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Corte di Cassazione, Order no. 2980 of 7.02.2020: parasitism and sales below cost

The Corte di Cassazione, the Italian Supreme Court (hereinafter the 'Supreme Court') ruled on parasitic unfair competition and sales below cost. The Supreme Court (partially) upheld the second instance decision, considering the decision to exclude parasitic unfair competition to be correct, based on an overall assessment of the contested conduct. It also ruled out sales below cost in the absence of a dominant position on the market or the adoption of prices likely to strengthen the monopoly position.

FACTS OF THE CASE AND GROUNDS OF APPEAL BEFORE THE SUPREME COURT

The dispute at issue involves the plaintiff M.E.D.I.A. Mezzi Editoriali di Informazione Aziendale S.r.l. (hereinafter 'MEDIA') and the defendant Mecalux Italia S.r.l. (hereinafter 'MECALUX').

At first instance, the Court of Milan concluded that MECALUX had carried out misleading advertising, thus committing acts of unfair competition against MEDIA. The Court ordered MECALUX not to distribute advertising catalogues, but ordered MEDIA (which, in the present case, had its claims accepted, albeit only in part) to pay the costs.

MEDIA had appealed against the judgment before the Court of Appeal of Milan ("CoA"), which concluded that MECALUX's conduct did not constitute parasitic unfair competition in terms of slavish imitation, unprofitable pricing and misleading advertising.

MEDIA therefore appealed the CoA decision before the Supreme Court on two grounds:

1. The CoA had erred in its examination of the other party's conduct, failing to assess it globally and, rather, carrying out a parcelled out examination, without considering the underlying parasitic competition strategy, which included the below cost sales;

2. The decision of ordering MEDIA to pay 2/3 of the costs of the proceedings at first instance with compensation of 1/3, in spite of being MEDIA partially successful, considered being wrong.

DECISION OF THE SUPREME COURT

As for the first ground – which was considered partially inadmissible and partially unfounded –, according to the Supreme Court, **the CoA took into account the overall conduct of MECALUX and, in light of this, correctly excluded parasitism.**

First of all, the CoA applied the principle that has been repeatedly stated by the Supreme Court[1], according to which **parasitic unfair competition,** pursuant Article 2598, no. 3 of the Civil Code, consists in a "***continuous and systematic operation in the footsteps of the competing entrepreneur, through the imitation*** *not so much of the products, but rather of the significant entrepreneurial initiatives of the latter, in a time context close to the conception of the work, since it is carried out at a short distance from each single initiative of the competitor (in the diachronic parasitic competition) or from the last and most significant of them (in the synchronic one), i.e. before it becomes common heritage of all the operators in the sector*".

Secondly, in examining the contested **sales below cost** (also called predatory pricing or internal *dumping*), the CoA applied the principles set out by the Supreme Court, according to which the sale below cost is a sale of products on the market **at a price that is so low that it is likely to cause difficulties to competitors who practice a higher price[2]. In other words,** it is **an artificial reduction of prices below cost, not justified by the objective conditions of purchase of the goods[3]**.

From a regulatory point of view, selling below cost is defined by Article 15, paragraph 7, of Legislative Decree no. 114 of 31 March 1998, while the relevant rules are contained in Presidential Decree no. 218 of 6 April 2001. According to these legal provisions, on the one hand, **sales below cost are limited and**, on the other hand, **the assessment of whether they are illegal is left to the Competition and Market Authority and the civil judge** - both with regard to the prohibition of **abuse of a dominant position** and to the principles of **fair competition.**

The past case-law and doctrine were generally against sales below cost, which were considered illegal. This view has been overtaken by the subsequent case law[4], still relevant today, according to **which an entrepreneur is in principle free to choose what prices to apply** by carrying out a risk assessment; at the same time, it must be borne in mind what the market interest is or what is harmful or beneficial to its functioning and, therefore, to consumers.

As such, **sales below cost are contrary to Article 2598, paragraph 3, of the Italian Civil Code "*only if*** *it is an antitrust infringement, since it is carried out* ***by an undertaking in a dominant position and for predatory purposes****"; on the* other hand, it is *"favourable to consumers and the market, until it leads to the elimination of competition and, therefore, results in damage to consumers themselves and the market, so that only in the latter situation the antitrust unfair competition condust of internal dumping is carried out*"[5].

The Supreme Court therefore concluded that the first ground of appeal was unfounded, since MEDIA had neither attached nor proved that MECALUX held a dominant position or that the prices adopted had strengthened its position. On the contrary, the CoA found that MEDIA had a dominant position on the market.

With regard to the second ground of appeal – accepted by the Court - the Cassazione considered that the CoA had wrongly held that the Court of first instance had, in turn, correctly awarded the costs at first instance. **The winning party should have not been ordered to pay the costs[6]**.

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[1] See: Supreme Court 20 July 2004 no. 13423 and subsequent decisions Supreme Court 12 October 2018 no. 25607, Supreme Court 29 October 2015 no. 22118

[2] Supreme Court 26 January 2006 n. 1636

[3] Supreme Court 20 March 2009 n. 6865

[4] Supreme Court 26 January 2006 n. 1636

[5] The Supreme Court points out that this orientation is also supported by recent rulings of the CJEU, for example Decision No 295/16 of 19 October 20917

[6] See: Supreme Court 24 October 2018 no. 26918 and Supreme Court 23 January 2018 no. 1572.