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Counterproductive regulation? The EU's (mis)adventures in regulating unfair trading practices in the food supply chain

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Abstract

In April 2018, the European Commission revealed a proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain.¹ However, the issue of unfair trading practices (UTPs) in the food supply chain dates further back. For decades already, EU food producers have complained about increasing concentration on the purchasing markets for food in Europe, aggressive bargaining on the part of retail chains, including ever increasing demands for low prices and dubious commercial practices such as unfair use of proprietary information and unilateral changes to contract terms. Complaints have resulted in much discussion both at the EU and at the Member State level. On a number of occasions, Members of the European Parliament have pressed for enforcement of the competition rules and for reform of the Common Agricultural Policy (CAP). Additionally, a pan-European private self-regulatory initiative has been in place since 2013. However, where complainants have had the most success is at the national level. Making use of the exception in Art. 3(2) of Regulation 1/2003, EU Member States have introduced of a variety of new laws, in particular stricter competition rules and rules

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¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain COM(2018) 173 final.

on unfair B2B contractual practices, in order to regulate the exercise of buying power in the food supply chain. These laws deviate from 'mainstream' EU competition law and may even be seen as a form of protectionism-in-disguise. Today only 5 out of 28 Member States have no specific regulation, with some Member States having put several types of legislative instruments in place, alongside private regulation.

This article raises the question about the appropriate role of EU competition law in addressing concerns with unfair trading practices (UTPs) in the food supply chain in the context of an integrated market. It firstly explains the background to the problem and what the role of EU competition law has been until now and then it maps the developments at the Member State level. Next, by referring to a regulatory studies typology of counterproductive regulation, the article sheds light on some of the important yet overlooked perverse side effects which arise when regulation of buyer power or UTPs occurs at the *national level* in the context of an *integrated* market like the EU. In light of the analysis, it expresses doubt that these pitfalls will be corrected by the newly proposed Directive on UTPs in the food supply chain. The conclusion of the article is that the national legislative developments have not been able to make up for the lack of supra-national enforcement of EU competition law and that the paucity and slowness of action of the European Commission on this issue has led to damage for consumers, taxpayers, and competition in general.

JEL Codes

K12, K21, K23, K40

Keywords

Unfair trading practices, buyer power, business-to-business, competition law, superior bargaining power, food supply chain

1. Introduction

For more than a decade now there have been allegations that the food supply chain in the EU is not functioning optimally.² Falling prices for agricultural products, increased globalization, climate change and speculation in commodities have put pressure on the margins of farmers and

² According to the Proposed Directive, Since 2009 there have been three Commission Communications on the topic. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A better functioning of the food supply chain, COM(2009) 591. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling unfair trading practices in the business-to-business food supply chain, COM(2014)472 final. Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, COM(2016)032 final.

other food suppliers.³ Rising input costs, especially for labor and energy also have a role to play.⁴ When it comes to issues of market power, food producers also seem to be between ‘the rock and a hard place’. On the one hand, farmers face powerful input suppliers – for fertilizer and seeds, for instance.⁵ On the other hand, their profit margins are also squeezed by powerful buyers – such as food processors and manufacturers, wholesalers and retailers. The latter issue is particularly contentious. Allegations of unfair trading practices (UTPs) have been frequently voiced with policy makers.⁶ This is not just a European issue. Evidence suggests that the UTPs in question are widespread in Europe, and reports indicate that they occur in other sectors⁷ and in other jurisdictions.⁸ Competition authorities are active on the issue also in Australia⁹ and Japan.¹⁰

The European Commission has defined UTPs as practices which: ‘grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another’.¹¹ This is not a EU-only issue. The Australian Competition and Consumer Commission has alleged that such practices constitute ‘unconscionable conduct’, a

³ See e.g. Commission Staff Working Document, ‘Evolution of the market situation for milk and milk products’ (2014). The document discuss milk price developments in light of climate, animal feed prices, energy costs, global consumption and production trends, trends for using land (eg for biogas production), etc.

⁴ According to a European Competition Network Report, ‘the biggest cost elements of final food prices are energy and in particular labour, which, on average, accounts for 70-75 % of consumer food pricing in developed economies. European Competition Network Subgroup on Food, ‘Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector’ (May 2012), p.13, 17. The report also draws attention to commodity speculation as well as the role of powerful buyers (p. 17).

⁵ W. Schanbacher (ed), *The Global Food System: Issues and Solutions* (Praeger, ABC-Clio, 2014), p. 35. The book points to the cartels in potash and potassium, as well as the stronghold of DuPont and Monsanto over seeds.

⁶ European Commission, ‘Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe’. COM (2013) 37 final.

⁷ For instance, in the Netherlands, big banks and other big companies have also been in the spotlight for requesting unjustified payments from their suppliers in order to finance mergers or meet financial targets. See ‘Akzo Nobel eist 10% korting van al haar leveranciers’ (RTL Nieuws, 18.03.2009) <https://www.rtlnieuws.nl/economie/akzo-nobel-eist-10-korting-van-al-haar-leveranciers>, ‘ABN Amro eist 20% korting van grote leveranciers’(RTL Nieuws, 22.03.2009) <https://www.rtlnieuws.nl/economie/abn-amro-eist-20-korting-van-grote-leveranciers>, ‘Ook ING dwong kortingen bij leveranciers af’ (RTL Nieuws, 15.02.2010) <https://www.rtlnieuws.nl/economie/ook-ing-dwong-kortingen-bij-leveranciers-af>. According to experts, this is consistent with a change in purchasing culture in large companies over the past decades. See Arjan van Weele, ‘Changing Purchasing Culture: A Mission Impossible’ in Elisabetta Manunza and Fredo Schotanus (eds), *The Art of Public Procurement: Liber Amicorum Jan Telgen* (NetzoDruk, Enschede, 2018).

⁸ See OECD, Policy Roundtable: Competition Issues in the Food Chain Industry (2013) DAF/COMP(2014)16.

⁹ See Beaton-Wells, C. and Paul-Taylor, J. (2017), Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct <https://law.unimelb.edu.au/centres/clen/research/supermarket-project/developments/publications/codifying-supermarket-supplier-relations>, with a focus on the regulatory measure in Australia and S Corones, ‘Regulating Supermarket Misconduct as Customer/Acquirer of Goods and Services’ (2015) 43(5) Australian Business Law Review, 400-419.

¹⁰ See M Wakui and T Cheng, ‘Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?’ (2015) Journal of Antitrust Enforcement, 1-32.

¹¹ See European Commission, Proposal for a Directive of the European Parliament and of the Council on on unfair trading practices in business-to-business relationships in the food supply chain. A list of practices is attached in Annex I.

category in which 'a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage'.¹² In Japan and Korea, antitrust enforcers have prosecuted such practices under domestic law provisions prohibiting the abuse of superior bargaining power.¹³

Investigations reveal that the UTPs in question are not about occasional disadvantage in the context of opportunistic behavior. They are not single occurrence events or symptoms of sporadic opportunism; rather, the UTPs seem to occur systematically, as if they are part of a business model. This conclusion seems inevitable when reading the reports of the Australian cases against the 'Mind the Gap' scheme of supermarket Woolworths¹⁴ and supermarket Coles' so called 'Active Retail Collaboration' program.¹⁵ It seems that UTPs are part of modern retailers' business model.

In a competitive market with complete information, one-sided deals would not be a viable business model. Deviant traders would be punished by the market – an unhappy partner who has had a bad experience with another trader could 'vote' with her feet, seek a different contractual partner next time, and warn fellow traders. However, in a market in which power is concentrated in the hands of few contracting partners or buying groups, better alternative may be hard to find.¹⁶ According to the laws of the market, supplier exit may help to bring the market back in balance. However, in reality exit may be difficult in the short and medium run, especially for SME suppliers.¹⁷ This raises suspicions of market failure.

¹² The doctrine was elaborated in a consumer law context in the case *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. With a reform of the Australian Consumer and Competition law in 2010, the prohibition of unconscionable conduct has been extended to transactions involving an SME.

¹³ Yo Sop Choi, Kazuhiko Fuchikawa, 'Comparative Analysis of Competition Laws on Buyer Power in Korea and Japan' (2010) 33 (3) *World Competition*, 499–519; M Wakui and T Cheng, 'Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?' (2015) *Journal of Antitrust Enforcement*, 1–32.

¹⁴ See <https://www.accc.gov.au/media-release/woolworths/-mind-the-gap-scheme-not-unconscionable>

¹⁵ See <https://www.accc.gov.au/media-release/court-finds-coles-engaged-in-unconscionable-conduct-and-orders-coles-pay-10-million-penalties>.

¹⁶ According to a report prepared for the European Commission by researchers at Wageningen University in the Netherlands, 'It is estimated that the majority of the European food is bought by the retail through about 110 buying desks (Grievink, 2003), where perhaps about 3 million farmers produce three quarters of our food (EU SCAR, 2012).' See J Bijman et al., 'Support for Farmers' Cooperatives' (2012) < https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext_en.pdf >

¹⁷ Certain producers may be stuck with loans that they must keep repaying. In this case opportunistic hold-up can take place. However, there are other important aspects as well. Bankruptcy may be especially difficult for SMEs whose entire livelihoods are tied up to the family enterprise. Exit – in the sense of bankruptcy or restructuring the business is difficult not just financially but also psychologically as one might lose his or her status within his or her community. These issues are recognized by the European Commission which also notes that unlike the US, in the EU there is a stigma associated with bankruptcy. See European Commission, Communication to the Council, the European Parliament, the European Social and Economic Committee and the Committee of the Regions: Overcoming the stigma of business failure – for a second chance policy COM(2007) 584 final.

The problem is that the traditional legal redress mechanisms suffer from a number of deficiencies.¹⁸ Absent competition law enforcement or vigorously enforced public regulation, practices of commercial nature generally fall in the realm of ‘private law’. In theory, a disgruntled trader could take her contracting partner to court for breach of contract. Of course, fairness may be difficult to assess, although in some countries, courts are comfortable with scrutinizing private bargains for compatibility with general principles such as ‘fair dealing’.¹⁹ Beyond the difficulties of establishing substantive unfairness, private law enforcement is problematic for SMEs for other reasons. Firstly, legal enforcement comes at a high cost in terms of time and money, especially for SMEs. Lodging a claim requires some rudimentary legal awareness which SMEs often do not have.²⁰ In addition to these standard barriers for SMEs, there are additional problems linked to power imbalances. There seems to be a climate of apprehension among traders who are in a position of economic dependency. Such traders fear that they would suffer commercial reprisals - e.g. in the form of delisting of products or other commercial retaliation should they submit a complaint (what the Commission refers to as “fear factor”). In the context of economic dependency, private enforcement it is even more problematic due to such fear of commercial retaliation. In fact, the fear of commercial retaliation is also a barrier to public enforcement, where the enforcers require testimony from suppliers.²¹ Consequently, few claims are launched. Anecdotal evidence suggests that even in jurisdictions with laws prohibiting economic dependency cases tend to be launched by companies who are already bankrupt and have therefore have nothing to lose.²² Thus, it is not only the market which fails to discipline the misbehaving trader; traditional legal courses of action – such as private law procedures or public law procedures requiring supplier testimony are not easily accessible.

Unfair trading practices are a symptom of market failure. This market failure is aggravated by a legal failure – namely, the lack of accessible legal facilities for resolving this type of commercial dispute. Under these circumstances, unfair trading practices have become normalized as a feature of standard commercial practice, to the continued dismay of producers. As a result, the issue of regulating buying power in the food sector has continued to be an item on policy agendas. This

¹⁸ This is especially the conclusion in ; M Wakui and T Cheng, ‘Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?’ (2015) *Journal of Antitrust Enforcement*, 1-32.

¹⁹ In the *Peijnenburg* case, a Dutch court relied on a general principle of ‘fair dealing’ in Dutch contract law in deciding on a dispute between a supplier and supermarket chain Albert Heijn. See Albert Heijn BV tegen Koninklijke Peijnenburg BV (ECLI:NL:RBSHE:2005:AS5628) and the news item ‘Albert Heijn verliest van Peijnenburg in koekstrijd’ (*Trouw*, 11.02.2005) <https://www.trouw.nl/home/albert-heijn-verliest-van-peijnenburg-in-koekstrijd~a42fadce/>.

²⁰ See BDRC Continental (2015) SMEs & Competition Law. Qualitative Research Report.

²¹ Apparently, the Australian Competition and Consumer Commission (ACCC) lost the case against supermarket giant Woolworths not for lack of a legal instrument but for lack of proof. Notably, the authority mainly depended on documents for its decision. The reason was inability to call witnesses and provide sufficient evidence since the small suppliers on whose behalf the case was brought did not want to come forth due to fear of commercial retaliation. Australian Competition and Consumer Commission against Woolworths Ltd (Woolworths) [2016] FCA 1472. See the Press Release ‘ACCC won’t appeal Woolworths unconscionable conduct decision’ (16.12.2016) <https://www.accc.gov.au/media-release/accc-won%E2%80%99t-appeal-woolworths-unconscionable-conduct-decision>.

²² Such is reportedly the case in Spain when it comes to enforcement of the Spanish prohibition on abuse of economic dependence.

article is about the policy and legislative responses that have been put in place and the role of competition law, especially supranational competition law, as part of this package of policies.

2. The rise of stricter unilateral rules in the EU

The issue of the buying power retail chains is not entirely new but it has escalated in the past three decades.²³ Ever since one-stop-shopping retail chains started transforming the food retail landscape, legislators have paid close attention and considered enacting special laws.²⁴ In Europe, Germany was the first to introduce special provisions in its competition law already in the 1970s in response to the growing power of the retail chains.²⁵ France, Spain, Portugal and Italy followed with similar provisions in the 1980s and the 1990s. However, research reveals that these national provisions have rarely been enforced.²⁶ A number of impediments to the effective use of these laws have been identified: substantive requirements which sets the criteria for proving 'economic dependence' impossibly high or procedural burdens of bringing a case making it impossible for the small enterprises affected by such conduct to invoke the provisions in Court.²⁷

Despite the limited experience with these laws, in the past 15 years, more than ten Member States have enacted special laws or regulations to deal with the issue of buyer power in the food supply chain or the unfair trading practices that retailers are accused of.²⁸ Whether sector-specific or

²³ Discussions on the power of retail chains go back to the early twentieth century to the time when the 'chain store' concept was invented. See Godfrey M. Lebar, *Chain Stores in America 1859-1950* (Chain Store Publishing Corporation 1952). The book details the invention of the chain store concept and the regulatory reactions it has triggered over time.

²⁴ Ibid. In the US, the Robinson-Patman Act is an example of such legislation.

²⁵ D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 1998), 315. See also College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf>, 1-440. See also Liyang Hou, 'Superior Bargaining Power: The Good, the Bad and the Ugly' (2017), SSRN Electronic Journal.

²⁶ See Laraine L. Laudati (ed), *Proceedings of the European Competition Forum 1995*, Roundtable on Economic Dependence. See also SEO Economisch Onderzoek (Barbara Baarsma and Nicole Rosenboom), *Onerlijke handelspraktijken: voldoet bestaande (zelf)regulering?* (2013) Report prepared for the Dutch Ministry of Economic Affairs (SEO Report) http://www.seo.nl/uploads/media/2013-04_Onerlijke_handelspraktijken.pdf

²⁷ See the contributions in Laraine L. Laudati (ed), *Proceedings of the European Competition Forum 1995*, Roundtable on Economic Dependence. Also, SEO Report, pp. 39-47. The report looks into some of the older economic dependency laws as well as some of the newer laws. It notes the challenges for enforcement. For instance, in France, abuse of economic dependence – in Law L420-2 (2), sets a tough list of requirements including effect on competition on the market. In Germany, Article 20(2) of the competition law prohibits abuse of economic dependency; however, in the context of a civil procedure, it is difficult for the plaintiff to prove that the other party is in a dominant position; it is also reported that judges find it difficult to distinguish between an unfair advantage and a hard-bargained price; as a result this provision is mostly invoked in combination with other provisions. In Portugal, complainants under the Portuguese competition law no 19/2012, Article 12 have to show that the unfair trading practice has an effect on competition on the market and the supplier has to show that it does not have any other alternative purchasers.

²⁸ Examples: UK (Code and Ombudsman: 2013), Slovakia (on and off since the early 2000s – see further in this paper), Czech Republic (2010), Latvia (2009), Finland (2014), Bulgaria (2015), Ireland (2016), Poland (2017).

general, the laws are generally one of two varieties: they come as amendments of the competition law (e.g. as lower market dominance thresholds) or as amendments of the contract or commercial law (e.g. by introducing special rules on business-to-business transactions or by extending the consumer protection rules to small businesses). In the current European Union of 28 Member States, all but five Member States,²⁹ currently have some sort of legislation, and sometimes a mix of several types of legislation, in place that aim to solve the issue of UTPs in the food supply chain. Sometimes there is only one of the two main varieties – competition law amendment or a commercial law which shares similarities with consumer law – and sometimes there are both.

The table below is a mapping of the types of legislation available compiled on the basis of existing reports supplemented with research by the author. It indicates Member States which have both stricter competition rules, unfair business-to-business legislation (be it sector-specific for food or retail, or general), Member States with both (upper left quadrant), and Member States with neither (lower right quadrant). It is important to note that in some of the Member States with neither of the two types of developments, there may be private regulatory initiatives such as industry codes of conduct. The Supply Chain Initiative – a private self-regulatory initiative stimulated by the European Commission – is in principle available in all Member States and provides an extra normative layer to what is already a complex legal framework.³⁰

²⁹ The Member States with no such legislation are: Estonia, Luxembourg, Malta, the Netherlands and Slovenia. The latter two, however, do seem to have some form of private regulation in this field. In the Netherlands, there is even a portal at which ‘abuse of buying power’ can be notified. The Portal, operated by the Chamber of Commerce, aims to gather data on the use of buying power. See MKB Press Release, ‘MKB Servicedesk opent Meldpunt Inkoopmacht’ (5 October 2012) <https://www.mkb servicedesk.nl/6583/mkb-servicedesk-opent-meldpunt-inkoopmacht.htm>.

³⁰ This private, self-regulatory scheme was started in 2013 with the blessing of the EU. See <http://www.supplychaininitiative.eu/> and <https://www.supplychaininitiative.eu/regionalnational-supporting-initiatives> for an overview of the corresponding national-level initiatives.

Table 1. Stricter competition rules and UTP legislation for B2B in the EU

	YES	NO
	<i>Consumer protection extended to B2B³¹ (or other legislation covering UTPs in B2B)</i>	<i>Special contractual provisions on B2B or UTPs or extension of consumer protection to B2B (general contract law applies)</i>
YES <i>Stricter rules on unequal bargaining power in competition law³²</i>	Austria (all UCPD provisions ³³ + superior bargaining power ³⁴) France (Art. 6 and Annex I UCPD ³⁵ + rules on economic dependency ³⁶) Germany (partial UCPD extension ³⁷ + stricter dominance ³⁸)	Bulgaria (superior bargaining power) ⁴² Croatia ⁴³ Cyprus ⁴⁴ Czech Republic (food) ⁴⁵ Greece (economic dependence) ⁴⁶ Latvia (retail) ⁴⁷ Lithuania (retail) ⁴⁸

³¹ European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

³² College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf>, 1-440

³³ § 1(1) of the Federal Act amending the 1984 Federal Act against Unfair Competition.

³⁴ Article 4(3) of the Cartel Act.

³⁵ Unfair Commercial Practices Directive. The Directive is only applicable in the case of business-to-consumer relations; however, Member States have the options to extend the provisions to business-to-business transactions as well. Based on the European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10, France is listed as a Member State which has extended the UCPD Directive to business-to-business transactions. See Article L. 121-1, I and III and L. 121-1-1 of the Consumer Code

³⁶ Article L 420-2 of the Code de Commerce. Before 2010, France had a specific provision on economic dependence in civil law (Article L. 442-6), which was abolished. The existing provision also targets economic dependence under largely similar criteria. Due to the stringency of these criteria, however, enforcement remains sparse. See College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf>, 45-47.

³⁷ Section 3 of the Unfair Competition Act (UWG) as per European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

³⁸ Article 20 Gesetz gegen Wettbewerbsbeschränkungen (GWB).

⁴² Art. 37a on Superior Bargaining Power of the Act on Protection of Competition (Bulgarian State Journal No. 102 of 2008).

⁴³ Laws on Trade Nr. 87/08, 96/08, 116/08, 76/09, 114/11, 68/13.

⁴⁴ Cyprus Protection of Competition Act (Law 13(I)/2008).

⁴⁵ Act on Significant Market Power in the Sale of agricultural and Food Products and Abuse thereof, amended with Act No 50/2016.

⁴⁶ Art. 16 of L. 2000/1991.

⁴⁷ Section 13(2) related to "Prohibition of the Abuse of Dominant Position" of Latvian Competition law, introduced in 2009; As of 2016, there is also the Unfair Retail Trade Practices Prohibition Law.

⁴⁸ Law on the Prohibition of Unfair Practices of Retailers of 22 December 2009 (amended on 17 December 2015).

	Hungary (food; other B2B legislation) ³⁹ Italy (UCPD for micro-enterprises ⁴⁰ + economic dependence) ⁴¹	Poland (unfair contractual advantage in food) ⁴⁹ Portugal (economic dependence) ⁵⁰ Romania (food) ⁵¹ Slovakia (food) ⁵² Spain (food) ⁵³
NO Stricter competition rules (general competition law applies)	Belgium (some Annex I UCPD practices) ⁵⁴ Denmark (aggressive and misleading practices, UCPD) ⁵⁵ Ireland (food) ⁵⁶ Sweden (all UCPD provisions) ⁵⁷ UK (food; Grocery adjudicator) ⁵⁸ Finland (Unfair B2B Act; proposed* stricter dominance threshold) ⁵⁹ European Union * (proposal 2018)⁶⁰	Estonia Luxembourg Malta Netherlands Slovenia

³⁹ Act CLXIV of 2005 on Trade and Act XCV of 2009 on the Prohibition of Unfair Trading Practices vis-à-vis the Suppliers of Agricultural and Food Products

⁴⁰ Art.62 Law Decree 24.1.2012, n° 1; also, specifically for the agricultural sector: Law-decree 24.1.2012, Nr. 1 as amended by Law 24.3.2012, Nr. 27, concerning commercial (B2B) transactions in the field of agri-food products.

⁴¹ Art. 9, Law 18.6.1998 Nr. 192 on sub-supply relationships in productive activities.

⁴⁹ A Stawicki, 'Polish Competition Authority Gains New Powers to Fight Unfair Practices in the Food Industry' *Kluwer Competition Law Blog* (19.01.2017). See Polish Act on Combating Unfair Use of Contractual Advantage in Trading in Agricultural and Food Products 2017.

⁵⁰ Portugal Decree-Law n° 166/2013 of 27 December 2013.

⁵¹ Law 321/2009 on food marketing.

⁵² Law 362/2012.

⁵³ Law 12/2013 on measures to improve the functioning of the food chain (Ley 12/2013 de medidas para mejorar el funcionamiento de la cadena alimentaria). See also Carmen Estevan de Quesada, *Explotación de la Dependencia Económica en las Redes de Distribución* (Thomson Reuters Aranzadi, 2017) which discusses the legislative history and previous experiences with the law.

⁵⁴ Chapter 4 of Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur; as per European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

⁵⁵ The Marketing Practices Act Consolidated Act no. 58 of 20 January 2012 as amended by section 33 of Act no. 1231 of 18 December 2012; section 5 of Act no. 1387 of 23 December 2012 and section 1 of Act no. 378 of 17 April 2013 as per European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

⁵⁶ SI No 35 of 2016 Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 <https://dbei.gov.ie/en/Legislation/SI-No-35-of-2016.html>.

⁵⁷ Section 1 of the Marketing Practices Act (2008:486) as per European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

⁵⁸ Groceries Code Adjudicator Act 2013.

⁵⁹ Unfair Terms in Contract between Businesses Act, Nr. 1062/1993. The proposal was discussed in Mika Oinonen, 'The New 30% Rule: A Viable Solution to Detrimental Buyer Power in the Finnish Grocery Retail Sector?' (2014) 10 (1) *European Competition Journal*, 97-121.

⁶⁰ Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain COM(2018) 173 final, 2018/0082 (COD).

The adoption of these laws has been uncoordinated and has developed independently per Member State. European Commission's tolerance and perhaps tacit encouragement of the adoption of such national legislative developments is counterintuitive in light of the objectives of the modernization of EU competition law and in light of the internal market imperative of ensuring a level playing field. Apart from these concerns, however, this article raises an additional problem: that purely as a matter of regulation, encouraging these policy responses has been ineffective. Even worse – it has aggravated the regulatory problems in the food supply chain, thereby leading to counterproductive results.

This article seeks to provide a critical look at the legislative developments outlined above and, in particular, about the role that competition law has *not* played in the efforts to regulate unfair trading practices in the food supply chain. The realization underpinning this research is that although a number of actions have been taken to correct for the working of the food supply chain, and in particular, to address the buying power questions, competition law enforcement has played but a marginal role in this effort. A 2012 report on the activities of national and European competition law enforcers in the food sector for the period 2004-2012 lists over 160 enforcement actions: however, a closer look at the data provided reveals that few deal with the issue of buying power and unfair trading practices by a powerful buyer.⁶¹ Especially notable is the paucity of action at the EU level. This policy choice – to leave room for adopting diverging legislation at the national level and for national enforcement instead of intervening at the EU level with EU legal tools – is the object of study of this article. The article aims to assess the sum of these developments *as a whole* from the point of view of smart regulation and European integration.

3. Smart regulation, better regulation, and counterproductive regulation

The goal of smart regulation has been embraced by the EU and many of its Member States. Since the early 2000s, the EU has made efforts to improve its regulatory performance, the most recent of which is the Better Regulation initiative.⁶² The EU's concern with improving its governance has

⁶¹ There is data on a number of national enforcement actions against buyer cartels in Greece, Bulgaria, Latvia, and in Austria on abuse of dominance; however, the majority of the enforcement concerns horizontal cartels. See European Competition Network Subgroup on Food, 'Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector' (May 2012). More recently, there is rumor of the Commission investigating buyer cartels in France. Following the adoption of stricter rules on superior bargaining power, there is national enforcement in a number of jurisdictions, including Bulgaria (two decisions against Kaufland), and the Edeka case in Germany.

⁶² See European Commission, *European Governance: A White Paper* (2001) COM(2001) 428 final https://ec.europa.eu/europeaid/sites/devco/files/communication-white-paper-governance-com2001428-20010725_en.pdf. The acknowledgment of the subsidiarity and proportionality principles in

evolved in parallel with a steadily growing body of literature on regulatory governance, which includes theories of smart regulation and responsive regulation. Smart regulation is one of the theories which calls for a careful tailoring of regulation by observing the following five principles: 1) preferring 'complementary instrument mixes over single instrument approaches, while avoiding the dangers of 'smorgasbordism'; 2) starting with less interventionist measures; 3) building in responsiveness in a regulatory regime which would allow for 'early warning of instrument failure', 4) involving and empowering surrogate regulators, and 5) maximizing opportunities for win-win.⁶³

The case of regulating UTPs and buyer power in the food supply chain in Europe reveals that a number of these 'design principles' have been overlooked: a number of instruments have been adopted but their complementarity is assumed, instead of carefully studied. There is evidence of smorgasbordism with some Member States having layers and layers of regulation (both public and private regulation), while others have none – as evident from table 1. The EU did give a try to 'less interventionist' measures – notably by stimulating a pan-European voluntary initiative in the grocery sector, known as the Supply Chain Initiative.⁶⁴ Escalation of regulatory response⁶⁵ following persistent claims about UTPs and exploitation in the food supply chain has finally taken place with the proposed Directive on unfair business-to-business trading practices in food. However, the escalation of regulatory responses as a whole has not been coordinated at the EU level. Finally, one may also wonder whether the sum of regulatory responses (at the national level and at the EU level) meets the criteria of subsidiarity and proportionality. Considering the cross-border nature of the food purchasing and the significant divergences in legal frameworks, it is surprising that a European-wide solution has been overlooked until the 2018 proposal for a Directive. And considering the complexity of the legal framework and the overlapping nature of various regulatory instruments, the burden on market actors is likely disproportionate.

The argument in this article is that beyond breaching principles of smart regulation or being insufficiently effective, the regulatory status quo in the food supply chain may deserve the status of 'counterproductive regulation' – a situation in which the regulatory intervention aggravates the policy problem.⁶⁶ A typology of this form of 'regulatory iatrogenesis'⁶⁷ is discussed in a seminal

the 1992 Treaty of Maastricht as a sign of thinking about better regulatory performance; the principles are found in Art. 5(1) TEU. Most recently, the European institutions have promoted 'better regulation'. See European Commission, Better Regulation: Why and How (website) https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

⁶³ N Gunningham and D Sinclair, 'Smart Regulation' in P Drahoš, *Regulatory Theory: Foundations and Applications* (ANU 2017), 134-135.

⁶⁴ See <http://www.supplychaininitiative.eu/>. Although the Initiative has had some success in improving awareness of companies and providing possibility for complaints, the SCI has yet to be fully developed – the initiative needs to increase its member base and to improve the dispute resolution possibilities especially with respect to confidentiality. See <http://www.supplychaininitiative.eu/news/press-release-five-years-supply-chain-initiative-and-future-prospects> and the annual report at http://supplychaininitiative.eu/sites/default/files/sci_-_4th_annual_report_-_march_2018.pdf.

⁶⁵ Responsive regulation is meant in the sense of the work by Ian Ayres and John Braithwaite, 'Responsive Regulation: Transcending the Deregulation Debate' (Oxford University Press 1992).

⁶⁶ PN Grabosky, 'Counterproductive Regulation' (1995) 23 *International Journal of the Sociology of Law*, 347-369.

⁶⁷ Disease brought about or aggravated by medical intervention.

article by regulatory scholar Peter Grabosky.⁶⁸ Based on his extensive study of regulatory failures, Grabosky identifies five types of regulatory intervention which tend to backfire. The scenarios in Grabosky's framework include: 1) escalation, 2) displacement, 3) over-deterrence, 4) perverse incentives and 5) misunderstanding opportunity costs.⁶⁹ Grabosky's framework may not exhaust the topic of counterproductive regulation but it provides a useful frame through which the experiences of individual Member States' interventions with respect to UTPs in the food supply chain can be analyzed. Just like concepts such as 'moral hazard', the framework is useful in mapping and labelling the various pitfalls of rather different regulatory environments. In considering stories from the European Member States' experience with regulating UTPs in the food supply chain, one can find evidence of at least four of the five types of counterproductive regulation in Grabosky's typology. These examples will be discussed in the sections that follow.

4. Displacement: problem moving, not disappearing

In Grabosky's typology, one of the ways in which regulation can backfire is by displacing non-compliance 'into other areas within or beyond a regulatory jurisdiction or policy domain.'⁷⁰ For instance, companies may choose to offshore to avoid far-reaching environmental or health and safety regulation, thereby exporting the problem to a different jurisdiction instead of solving it. Another example of displacement is when the problem for one policy area is solved but a problem for another policy area is created. For instance, improving outcomes for the environment might come at the expense of human health and safety - thereby solving problems in one policy domain but causing problems in another. The idea of national regulation resulting in 'exporting' the problem to another jurisdiction or another policy (displacement) helps shed light on the ambivalent experiences of some Member States with stricter national legislation against UTPs in the food supply chain. The case of Slovakia illustrates how *de facto* and *de jure* circumvention can take place in the case of national legislation targeting UTPs imposed by multinational retail chains, operating in an integrated market.

4.1. The Retail Act Strikes Back or limits to unilateral solutions in an integrated market

At the turn of 2000-2001 – just four years before it became a member of the European Union – the Slovakian food retail market experienced profound changes. The country, a member of the former

⁶⁸ PN Grabosky, 'Counterproductive Regulation' (1995) 23 *International Journal of the Sociology of Law*, 347-369.

⁶⁹ Escalation is the example of regulation aimed at solving a problem (e.g. eliminating X), which inadvertently escalates the issue (e.g. increases the number of X). Displacement occurs when regulation, instead of solving the problem, shifts it to another policy area or another jurisdiction. Over-deterrence is failure to properly 'calibrate' regulation – thus, regulation aimed at decreasing X might decrease it by too much, to a level that is not desirable. Perverse incentives is a scenario featuring well known regulatory pitfalls such as moral hazard. Finally, opportunity costs refers to the idea of regulation striving for a perfect result to the point where the marginal costs of securing additional compliance are not justified.

⁷⁰ Grabosky, 351.

Eastern Bloc, which had been making strides in terms of economic development, was penetrated by foreign grocery retail chains. As with any major change, there were both winners and losers. While this development brought benefits for Slovak consumers in terms of low prices and more choice, concerns were raised about the power of the foreign chains – in particular, their buying power vis-à-vis local suppliers. As a result of concerns about the power and the practices of the retail chains, there was social and political pressure for some sort of solution – be it legislation or regulation.⁷¹ In response to the pressure in 2003 Slovakia adopted the Act on Retail Chains.⁷² The Act was to be enforced by the Ministry of the Economy, not by the competition authority.⁷³ The Act adopted the “economic dependency” criterion.

The high expectations of the act were disappointed. Firstly, already in 2007 suppliers of food products started complaining about buyer power again.⁷⁴ These complaints led to a revision of the act and its replacement by another piece of legislation – the Act on Inappropriate Conditions in Business Relations which entered into force in 2008.⁷⁵ The Act did not apply only to the food sector, but to any commercial relations.⁷⁶ However, this Act was also found ineffective primarily due to difficulties in enforcing it – notably, the economic dependency criteria were difficult to satisfy.⁷⁷ In 2010, Slovakia adopted yet another piece of legislation, the “Unfair Terms in Foodstuff Act”.⁷⁸ The new act focused only on the food sector and removed the economic dependency criterion. It targeted specifically unfair contract terms and prohibited 30 types of such terms. The Act was to be enforced by the Ministry of Agriculture.

Yet, even this reform was unsuccessful. Already at the time of its adoption, many feared that the Act would damage domestic producers by prompting the retail chains to source from abroad.⁷⁹ Less than a year after its adoption, the act was repealed.⁸⁰ The Ministry of Agriculture argued that following the adoption of the Act, multinational retail chains had started avoiding Slovak

⁷¹ This paragraph is based on OECD Roundtable on Monopsony and Buyer Power (2008), 215. According to Slovakia’s submission: “This changed the long-time pattern of the Slovak retail trade considerably. As retail chains introduced new relations, cooperation forms and trade practices, discussion on contributions or defectiveness of their buyer power was opened.”

⁷² Act No. 358/2003 Coll. on Retail Chains (amended).

⁷³ Much of this paragraph is also based on the information available in OECD Roundtable on Monopsony and Buyer Power (2008), 215.

⁷⁴ OECD Roundtable on Monopsony and Buyer Power (2008), 215-216.

⁷⁵ Act No. 172/2008 Coll. on Inappropriate Conditions in Trade Relations; see OECD (2008), pp. 215-216. See also Z Hodonova and R Oleksik (Kinstellar), “Slovakia’s Unfair Terms in Business Contracts Between Resellers and Suppliers of Foodstuffs” (<http://www.kinstellar.com/insights/detail/100/slovakias-unfair-terms-in-business-contracts-between-resellers-and-suppliers-of-foodstuffs> ; published in Concurrences under N 31177 under the title “The Slovak Parliament draws rules on unfair supply contract terms for foodstuffs (Act n° 140/2010)”. <http://www.concurrences.com/Bulletin/News-Issues/May-2010/The-Slovak-Parliament-draws-rules-31177?lang=en> (May 2010).

⁷⁶ Hodonova and Oleksik (above).

⁷⁷ See also Zuzana Hodonova and Roman Oleksik (Kinstellar). The authors argue that the main reason for the limited effectiveness of the Act was the fact that it adopted an ‘economic dependency’ approach; without a proper definition of and criteria for economic dependency, enforcement was encumbered.

⁷⁸ Act No. 140/2010 Coll. on Unfair Terms in Business Contracts between Reseller and Supplier of Goods that are Foodstuffs, in effect as of 1 May 2010. See Hodonova and Oleksik.

⁷⁹ Hodonova and Oleksik.

⁸⁰ The Act entered into force on 1 May 2010 and was repealed on 12 January 2011.

producers; by repealing the act, they hoped more national producers would have access to the domestic market.⁸¹

The Slovakian example shows how enacting stricter legislation in an integrated market can backfire. More evidence pointing to a similar concerns in the EU comes from Ireland. According to Paul Gorecki, former member of the Irish Competition Authority, one of the reasons behind the lobbying for a code on UTPs in Ireland was increased competition from goods sold in the UK.⁸² Both consumers and supermarkets found it more attractive to purchase across the border when the euro appreciated; the supermarkets apparently used sourcing from abroad as a threat in negotiation with local suppliers. Suppliers pressed the government for protection.

And yet, if goods are produced more cheaply abroad or become cheaper as a result of currency appreciation at home, it is only logical that a higher contracting standard *at home* will only aggravate the problem. Yet, this is precisely the type of law adopted by Ireland in early 2016. The law drastically reduces flexibility in contracting. Thus the question stands: to what extent can such a law be effective in achieving its goal of improving the contracting environment for Irish farmers if power relations remain similar and if retailers can continue to shift demand to foreign producers in order to force lower prices.

Beyond the issue of *de facto* circumvention of national law by means of a *factual act* such as sourcing from abroad, there is also the issue of *de jure* circumvention, for instance by means of a *legal act*. The public consultation by the Commission revealed that isolated cases of forum shopping by stronger contractual parties are observed in the EU:

*"[...] responses by public authorities to the Green Paper consultation reported isolated cases of 'forum shopping', i.e. a practice whereby the stronger contractual party unilaterally determines in which Member State, and hence under which regulatory framework, the contract is applied in order to avoid the national frameworks with stricter measures against UTPs. This issue was explicitly raised by 5 Member States in the public consultation and during discussions in various stakeholder fora organised by the Commission."*⁸³

It is plausible that retailers are able to circumvent – *de jure* (via choice of jurisdiction clauses) or *de facto* (by sourcing from abroad) – the stricter rules to which they are now subject in many EU jurisdictions. Of course, the issue merits in-depth empirical research. But it also raises an important theoretical question: can national legislation on UTPs imposed by powerful buyers ever be effective in an integrated market? The proposed Directive can solve the issue to the extent that it introduces a floor for contracting terms which holds all across the EU. However, it should also

⁸¹ PMR Newsletter, "Slovakia's retail law repealed" (18.01.2011) <<http://www.ceeretail.com/news/97676/slovakia-8217-s-retail-law-repealed>>.

⁸² P. Gorecki, "A Code of Practice for Grocery Goods Undertakings and An Ombudsman: How to Do a Lot of Harm by Trying to Do a Little Good" (2009) 40 *The Economic and Social Review*.

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Tackling unfair trading practices in the business-to-business food supply chain" (COM(2014) 472 final) http://ec.europa.eu/internal_market/retail/docs/140715-communication_en.pdf, 6-7.

be reminded that the Directive aims at minimum harmonization – unless the minimum harmonization (and its subsequent implementation) is sufficient to solve the core problem, it will be but a Band-Aid on the festering issue of buyer power; a Band-Aid which can be avoided by means of legal circumvention and altering trade flows.

4.2. Compromising the CAP

It is a peculiarity of the EU Treaties that farmer welfare is explicitly protected by law. Put simply, the drafters of the EU Treaties (and all subsequent and preceding treaties) have instituted individual farmer welfare as an objective of EU common agricultural policy⁸⁴ – an objective on par with other ones such as efficiency,⁸⁵ consumer welfare,⁸⁶ and food security⁸⁷. Of course, one might argue, this goal is highly controversial – a textbook example of rent-seeking whereby a well-organized group of economic actors extracts benefits from the rest of society – in this case, dispersed consumers and taxpayers.⁸⁸ One may criticize the legislator's choice but from a positive law perspective, it is valid law which needs to be respected – the Treaties' commitment to farmer welfare mean there is a legal basis and, in fact, a legal imperative, for policy-makers to intervene in case this objective is compromised.

It is alleged that the non-enforcement of EU competition law against powerful purchasers contracting with primary producers, has led to a problem for meeting the policy objective of this policy area - the Common Agricultural Policy (CAP) which protects, among other things, farmer welfare.⁸⁹ Additionally, other goals – also achieved through the CAP – may be compromised. Such is the case, for instance, with environmental goals.⁹⁰ Arguably, farmers are important in the EU not just because they produce food. Although originally established to ensure food security and free trade in agricultural products within the six Member States of the European Economic Community, the Common Agricultural Policy has taken on other objectives over time.⁹¹ One may think that in addition to producing food, today European farmers are responsible for providing other goods: such as preserving the traditional landscapes of Europe, local knowledge about small-scale food production and perhaps even traditional lore; increasingly, one might view

⁸⁴ Art. 39(b) TFEU includes 'to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;' as an objective of the common agricultural policy.

⁸⁵ Art. 39(a) TFEU.

⁸⁶ Art. 39(e) TFEU.

⁸⁷ Art. 39(d) TFEU speaks of the need to 'assure the availability of supplies'.

⁸⁸ The impact of the CAP on consumers and taxpayers has been criticized from the very start. See Kenneth W. Dam, 'The European Common Market in Agriculture' (1967) 67 (2) *Colum. L. Rev.* 209.

⁸⁹ See European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy (2015/2140(INI)), para 104 and European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)) [2018]OJ C 086/05).

⁹⁰ Speech by Commissioner Phil Hogan at EU Agricultural Outlook Conference 2017 (18 December 2017), <https://ec.europa.eu/commission/commissioners/2014-2019/hogan/announcements/speech-commissioner-phil-hogan-eu-agricultural-outlook-conference-2017_en>.

⁹¹ See Kenneth W. Dam, 'The European Common Market in Agriculture' (1967) 67 (2) *Colum. L. Rev.* 209.

farmers as custodians of the land.⁹² Thus, farmer struggles jeopardize not only the EU agricultural policy, but also other policies which depend on farmer cooperation.

Farmers' incomes are made up of receipts from sales of what they produce and of subsidies. An empirical question which this article cannot answer is whether – as a result of having their margins squeezed by powerful contractual partners – European farmers have become more efficient, innovative or resilient. However, what the discussion further in this article will show is that UTPs have led to farmers demanding for further protection via national laws, further subsidization, and further derogations from competition law.

5. Escalation: more regulation, more unfair outcomes

The sections above have argued that EU competition law's non-intervention against abuse of buying power in the food sector has led to geographical displacement and policy area displacement. This section will make another argument about EU competition law's non-intervention on the issue of buying power and UTPs in the food sector – that the original policy problem has gotten more complex as a result of EU competition law's non-intervention until this point, thereby escalating the policy problem.

Regulation done wrong might escalate the risks or problems it is trying to eliminate. Grabosky notes that 'stringent regulation of new risks may exacerbate existing risks',⁹³ and that under-enforcement may result in a problem which then becomes so complex as to no longer be tractable.⁹⁴ Thus, regulation – too much or too little of it – may result in the problem escalating and becoming much more complex to deal with than it would have been in the first place. The escalation perspective essentially asks regulators to consider: is the problem likely to become worse *because of* too much enforcement or too little enforcement?

There are two ways in which the 'escalation' lens can help shed light on developments in the EU. One is to consider whether the regulatory instruments employed to tackle buying power and UTPs might actually aggravate the consequences of buying power instead of alleviating them – we already saw that displacement as a result of legislation may cause more harm to those needing protection than the unfair practices themselves. The argument to be explored is that legislative instruments seeking to regulate certain contractual terms may shift the exploitative behavior to non-regulated terms. As to the regulated terms of contract, much will depend on the quality of drafting of the legislation. If the legislative requirements can easily be circumvented by nominal compliance, the effectiveness of the measure is likely to be compromised.

5.1. The problem of nominal compliance

⁹² Agricultural Markets Task Force, 'Enhancing the Position of Farmers in the Supply Chain' (Report, 2016) <https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf>, Annex E: Contribution by Mr. Sarmir.

⁹³ Grabosky, 348.

⁹⁴ Grabosky, 350.

It is difficult for a legislator to regulate all aspects of a business transaction. For instance, when laws specify the forbidden practices to such a degree that circumvention by means of slightly changing or relabeling a practice is possible, nominal compliance can take place while exploitation continues. By contrast, open-ended norms may give a willing and capable enforcer sufficient ground for intervention. This is a classic trade-off between general and concrete rules.

An interesting case to consider in this respect is the UK Grocery Code Adjudicator's 2016 investigation into UK retailer Tesco's practices. The adjudicator (GCA) examined claims that Tesco was using prompt payment as a bargaining chip in negotiations and that it made requests for additional payments. Although the notion of a 'reasonable payment term' is not defined in the Grocery Code, the GCA managed to find that the practice was unreasonable and established that Tesco 'knowingly delayed paying money to suppliers in order to improve its own financial position.'⁹⁵ The Adjudicator used the open-ended nature of 'unreasonableness' in order to condemn the practice.⁹⁶

However, interpretation proved difficult with respect to the allegation about requests for payment. Requests for payment in order to improve the positioning of the suppliers' goods or to increase the allotted shelf space would be in breach of paragraph 12 of the Code. Importantly, in this case there was no evidence of *direct* requests for improved shelf position as such, although payments for other services seemed to coincide with better positioning. According to the GCA, Ms. Tacon, this evidence of other 'practices' might amount to 'indirect requests', but she did not make a conclusive finding to this effect:

*'[These practices] include requests for "investment" by Tesco in exchange for benefits to be agreed with the supplier. The benefits sought by suppliers included better positioning or increased shelf space. This may amount to an indirect requirement by Tesco for payment contrary to paragraph 12 of the Code. I also received evidence during my investigation of payment by suppliers of large sums of money in exchange for category captaincy or participation in a range review. The evidence suggests that this may have become common practice in Tesco. I received some evidence that the benefits that suppliers derive from these arrangements may include maintained or improved share of shelf or better positioning.'*⁹⁷

⁹⁵ Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf, p. 6

⁹⁶ Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf, p. 7. The GCA found that: '[Tesco's] Buyers frequently sought to use money owed to a supplier as leverage in negotiations for future agreements or promotions.[...] Tesco acted unreasonably when seeking to bring the resolution of debts into other commercial negotiations and delaying payment of monies owed until other negotiated terms were agreed.'

⁹⁷ Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf, p.6.

Importantly, Tesco was found in breach of the prohibition on requests for payment already in 2014 by the GCA; however, the finding came at a time when the GCA did not have the legal powers to impose monetary sanctions.⁹⁸ Perhaps the company got better at covering its tracks in the years following the investigation? It is not possible to tell. However, the GCA's experience with enforcing the Code shows how well-meaning provisions targeting specific practices may be circumvented even when enforced by a committed regulator.

Finally, although this section has not addressed the issue of remedies, this is certainly an important point to consider. What remedies are available in the case of a finding of a breach of UTP legislation? National instruments differ wildly in this respect. The UK GCA has the powers to impose fines of up to 1% of the annual UK turnover of the chain, which could amount to millions of pounds. By contrast, in the Bulgarian Competition Authority's decision against retail chain Kaufland, the fine imposed represented 7% of the net profits made on the products which were subject of the decision or roughly 80 000 EUR.⁹⁹ Weak remedies may not send the right signal to the business community and may increase the costs of doing business without substantial improvement in terms of fair trading.

5.2. Raising the cost of good contracts

Legislation on unfair trading practices never discusses price. However, discussions about unfair trading practices can rarely be seen separately from discussions on price. The discourse on unfair trading practices, is, of course, ultimately about 'who gets what' in the food supply chain and how the gains from trade are split among the actors in the food supply chain. Perhaps some unfair trading practices can be attributed to management sloppiness such as a late payment or an extra charge by mistake. However, the practices targeted by European and national legislation primarily have an economic function – they are economically advantageous for the party imposing them because they provide it with flexibility, additional monetary benefits, or absolve it of responsibility for commercial risk or failure. In the face of regulation of these terms, an undertaking which has the power to extract these terms may turn to non-regulated contract terms in order to exploit its power. Such non-regulated contract terms may be price, quantity, frequency of orders, or length of contract.

One way in which efforts to improve contracting conditions for disadvantaged trading partners may be circumvented is by putting pressure on supplier prices. Contract terms and price are not necessarily substitutable from the perspective of the buyer but sometimes they can be. Limiting the possibility to extract a rent *ex post*, in light of actual sales performance, might lead purchasers to extract the rent *ex ante*. Inability to impose one unfair contractual term due to a ban might lead to imposing another. Given the close link between retroactive demands for discounts, promotion money, and price, one may fear that powerful buyers– faced with rigid regulations on unfair

⁹⁸ Tesco was already found in breach of this provision in 2014. See <https://www.gov.uk/government/case-studies/code-clarification-charging-for-optimum-shelf-positioning>

⁹⁹ Case Ketī-94/Kaufland, Decision № 1111 of the Bulgarian Commission for the Protection of Competition taken in Sofia on 20.12.2016.

trading practices – will use their muscle to obtain lower prices or advantages by other means. A forbidden UTP may be substituted by one that is less strictly regulated or by attacking other terms of the contract, notably – the price.¹⁰⁰

There is no readily available evidence on the impact on prices paid to producers in the aftermath of regulatory action on UTPs. However, a useful case to consider is the milk sector following the adoption about the Milk Package. The Milk Package was introduced following the crisis in the dairy sector in 2009. It allowed Member States¹⁰¹ to introduce strict requirements for the contracting process between milk producers and first purchasers. The contracts would have to meet the following criteria: to be concluded in advance of delivery, be made in writing, include the price payable (static or calculated by a formula, the ingredients of which must be clarified in the contract itself), the volume and timing of deliveries, duration of the contract (including termination clauses for indefinite contracts), clarifications about payment periods and procedures, milk collection and deliveries, and force majeure provisions.¹⁰² Where such contracts are mandated the Member states may establish minimum duration which may not be less than six months.¹⁰³ Essentially, the measures aimed to intervene on the contract law part of the problem – by ensuring bargaining power imbalances are not misused for the purpose of bad contracting which leaves scope for uncertainty and exploitation.

Additionally, the regulation aimed to address the bargaining power issue itself by allowing for collective bargaining by recognized producer organizations¹⁰⁴ under certain conditions, notably that the volume of raw milk covered by the negotiations does not exceed 3.5 % of total EU production and 33% of total volume produced or delivered in that Member State.¹⁰⁵ The Regulation also strengthens the status of interbranch organizations¹⁰⁶ - under Article 210 of Regulation 1308/2013, Article 101(1) TFEU does not apply to agreements and concerted practices of recognized interbranch organizations provided that they are notified and exempted by the European Commission for meeting some basic requirements.¹⁰⁷ Such exemptions would be expected to strengthen the position of producers.

¹⁰⁰ Similar conclusion is reached in Wakui and Cheng, , 'Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity' (2015) *Journal of Antitrust Enforcement*. This is one of the author's criticisms of the Japanese law on superior bargaining power.

¹⁰¹ It was not compulsory for Member States to introduce such contracting requirements and not all Member States have done so.

¹⁰² See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, Article 148.

¹⁰³ Art. 148 of Regulation 1308/2013.

¹⁰⁴ The provision only applies for producer organizations which are recognized under Article 152(3) of Regulation 1308/2013.

¹⁰⁵ Article 149 of Regulation 1308/2013. As per Art. 149 (3), for Member States with volume of raw milk production of less than 500 000 tonnes, the applicable threshold is 45% of national production.

¹⁰⁶ Art. 157 (a) of Regulation 1308/2013. These are organizations which cover at least two different stages in the supply chain – producing, processing, and distribution.

¹⁰⁷ The following are forbidden: partitioning of the internal market, affecting the operation of the market organization, are disproportionate (not necessary for achieving the objectives of the CAP that interbranch organizations are meant to achieve, are fixing prices or quotas, are discriminatory, eliminate competition on a substantial portion of the market. See Art. 210 (4) of Regulation 1308/2013.

The Milk Package has been deemed relatively successful – its main goal was to strengthen the producer's position in the supply chain and, according to a report by the European Commission, '[t]here is evidence that it has done so to some extent, including through various other collective actions of producers going beyond the milk package'¹⁰⁸. Currently, 13 Member States have introduced the possibility of compulsory contracts and, as a result, 41% of milk deliveries in the EU are covered by compulsory written contracts. Additionally, other laws or private voluntary codes of practice provide similar contracting conditions to the ones previewed in the Milk Package. Taking these other instruments into account, '95% of total EU milk deliveries are covered under a formal agreement, in one form or another.'¹⁰⁹

The strengthening of Producer Organizations ('POs'), in particular by providing the possibility of collective bargaining, has also been relatively successful. According to the survey carried out by the Commission, the main objectives of POs are: better prices, more stable prices, and 'overall improvement of the producer's position in the supply chain', and ensuring milk collection for all members.¹¹⁰ Of the respondents, almost 70 % achieved a better price and about 60 % partially achieved a more stable price. However, 20% of respondents informed that they had absolutely failed to achieve both of these goals.¹¹¹

Despite these measures, and in addition to safety nets in case of dropping prices such as interventions on markets for skimmed milk powder, and direct income support, the perception is that milk farmers in the EU continue to struggle. Media items portray the deplorable situation of dairy farmers; dairy farmers are frequently in the news in relation to protests related to their relationship with buyers and the low purchasing prices for milk.¹¹²

6. Perverse incentives: who is milking the CAP?

Regulatory intervention can create counterproductive effects when the regulation stimulates the behavior it aims to eliminate and when the benefits of regulation are not captured by those intended to benefit from them. In the context of claims regarding buyer power and UTPs, the

¹⁰⁸ See European Commission, 'Report from the Commission to the European Parliament and the Council: Development of the dairy market situation and the operation of the "Milk Package" COM(2016) 724 final {SWD(2016) 367 final} https://ec.europa.eu/agriculture/sites/agriculture/files/milk/milk-package/com-2016-724_en.pdf, 14.

¹⁰⁹ Ibid, 6.

¹¹⁰ Ibid, 8.

¹¹¹ Ibid, 8.

¹¹² Media items are too numerous to mention. See eg. Graham Ruddick, 'UK farmers join Brussels protest over milk and meat prices' (*The Guardian*, 6.09.2015) <https://www.theguardian.com/environment/2015/sep/06/uk-farmers-join-brussels-protest-over-milk-and-meat-prices>; Scheherazade Daneshkhu, 'Dairy farmers to protest over price falls' (*Financial Times*, 21.03.2016), Jan Walter, 'Are subsidies driving dairy farmers into bankruptcy?' (*Deutsche Welle*, 29.05.2016) <http://www.dw.com/en/are-subsidies-driving-dairy-farmers-into-bankruptcy/a-19289812> and 'Farmers protesting collapsing milk prices bury the EU under ton of powdered milk' (*Deutsche Welle*, 23.01.2017) < <http://www.dw.com/en/farmers-protesting-collapsing-milk-prices-bury-the-eu-under-ton-of-powdered-milk/a-37244986> >; Samuel White, 'Dairy farmers demand EU action on milk prices' (*Euractiv*, 27.10.2017) <https://www.euractiv.com/section/agriculture-food/news/dairy-farmers-demand-eu-action-on-milk-prices/>;

approach to the Common Agricultural Policy (CAP) has also changed in response to pressure from farmers and food producer organizations. In the absence of competition law under-enforcement, issues of economic regulation have shifted from competition policy to the specific realm of agricultural policy.

The development of the CAP reform is an example of how corrective measures can distort markets and incentives, while only partially benefitting those whom they aim to protect. These developments fit the script of the 'perverse incentives' scenario in the typology of counterproductive regulation. This scenario covers cases of 'moral hazard' – such as when rebates for toxic waste incentivize purposeful waste production and cases where the presence of insurance or a guarantee results in excessive risk taking on the part of the insured.¹¹³ In the case of buying power and UTP regulation, we might also say that perverse incentives have been created which not only do not diminish the problem of buyer power or UTPs, but which also imply inefficient use of public funds.

The European Treaties have an explicit commitment to farmer welfare which is found in Article 39 (b) TFEU. The way the CAP achieves this objective is by means of the following instruments: direct income support for farmers, market interventions ('market measures') in times of crisis, and rural development programs.¹¹⁴ In addition to the direct payments,¹¹⁵ farmers can also apply for additional payments available under other schemes: a green payment, a young farmers' subsidy, support for small and medium-sized farms, and support for farmers in areas with difficult farming conditions. Although the CAP has become more market-oriented since the 1980s,¹¹⁶ EU farmers are among the most heavily subsidized in the world.¹¹⁷ In fact, the CAP has traditionally absorbed more than 50% of the total EU budget – ranging from above 70% in the 1980s to just under 40% in recent years.¹¹⁸ These heavy subsidies have led to much criticism regarding their

¹¹³ Grabosky, 354-355. In Grabosky's view, the Reagan administration's policy of deposit insurance for small financial institutions combined with under-enforcement of prudential controls led to a the Savings and Loan Scandal of the 1980s. The story prompts one to wonder if the case of agriculture might be following the same line.

¹¹⁴ CAP Overview, https://ec.europa.eu/agriculture/cap-overview_en . See also Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L 347/487 as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 OJ L 350/15 (Omnibus Regulation).

¹¹⁵ Direct payments explained at https://ec.europa.eu/agriculture/direct-support/direct-payments_en . An overview is also available in Annex I to Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy as amended by the Omnibus Regulation, OJ L 347/654.

¹¹⁶ See Gerry Alons and Pieter Zwaan, 'New Wine in Different Bottles: Negotiating and Selling the CAP post-2013 Reform' (2016) 56 (3) *Sociologia Ruralis*, 349, 351.

¹¹⁷ See OECD chart featured in 'Malcolm Turnbull correct: Australian farmers among world's least subsidised' (ABC News Item, 3 March 2014)< <http://www.abc.net.au/news/factcheck/2014-02-14/malcolm-turnbull-correct-on-farmers-subsidies/5252596> >.

¹¹⁸ At their highest, farmer subsidies absorbed more than 70 % of the total EU budget. The percentage has shrunk over time to just under 40% of the total budget, but the absolute sum of money spent on agriculture has grown due to the larger number of Member States. Although the percentage of EU budget devoted to agriculture is shrinking in relative terms, it has grown in absolute terms - due to the more countries following accession of new Members. See European Commission, 'CAP post-2013: Key graphs & figures'

distortionary impact on world trade. Despite this, it appears that CAP subsidies are not enough to ensure support for farmers. How come farmers are complaining of insufficient income if they are already so heavily subsidized?

Perhaps one of the reasons has to do with structural issues such as the supplier power over key inputs and the buying power of processors and retailers. The economic argument goes that even a monopsony buyer would not push prices too low because a rational buyer needs to have a competitive supplier base in business in order to stay profitable in the long run. But what about a buyer who knows that regardless of how hard it pushes, farmers *will* stay in business thanks to generous government support backed by a legal commitment to intervene?¹¹⁹ A clever buyer will learn to incorporate this knowledge and will adjust its strategy accordingly. Given a serious commitment by the public to continue to subsidize one's suppliers, it is only rational that the purchaser will take this into account just as a bank which knows it is going to be bailed out runs the risk of taking too much risk. There is no need to worry about starving the goose that lays the golden eggs – because the goose will be resuscitated, fed, and propped back on its feet thanks to generous taxpayers' support.

But there is more to this observation. If retail chains extract welfare from farmers, who then have to be subsidized, it is evident that not only farmers benefit from subsidy payments. In a perverse chain of events, supermarkets benefit both directly and indirectly from CAP subsidies. Indirectly, they benefit because they can exploit a stable supply source without concern about the long-run consequences. Directly, they benefit because the 'rents' they extract from dependent suppliers are – in a perverse way – the 'rents' that farmers receive from the taxpayers of the EU.

According to an OECD Roundtable Report on Subsidies:

*'Another weakness of the use of subsidies as a redistributive tool, rather than direct income taxation and redistribution, is that subsidies often miss their goals because they may end up being appropriated by agents that are not the intended beneficiaries. Again, aid to agriculture is a case in point.'*¹²⁰

Subsidies and related support measures such as intervention measures may play a useful role in correcting market outcomes and achieving socially (or politically) palatable results. Yet, as it turns out, subsidy policies cannot be viewed in isolation from structural issues on markets, and thus, by implication, from competition policy. In this case, it is evident that the CAP cannot fulfill its goal of transitioning to a more market-based regime if suppliers need to 'bailed' out every so often.

According to former Chief Economist of DG Competition Massimo Motta, objectives other than economic efficiency are best met with 'policy instruments that distort competition as little as

(March, 2017) <https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1_en.pdf>

¹¹⁹ Additional argument that is valid regardless of the presence of income support is that a monopsonist who lacks the knowledge about supplier cost structures or a monopsonist with short-term management horizons may indeed press too hard. The result is akin to 'killing off the goose that lays golden eggs', namely eroding a reliable and dependent supplier base, thereby also weakening the monopsonists' position.

¹²⁰ OECD on subsidies, p. 39.

possible'.¹²¹ The reflection herein suggests that the opposite may also be true – non-enforcement of competition policy may distort other policy areas, thus jeopardizing their ability to meet other important objectives.

7. Over-deterrence: how many pieces of legislation does it take to tackle UTPs?

That strict standards may chill desirable behavior is a widely acknowledged concern in antitrust law. It is an argument often surfacing in debates about type I v type II errors.¹²² The same logic applies to regulatory choices – whereas lax standards may lead to all sorts of problems associated with *laissez-faire*, 'draconian standards' may prejudice investment and innovation. The question raised by this type of regulatory failure is whether the regulators are setting standards so high that regulatees are faced with unjustified costs of compliance. This section sheds light on two responses to the problem of UTPs in the supply chain – the strengthening of the role of producer organizations under the CAP and the increasingly complex legal framework applicable to trade in food products.

7.1. Fighting fire with fire: strengthening producer organizations under the CAP

Agriculture is special not only because it is subsidized but also because primary food producers are subject to a special competition regime. In principle, the competition rules are meant to apply to primary agricultural producers – this is established in Article 42 TFEU. At the same time, the argument goes that in order to achieve the other objectives of Article 39 TFEU, notably the goal of farmer welfare, the competition law norms may have to be set aside. Claims about buying power and UTPs have provided an impetus to clarify the relationship between competition law and CAP objectives and have served as an important argument to strengthen the exemptions from competition law.

CAP legislation over the years has attempted to introduce qualified exceptions for primary producers from the cartel prohibition.¹²³ However, the relationship between competition norms and CAP objectives remained unclear: the nature and scope of such exceptions have been tested in a number of cases before the European Court of Justice. The result is a fragile and not very clear

¹²¹ M Motta, *Competition Policy: Theory and Practice* (CUP 2004), 30.

¹²² In antitrust jargon, a type I error refers to under-enforcement, namely – letting harmful practices continue; a type II error refers to over-enforcement, namely – prohibiting harmless practices. The type I and type II error terminology originated in the field of statistics.

¹²³ In the very first CAP regulation addresses this possibility. See Art. 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products [1962] OJ 30. See also Recital 7 of Regulation No 2200/96 which notes that 'in the face of ever greater concentration of demand, the grouping of supply through these organisations is more than ever an economic necessity in order to strengthen the position of producers in the market'.

compromise between the two goals.¹²⁴ In the latest judgment on the matter, the 2017 *Endives* judgment, the Court held that under conditions of strict proportionality, an anticompetitive agreement which takes place within a single producer organization or association of producer organizations will fall outside the scope of Article 101 (1) TFEU.¹²⁵ The Court specifically mentions the presence of buyer power as an acceptable justification for the anticompetitive agreement.¹²⁶

The Court's judgments complement a trend in CAP legislation to strengthen exemptions from competition law in order to stimulate producer consolidation. Over the past decade, increasingly far-reaching derogations from the competition provisions have been introduced in CAP policy. Starting with the Milk Package of 2012, there was the possibility of mandating written contracts and a derogation from Article 101 TFEU for certain collective bargaining agreements between recognized milk producer organizations and purchasers.¹²⁷ With the general CAP reform in 2013, further derogations from Article 101 TFEU were included and the position of producer organizations and associations for producer organizations was strengthened. The possibility for recognized producer organizations¹²⁸ and associations of producer organizations¹²⁹ to collectively negotiate contracts for the supply of olive oil,¹³⁰ beef,¹³¹ and certain arable crops¹³² was introduced subject to certain conditions.¹³³ Supply management measures were provided for

¹²⁴ The Court has held that although the competition rules are meant to apply to the agricultural sector, the objectives of the common agricultural policy take precedence over competition norms. Cases include Case C-280/93 *Germany v Council* [1994] EU:C:1994:367, [61]; Case C-311/94 *IJssel-Vliet Combinatie BV v Minister van Economische Zaken* [1994] ECLI:EU:C:1996:383 [31]; C-137/00 *Milk Marque and National Farmers' Union* [2003] EU:C:2003:429, [81]; Case C-456/00 *France v Commission* [2002] EU:C:2002:753, [33]; Case C-373/11 *Panellinos Syndesmos Viomichanion Metapoisis Kapnou* [2013] EU:C:2013:567, [39]; aff'd in Case C-671/15 *President of the Autorité de la concurrence v Association des producteurs vendeurs d'endives (Endives)* [2017] ECLI:EU:C:2017:860, [37].

¹²⁵ Case C-671/15 *President of the Autorité de la concurrence v Association des producteurs vendeurs d'endives (Endives)* [2017] ECLI:EU:C:2017:860.

¹²⁶ *Endives*, [65].

¹²⁷ European Commission DG Agriculture website, 'The "Milk Package' <https://ec.europa.eu/agriculture/milk/milk-package_en>'. See also Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector. This regulation was repealed following the entry into force of Regulation 1308/2013, notably Article 149. The sugar sector also enjoyed exemptions even prior to these reforms. See Art 125 of Regulation 1308/2013.

¹²⁸ The criteria for recognized producer organizations are defined in Art. 152 of Regulation 1308/2013.

¹²⁹ As defined in Art 156 of Regulation 1308/2013.

¹³⁰ Article 169 of Regulation 1308/2013.

¹³¹ Article 170 of Regulation 1308/2013.

¹³² Article 171 of Regulation 1308/2013.

¹³³ For an overview and examples, see European Commission, *Commission Notice: Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors* [2015] OJ C/431, 1. Broadly, these requirements include: the PO or APO must be recognized by the competent authorities of the relevant Member State; there is 'The PO must pursue one or more of the objectives of concentrating supply, the placing on the market of the products produced by its members or optimising production costs; the integration of activities leads to efficiencies; 'The volume of a given product subject to negotiations by a particular PO must not exceed 20 % (for olive oil) of the relevant market/15 % of the total national production (for arable crops and for beef and veal); producers cannot be members of more than one PO which bargains collectively on their behalf; POs are required to notify the volume of product covered by the collective bargaining to the competent national authorities.

ham¹³⁴ and cheese¹³⁵ with protected designation of origin or a geographical indication. A provision on so called 'crisis cartels' providing producer organizations and interbranch organizations to take collective measures in order to stabilize markets in case of disturbance.¹³⁶

The 2013 reforms are not the end of the story. The CAP has once again experienced significant reform with the entry into force of the so-called Omnibus Regulation on January 1st, 2018.¹³⁷ The Regulation aims to further strengthen the position of producers – for instance, by ensuring there is funding and support available for coaching initiatives to encourage farmers to join producer organizations.¹³⁸ The provisions on written contracts have been strengthened and expanded. In the case of milk producers, even where Member States choose not to mandate contracts, individual producers, POs or APOs, may require a written contract fulfilling the criteria of minimum duration.¹³⁹ This possibility is also open to producers, POs, or APOs, of other agricultural sectors (not only milk and sugar) thanks to an amendment of Article 168 of Regulation 1308/2013.¹⁴⁰ The value-sharing agreements which were previously only available for the sugar sector, have been further extended. Under a new Article 172(a), introduced by the Omnibus Regulation, farmers, associations of farmers and their first purchasers, are now allowed to establish 'standard value sharing clauses' – agreements about how to cope with changes in market prices of the products, including bonuses and losses.¹⁴¹ This option is also available to interbranch organizations.¹⁴²

Perhaps most importantly, the Omnibus Regulation expands the scope of derogations from competition law, relieves these derogations from the conditions of productive efficiency, and makes these derogations explicit. For instance, Art. 152 of Regulation 1308/2013 which deals with producer organizations now includes an explicit derogation from Article 101 TFEU.¹⁴³ The collective bargaining exemption is thus not only available for specific sectors such as milk, beef and veal, olive oil and certain arable crops, but for all recognized POs and APOs. Importantly, whereas such activities in the past were subject to an efficiency criterion and market share thresholds, these criteria are no longer present. Farmers, POs and APOs may request an opinion from the Commission about the compatibility of their agreements with Art. 39 TFEU.¹⁴⁴

Furthermore, the conditions for crisis cartels, introduced with the reform in 2013, are relaxed. Under the new rules, crisis cartels are open not only to recognized POs, APOs, and interbranch organizations but more generally to farmers, farmers' associations, or associations of such

¹³⁴ Article 172 of Regulation 1308/2013.

¹³⁵ Article 150 of Regulation 1308/2013.

¹³⁶ See European Commission, 'CAP Reform – an explanation of the main elements' (Memo, Brussels, 26 June 2013); http://europa.eu/rapid/press-release_MEMO-13-621_en.htm.

¹³⁷ Regulation 2017/2393 of 13 December 2017.

¹³⁸ See for instance, the amendments to Articles 33, 34, and 35 of Regulation 1308/2013 – explained in Article 4(1), (2) and (5) of Regulation 2017/2393.

¹³⁹ Article 148 of Regulation 1308/2013 as amended by Art. 4 (8) of Regulation 2017/2393.

¹⁴⁰ See Art. 4 (15) of Regulation 2017/2393.

¹⁴¹ See Art. 4 (17) of Regulation 2017/2393.

¹⁴² See Art. 4 (12) of Regulation 2017/2393.

¹⁴³ See Article 4 (10) of Regulation 2017/2393.

¹⁴⁴ See Art. 4 (20) of Regulation 2017/2393.

associations.¹⁴⁵ Following the Omnibus regulation, the preconditions for granting an exception have been scrapped, so a crisis cartel is no longer a measure of last resort.¹⁴⁶

These changes sound suspicious from a competition law perspective. Essentially, they aim to consolidate producers in certain sectors in order to improve the prices and contracting conditions for producers. Surely, consolidation on the producer side may solve the problem of *farmers*, but at whose expense? The theory of bilateral monopoly teaches us that the outcomes are sub-optimal in terms of efficiency. A situation in which both producers and retailers are concentrated would increase prices to consumers and shrink demand. As one CAP researcher puts it:

*'the attempt to strengthen producers' organisations, rather than curbing the power of the oligopolistic downstream sector, bears the risk of double marginalization, which might eventually be costly for consumers and lower the demand for products such as fruit and vegetables'.*¹⁴⁷

A joke told by economists is that 'the only thing worse than a monopolist is two monopolists' – a humorous hint at the problem of 'double marginalization'. Despite this, a preference was made for empowering the producer side, rather than for deconcentrating purchasing markets. Such suggestions remain controversial from a mainstream competition viewpoint, and even proponents of such solutions, notably John Kirkwood, caution that the choice for buyer cartels should be made only under very strictly defined circumstances.¹⁴⁸ It is not self-evident how Kirkwood's criteria apply to power buyers in the EU food supply chain. In this case, the justification for creating bilateral monopolies might have to be reexamined.

The sacred cow of competition law – collective action by competitors – took a stab with the entry into force of the milk package. It has taken a serious blow with the 2017 CAP reform. According to the evaluation reports of the milk package, collective bargaining has succeeded in improving the position of milk producers.¹⁴⁹ The question is (again): at whose expense? Sub-paragraph (e) of Article 39 TFEU specifically establishes the goal that 'supplies reach consumers at reasonable prices', thus requiring that the objective of increasing standard of living for the farming community be balanced against fairness to consumers. With an increased power for suppliers and no intervention against the bargaining power of the chains, consumers are likely to find

¹⁴⁵ See Art. 4 (21) of Regulation 2017/2393 amending Art. 222 of Regulation 1308/2013.

¹⁴⁶ See Art. 4 (21) of Regulation 2017/2393 amending Art. 222 of Regulation 1308/2013. The requirement that a crisis cartel can only be approved if the Commission has 'already adopted one of the measures referred to in this Chapter, if products have been bought in under public intervention or if aid for private storage referred to in Chapter I of Title I of Part II has been granted' (former Art. 222(2) of Regulation 1308/2013) has been deleted. This means there is a shorter pathway to granting approval for limitation of competition.

¹⁴⁷ See Jean-Christophe Bureau, 'Where Is the Common Agricultural Policy Heading?' (2012) 6 *Forum Intereconomics*, 316, 319.

¹⁴⁸ See John Kirkwood, 'Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy', (2014) 69(1) *U. Miami L. Rev.* 1, 51 -52. According to Kirkwood, buyer cartels could be justified in the presence of buyer power if three cumulative requirements are met: the suppliers are faced with legally acquired, substantial, persistent, and durable monopsony power; the suppliers' cartel will engender procompetitive effects downstream; no downstream market power will arise as a result of the collusion.

¹⁴⁹ European Commission, 'Report from the Commission to the European Parliament and the Council: Development of the dairy market situation and the operation of the "Milk Package" provisions' (2016) COM(2016) 724 final, 14-16.

themselves bearing the burden of market-correcting. It is important to stress that food, unlike brand-name cosmetics or smartphones, is not a discretionary item – it is essential to survival. It makes up a significant portion of the essential expenditures of consumers; and poor consumers spend a disproportionate amount of their income on food.¹⁵⁰ Consumers have been faced with shortages and price hikes for some products.¹⁵¹ There are also problems with food quality, as reports have shown that manufacturers skimp on ingredients in order to save on costs, especially in the ‘poorer’ EU Member States.¹⁵²

Striking a balance between the interests of producers, processors, distributors, and consumers is a difficult task. The CAP reform has aimed at strengthening the position of producers vis-à-vis other actors in the supply chain; however, it has not weakened the power of retailers or processors. The weakest link in the chain is the consumer who will likely have to bear the cost of the rebalancing of power in the food supply chain.

Taking stock of all the regulatory developments, one may conclude that not intervening with competition law to address the issue of exploitation of bargaining power has ultimately played against the consumer interest and efficiency. The result is to the dislike of the Commission which noted its concern about the producer cooperation provisions in the new Omnibus regulation.¹⁵³ Competition authorities have often claimed that they are wary of enforcing the competition rules in cases of buyer power for fear of harming consumer welfare.¹⁵⁴ It seems that non-enforcement of competition law in cases of buyer power has resulted in harm to consumer welfare nonetheless.

7.2. The proposed Directive on UTPs

The Commission has been under pressure to tackle the issue of UTPs in the food supply chain for a long time already. The 2013 Green Paper on the topic raised expectations of a forthcoming EU legislation. The response was delayed, as in the meantime the Commission placed its faith in a pan-European self-regulatory scheme known as the Supply Chain Initiative. By 2018, the

¹⁵⁰ See European Competition Network Subgroup on Food, ‘Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector’ (May 2012), 14-15. According to the report based on data from DG Agriculture, EU consumers spent on average 14.1 % of their total household budgets on food in 2011. However, there is a great disparity within Member States with consumers in Luxembourg spending 9 % of their income on food and consumers in Romania spending 33 % of their income on food. In general, poor consumers spend a higher percentage of their income on food than wealthier consumers and are likely to be hit harder by rising food prices.

¹⁵¹ See also <https://www.euractiv.com/section/agriculture-food/news/spreading-thin-france-grapples-with-butter-shortage-price-hike/>.

¹⁵² See Euractiv, ‘EU bans dual quality food after pressure from eastern members’ (12.04.2018) <https://www.euractiv.com/section/agriculture-food/news/eu-bans-dual-quality-food-after-pressure-from-eastern-members/>; European Commission, ‘Dual quality food products: Commission guides Member States to better tackle unfair practices’ (Press release, Brussels, 26 September 2017) http://europa.eu/rapid/press-release_IP-17-3403_en.htm and European Commission, ‘Dual quality of food products: New guidance for EU Member States’ (26 September 2017); <https://euobserver.com/business/141352>.

¹⁵³ See Regulation 2017/2393, Commission statements on OJ L 350/49.

¹⁵⁴ J Stefanelli and P Marsden (British Institute of International and Comparative Law), *Models of Enforcement in Europe for Relations in the Food Supply Chain* (23 April 2012).

Commission concluded that the scheme had not performed up to expectations. The Preamble to the proposed Directive notes that the Supply Chain Initiative is

*'unlikely to develop into a comprehensive governance framework that would make public governance measures including enforcement superfluous. Participation in the SCI is voluntary and the SCI so far does not cover all operators in the food supply chain. For instance, while retailers are members of the SCI retailer buying alliances do not participate in the SCI, nor do the organisations representing agricultural producers.'*¹⁵⁵

The sentiment is echoed in 2018 the proposal for Regulation of online intermediation service providers, where the Commission notes that:

*'Previous experience with the Supply Chain Initiative (SCI) in the food sector also suggests that purely voluntary initiatives are not suited for creating a functioning independent redress mechanism and fairness rules that are attractive and credible for both sides of the market. Despite some progress (elaboration of principles of good practice and setting up of a governance group), agricultural providers – the main supposed beneficiaries of the scheme – did not sign up to the scheme because of confidentiality and enforcement concerns.'*¹⁵⁶

This development suggests the end of counterproductive regulation in the food sector is near. However, in light of the discussion so far in this article, one may be skeptical about the effectiveness of the proposed Directive. A close look at the draft legislation raises a number of questions regarding its scope, enforcement provisions, and remedies.

In terms of scope, the proposed Directive seems to promise more than it delivers. The scope of the Directive is limited to the primary agricultural products listed in Annex I to the Treaty and products processed from primary agricultural products for use as food, thus excluding non-food grocery products.¹⁵⁷ Some practices are only prohibited with respect to perishable food products.¹⁵⁸ For instance, Article 3 (1)(a) obliges Member States to prohibit payment terms of more than 30 calendar days for perishable food products and Article 3(1)(b) prohibits cancellations of orders of perishable food products on unreasonably short notice.¹⁵⁹ The payment terms for non-perishable food products are not addressed.

The general prohibition of unfair practices is less strict than might appear at first glance. Article 3 (1), sub-paragraphs (c) and (d) prohibit respectively the following practices: unilateral and

¹⁵⁵ Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain COM(2018) 173 final , 2018/0082 (COD) (hereinafter: Proposed Directive on UTPs in Food), p.2.

¹⁵⁶ Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services COM(2018) 238 final 2018/0112 (COD), p.5.

¹⁵⁷ See Article 2(d) of the proposed Directive.

¹⁵⁸ The Directive defines these as 'food products that will become unfit for human consumption unless they are stored, treated, packaged or otherwise conserved to prevent them from becoming unfit'. See Article 2 (d) of the proposed Directive.

¹⁵⁹ The exact text of the prohibition in Article 3(b) of the Proposed Directive refers to a situation in which 'a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products'.

retroactive changes to the terms of supply regarding frequency, timing, volume, delivery, quality standards or prices; and supplier payment for wastage of food products on the buyer's premises which is not caused by supplier fault or negligence. Yet, a prohibition on unilateral change and retroactive changes does not mean that power imbalances are remedied. It means that a supplier who is not afraid of commercial retaliation can invoke a legal right to refuse such a unilateral, retroactive charge; alternatively, a supplier afraid of reprisals might still choose to 'acquiesce' to a proposal for a retroactive change in contract terms in order to avoid commercial retribution via the non-regulated terms.

Some UTPs are not prohibited at all. The practices enumerated in Article 3(2) (a)-(d)¹⁶⁰ are only prohibited if 'they are not agreed in clear and unambiguous terms at the conclusion of the supply agreement'. This means that the practice can continue as long as it specified sufficiently clearly at the time of the agreement. This means that the charging of shelf and listing fees, marketing contributions or the return of unsold products can continue – as long as it is not arbitrary – namely, as long as it is specified at the time of conclusion of the contract. The meaning of the latter – what would count as the moment of entering into a contract – will be a matter of interpretation for national courts and authorities.¹⁶¹

In terms of strengthening enforcement, the Directive requires a designated public authority¹⁶² with the powers to initiate and conduct investigations *ex officio* or upon complaint, to request information, to take infringement decisions resulting in a cease-and-desist order, and to impose pecuniary fines on infringers.¹⁶³ It also provides the possibility for authorities to protect the confidentiality of complainants upon request.¹⁶⁴ However, the authority may choose not to take an infringement decision when doing so might compromise the confidentiality of the complainant. In practice, this leaves the concern about the 'fear factor' in place. Complainants may still choose to alert authorities of unfair practices but in the end may fail to get relief. The truly interesting possibility is for producer organizations or associations of producer organizations to submit complaints on behalf of their members.¹⁶⁵ However, this possibility seems to refer only to producer organizations and associations of producer organizations of primary agricultural producers, as defined in Article 152 and 156 of Regulation 1308/2013, not to any producer organization in the food supply chain. The remedies also remain unclear – the Directive mentions that authorities should be able to impose pecuniary fines which are 'effective, proportionate and dissuasive taking into account the nature, duration and gravity of the infringement'¹⁶⁶ – however, the actual implementation and interpretation of this may differ from Member State to Member State.

¹⁶⁰ The practices in question include: a) return of unsold products to the supplier; b) additional charges for stocking, displaying and listing products; c) promotional charges; d) marketing fees.

¹⁶¹ For instance, the question might arise if the contract counts as the moment of first establishing a commercial relationship or whether the contract is renewed annually.

¹⁶² Article 4 of the proposed Directive.

¹⁶³ Article 6 of the proposed Directive.

¹⁶⁴ Article 5 (3) of the proposed Directive.

¹⁶⁵ Article 5 (2) of the proposed directive.

¹⁶⁶ Article 6 (d) of the proposed Directive.

When it comes to the potential of the Directive to smooth down differences within the EU and ensure a level playing field, an obvious point to make is that the legislative instrument chosen is that of a Directive, not a Regulation.¹⁶⁷ This leaves Member States wiggle room for implementation choices. As a result, the actual implementation and strictness of enforcement across Member States may differ. In light of these challenges, regulatory arbitrage may persist.

Finally, the approach taken is that of minimum harmonization.¹⁶⁸ The practical significance of this legislative choice is that Member States will have to incorporate the Directive requirements on top of the already existing legal frameworks. The Directive does not make the pre-existing national rules nor the private regulatory initiatives like SCI disappear; rather, it adds an additional layer on top of the pre-existing mix of private and public law norms.

8. Opportunity-costs: reexamining enforcement priorities

Striving for perfection in enforcement may result in under-enforcement as the regulator spends time and energy on certain cases while neglecting other important cases. Thinking about opportunity costs can provide another useful frame through which a critical perspective on the enforcement of the EU competition rules against unfair trading practices can be seen. Seen through this lens, one might wonder: has the EU competition regulator made the correct enforcement choices in the food supply chain – in view of available knowledge and in view of opportunity costs?

When it comes to the issue of buying power and unfair trading practices in the food sector, the Commission's approach has consistently been set in favor of non-intervention. Many national studies have been carried out in the past years,¹⁶⁹ signaling problematic practices, but the

¹⁶⁷ By contrast, in the case of unfair practices in the online intermediation services, the legislative choice was made for a Regulation.

¹⁶⁸ Article 8 of the proposed Directive. Notably, such rules are only allowed provided they are compatible with the rules on the functioning of the internal market.

¹⁶⁹ For instance, the UK Competition Commission carried out two market investigations in the grocery sector – in 1999-2000 and in 2006-2007. See UK Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000) available at http://webarchive.nationalarchives.gov.uk/+/http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm and UK Competition Commission, *Groceries market investigation* (2008) <http://webarchive.nationalarchives.gov.uk/20140402194746/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry> ; Nordic Competition Authorities Joint Report, *Nordic Food Markets - a taste for competition* (2005) https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_food_markets.pdf ; Baltic International Center for Economic Policy Studies (BICEPS), *Competition in Baltic Grocery Retail Markets* (2006) http://www.biceps.org/assets/docs/izpetes-zinojumi/Competition_in_Baltic_Grocery_Retail_Markets.pdf. In the Netherlands, see EIM, *De aard en omvang van inkoopmacht: Onderzoek naar de perceptie van leveranciers* (2009) Report prepared for the Dutch Ministry of Economic Affairs, SEO Economisch Onderzoek (Barbara Baarsma and Nicole Rosenboom), *Oneerlijke handelspraktijken: voldoet bestaande (zelf)regulering?* (2013) Report prepared for the Dutch Ministry of Economic Affairs

Commission has remained guarded in its approach. Concern with chilling competition and ensuring accuracy has prompted the Commission to order an extensive study on the impact of retail concentration on choice and innovation,¹⁷⁰ but there is no knowledge of the Commission using its investigative powers to undertake dawn raids or sector inquiries, as it has done in other sectors in the past.¹⁷¹ When it comes to the food sector, at the EU level, no big case was pursued, no formal sector inquiry was opened, and no guidelines were introduced.¹⁷²

This stance is especially peculiar when contrasted with the approach of the Commission to similar competition concerns in other sectors. Let us consider the issue of private labels, which essentially concerns the customer-competitor conflict between supermarkets and their suppliers. The issue of supermarkets replacing ‘tier-B’ brands with own label products which compete head-to-head with other brands or the use of private labels as threat in negotiations, has been discussed in the competition law literature for more than a decade already.¹⁷³ The study commissioned by DG Competition on concentration in food markets revealed that under some circumstances, the presence of private labels might result in less innovation.¹⁷⁴ No action has been undertaken by the Commission against the self-preferencing practices of supermarkets in the case of private labels.¹⁷⁵ The same practice of self-preferencing is, however, at the core of the decision in the

http://www.seo.nl/uploads/media/2013-04_Oneerlijke_handelspraktijken.pdf and TISCO, ‘Eerlijk, scherp en betrouwbaar. Een interactieve verkenning naar ijkpunten voor eerlijk zakendoen en effectieve conflictoplossing’ (2012) Report prepared for the Second Chamber of the Dutch Parliament <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vix1ordxlvyi>; Spanish Competition Authority, ‘Report on Competition and the Agrifood Sector’ (Informe sobre Competencia y Sector Agroalimentario)(2010) available at https://www.cnmec.es/sites/default/files/1185937_5.pdf.

¹⁷⁰ Cambridge Econometrics Ltd. and Arcadia International, *The economic impact of modern retail on choice and innovation in the EU food sector* (2014, Report prepared for the European Commission), <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>.

¹⁷¹ The Directorate General for Competition has carried out market inquiries for energy (2005), retail banking and business insurance (2007), pharmaceutical sector (2009), e-commerce (2015).

¹⁷² It must be noted that the 2010 Block Exemption Regulation does reflect the issue of buyer power by introducing a 30% threshold on the purchasing side. However, there is limited information about the actual practical significance of this stricter regulation in the context of unfair trading practices in the food supply chain.

¹⁷³ Ariel Ezrachi, ‘Unchallenged Market Power? The Tale of Supermarkets, Private Labels and Competition Law’ [2010] *World Competition* 33(2), 13. See also the contributions in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy. The Changing Landscape of Retail Competition* (OUP, Oxford 2009); V Daskalova, ‘Private labels (Own Brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law’ (2012) TILEC Discussion Paper 2012-02 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981958; H Nevo and R van den Bergh, ‘Private Labels: Challenges for Competition Law and Economics’ (2017) 40(2) *World Competition*, 271.

¹⁷⁴ Ibid, 34. The study concludes about the impact of private labels as follows: ‘We did not find evidence generally that a larger share of private labels (at national or local level) curbed choice. If anything, at least up to a moderate level, it is associated with slightly more choice, except in the case of the range of product prices where a larger share of private labels in a given product category and shop was associated with slightly less choice. However, beyond a certain level (which varies depending on the product category) it appears that a higher share of private labels is associated with less product variety.’

¹⁷⁵ For instance, supermarkets often charge shelf fees and promotion money to the suppliers of branded goods that they carry. However, private labels are exempt from such fees.

Google Shopping case.¹⁷⁶ Even though there are debates as to the extent to which the existing EU competition law doctrine covers this theory of harm,¹⁷⁷ the Commission proceeded with the case.

Another example concerns the attitude of the Commission on matters of fairness and distributive justice, especially with respect to the division of 'rents' between trading partners. The Commission has been reluctant to intervene in such cases in the food supply chain. At the same time, the Commission has launched several investigations with respect to breaches of FRAND (fair, reasonable and non-discriminatory) commitments in the context of licensing for Standard Essential Patents. It has also intervened in a number of cases involving exploitative terms of contract.¹⁷⁸ Notably, in these cases, the parties were not necessarily unequal in terms of bargaining power.¹⁷⁹ The matter was deemed so important that in 2017 the Commission published Guidelines on the issue of calculating a FRAND rate.¹⁸⁰ The most recent development has been the Commission's push for legislation on unfair platform-to-business trading practices.¹⁸¹

Claims related to exploitation of buyer power in the food sector have not engendered the same type or response. Even if there may be some doctrinal uncertainty about buyer power or unfair trading practices and the scope of EU competition law, there is also sufficient scope for testing the limits of the law. The concept of buyer power is no stranger to EU competition law. It has been

¹⁷⁶ Commission decision in Case AT.39740 *Google Search (Shopping)*, C(2017) 4444 final.

¹⁷⁷ See Bo Vesterdorf, 'Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin' (2015) 1 (1) *Competition Law and Policy Debate*, 4. The doctrinal accuracy of this piece has been criticized in Nicolas Petit, 'Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf' (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253.

¹⁷⁸ See European Commission, 'Antitrust: Commission initiates formal proceedings against Qualcomm' (MEMO/07/389 (2007) http://europa.eu/rapid/press-release_MEMO-07-389_en.htm?locale=en); Case COMP/38.636 – RAMBUS (2009); European Commission, 'Antitrust: Commission welcomes ICom's public FRAND declaration', MEMO/09/549 (2009); Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents C(2014) 2892 final http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf; Case AT.39939 - Samsung - Enforcement of UMTS standard essential patents (2014) C(2014) 2891 final http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

¹⁷⁹ In *Huawei*, the Court of Justice of the EU observed that the parties, 'it must be recognised, have equivalent bargaining power.' See Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp* [2015] ECLI:EU:C:2015:477 [37].

¹⁸⁰ European Commission, *Setting out the EU approach to Standard Essential Patents* (Communication, Brussels, 29.11.2017) COM(2017) 712 final).

¹⁸¹ European Commission, *Online platforms: Commission sets new standards on transparency and fairness*, (Press release, Brussels, 26 April 2018) http://europa.eu/rapid/press-release_IP-18-3372_en.htm. Notably, however, this is not an initiative of DG COMP. The initiators are DG CONNECT and DG GROW (the DG responsible for Internal Market), as can be verified from the Inception Impact Assessment.

invoked in a number of cases¹⁸² and has been investigated in merger control.¹⁸³ A growing body of literature suggests that buyer power is a competition law issue as much as seller power – be it from an economic or legal point of view.¹⁸⁴ Given the existing case law, the open-ended texture of the antitrust provisions and the antitrust scholarship available, the Commission’s reluctance to take action is difficult to comprehend.

Hasty enforcement in the absence of evidence can be damaging to the market, to stakeholders and to the regulator’s reputation. At the same time, failure to act in the presence of convincing theory and evidence can also be damaging. Enforcement without solid evidence may result in chilling competitive effects, but non-enforcement also sends a message. In a 2017 speech, Director-General for Competition at the European Commission Mr. Johannes Laitenberger notes that not prosecuting sends signals to incumbents and present and prospective market players.¹⁸⁵ Not investigating cases due to lack of resources (absorbed by efforts invested in perfecting other cases) means breaches are not discovered or are punished too late. In his words ‘one must be as concerned about under-enforcement as about over-enforcement’.¹⁸⁶ Although these are the words of the Directorate General, this has not been the attitude of DG COMP in the food sector. The European Commission has chosen to ‘play it long’, gather evidence, and err on the side of non-enforcement. The result, as argued above, has been that the focus of the debate has shifted – from competition law enforcement to ‘other remedies’ such as sector-specific exemptions from competition law and sector-specific regulation on unfair trading practices. This has been the trend at the EU level and at the national level, with a number of public and private developments taking place in parallel. The sum of these regulatory responses is arguably much more damaging to

¹⁸² Case 298/83 *Comité des industries cinématographique des Communautés européennes (CICCE)* [1985] ECLI:EU:C:1985:150; Case T-219/99 *British Airways Plc v Commission of the European Communities* [2003] ECLI:EU:T:2003:343 and Case C-95/04 P *British Airways Plc v Commission of the European Communities* [2007] ECLI:EU:C:2007:166; Case 08/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343. Recently, the Commission fined for participation in a buyer cartel, see European Commission, ‘Antitrust: Commission fines three companies €68 million for car battery recycling cartel’ (Press release, 8.02. 2017) http://europa.eu/rapid/press-release-IP-17-245_en.htm.

¹⁸³ Case IV/M.784 – Kesko/Tuko, Commission Decision 97/277/EC (1997); Case No IV/M.890 - Blokker/Toys “R” Us (1997); Case No IV/M.877 - Boeing/McDonnell Douglas (1997); Case No IV/M.1225 - Enso/Stora (1998); Case IV/M.1221 – Rewe/Meinl (1999) ; Case IV/M.1684 – Carrefour/Promodes (2000); Case COMP/M.3968 Sovion/Südfleisch (21.12.2005); Commission Decision M.7000 – Liberty Global/Ziggo (2014).

¹⁸⁴ In addition to a number of journal articles addressing topical issues in buyer power (cartels, abuse of buyer dominance, foreclosure, and merger control), a number of books and PhD thesis have addressed the issue. Blair R and Harrison J, *Monopsony in Law and Economics* (1st edn, CUP 2010); F van Doorn, *Buyer Power in EU Competition Law and Economics* (Eleven, 2015); V Daskalova, *The Monopsony Paradox Buyer Power and Enforcement of the EU Antitrust Provisions* (dissertation, 2016); Peter Carstensen, *Competition Policy and the Control of Buyer Power: A Global Issue* (Edward Elgar 2017). Notably, Prof. Carstensen argues that buyer power is even more problematic than seller power.

¹⁸⁵ Johannes Laitenberger (Director-General for Competition, European Commission), ‘Accuracy and administrability go hand in hand’ (Speech at CRA Conference Brussels, 12 December 2017) http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf

¹⁸⁶ Johannes Laitenberger (Director-General for Competition, European Commission), ‘Accuracy and administrability go hand in hand’ (Speech at CRA Conference Brussels, 12 December 2017) http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf

competition and to consumer welfare than a measured intervention with the tools of EU competition law would have ever been.

9. Beyond smart regulation: what implications for competition law and the internal market?

The European Commission's tolerance and tacit encouragement of the adoption of such national legislative developments is remarkable at least for two reasons. One has to do with the compatibility between such provisions and 'mainstream' competition laws. A second one has to do with their compatibility with the EU internal market objectives.

9.1. The myth of other laws

The dominant mantra seems to be that keeping competition law pure by separating competition and non-competition issues in different legal disciplines is a desirable approach. It is frequently suggested that non-competition issues which are deemed important for political or distributive justice reasons can be addressed via 'other' laws. This is an easy way out. In practice, legal disciplines do interact and conflicts of norms, be it EU norms or national norms and EU norms, do occur. Market actors are faced with the legal framework as a whole – and have to adjust their behavior to satisfy the plethora of norms, public and private, that they are faced with. Competition law cannot ignore these developments and their impact on the market.

Whether it concerns superior bargaining power laws or extending consumer protection to SMEs, the relationship between "standard EU competition law" and these "other" legislative developments remains understudied. It is clear that they are controversial from a mainstream competition law point of view.¹⁸⁷ It may, though need not, be the case that such laws serve protectionist goals or seek to soften competition for national operators to the detriment of efficiency and consumer welfare more broadly in the EU.¹⁸⁸ However, it is also possible that such laws can play an important role in correcting problems that competition law is unable to deal with, that they can play a complementary role. Such complementarity, however, cannot be assumed, and it is a missed opportunity that this issue has not been more critically probed by the European Commission.

The trend of adopting diverging rules on competition (or rules which could have an impact on competition) or unfair business-to-business practices at the national level stands in stark contrast

¹⁸⁷ International Competition Network (Task Force for Abuse of Superior Bargaining Position), 'Report on Abuse of Superior Bargaining Position' (2008). <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>. For instance, the UK, USA and Canada expressed the view that such laws are unnecessary or even harmful. See pp. 16-18.

¹⁸⁸ These measures have been criticized as protectionist in nature. See notably, P. Gorecki, "A Code of Practice for Grocery Goods Undertakings and An Ombudsman: How to Do a Lot of Harm by Trying to Do a Little Good" (2009) 40 *The Economic and Social Review*.

with the modernization agenda of EU competition law and with the broader goals of harmonizing trading rules within the EU. One of the main tasks for the competition law modernization program was to achieve decentralization *while ensuring uniform application* of the competition rules throughout the EU.¹⁸⁹ Arguably, the seeds for divergence were already in the modernization regulation itself – according to Art. 3 (2) of Regulation 1/2003 which holds that ‘Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.’ Thus, while strict uniformity is required for enforcing Art. 101 TFEU or national equivalents thereof, legislative divergences from the European norms on unilateral conduct are permitted. Currently, most Member States have also decided to make use of this derogation. Counterintuitively, given the modernization agenda, the European Commission has welcomed these national initiatives.¹⁹⁰ With the proposed Directive on UTPs in the food supply chain, the EU Commission itself has shown a preference for ‘other laws’ instead of competition law. This may be good news to those maintaining a strict separation between legal disciplines, but in fact it means that competition law will have to compete with other instruments in the realm of business-to-business relations.

9.2. The integration imperative

The EU competition law modernization goals aside, this tolerance for the developments is suspect from a EU integration perspective as well. The EU Treaties are meant to create a level playing field by means of strict internal market rules (prohibiting *states* to take measures which directly or indirectly may put in place barriers to cross-border trade in goods, services, and capital, among others)¹⁹¹ and by means of competition law and state aid rules (the former prohibiting *private parties* from partitioning the internal market, the latter ensuring state resources are not used to distort the market)¹⁹². With respect to competition law, the Court has played its part – it has interpreted Regulation 1/2003 in such a way as to privilege a harmonized version of what competition law is about in the EU.¹⁹³

The EU has also made a lot of effort to promote harmonization in more difficult terrains – namely, by stimulating harmonization of private law, and especially of contract law, in Europe.¹⁹⁴ A 2011

¹⁸⁹ European Commission, *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, (Brussels, 28.04.1999) http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf.

¹⁹⁰ European Commission. ‘Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain’ COM(2016) 32 final.

¹⁹¹ These provisions, so-called free movement provisions, are found in Art. 28 TFEU (goods), Art. 45 TFEU (workers), Art. 49 TFEU (freedom of establishment), Art. 56 TFEU (services), Art. 63 TFEU (capital).

¹⁹² Articles 101-106 TFEU on competition and 107-109 TFEU on state aids.

¹⁹³ For instance, the Court’s decision in C-375/09 *Tele2 Polska* [2011] ECLI:EU:C:2011:270.

¹⁹⁴ Notably there is the DCFR initiative which aimed to identify common European private law principles. See Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, European Law Publishers 2009) https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf. Another initiative aimed to facilitate cross-border contracting by means of harmonization via an optional instrument was the Common European Sales Law for the EU. The law would provide an alternative contracting regime for SMEs

report revealed that uncertainty about foreign contract law constituted an important barrier to cross-border trade within the EU.¹⁹⁵ Such uncertainties are undoubtedly augmented given the adoption of a variety of new laws and initiatives aiming at improving relations in the food supply chain. As a result, the playing field seems to be far from level. According to the researchers carrying out a mapping of the stricter laws on unilateral conduct per Member State, the legislative developments have resulted in a 'conundrum of public and private regulatory initiatives, which [...] forms a unique mix for each Member State of the European Union.'¹⁹⁶ As argued above, this situation is not remedied by the proposed Directive.

10. Conclusion

More than two decades ago, Professor Frederik Scherer wrote the following about the US agricultural policy in the XIXth century:

*'...farming in the United States (and Europe too) has experienced a seemingly unending series of problems that have precipitated massive governmental interventions. These problems can be grouped under four main headings: unstable prices, an historical tendency toward poverty, wide swings in the financial fortunes of farm enterprises, and new problems introduced by the government in its attempts to solve the first three problems.'*¹⁹⁷

These words ring true for the EU of today. It seems that regulating agricultural markets is a difficult task. There is a lot at hand that complicates the seemingly simple goal of sustaining an adequate standard of living for the farming community – there is the unpredictability of nature, all the more challenging due to climate change, there is the threat of pests and diseases; there are economic factors such as global trends and fashions in food and nutrition, the perishability of products, the availability of substitutes, the possibilities for export, the availability of imports. Amid these many global forces (of nature and markets), the buying power of contracting partners seems to be but one of many farmer woes. Nonetheless, the power of buyers is an important factor; with dwindling subsidies, the price that suppliers ultimately receive for their product is an important determinant of their profitability. Failing to address concentration on the purchasing may jeopardize the regulator's ability to intervene to correct for other challenges in the sector

and consumers purchasing digital products from abroad. However, the initiative failed to receive sufficient legislative support from the Council and has stalled since December 2014. See the legislative train schedule at <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law>. See also Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses [COM(2010) 348 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0348>>]

¹⁹⁵ See The Gallup Organization Hungary, European contract law in business-to-business transactions: Analytical Report (Report prepared for DG JUSTICE of the European Commission) 2011; http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf.

¹⁹⁶ College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf>, p. 21.

¹⁹⁷ Frederik M. Scherer, *Industry Structure, Strategy, and Public Policy* (Pearson, 1997), p. 17.

(unpredictability of supply, unpredictability of demand, fickle global markets) or to achieve other goals within a given sector such as environmental goals, rural development and social cohesion goals.

The latest development – the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain – may be a step in the right direction, but it is not a competition law solution. Vigorous enforcement may send a signal, but it is no substitute for competition law tools such as investigations into excessive pricing, remedies such as divestiture, and effective merger control. Another lesson from this article should be about the need to coordinate implementation and enforcement across jurisdictions – in order to avoid forum shopping and de facto circumvention – which companies exploit to their advantage. Differences in terms of quality of implementation and in terms of intensity and quality of enforcement can replicate the perverse effects described earlier in this article.

This article has taken a look at the consequences of delegating it all to ‘other laws’ – unfair trading laws, stricter competition rules and private regulatory schemes at the national level, and the Common Agricultural Policy at the EU level. It has argued that the sum of regulatory interventions has been counterproductive. It concluded that national-level legislation has not been entirely effective, given that purchasing markets for many products are EU-wide and purchasers have presence in multiple Member States or operate internationally via buying alliances. As for unfair trading laws, although they are important, they do not eliminate the bargaining power imbalance and they do not regulate the sensitive issue of price; therefore, even strict enforcement of good contracting practices might backfire with requests for lower price. Such legislation may help improve conditions of trade, but it does not resolve the fundamental bargaining power imbalances which shape the content of the bargain. This is where competition law should play a role – by ensuring deconcentrated markets in which both buyers and sellers have a choice of contracting partners.¹⁹⁸

As to the CAP, non-enforcement of the competition rules seems to have played handsomely into the hands of special interests. Despite the EU’s commitment to progressively transition from the era of subsidies to a more liberalized market with free competition, the CAP has taken a turn. Starting with the Milk Package, the 2013 CAP reform, and the Omnibus regulation of 2018, the CAP has strengthened the position of producers and their organizations, with the express goal of consolidating the supply side so that the buying power of other actors in the supply chain can be counterbalanced. Even so, CAP reforms have not succeeded to fully rid farmers of their troubles; calls for public support and measures against powerful contracting partners have not subsided. One definite loser of the combination of these policies is the consumer and the citizen¹⁹⁹.

¹⁹⁸ D Zimmer, ‘The Basic Goal of Competition Law: To Protect the Opposite Side of the Market’ in D Zimmer (ed), *The Goals of Competition Law* (Edward Elgar, 2012).

¹⁹⁹ Although, surprisingly, a 2016 Eurobarometer study has found that ‘four out of five EU citizens believe it is important to strengthen farmers’ role in the food chain.’ See Samuel White, ‘Commission launches public consultation on food chain fairness’ (*Euractiv*, 16.08.2017) and also the website of the survey <http://ec.europa.eu/COMMFronOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPICIAL/surveyKy/2087>.

Finally, EU competition law – as a policy area and discipline of EU law – must also recognize some strategic losses. Much of the attention of the European Parliament in the 2000s was on the activities of DG Competition. Questions from Members of the European Parliament and framed the issue of UTPs and exploitation of buyer power in terms of competition law and requested that the Commission would intervene with the tool of competition law. Interest in deconcentrating markets and addressing unfair trading practices has not subsided, but it has shifted to other, more receptive, Commission services. At the national level, divergence from the standard EU competition law provisions has been normalized.

Making a market may in the first place be about abolishing restrictions to trade, and only in a second place – about correcting externalities and achieving socially palatable results. In theory, it may be logical to keep market-making and market-correcting apart: competition law keeps markets open, and other instruments make sure that other goals can be achieved. In practice, as this article has attempted to show, market-making and market-correcting are interwoven, and failure to fine-tune the division of labor between different legal disciplines, policy areas and levels of regulation may be costly. Instead of smart regulation, the result may be counterproductive regulation. Perhaps keeping EU competition law away from thorny issues of fairness and distributive justice or under-studied topics such as buying power was a prudent choice for the EU competition enforcers; but one can also think of it as a missed opportunity for EU competition law to safeguard consumer welfare, promote a culture of competition (not protection), and not least of all – create a level playing field on an integrated market.

Annex 1

Excerpts of a summary of “the views of NCAs expressed at the first meetings of the Joint Working Team on Milk (November 2009 and January 2010) converg[ing] on the following points”.²⁰⁰ The NCA officials stated:

*“It is **not the aim of EU competition rules**, as currently devised, to interfere in the bargain struck between contractual parties, **in the absence of proven competitive harm**.”*

*“[...]it is necessary to draw in this regard **a clear distinction** between concerns about **potentially unfair trading practices** – related to the imbalances in bargaining power of contracting parties – **and** concerns about **anti-competitive practices**.”*

*“Competition Authorities consequently tackle buyer power **to the extent that it harms, or could potentially harm, the competitive process and thereby consumer welfare**. In this regard, it should be noted that contractual imbalances associated with unequal bargaining power does not always present a “buyer power” problem, in terms of competition law; therefore, the two concepts should be carefully distinguished.”*

*“Unequal bargaining power often leads to commercial dealings, which are unlikely to restrict competition to any significant extent, but which appear to be **unjust, unfair or undesirable from a social or political point of view**. This has in turn triggered legislative responses in many Member States such as, for example, the adoption of laws on unfair trading practices or abuses of contractual dependency aiming to subdue the behaviour of the powerful contracting party.”*

*“The exercise of buyer power in an anti-competitive manner **is contrary to EU competition law where there is a proven detriment to downstream consumers**. Much of the current political interest is in fact focused on issues of “unequal bargaining power” which should be distinguished from issues of “buyer power”, and actually highlights problems faced by small suppliers in the context of contractual negotiations with stronger buyers. [...] **Most Member States have already enacted specific laws dealing with such issues and have established legal protective mechanisms for all contractual parties in the context of their commercial laws**.”*

²⁰⁰ European Commission, *The Interface between Eu Competition Policy and the Common Agriculture Policy (CAP): Competition Rules Applicable to Cooperation Agreements between Farmers in the Dairy Sector* (Working Paper, 2010) <http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf>, 28-30, (bold added).

Annex 2: UTPS

UTPs (based on Green Paper on Unfair Trading Practices 2013)

1. Ambiguous contract terms
2. Lack of written contracts
3. Retroactive contract changes
4. Unfair transfer of commercial risk
5. Unfair use of information
6. Unfair termination of a commercial relationship
7. Territorial supply constraints

Annex 3: Market Share of Top 3 Retailers per Country in the EU

Source of data: Food Drink Europe (2011). More recent data is not available.

http://www.fooddrink europe.eu/uploads/publications_documents/Final_Data_Trends_30.4.2012.pdf, p. 19

Annex 4: CAP expenditure as part of total EU expenditure (1980-2016)

Source of the table: European Commission, 'CAP post-2013: Key graphs & figures' (March 2017)
https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1_en.pdf