The Italian Regulation against the abuse of economic dependence.

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Abstract: The Italian regulation against the abuse of economic dependence is far from being either homogeneous or harmonized. There are, in fact, different set of laws, sharing different rationales and providing for different means of protection. In order to enhance fairness as the guiding principle in contractual relations on the market, the Italian discipline shall be reconciled with the Italian consumer policy and competition law and a sound interpretation of the relevant provisions shall be advanced.

1. Introduction

The Italian regulation against the abuse of economic dependence is far from being either homogeneous or harmonized. There are, in fact, different set of laws, sharing different rationales and providing for different means of protection.

With this in mind, scope of this paper is: i) to review the Italian regulation against the abuse of economic dependence from its origins to its most recent developments, ii) to comment on some of the controversial aspects surrounding the Italian system, coming to the conclusion that iii) a sound interpretation of the overall regulation shall be advanced in order to align its features with the pursued objective to assign the Italian Competition Authority the role promote fairness as a general principle applicable to market relations[1].

2. Private enforcement regulation against the abuse of economic dependence

In Italy, the abuse of economic dependence has never been regulated as such. Once the phenomenon emerged as being relevant by itself and the private law enforcement proved to be ineffective as such, the Legislator decided to take into due consideration those situations characterized by economic discrepancies within the 1998 Law on sub-contracting (Law No. 192/1998)[2].

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[1] For an application related to agricultural markets, see also A. Argentati, La disciplina speciale delle relazioni commerciali nel settore agroalimentare. Riflessioni sull'art. 62 L.N. 27 del 2012, in Giust. Civ., 2012, II,441.

[2] Thanks to a specific strategic choice, the buyer entrusts external manufacturers, usually, but not exclusively, of small and medium size, with more and more phases of production, if not all manufacturing stages (including assembly), so that the buyer must only see to the final assembly of the finished product, or simply to its launch onto the market through affixing the trademark. From this perspective, this technique of decentralization is no longer "demonized" as a pathological" element of the economy, nor is it held, as was often seen in the past, to a false division of labor among businesses (to dodge labor laws). Rather, it tends to be positively evaluated as market oriented if and as much as it is useful for the activation of potentially dynamic competitive mechanisms (see European Commission's 1979 Subcontracting Notice (OJ 1979 C 1, p. 2).

The reason why the Legislator chose sub-contracting as the relevant *sedes* was that, in line of principle, such decentralizing technique is viewed as a pro-competitive scheme since it offers a specific possibility for development for small and medium sized businesses[3]. However, equal to any business relationship between parties working at different levels of the production chain, also such contractual arrangement may reveal a "pathological"[4] side any time one party is exposed to an excessive "economic pressure" from the other[5].

This may well be the case when one party makes substantial investment in specialized activities, destined for the negotiating party who requested it only. In such event, the end result is easily foreseeable: highly specific investment risk turning into an irrecoverable cost, tending to lose all or most of its value if the relationship is interrupted[6]. If so, a situation of serious contractual imbalance becomes apparent, the same party being contractually weak and economically captive in that relationship, which in fact may not be substituted with others[7].

In case of contractual imbalance, the threat of termination exposes the captive party to opportunistic behavior that is hardly detectable via traditional legal remedies.

A prompt solution is offered by the Law on sub-contracting that at Article 9 according to which: "1.The abuse of a client's or supplier's state of economic dependence in regard to one or more businesses is forbidden. A state of economic dependence exists when a business finds itself in a position to bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another business. The assessment of economic dependence also accounts for any real possibility for the abused subject to find satisfactory alternatives elsewhere in the market. 2. An abuse may consist in the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions or the arbitrary interruption of established commercial relations. 3. Any agreement to achieve abuse of economic dependence is null and void. The ordinary courts shall take cognizance of cases of abuse of economic dependence,

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Through "circularity" of production - from the buyer to the subcontractor, in terms of executive projects, technical knowledge, or even of machinery, and from the subcontractor to the buyer, in terms of the creation based specifically on the needs of the buyer - there is promotion, in fact, of a double, interwoven outcome. From an "internal" organizational point of view, it streamlines the production process, optimizing production costs, it rewards qualification and specialization, as well as ensures the adjustment of production to the changing needs and demand. From an "external," functional perspective, the market expands, creating opportunities for growth and competition for new entries, and upon final analysis the competitive process is revitalized (see A. Musso, "La subfornitura", in Commentario al codice civile (diretto da) A. Scialoja-G. Branca-F.Galgano, Bologna-Roma, 2003, 487). Under a competition law perspective, therefore, subcontracting qualifies as a form of collaboration, or rather an agreement pursuant to art. 2 of Law 287/90 and / or Article.101 of the TFEU, which, as a springboard for the expansion of the market, "usually" takes on a pro-competitive meaning (see European Commission's 1979 Subcontracting Notice (OJ 1979 C 1, p. 2). On the contract, see G. Iudica, Commento alla legge n. 192/98, in I Contratti, 1998, 411; G. Tucci, C. Calia, La subfornitura in Italia: sette anni di applicazione della legge 18 giugno 1998, n. 192, in Riv.dir.priv., 2006, 105; V. Franceschelli, Subfornitura: un nuovo contratto commercial e, in Subfornitura , a cura di V. Franceschelli, Milano, 1999, 9.

[3] R. Caso, Subfornitura industriale: analisi giuseconomica delle situazioni di disparità contrattuale, in Riv.crit.dir.priv., 1998, 248.

[4] F. Denozza, Imprese artigiane e decentramento produttivo, in GCo, 1976, 810; A. Musso, Concorrenza ed integrazione nei contratti di subfornitura industriale, 1993, 11

[5] M. Libertini, Posizione dominante individuale e posizione dominante collettiva, in Riv 2003, 557; M.S. Spolidoro, Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica, in Riv. dir. ind., 1999, 203.

[6] On the relation between subcontrcting and vertical relations, G. De Nova, La subfornitura: una legge grave, in Riv. Dir. Priv., 1998, 449; A. Catricalà, E. Gabrielli, Prefazione, in I contratti nella concorrenza, a cura di Catricalà-Gabrielli, UTET, 2011, XX-XI.

[7] M.R. Maugeri, Abuso di dipendenza economica e autonomia privata, Giuffrè, 2003, 1 ss.

including the grant of restraining orders and injunctions and the award of damages".

In synthesis, the provision provides for a specific regulation against conducts amounting to an abuse of economic dependence in so far as they affect only the relationship between the parties.

The conditions to apply the Law are stringent.

First, a situation of economic dependence must occur as one in which a business is able to determine, in its business relationship with another company, an excessive imbalance of rights and duties. Second, once such pre-requisite is satisfied, the regulation bans - with relative nullity of the agreement to be declared by the judge - not only the continuation of the situation of subjection or predominance, but also the exploitation of such "relative" power, provided that the conduct is relevant for the involved parties only, without having a lasting effect on the market[8].

Through this, the Legislator first subtracted from the principle of free will of the parties all relations between the businesses governed by contractual imbalance (and thus all typically vertical relationships and not only the one put in place between buyer and subcontractor), then granted the weaker counterpart with private legal protection, as long as all applicable requirements occur[9] and only if the misconduct completes its effects within the contractual relation.

2.1. Unsolved doubts on the scope of application

Coming to the scope of application, it is interesting to note that Article 9 has been widely interpreted by the Courts, that still tend to swing between either a very restrictive and a broad approach.

Under the first line, a situation of abuse of economic dependence occurs within a subcontracting relation only. As recently recalled by the Trib. Roma (sez. 10 civile, 4 july 2011, n. 14381), "The provisions of the abovementioned law are exceptional and sector-specific and therefore they cannot be subject to analogical interpretation. This solution is far preferable for two order of reasons, the first one literal and exegetical, the other one systematic". "Its provisions are not capable of being applied beyond the boundaries drawn by the semantic meaning of the literal formulation". In fact, the title and several provisions of Law 192/98 (in part. Article 1, Article 2(5) letter. a), Article 5; Article 7) suggest that Article 9 cannot be applicable "to contractual relations genetically and structurally different from subcontracting production". "The second argument to exclude this extension is based on the relationship between the provisions of the law on subcontracting and the general principle of autonomy and self-determination in contractual relations, according to art. 1322, second paragraph, of the [Italian] Civil Code". In effect, the rules on subcontracting established by Law n. 192/98 aim at rebalancing the economic and contractual relations between the parties and granting an adequate level of legal protection to the subcontractor by limiting the power of the contracting party in a stronger position. It follows that the application of Article 9 to contractual relations other than subcontracting would be in breach of the principle expressed by Article 1322 c.c.. In fact, given the general nature of the principle of contractual autonomy, derogations to the latter can be only authorized by law, and cannot be the result of an analogical interpretation made by the courts.

The same line of reasoning has been endorsed by the Trib. Potenza (23 march 2011, n. 414), according to which, Article 9 of Law no. 192/1998 (prohibition of abuse of economic dependence), applies only to subcontracting agreements because it represents an exceptional derogation from the general principle of freedom of contract. The reason of such derogation is highlighted by Trib. Torre Annunziata (30 march 2007), that mentioned that the speaker of the proposal highlighted that this would have probably restricted the scope of application of the provision.

[8] See, inter alia, A. Bertolotti, Il contratto di subfornitura, Torino, UTET, 2000.

[9] A. Catricalà, E. Gabrielli, Prefazione, in I contratti nella concorrenza, a cura di Catricalà-Gabrielli, UTET, 2011, XX-XI.

Under a broad interpretation, the abuse of economic dependence is recognized as possible recurring in all kind of relations. In particular, the Trib. Torino (sez. 9 civile, 11 March 2010) clarified that the prohibition of abuse of economic dependence applies to all kind of relations, because it is an expression of the general principle of good faith and fairness in contractual relations, aimed at ensuring legal protection to the party that is in a condition of "economic dependence". The addressees of the prohibition of abuse of economic dependence – unlike other provisions of the same law – are both clients and suppliers, since they represent the ones who may perform and suffer abuses but also the ones to which are addressed prohibitions and remedies. More recently, the Trib Roma (sez. 3 civile, 22 January 2014, n. 1545) confirmed, recognizing that the abuse of economic dependence is applicable to every form of interaction between undertakings. In fact, the condition of economic dependence does not necessarily require the previous existence of a business relation between companies (as it is demonstrated by the references made by Article 9 to the refusal to purchase and the refusal to contract); however, such a condition could also be the result of close trade relations between the parties which are capable of affecting the business strategies of one party by depriving the latter of its independence in commercial relations.

As an intermediate position, the provision on abuse of economic dependence can be applicable to all vertical relations that are – from a structural point of view – similar to subcontracting. In this sense, the Trib Roma (sez. 3 civile, 5 february 2008, n. 2688) concluded that Article 9 does not make any reference to subcontracting, and conversely it mentions in general terms any “client's or supplier's state of economic dependence”. Consequently, it is evident that - unlike other provisions of the same law which concern exclusively the supplier - Article 9 aims at offering legal protection to both clients and suppliers. However, it is not possible to “enlarge” the scope of application of the provision to every hypothesis of economic dependence. In fact, Article 9 gives the judge the power to limit the contractual autonomy only in specific circumstances, i.e. where a company is able to determine an excessive imbalance of rights and obligations "in its commercial relations with another business". The provision refers only to those “vertical relations” where – as in the case of subcontracting – different undertakings coordinate themselves in order to create a single economic process: therefore, it is not acceptable to enlarge the scope of application of the provision as to cover every hypothesis of economic dependence. In the same line, the Trib. Torre Annunziata (30 March 2007) referred that the reference to “client” and “supplier” demonstrates that Article 9 does not apply to every kind of relation between companies, but only to vertical relations which concern the production, distribution, execution of services. It should be highlighted that the “economic dependence” can concern both the supplier and the seller: in fact, Article 9(2) affirms that the abuse of economic dependence may consist either in a "refusal to sell” or in a "refusal to buy".

In such patched scenario, the Supreme Court (Cassazione, Sezioni Unite (24906/11)) expressed its views in an “obiter dictum”, affirming that the prohibition of abuse of economic dependence represents a provision “of general application, which does not need specific subcontracting relationship”.

Of course, the Supreme Court position has been recalled in subsequent judgements (see, inter alia, Trib. Firenze, sez. 3 civ., 24 January 2014, n. 218; Trib. Milano, sez. 7 civ., 24 September 2014, n. 11203), but the issue seems far from being settled, if one considers that in 2014 the Trib. Milano (sez. 11 civile, 24 april 2014, n. 5403) swang back to the most restricting approach, concluding that the abuse of economic dependence concerns exclusively subcontracting relations and thus it cannot be at issue in an exclusive sale agreement.

2.2. Economic dependence. Definition and contradictory trends

In line of principle, a state of “economic dependence” occurs when an enterprise is not able to substitute its production or its counterparty without incurring in unreasonable costs.

Such situation can arise within a contractual relation only (Supreme Court, 24906/11)[10], only when two cumulative requirements are satisfied: 1) The "business finds itself in a position to bring about excessive imbalances in the rights and obligations pertaining to its commercial relations with another business" (Article 9, Law No. 192/98) and 2) The absence of any "real possibility for the abused subject to find satisfactory alternatives elsewhere in the market".

Unfortunately, the above conditions are not applied consistently.

Starting from the first requirement, under a strict economic approach, (Trib Bari, 22 October 2004), in order to verify the existence of a prejudice for the weaker party, it is necessary to take into consideration only the sunk costs sustained by the company. In fact, the total amount of the investments sustained by the party during the business relation is not a relevant data. As a result, when parties conduct their business relations having regard to market conditions, the requirement of excessive imbalance in the rights and obligations is not satisfied (Trib. Roma (sez. II, 4 February 2010).

Under a legal perspective assessment, the excessive imbalance of rights and obligations between the parties should be assessed in legal terms, and not in economic terms. Therefore, a contract attributing to both parties the right of withdrawal - thus placing them on an equal footing – excludes the existence of an economic dependence (Trib. Torino, 18 March 2010).

What makes the overall scenario more confusing is that even within the same approach, contradictory conclusions are drawn. Under the legal assessment perspective, for instance, the Judge has also concluded that a contract attributing to both parties the right of withdrawal does not exclude the existence of an economic dependence. In fact, even though the contract apparently puts the parties on an equal footing, it could leave de facto one of them in a condition of economic dependence (Trib. Torre Annunziata, 30 March 2007). Also, in some cases it has been concluded that it is not necessary to assess the effective existence of excessive imbalances in the rights and obligations attributed to the parties. In fact, in order to fulfill the requirement it is sufficient to prove the existence of a potential imbalance between the parties (Trib. Parma, 15 October 2008).

Under the economic approach, different and not reconcilable nuances apply. The Trib Taranto (17 September 2010), based its analysis on the economic dimension of the companies, without having regard to the effective imbalance of rights and obligations

Coming to the second condition, the absence of satisfactory alternatives shall occur: a) under an objective profile, because there are no alternatives at all; b) under a subjective profile, because the investments made cannot be re-used elsewhere (Trib. Forlì, 27 October 2010) or cannot be efficiently re-used because of the high costs of conversion (Trib. Roma, 17 March 2009).

Of course the connection with a relevant market is important. Trib. Bari (6 May 2002) clarified that the absence of satisfactory alternatives should be verified having regard both to the market on which the company operates and to the specific conditions of the company. However, such position has been slightly reviewed in 2010 when the Trib. Forlì (27 October 2010) assessed that the analysis on the absence of satisfactory alternatives for the company should include (but not be limited to) the market on which the company

[10] For a different interpretation: Trib. Torre Annunziata (30 March 2007), according to which the state of economic dependence does not necessarily need a previous business relation (for instance, in cases concerning refusal to sell or refusal to buy): in these circumstances, the economic dependence is a consequence of a situation of monopoly or oligopoly which concerns the market in which operates the weaker party (so called "original economic dependence"). The Court however highlights that the existence of this form of economic dependence is still debated. See also, Trib Catania (5 January 2004), according to which the abuse of economic dependence can consist also in preventing new companies (which clearly do not still have business relations with other parties) the access to the market. This is also confirmed by the reference in para. 2 to the hypothesis of "refusal to sell or refusal to buy".

operates.

Such puzzle scenario becomes unacceptable when some Courts open the door to other possible and variable requirements. It has been said for instance that the assessment of the existence of an economic dependence should not be based only on the two requirements provided by the law. In fact, the latter expressly provides that "the assessment of economic dependence also accounts for any real possibility for the abused subject to find satisfactory alternatives elsewhere in the market". Consequently, it is evident that the legislator wanted to give the Court the possibility to base its analysis on other parameters, that have not been listed because of their heterogeneity. For instance, in a case of refusal to sell, it is necessary to consider also the duration of the business relation as well as the nature of the contractual performance (Trib. Bari, 6 May 2002).

If the duration of the business relation is relevant, then some Courts have reversed such requirement, giving consideration to a short term dependency also. Trib. Bari, 6 May 2002, for instance recognized the state of economic dependence of a clothing store in respect of its main supplier, even though it was a case of short-term dependency (limited it to the imminent seasonal sale) and concerned only a part of the stock.

2.3. An open list of abusive conducts

It is a clear cut principle that a conduct is abusive if qualifies for a violation of the principle of objective good faith. More precisely, the Supreme Court (sez. III, 18 September 2009, n. 20106) has specified that the stronger party should exercise its contractual autonomy respecting some general principles, such as objective good faith, loyalty and correctness[11]. As a result, no company is entitled to abuse the rights it holds but have to behave in "rational terms" (Trib. Roma, 30 November 2009 and Trib. Torre Annunziata, 30 March 2007).

From the beginning it becomes apparent that "An abuse may consist in the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions or the arbitrary interruption of established commercial relations": of course, such list is exemplificative. For example, in relation to the exercise of the right of withdrawal from a permanent contract, the Court (Trib. Torre Annunziata, 30 March 2007) stated that the clause that attributes to the parties the right of withdrawal is compatible with the structure of permanent contracts, provided that the exercise of such a right should is preceded by a reasonable notice period, which will give the other party the possibility to find other "satisfactory alternatives" on the market. As far as the non-renewal of a business relation based on a series of temporary contract, is concerned, another Judge (Trib. Bari, 22 October 2004) claimed that the decision of the dominant party not to continue the business relation – even though legally permitted – is unlawful if it results to be arbitrary and unexpected for the counterparty, who reasonably relies on the prosecution of the business relation.

Coming to some typical conducts (the imposition of unjustifiably burdensome or discriminatory contract conditions), it has been assessed (Trib. Trieste, 21 September 2006) that the behavior of the dominant party - which unilaterally set the contract conditions (including the price) and leaves the other party only the choice to sign it or not - imposes to the other party unjustifiably burdensome contract conditions constitutes, and thus represents a form of economic dependence contrary to the principle of good faith.

[11] The same principles represent also the criteria for the interpretation of the strongest party's contractual behavior. It is for the Court to verify whether the exercise of the rights expression of its contractual autonomy has been elusive of the general principles of good faith, loyalty and fairness. In this regard, the Judge is required to control and interpret the acts of private autonomy taking into account the position of the parties, in order to assess whether the dominance (also in economic terms) of one party over the other can bring to abusive behaviors. For this reason, the judge, in monitoring and interpreting the act of private autonomy, should also find the right balance of the parties' conflicting interests.

With regard to arbitrary interruption of established commercial relations, the "arbitrary" interruption of established commercial relations only concerns those atypical permanent contracts for which the right of withdrawal is not provided. According to the Court, the interruption can be defined as "arbitrary" when such a choice is not supported by any valid reason (Trib. Taranto, 22 December 2003).

With regard to atypical abuses, the unilateral modification of the downstream market conditions may play an important role considering the inclusion of new members in the distribution system (Trib. Torino, 12 March 2010): the behavior of the dominant party which - exercising its contractual prerogative - includes in a distribution system new members in charge of areas already covered by the old distributors, constitutes an abuse of economic dependence. In fact, such a behavior does not allow the weaker party to recoup the costs of the investments made and thus constitutes a violation of the principle of good faith. Competition with its own resellers also may be relevant (Trib. Isernia, 12 April 2006): the competition between a company – producer of branded products – and its resellers on the downstream market represents an abuse of economic dependence as long as the producer imposes to its dealers a reselling price which is higher than the price that it directly offers on the market. Such a behavior can be qualified as abusive since it does not allow the weaker party to recoup the costs of the investments made. Also the significant restriction of the orders made can qualify for abuse. According to the Court (Trib. Catania, 9 July 2009, Trib. Bassano, 9 February 2010 and Trib. Catania, 2 September 2009), the significant reduction of the orders made by a company is equivalent to the hypothesis of the interruption of established commercial relations. This behavior is considered as abusive because of the absence of any valid reason.

3. Public enforcement regulation against the abuse of economic dependence

Despite the diverging trends above recalled, the private law enforcement regulation clearly presumes that the abusive conduct affects the counterpart only.

What if this is not the case, the same behavior having a market impact[12]?

Under a competition law perspective, in the absence of even the slightest degree of convergence of will between the parties, the conditions for the applicability of either Italian (Article 2 of Law No. 287/90) or Community Competition Law (Article 101 of the TFEU) against agreements in restraint of trade are lacking (or at least should be)[13].

This creates an opening to the qualification of the relevant misconduct under Article 3 of Law No. 287/90 and/or article 102 of the TFEU, that is to say the abuse of dominant position. To this end, it is clearly necessary that the abusive behavior, that in subcontracting typically has an *intra muros* effect, implies the ownership of a dominant position on the market, that is the capability of the subject that occupies this position to function in a manner that is largely independent from anyone else, and thus from competitors, suppliers and, upon final analysis, consumers. Moreover, it is necessary for that behavior - having the ability to significantly influence the way in which the competition will occur - to overcome the "internal" contractual dialectic and be projected "externally" on the market, altering its functioning in a significant way[14].

[12] V. Falce, Abuse of economic dependence and competition law remedies: a sound interpretation of the Italian regulation, ECLR, 2015, Vol. 36, 71; M.R. Maugeri, Abuso di dipendenza economica e autonomia privata, Giuffrè, 2003, 1 ss.

[13] However, see European Commission, Decision 28 January 1998, Case IV/35.733 VW/Audi, in G.U.C.E., L 124/60, 25.4.1998; European Commission, Decision 82/367/EEC, Hasselblad, G.U.C.E., L 161, 12.6.1982. On coercion as expression of an abuse of dominant position, R. Pardolesi, Intese restrittive della libertà di concorrenza, in AA.VV., Diritto antitrust italiano, Milano, 1993, 246 e ss.

[14] V. Falce, M. Maugeri, Indotto, concorrenza e mercato: il caso della subfornitura, in AGE, 2011, passim.

If it is so, that opportunistic/abusive behavior is not stand-alone. Quite the contrary, it interferes with the interpersonal dialectic as a reflection, a typical expression of an economic effect, consisting in its ability to affect the market forces.

As a result, under the Italian framework the contractual and economic consequences deriving from the misconduct are pivotal to determine whether the general regulations (competition law prohibiting abuses of dominant position) aimed at protecting the competitive process applies instead of the particular rule (civil law and contract policy dealing with abuse of contractual dominant bargain power) pertaining to the contractual relationship, the purpose and effects of which may occur regardless of the working of competitive mechanisms[15].

As to the price of some impositions and many simplifications, the distinction between abuse of a dominant position and of economic dependence is linear up to this point. From here on, instead, the picture becomes considerably more complex[16].

Downstream of a tortuous process (in which the institution of economic dependence, to be included within antitrust law, was finally inscribed within the law on subcontracting), the Legislator referred back to Law No. 192/1998: with Article 11 of Law No. 57/01, it added Paragraph 3-a to Article 9 of the 1998 Regulation, assigning the ICA a specific jurisdiction on the matter.

The ICA, in fact, becomes competent to apply antitrust law to behaviors amounting to abuse of economic dependence, which, "beyond" the application of Article 3 of the Law No. 287/1990 and "regardless" their ability to qualify abuse of dominant position, are in any case "relevant" for the protection of competition.[17]

With such wording, the intuitive proximity / contiguity between the abuse of economic dependence and the abuse of dominant position is more viscous from two points of view: in fact, the Legislation, on the one hand, seems to make the distinction in a manner which is not quite explicit and, on the other, disciplines in an even less clear manner the possible areas of intersection and mutual interference between public and private enforcement[18].

More precisely, the Regulation seems to have first specified that conducts amounting to abuse of economic dependence may also qualify as abuses of dominant position: if in order to declare multiple offenses in regards to the same behavior a regulation was not needed, the only contribution of the case may be in the sense of having left open the possibility for the victim of the abuse to act before the Court of Appeals in the past and today within the Specialized Sections for the declaration of nullity of the contract and compensation for damages suffered, in compliance with article 33 of Law No. 287/90[19].

Second, and herein lies the *quid novi* of the provision, it seems to have expanded the type and category of behavior which, while not integrating a typical antitrust case, cross the threshold into competition law[20].

Under this latter aspect, Paragraph 3-a enlarges the area of competition law to "unique" misbehaviors (that, despite their impact effect, are relevant for competition law) exploiting a "peculiar" dominant position (which is *inter partes*, being held by an obligatory partner vis-a-vis the other which is dependent from it).

If this is the case, then, both the theory of essential facility[21] and the doctrine of the

[15] C. Osti, L'abuso di dipendenza economica, in Mercato concorrenza regole, 1999, 18.

[16] On the issue, see M.S. Spolidoro, Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economia, in Riv. dir. Ind., 1999, I, 193.

[17] P. Fabbio, L'abuso di dipendenza economica, Giuffrè, 2006, in particolare 425 ss.

[18] On the issue, see M.S. Spolidoro, Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economia, in Riv. dir. Ind., 1999, I, 193; G. Colangelo, L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti. Un'analisi economica e comparata, Torino, 2004, 4.

[19] P. Fattori, M. Todino, La disciplina della concorrenza in Italia, 2010, 185.

[20] M. Libertini, Posizione dominante individuale e posizione dominante collettiva, in Riv 2003, 556.

[21] As known, under the essential facility doctrine, those businesses in possession of essential resources are obliged to guarantee access to third parties under equal, reasonable and non-

obligatory partner[22] may well contribute to reconcile the new provision with Article 3 of Law No. 287/1990, limiting the boundaries of the zone of interference between the two provisions accordingly. Through the above doctrines, in fact, the latitude of the concept of dominance, as traced by the relevant praxis, has already reached situations of economic dependency.

As such, however, it ran and continues to run the risk of creating confusing situations of economic power and situations of contractual power, even when they are not reciprocally implied. In the case of the essential facility doctrine, the relevant market plays a critical role in the assessment of, first, the dominant position and, second, the relative abuse: in fact, the relevant market ends up coinciding with the infrastructure or in any case the resource, which one may have exclusively and whose indispensable nature is established primarily on the basis of interest, even potential, of the person seeking to access it. In the case of the obligatory partner theory, the relation of dependence between the parties constitutes the hinge around which the boundary of the relevant market turns, and so leading to the assessment that a dominant position was used in an illegal manner.

It is specifically here that it seems possible to identify the positive contribution of Article 3-a. Thanks to it, the abuse of economic dependence, which until recently was drawn "forcibly" within the context of abuse of dominant position, now may amount to antitrust misbehavior without resorting to artificial reconstructions and improbable equations. This may well be the case when the dominant firm denies access to intermediate resources or interferes with the development of an economic activity. Of course, to make the conduct relevant under an antitrust viewpoint, the effect on the market cannot be presumed, but must be verified concretely[23].

3.1. Versus a more effective public enforcement

The above legal framework has been recently strengthened[24] and the legal means of protection enriched with a new category of abuse of economic dependence[25].

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discriminatory conditions. Originating in the United States, for some time also common in the EU and Italy, the doctrine in question defines those resources, material or immaterial, to be essential when they are required for the carrying out of certain specific economic activities and whose ability to be duplicated or substituted is unrealistic from an economic or material point of view. Heterogeneous materials, port or airport infrastructure, a train terminal at a stadium, a hospital or even a ski lift, a daily distribution network, data held within a telephone book or diagnostic software, television broadcast information and Chamber of Commerce information may all satisfy applicable parameters of the theory. In cases in which, then, a business owns an essential resource, the refusal to allow its use could be considered both a relational and economic violation. *Amplius*, V. Falce, M. Maugeri, M. Maugeri, Indotto, concorrenza e mercato: il caso della subfornitura, in AGE, 2011, passim; P. Fattori, M. Todino, La disciplina della concorrenza in Italia, 2010, 185.

[22] Under the relevant doctrine, the particular bond that is created between the two economic subjects, typically active at different levels of the production chain, allows behaviors to develop which are assumed within the atmosphere of that relationship at the threshold of the importance of antitrust. One may think of situations in which a company needs to have a certain product in its line, either because it is necessary to fill needs based on demand, or because without it he would no longer be able to stay in business; think also of the essentially indispensable connection, because its replacement would in fact be impractical or extremely expensive, or, finally, such as to determine a substantial loss. On the intersection please refer to M.S. Spolidoro, Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica, in Riv. dir. Ind., 1999, 203.

[23] L. Delli Priscoli, L'abuso di dipendenza economica nella nuova legge sulla subfornitura: rapporti con la disciplina delle clausole abusive e con la legge antitrust, in Giur. Comm., 1998, I, 835.

[24] Law 11 November 2011, No. 180, in G.U. n. 265 14 November 2011.

[25] It is a fact that many payments in commercial transactions between economic operators or between economic operators and public authorities are made later than agreed in the contract or laid

In line with Directive 2011/7/EU, effective actions and remedies have been made available within business-to-business relations any time a consistent late payment issue arises at National level.

In particular, according to the new law, conducts infringing late payment legislation qualify an abuse of superior bargaining position any time the violation is generalized and persistent. Besides, the competence to enforce the provision is *de iure* granted to the Italian Competition Authority ("ICA" or "Competition Authority") that as such is entitled to investigate these *intra partes* misconducts, imposing traditional antitrust remedies and sanctions.

The novella is welcome as far as it is aimed at supporting captive (small and medium sized) undertakings (against large corporations) with effective legal means and in turn at reinforcing fairness in contractual relations.

With the introduction of Law No. 108/2011, in fact, the Legislator reshaped the legal system available for small and medium sized undertakings against clients who delay payment for commercial transactions, using the tools provided by antitrust law.

In particular, under Article 10 of the Law two main directives shall first guide the Government in implementing Directive No. 7/2011 regarding delayed payments[26], which were essentially: a) the introduction of measures capable of fighting the negative effects (such as competitive distortions) derived from the dominant position of businesses in regards to their suppliers or subcontracted businesses, in particular when there are micro, small or medium businesses; b) the enlargement of the competencies of the Italian Competition Authority which, then, may scrutinize and sanction the illegal behavior of large businesses.

Second, the new Regulation completed paragraph 3a of Article 9 of Law No. 192/1998, providing that "in the event of widespread and repeated violation of the rules referred to in Legislative Decree No. 231/2002 (on late payments) put in place to the detriment of businesses, with particular reference to small and medium-sized businesses, the abuse is considered to have taken place regardless of the assessment of economic dependence. In other words, meeting the relevant pre-requisites (i.e. persistent late payment behavior), there is the perfect example of abuse of economic dependence where the competence is attributed to the Competition Authority, that, as such, is entitled to investigate such form of *intra partes* abuses, applying traditional antitrust remedies and sanctions.

There is no doubt that contractual relations on the market gain a renewed relevance both under the principle of fairness and loyalty among parties and under the paradigm of free competition. More specifically, with the completion of the case study, two complementary sides of protection are observed: one public, in which the ICA is called to ascertain illegal activity and to impose administrative sanctions, and the other, having private nature, in which professional associations are given special permission to take

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down in the general commercial conditions. Although the goods are delivered or the services performed, many corresponding invoices are paid well after the deadline. Such late payment negatively affects liquidity and complicates the financial management of undertakings. It also affects their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. The risk of such negative effects strongly increases in periods of economic downturn when access to financing is more difficult. See Directive 2011/7/EU of the European Parliament and of the Council, 16 February 2011, on combating late payment in commercial transactions, OJ L 48/1, 23 February 2011.

[26] Now, while Directive 7/2011 was initially instituted in Italy, despite the fact that the implementing regulations (see Legislative Decree 11.9.2012, no. 192 in the OG of 11.15.2012, No. 267 which modified Legislative Decree 10.9.2002, No. 231) reserved no special role for public enforcement and then included within the Cresci Italia Decree (see Law 27/2012), introducing new specific competencies entrusted to the ICA, in line with the Directive, the new case of abuse of economic dependence was inserted into the Law on subcontracting (Law no. 192/1998), wherein (article 9, paragraph 3-a) the ICA is given a specific task to evaluate and, if the case dictates, condemn behaviors which, taking advantage of the state of economic subjection of the counterpart, are susceptible to being felt on the market.

legal action (in accordance with article 4 of Law No. 108/2011).

On the general interest perspective, the ICA is surely attributed a new area of intervention, being able to prosecute and punish abusive behavior which falls both within subjective terms (aimed at businesses, especially small and medium sized) and objective-behavioral terms (consisting in continuous delayed payment) within the scope of the ban.

One may wonder what is exactly new. Well, the decision to reserve an area of expertise to the Competition Authority with respect to behavior integrating an abuse of economic position, namely exploitation of the position of negotiating strength of an undertaking in relation to another customer or supplier, in not groundbreaking. It is well-known that since 2001 the ICA has been given the power to assess these strategies when they are "relevant to the protection of competition and the market."

Rather, the *quid novi* of the story must first be traced back to the categorization of the requirement of dependency, thus in turns entitles the antitrust enforcement. With the new Regulation, in fact, a clear-cut solution is given to the problem traditionally met both at the level of private and public enforcement of imbalance in the assessment of the state of negotiations, which qualifies as the necessary and sufficient assumption for scrutinizing behaviors of abuse of economic dependence[27].

What is more, the range of the regulation goes beyond this, because "in the event of widespread and repeated violations" of the rules on delayed payments by a company "to the detriment of businesses, with particular reference to those of small and medium-size, an abuse occurs regardless of the finding of economic dependence."

The *littera* of the novella is sharp, introducing an antitrust violation *ex se* grounded solely on a finding of "widespread and repeated" violation of the rules on delayed payments. To this effect, the offense is considered to have occurred for the simple fact of widespread and prolonged dilatory behavior (the existence of which is proven essentially by it having been done and of which the effects on the market are due to the persistent failure to comply with the terms of payment and therefore are qualified by the dilatory behavior against which the weaker party has no other alternative but to remain helpless). In other words, it is sufficient to prove that the rules on the time and manner of payments were widely and repeatedly infringed, because that action can be considered illegal even within the overall perspective of competition, resulting in activation of the powers of investigation[28].

All things considered, it seems unquestionable that the Italian novella acts on two fronts, the first being represented by the conditions of the state of economic dependence *tout court* and the second by the assumptions according to which such behavior is relevant *talle quelle* under antitrust law. If this is so, then the frequency of episodes and the latitude of the pipeline through which the company contravenes the rules on the timeliness of payments is rooted in a double presumption: i) that of the dominance of a company against the other party (which therefore is in a situation of "economic allegiance", not being able to oppose this form of harassment or obtain satisfactory alternatives) and ii)

[27] V. Falce, Abuse of economic dependence and competition law remedies: a sound interpretation of the Italian regulation, ECLR, 2015, Vol. 36, 71.

[28] In support of this interpretation is the *sedes materiae* of the new law, the provision being placed not to complete the paragraph devoted to the conditions of the state of economic dependence, but that which is focused on the intervention of public law, which is always conditioned to the establishment of interference on the market. In this context, a decryption which differs from the one proposed, for which the rule would be exclusively aimed at overcoming the mere requirement of dependence, taking it as alleged, would require imposing a double limit. In particular, it would face a formal limit because it would release the regulation from its location, namely paragraph 3-a of Article 9, ignoring the fact that the new case is placed within in the provision devoted to the powers assigned to the ICA. It would also encroach upon a substantial limit, because the state of negotiation imbalance could not attract antitrust jurisdiction except in the face of- independent - assessment of the market impact of the behavior. To this effect, it would defeat the intention of the legislature, resulting in unnecessary intervention, as it has no positive content regarding the conditions that must be met to justify the competence of public law.

that of the abuse *by object*, namely illicit exploitation of the situation of dominance that would be covered by the generalized proven breach of the terms of payment (legal or contractual).

4. Conclusions

A said, recent developments testifying the expansion of the competition law arena quest for a unified interpretation of the overall regulation on the abuse of economic dependence.

In fact, the new equation employed by the Legislator according to which a conduct (i.e. late payment) amounts to a per se antitrust infringement (i.e. abuse of dominant position) risks forcing the architecture designed by the Italian Competition Law (Law No. 287/90) and at the same time risks confusing the boundaries between private and public enforcement against abuse of economic dependence. As a result, despite the good intentions, the *iuris et de iure* presumptions introduced by the new Italian regulation may result in possible unwilling consequences.

In the new environment, persistent late payment behavior is not only the necessary and sufficient condition to prove a situation of disproportionate bargain power. It is also sufficient to qualify an abuse of relative position, enlarging the realm of *per se* antitrust infringement independently from any economic assessment.

Differently from a pure abuse of economic dependence case, attracting private law enforcement, the elements concurring to the evidence of an illicit conduct are considered as given. Differently from an abuse of superior bargaining position case having a competition law dimension, the infringement occurs regardless any market impact has been proven or assumed.

In such scenario, any legitimate and objective justification is apparently *inutiler data*: the novella neglects including both any check and balance clause aimed at reducing the risk of false positive infringements (likely to occur if the late payment depends on a situation of crisis or a total collapse, on third party late payment) and any reference to other possible relevant subject matter (contractual liability, tort law, bankruptcy law, etc.).

Overall, the benefits connected to the novella are likely to be nullified by the costs related to its application since, as it stands, the regulation risks to blur the line traditionally separating private and public enforcement, in terms of impact assessment on the market.

To reduce such possibility and in order to shape the features of the new law in line with the pursued objective to enhance fairness as a general principle applicable to market relations, a sound interpretation of the regulation shall be advanced.

To this end it shall be considered that competition law may well enter into play against a late payment conduct if from the characteristics of the abusive conduct it is inferable (succeeding a qualitative and quantity test, and having evaluated the legitimate justifications advanced by the party) its capability to significantly affect the market. In such way, the presumption does not operate *de iure*, and a market oriented approach is restored.

In conclusion, thanks to this minor adjustment acting under *positive law*, the intention and the features of the novella converge, contributing to penetrate the puzzled area of those activities carried out within the framework of a vertical relationship, that are capable of expelling the weaker party from the market, which ultimately constitutes a fundamental tool to guaranteeing the proper functioning of the market itself.

Besides, and more importantly, thanks to this exegetical proposal the ICA may finally confirm the traits of a two-faced partisan without forcing the system. As guardian and tutor, the Competition Authority may act, on the one hand, securing the functioning of the market and, on the other, watch over market relations, fighting the behaviors abusing an imbalance of power between the parties where, because of the market relevance of the conduct, the time and manner of civil justice are ineffective.