTOR

The structural differences of the Italian large-scale food distribution sector compared to other European countries led the ICA to pay particular attention to GDO sector.

It must be considered, in this respect, that the role of national competition authorities is very important in the GDO sector since, as specified by Joaquin Almunia¹⁰⁴ “*Food and other consumer goods are a large part of what every European needs - day in day out - to lead a dignified life*”¹⁰⁵. Thus, as stated by Almunia, “*European citizens should enjoy good food at affordable prices*”¹⁰⁶.

Furthermore, food distribution contributes significantly to increase the European economy¹⁰⁷.

¹⁰² Price has become a key factor behind decisions to purchase and, in this context, the supermarket is the most popular format in the Spanish large-scale distribution sector, with a share of 69% of the total sales area (Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute), “*Spagna. La grande distribuzione organizzata*”, 2013).

¹⁰³ According to the 2012 data provided by AEF, the Spanish association for the sector, turnover in the franchise sector has reached € 25.937 billion. In Spain there are currently 59.758 retail outlets operated under a franchise (in 2011 there were 58.279) (Report by the Istituto nazionale per il Commercio Estero (Italian Foreign Trade Institute), *cit.*, 2013).

¹⁰⁴ Almunia J. is the European Commissioner responsible for competition since 2010, during the European Commission led by Manuel Durão Barroso until 2014.

¹⁰⁵ “*Food and other consumer goods are a large part of what every European needs – day in day out – to lead a dignified life. Despite the diversification of consumption that took place over the past decades, they still account for about 15% of total household expenditure. But the overall average does not tell the whole story. These products and services take a lot more room in the basket of poorer consumers. According to some estimates, their share reaches 30 to 45% in Europe’s less affluent areas*” (Almunia J., *Consumer-goods markets: A litmus test for competition policy*, Speech/13/410, 14th May 2013).

¹⁰⁶ European Commission - IP/14/1080, 2nd October 2014.

¹⁰⁷ According to the Communication of the European Commission “*A better functioning food supply chain in Europe*” of 2009 (COM(2009) 591) “*the food supply chain is a major contributor of the European economy, connecting sectors – agricultural, food processing industry and distribution – that together make more than 7% of European employment. These sectors have a direct impact on all European citizens, since food represents on average 16% of households’ expenditures*”.

For these reasons, the intention of the national competition authorities in taking action in this area is to ensure the proper functioning of the market at all levels of the food distribution chain in order to generate benefits for consumers¹⁰⁸.

In line with this approach, the Competition Authority has recently intervened in the field of e-commerce with the main aim of protecting consumers in the digital environment¹⁰⁹. The Competition Authority also took into account the special nature of this sector in the Report related to year 2013 (published on March 31st 2014), according to which “*the phenomenon of e-commerce is still in an evolution process and raises consumer protection needs which have not been considered before and which may suddenly change*”¹¹⁰. Although the Competition Authority has not taken any action in e-commerce in the large-scale food distribution sector yet, the ICA in its report stated that “*the Authority has given its utmost attention to the challenges related to the development of the digitalisation, in order to act in the area of e-commerce using tools which are suitable to ensure effective and timely intervention*”¹¹¹.

At European level, the growing tensions between producers and retailers in the large-

scale distribution sector had already attracted the attention of the European Commission in 2009 (the same year in which the EU Commission prepared a Communication on the functioning of the agro-food supply chain in Europe)¹¹², and in 2011, under the High Level Forum, in which - in consultation with the stakeholders - the Commission laid down certain principles by which the operators in the GDO sector should be guided and specified a number of unfair commercial practices¹¹³. Recently, the European Commission published a study on the food industry which dealt with

¹¹² EU Commission, “*A better functioning food supply chain in Europe*” 2009 (COM(2009) 591), *cit.*, in which the EU Commission, having noted the lack of price transparency in the food distribution industry, set out some important guidelines to address the problems of this sector: “*promote sustainable and market-based relationships between stakeholders of the food supply chain; increase transparency in the food supply chain; foster the integration of the internal market for food and the competitiveness of all sectors of the food supply chain*”. However, in 2004 for the first time, the European Economic and Social Committee in a report raised the issue of problems of large retailers, from which it was clear that tensions along the food supply chain in Europe had grown to such an extent that effective action could no longer be delayed (EESC Opinion 2005/C 255/08). It is also important to mention: the European Parliament's Report (2010) 2009/2237, in which Parliament asked the European Commission to make High Level Forum on the Food Supply Chain permanent and, *inter alia*, it asked Member States to draw up codes of good commercial practices for the food supply chain; and the European Parliament Resolution dated January 19th 2012, which highlighted the imbalances in the food distribution chain.

¹¹³ *High Level Forum for a Better Functioning Food Supply Chain*, 2011, followed by Forum 2012 (final report 15th October 2014 available at: http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=7838). For example, the unfair commercial practices identified by the Commission include: the unilateral termination, without notice and without justification of a business relationship, unilaterally and retroactively changing the cost or price of goods and services, and the application of clauses of liquidated damages which are unjustified or disproportionate to the loss suffered.

¹⁰⁸ ECN, “*Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*” – European Competition Network (May 2012).

¹⁰⁹ It is important to note that the phenomenon of e-commerce, consisting in the performance of commercial activities and transactions electronically (through a website or an application) and including mostly the marketing of goods and/or services, online distribution digital content, or carrying out financial transactions and stock exchange, has been developed in recent years alongside traditional sales channels. (for further details, see Pellegrini L., Zanderighi L., *cit.*, p. 189-191 and Foglio A., *Vendere alla grande distribuzione*, 2005).

¹¹⁰ ICA, Annual Report, 31st March 2014, *cit.*, p. 168.

¹¹¹ ICA, Annual Report, 31st March 2014, *cit.*, p. 169.

the issues of choice and innovation, analysing whether the increased concentration and use of brand products by retail chains (private labels) had hindered choice and innovation in the European food sector¹¹⁴.

The results of this study, presented at the beginning of October 2014, are certainly useful for all national competition authorities to guide most of their activities in this area.

It should be noted that, since 2004, these European initiatives have always been accompanied by a growing focus on the large-scale distribution sector by the European Commission, which has concluded about 120 investigations ascertaining an infringement¹¹⁵.

At the Italian level, the aforementioned slow modernization of the distribution system resulting in its fragmentary nature, the characteristics of the system and the role of the alliances of food retail chains, together with the growing European-level initiatives have helped to attract the interest of the Competition Authority in respect of competition or antitrust issues related to the GDO sector.

The Competition Authority plays an important role in the large-scale food distribution sector:

¹¹⁴ European Commission, *The economic impact of modern retail on choice and innovation in the EU food sector, Final Report*, published on 2nd October 2014 on the European Commission website. In particular, according to the press release issued by the European Commission on 2nd October 2014, “the results show that the entry of new competitors always increases choice and innovation. In many Member States, retail markets are not overly concentrated, and the retailers’ bargaining power does not seem to have a negative impact on choice and innovation. Finally, while choice for European citizens has continuously increased in shops since 2004, the number of innovations reaching the consumer each year has decreased since 2008 largely due to the economic crisis” (European Commission - IP/14/1080 02/10/2014).

¹¹⁵ ECN, *Report*, cit.

it uses all the powers available in order to punish anti-competitive conducts¹¹⁶. The purpose of antitrust enforcement is to ensure the sector’s development by preventing and removing any closure of the market¹¹⁷. Thus the ICA, playing a major role¹¹⁸, has, over the past few years, deployed its assets of professionalism and competence to show the best way to follow in order to favour effective competitive dynamics. The particular intensity of the efforts of the Competition Authority is mostly due to the fact that in this area (as in pharmaceuticals), the “*competitive distortions directly affect the well-being of the community, demand-side purchasing power and, with regard to health, even the enjoyment of fundamental rights by the citizens*”¹¹⁹.

The interest of the Competition Authority in respect of the food supply chain was renewed even more by the crisis that hit Europe and Italy in the last few years, during which there have been several inflationary increases which affected food products throughout the European Union, creating the need for a better understanding of the competitive dynamics in the GDO sector.

First, as mentioned above, the Competition Authority has frequently intervened with regard to regional regulations governing shop opening hours. Indeed, the goal of the Competition Authority has always been to prevent the

¹¹⁶ In particular, applying competition law (Law no. 287 dated 10th October 1990, in Official Gazette no. 240 dated 13th October 1990).

¹¹⁷ ICA, Annual Report, 31st March 2014, p. 9.

¹¹⁸ Bruzzone G., *Poteri e garanzie nel diritto antitrust. L’esperienza italiana del sistema della modernizzazione*, 2008, p. 33. The Competition Authority’s annual report published in 2014 states that “the role of the Competition Authority is, therefore of particular importance, since it is in the GDO sector that most of the prices of consumers’ goods are decided”.

¹¹⁹ ICA, Annual Report, 31st March 2014, p. 17.

adoption of unduly restrictive rules and grant shops in the GDO sector full freedom to determine how to carry out their economic activities¹²⁰.

¹²⁰ As noted above (see footnote 31), in February and April 2013, the Competition Authority sent four opinions pursuant to Article 21-*bis* of Law no. 287/1990, to four different municipal authorities against their resolutions and orders aimed at controlling opening and closing hours and days of the shops in their towns. Thus in this case, too, the Authority took immediate steps to remove those obstacles that could affect the liberalization of opening hours. Furthermore, the Competition Authority gave its opinion on the “*proposal for a Law to amend Article 3 of Decree-Law no. 223 dated 4th July 2006, converted, with amendments, by Law no. 248 dated 4th August 2006, and other provisions governing the opening hours of the shops*” (Draft Law C750 presented on 15th April 2013, approved by the Chamber of Deputies on 25th September 2014 and currently under examination before the Italian Senate). The aim of this draft Law is to intervene on the rules on opening hours and Sunday and mid-week closing, providing for some exceptions and some constraints. In its recent opinion, the Competition Authority argued that such constraints may hinder the normal competitive dynamics and thus reduce the scope for operators to tailor the service to the characteristics of the demand, leading to a possible worsening of the conditions of supply and consumer choices “*without any valid justification in terms of efficiency*”. In particular, according to the Competition Authority, “*the re-introduction of constraints in terms of opening and closing hours [would be] an obstacle to the free run of the dynamics of competition*” inasmuch as it would infringe Article 31 of “Decreto Salva Italia” (Decree-Law no. 201 dated 6th December 2011, converted into Law no. 214 dated 22nd December 2011, amending Article 3(1)(d)-*bis* of Legislative Decree no. 223 dated 4th July 2006, converted into Law no. 248 dated 4th August 2006 (“the Bersani Decree”). As a result of those amendments, the Bersani Decree provides that “*commercial activities, as identified by Legislative Decree no. 114 dated 31st March 1998, and the supply of food and beverages, shall be carried out, among other things, without the following restrictions or requirements: ... (d) observing opening and closing hours or the obligation to close on Sundays and holidays and half-day closing during the week*”. Therefore, at present national legislation provides that commercial activities cannot be subject to limits on opening hours and shop closings). According to the Competition Authority, “*the introduction of restrictions on economic freedom should be limited to what is strictly necessary in*

Subsequently, the Competition Authority has recently focused on new antitrust issues.

From the annual reports by the Competition Authority since 2009 it is clear that there has been a change in the interest of the ICA in the food supply chain: between 2009 and 2011 cases relating to the large-scale distribution sector often concerned promotions by operators in the GDO sector¹²¹, or failure by the seller to provide the two-year guarantee or even the failure to inform customers of such guarantee or of the difference with any guarantees offered, whether or not free of charge, by the manufacturers¹²². Since then, in the subsequent years, however, the Competition Authority has focused its attention on different issues, such as on the growing importance of alliances in the GDO sector and on some cases of abuses of dominant position.

In particular, the analysis of these issues culminated in the Inquiry on the role of the large-scale distribution sector¹²³, started in 2010

the pursuit of specific public interest needs, to be assessed referring to the particular case in accordance with the principle of proportionality” (ICA, Opinion AS1147, September 11th 2014).

¹²¹ ICA, Annual Report, 31st March 2010, p. 258. In particular, these cases have mainly concerned the lack in the stores of products sold at promotional conditions, or the application of false discounts and prices, gift vouchers without clear conditions on the offer and, with reference to below-cost promotions, advertising prices above purchasing costs or failing to inform about the duration of promotional conditions.

¹²² ICA, Annual Report, 31st March 2011, p. 321.

¹²³ ICA, IC43, *cit*. Although here the attention will be focused on the last Inquiry ended by the ICA, it should be also taken into consideration that in 2007 the Competition Authority concluded another inquiry (IC28) on the food supply chain. This Inquiry, in particular, took account of the increasing importance of the food supply chain and of agricultural products in terms of

after having received the complaints from operators in the food production sector and from supplier in the large-scale distribution sector, regarding certain unfair and/or anti-competitive practices by modern retail chains when negotiating the purchase of the products¹²⁴.

volumes and costs, and the widespread perception that prices of fruit and vegetables increased as the lira was converted into euro (January 2002). As a result of this Inquiry, which was intended to determine whether such increase was the result of the currency change or whether the inefficiency of the structure of the industry and the related competition issues had favoured the adoption of speculative and/or anti-competitive behaviours by the operators at various stages of the food supply chain, the ICA found that in the fruit and vegetable distribution chain there are different situations, not only with regard to the different types of products, but also in terms of the number and characteristics of the operators involved at the various stages. This led, in many cases, to an excessive length of the distribution chain and to the possibility to adopt profitable speculative behaviours. Moreover, the ICA also found, *inter alia*, that the large-scale distribution sector could play a decisive role increasing the efficiency of the entire supply chain, “*unlike the local shops [esercizi di vicinato] which appear, instead, inadequate to face any kind of innovation aimed at increasing the efficiency of the supply chain*”. Other national competition authorities have also concluded or opened investigations similar to the Italian ones. For example, in 2000 the UK Competition Commission, after having carried out an inquiry on the food sector, published a highly critical report on the behaviour of the GDO and found a number of business practices that were aimed at reducing the competitiveness of suppliers, such as requests for retrospective reductions of prices, retrospective financing of promotions and other business practices aimed at changing the terms of the contracts retrospectively. Furthermore, the Competition Commission, in October 2007 published an interim report on the results of an investigation into the grocery market which showed that the most commercial behaviours already reported in the 2000 report continue to be adopted in the market. Finally, in April 2008, the UK Competition Commission published the results of an inquiry assessing the effects of the GDO sector on small retailers.

¹²⁴ In particular, according to the same Inquiry, “*the increasing concentration over time in the distribution sector and the*

This inquiry concerned not only the competition dynamics between large retail operators in presence of contractual obligations involving the sharing of one or more business functions (franchising relationships, consortia, alliances between food retail chains etc.), but also the role of private labels in the definition of the contractual relationships with suppliers.

From a horizontal point of view, the Competition Authority also highlighted the need to develop the definition of “relevant market”, assuming, on the one hand, the interchangeability of stores in segments even where not comparable from a dimensional point of view and, on the other, the possibility that also stores having similar sizes can have different characteristics. The ICA, therefore, suggested dividing the category of supermarkets into two segments: superstores (with a size from 1.500 to 2.500 square metres) and small-medium supermarkets (with areas between 400 and 1.500 square metres)¹²⁵.

Without going into the details of the findings specified by the Competition Authority in its Inquiry, it is interesting to note that the ICA concluded that, within the various organizational models in the Italian food distribution system, those that are more centralized are those that operate under the

consequent strengthening of market power of the major chains has led to a widespread imbalance of bargaining power in the purchase of products, which – as complained by producers – is shown in the “unfair”, or even restrictive contract terms imposed by the large retailers. These terms are related not only to the purchase price of the products and to trade discounts, but also to the request for payment of large sums, to be paid to the GDO distributors for their distribution services (access fees, promotional contributions, fees for preferred displays, or for the services rendered acting as an alliance of retail chains etc.), all collectively referred to as trade spending” (ICA, IC43, cit., p.4).

¹²⁵ ICA, IC43, cit., pp. 9-27.

same brand, especially Coop and Conad, “*which, in addition to managing the cooperation between the member cooperatives in respect of a large number of business functions, have an organizational structure that allows close control of the behaviour of its members, by providing organised decision-making, management and decentralized operating structures at local level (“districts” regarding COOP and the large cooperatives with reference to CONAD) able to exercise extensive coordination of the behaviours of the members of the chain existing in each area*”¹²⁶.

Even the antitrust issues of alliances of food retail chains were thoroughly covered by the Inquiry. Defined by the Competition Authority as “*alliances between retail chains, each of which acts as a central purchasing organisation for its group and its members, aiming at achieving cost savings in the purchase of goods through collective negotiation with suppliers*”¹²⁷, it found that, in assessing the effects of competition, “*a very careful balance [must be struck] between the potentially restrictive effects of each of them - which seem to become increasingly significant due to the increasing areas of cooperation between the chains belonging to the same alliance - and the tangible benefits to the well-being of the consumer - which cannot be automatically assumed but must be tested from time to time depending on the incentives actually in place in the market to transfer downstream the cost savings*”¹²⁸.

However, with reference to the GDO-suppliers’ relationship and the high level of conflict that characterizes it, the Competition

Authority made some observations with regard to the following two different aspects: i) buyer power (defined as “*the ability of a buyer to reduce the price to be paid to a supplier or to induce the latter to offer non-price conditions more favourable*”)¹²⁹, with regard to which the Competition Authority stressed the need for an analysis based mainly on the overall effects on both consumers and on the market; and ii) trade spending (or “*the amount paid by suppliers to distributors for promotion, distribution and sales activities and services offered by distributors*”)¹³⁰. With reference to these aspects, the Competition Authority has declared its intention to look carefully into the behaviour of the largest distributors (e.g., the obligation to buy packages which include unwanted services, or unilateral and sometimes retrospective changes to the general conditions).

This is quite clearly an Inquiry of utmost significance, since it has highlighted the need for the Authority to examine new antitrust issues, balancing pro-competitive effects and potentially restrictive effects on competition.

In light of the outcome of the Inquiry, of the issues resulting from the great fragmentation of the Italian distribution system at national level, and of the significant importance of Coop Italia at local level, the Authority will need to continue to intervene in the GDO sector.

One of the tools available to the Authority, as mentioned above, is Article 62 of Law no. 27 dated 24th March 2012, together with the principles laid down in the above-mentioned *High Level Forum for a Better Functioning Food Supply Chain in Europe*, which should allow all

¹²⁶ ICA, IC43, *cit.*, p. 62. For this reason, according to the Competition Authority, “*these chains, therefore, irrespective of the high number of associated companies and the dissimilarity grade of their sales area, appear to be highly integrated, which makes them able to compete by acting effectively and efficiently with the large corporate groups, both nationally and in the local markets*”.

¹²⁷ ICA, IC43, *cit.*, p. 85.

¹²⁸ ICA, IC43, *cit.*, p.109.

¹²⁹ Chen Z., *Buyer Power, Economic Theory and Antitrust Policy*, Res. L. Econ., 2007, 17, 19.

¹³⁰ ICA, IC43, *cit.*, p. 127.

national competition authorities to intervene adopting a common orientation.

It is useful to note that it is only with the aforementioned Inquiry that the ICA has been able to deal with the new antitrust issues in the GDO sector (such as the growing significance of the alliances between food retail chains, mergers and cases of abuses of dominant position).

As in other sectors, such as pharmaceuticals, it is expected that, after having examined the GDO sector in the Inquiry, the Competition Authority will open new proceedings in the large-scale food distribution sector, too.

5. THE MOST RECENT INTERVENTIONS OF THE ITALIAN COMPETITION AUTHORITY IN THE LARGE-SCALE FOOD DISTRIBUTION SECTOR

In consideration of the structural peculiarities of the different European distribution systems, and given the particular importance of the role of the competition authorities in the large-scale food distribution sector, there have been many interventions and initiatives by the European competition authorities in the GDO sector¹³¹.

¹³¹ It should be observed that in recent years the large-scale distribution sector has been the target of attention also of the national competition authorities of other countries. For example, on 24th September 2014 the German competition authority, the Bundeskartellamt, concluded a wide-ranging inquiry, started in 2011, the subject of which were the imbalances existing between food retailers, such as Edeka and Rewe, and their suppliers. In July 2014, the Bundeskartellamt found there had been an abuse of dominant position by the Edeka chain of supermarkets, which had asked its suppliers to grant it special discounts: in particular, on 3rd July 2014 the German authority established that the discounts

In Italy, the most important issues are related to the alliances of food retail chains¹³², abuses of dominant position and the merger control, with reference to which from the ICA's approach it emerges that there is the need to carry out a difficult balance between pro-competitive effects and anti-competitive effects.

5.1. Alliances between food retail chains

The ICA, when examining the antitrust issues related to alliances between food retail chains, adopted an approach aiming at analysing the

requested by this chain of more than 500 of its suppliers infringed a specific prohibition (i.e. "Anzapfverbot"), which is extremely significant in the German food retail sector (Bundeskartellamt, 3rd July 2014. Further information may be found at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/03_07_2014_edeka.html). Similarly, the Lithuanian competition authority in January 2014 fined the retailer Maxima for having put in place a number of unlawful agreements with food and drink suppliers. Those agreements consisted in anticompetitive practices which failed to ensure that the interests of suppliers and retailers were balanced, in view also of the considerable bargaining power held by the retailers (Competition Council of the Republic of Lithuania, 22nd January 2014). Furthermore, in the United Kingdom, in February 2013, the CAT (Competition Appeal Tribunal) accepted the agreement reached between the chain of supermarkets Tesco and the Office of Fair Trading (OFT - the UK competition authority) in order to conclude the case after the judgment of the CAT in December 2012, that partially annulled the findings of the OFT, in which Tesco had been fined for having taken part in a cartel to fix the price of cheese. In particular, the appeal against the OFT's Decision by Tesco ended with an agreement on the amount of the fine in respect of three allegations regarding an exchange of information on the price of the cheese. The decision dated July 26th 2011 by the OFT to impose a fine on Tesco was therefore reduced and set at £6.5 million, instead of £10.43 million applied initially (UK Competition and Markets Authority, 26th February 2013).

¹³² See Section 3.

economic and legal context as well as the nature of the alliance, the structure of the relevant markets and the market power of the parties.

It has been observed that the alliances between food retail chains were born out of a need to face the bargaining power which the large producers had against a large-scale food distribution sector which was overly segmented, and also in order to recover quickly low administrative effectiveness when the market was in a great state of flux¹³³.

As explained above¹³⁴, together with the benefits produced by alliances of food retail chains, that will be further described below, such alliances also create antitrust issues: the potential risk of exchange of information, the uniformity of the commercial terms (which does not allow changes of the final prices or a long-term relationship with the suppliers), and the strong contractual power exercised by the such alliances against suppliers.

Since the first proceedings in this matter, the ICA examined the contractual power of the alliances of food retail chains¹³⁵.

¹³³ See Section 3. Of particular influence is the definition put forward by the ICA: alliances of food retail chains were defined as “a grouping of large undertakings (undertakings and branches) or of groups of large retailers, exclusively intended for the purpose of jointly negotiating purchasing conditions with the suppliers. The alliance of retail chains is thus a second level of association inasmuch as it consists of entities which already have centralised among themselves the main business functions” (ICA, Decision no. 6113 dated 18th June 1998, *Schemaventunopromodes/Gruppo GS*, C3037). Centralization of the business functions, the sharing of the costs and of the objectives, and harmonisation of behaviours are just some of the features of the alliances of retail chains that potentially give rise to anticompetitive effects.

¹³⁴ See Section 3.

¹³⁵ In this regard, it should be noted that in some European countries the legislator has intervened directly

Firstly, in the case *Coop Italia-Conad/Italia distribuzione*¹³⁶, the ICA assessed the agreement between Coop Italia and Conad to set up Italia Distribuzione (ID), a joint venture negotiating contracts with the suppliers for the purchase of goods by individual undertakings which were part of the Coop and Conad systems: in that case, the ICA found that the bargaining power wielded by ID against the suppliers was not balanced out by the bargaining power of the individual producers, and did not enable the latter to move easily from one distribution channel to another¹³⁷. ID thus “*put itself forward as a privileged interlocutor when negotiating terms for the purchase of the assortment of goods of the two chains, since it was able to offer the supplier a territorial cover which no other distributor, considered individually, would [have been] able to guarantee*”¹³⁸.

Furthermore, in addition to the widespread presence of Coop and Conad in central northern Italy and central southern Italy respectively, distributors had greater flexibility

in order to regulate the power relationship between the various economic operators. It is in that context that the *Groceries Code Adjudicator* and the GSCOP (*Groceries Supply Code of Practice*) was introduced in the United Kingdom. See, in this regard, Section 6 (Conclusions).

¹³⁶ ICA, Decision no. 9352 dated March 29th 2001, *Coop Italia-Conad/Italia Distribuzione*, I414.

¹³⁷ “In fact, each distribution channel requires special manufacturing and packaging of the products, different logistical structures, different sales strategies and specific awareness and ways of having contacts with the customers. In addition, the largest national and international producers as a rule usually decide their own volume of production relying on their output - which is quite high - being absorbed by the demand of the operators involved in modern distribution. It is worth noting also that the main producers already supply the other sales channels in addition to the modern distribution channel” (ICA, I414, *cit.*, p. 29).

¹³⁸ ICA, I414, *cit.*, p. 29.

in varying their ranges of products by changing suppliers¹³⁹.

As a result of such factors, in the above mentioned case the ICA started to adopt its own restrictive approach towards the alliances of food retail chains, authorising the alliance between Coop and Conad on certain conditions.

In particular, the ICA stated that “*the creation of a joint venture which carries out the functions of an alliance of food retail chains, is, as a general rule, an instrument through which the retail operators can reach efficiency gains when organising purchases and obtain cost savings when negotiating contracts with the suppliers*”, and specified that, for the purpose of granting an exemption, “*the advantages which may be achieved by setting up a joint purchasing venture must necessarily bring substantive benefits to the consumer*”¹⁴⁰. In *Coop Italia-Conad/Italia distribuzione* case, the commitments offered by the parties (for example, the introduction of clarifications and additions to the ID’s statute and/or mandate, and the commitment according to which “*neither of them would reduce the total number of suppliers that will not be dealt with by ID and which are now dealt with by Coop Italia and Conad themselves*”)¹⁴¹ were held by ICA to be appropriate to ensure a more efficient organization of the distribution, producing “a

reduction of the costs which may be passed on to retail prices”¹⁴².

The decisions of the ICA adopted in the last years are also in line with such restrictive approach.

As stated above, alliances of food retail chains may constitute the perfect *scenario* for coordination between competitors and can facilitate the exchange of information between them.

These issues have been examined recently by the Authority, which has accepted the commitments offered by Centrale Italiana, Coop Italia, Despar Servizi, Gartico, Discoverde and Sigma in the context of a proceeding launched in December 2013 and aimed at ascertaining whether the parties were part of an agreement restricting competition within the meaning of Article 101 TFEU with regard to the creation of Centrale Italiana S.r.l. (¹⁴³). The main commitment proposed by Coop Italia and Centrale Italiana, and accepted by the ICA, has been to close Centrale Italiana starting from 2015, allowing Centrale Italiana to conclude only the negotiations related to 2014¹⁴⁴.

The abovementioned decision of the Competition Authority and the closing of

¹³⁹ Moreover, as the ICA held, the agreement presented “*features such as to lead to a presumption that, following its implementation, there would be coordination of the competitive behaviour of COOP and CONAD in the retail markets also. Firstly, in fact, on the basis of what was originally notified, the two distribution systems may share great part of the supply costs, which could have a large impact on the total costs of an undertaking in modern distribution (on average 80% for COOP and CONAD). The agreement would therefore enable the parties to share a quite significant part of the total costs*” (ICA, I414, *cit.*, p. 31).

¹⁴⁰ ICA, I414, *cit.*, p. 35.

¹⁴¹ ICA, I414, *cit.*, p. 11.

¹⁴² “*Furthermore, among the cost savings that the parties will achieve must be included those which are not strictly 'monetary' such as, for example, the reduction of transaction costs arising from simplification and the shorter time required to conclude negotiations with the suppliers*” (ICA, I414, *cit.*, p. 35).

¹⁴³ ICA, I768, *cit.* In particular, the ICA suspected that the parties had used Centrale Italiana as a vehicle in order to achieve further forms of collaboration, such as the search for synergies of a commercial nature and the development strategies of the two chains.

¹⁴⁴ ICA, Decision no. 25090 dated 17th September 2014, *Centrale d'acquisto per la Grande Distribuzione Organizzata*, I768.

Centrale Italiana represent an important development and appear acceptable given the numerous restrictive effects produced by Centrale Italiana (especially the high level of share of the purchasing costs and the reduction of the degree of autonomy of the parties, also in relation of the management of their policies on promotions and displays). These are effects that have become particularly significant in light of the market power held jointly by the members of Centrale Italiana with respect to the relevant downstream markets, as shown by a market share which, in many provinces and regions, was over 40%¹⁴⁵.

In the abovementioned decision, the Competition Authority also held that the alleged collusion between the parties was further helped by a substantial exchange of sensitive business information between the companies that were members of Centrale Italiana. Such exchange of information concerned not only the extremely sensitive information relating to costs and purchase terms but also to the turnover (of sales and purchases) of various products and other important aspects of sales policies¹⁴⁶.

As recently shown by the Competition Authority in its Inquiry, the potential exchange of information within the alliances of food retail chains is the most serious issue in light of the extremely variable nature of the composition of the alliances of retail chains, which is the result of the easy and frequent movements by the members from one alliance to another¹⁴⁷. The reasons of the frequent changes in the composition have been found to

be, in particular, the attractiveness of the portfolio of contracts of each individual chain or in the different territorial positions of the retailers members of the alliances, which “*can guarantee to the alliance of retail chains stronger negotiating positions deriving from a greater coverage of the sales markets; as a rule, the predominant structure of the alliances is typically characterized by a larger chain that acts as leader and other members whose size is sometimes considerably smaller*”¹⁴⁸.

Movements from one alliance of food retail chain to another, together with the low effectiveness of the systems protecting information and the yearly negotiation of the terms (which remain valid for all the remaining duration of the contract, after a chain leaves the alliance), increase the general degree of transparency of the purchase conditions and induce “*a certain level of uniformity: a chain that moves from one alliance to another with an advantageous purchase contract, even if that chain is small, has the effect of making its contract the “benchmark” for the negotiation of the new alliance*”¹⁴⁹.

However, despite such significant antitrust issues, there should also be considered the potentially pro-competitive effects of the alliance of food retail chains: the broadly share of objectives and costs (that confers greater stability to the purchase agreements concluded

¹⁴⁵ ICA, I768, *cit.*
¹⁴⁶ ICA, I768, *cit.*
¹⁴⁷ ICA, IC43, pp. 106-107.
¹⁴⁸ The creation of associations between competitors has some critical aspects: firstly, the existence of multiple levels of negotiation following the alliance level may remove the practical significance of the benefit of reduced transaction costs that result from centralised negotiations within the alliance; secondly, the changeable nature of the various alliances raises the level of market transparency with regard to the contractual conditions applied by the producers to the supplies “*favoured a transfer of information between competitors on their main costs*” (Amendola V., *cit.*, p. 162).

¹⁴⁹ ICA, IC43, pp. 106.

by the alliances of food retail chains on behalf of their members), the potentially increased efficiency of the undertakings (and the consequent benefits to consumers), the savings on purchase conditions and possible reduction of sales prices, are just some of the potential advantages of the alliances of food retail chains¹⁵⁰. Such potential pro-competitive effects could lead the Competition Authority to adopt different decisions in future.

For example, the competitive effects could adequately countervail the anti-competitive effects of the alliances of food retail chains if the latter had a less cumbersome and more efficient structure, which could facilitate negotiations.

This possibility is confirmed by some considerations made by the ICA in the abovementioned decision of acceptance of commitments¹⁵¹, and in the recent Inquiry concluded by the ICA.

From such considerations it may be inferred that one of the elements which make worse the competition issues related to the alliances of food retail chains, is the framework of the contractual relationships: indeed, in the decision - dated 4th December 2013 - to open the investigation, the ICA mentions the presence of agreements which are “burdensome and complex and which, in many cases: (i) are not clearly defined before the period of the supply; (ii) are integrated by consecutive requests by the distribution chains and unilateral retrospective amendments of the terms; (iii) do not allow those

undertakings with less contractual power the ability to assess and challenge the commercial conditions being negotiated”¹⁵²; likewise, it emerges from the ICA Inquiry that the alliances of supermarket chains often have structures which are hardly streamlined that do nothing for the speed or efficiency of negotiations¹⁵³.

Thus, if alliances of food retail chains were more streamlined, the competitive effects could more easily outbalance their potential restrictive effects. In that regard, the Competition Authority remarked in its Inquiry as follows¹⁵⁴: “*the likely trend of the alliances towards more streamlined forms of association – without their own operating structure, which is, at the same time, more close-knit - inasmuch as it is constructed around a single undertaking acting as agent, based on a greater strategic sharing of objectives - could potentially let purchasing associations to be more stable, thereby increasing their ability to compete with other associations and attenuating the risk of standardisation of the behaviour among undertakings belonging to different alliances of food retail chains*”.

Further supporting the view that alliances of supermarket chains may potentially produce pro-competitive effects, it is worth noting that the recent study carried out by the European Central Bank¹⁵⁵ in 6 European countries including Italy showed that there is a “*positive and significant correlation between the degree of*

¹⁵⁰ These benefits were clearly highlighted by the Competition Authority in its Inquiry (ICA, IC43, *cit.*, pp. 85 ff.).

¹⁵¹ ICA, I768, *cit.*

¹⁵² ICA, Decision no. 24649, dated 4th December 2013, *Centrale d'acquisto per la Grande Distribuzione Organizzata*, I768.

¹⁵³ ICA, IC43, *cit.*, p. 104.

¹⁵⁴ ICA, IC43, *cit.*, p. 109.

¹⁵⁵ “*Structural features of distributive trades and their impact on prices in the euro area*”, Occasional Paper Series, No 128/2011, Task Force of the Monetary Policy Committee of the European System of Central Banks, p. 79.

*concentration of the alliances between retail chains in 2010 at local level (regional and smaller areas, within a radius 5 or 10 km) and the annual trend in prices from 2003 to 2010: in other words, at a higher level of concentration at the alliances level, in the food and drink sector, there does not seem to be a negative price dynamic*¹⁵⁶.

In view of all the foregoing, it is expected that the Competition Authority will continue to intervene with regard to alliances of retail chains, where it seems increasingly necessary to strike an appropriate balance between the potentially restrictive effects on competition - which appear to become greater in parallel with the spread of alliances of food retail chains - and the possible benefits for consumers, which should always be considered on a case-by-case basis.

5.2. Abuses of dominant position

In recent years the Competition Authority has shown an increasing interest also with regard to abuses of dominant position in the GDO sector.

Abuses of dominant position¹⁵⁷ in the sector are of particular significance in view of the fact

¹⁵⁶ ICA, IC43, *cit.*, p. 108.

¹⁵⁷ In *United Brands* (Case C-27/76) the Court of Justice defined the “dominant position” as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”. At European level, in the *Irish Sugar* case, the fact that a dominant undertaking reserves to itself, without an objective need, an auxiliary or derivative activity on a neighbouring but distinct market on which it does not occupy a dominant position, at the risk of eliminating all competition on that market, was held to be an abuse infringing Article 102 TFEU. In particular, in the industrial sugar market, the Court of First Instance (now the General Court of the European Union) held that it is

that, at European level, it “is increasingly dominated by a small number of supermarket chains”, that are “fast becoming “gatekeepers” of the market”, controlling “farmers’ and other suppliers’ only real access to EU consumers”¹⁵⁸.

In fact, often in the GDO sector an undertaking manages to acquire a dominant position over its competitors, reducing the competitiveness of the latter, obviously leading to the detriment of the consumer. Therefore in the GDO sector, the role of the national competition authorities, together with the European Commission, becomes particularly important in order not only to pursue genuinely competitive behaviours, but also, in view of a complex balance, to identify the conduct which leads to efficiency gains with positive effects for consumers¹⁵⁹.

When carrying out such balances, it should be borne in mind that “the buying power itself does not necessarily impede competition, if competition

an abuse of a dominant position the conduct of a dominant undertaking which grants different discriminatory prices to its customers, depending on whether or not those customers are in competition with it as sugar packers on the retail sugar market (Court of First Instance, judgment 7th October 1999 Case T-228/97 *Irish Sugar plc v. Commission*). Similarly, it has been considered an abuse of a dominant position the behavior of a dominant undertaking granting discounts on the basis of the achieving of certain targets (“target discounts”). Such behaviour was held to amount to abuse inasmuch as it was clearly intended to tie the clients to the dominant undertaking and accordingly make it more difficult the competitors’ presence on the market (ICA, Decision no. 7804 dated 7th December 1999, *Pepsico Foods and Beverages International-Ibg Sud/Coca Cola Italia*, A224).

¹⁵⁸ Resolution of the European Parliament dated 18th February 2008, “Study and solutions to the abuse of market power by the large supermarkets operating in the European Union”.

¹⁵⁹ ECN, Report, *cit.*, p. 41.

*downstream is intense and the buying power creates efficiencies that are passed on to consumers*¹⁶⁰.

In this context, the complex case *Esselunga/Coop Estense*¹⁶¹ represents an important turning point as well as the most significant intervention by the ICA in the large-scale distribution sector.

As noted above, in 2012 the Competition Authority decided that the continuous and repeated unified strategy between 2001 and 2009 by Coop Estense constituted an abuse of dominant position aimed at preventing the entry of Esselunga into the Modena area.

In particular, the Competition Authority found that Coop Estense systematically blocked attempts by Esselunga to open new food retail shops, in areas which were potentially ideal for opening such shops and that were available, also intervening in administrative procedures started by Esselunga in order to obtain the necessary permits¹⁶². The Competition

Authority therefore stated that, as a result of such conduct, Coop Estense maintained or even reinforced its dominant position in the relevant market, with market shares which increased over time, so that in 2011 it held a share of 66% in the market of hypermarkets and a share of 47% in the market of supermarkets in Modena area¹⁶³.

At the end of the proceeding, the Competition Authority decided to fine Coop, as a dominant operator on the market, for having put in place an exclusionary strategy which appeared more serious since, according to the ICA, it was deployed in the context of a market already characterized by the limited availability of areas suitable for the opening of stores and by significant administrative barriers to entry. Thus, by hindering an “efficient” competitor – such as Esselunga - from entering the market, Coop Estense caused damage to the consumers in terms of greater prices and/or reduced choice¹⁶⁴.

It should be pointed out that the *Esselunga/Coop Estense* case is of particular importance also in view of the fact that the undertaking enjoying a dominant position (*Coop Estense*) was ordered not only to bring the infringement to an end, but also to desist from similar unlawful conduct in future. Furthermore, for the first time the municipal authority was asked to “*consider very carefully any decisions it might adopt, which could negate or, at least,*

¹⁶⁰ J. P. Schmidt, *Antitrust developments in the food sector in the EU*, 2013 34 E.C.L.R., Issue 5.

¹⁶¹ ICA, Decision no. 23639 dated 6th June 2012, *Esselunga/Coop Estense*, A437.

¹⁶² In particular, Coop Estense had bought land in Modena next to a larger area in respect of which Esselunga had submitted a project for the opening of a supermarket. Under the administrative rules, the Esselunga project could be implemented with some planning changes in the area, but only subject to Coop Estense's consent. The latter thus acquired a veto over Esselunga's project and systematically opposed any attempt to reach agreement with it. Therefore, according to the ICA, there was no commercial reason for Coop Estense's conduct other than to block Esselunga. In fact, Coop Estense (i) bought the area next to that of Esselunga's at quite a high price, although it was not far from its own store, in full knowledge of the veto it gained by acquiring the land; (ii) following Coop Estense's acquisition, it systematically rejected any planning changes necessary for the development of Esselunga's project.

¹⁶³ Intervention of Giovanni Guglielmetti “*Cooperative e profili nazionali e comunitari di diritto della concorrenza e antitrust*”, Milan 22th February 2013, Università degli Studi Milano – Bicocca, available at: http://www.ergoncooperativolombardo.it/wpcontent/uploads/2012/07/02_ergon_guglielmetti.pdf.

¹⁶⁴ ICA, A437, *cit.*

attenuate the effects of the obligations incumbent¹⁶⁵ on Coop Estense¹⁶⁶.

In particular, the Competition Authority established that “any decision by the municipal authority aimed at changing the intended purpose of the area must give due consideration to the obligation imposed by the Authority on Coop Estense – in terms of genuine collaboration to enable early access to the market by Esselunga – avoiding to frustrate the content of such imposition”¹⁶⁷.

Also interesting the later judgment issued by TAR Lazio (“Tribunale amministrativo regionale” – Lazio Regional Administrative Court), that overturned ICA’s decision¹⁶⁸. Lazio Regional Administrative Court, in particular, annulled the fine imposed by the ICA on the ground that, although a causal link and an exclusive effect are essential elements of an infringement under Article 3 of Law no. 287/90, ICA had failed to provide evidence for a causal link

between the dominant position enjoyed by Coop Estense and its exclusionary behaviour¹⁶⁹.

The Italian Supreme Administrative Court (“Consiglio di Stato”), instead, adopted a different approach, aimed at pursuing the exclusionary behaviour of Coop in a sector, i.e. the large scale food distribution sector, which was already characterised by a notable lack of shopping areas¹⁷⁰.

In the end, the Administrative Court confirmed the decision of the Competition Authority, providing some interesting remarks.

Specifically, the Supreme Administrative Court initially criticised the approach of the ICA according to which, with regard to undertakings enjoying a dominant position, in order to distinguish between permissible conduct and unlawful conduct, it is necessary to ascertain whether there is an actual anti-competitive effect with a causal link to the unlawful conduct, inasmuch as only such element is capable of making unlawful the conduct of the undertaking¹⁷¹. In particular, it was held that “evidence of an anti-competitive object can be confused with evidence of an anti-competitive effect: if it is demonstrated that the purpose pursued by the behaviour of a dominant undertaking is to restrict competition, such behaviour is itself prejudicial, because it could also cause such restrictive effect”¹⁷².

Therefore, the Supreme Administrative Court held that the infringement “is completed by the anticompetitive conduct, provided that such conduct is capable of upsetting its proper functioning and the

¹⁶⁵ ICA, A437, *cit.*, p. 288.

¹⁶⁶ It should be considered that, according to the case-law of the Supreme Administrative Court, the Authority may proceed, where anti-competitive conduct has been ascertained, applying “financial fines and with warnings which, in order to be able to order specific conducts different from the mere cessation of the collusive behaviour, should be supported by adequate reasoning and an assessment of the position of all the interested parties”. Thus, while it is “acceptable that the Authority should be able to order the removal of the effects” of the unlawful conduct, “...in such a case, the Authority should evaluate the factual framework of the case, the effects on third parties’ positions of the specific measure ordered, as well as the suitability of the imposed measures under reasonableness and proportionality profiles” (Supreme Administrative Court, 3rd June 2004, no. 926; Supreme Administrative Court, 6th November 2006 no. 6522; Lazio Regional Administrative Court, 11th September 2001, no. 7433).

¹⁶⁷ ICA, A437, *cit.*, p. 288.

¹⁶⁸ Lazio Regional Administrative Court, 2 August 2013, no. 7826.

¹⁶⁹ Bastianon S., “Esselunga v. Coop Estense e la guerra tra supermercati: l’abuso di posizione dominante come illecito di mera condotta”, in course of publication, p. 1.

¹⁷⁰ Administrative Court, 25th March 2014, no. 1673.

¹⁷¹ Bastianon S., *cit.*, 2014, pp. 7-8.

¹⁷² Supreme Administrative Court, no. 1673, *cit.*

freedom of the market. The mere potentiality of the restrictive effect is sufficient for the finding of an infringement. It is therefore the correctness of the economic conduct by competitors that the legal system is intended to ensure, and not necessarily the mere objective competitiveness of the market¹⁷³.

The message of the Supreme Administrative Court is clear: the conduct of an undertaking in dominant position must be assessed *ex ante* rather than *ex post*, since it is sufficient that such conduct is capable of restricting competition, without being necessary a causal link between conduct and effect.

What is important, according to the Administrative Court, is the *dangerousness* of the conduct adopted by the dominant undertaking, the “*merely potential restrictive effect*”¹⁷⁴, rather than the actual distortion of competition that might occur in future because of such conduct.

In this context, some considerations of the Supreme Administrative Court, which introduced new elements into the existing case-law, are very important: “*every competitor of an undertaking being in a dominant position has the right not to be excluded as a result of the unlawful conduct of the dominant undertaking, apart from a possible substantive reduction of competition or efficiency of the market caused by such conduct, because only the conduct of the dominant undertaking must be considered. In other words, the infringement may be an illicit of mere conduct*”.

The mere likelihood of the conduct of an undertaking in a dominant position to restrict competition as a sufficient factor to hold such conduct as an infringement of Article 102 TFEU derives from the concept of “*special*

responsibility” of the dominant undertakings not to restrict competition. Said responsibility, according to the approach developed at European level, implies that certain conducts deemed lawful and economically reasonable if taken by other undertakings may be considered unlawful when adopted by an undertaking in a dominant position¹⁷⁵.

According to the Supreme Administrative Court, in the above mentioned case, in particular, the concept of “*special responsibility*” consisted in the “*duty to consider local planning regulations and to refrain from interfering with them or with the availability of the lands concerned, leaving them available to other hypothetical competitors (and competing with such competitors properly)*”.

Adversely interfering under an administrative point of view would in fact have amounted to adopting an “*obstructive conduct, aimed at creating a barrier to entry to the relevant market and therefore in practice to preclude one of the essential conditions of competition, that is the freedom of entry into the market*”¹⁷⁶.

¹⁷⁵ See Court of Justice, judgment dated 13th February 1979, Case C-85/76 *Hoffman v. La Roche*; European Commission, decision dated 14th July 1999, Case C-95-04 *Virgin v. British Airways*; Court of First Instance (now General Court), judgment dated 1st April 1993, Case T-65/89 *BPB Industries and British Gypsum v. Commission*, Paragraph 69; Court of First Instance, judgment dated 8th October 1996, Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge Transports SA and Others v. Commission*, Paragraph 107; ICA, Decision no. 10763 dated May 23rd 2002, *International Mail Express Italy/Poste Italiane*, A299.

¹⁷⁶ On *Esselunga/Coop Estense* see also Angeli M., “*Antitrust liability for abuse of right: the Council of State rules on Coop Estense*” in *Rivista Italiana di Antitrust*, no 2/2014, p. 151. The concept of “*special responsibility*” was developed by the Court of Justice, dated 9th November 1983, Case C-322/81 *Michelin v. Commission*. In particular, an undertaking which has a dominant position has a “*special responsibility*” not to allow its conduct to have a

¹⁷³ Supreme Administrative Court, no. 1673, *cit.*

¹⁷⁴ Supreme Administrative Court, no. 1673, *cit.*

The same approach, aimed at preventing Esselunga from being excluded, was adopted by the Competition Authority in the case *Esselunga/Unicoop Tirreno*. In that case, the Competition Authority held that the conduct of Unicoop Tirreno did not constitute an abuse of a dominant position. The Competition Authority launched an investigation against Unicoop Tirreno Cooperativa s. r. l. into an alleged unlawful conduct carried out by it through Levante S.r.l., which had been specifically created with Unicoop Firenze, with the aim of impeding the entry of Esselunga into the food distribution sector in Livorno, blocking the purchase by Esselunga of the only land still available for opening a hypermarket in that municipality¹⁷⁷. At the end of the proceeding, contrarily to the considerations made by the Competition Authority in *Esselunga/Coop Estense*, it held that there was no clear evidence to ascertain that Unicoop Tirreno had abused a dominant position - to the detriment of Esselunga - aimed at impeding the access by a competitor to the relevant markets in Livorno.

Such cases represent an important turning point since they show that in the GDO sector it is necessary to guarantee also the proper economic conduct of dominant undertakings, that have specific competitive duties towards their competitors.

The rivalry between operators in the large-scale food distribution sector was not the only issue examined by the Competition Authority.

distorting effect (see, by way of example, Supreme Administrative Court, 13th September 2012, no. 4873).

¹⁷⁷ ICA, Decision no. 23640 dated 6th June 2012, *Esselungav Unicoop Tirreno-Unicoop Firenze*, A437B.

It is important to note that the issues that characterize relations between suppliers and operators in the GDO sector have been for many years of considerable concern to the Competition Authority. The strong rivalry between suppliers and large retailers has sometimes led suppliers which held a particularly strong position to adopt unlawful behaviors towards the large retailers in order to put competitors at disadvantage.

In this way, large retailers have been used by suppliers as a perfect tool (because of its fragmented nature and its strategic importance) to gain an advantage over their competitors and, consequently, to raise entry barriers to the distribution market.

An example of such behaviour could be found in the *Pepsico Foods and Beverages International-Ibg Sud/Coca Cola Italia* case¹⁷⁸, in which the ICA held that the discriminatory loyalty discounts set up by Coca Cola represented an abuse of dominant position.

In particular, Coca Cola adopted some behaviours (offering discounts¹⁷⁹ and other benefits to wholesalers, as well as introducing exclusive clauses in the contracts and assigning individual sales targets for the wholesalers) with the aim of impeding competitors' access to wholesale distribution channels.

¹⁷⁸ ICA, Decision no. 7804 dated December 7th 1999, *Pepsico Foods and Beverages International-Ibg Sud/Coca Cola Italia*, A224.

¹⁷⁹ It should be noted that "although there is no legal requirement for a company in a dominant position to charge identical prices or make public the terms applied, the sheer lack of transparency [of the] entire rebate system ... may be considered as an abuse of its dominant position" (Irish Sugar Commission Decision, *cit.*, Paragraph 150).

Furthermore, Coca Cola implemented certain practices towards the large-scale food distributors consisting in influencing the products' supply and the grant of discounts, subject to, for example, certain types of modalities of display of the products¹⁸⁰, as well as to minimum quantities of the product to be displayed, the use of personalized shelves or to the carrying-out of a certain number of activities to display the products out of the area assigned to that type of products, and to the installation of refrigeration equipment.

Esselunga, in its complaint pointed out that such practices harmed its possibility of making a margin from the resale of its products, forcing the complainant to market its products at a loss. Such products, because of consumer loyalty to the relevant brands, had to be present as part of the range of products of large-scale food retailers, otherwise – if such products were absent – the large retailers' image as well as their turnover would have suffered serious damage.

This factor, together with the impossibility for retailers to change suppliers, led the ICA to find that Coca Cola had its abused dominant position by imposing its market power against the GDO retailers, which were not able to

counterbalance the power held by Coca Cola. The distributive chains, in fact, appeared forced to accept the conditions set by Coca Cola “*in order to decrease the products' purchase costs*” and to sell the products in accordance with the retail price recommended by the manufacturer, otherwise they would not have been able “*to sell the products at a profit, in view of the costs of the allocated space and the costs of management of the products*”¹⁸¹.

According to the ICA, such conducts, that were aimed at denying shelf space and thus at excluding competitors, put the consumer at disadvantage, since they led to worse price variation and hindered the introduction of new products in the market.

In that regard, it is important to note that, in order to conclude its decision in such a way, the ICA took into account the special nature of the Italian distributive system, comparing it with the other European systems, in particular its low density: “*the top 5 undertakings in the large-scale distribution sector in Italy have a combined share of 35% and the top 10 a 51% share of the food distribution market*”¹⁸².

Therefore, the ICA has paid particular attention since the late nineties (the ICA decision, indeed, was issued at the end of 1999) in holding that, although there already was some concentration in progress in the distribution sector, the GDO sector did not have a market power suitable to counterbalance the power of the suppliers.

¹⁸⁰ In particular, the clauses in the contracts with the large retailers were intended “*to increase the space for TCCC products*” and their visibility in the stores by means of extra display and coolers located at strategic points in order to reduce the availability of competing products, in particular PepsiCola, and their visibility, reducing the extent to which they were able to attract unplanned impulse purchases by consumers” (ICA, A224, *cit.*, p. 46). The extra displays were, moreover, located “*in especially prominent positions, for which there is a demand not only by non-alcoholic beverage undertakings but also by every other undertaking for which there is a share of impulse purchases and a complementarity with other food products*” (ICA, A224, *cit.*, p. 49).

¹⁸¹ ICA, A224, *cit.*, p. 47.

¹⁸² ICA, A224, *cit.*, p. 28.

In that regard, a study on *buyer power*¹⁸³ drawn up in 1999 for the European Commission¹⁸⁴ is important and has been mentioned by the ICA in said decision in order to highlight that the GDO retailers did not have a strong market power suitable to counterbalance the power of Coca Cola Italia: “*there is a clear difference between buyer power when exercised against small manufacturers as opposed to large multinational manufacturers The buyer power exercised against manufacturers with significant market power on their own is less likely to be a problem for the manufacturers (other than reducing their profit). ... The large Multi National Enterprises with prime brands appear to be generally well positioned to resist buyer power*”.

In line with this approach, which does not consider *buyer power* hypothetically held by large retailers to be *per se* forbidden, the European Competition Network in 2012 specified in the aforementioned *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*¹⁸⁵, that buyer power can be said to exist “*if a market is concentrated to such an extent that a*

particular buyer has not only power over a particular supplier but over suppliers in general”¹⁸⁶.

The Lazio Regional Administrative Court adopted the same approach of the ICA in the *Coca Cola case*¹⁸⁷, adding that, theoretically, the distributive chains could have been able to increase the price of the products but, “*unless the various retailers [had concluded] an agreement forbidden under Law no. 287/90, they [would have risked] a reduction in sales because of the competition in that sector*”¹⁸⁸. The retailers were thus forced to adopt behaviours against their wishes, suffering a “*pressure on their business decisions*”¹⁸⁹.

In that regard, it should be pointed out that the Lazio Regional Administrative Court again held sufficient the “*potential suitability*” of the behaviour of the dominant undertaking to restrict competition: “*an actual squeeze on competition*”, on the contrary, was not found to be essential to a finding of abuse of a dominant position¹⁹⁰.

¹⁸³ As pointed out by the ICA in its own Inquiry into the large-scale food distribution sector, one of the clearest definitions of buyer power is that “*provided by the American Antitrust Institute, that is “...the ability of a buyer to reduce the price to pay to a supplier or to induce it to offer more favorable non-price conditions. Another definition is discussed by Dobson, for whom buyer power derives from an unequal bilateral relationship between suppliers and buyers that gives the stronger buyers “...the ability...to obtain from suppliers more favorable terms than those available to other buyers, or terms that would otherwise be expected in case of normal competitive conditions” (ICA, IC43, cit, p. 114; Dobson P. W. Exploiting Buyer Power: Lessons from the British Grocery Trade, Antitrust Law Journal, (2005), Vol. 72, pp. 529-562).*”

¹⁸⁴ Dobson Consulting, *Buyer power and its impact on Competition in the Food Retail Distribution Sector of the European Union*, May 1999.

¹⁸⁵ See Section 4, footnote 113.

¹⁸⁶ “*From the perspective of EU competition law, the power of a buyer over its suppliers can constitute a problem, for instance, if this position is used to foreclose (potential) rivals to the detriment of consumers. However, buyer power can also be to the benefit of consumers, for instance, by acting as a countervailing power that exerts competitive constraints on a powerful supplier or by creating purchase efficiencies that are passed on to consumers*”. This is thus different to “*unequal bargaining power*”, which is found “*whenever one party to a proposed contract, be it either the supplier or the buyer, can 'drive a hard bargain'; that is, can impose upon the other contracting party terms and conditions that are deemed unfavorable by that other party. Unequal bargaining power and resulting contractual imbalances do not necessarily imply a competition infringement in most cases*” (ECN Report, cit., p. 41).

¹⁸⁷ Lazio Regional Administrative Court, no. 11485, dated 11th December 2000.

¹⁸⁸ Lazio Regional Administrative Court, no. 11485, cit., p. 44

¹⁸⁹ Lazio Regional Administrative Court, no. 11485, cit., p. 46,

¹⁹⁰ Lazio Regional Administrative Court, no. 11485, cit., p. 47, “*it should also be borne in mind that, as previously*

Finally, the approach adopted by Lazio Regional Administrative Court and the ICA has been, in the end, taken by the Supreme Administrative Court¹⁹¹, that rejected the appeal brought by the parties (Coca Cola Italia s. r. l and others) and confirmed the fine imposed by the ICA.

The *Coca Cola* case, which is particularly important considering that the ICA found that suppliers of products that have to be necessarily present as part of the range of the large retailers have a strong buying power, highlights how, in recent years, the growing power of the large retailers induced the ICA to pay closer attention to the behaviours adopted by the large retailers towards suppliers.

Without examining in depth such conducts, it should be considered that said behaviors have been analysed by the ICA in its last Inquiry¹⁹².

observed, according to the case-law of the Court of Justice (...) an actual squeeze on competition is not an essential element for a finding of abuse of a dominant position; it is sufficient that a conduct adopted could have potentially such effect". This is the same approach taken by the Supreme Administrative Court in the abovementioned case *Esselunga/Coop Estense*.

¹⁹¹ Supreme Administrative Court, 19th July 2012, no. 4001.

¹⁹² ICA, IC43, *cit.*, p. 113. These cases could be considered included in the *trade spending* phenomenon, *i.e.* "the amount paid as a whole by suppliers to the large distributors in respect of services related to displays, distribution and promotions in general". When distributors are negotiating the sale of services, they adopt conduct or behaviour such as: "(i) making the purchase of the products conditional on the sale of the package of services; (ii) imposing retail prices unconnected to the services and to the actual advantage derived from it to the supplier; (iii) supplying services which are inadequate for the fee paid, although it is not always possible for a small producer to check whether such services are adequate" (ICA, IC43, *cit.*, p. 209). Trade spending, therefore, "refers to the whole family of commercial practices which imply the payment, by the supplier, of fees to the supplier aimed at supporting, promoting or just selling its products". These fees are negotiated secretly "without any public communication of the terms agreed and must be paid in

From this Inquiry, in particular, it emerges a complex framework, with regard to the relationship between the GDO retailers and the suppliers: from this author's point of view, such relationship should be examined in the light of the economic theory of *buyer power*, which, as the Competition Authority rightly pointed out and as it emerges from the *Coca Cola* case, suggests "less stringent assessments in the definition of dominant positions under the demand side, thus allowing a rethink of the classical theories developed for the analysis of cases under the supply side"¹⁹³.

In this context, Article 62 of Law no. 27/2012 represents an important turning point with regard to the analysis of the relationship between the GDO retailers and the suppliers, since this Article, "if interpreted as an instrument for the protection of the market, it enables a qualified intervention by the Authority for the protection of a public interest, namely the effectiveness of the competitive structure of the market"¹⁹⁴.

advance, before the goods are supplied" (ICA, *cit.*, p. 127). In this context are included "listing fees" or payments, often made in advance, required by the distributor from the supplier for access to shelf space. These payments are rarely asked for or paid by the dominant supplier, since it is also in the interest of the distributor to give shelf space to the products of such supplier. Thus, such fees "have perverse effects, on the one hand by imposing additional costs on some suppliers and not on the dominant one, thus impairing competition between them, and on the other by having the effect of actual anti-competitive foreclosure, impeding the access of smaller and financially weaker suppliers" (Belotti G., *La GDO e il diritto antitrust in Italia: le principali peculiarità e le maggiori criticità*, in "Antitrust between EU law and national law", Raffaelli E.A. (ed.), Bruylant, 2013, p. 181).

¹⁹³ ICA, IC43, *cit.*, p. 203.

¹⁹⁴ ICA, IC43, *cit.*, p. 203.

5.3. Merger control

Another area of intervention of the Competition Authority in respect of *buyer power* in the GDO sector is merger control, in which it is important to check “*not only the effect of increased market power on the supply side, towards the consumer, but also the increased market power on the demand side, towards the suppliers*”¹⁹⁵.

A careful analysis of mergers constitutes the most important instrument in order to avoid the creation of *buyer power*, precisely in view of the special nature of the commercial relationships in the large-scale distribution sector.

For that reason, together with cartels and abuse of dominant position, the Competition Authority, which often seeks to strike a balance between restrictive effects on competition and potential pro-competitive effects, has been paying closer attention to mergers in the retail sector.

Generally, the term “merger” refers to the result of a process through which a specific undertaking strengthens its position on the market, not after an internal growth but through external means, drawing on the resources of third parties¹⁹⁶.

In particular, with regard to antitrust rules, as the Supreme Administrative Court recently held in case *Lidl*¹⁹⁷, the object of the acquisition

should be “*an economic entity, to which a turnover can be clearly attributed, which is transferred from the vendor to the assignee.... The merger should produce a lasting change in the control of the undertakings concerned and in the structure of the market*”.

Therefore, the mere acquisition of authorisations to carry on a commercial activity within the modern distribution system (i.e. a licence), with the intention of obtaining further licences through the so called “union” (“*accorpamento*”) does not constitute a merger¹⁹⁸.

Indeed, in cases of transfer of licences, there is a transfer of an asset with an economic value, but there is not the transfer of business or the acquisition of control of the vendor company and thus such operation does not constitute a merger. The *Lidl* case is particularly interesting since, after the Supreme Administrative Court issued its decision, the Competition Authority made a significant change to the pre-merger Notification Form¹⁹⁹, which now expressly states that a merger does not arise in cases where, cumulatively, the transaction consists

to Article 19(2) thereof, it imposed a total fine on Lidl amounting to €309.000. The Lazio Regional Administrative Court upheld Lidl's appeal at first instance, reducing the total fine to €129.000.

¹⁹⁸ According to Legislative Decree no. 114/1998, in order to open any medium to large sales stores it is necessary to apply to the relevant municipal authority for the appropriate licence. In case of refusal by the municipal authority, an undertaking may search for a licence “on the market” or purchase it from another operator. However, given that undertakings cannot seek licences on their own, they then do what Lidl did in this case: they first proceed concluding business transfer contracts (containing the license and other assets of “symbolic” value which are necessary to justify such contracts), and then go on to obtain the relevant authorization to open the retail store through the so called “accorpamento” (union) of the licences.

¹⁹⁹ ICA, Decision no. 19964 dated 18th June 2009, *Amendments to the formal procedure for the notification of mergers between undertakings*.

¹⁹⁵ ICA, IC43, *cit.*, p. 118.

¹⁹⁶ Mangini V., Olivieri G., *Diritto antitrust*, Torino, 2009.

¹⁹⁷ Supreme Administrative Court, no. 1894 dated 17th February 2009. Lidl had communicated late to the Competition Authority the acquisition of 122 business branches between 2000 and 2007. By decision no. 16809 of 10th May 2007, the ICA held that such transactions had not been communicated in advance, as required by Article 16(1) of Law no. 287/90 and therefore, pursuant

merely in the acquisition of a commercial license and the vendor is not prevented - either by an agreement between the parties or a decision of a public entity - from continuing the commercial activity²⁰⁰.

With specific reference to the GDO sector, as seen above, there has been in recent years a increase of merger operations between the retail chains, while at the same time a large number of suppliers has remained, often consisting of small and medium undertakings.

Therefore, in the GDO sector the effect of these transactions can be disruptive both because of the market power of suppliers, making mergers within the large-scale food distribution sector particularly complex, and in view of the significant increase of the market share that the distributor could obtain from such an operation, at the expense of suppliers and consumers.

In this framework, the national and the European competition authorities as a rule tends to prohibit mergers in the large-scale food distribution sector that allow the undertakings resulting from such mergers to

acquire a significant competitive advantage in the relevant market²⁰¹.

It should nevertheless be observed that, when seeking an appropriate balance between competitive effects and anticompetitive effects, there is a general tendency to favour the mergers in the food distribution sector²⁰², when the presence of strong competitors guarantees a high level of competitiveness²⁰³.

According to such an approach, the Competition Authority, when seeking to strike the balance between pro-competitive and anti-competitive effects, has occasionally authorised a merger between suppliers because of the strong bargaining power held by large retailers (who, by reason of their size and their commercial importance, are generally able to resort to alternative sources of supply in the event of price increases by suppliers).

It is therefore interesting to note that, in such cases, the Competition Authority considered the presence of many and well-qualified competitors, and an unused productive capacity, as well as the absence of substantial barriers to entry, and the significant power held by the large retailers. Such elements, according to the ICA, “are strong countervailing factors against

²⁰⁰ In particular, it was decided modify the first part (“General conditions on application, definition and procedural aspects”) of the Form, Section A, paragraph 2 (“Transactions that do not constitute a merger”), letter d (“Undertakings that do not carry on an economic activity”), after the second paragraph: in particular, in such part it has been added the following: “there is no concentration where the transaction consists in the acquisition of only the commercial licence, and the vendor is not prevented from continuing to carry on business under the transferred commercial licence either under agreements or provisions adopted by local bodies”. Furthermore, additional wording was introduced into “Section II” (“Other information”) of Prospectus B of the Form (“Mergers”), at letter B3 (“Description of the transaction”): “where the transactions concern ‘local’ shops [esercizi di vicinato], please provide a detailed description of the assets being transferred (note: See Part 1, Section A, par. 2, let. d)”.

²⁰¹ European Commission, 26th April 1997, “Kesko/Tuko”, Case no. IV/M.784. In particular, the European Commission in this case found that the merger was incompatible with the common market since it would have allowed Kesko to acquire a dominant position on markets for retail of consumer goods in Finland.

²⁰² European Commission, 25th April 2007, “Reve/Del Vita”, Case M. 4590; European Commission, 4 May 2006, “Carrefour/Hyparlo”, case COMP/M.4096.

²⁰³ European Commission, 22nd December 2005, “Tesco/Carrefour”, Case COMP/M.3905; European Commission, 11th November 2004, “Kesko/ICA/JV”, Case COMP/M.3464.

the market power on the supply side. These factors can remove any concern related to the unilateral effect that the merger concerned could produce'²⁰⁴.

In line with this approach, the ICA approved, in some cases, mergers in the food retail sector by making these transactions subject to certain conditions. The remedies offered by the undertakings concerned, and accepted by the Competition Authority, have been various:

- i. the transfer of a brand with significant reputation and a considerable presence on the market, as in the *Cirio/Centrale del latte di Roma* case²⁰⁵;
- ii. structural adjustments, such as the closure of certain stores and the closure of Supercentrale²⁰⁶, as in the *Schemaventuno-promodes/Gruppo GS* case;
- iii. reduction of the period of joint management of the undertaking acquired and the introduction of mixed pricing, as in the *Società Esercizi Commerciali Industriali-S.e.c.i.- Co.pro.b. – Finbieticola/Eridania* case²⁰⁷, in which the parties committed to avoid any substantial or lasting restriction on competition in the relevant markets (in the mentioned case, the markets of sugar, of the supply of beet and of the distribution of seed);

- iv. the increase of the presence of the product in the retail channel²⁰⁸ as in the *Koninklijke numico/Mellin* case, in which the Competition Authority authorised the merger subject, however, to some measures aimed at guaranteeing significant reduction - to the distributive chains and to specialised shops - of prices of milk for infants, thus not restricting the availability of the product only to pharmacies;
- v. the transfer of certain stores²⁰⁹ as in the *Conad del Tirreno/Nove rami di Azienda di Billa* case where the undertaking committed itself to transfer or rent a store in order to restrict its market power in a specific area;
- vi. the transfer of a specific branch of a business and the maintenance of a different sales division for a specific brand, as in the *Bolton Alimentari/Simmenthal* case²¹⁰ in which the ICA authorised the merger only on the condition that Bolton sold Manzotin and for a period of time maintained a separate division for Simmenthal products. This last remedy, in particular, was adopted in order to resize the bargaining power that the new entity resulting from the merger would have acquired with respect to the large distributors and the retail business in general.

In the light of the foregoing, it emerges that, consistently with the approach at European level, the Competition Authority dedicated particular attention to mergers in the large-scale

²⁰⁴ ICA, Decision no 20096 dated 15th July 2009, *Bauli/Ramo Di Azienda Di Nestle' Italiana*, C10109. See also ICA, Decision no. 17760 dated December 20th 2007, *Bolton Alimentari/Rami D'azienda Di Brands*, C8971.

²⁰⁵ ICA, Decision no. 5289 dated 10th September 1997, *Cirio/Centrale del latte di Roma*, C2863.

²⁰⁶ ICA, Decision no. 6113 dated 18th June 1998, *Schemaventuno-promodes/Gruppo GS*, C3037.

²⁰⁷ ICA, Decision no. 11040 dated 1st August 2002 *Società Esercizi Commerciali Industriali-S.e.c.i.- Co.pro.b. – Finbieticola/Eridania*, C5151.

²⁰⁸ ICA, Decision no. 14390 dated 15th June 2005, *Koninklijke numico/Mellin*, C6941.

²⁰⁹ ICA, Decision no. 23542 dated 3rd May 2012, *Conad del Tirreno /Nove rami di Azienda di Billa*, C11461.

²¹⁰ ICA, Decision no. 24102 dated December 5th 2012, *Bolton Alimentari / Simmenthal*, C11799.

food distribution sector, in view of the potential effects that such operations could produce.

Nevertheless, it must be stated that, following the recent change of the turnover thresholds - pursuant to which undertakings are obliged to notify mergers²¹¹ - which are now cumulative, the number of concentrations notified to the ICA has reduced considerably.

For this reason, the recent public consultation launched by the Competition Authority on the proposal to revise these turnover thresholds²¹², through which the Competition Authority gathered the critical comments of the undertakings, has been particularly important. It also became clear that there is the need to change the way in which the notification system is organised: the threshold related to the total turnover achieved by the undertakings concerned in the merger should be reduced.

The aim, in light of the significant reduction of notified concentrations, is to extend the powers of the Competition Authority, in order to allow the Authority to control also mergers among small and medium undertakings, which could be of particular significance in local markets²¹³.

In light of the fragmented nature of the Italian distribution system and the increasing frequency of mergers in the GDO sector, it is more appropriate to extend the Competition Authority's power to monitor concentrations in that sector in order not only to achieve the essential balance between pro-competitive effects and restrictive effects that such mergers might produce, but also in order to reduce the competition concerns in a sector which is crucial for the growth of the European economy.

6. CONCLUSIONS

The slow modernisation of the large-scale Italian food distribution sector has resulted in structural differences between the Italian and the European systems (for example, its fragmentary nature at national level, the expanding role of alliances between food retail chains and the role of cooperatives at local level).

Such slow modernisation, however, has not prevented the Competition Authority from developing its own interest in the large-scale food distribution sector, in line with the European Commission and the other European competition authorities.

The role of the Competition Authority in the next few years will be particularly crucial in view of the important instrument provided by Article 62 of Law no. 27 dated 24th March 2012, pursuant to which the ICA will have to intervene not only by starting proceedings at its own initiative, but also and especially

²¹¹ Article 16(1) of Law no. 287/90, as amended by Decree-Law no. 1/2012: *"with effect from 1 January 2013 the turnover thresholds above which a prior notification of concentration operations must be provided, will no longer be alternative but cumulative"*.

²¹² ICA, Communication of May 15th 2014, *"Consultaione pubblica avente ad oggetto la proposta di modifica delle soglie di fatturato a seguito della modifica dell'art. 16, comma 1, della legge n. 287/90 introdotta dal decreto legge n. 1/2012"* (*"Public consultation on the proposal to amend the turnover thresholds following the amendment of Article 16(1) of Law no. 287/90 by Decree-Law no. 1/2012"*).

²¹³ After the conclusion of the public consultation, the Competition Authority declared its intention to monitor

the prior notification scheme during 2014 (ICA, Communication dated 15th May 2014, *cit.*).

facilitating and encouraging complaints by the interested parties. This is an instrument designed to ensure transparency and proper conduct in *business-to-business* relations in the food and agriculture sector, which is itself characterized by an imbalance in bargaining power. For this reason, it is in the interest of the individual operators in that sector to notify any conduct which is contrary to Article 62, thus cooperating with the Competition Authority.

In addition, with the introduction of Article 62 the GDO sector will certainly continue over the next few years to be an interesting matter of study and discussion.

Indeed, in order to facilitate the study of the GDO sector, it would be useful to set up in Italy a *Groceries Code Adjudicator* (GCA), a body created in the United Kingdom by the UK Parliament on 25th June 2013 whose functions are the following: to regulate relations between the supermarkets and their suppliers, to settle disputes between suppliers and retailers, and to publish guidelines on the application of the GSCOP (*Groceries Supply Code of Practice*), to collect information following a complaint from the suppliers and the leading producers and to be proactive in investigating infringements of the new Code²¹⁴. Its duties may be summarised

²¹⁴ In particular, it has the following responsibilities: “investigate confidential complaints from any source about how supermarkets treat their suppliers, make recommendations to retailers if a complaint is upheld, require retailers to publish details of a breach of the code in the most serious cases, impose a fine on the retailer arbitrate disputes between retailers and suppliers” (<https://www.gov.uk/government/organisations/groceries-code-adjudicator/about>). In the United Kingdom, a code of best practices (*Groceries Supply Code of Practice*) - introduced at the initiative of the Competition Commission in 2002 and then strengthened, again after a proposal of the Commission - is implemented in various

in a single expression, extracted from the first report by the GCA published in June 2014²¹⁵: the GCA “*was set up to ensure supermarkets treat their suppliers lawfully and fairly*”.

The introduction of the GCA has made clear the need to improve the way in which the increasingly important large-scale food distribution sector is dealt with from the viewpoint of the protection of competition, the market and consumers. Thus, if every European country set up an independent body with the same functions, with the power to investigate and set fines, the uniformity in the interventions of the competition authorities in the large-scale food distribution sector and, moreover, proper cooperation between the European competition authorities could be ensured.

At the same time, it would be appropriate to introduce in all the European States a *code of conduct* that would regulate the relations between suppliers and distributors. Such code, however, should not be subscribed by only some distribution chains, as in the United Kingdom: instead, it should be subscribed by all the major distribution chains.

This is certainly an ambitious project which, if realised, could make it possible to protect adequately the public interest to achieve a correct functioning of the market, mainly in the interest of consumers, but also of all the

ways by the Office of Fair Trading, in addition to the GCA (in this regard, see also the Inquiry carried out by the Italian Competition Authority (IC43), pp. 183 ff.

²¹⁵ Groceries Code Adjudicator Annual Report 23th June 2013 – 31th March 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322415/10143-GCA-Annual_Report_2014.pdf.

economic operators active in the relevant sectors.

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