Abusive trading practices in the "Measures for a Better Functioning Food Supply Chain Act 12/2013, of 2 August"

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In this paper we analyse a discussion on the abusive trading practices regulated under the recent Act 12/2013

1. Scope of the act

The Official State Gazette of 3 August (no. 185) has published the Measures for a better functioning food supply chain Act 12/2013, of 2 August, which will come into force five months after publication.

As stated in its first article, the purpose of this new Act is to introduce measures to improve the functioning of the **"food supply chain"**, defined as the set of activities carried out by the different operators involved in the production, processing and distribution of food or food products (including those made between agro-food supply chain operators in the process of packaging, processing or storing for later sale, and purchases of livestock, fodder and all raw materials and ingredients used for animal feed).

For the purposes of application of the Act, only "natural or legal persons in the food industry , including associations, plants or joint ventures for sales or purchases, engaged in economic activity at the food supply chain level" shall have the legal consideration of "**operators**". Therefore, end consumers, and any trading with them, are excluded from this Act.

It should be noted that the Act expressly **excludes** from its scope the following activities:

— Food transportation.

— Trading with catering or hospitality businesses.

— Product deliveries made to agricultural cooperatives and other partnerships by the members of the same where the articles of association (corporate bylaws) lay down this duty.

Within this scope, it is noteworthy that the Act restricts the application of some of its provisions (Part I of Title II) to the trading of operators conducting commercial transactions whose price exceeds 2,500 Euros, provided they are in conditions of imbalance within the meaning of article 2 of the Act. However, another set of provisions relating to certain abusive trading practices, which are those that we address in this paper, apply to all commercial transactions covered by the scope we have just defined.

2. Regulation of abusive trading practices

2.1. General

Several issues are regulated under Part II of Title II of the Act: a) unilateral changes and unanticipated commercial payments

(art. 12), b) the provision of commercially sensitive information (art. 13), and c) the management of marks (art. 14).

Underlying these three precepts is the legislature's desire to avoid a number of practices resulting from the asymmetry nowadays observed among food supply chain operators. In fact, facing the smaller operators we find , as the strong party, large retail groups with a bargaining power such that has led the Opinion of the European Economic and Social Committee on the Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe [COM (2013) 37 final], for example, to highlight the large imbalances in the food supply chain , "since the oligopolies have enormous bargaining power vis-à-vis their commercial partners, who are far more fragmented." And this same situation is made clear in the Preamble of Act 12/2013, which states that it sometimes results "in potentially abusive trading practices and anti-competitive practices that distort the market and have a negative effect on the competitiveness of the agro-food sector as a whole".

There is, therefore, a current of opinion tending to legally prevent abusive practices resulting from this situation. And this is what has led the Spanish legislature to regulate these issues, connecting with the guiding principles of Act 12/2013 set out in article 4, according to which "business relationships subject to this Act shall be governed by the principles of balance and fair reciprocity between the parties, contractual freedom, good faith, mutual interest, equitable sharing of risks and responsibilities, cooperation, transparency and respect for free market competition."

Several of the practices regulated by Act 12/2013 are already regulated by other legislation (including the Unfair Competition Act) or are part of the catalog of conduct that falls under the scope of the Competition (Antitrust) Act 15 / 2007 and articles 101 and 102 TFEU. This can lead to the concurrent application of different legislation to the same conduct, or at least the need to conduct a comprehensive study of such conduct from the perspective of three different pieces of legislation. It is still early to assess whether this accumulation of legal remedies will be effective and beneficial to the market or will otherwise complicate the legal analysis too much to the point of generating uncertainties.

The most important consequence of the inclusion of these practices in the new Act lies in the administrative sanctioning procedure provided therein. Indeed , article 23 of Act 12/2013 considers the commission of (some of) the abusive trading practices a food contract infringement, resulting in the imposition of fines that can range from 3000 Euros, for minor infringements, to one million Euros, in the case of very serious infringements . However, with regard to administrative sanctions, it should be noted that when, as a result of a breach of the obligations contained in the Act, effective market competition is affected, the provisions contained in the Competition (Antitrust) Act 15 / 2007 of 3 July shall apply. Therefore, art. 22.2 of Act 12/2013 provides that the investigation of a criminal case before the courts of justice or the initiation of competition infringement proceedings, will suspend any administrative sanctions brought for the same facts.

This explains why some producer organizations (such as COAG , Coordinator of Farmer and Rancher Organisations) have expressed their dissatisfaction with the fact that Act 12/2013 did not include any reference to or regulation over other abusive practices (despite being subject to general legislation on unfair competition and antitrust) such as the conditioning of product supply to not purchasing competing products, or selling below cost cases.

2.2. Unilateral changes and unanticipated commercial payments

According to article 12 of the new Act, ad-hoc changes to contractual terms are prohibited. And in this regard, food contracts must contain appropriate

clauses providing the procedure for any amendments and, if necessary, determining their retroactive enforceability.

The above article also prohibits additional payments over and above the agreed price unless they refer to the reasonable risk of listing a new product or the partial financing of the commercial promotion of a product (reflected in the retail unit price) as agreed and expressly included in an agreement made in writing, together with a description of the consideration to which such payments are associated. Thus, there is an intention to curb the practice by which providers deliver a product and at the end of the campaign apply non-established discounts, or situations where providers are obligated to make payments to distributors to finance promotions or commercial support. In the words of the Minister of Agriculture, Food and Environment, Mr Arias Cañete, this is a substantial reform to the current situation as "the farmer will know the economic return he will have, there will be no surprises along the way and there will be no discounts or promotions."

However, the wording that the Act gives this precept is hard to comprehend, to the extent that one wonders if the legislature simply expressed itself incorrectly. Indeed, article 12.2 of the Act states that it prohibits "additional payments over and above the agreed price", except in certain cases. Literally, what this provision prohibits is that an operator, who has already paid the product price, should have to pay an additional or higher price. That is, it prohibits, once the transaction price has been fixed, the buyer from having to pay an additional price, save for in the exceptional cases provided. The rule seems to provide exactly the opposite of what it intends to regulate, since the rule seems to intend to prohibit, at least in spirit, that the *supplier* should have to make payments to the buyer (that is, prohibit a farmer from making additional discounts or having to make payments to the transformer, or the supplier of a distributor from having to make payments to the latter), not that the buyer should make payments to the seller. Therefore, we wonder how effective a rule will be that seems designed for a specific factual situation, but is drafted in a way that regulates the opposite case.

On the other hand, we must not forget that payments for promotional campaign entries, listing or upfront entry and other standard situations in the world of distribution, are agreements that are in any case subject to competition law. Specifically, on vertical restrictions, the Communication from the Commission on the subject supports the validity of such agreements in paragraph 203, provided that the market shares of buyer and supplier do not exceed 30 %. Beyond that market share, the validity of such agreements from a point of view of competition law should be analysed case by case. So the mere conformity with the provisions of the Food Supply Chain Act does not guarantee the legality of this conduct from the point of view of competition law.

Moreover, the Act also provides that "the agreement must set out refund mechanisms for previously paid payments, when the consideration or promotion or similar activities related to them did not comply with the terms and conditions agreed."

2.3. Provision of commercially sensitive information

Article 13 of Act 12/2013 provides that food supply agreements must specify in writing the information to be furnished by the parties for the effective fulfillment of their contractual obligations, as well as the period to deliver such information, which in any case should be proportionate and justified on objective reasons related to the subject matter of the contract, without prejudice to the application of the rules on competition.

On this basis, the Act deals with the supply of commercially sensitive information, defined as "the set of technical skills that are not in the public domain, which are related to the nature, features or purpose of a product, to the methods or processes for their production, or to the distribution or marketing methods or means, and

whose knowledge is necessary for the manufacture or marketing of the product" (article 5 h). That is, what is traditionally known as know-how or trade or industrial secret.

Well, this type of information may be required between operators provided such requirement is recorded in the written agreement. If not stated in the agreement, an operator may not require from another supply-chain operator commercially sensitive information about his products, nor documents for verifying such information. Actually, even before the adoption of this regulation, an operator's demand of secrets of another was not legally feasible (in the absence of prior agreement). However, what is now clear from the new regulation is that this type of requirement (where there is no legal basis, in the sense that the requested party is obliged to provide the information), will involve an abusive trading practice, and will result in administrative sanctions provided for in Act 12/2013.

Moreover, article 13.3 also provides that "commercially sensitive information obtained in the process of negotiation or execution of a food supply agreement will be destined only for the purposes for which it was provided, subject always to the confidentiality of information transmitted or stored". In fact, this provision already derives from the provisions of the Unfair Competition Act in relation to the protection of secrets.

And finally, Act 12/2013 also stipulates in article 13.4 that "operators shall not require from other operators commercially sensitive information nor disclose such information on other operators, in particular documents for verifying such commercial information". One wonders, given this categorical prohibition, whether it is lawful or not for a written agreement to stipulate that an operator will provide commercially sensitive information held regarding another operator where the latter has authorised the former to disclose such information to third parties. It does not seem logical to prevent such conduct, without prejudice to the application of competition rules to exchanges of commercially sensitive information.

2.4. Brand management

Article 14 of Act 12/2013, under the heading of "brand management", includes a number of practices that are already covered by the Unfair Competition Act, the Competition (Antitrust) Act, the Trade Marks Act, or the General Advertising Act. And indeed, Act 12/2013 expressly refers to these legal texts by providing that "the operators shall manage the food brands offered to the consumer, both their own and those of other operators, avoiding practices contrary to free competition or that constitute unfair competition in accordance with the provisions of the Competition (Antitrust) Act 15/2007, of 3 July , and the Unfair Competition Act 3/1991, of 10 January , as well as unlawful advertising pursuant to the General Advertising Act 34/1988, of 11 November (art. 14.1). Thus, Act 12/2013 simply refers at this point to other legislation, without adding anything substantial to the subject matter (subject matter that is regulated, for example, specifically in the European Commission's Guidelines on vertical restrictions).

After this general referral, Act 12/2012 makes a more specific reference to cases of exploitation of the reputation of others and unlawful advertising in the context of brand management , an unnecessary reference, since those cases are already covered by article 14.1. Indeed , according to article 14.2 , "the improper use by an operator and to the sole benefit of an external business initiative is prohibited, as well as those actions that constitute unlawful advertising on account of being deemed unfair through the use, either in containers, in presentation or product or service advertising of any distinctive elements that provoke a risk of association or confusion with brands or trade names of another operator in the terms defined in Trade Marks Act 17/2001, of 7 December, and notwithstanding the provisions of articles 11 and 12 of the Unfair Competition Act."

Doubtless, this specific referral seeks to curb trade mark and unfair competition infringement related to the most common distinctive signs, both in terms of brand and off-brand labels. Now, from the time that article 23 of Act 12/2013 does not class the infringement of article 14 as a sanctionable infringement, some of the practices referred to in article 24 do not entail any consequence beyond those already contained in the said unfair competition, competition, unlawful advertising or trade marks legislation. Therefore, at this point, *nihil novum sub sole*.

3. Production and dissemination of comparative studies and analyses

In relation to competition issues regulated by Act 12/2013, the fourth additional provision of the Act, on comparative studies and analyses of food products , ready for sale to the final consumer , and whose findings are intended for dissemination, also merits some words.

According to Act 12/2013 these studies, whether conducted at the initiative of a natural person or a legal person, must observe the principles of truthfulness, technical and analytical rigor and compliance with all the guarantees provided for in EU or national legislation on analyses. In addition, all tests or analyses based on studies, reports and analyses must be performed by a laboratory that has an accreditation equivalent to that required from laboratories involved in the official control of foodstuffs.

Test results will be communicated to the manufacturer or owner of the establishment in accordance with the procedure established by regulation, allowing for a second comparison analysis and, if necessary, a third resolving analysis where a legal breach derives from the results. Similarly, regulation must determine the procedure studies, reports or analyses must conform to, regarding the technical description, the procedure to purchase the products to be analysed, sampling requirements and the procedure for communication of results to concerned parties.

Last, we recall the principles derived from unfair competition and consumer protection legislation, providing, for example, that studies, reports and analyses should not mislead consumers as to the safety , product quality or compliance with relevant food legislation.

And in short, the above provides that the breach of the principles and requirements for studies, reports and analyses carried out by public or private entities intended for public disclosure may be regarded as conduct objectively contrary to the requirements of good faith in accordance with Part II of the Unfair Competition Act 3/1991, of 10 January. However, the violation of these principles and requirements for studies, reports or analyses is not classed as a sanctionable administrative infringement on the basis of Act 12/2013.