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ABUSE OF DOMINANT POSITION: THE CASE OF UNILEVER ITALIA MTK. OPERATIONS SRL VS LA BOMBA SNC

THE PURPOSE OF THIS THESIS WILL BE TO ILLUSTRATE THE GENERAL LEGAL FRAMEWORK INHERENT TO COMPETITION, FOCUSING MAINLY ON THE ABUSE OF DOMINANT POSITION, ANALYZING IT IN RELATION TO A CONCRETE CASE

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1. BRIEF DESCRIPTION OF THE CASE.

On 31/10/2017, the Antitrust Authority (henceforth AGCM) settled a case of dominant position, and abuse thereof, inherent to the marketing of Algida ice cream. The parties to the dispute were Unilever Italia Mtk. Operations Srl[1] (henceforth Unilever) and La Bomba Snc[2] . With measure number 26822[3], after four years of preliminary investigation[4], Uniever was sentenced to a fine of 60,668,580 euros, because it engaged in exclusionary conduct in the single-serving industrial ice cream sector, distorting the market and preventing competitors from competing on equal terms. The company "la bomba" complained that since 2011, Unilever had ordered, through its dealers, the operators of bathing establishments in various areas,[5] not to sell, together with its own products, also the ice lollies produced by the company "la bomba", because otherwise it would not have complied with the previous agreements concerning discounts, but, on the contrary, it would have imposed the payment of penalties and terminated the supply contract. The complainant complained that the characteristics of the contracts signed by Unilever, both with independent bars and with trade associations, hindered the development of its business, despite the high quality of the product made by "la Bomba" [6]. The Bomb has therefore highlighted the serious behaviours adopted by Unilever, which, in order to consolidate its dominance in the O.O.H [7]. market, was making use of "corporate bullyIng" practices. From my point of view, no retailer can give up offering certain products (the must-have brands[8]), because it could risk losing the trust of a certain part of consumers, who might have a great loyalty towards certain brands, especially in the market of "impulse products". On the other hand, on the side of the producers, we can see how they offer generous commercial policies to individual merchants, for example rewarding them in proportion to their ability to sell, with gadgets, displays, refrigerators, etc.. Corporate bullying is triggered when, in addition to the generous commercial policies mentioned above, illicit mechanisms are added to prevent the public operator from buying and marketing the products of the competition. Therefore, a two-for-one damage is realized: to the competition and to the consumers. The conduct of Unilever have certainly damaged the major competitors (eg Sammontana, the only company of impulse ice cream still made in Italy), but also small producers, suffocated by corporate bullyng even when they make products of superior quality. In my opinion, however, the greatest damage is to the final consumer, deprived of the possibility of choice.

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[1] "Unilever Italia Mkt. Operations S.r.l." is a company active in the development and marketing of consumer products, with well-known brands in the ice cream, food, home and personal care sectors, and is part of the Unilever Group. In the ice cream and frozen food market, consumed away from home, it sells well-known brands, including "Algida". In 2013 it had a turnover of approximately 1,405 million euros in Italy alone.

[2] "la Bomba s.n.c. " is a company that produces artisanal ice cream. Its turnover in 2014 did not exceed one million euros.

[3] AGCM Bulletin No. 47/2017 available at: https://agcm.it/pubblicazioni/bollettino-settimanale/2017/47/alias-9064

[4] The first report occurred on April 3, 2013, later supplemented in May 2015

[5] Adriatic and Lazio coasts

[6] A letter dated June 2013 sent by a Unilever area concessionaire to an association of bathing establishments was filed, in which the former acknowledged the high quality of the product of "la bomba".
AGCM Bulletin no.21/2015, point 9. Available at: https://www.agcm.it/dotcmsDOC/bollettini/21-15.pdf

[7] Out of home" distribution channel

[8] In general all the big brands of international fame (ex: Coca-cola, redbull, fonzies, etc.)

2. COMPETITION

2.1 Definition:

Our age is characterised by a strong globalisation of markets, which has gradually led to more uniform and convergent patterns of consumption and production. From these phenomena derives the necessity of a regulation of competition, in order to keep it free and fair, protecting the interests of consumers and enterprises, condemning anti-competitive behaviours. Antitrust law therefore becomes an indispensable and crucial tool for the achievement of market efficiency[9] because it leads to a higher level of consumer welfare[10], also acting as a selection mechanism: more efficient firms replace less efficient ones.
Competition is therefore an instrumental legal good, aimed at achieving higher goals, such as consumer welfare and freedom of private economic initiative.
This is generally understood as a form of market which contrasts with monopoly and oligopoly, since in it several undertakings produce goods or services (supply) which satisfy a plurality of purchasers (demand).
However, there is no provision giving a clear definition of the legal asset "competition".
In my opinion, there is no need to define competition definitively, not least because this is not possible. The idea of restricting competition to certain elements is dangerous thinking. Competition is a dynamic process, based on an indeterminate number of elements, including innovative capacity and the ability to exploit research. It is therefore necessary to maintain an open and flexible definition which will enable us to protect future new and as yet unknown forms of the market.

2.2 National competition:

In the Italian legal system, antitrust law[11] rests on two pillars: domestic and EU regulations. The source regulating competition and the market, at the national level, is Law n.287/1990[12]. This law is composed of six titles: 1) it regulates agreements, abuses of dominant position and concentrations; 2) it institutes the Guarantor Authority of Competition and the Market[13]; 3) it describes the powers of the AGCM[14]; 4) it regulates the prerogatives of the Government in the matter of concentration operations; 5) it concerns the provisions regarding participation in the capital of credit institutions; 6) it contains the norms inherent to the application of sanctions and judicial protection.
However, it must be specified that the national law has a residual character: it concerns agreements, abuses of dominant position and concentrations of companies that do not fall within the scope of Articles 101 and 102 of the TFEU, or other EU acts with the force of law and they are equivalent.
In accordance with the principles contained in art. 41 of the Italian Constitution, according to which private economic initiative is free[15], even if it cannot be carried out in contrast with social utility in such a way as to

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[9] Concept summarizing the ability of markets to provide the best service expected by the economic agents participating in them. Available definition: https://www.treccani.it/enciclopedia/mercato-efficiente_%28Dizionario-di-Economia-e-Finanza%29/ rcato-efficiente_%28Dizionario-di-Economia-e-Finanza%29/

[10] in relation to the price, quality and variety of goods and services available on the market

[11] Set of rules that regulate the relationships between entrepreneurs in order to allow a correct development of competitive relations.

[12]Text of the law available at : https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1990-10-13&attohttps://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1990-10-13&atto.codeRedazionale=090G0340&list30days=false

[13] is an independent administrative authority that carries out its activities and takes decisions in full autonomy with respect to the executive power. It enjoys broad cognitive and consultative powers. The official website is available here: https://www.agcm.iit/chi-siamo/

[14] Competition and Market Authority

[15] Art. 41 Const. para 1. Available at: https://www.senato.it/istituzione/la-costituzione/parte-i/titolo-iii/articolo-41#:~:text=L'iniziativa%20economica%20privata%20%C3%A8,alla%20libert%C3%A0%2C%20alla%20dignit%C3%A0%20umana.

cause damage to security, freedom and human dignity[16], the ratio of Law n.287/1990[17] is to establish regimes of undistorted competitive internal markets. In fact, the content of art. 41 of the Constitution seeks to achieve a synthesis between freedom of economic initiative and the need for it not to be absolute, but to take into account the limits of the law and to be exercised in a spirit of solidarity.
As mentioned above, the Italian legislation is clearly derived from Community law. This is also demonstrated by the interpretative rule in art. 1, paragraph 4, of law 287/1990[18], according to which the internal law must be applied and interpreted in harmony with European law. Furthermore, with the reform of Title V of the Constitution[19], one of the most important articles of the Constitution, art. 117, is modified. In paragraph 1, it [20]is unequivocally established that, in the matter of regulation of the markets, the state and regional laws are bound to respect the constraints deriving from the community system, among which is the principle of free competition.
The last fundamental aspect of Law 287/1990[21] is the establishment of the AGCM, an "ad hoc" body whose main mission is to protect competition. In fact, it investigates collusive behaviour[22], abuse of dominant position and excessive market power relating to integration operations, i.e. through mergers and acquisitions; in my opinion we could say that its direct objective is to protect competition, but indirectly it also protects the consumer, since the latter is always the weakest link in the market. Finally, it analyses and sanctions unfair commercial practices and misleading advertising, and ascertains the unfairness of contractual clauses included in consumer contracts. Therefore, the AGCM enjoys a series of investigative and decision-making powers, but also consultative powers on legislative and regulatory initiatives: it must report any discrepancies caused by laws, administrative measures or regulations to the legislative and executive bodies. Moreover, in the presence of presumable abusive conducts, the AGCM may act "ex post" by carrying out investigations or fact-finding inquiries on specific conducts that end with a warning or an administrative sanction.

2.3 Competition within the Community:
within the community legal system, we can include several sources, which have been affected by recent regulatory developments. One of the main sources is certainly the Treaty on the Functioning of the European Union (hereinafter TFEU), which contains rules aimed at preventing restrictions and distortions of competition in the market. It sanctions anti-competitive agreements between companies and abuses of dominant position. A central role is played by the European Commission, which, among other powers, can also prohibit mergers and acquisitions that lead to a reduction in competition. The European Commission's powers to investigate and intervene in possible breaches of EU competition rules are subject to internal scrutiny, including that of the Court of Justice of the EU.
Competition within Community law is regulated by various sources, some primary, some secondary. Many of these, moreover, have been affected by various regulatory developments.

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[16] Art. 42 Const. paragraph 2. Text available at: https://www.senato.it/istituzione/la-costituzione/parte-i/titolo-iii/articolo-41#:~:text=L'iniziativa%20economica%20privata%20%C3%A8,alla%20libert%C3%A0%2C%20alla%20dignit%C3%A0%20umana.
[17] See footnote 12
[18] See footnote 12
[19] Implemented by Constitutional Law No. 3/2001. Available at : https://www.gazzettaufficiale.it/eli/id/2001/10/24/001G0430/sg
[20] est%C3%A0%20legislativa%20%C3%A8%20esercitata,comunitario%20e%20dagli%20obblighi%20internazionaliArt. 117 Cost. Text available at: https://www.senato.it/istituzione/la-costituzione/parte-ii/titolo-v/articolo-117#:~:text=La%20potest%C3%A0%20legislative%20%C3%A8%20exercisede,communitarian%20and%20international%20obligations.
[21] See fotnote 12
[22] agreements on commercial policies between companies in the same market segment to harm competition and consumers

The most useful articles for the purposes of this presentation are: Article 101 TFEU and Article 102 TFEU. Article 101 TFEU[23], in its first paragraph, prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which affect trade between EU countries and which may prevent, restrict or distort competition. In paragraph 3, it recognises that some restrictive agreements may create objective economic benefits that outweigh the negative effects in terms of distortion of competition, and allows those agreements to be exempted from those prohibitions.
Article 102 TFEU [24]concerns the dominant position of an undertaking and prohibits its abuse.
With the entry into force of the Treaty of Lisbon[25], European competition law undergoes some changes: some terminology is removed[26], but others are confirmed[27].
As far as secondary law is concerned, the main sources include two regulations:

- EC Regulation No. 1/2003[28], which replaces the old Regulation No. 17/1962[29] on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty. The aim of the new regulation is to ensure the coordination of an integrated single market, especially after the entry of new member states into the EU. The new regulation moves from a system of prohibitions to a system of directly applicable exceptions, whereby the competition authorities and courts of the Member States have the power not only to apply Articles 81(1) and 82 of the Treaty, which are directly applicable by virtue of the case law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty[30].
- EC Regulation 139/2004. Sets out EU rules on concentrations with a Community dimension[31] where two or more undertakings combine by way of merger or acquisition. It provides that "A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market" [32].

3. ABUSE OF DOMINANT POSITION

3.1 Objectives of the legislation:
Antitrust law prohibits the abuse of a dominant position. This is considered as unlawful conduct capable of harming the principle of free competition in the market. It should be pointed out that a company is not prohibited from obtaining a dominant position in the market: the company that wins business "on merit" is not penalized. The primary objective of antitrust legislation is to protect competition, while the protection of individual competitors appears subordinate to this. The EU regulation governing the case at hand is Article 102 TFEU, which has similarities with Article 101 TFEU: both articles regulate the activities of companies in the market, representing directly applicable primary law rules. However, Article 102 TFEU differs from Article 101 TFEU in that it regulates the unilateral conduct of an undertaking with significant

[23] (ex Article 81 TEC). Text available at: https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX:12008E101&from=EN
[24] (ex Article 82 TEC). Text available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A12016E102
[25] Signed on 13/12/2007; entered into force on 01/12/2009
[26] e.g. 'undistorted competition' in Article 3 of the EU Treaty
[27] Articles 101 et seq. of the TFEU
[28]https://eur-lex. Adopted on 16/12/2002. Text available at: https://eur-lexhttps://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R0001
[29] Adopted on 06/02/1962. Enabled the development of Community competition policy
[30] Regulation (EC) No 1/2003, paragraph 4. Text available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A32003R0001
[31]EC Regulation No 139/2004, Art 1. Text available at: https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=celex%3A32004R0139
[32] EC Regulation No 139/2004, Art 2, paragraph 3. Teto available at: https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=celex%3A32004R0139

market power[33]. Collusion [34]between two or more undertakings is therefore not required as in the case of Article 101 TFEU.

3.2 Concept of dominant position:
Antitrust law does not contain an exact definition of "dominant position". However, it is possible to obtain a general definition from the case law of the European Court of Justice[35], which defines it as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers". An undertaking in a dominant position may therefore impair the normal course of competition in the market, since it may engage in certain types of conduct without concern for other competitors and their commercial policies. It could potentially drive competitors out of the market and even make it difficult for new competitors to enter the market.

3.3 Abuse of dominant position: European legislation.
abuse of a dominant position is regulated by Article 102 TFEU (formerly Article 82 TEC)[36], which prohibits any abuse by one or more undertakings which are in a dominant position in the common market or in a substantial part of it as being incompatible with the common market in so far as it may affect trade between Member States.
From a literal exegesis of the text of Article 102 TFEU we can observe that it contains four essential elements.

1) Existence of one or more undertakings. As far as the definition of an undertaking is concerned, the TFEU does not provide one. Also in this case it is necessary to look for it in the Community case law. Initially, the Court of Justice of the European Union in the case "Klaus Höfner and Fritz Elser v Macrotron GmbH"[37] in order to verify whether a public employment office could be considered an undertaking within the meaning of Articles 85 and 86 of the EEC Treaty, defined an undertaking as any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed, and that the activity of placement is an economic activity. The fact that placement activities are normally entrusted to public offices cannot affect the economic nature of those activities. Placement activities have not always been, and are not necessarily, carried out by public bodies. It follows that a body such as a public employment office which carries out placement activities can be classified as an undertaking for the purposes of applying the Community competition rules. At a later stage[38], the Court of Justice of the European Union added a further element to this definition, including any activity consisting of offering goods or services on a given market. Based on these two statements, we could therefore define an enterprise as any entity engaged in an economic activity consisting of offering goods and services, regardless of the methods of financing the activity and regardless of its legal status. Finally, by analysing the clarification provided by the

[33] It does not therefore concern all enterprises in general
[34] Anticompetitive agreement, express or implied, in which two or more firms seek to achieve an unlawful result in the marketplace through product or price policies. Source: https://www.studiocataldi.it/articoli/33846-collusione.asp ,
[35] Judgment of 14/02/1978, United Brands , Case 27/76, point 65. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61976CJ0027&from=IT
[36] TFEU, Title VII, Chapter I, Section I https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0017.02/DOC_2&format=PDF
[37]Judgment of the Court of 23/04/1991, Klaus Höfner and Fritz Elser v Macrotron GmbH, Case C-41/90, Points 20, 21, 22 and 23. Text available at: httpshttps://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61990CJ0041 r-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61990CJ0041
[38] Judgment of 12 September 2000,Case of Pavel Pavlov and others v Stichting Pensioenfonds Medische Specialisten, Joined Cases C-180/98 to C-184/98, paragraphs 116, 123, 126. Text available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61998CJ0180&from=IT

European Court of Justice in the "Wouters" case. [39]we can see that the competition rules do not apply to activities which, by their nature, purpose and rules to which they are subject, do not fall within the sphere of economic activity or which are linked to the exercise of the powers of a public authority. This judgment is also important because it underlines that natural persons can also be enterprises, when they exercise an economic or commercial activity on their own (Members of the Dutch Bar, lawyers,
were considered to be undertakings within the meaning of Article 81)

2) Influence in the common market. Also in this case there is no clear and coincident definition, but this can be derived partly from Article 101 TFEU and partly from the Community case law. For example, relying on the judgment in the "t mobile" case[40], the court held that given the absence of a precise notion, it is necessary to analyse the various agreements on a case-by-case basis. However, where such agreements are missing (e.g. in the case at issue, there was no formally drafted agreement, but only a substantive agreement resulting from the outcome of a meeting), because they were not recorded, the behaviour and reactions of the parties involved must be analysed. The onus is therefore on the Commission to prove the market-distorting effect by analysing the individual agreements intended by the parties to produce anti-competitive effects. This is because companies are unlikely to sign formal anti-competitive agreements, and it is therefore the European Commission's task to investigate the relationships and communications of the companies involved.

3) Dominant position and abuse of it. As said before, a dominant position obtained by merit is not forbidden, but it is the abuse of this position that is strictly forbidden. Therefore, in order for this case to occur, both elements are necessary, subjective and objective, which are therefore cumulative. An undertaking in such a position therefore has a responsibility not to hinder the normal course of competition. Moreover, a further facet not to be forgotten is that a dominant position may also be held by several undertakings, even if they are formally independent of each other, but they impose themselves on the market as a single entity "provided that, from an economic point of view, they present themselves or act together, on a specific market, as a collective entity. In this sense ... collective dominance[41]'.
The case law of the Court of Justice also[42] establishes a presumption of dominance, which arises when the audited undertaking has a market share in excess of 50 %. The burden of proof to the contrary lies with the undertaking. Market share is therefore an indirect measure of power within a given market sector. It is indirect because the market share may not respect the possible loss of revenue resulting from the price increase, also because it is indifferent to non-indifferent aspects, i.e. economies of scale, the number of buyers, entry barriers, etc. The Commission has stated that: "market shares provide a useful first indication for the Commission of the structure of the market and the relative importance of the various firms operating in it. However, the Commission will interpret market shares in the light of the relevant market conditions and, in particular, the dynamics of the market and the degree of product differentiation. The trend or development of market shares over time may also be taken into account in volatile markets or in markets based on the award of contracts[43]'.
Therefore, the assessment of the abuse of dominant position cannot disregard an evaluation of the market shares held, which are indicators of power within the relevant market. The identification of a relevant

[39] Judgment 19/02/2002, J.C.J. Wouters, C-309/99, paras 111, 112, 113. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61999CJ0309&from=IT
[40] JUDGMENT OF THE COURT 4. 6. 2009, T-Mobile Netherlands BV, CAUSE C-8/08, point 62. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:62008CJ0008&from=EN
[41] Court of Justice of the European Communities, Section V, 16/03/2000, No 395. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61996CJ0395
[42]Judgment of 3 July 1991, AKZO Chemie BV v Commission of the European Communities, Case C-62/86, Item 5. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:61986CJ0062_SUM&from=EN
[43] Commission Communication No 2009/C 45/02, point 13. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:IT:PDF

market is therefore extremely necessary, because it is within this market that the conduct of the company will be assessed and therefore its possible abuse.
On the basis of the Commission notice[44], it is necessary to consider the product and geographic markets together. The former is defined as 'the relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. [45]and the geographic market is defined as 'the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas[46]'. The notice also provides a yardstick for assessment: substitutability. According to the Commission, companies operating in a competitive market must respect two fundamental aspects: demand substitutability and supply substitutability. A market can be competitive if consumers have a choice between identical or similar products, i.e. products which cover the same needs, and if the supplier does not face any obstacles in providing services or products in a specific market. Only in this way will it be possible to calculate market shares that will provide relevant information on market power for the purpose of verifying the existence of a dominant position.

FACTS MENTIONED BY THE NORM: Article 102 TFEU contains four typical cases, but its content does not represent an exhaustive list of abuses. It therefore represents a general clause that can also be used to inhibit atypical abusive conduct. The abusive practices envisaged are:
1) directly or indirectly imposing unfair purchase or selling prices or other
unfair trading conditions. This can occur when an undertaking adopts excessively high prices, causing harm to consumers, or, conversely, excessively low prices, in order to cause harm to competitors. Predatory pricing, for example, is an abusive exclusionary conduct consisting in temporarily setting prices below its marginal costs. When this conduct is carried out by a dominant firm, the only purpose is to exclude other competitors from the market. In addition to causing harm to direct competitors, it is presumed that it will also cause harm to consumers, after having achieved a monopoly position, it will certainly raise prices again. This case also includes the prohibition of excessive discounting, because if the company is in a dominant position it will commit an exclusionary abuse.
2) limiting production, markets or technical development to the prejudice
of consumers. It occurs when the dominant undertaking engages in behaviour that aims at creating 'entry barriers' for competitors in order to prevent them from entering a particular market. The barrier can be "structural", i.e. linked to the basic conditions of the industry, or "strategic", i.e. intentionally created by the company already present in the market, for example with exclusive agreements, predatory pricing or massive advertising investments.
(3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. This is the case, for example, when an undertaking in a dominant position favours certain competitors, because it considers them unsafe, to the detriment of others, in the purchase of certain products or services. The classic example is that of a "refusal to contract" without objective justification, when the undertaking in a dominant position holds an "essential facility", i.e. a resource that cannot be renounced for the conduct of the other's business.
4. Contracts with additional services. This case occurs when the undertaking in a dominant position conditions the conclusion of the main contract on the conclusion of other supplementary contracts, which

[44] Communication from the Commission (97/C 372/03). Available https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A31997Y1209%2801%29
[45] Commission Notice on the definition of the relevant market, (97/C 372/03), point 7. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A31997Y1209%2801%29
[46] Commission Notice on the definition of the relevant market, (97/C 372/03), point 8. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31997Y1209%2801%29

however have no logical connection, neither from the point of view of commercial usage, nor from the point of view of the nature of the contracts. This conduct may be expressed through tying or bundling practices[47].
Tying' refers to the situation where a customer who purchases one product (the tying product) is forced to also purchase another good or service from the dominant undertaking (the tied product).
Aggregate selling', on the other hand, concerns the way in which products are offered and the way in which prices are set. It is differentiated into "pure", where there is a single block of products for sale, and "mixed", where the products are sold separately, but the sum of the individual costs is higher than the aggregate price.
Antitrust law will be deemed to be infringed[48] if the undertaking is dominant in the main market, and if the main and ancillary products are different in nature, i.e. not logically related.
Concluding the analysis of art. 102 TFEU it is necessary to underline that it has been accompanied by numerous implementing regulations and guidelines[49].

CRITICAL AREAS NOT MENTIONED BY THE LEGISLATION: both the Community legislation and the national legislation do not contain an exhaustive list of cases related to the abuse of dominant position. Among the various possible illicit cases not expressly provided for by the legislation in force, there are two that can be found in the case law: exclusionary abuse and exploitative abuse. With the first conduct we refer to the case in which a company in a dominant position makes it difficult for competitors to access the market, for example by using predatory prices, exclusivity clauses or loyalty discounts, indirectly harming the interests of the consumer, and directly those of competitors. By exploitative conduct, on the other hand, we refer to conduct whereby the dominant firm exploits its market supremacy directly over firms linked to it by a "vertical relationship".
In the event of the occurrence of any of the above cases, AGCM may act "ex post" through investigations that may result in the imposition of administrative fines or injunctions against the conduct.

3.4 National Scope:
the national legislation substantially reproduces the provisions of Article 102 TFEU in Article 3 of Law No 287 of 10 October 1990[50]. The only difference is essentially of a literal nature, since the Italian legislation speaks of 'unjustifiably onerous conditions'[51].

4. STAGES OF THE PROCEDURE AND ANALYSIS OF THE CONTRACTUAL SYSTEM.

After having analyzed the regulatory framework, we proceed to the analysis of the individual case.
By means of a report received on April 3, 2013, later integrated in May 2015, the company "La Bomba" [52]complained about an anti-competitive behaviour carried out by the company "Unilever".[53] which allegedly

[47] Communication from the Commission, (2009/C 45/02), Point 48. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=DA
[48] Communication from the Commission, (2009/C 45/02), point 50. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=DA
[49] Regulation (EC) No 1/2003 of 16 December 2002, Regulation (EC) No 773/2004 of 7 April 2004, Communication of the Commission of 27 April 2004, Communication of the Commission of 5.12.2008, Directive (EEC) No 2014/104/EU of 26 November 2014
[50] Law text available at:
https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1990-10-13&atto.codiceRedazionale=090G0340&elenco30giorni=false
[51] Title I, Article 3, paragraph 1 letter a
[52] "la Bomba s.n.c. "is a company producing artisanal ice cream. Its turnover in 2014 did not exceed one million euros.
[53] "Unilever Italia Mkt. Operations S.r.l." is a company active in the development and marketing of consumer products, with well-known brands in the *ice cream, food, home and personal care* sectors*, and is part of the*

ordered the operators of bars and bathing establishments in various areas[54] not to sell, together with its own products, the ice lollies of the competitor La Bomba , because otherwise it would apply the mandatory payment of penalties and the termination of the supply contract[55]. The complainant alleged that the characteristics of the contracts signed by Unilever, both with independent bars and with trade associations, hindered the development of its business, despite the high quality of the product produced by "La Bomba" [56]. The contractual system adopted by Unilever was based on a framework agreement concluded with the trade associations of retailers, within which the individual retailer belonging to the trade association entered into a contract with the Unilever area dealer. The content of the framework agreements was characterised by product exclusivity clauses, under which individual retailers were obliged to obtain their ice cream and frozen food products exclusively from Unilever, and cabinet exclusivity clauses, under which they were obliged to use only the refrigerators supplied on loan[57]. In order to obtain the full loyalty of the individual retailers, Unilever also allegedly provided for loyalty-building fees and the application of favourable discounts[58]. However, the application of these was, of course, subject to the achievement of a certain turnover target. In addition, there was also an annual fee for the trade association, calculated on the basis of the turnover targets achieved by the individual merchant members. Unilever's conduct thus severely hampered the development of the complainant and also restricted consumer choice. The situation was aggravated by the conduct of the Unilever officials, who carried out real checks on the exclusive supply of products, in which they admonished the trade associations because in many outlets associated with them the products of the competitor were also present[59]. Following this report, the trade association, in fact, communicated via email [60]to individual merchants the need to stop selling the product the bomb, because "Algida is one of the biggest supporters for the survival of the association", also providing a compensation of 250 euros for each store that would no longer deal with the competitor's product in their store. Following the report, the AGCM sent two requests for information (23 September 2014 and 17 March 2015) to Unilever in order to understand the contractual system adopted by it. The pre-investigation activity revealed that Unilever used approximately 50-250 dealers, who provided the products by entering into precise agreements with individual outlets, trade associations and management customers. After gathering such information in the pre-investigation phase, on June 4, 2015, the Italian Antitrust Authority (AGCM) commenced an investigation against Unilever Italia Mkt Operations S.r.l.. pursuant to article 102 of the TFEU and article 14 of Law 287/1990, in order to verify the existence of conduct that restricts competition.

We will now proceed to illustrate the commercial policies adopted by Unilever, analysing the contractual system adopted, the type of market, the damage caused and finally the penalty imposed.

UNILEVER'S CONTRACTUAL SYSTEM: Unilever distinguished its customers into 'dealers' and 'management'. The type of contract adopted, and the way in which it was concluded, varied according to the customer.

Unilever Group. In the ice cream and frozen food market, consumed away from home, it sells well-known brands, including "Algida". In 2013, it had a turnover of approximately €1,405 million in Italy alone.

[54] Adriatic and Lazio coasts

[55] In which there were big discounts

[56] A letter dated June 2013 sent by a Unilever area concessionaire to an association of bathing establishments, in which the former acknowledges the high quality of the "la bomba" product, has been filed. Text available at Point 9 of AGCM Bulletin, No.21., 15 June 2015, p. 171. Available at https://www.agcm.it/dotcmsDOC/bollettini/21-15.pdf

[57] In this regard, Unilever allegedly asked its stores to remove the frigs that the bomb had provided for the storage of its popsicles. Text available at paragraph 7, AGCM Bulletin, No.21., 15 June 2015, p. 171. Deposable at: https://www.agcm.it/dotcmsDOC/bollettini/21-15.pdf

[58] AGCM Bulletin, No. 21., 15 June 2015, Point 5. Available at: https://www.agcm.en/dotcmsDOC/bulletins/21-15.pdf

[59] AGCM Bulletin, No. 21., 15 June 2015, Point 9, letter June 2013

[60]AGCM Bulletin, No. 21., 15 June 2015, Point 9, email July 2013

In the case of the "dealer" customers, Unilever operated on a national territory through the conclusion of dealership mandates, which in turn were characterised by bilateral exclusivity. The initial scheme was therefore as follows: Unilever marketed its products with a single distributor, who resold them in a certain territorial part; at the same time, the dealer could not distribute competitors' products. Subsequently, the dealer started its business by submitting to the individual outlets within its territory standard contracts supplied by Unilever. The contracts were then passed on to Unilever, which inspected them. The dealer was free to choose the outlets he wished to sell to, and in cases where he had the discretion to do so could also apply special discounts, provided the content of these was agreed in advance with unilever. Within this customer group, we can distinguish two types of contract: 'normal' and 'special'. The standard contract referred to low annual requirements, while the special contract referred to higher quantities of goods[61]. All standard contracts provided for immediate payment of the goods and payment of discounts at the end of the season, based on annual turnover. In addition to this, there were clauses of merchandise exclusivity, exclusivity for equipment on loan for use and a tacit extension clause. In addition, the contracts concluded through the concessionaires included contracts concluded with trade associations. These contracts could be described as 'framework agreements', to which the subsequent contracts concluded by the dealers with the individual outlets belonging to the trade association then referred. The association undertook to purchase the agreed quantity on the agreed terms, and in return unilever paid them a fee based on the number of sales.
The other types of customers were the "management" customers. [62]with whom Unilever entered into contracts without the help of dealers. These contracts also included product exclusivity and fixed or proportionate discounts.
Irrespective of the type of customer, all the contracts contained a clause stating that the business equipment was to be loaned by Unilever on condition that it was used only for the sale of Algida ice cream. There was also an obligation not to promote and market the products of competitors. In the event of non-compliance, Unilever would terminate the contract and impose penalties.

RELEVANT MARKET: the case under consideration is in the market for the sale and production of industrial ice cream in the OOH sector. Analyzing the market in the area of places of purchase and consumption, we can distinguish:
1)home consumption ("in home" or IH) which takes place in the home not immediately after purchase
2) "out of home" or OOH consumption that takes place immediately in the same place of purchase
Furthermore, based on the type of consumption, it is possible to distinguish the ice cream sector into: impulse ice cream and take-away ice cream. Impulse ice cream can be divided into two categories: industrial and artisan, where the first, Italy, has a consumption that takes place on the whole national territory.
Based on the data provided by Unilever in 2013, the ice cream sector was worth about 4,921 million euros, and Unilever, with the brand Algida, ranks first in the sales of industrial impulse ice cream, having a market share of 40-50 %, followed by the other two biggest brands that also enjoy international fame, namely Nestlè and Sammontana, which possess a market share of about 15-20 %. In 2015, on the other hand, Unilever's position was even stronger, as it holds a 60-70 % market share with its algida brand[63]. In this context, where not even leading companies such as Nestlè and Sammontana are able to compete on equal terms, the small company "la Bomba" also fits in, which in addition to being a small company that operates only on a certain territorial area, also offers a limited product, namely ice-based products.
Unilever is therefore considered to enjoy a dominant position in the marketing of impulse ice cream because:

[61] It concerned outlets located in areas where there was higher public access, e.g. bathing establishments, cinema bars etc.
[62] Companies that manage several points of sale
[63] Source: 2015 Canadean study

- It has a share of more than 60 %.
- It holds power in particular geographical areas [64]
- Great fame of the brand Algida
- Ability to select customers and impose exclusivity clauses on them

On the basis of these characteristics held by uniever in the market, we can therefore argue that the contractual clauses adopted were intended to keep as many customers as possible, while at the same time hindering the entry of competitors into the market and, indirectly, also limiting consumers' choice. Furthermore, unilever exercised constant control over compliance with the product exclusivity clauses, through its dealers and trade associations. As mentioned above, the contractual clauses differed according to the type of customer to whom they were addressed. This is because Unilever scrupulously analysed the risk of loss of turnover on the basis of the characteristics of its competitors. In particular, the bomb company was a dangerous competitor because consumers had a particular liking for its products. Consumers preferred the bombsicle produced by la bomba to the unilever ice lolly, which was considered to be a poor quality product.
Unilever tried to justify itself by arguing that its dealers were autonomous entrepreneurs in the implementation of commercial policies, and that therefore it was not possible to see Unilever and its dealers as a single economic entity. However, from an analysis of the contracts and relationships between Unilever and its dealers, it is not possible to regard the dealers as autonomous entities when it comes to the provision of exclusivity clauses and loyalty conditions, because, according to Community case-law, "in the context of competition law, the concept of an undertaking must be understood as referring to an economic unit from the point of view of the subject-matter of the agreement, even if from a legal point of view that economic unit consists of several natural or legal persons[65]".
In view of this, it is considered that Unilever, by its conduct and, in particular, by the exclusivity clauses adopted, has distorted competition throughout the Italian national territory, which represents part of the European market. Consequently, the abuse is liable to undermine what is pursued by the EU, namely economic integration between the Member States. Unilever's conduct therefore constitutes an abuse of a dominant position, as it infringes Article 102 TFEU. On the basis of art. 15, paragraph 1, law n. 287/1990[66], which provides for two criteria for the application of an administrative fine, namely the seriousness of the infringement and its duration, the AGCM imposed a fine of €60,668,580.
After the imposition of the measure, Unilever decided to appeal the AGCM's measure. In this regard, I believe it is appropriate to briefly describe the Italian system of jurisdiction and competence. As mentioned above, the AGCM is an independent administrative authority. Therefore, in order to challenge one of its measures, it is necessary to resort to jurisdictional powers. In this case, the competence lies with the administrative judge, in particular with the Regional Administrative Court of Lazio, which is the court of first instance in the administrative field. Against the measures of this court, it will be possible to appeal to the Council of State. Unilever complained about a deficient investigation by the AGCM and the absence of a proper market analysis. During the investigation, Unilever informed AGCM of its willingness to remove the unlawful aspects highlighted by AGCM, but AGCM rejected the commitments on insufficient grounds. Unilever continued to argue for dealer autonomy, claiming in support of this that Unilever does not own any share of the dealers' assets. Subsequently, the AGCM entered an appearance, asking that the appeal be dismissed. However, the Regional Administrative Court, after holding the case in abeyance, decided to uphold the AGCM's decision, arguing that the market share held by unilever, together with the conduct of the dealers, who directly apply unilever's commercial policies, enable the latter to influence the

[64] Southern Italy and the islands, where there is the greatest number of coasts and tourists
[65] Paragraph 11 of the grounds of the judgment of the Court (Fourth Chamber) of 12 July 1984.
In the case of Hydrotherm Gerätebau GmbH against Compact del Dott. Ing. Mario Andreoli & C. sas. https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61983CJ0170#MO
[66]Text available at: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato

performance of the market. In a ruling dated May 31, 2018, No. 6080, the Lazio Regional Administrative Court therefore rejected the appeal brought by unilever. From the TAR's rejection, Unilever decided to appeal before the Consiglio Di Stato. Unilever requested the application of the principles applied by the European Court of Justice to a similar case[67], which saw "Intel Corp. Inc." against the "European Commission". The European Commission had imposed a fine of approximately 1 billion euros on Intel Corp. Inc. Because it had considered that the behaviour adopted by this one was configurable as an abuse of dominant position. The case was similar because to the society in question was contested the adoption of commercial policies, and that is the application of discounts conditioned by a clause of exclusive supply, that violated the norms in matter of competition previewed from the EU. Intel, in fact, had applied a discount system towards detrminate companies [68]that produced electronic equipment, in particular PCs, as long as they had committed to buy certain components [69]exclusively from Intel. The European Commission, however, considered that this commercial practice had a negative influence on the market, causing damage to free competition. After the imposition of the fine, Intel applied to the EU Court for annulment. However, the court upheld the fine. Intel then decided to appeal to the EU's Court of Justice, claiming that the Court had made an incorrect assessment of the discounting system adopted. In particular, Intel argued that the GC had not correctly assessed the AECT test[70], because the Commission's assessment of this test was vitiated by numerous errors, and therefore the GC, if it had carried it out correctly, would have reached a different conclusion from the Commission, namely that the discount scheme was not capable of harming competition. The decision of the European Court of Justice was to refer the case back to the court, as further assessments were necessary. [71]Unilever, therefore, relying on the Intel judgment, argued that AGCM had not carried out a concrete analysis of the concrete effects of the conduct, since Unilever continued to argue that there was no exclusionary effect on its competitors. On the contrary, AGCM argued that the principles of the Intel judgment concerned only abuses arising from the rebate system, and that the ECJ's decision was based exclusively on a formal defect inherent in the AECT test, not also abuses inherent in exclusivity clauses[72]. on the basis of the questions raised, the council of state decided to suspend the trial and refer the matter to the court of justice[73]article 267 tfeu, since it is necessary to verify whether the principles of the intel judgment are generalizable, regardless, therefore, of the type of clauses

CONCLUSIONS.

In my opinion, the conduct engaged in by Unilever falls within the scope of the abuse of dominant position provided for in Article 102 TFEU. The market share held, the relationship with the dealers, and in particular the system of standardization of contracts submitted to individual stores can only reflect the clear will of unilever to establish a system of closure towards its competitors, large or small. The company has clearly put in place corporate bullying activities through exclusivity clauses, loyalty discounts (whose objective was to cage the individual stores in a perspective of convenience to the detriment of any offers proposed by

[67] Judgment of the Court (Grand Chamber) of 6 September 2017, Case C-413/14 P. https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62014CJ0413
[68] HP, DELL, LENOVO, NEC
[69] Intel Processors
[70] Judgment of the Court (Grand Chamber) of 6 September 2017, ntel Corp. Inc. v. European Commission, Case C-413/14 P, paragraphs 131 and 132. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62014CJ0413
[71] Judgment of the Court (Grand Chamber) of 6 September 2017, ntel Corp. Inc. v. European Commission, Case C-413/14 P, paragraphs 148. Available at: https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62014CJ0413
[72] State Council Judgment, No. 07713/2020 , Point 3.3. available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=27D40A6829D51693EDD1AE1EEB2A726B?text=&docid=237942&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1793878
[73] Judgment of the Council of State N. 07713/2020 , point 3.4. text available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=27D40A6829D51693EDD1AE1EEB2A726B?text=&docid=237942&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1793878

competitors) and cabinet exclusivity clauses. In addition, the justification of unilever inherent autonomy of its dealers in my opinion is completely unfounded, because a company of international level can not be unaware of European case law on the definition of enterprise. Moreover, by means of the territorial exclusivity mandate, the dealers become part of Unilever's distribution and sales chain, and therefore any activity carried out by the dealers can only benefit Unilever. I also consider that the reference to the principles adopted by the European institutions in the Intel case is not entirely applicable to the present case. It is true that Intel applied a discount system similar to that applied by Unilever, but at the same time Unilever's conduct is not limited to the discount system alone, since it carried out genuine market research and, with the help of its dealers, sought in every way possible to exclude the 'bomb' competitor from the market. This is further confirmed by the evidence submitted by la bomba, i.e. e-mails and letters in which the clear intention to eliminate the product supplied by it is apparent. In this regard, I recall the contents of a letter dated June 2013 drafted by a Unilever dealer and addressed to a trade association. In this letter, the Unilever official stated that "the La Bomba product has been widely distributed to many of our member stores, a list of which is attached. The cost of this product, without wishing to speak of quality, is higher than ours, without taking into account the discounts you benefit from. In addition, grant a dedicated refrigerator makes this initiative impactful and penalizing for us (we no longer sell ice-based products). In addition to the economic damage, I am concerned because the company has sent me several reports that I cannot underestimate or ignore. I believe it is essential to intervene decisively, perhaps with a proposal that we could study together, always with the intention of safeguarding reciprocal interests"[74]. Finally, I believe that the fine imposed by the AGCM is fair, because in addition to having highlighted the serious conduct carried out by Unilever, it is based on a specific national law, in particular Article 15, paragraph 1, of Law no. 287/90. 287/90[75], according to which, in the case of serious infringements perpetrated over a long period of time, in addition to setting a deadline for the elimination of the unlawful conduct, the AGCM may impose an administrative fine calculated on the basis of the turnover achieved by the company that carried out the abusive conduct.

[74] AGCM Bulletin, No.21, June 15, 2015,Item 9. Deposable a. https://www.agcm.it/dotcmsDOC/bollettini/21-15.pdf
[75] Text available at: https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato#:~:text='tax avoidance%20fiscal%22%5D-,1.,the%20elimination%20of%20infractions%20same.

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Listed below are the online sources from which I have found data, news, documents and evaluations to write the semester paper:

all documentation relating to the contracts and conduct of unilever were found on:

https://www.agcm.it/dotcmsDOC/bollettini/47-17.pdf

https://www.agcm.it/dotcmsDOC/bollettini/47-17.pdf

The judgment of the TAR LAZIO is available on:

https://www.giustizia-amministrativa.it/

judgment of the council of state is available on:

https://curia.europa.eu/juris/showPdf.jsf;jsessionid=27D40A6829D51693EDD1AE1EEB2A726B?text=&docid=237942&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=1793878

national laws are available at:

https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1990-10-13&atto.codiceRedazionale=090G0340&elenco30giorni=false

all the relevant judgments have been found on:

https://eur-lex.europa.eu/homepage.html?locale=it

other resources available on:

https://www.studiocataldi.it/

https://www.brocardi.it/

https://www.studiolegaleadamo.it/