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BRIEF

Innovation and Market Power in the Food Supply Chain: Challenges for Competition Policy and Regulation

Workshop Jointly Organised with Assonime

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Abstract

On 20th September 2019, the Robert Schuman Centre for Advanced Studies (RSCAS) and Assonime (Italian Association of Joint Stock Companies) jointly organised a workshop within the framework of the Florence Competition Programme (FCP) and the Florence School of Regulation, Communications & Media (FSR C&M). The event took place at the EUI campus in Florence. The workshop discussed the roles of innovation and market power in the food supply chain. It started with a keynote speech delivered by Tassos Haniotis, Director for Strategy and Policy Analysis at DG Agriculture of the European Commission. There were two panels, which dealt with: (i) the impact of innovation on the food supply chain, and (ii) the role played by the new rules on unfair trading practices. A roundtable discussing the impact of e-commerce on the retail food industry, and the challenges currently faced by public policy ended the workshop. The event gathered several different stakeholders, including competition enforcers as well as representatives from academia, industry, law and economic consulting firms. The diversity of views ensured a lively debate. The present policy brief summarizes the main points that were raised during the discussion and seeks to stimulate further debate.



Panel I - Innovation and Agriculture 4.0: Impact on the Food Supply Chain

The first panel focused on the numerous challenges that the agricultural sector is currently facing. First, speakers held that the recent climate changes have made production unpredictable, negatively affecting the stability of the food supply chain. Furthermore, they observed that while the demand for certain grocery products in Western countries is declining, the trend in emerging economies is the opposite. By 2050, it is estimated that the world's population will reach 9/10 billion people. However, 820 million people do not currently have enough food to meet their daily nutritional needs, which demonstrates that the sector needs to increase its global production and reduce food waste and loss.

Without doubt, technological innovation can accommodate some of the needs caused by the growing demand for food, while still safeguarding the environment. Agriculture 4.0 relies on the large amount of data collected by sensors, cameras, applications, platforms, mobile devices, robots, and farm machinery, which are then processed using analytics tools that give insights on farm yields and environmental impacts. Its ultimate objective is to maximize food production, while minimizing the use of land, water and pesticides. In contrast to the 'green revolution', which raised global food production at the expense of the environment in the XXth century, Agriculture 4.0 has the potential to reduce environmental impact while making agriculture more productive and efficient.

Speakers observed that new technologies in the agricultural sector are generating a number of challenges. Firstly, rural areas often do not have any access to broadband, an indispensable tool for the data collection and analysis processes which are at the core of Agriculture 4.0. Secondly, farmers often do not have any knowledge of the benefits generated by new technologies and, as a consequence, they are unable to fully benefit from new methods used in food production. For instance, small farmers are often reluctant to invest in new data intensive technologies, mainly due to a lack of understanding of the potential benefits, a lack of financial resources for their deployment, and a lack of digital skills needed to operate such technology. More important, however, they do not understand their rights of ownership in the data

they generate and therefore, are likely to sign data sharing agreements with equipment manufacturers and service providers which are often not favorable to them.

Notably, within the Common Agricultural Policy (CAP), the European Commission has established an Innovation Partnership Program, which includes over 1000 groups of local farmers in the different EU Member States. Its main aim is to educate small farmers about the benefits of new technologies in the agricultural industry. However, speakers agreed that such educational programs may require more funding from the EU Member States. Furthermore, since farmers rarely speak English, such programs can only be implemented at the local level, rather than on a large cross-border scale.

In addition, speakers noted that Agriculture 4.0 is having a major impact on the structure of the industry. Digital agriculture was one of the factors behind the recent mergers and acquisitions in the seed, biotechnology and crop protection chemicals industry. However, relatively little information is available in the public domain on market concentration in the food chain. A detailed OECD study on concentration in seed markets has shown that the degree of market concentration varies from country to country, and that it is influenced by the type of crop produced. For instance, cereal seed is highly concentrated in Mexico, which records values going above 5000 on the Herfindahl–Hirschman Index (HHI), while Russia is characterized by a large number of producers, none achieving HHI values above 1000.¹ Moreover, and in contrast with the widespread perception of market power and competition problems in food chains, several reviews of academic literature do not find evidence of buyer power exerted at the expense of farmers.²

Finally, in light of the waves of consolidation that have taken place since the 1980s, speakers observed that some of these concentrations are raising questions related to the effects produced upon innovation. For instance, in the

1. OECD, *Concentration in seed markets: potential effects and policy responses*, Paris, OECD Publishing, 2018; see also K. Deconinck, *New evidence on concentration in seed markets*, Global Food Security, Forthcoming.
2. R. Sexton and T. Xia, *Increasing concentration in the agricultural supply chain: implications for market power and sector performance*, *Annual Review of Resource Economics*, 10:1, 2018, pp. 229-251; I. Sheldon, *Industrial organization of the food industry*, in *The Routledge Handbook of Agricultural Economics*, G. Cramer, K. Paudel and A. Schmitz eds., 2018.



*Dow/Dupont*³ and *Bayer/Monsanto*⁴ cases scrutinised by the European Commission, the main focus of the assessment did not deal with the impact of the notified merger transactions on prices in the relevant markets only but also on the merging firms' incentives to innovate after the completion of the transaction.

Panel II - The Role of Competition Policy and the New Rules on Unfair Trading Practices

Different EU policies have an impact on the food supply chain, e.g., competition policy, CAP and rules on unfair trading practices. The goals of these policies are not always aligned. For instance, while competition policy is mainly aimed at safeguarding the competitive process as a means to ensure efficiency and protect consumers, the CAP encompasses a different spectrum of objectives. Under Art. 39 TFEU, in fact, CAP should increase agricultural productivity, whilst ensuring a fair standard of living for all farmers and reasonable prices for consumers simultaneously. These different goals may affect the way policies interact in meeting the current challenges in the food supply chain.

During the workshop, speakers focused on the new Directive 2019/633 on Unfair Trading Practices (UTP) in the agricultural and food supply chain.⁵ The aim of the Directive is to protect small suppliers of agricultural and food products, including processed food, with respect to buyers with a significant bargaining power, identified by means of relative turnover thresholds. The Directive prohibits a number of trading practices in business-to-business relationships which are considered unfair. In particular, it lists ten 'black' practices, which are always prohibited, and six 'grey' practices, which are prohibited unless they have been previously agreed in clear terms between the supplier and the buyer.

In the implementation of the Directive, EU Member States will have to decide which national authority will be in charge of enforcing the new legislation. During the workshop, speakers discussed the national experiences in enforcing the rules on unfair trading practices that pre-dated the UTP adoption. In particular, they focused on the decisions adopted by the *Autorità Garante per la Concorrenza e il Mercato* (AGCM, Italian Competition Authority) under Art. 62 of Law Decree 1/2012.⁶ In recent years, the AGCM relied on this legal basis to fine a number of large retailers due to unfair trading practices they imposed on agricultural and food producers.

As for the identification of the authority that would be best equipped to enforce the new UTP rules, most participants, taking into account the positive AGCM's records, shared the view that assigning the task to national competition authorities would be a suitable solution. Competition authorities are used to assess B2B relations along the supply chain from a position of neutrality with respect to the involved interests; moreover, since they are empowered to apply also complementary rules for the proper operation of markets, they may be in a position to choose the most effective instrument in their toolbox, depending on the features of each case.

Roundtable Discussion - The Impact of E-Commerce on the Food Supply Chain and the Challenges for Public Policy

During the roundtable discussion, speakers held that, in 2009, online food and grocery shopping accounted for 13% of goods and services ordered online in Europe. According to Eurostat⁷, in the period between 2009 and 2018, this share has almost doubled, recording a growth of 92%, which makes it reasonable to expect that traditional store-based sales will face important challenges in the near future. In light of these trends, it was argued that

3. European Commission, *Dow/DuPont*, Case M. 7932, Decision of 27 March 2017.

4. European Commission, *Bayer/Monsanto*, Case M. 8084, Decision of 21 March 2018.

5. Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJL 111, 25 April 2019.

6. Law Decree 1/2002 (Art. 62), converted into law by Law n. 29/2012.

The text of the legislation is available at (Italian language only) <https://www.agcm.it/chi-siamo/normativa/dettaglio?id=44e6b2c1-25da-47a0-b300-4d41c31a5161&parent=Articolo%2062&parentUrl=/chi-siamo/normativa/articolo-62> (last accessed 30.10.2019).

7. Statistics available at <https://ec.europa.eu/eurostat/> (last accessed 30.10.2019).



while e-commerce is likely to produce beneficial effects for consumer welfare in the short run, it is also generating a substantial impact on business strategies at different levels of the food supply chain that, in turn, may raise new issues that will have to be addressed by public policy.

In particular, speakers held that the features of two-sided platforms seem to require a substantial rethinking of traditional merger analysis in relation to those transactions involving online players, as opposed to brick-and-mortar grocery stores, with reference to: (i) the geographical dimension of the market definition; (ii) the identification of the empirical tools to be used for the anticompetitive assessment; and (iii) the suitability of structural remedies. In this respect, the recent merger between *Just Eat* and *Hungryhouse*, two online takeaway food ordering platforms operating in the UK, represents a very interesting case. The parties were able to persuade the Competition and Markets Authority (CMA) that the transaction should not raise any competition concern, despite having a combined share of 80% in the relevant market at stake. As a result, in November 2017, the CMA cleared the merger unconditionally⁸.

During the workshop, speakers also noted that even *Amazon's* acquisition of the grocery chain *Whole Foods* survived the antitrust scrutiny of the US Federal Trade Commission (FTC) in 2017⁹. In particular, the FTC took the view that the transaction did not raise any particular concern, since both Amazon and Whole Foods held a small share of the retail food market. Furthermore, Amazon's size and consumer reach were not considered either a barrier to entry for new firms or an obstacle to the expansion of existing competitors. Notably, the prioritization of its own products was not considered a relevant competition issue, since the platform was not an essential facility and there was no risk of foreclosure. Significantly, the main effects observed in the two years following the transaction amounted to a substantial reduction in prices

and a general modernisation of the food retail industry, which has also had important benefits for consumers. Speakers observed that the criticism put forward by a number of commentators in the aftermath of the FTC's decision was based on the perceived risk that the merger might result in lower wages for the two firms' employees. Given the complexity of the matter and its potentially huge impact on policies different from antitrust rules, speakers suggested that national competition authorities should always focus on the impact on consumers. On the other hand, competition enforcers should interact with other public authorities and establish forms of cooperation with them.

Finally, departing from a broader perspective, speakers argued that e-commerce may pose additional challenges for public policy, related, for instance, to safety and quality controls for food storage. Speakers also pointed to the need for regulatory harmonisation across EU Member States, in order to guarantee a more efficient system for taxation, transportation and delivery, as well as packaging, in accordance with other pieces of legislation favoring the protection of consumers, health and the environment.

8. CMA's final report (2017) is available at <https://assets.publishing.service.gov.uk/media/5a0d6521ed915d0ade60db7e/juste-at-hungryhouse-final-report.pdf> (last accessed 30.10.2019).

9. Statement of the FTC's Acting Director of the Bureau of Competition on the agency's review of Amazon.com, Inc.'s acquisition of Whole Foods Market Inc, 23 August 2017, available at <https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau> (last accessed 30.10.2019).



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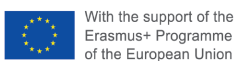
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Florence School of Regulation Communications and Media

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Florence Competition Programme

The Florence Competition Programme (FCP) in Law & Economics is a programme of the Robert Schuman Centre for Advanced Studies at the European University Institute, which focuses on competition law and economics. FCP acts as a hub where European and international competition enforcers and other stakeholders can exchange ideas, share best-practices, debate emerging policy issues and enhance their networks. In addition, since 2011, the Robert Schuman Centre for Advanced Studies organises a training for national judges in competition law and economics co-financed by DG Competition of the European Commission - ENTrANCE for Judges.



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