THE ROLE OF COMPETITION AUTHORITIES IN ISSUE CONTRACTS: THE NEED FOR A NEW COOPERATION PROSPECTIVE IN EUROPE*

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Good afternoon all colleagues and thank you Professor Carl Stychin for inviting me to talk to you about my research. My aim has been investigating how the European Competition Network (ECN) can work pursuing not only the protection of fair competition but also consumers. Thus, the goal is the focus on the necessity to improve cooperation among Competition Authorities in Europe and their relationship with European Commission. Normally, when we speak about what competition authorities do, we naturally think of problems which occur because of mergers, cartels, dominant position, and their effects on small business. Nevertheless, it is important to focus on the potential powers of Competition Authorities and of the ECN to protect consumers' rights through indirect impact on contract. My research on the theme of Multilevel Marketing has been an example and therefore a demonstration of the potential role of Competition Authorities regarding consumer rights and the US experience has been a starting point, taking into account the role of the Federal Trade Commission (FTC) being crucial for a competition and rights protection.

In reverse order of what I have just proposed to talk about and with the purpose to facilitate the understanding of my research path and therefore also the results recorded today, I would like to talk at first about Multilevel Marketing (MLM) and the role of the FTC and later about the role of the ECN and the activities of National Competition Authorities (NCAs).

The opportunity to connect the US scenario with the European one comes from my studies on MLM, a direct selling system, very common all over the world that represents a multi-billion-dollar worldwide industry and is often used to hide pyramid schemes.

The research on MLM and the lack of legislation on this theme not only in the US but

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also, in Europe led me to discover the significant role that competition authorities can also play in protecting consumers.

The importance of the role of the Competition Authorities came up because of the lack of legislation about MLM which has been replaced by measures taken by the FTC. This has indirectly affected this form of selling, with statements that can be implemented across the board. It's important to bear in mind that, in the US, competition law is a federal topic. Therefore, it's axiomatic that the FTC has been playing a very important part because it is easy to understand how huge the power of the FTC is. Bearing in mind its history is also vital to recall that the US jurisdiction was the first one to have introduced a coherent competition system, known as "antitrust" still based today in these three Statutes: Sherman Act 1890, Clayton Act 1914 and the Federal Trade Commission Act 1914.

That's why, after having outlined the MLM system and the strength of the FTC on MLM regulation, I would like to make a comparison with the European experience, where there is a big disparity between the resolutions of competition Authorities in Europe and where only recently the importance of federalization of EU Competition law enforcement has been established. A significant move in this way has been the recent EU directive n. 1/2019 that has the specific aim of empowering the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Nevertheless, the road to follow is still long in order to achieve real cooperation between Competition Authorities, especially when the undertakings involved in proceedings are multinational.

After this brief introduction, first and foremost, it's important to establish the characteristic features of multilevel complex method of direct selling that was born in the US and has now spread all over the world. MLM is a method whereby consumers are actively involved in the system, shortly afterwards becoming distributors of the same goods or services purchased. Distributors operate as independent agents with huge flexibility about the organization of the job and with the commitment to create a minimum of two new sales downline. In truth, they are encouraged to build and manage their own sales force by recruiting and training other independent agents. On one hand, the stated advantages for the company are the opportunity to save money usually invested in marketing and advertising with the aim to allocate most of the resources to

the quality of the products or services; the most important marketing aspects are accomplished directly by the distributors-consumers.

On this prospective, it's interesting how in MLM it's possible to ascertain the evolution of the notion of the consumer or of the weak part of the contract, considering that in this direct selling method the consumer is most of the time also the distributor. However, in Competition Law the term consumer refers not only to the final consumers, but also to the person who has a direct and indirect use of the product affected by the anti-competitive conduct or agreement. The competition law notion of consumer is broader than the one used in consumer law and, therefore, the protective scope of competition law cannot be limited to the protection of final consumers. Competition Law is aimed at enhancing consumer welfare and the notion of consumer embraces a wider variety of stakeholders, for whom Competition Law has a role to play. The importance of consumer welfare in EU Competition Law can primarily be deduced from EU legislation and soft law instruments. The wording of Articles 101 and 102 TFEU, as well as the way in which they are interpreted by the Commission, seems to attribute particular emphasis to the impact of certain competition measures on Consumer Law. Accordingly, it is important not to underestimate the relationship and interplay between Competition and Consumer law and think about the potential spill over effects between the two disciplines, and the limits of Competition Law enforcement in endorsing different consumer interests.

On the other hand, consumers are interested in entering in network marketing because it gives them the opportunity to earn money not only on the basis of their own sales, but also on the sales created by the distributors sponsored by them (entered into the system thanks to their invitation). Hence, each distributor also receives a portion of the income generated by their distributors downline. Furthermore, there is the bonus of the opportunity that can be taken when a certain position (linked with the number of sales) is achieved. The compensation plan, therefore, is mainly modulated on three variables: sales made personally, sales made by sponsored agents, bonuses linked to the position in the sales network. As a result, the plan of compensation is very complex, and it is the nucleus of the system, the reason for the success of the system but, from the point of view of its legality, it can be the weak point of the system too. MLM is a very interesting object of study, because it's a system that has obvious similarities with a pyramid scheme, that- as everybody knows - is an illegal system. Firstly, it's necessary to

understand how MLM differs from a pyramid scheme before focusing our attention on the authorities' competition role in the policy consumers, as I said at the beginning. In a pyramid scheme, the goal is recruitment and not the sale of products while in a fair commercial transaction it should, above all, be the sale and purchase of products and services. The value of recruitment is linked to the fact that to enter in the sales-net it is necessary to pay an entrance fee, which is non-refundable. Therefore, the initial financial outlay is a red flag. Over the years, pyramid schemes have become more sophisticated, so it's not so easy to recognize them, as they are often hidden behind multilevel marketing systems. Unfortunately, the legislation everywhere, both in Europe and in US, is very weak, and this loophole allows companies to take advantage of this, skirting around the law. Most of the existing laws recognise consumer rights to be refunded of products unsold and give the consumer/distributor the right to withdraw from an agreement, which is one of the most recognised consumer rights. Nevertheless, it is not sufficient. Experience in the sector shows that the increased borderline multilevel sales with pyramid sales are the result of voluntary behavioural choices induced by growth aspirations in the system that are presented in a completely artificial way. This is a very important aspect because buying products with the principal aim of moving up in the line of sellers, is a distortion of the market meaning. The objective of acquiring a hierarchical position in the sales network, provided that it allows the provisioning of bonuses, is such a high priority that many distributors prefer to sell also at the cost price and not at the price recommended to the public. Consequently, they prefer not to earn on the price margin (as they say in jargon), in order to accumulate sales that guarantee growth in the hierarchy of sellers. Some Competition Authorities demonstrated this, while investigating and evaluating the risk of unfair behaviour in companies, they decided that some guaranties/clauses must be inserted in contracts. For example, there is an auto-ship form, that give you the opportunity to order a certain quantity of products periodically; this is an opportunity that may turn out to be a risk if it's not accompanied by certain guaranties. In theory, the auto-ship should be a way to make personal use easier, in practice it can be the way to achieve a bonus. Thus, to avoid this exploitation, in the occasion of a proceeding actuated against Herbal Life, a well-known multinational company of beauty and healthy products, the FTC has established some rules that have become mandatory for the validity of the contracts of new distributors. Some of the contractual rules established by FTC are: 1) the compensation

is due only when the product is sold to the final consumer; 2) the fees can be measured only to a percentage, up to a maximum of one third of sales, when the latter is for personal use only (self-consumption purchases); the self-consumption can never exceed a given, reasonable amount, in a given period of time. The US experience proves to have been very important not only because it is the place where the phenomenon was born and has had the greatest diffusion, but especially due to the role played by the Federal Trade Commission. In this business the FTC has showed its power to not only influence but also determine the clauses of contracts. While the power of FTC is well known because it was the first institution that took serious notice about fair competition and free market, its ability to influence and to determine the clauses in contract and, therefore the consumer protection, is perhaps less well established and herald of news in terms of protection of rights. And the future aim is to guarantee this, with the addition of ensuring the proper functioning of the market in a uniform way. FTC is a very strong instrument for many reasons, mostly since it is able not only to impose significant fines but also to correct the illegal aspects of activities through banning the illegal clauses and by ensuring some clauses that protect consumers and, in this case, also distributors. FTC correct undertakings to ensure illegal activities aren't repeated, and at the same time it is able to avoid the halt of activities, so as to prevent the interruption or definitive end of the activity, which would damage the market. Unlike in Europe where many Member States don't have enough instruments to make corrections, like leniency programme, or commitments policy. The latter offers the opportunity to remedy errors and the chance to keep the business alive. Before adopting a decision requiring that an infringement be ended, undertakings concerned can offer commitments to meet the concerns expressed by the Authority in its preliminary assessment. In this case the Authority (or the Commission) may, by decision, make those commitments binding on the undertakings. The decision can be taken as to when, after a specified period, there are no longer grounds for action by the Authority or by the Commission. In MLM the commitments policy is very determinant, and it is a precious tool to not damage the market, to survive activities, and to compensate consumers and distributors and, consequently, to repair damages, but certainly it requires that Competition National Authority has the means and instruments to resort to this solution. It requires a convergent policy among NCAs, that determines the development of the distinction of different degrees of independence. The latter must not be conceived and coveted without limits. Even if the independence

intended as the need to insulate competition agencies from political interference persists, the need of cooperation referring to multinational companies and transnational business and contracts (which has effects outside national borders) would enhance the necessity of reciprocal influence to pursue an effective coordination.

After these premises, turning our eyes towards the European scenario, even if the European system is very far from a sort of a federalization of competition rules, nevertheless recently it's possible to record a change of policy, after the Directive Eu n.1/2019.

In Europe, uniformity of direction is desirable, and the European Competition Network can be the main instrument for cooperation between National Competition Authorities (NCA) and European Commission. But so far it is still only a declaration of intentions that is difficult to carry out. EU directives commonly contain substantive requirements regarding national supervisory authorities, such as their independence with endowment with adequate financial and human resources. Additionally, procedures, remedies, and sanctions to be applied by national authorities are often prescribed in considerable detail. The Regulation n.1/2003, which is the main law reference when we look for the base of uniformity competition law, represents an embryonic stage. The Regulation looks at the enforcement of articles 81 and 82 of the European Community Treaty, alias art. 101 and art. 102 of TFUE, Treaty on the functioning of the European Union. As you know the Regulation, or the Modernisation Regulation, as popularly called, decentralised the enforcement of arts 101 and 102 TFEC by giving the national courts and the NCAs, alongside the European Commission, the power to apply these provisions in their entirety and the commitment to ensure compliance with the obligations of Regulation n. 1/2005. Article 5 establishes the power of NCAs to adopt decisions to bring infringements to an end, but it does not address the means and the instruments to apply these rules. It means that, so far, although the NCAs apply the same substantive rules, the means, and the instruments they have depend on what is available under national law. And some NCAs do not have all the tools they need to detect and tackle competition law infringement effectively.

For example, the level of fines imposed varies greatly, so the penalty for the same offence can be much higher in one member state then in another, without that difference being justified by objective circumstances, or some NCAs don't have the fundamental power to inspect the homes of businesspeople for evidence of infringement, or some

NCAs cannot access data stored on clouds, or some NCAs cannot impose structural remedies to restore competition on markets.

Furthermore, it is very important to observe that there are massive divergences in leniency programmes across the Member States that discourage companies and individuals from coming clean and providing evidence of anti-competitive practices. Besides, the fact that in some States, leniency statements are accessible to public prosecutors and the police, who could use it for purposes other than for the enforcement of EU competition rules is extremely meaningful. Otherwise in same State civil court in proceedings, other than actions for damages, can have access to statements of NCAs that can expose companies' cooperating with competition authorities. Another significant issue is determined by the inability of administrative NCAs to request the enforcement of their fines across borders if the infringer has no legal presence in their territory.

This is not sustainable in the digital era, where many companies, and for sure MLM companies, sell products and services over the internet, potentially to numerous countries, but if they don't have a legal presence in some Member States there, these companies currently have a safe haven from paying fines.

Some problems with the concrete and successful action of the European competition network come also from the necessity to cope with particularities presented by the technological revolution.

The digital revolution has intensified the risk of non-homogeneous results by raising the number of multinational players and, consequently, of cross-border cases and by increasing the numbers of new competition issues needing a solution on policy that cannot be pursued in isolation, without reference to the legal, economic, political, and social context.

Even though the decentralization must be considered positive, it determined that competition authorities have become vulnerable to general systematic problems of multilevel governance because of the absence of the specific clarification of accountability and of the procedure of the cooperation and of exchange of information. Furthermore, this decentralization and multiplication of enforcement action should be followed by the introduction of clear and binding rules for the allocation of cases to make this decentralized public enforcement efficient and more predictable. It seems pointless, if not harmful, to accept multiple proceedings by NCAs in which a single case

is split up among NCAs, with each of them restricting their decision to the domestic effects of the case.

This approach seems to fit in with the principle of "ne bis in idem", it can be said that such a division is neither pleasant for the parties involved nor does it serve the public interest in efficient enforcement. More legislative interventions by Europe are needed not only to make the convergence of the structure effective and of the enforcement powers of NCAs, but also to extend their decision-making powers to the whole territory of the EU. There is suspicion that the Commission lacks sufficient incentives to initiate a regulation that will not bolster its own position as the undisputed centre of the European Competition Network. The latter was created by the Regulation n. 1/2003 with the specific aim of preventing conflicts between EU and national competition rules, as well as ensuring the uniformity of European Competition rules. Thus, the ECN was established also with the purpose of assisting the coherent and consistent application of competition rules across the EU. It is a precious framework whose aim is to guarantee communication and cooperation between the European Commission and the National Competition Authorities.

It is undeniable that the ECN has a huge potential pursuing not only the protection of fair competition, but also the ones of consumers through the definition of mandatory contract clauses. On the other hand, this network is an essential forum for discussion and cooperation. The foundation for its creation is in Article 11 and 12 of Regulation n.1/2003. These articles set out the principles according to which the NCAs and the Commission can exchange information. But we must say immediately that the features of ECN are derived from these specifics articles of Regulation but are not listed clearly in the Regulation. Moreover, the Regulation sets out three main mechanisms in order to ensure the coherent application of the antitrust rules: 1) obligation on NCAs to apply Community law whenever there is an effect on trade between Member States, in a manner that ensure convergence between national law and Community law; 2) obligation on the NCAs to inform Commission at the latest thirty calendar days before the adoption of an envisaged decision; 3) possibility for the Commission to intervene if there is serious risk of incoherence by relieving the NCA of its competence to act. First of all, because the ECN is not a legal entity, and it can adopt only non-binding recommendations and more over the EC holds a managerial position with powers not shared with NCAs. Thus, the hierarchical structure has some consequences: it may

create problematic dominant positions of some members over the others; it may undermine the network stability; it may distort the natural interdependencies among actors. Many questions come up. Should the ECN Grand Chamber solve a jurisdiction issue in case of disagreement during case allocation discussions? Should it solve a conflict between NCAs or between the EC and NCAs, pointing out how new competition issues should be addressed? Would it decide whether competition law should be applied in a particular sector and whether an investigation should be stopped or carried out in a different way? The accountability of choices among authorities during the cooperation is still undefined. The hierarchical structure of the current system by equalising the NCAs with the EC without undermining its role as Guardian of the Treaties would be desirable. For this reason, it is crucial to process a new system of exchange of information that is the condition to guarantee uniformity of consumer protection in competition and consumer matters. In addition, we need to deal with the enormous theme of information technology that comes with all data protection regulation. I hope to be able to return to this theme with you at the earliest opportunity. Thank you for your attention. Now I would like to open up the floor to any question you may have.