

# The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?

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## I. Introduction

Promoting fairness in business-to-business relationships has been discussed in the EU for years, dating back to at least the negotiation of the 2005 Unfair Commercial Practices Directive.<sup>1</sup> The EU does not have competences to harmonise contract law as such (although a number of attempts at an informal process have been stimulated over the years);<sup>2</sup> however, the EU can regulate contractual and other practices via its competences in competition law,<sup>3</sup> its competences in the field of the internal market,<sup>4</sup> or by relying on sector-specific competences, as in agriculture. The European Commission used the latter, namely Article 43(2) TFEU,<sup>5</sup> as the legal basis for the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, which entered into force in May 2019 (hereinafter: the UTP Directive).<sup>6</sup> The UTP Directive is the culmination of more than ten years of discussion between the European Parliament, the European Commission, the Economic and Social Committee and Committee of the Regions, and various stakeholders.<sup>7</sup>

The UTP Directive covers fifteen unfair trading practices in the context of power imbalances in vertical relationships. It is not meant as a competition law amendment and does not make reference to the Commission's practice or EU *acquis* in the area of vertical restraints. Despite this, it is worth asking: does this

## Key Points

- There is an overlap between the Unfair Trading Practices (UTP) Directive and EU competition law to the extent that unfair trading practices can have exclusionary effects and to the extent that exploitative abuses are also regulated in EU competition law.
- EU competition law has a sophisticated framework for assessing vertical restraints; the UTP Directive is less precise but promises to strengthen enforcement.
- The UTP Directive raises important questions with respect to procedural and substantive justice in the context of power imbalances but it does not provide the analytical tools for an assessment of fairness; this is where competition law can be of help.

new legislation change anything for competition law and to what extent is it consistent with the existing EU competition law framework? This article aims to take a critical look at these matters. To do so, it will firstly summarise the substantive and procedural aspects of the UTP Directive. Next, it will explore the fundamental overlaps as well as divergences between this new legislation and EU competition law. Finally, the article zooms in on the types of unfair practices covered in the UTP

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1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [11.6.2005] OJ L 149/22.

2 A notable example is the DCFR. 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).

3 Article 3 (1) (b) TFEU and Article 103 TFEU.

4 Article 4 (2) (a) TFEU and Article 114 TFEU.

5 Article 43 (2) TFEU allows the European Parliament and the Council to adopt measures necessary to achieve the objectives of the common agricultural policy and the common fisheries policy.

6 Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111/59; (hereinafter: Directive 2019/633 on UTPs in food).

7 Communication from the Commission, 'A better functioning food supply chain in Europe' [28.10.2009] COM(2009) 591.

Directive and discusses their treatment from a competition law perspective. The article concludes that despite differences in terms of scope and method of assessment, there are some important overlaps between the two normative frameworks. The UTP Directive raises fundamental issues of competition law and market regulation, such as exploitative and exclusionary practices in the context of economic dependence, superior bargaining power and buyer power. These issues are the subject of ongoing regulatory initiatives in different sectors and in different jurisdictions. This article argues that although the UTP Directive provides an important opportunity to experiment with new approaches to these issues, it does not provide the analytical tools needed to solve the fundamental questions it raises. This is where competition law analysis can play a key role in shaping the future approach to these issues.

## II. The UTP directive in brief: substance and procedure

### A. Substantive scope

The UTP Directive aims to regulate unfair trading practices with respect to trade in agricultural and food products. It covers trade in the products listed in Annex I to the Treaty on the Functioning of the European Union as well as products which have been processed from products listed in Annex I and which are intended for use as food. The list in Annex I includes some non-food agricultural products such as tobacco, cork, flowers used for ornamentation, coffee, tea, wine, hemp, etc. Purchasers of such products – be they retailers, wholesalers, or processors – are thus affected by the UTP Directive. What is not covered are non-food groceries, which are not covered in Annex I, for example personal care products, detergents, cleaning supplies, etc.

Although *prima facie* concerned with issues of vertical relationships in the context of power imbalances, the scope of the UTP Directive differs from the scope of EU competition law in several important respects. In terms of methodology of assessment, competition law relies on market share thresholds combined with a qualitative

analysis of market power, whereas the UTP Directive relies solely on turnover thresholds. Importantly, whereas the original proposal only covered sales by an SME supplier to a non-SME buyer,<sup>8</sup> this is no longer the case. The UTP Directive identifies a schedule with five categories, each matching the size of the supplier to a buyer of a certain size, size being measured in terms of annual turnover. The scope of the UTP Directive is represented graphically in Table 1. The commercial relations which are not covered by the UTP Directive are coloured in green, and the commercial relationships covered by the UTP Directive are coloured in red (Table 1).

Secondly, the UTP Directive applies to all sales made to buyers which are public authorities, except where the supplier has a turnover of more than 350 million euros.<sup>9</sup> The concept of public authority covers national, regional or local authorities, but also bodies governed by public law and associations formed by one or more such authorities or bodies, regardless of size.<sup>10</sup> By contrast, EU competition law's application to the purchasing activities of public authorities is limited to activities carried out for commercial, non-solidarity purposes, as clarified in the *FENIN* judgment.<sup>11</sup> This may catch some public entities by surprise, for instance small municipalities, buying alliances formed by municipalities, or other bodies governed by public law such as perhaps public universities.<sup>12</sup> The UTP Directive does not make an explicit link to the EU public procurement regime, which is unhelpful because it is unclear to what extent the concept of 'public authority' employed by the UTP Directive coincides with the concept of 'contracting authority', as defined in the field of EU public procurement. A narrow category of entities, namely public entities providing healthcare and entities participating in school schemes are exempt from the UTP Directive's prohibition on payment delays.<sup>13</sup>

Thirdly, the UTP Directive also covers buying alliances provided that they meet the turnover requirements. It applies to buyers, where a buyer refers to natural or legal persons, including a group of natural and legal persons,<sup>14</sup> even though agreements between consumers and suppliers are not covered.<sup>15</sup> By contrast,

8 Article 1 (2) in 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 [2018] COM/2018/0173 final.

9 Article 1 (2) of Directive 2019/633 on UTPs in food.

10 Article 3 (2) of Directive 2019/633 on UTPs in food.

11 Case C-205/03 P *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission of the European Communities* [2006] ECLI:EU:C:2006:453.

12 See Article 2 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement [28.3.2014] OJ L 94/65.

13 See Article 3 (1) of Directive 2019/633 on UTPs in food makes an exception for public entities providing healthcare regarding the prohibition on payment delays; it also makes an exception for payments made in the framework of school schemes described in Article 23 of Regulation 1308/2013.

14 Article 2 (2) or Directive 2019/633 on UTPs in food.

15 See Article 1 (2) of Directive 2019/633 on UTPs in food.

Table 1: Scope of application of the UTP Directive.

|                    |                       | Buyer Turnover* |                    |                     |                      |                       |             |
|--------------------|-----------------------|-----------------|--------------------|---------------------|----------------------|-----------------------|-------------|
|                    |                       | T < 2 mln       | 2 mln < T < 10 mln | 10 mln < T < 50 mln | 50 mln < T < 150 mln | 150 mln < T < 350 mln | 350 mln < T |
| Supplier Turnover* | T < 2 mln             |                 |                    |                     |                      |                       |             |
|                    | 2 mln < T < 10 mln    |                 |                    |                     |                      |                       |             |
|                    | 10 mln < T < 50 mln   |                 |                    |                     |                      |                       |             |
|                    | 50 mln < T < 150 mln  |                 |                    |                     |                      |                       |             |
|                    | 150 mln < T < 350 mln |                 |                    |                     |                      |                       |             |
|                    | 350 mln < T           |                 |                    |                     |                      |                       |             |

\*Annual turnover in millions of Euros.

under the EU competition law framework, buying alliances are likely to meet the criteria of Article 101 (3) TFEU, when their joint market shares on the purchasing and on the selling markets fall below certain thresholds.<sup>16</sup>

Fourthly, the UTP Directive covers trading relationships with a non-EU dimension. It applies to buyers established in the EU which trade with non-EU suppliers as well as to buyers established outside the EU which trade with EU suppliers. The UTP Directive thus aims to avoid putting EU suppliers at a competitive disadvantage which would happen if trade is diverted to suppliers outside the EU.<sup>17</sup> A second rationale is to prevent regulatory arbitrage by buyers which might otherwise choose to establish themselves outside the EU in order to avoid compliance with the stricter rules.<sup>18</sup> By comparison, EU competition law, notwithstanding the judgment in *Intel*,<sup>19</sup> generally applies to conduct taking place outside the EU insofar as its effect is felt within the EU market.

Finally, the UTP Directive covers not only contractual matters but also business torts such as commercial reprisals and misuse of intellectual property rights. In this aspect, the UTP Directive resembles Article 102 TFEU rather than Article 101 TFEU, which only covers agreements between undertakings. The UTP Directive enumerates nine practices which

are *per se* prohibited (the Black List), as unfair in themselves. There is an additional list of six practices, which are prohibited unless agreed in clear and unambiguous terms in the original or a subsequent agreement between the parties (the Grey List). Unlike competition law, however, there is not a specific methodology of assessment. There is not an explicit standard of fairness, nor is there a discussion of possible efficiencies.

## B. Enforcement architecture and remedies

To ensure effective enforcement, the UTP Directive requires Member States to designate one or more enforcement authorities.<sup>20</sup> These authorities must be granted powers of investigation, including the possibility to carry out unannounced site inspections; they must furthermore have the necessary resources and expertise.<sup>21</sup> Reporting obligations as well as annual meetings and the set-up of a website also serve to ensure that authorities are incentivized to take action.<sup>22</sup> The UTP Directive does not prescribe specific remedies for infringement but requires that enforcement authorities be empowered to impose fines and other equally effective penalties and interim measures, which must be effective, proportionate and dissuasive in view of the characteristics of the

16 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/01, Chapter 5, especially paragraphs 207–212.

17 Preamble of Directive 2019/633 on UTPs in food, paragraph 12.

18 Preamble of Directive 2019/633 on UTPs in food, paragraph 12.

19 Case C-413/14 P *Intel Corp. v European Commission* [2017] (Grand Chamber) ECLI:EU:C:2017:632 paragraphs [40–58]. The Court of Justice found that there is scope for EU competition law intervention even when

the effects are more remotely related to effects within the EU (so called ‘qualified effects’ doctrine).

20 Article 4 of Directive 2019/633 on UTPs in food.

21 Article 6 of Directive 2019/633 on UTPs in food.

22 Article 8 of Directive 2019/633 on UTPs in food provides for annual meetings and requires that Member States ensure effective cooperation in terms of enforcement among each other. Paragraph 3 of Article 8 states that the Commission will establish a website for exchange of information on enforcement. Article 10 of Directive 2019/633 on UTPs in food lays down the reporting obligations.

infringement.<sup>23</sup> An innovative element of the UTP Directive is the possibility for producer organisations, as well as other organisations representing (or having a legitimate interest in representing) suppliers, to submit complaints.<sup>24</sup> The possibility for anonymous complaints is also provided,<sup>25</sup> although a decision may be foregone if it risks revealing the identity of the complainant.<sup>26</sup> These provisions, combined with the prohibition on commercial retaliation, might help mitigate the fear factor that has impeded enforcement until now.

### III. The UTP directive and EU competition law: overlaps and divergences

#### A. Dominance and beyond: superior bargaining power and economic dependence

Competition law targets bottlenecks on the market which restrict the possibility of entry and prejudice the quality of the market outcomes in terms of price, quality, quantity or variety. On a market with free entry, bad traders will be penalised in due time because disappointed partners can easily move their business to a rival. Competition on a free market thus helps weed out the bad traders. This is why competition law strives to keep the market as free as possible from entry barriers; to do so, it screens contracts and practices which aim to consolidate the market or fence it off for the sole benefit of some traders.

Contracts which aim to close the market off to rivals can be scrutinised within the framework of both Articles 101 and 102 TFEU, the latter applicable only when the party imposing the restraint is in a dominant position. Following the adoption of the more economic approach, competition law considers that vertical

agreements between parties, none of which has much power, will probably not affect the market as a whole and will leave sufficient room for rivals to operate. For this reason, Article 101 TFEU introduces an exemption from scrutiny for vertical agreements between companies, when each party has a share below 30% on the relevant product and geographic market.<sup>27</sup> This presumption may nonetheless be withdrawn in certain cases, as will be discussed below.

Competition law also polices the behaviour of those undertakings which, by virtue of success or special privileges, have become so big and powerful that they are no longer effectively disciplined by the market. Article 102 TFEU targets such so called dominant undertakings – companies which, although not necessarily monopolists, are unrivalled in terms of strength on the relevant market and are not likely to be disciplined by the natural competitive forces. The European Commission considers that dominance is not likely to be found when an undertaking has a market share below 40% on the relevant market.<sup>28</sup> However, in specific cases when competition is limited, e.g. because of capacity limitations, the Commission might nonetheless use Article 102 TFEU against companies with market shares falling below this threshold.<sup>29</sup>

It is clear from the above that the contracts of a retailer with a market share above 30% may face some scrutiny from the authorities, be it under Article 101 or under Article 102 TFEU.<sup>30</sup> But what about anticompetitive conduct occurring below these thresholds? The reader must be reminded that the presumption of legality enjoyed by agreements between parties each with a market share of less than 30% may nonetheless be withdrawn.<sup>31</sup> Even when the agreement is compatible with the Block Exemption Regulation, the Commission, or a national competition authority, may nonetheless scrutinise it for compatibility with Art. 101 (3) provided

23 Article 6 of Directive 2019/633 on UTPs in food.

24 Article 5 (2) of Directive 2019/633 on UTPs in food.

25 Article 5 (3) of Directive 2019/633 on UTPs in food.

26 Article 6 (1) (d) of Directive 2019/633 on UTPs in food.

27 Article 2 of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [23.4.2010] OJ L 102/1.

28 Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [24.2.2009] OJ C 45/7, paragraph 14.

29 Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [24.2.2009] OJ C 45/7, paragraph 14. Notably, in the Commission's case against British Airways, the defendant had a market share just under 40% of the relevant market

but was found to be operating in a market where the other competitors did not exercise much constraint. See Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 – Virgin/British Airways) [4.2.2000] OJ L 30/ 1, paragraphs 38–43.

30 Article 102 TFEU also covers non-contractual practices.

31 Article 29 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [4.1.2003] OJ L 1/1. Paragraph 1 of Article 29 empowers the Commission to do so with respect to agreements, decisions by associations of undertakings or concerted practices which produce effects incompatible with Art. 101 (3) TFEU. Paragraph 2 of Article 29 of Regulation 1/2003 empowers national competition authorities to withdraw the benefit when the abovementioned occurs in a Member State or a part of it, when those have the characteristic of a distinct geographic market.

that anticompetitive effects are present. The Vertical Restraint Guidelines explain that this is likely to be the case when competition on the relevant market is ‘significantly restricted by the cumulative effect of parallel networks of similar vertical agreements practised by competing suppliers or buyers’.<sup>32</sup> Considering that markets can be rather narrowly defined – down to a specific product such as bananas, which the Court has considered to be on a market of its own<sup>33</sup> – it seems that competition law has a wide reach to discipline not only giant multi-national enterprises, but also more modestly sized undertakings, such as dominant companies on narrowly defined product and geographical markets.

Given this rather comprehensive and nuanced framework, one may wonder what the rationale for the UTP Directive is. To what extent are issues such as ‘imbalances in bargaining power’, ‘relative bargaining power’, and ‘economic dependence’ – all mentioned in the Preamble of the UTP Directive – legitimate problems of market regulation? And to what extent are these issues already addressed under the existing competition law framework? Firstly, it must be clarified that these are concepts which may, but need not, overlap with the concepts of market power and dominance which competition lawyers and economists are familiar with. That is because they refer to different types of problems. Economic dependence describes the relationship between two parties without saying much about the nature of competition on the market. Economic dependence may be the result of market power or limited competition on the market, but it might also be due to asset specificity, e.g. choices in terms of technology or business operations (such that the supplier’s equipment is only suited for one company).<sup>34</sup> These explanations notwithstanding, a company may also be dependent because of its own poor business planning or sheer lack of initiative, as in when a company which has failed to keep up with market developments can only realistically deal with one partner.

Superior bargaining power is yet another concept. According to the OECD Roundtable note, three factors should be considered when testing for bargaining power: ‘the outside option of the buyer, the outside option of the seller, and relative bargaining effectiveness’.<sup>35</sup> It is easy to see that when there is limited

competition among purchasers, suppliers will have limited outside options. At the same time, when there is robust competition among suppliers, retailers will have a good outside option. Such a mismatch in terms of intensity of competition can play to the disadvantage of one side of the market. However, insufficient competition is but one of the possible explanations for the presence of power imbalances. Other factors, such as ‘relative bargaining effectiveness’ might also play a role. The latter can be a function of having access to information, superior understanding of purchasing and supply management, ability to delay the transaction,<sup>36</sup> or better business skills, e.g. negotiation skills. Superior bargaining power is often associated with economic dependence. However, as evident from the discussion above, there may be different reasons why a company has more bargaining power than its suppliers. Market power or economic dependence on the part of the supplier could be the explanation behind superior bargaining power; however, a company may also be able to extract advantages from its suppliers due to non-competition related factors, such as superior bargaining ability.

To what extent do economic dependence and superior bargaining power represent a legitimate problem of market regulation? The simple answer can be that when such power imbalances impede the natural market mechanism or lead to negative effects on competition, welfare, and efficiency, there is good reason to intervene. The case for doing so may be particularly strong when, instead of isolated instances of an unfair contract or a practice, there is evidence of widespread abuse. Then one may start to suspect that instead of a singular case of one company being dependent on its purchasers due to its own lack of competitiveness, the real problem might be one of limited competition or market power on the purchasing market.

In theory, competition issues should be addressed in the EU competition law framework. In practice, there may be several doctrinal, as well as pragmatic, obstacles to applying competition law in these cases. Dominance is hard to prove, even on a narrowly defined purchasing market. The collective dominance route is also fraught with difficulty. On the other hand, Article 101 TFEU is only concerned with agreements, not with the broader category of ‘practices’. Even though restraints imposed

32 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraph 75.

33 The classic discussion can be found in Case C-27/76 *United Brands Company and United Brands Continental BV v Commission of the European Communities* [1978] ECLI:EU:C:1978:22, paragraphs 22–35.

34 A detailed discussion of the different types of economic dependence can be found in P Kellezi, ‘Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence’

in Mackenrodt MO., Gallego B.C., Enchelmaier S. (eds) *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (2008) MPI Studies on Intellectual Property, Competition and Tax Law Volume 5 (Springer, Berlin, Heidelberg).

35 OECD Roundtable on Monopsony and Buyer Power (2008) <<https://www.oecd.org/daf/competition/44445750.pdf>>, 39.

36 OECD Roundtable on Monopsony and Buyer Power (2008) <<https://www.oecd.org/daf/competition/44445750.pdf>>, 42.

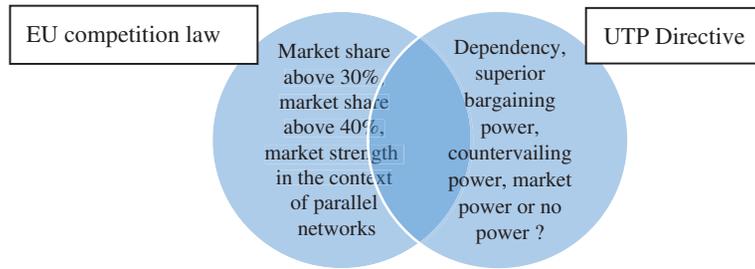


Figure 1: Power or no power? Overlaps between EU competition law and the UTP Directive.

by non-coordinating oligopolists may fall under scrutiny under the cumulative agreements doctrine under Article 101 TFEU, competition authorities will likely require proof of exclusionary effect or consumer harm. From a pragmatic point of view, high evidentiary standards and a sophisticated economic methodology suggest lengthy and expensive trials; this makes private enforcement unattractive. Public enforcement is contingent on the competition authority's abilities and priorities. A smaller-impact, less articulate claim may be neglected in favour of easier-to-prove, clear-cut, or higher-impact cases. In sum, there may very well be a gap in the competition law framework – in terms of doctrine as well as in terms of enforcement.<sup>37</sup>

To the extent that they both address issues which may be linked to market power or limited competition, there is an overlap between the UTP directive and EU competition law. Given that it provides opportunities to gather data on this topic, the UTP Directive may be considered a useful experiment which can help design a response to a gap in the competition law framework. In reality, however, it is doubtful that the UTP Directive can deliver on this promise. Although it discusses issues of dependence and superior bargaining power, the UTP Directive employs no established criterion to operationalise these concepts. The turnover schedule is hardly a reliable indicator of either market power or superior bargaining power or economic dependence. The UTP Directive applies to purchasers which are not even large, e.g. retailers with a turnover of just over 2 million euro when they trade with a supplier with a turnover of just under 2 million euro. The UTP Directive also applies to purchasers who would not be considered dominant under the competition rules because they face strong countervailing power, as would arguably be the case when a retailer with a turnover of just over 350 million euro negotiates with a supplier whose turnover is just under 350 million euro. In sum, whereas the two

normative frameworks may have an overlap in terms of normative orientation, they speak different languages when it comes to methods of assessment. This overlap is illustrated in Figure 1.

## B. Unfair trading practices: exploitation or exclusion?

At first glance, the UTP Directive deals with issues foreign to antitrust: payment delays, order cancellations, product returns, payments for damaged goods, and advertising and promotion fees. At second glance, however, one might recognise the practices, and the concerns underpinning them, in competition law cases, Commission decisions, and *obiter dicta* in court judgments.

Arguably, concerns about fairness in vertical relations have always been part of EU competition law. One need not look further than the text of Article 102 TFEU, which, in paragraph a) prohibits dominant companies from imposing unfair prices and unfair terms on suppliers or on purchasers; the same article in paragraph d) prohibits dominant companies from imposing requirements which have no connection with the subject of their transaction. These issues were the subject of the complaint in *FENIN*, a case before the Court of Justice of the European Union, which was triggered by a 1999 rejection decision of the European Commission. *FENIN* is a Spanish industry association representing mostly SMEs who produce or supply medical equipment and materials. The association complained of the joint behaviour of Spanish health ministries and various other governmental entities.<sup>38</sup> In particular, *FENIN* complained about: excessive payment delays, with an average payment period in the territory of Spain 271 days, and payment delays of 557 days in the state of Andalusia; requests for contributions which were unrelated to the subject of the contract, such as monetary

37 This issue is of increasing fascination to competition scholars. See the contributions in F Di Porto and R Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar 2018).

38 Commission Decision IV.F.1/36.834 – *FENIN* (26 August 1999), paragraphs 1–8.

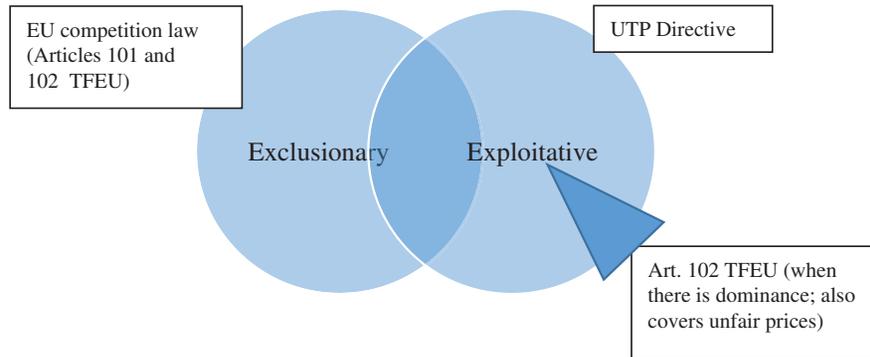


Figure 2: What counts as infringement? Overlaps between EU competition law and the UTP Directive.

contributions to celebrate hospital anniversaries; and requests to purchase old machinery as condition for renewing contracts.<sup>39</sup> The complaint failed on grounds that the entities accused of abuse of dominance were not undertakings: the Court found that because the purchases in question were inputs for downstream activities which were mostly provided on the basis of solidarity, the purchasing behaviour did not amount to an economic activity. The practices FENIN complained about mirror a number of the practices covered by the UTP Directive; in an Article 102 TFEU context they would be considered an example of the perfectly valid, although deprioritized, doctrine of exploitative abuse.<sup>40</sup>

Perhaps less obviously, fairness concerns have also motivated a good deal of litigation under Article 101 TFEU. Litigation between franchisees and franchisors<sup>41</sup> and pub tenants and breweries<sup>42</sup> comes to mind. In these cases restriction of competition was invoked as a reason to void vertical agreements at a moment when for one party the deal had soured. Even if one considers Article 101 TFEU to be focused on exclusionary abuses (the prohibition of collusion notwithstanding), there will be a number of agreements where exclusion and exploitation coincide. By analogy, even though the UTP Directive primarily covers exploitative abuses, with or without actual dominance, it also covers some practices which may have an exclusionary effect. The latter is less obvious but can be explained by reference to the so called ‘waterbed effect’ – the theory that when suppliers

grant advantages to a powerful buyer, they raise the prices to smaller buyers, thereby causing the latter to suffer a competitive disadvantage.<sup>43</sup> In those cases, the preferential treatment of some buyers may harm intrabrand competition. The intuition behind this theory of harm is the basis for legislation, such as the Robinson-Patman Act in the US, which prohibits suppliers from discriminating against buyers. However, buyer-imposed vertical restraints, can also harm interbrand competition. For instance, requirements for payments such as listing fees make access to the market costly for smaller and under-capitalised brands, and increase the cost of products to consumers.<sup>44</sup> Also here, the exclusionary and exploitative aspects coincide. This means that although the UTP Directive does not intend to amend competition law, it does modify the existing approach to vertical restraints, because it outlaws some types of restraints entirely. In this sense, we cannot speak of a strict division of labour between the two normative frameworks. The overlaps are illustrated in Figure 2 and will be discussed in more depth in section IV.

#### IV. Complementarities and divergences: zooming in on the unfair trading practices

Competition law has a sophisticated assessment framework for vertical restraints. Importantly, it has operated

39 Commission Decision IV.F.1/36.834 – FENIN (26 August 1999), paragraph 12.

40 Communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [24.2.2009] OJ C 45/7, paragraphs 5–7.

41 Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECLI:EU:C:1986:41. In *Pronuptia*, the franchisee wanted to get rid of contractual obligations that she was being sued for, notably arrears in payments.

42 Case 23–67 *SA Brasserie de Haecht v Consorts Wilkin-Janssen* [1967] ECLI:EU:C:1967:54; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECLI:EU:C:1991:91; Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECLI:EU:C:2001:465.

43 See e.g. P Dobson and R Inderst, ‘The Waterbed Effect: Where Buying and Selling Power Come Together’ (2008) 2 *Wisconsin Law Review*, 331; R Inderst and TM Valletti, ‘Buyer Power and the ‘Waterbed Effect’ (2011) 59(1) *Journal of Industrial Economics*, 1.

44 See e.g. *The Economist*, ‘Buying up the shelves’ [20.6.2015] and the discussion in Section IV below.

under the assumption that restraints are primarily imposed by suppliers, rather than by buyers or by distributors. This assumption is no longer realistic given the fact that some purchasers, especially some retail chains, wield a lot of power. The interesting element of the UTP Directive is that it helps shed light on such buyer-led vertical restraints. However, is its approach to these restraints in line with what the EU competition law doctrine would prescribe? This question will be answered in the sections below. The analysis reveals that although the UTP Directive may not have sophisticated answers to the questions it raises, competition law analysis on a number of issues is also lagging behind.

- *Prohibition of payment delays*

Given the existing legal framework, this prohibition – which imposes a maximum payment term of 30 days for perishables and 60 days for non-perishables – is hardly revolutionary. These maximum payment terms are no other than the payment terms set by the Late Payments Directive which has been in force since 2011. The latter already requires that businesses pay within 60 days, unless expressly agreed otherwise and unless that is grossly unfair,<sup>45</sup> and that public authorities pay within 30 days or within 60 days (in exceptional circumstances).<sup>46</sup> The Late Payments Directive itself includes provisions on statutory interest,<sup>47</sup> on minimum compensation for recovery costs,<sup>48</sup> and on unfair contractual practices.<sup>49</sup>

The Late Payments Directive aimed to reverse a culture of late payment which affected SMEs in particular. SMEs were hit hard during the financial crisis, when financing was scarce and debtors were not prompt with their payments. Payment delays are unambiguous from a legal perspective, because they represent a breach of contract; the problem, as the Late Payments Directive itself recognises, has been

enforcement, notably slow redress procedures and insufficient deterrent penalties (such as the possibility to obtain interest).<sup>50</sup> Despite its good intentions, the Late Payments Directive has struggled to change the culture:<sup>51</sup> a 2016 study on its effectiveness shows that enforcement remains a key problem.<sup>52</sup> Voicing discontent by bringing legal proceedings or making use of other complaint mechanisms remains unappealing to creditors as they fear upsetting the business relationship.<sup>53</sup> The UTP Directive is thus the latest attempt to fix problems in the national private law frameworks which the Late Payments Directive also aimed to solve.

From a competition law point of view, payment delays are mostly an exploitative practice, which nonetheless can have an effect on competition. When companies systematically delay payments without fear of being punished by the market or by means of contract law enforcement, they enjoy flexibility over payment terms and, essentially, free credit. This is an advantage which competitors do not receive. Simultaneously, the practice puts the unwilling debtor at a disadvantage vis-à-vis its own competitors, where these competitors are better capitalised or have more sources of income.

Payment delays were the subject of an Art. 102 TFEU complaint in the case of *FENIN* but the Court never reached the point of examining the merits of the case. One might wonder if in the context of an Article 102 TFEU assessment payment delays could ever be objectively justified. Rather, they seem to be like the ‘naked restraints’ identified in the *Intel* case – a practice devoid of any objective commercial or other justification which cannot be reconciled with ‘normal competition’.<sup>54</sup> Given that payment delays represent a breach of contract, it is hard to imagine lawyers, even those in favour of preserving contractual freedom, justifying systematic breach of

45 The exception is meant for cases such as trade credit and in cases of very complex contracts. Preamble of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1, paragraphs 13 and 26.

46 Articles 3 and 4 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1.

47 Article 3(3)(a) and Article 4(1) of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1.

48 Article 6 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1.

49 Article 7 of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1.

50 Preamble of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1, paragraph 12.

51 Preamble of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [23.2.2011] OJ L 48/1, paragraph 12.

52 European Commission, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs ‘Late Payment Directive’ <[https://ec.europa.eu/growth/smes/support/late-payment\\_en](https://ec.europa.eu/growth/smes/support/late-payment_en)>.

53 The fear of retaliation is also acknowledged in the review of the Late payments Directive as one of the factors which hinder enforcement. See Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [26.08.2016] COM/2016/0534 final, Chapter 2, paragraphs 2 and 6.

54 Commission Decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 – Intel) [13.5.2009] D(2009) 3726 final, paragraph 1676.

contract on efficiency grounds. Companies sometimes argue technical error (or managerial sloppiness), e.g. failing to pay on time due to changes in software, or because of losing the occasional invoice.<sup>55</sup> However, the Court has held that inefficiency on the part of the dominant undertaking is not an objective justification and does not excuse its abuse of dominant position.<sup>56</sup>

The UTP Directive offers no mechanism of objective justification with respect to payment delays or the other practices on the black list. That said, it does not radically change the existing legal framework either. It simply reinforces the existing provisions in order to make up for gaps in enforcement which arguably originate in private law.

- *Prohibition of short notice order cancellations for perishables*

Article 3(1)(b) of the UTP Directive prohibits cancellations which put the supplier in such a position that it cannot reasonably be expected to find another way of commercialising its products. A period of less than 30 days is always considered as short notice. Unlike the discussion on payment terms, it is not clear if short notice cancellation is considered a breach of contract or not; it is also unclear what kind of cancellation terms beyond 30 days can safely be stipulated in a contract. A confusing element of the UTP Directive is the fact that the practice of returning unsold products to the supplier without paying for them or for their disposal is a practice featured on the grey list of practices. Specifically, Article 3(2) of the UTP Directive provides that parties can make agreements regarding returns. Given that returns are less strictly treated than cancellations, one may expect to see a lot more returns instead of order cancellations in the future since the former can be negotiated pursuant to a contract, whereas the latter are *per se* prohibited.

To the extent that it prevents products from going to waste and being taken out of the market, the provision in the UTP Directive is consistent with the thrust of EU competition law. Both Article 101(1)(b) and Article 102(b) TFEU condemn the limitation of

production. This is what would occur if products or services are taken out of the market due to one party changing its mind on such a short notice that the products cannot be commercialised: resources would be wasted, output would be limited, and consumers would be harmed.

In addition to the efficiency loss, the practice may also serve to limit competition. When large purchasers overbuy and then cancel a part of the order, thereby dooming certain goods to waste, less products are available to the other purchasers, and the prices increase. At the end of the day, consumers are deprived of the opportunity to benefit from more output and better prices. Overbidding and overbuying as a form of predation practiced by large purchasers is a rare but plausible antitrust theory of harm, as shown in the 2007 US Supreme Court case *Weyerhaeuser*.<sup>57</sup> In the EU, the practices of overbooking capacity and capacity hoarding have been the subject of commitment decisions against energy companies.<sup>58</sup> Although these theories of harm are under-explored in the context of unilateral conduct, they raise familiar doctrines of output limitation under Article 101 TFEU.<sup>59</sup> When companies routinely cancel orders of goods which are then not commercialised – regardless of whether this is due to their own poor planning, to changed market conditions, or to an anticompetitive scheme – resources are wasted and the market mechanism is prejudiced. In this case, the outcome may or may not be unfair (e.g. depending on whether the supplier is properly compensated), but it is in any case inefficient and harmful to consumers.

- *Prohibition of unilateral changes to the core terms of the contract*

When parties make agreements, they do not necessarily agree on all the terms once and for all time. The Preamble of the UTP Directive acknowledges this reality and affirms that a buyer is free to ‘specify a concrete element of the transaction at a later stage in respect of future orders’ as long as there is an agreement which specifically allows for that.<sup>60</sup> However, a buyer may not unilaterally change the

55 This was the response of a retail chain to claims by the UK Small Business Ombudsman that the chain was systematically breaching contract. P Collinson, ‘Holland & Barrett accused of treating suppliers ‘shabbily’ [8.04.2019] *The Guardian* <<https://www.theguardian.com/business/2019/apr/08/holland-barrett-accused-of-treating-suppliers-shabbily>>.

56 Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] ECLI:EU:C:1989:319, paragraph 42.

57 *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S.Ct. 1069 (2007).

58 On capacity hoarding, see Commission Decision (Case COMP/39.315–ENI) [29.09.2010]. On capacity overbooking, see Commission Decision (Case AT.39317 – E.ON Gas) [26.7.2016].

59 See e.g. Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd.* [20.11.2008] ECLI:EU:C:2008:643.

60 Preamble of Directive 2019/633 on UTPs in food, paragraph 21.

core terms of the contract, namely the terms related to the ‘frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services’.<sup>61</sup> This provision seems to target the practice of retroactive and unilateral contract changes, as described in the 2013 Green Paper on UTPs.<sup>62</sup> The Preamble of the UTP Directive clarifies that the prohibition in Article 3(1)(c) is not targeting proposals for change to that contract as such, but rather the implementation or execution of such changes when they are decided unilaterally. The example given is that of a buyer delisting products which are covered by a supply agreement.<sup>63</sup> Thus, buyers can still propose changes to key terms of the agreement as long as they obtain the supplier’s agreement before implementing these changes.

Unilateral change clauses exist in a variety of contracts. They are not necessarily abusive, especially if negotiated freely in the context of competitive markets. Competition law has not taken an explicit stance on such clauses but in some cases the fact that a party could unilaterally change the terms of a contract has been considered unfair. For instance, in the 1991 decision against Tetra Pak, the European Commission noted that ‘the fact that, in a long-term supply contract, the system allows Tetra Pak to fix and amend prices unilaterally without being required to follow any indexing or adjustment system laid down by contract, even though Tetra Pak’s dominant position places it to a large extent above the laws of the market in this respect, must be considered an unfair trading condition,’ noting that this also enabled the dominant company to pursue a policy aimed at foreclosing competitors.<sup>64</sup> The ability to unilaterally change prices enabled Tetra Pak to calibrate its prices in order to pursue a predatory strategy. The General Court agreed with the Commission’s analysis that the terms were unfair and added that they went far beyond what would be necessary for the company to secure its legitimate business interest and that they tended to increase Tetra Pak’s dominance as well as the customer’s

economic dependence on Tetra Pak.<sup>65</sup> The Court found that ‘whether considered in isolation or together, [the clauses] were unfair.’<sup>66</sup> In the context of Article 101 TFEU, the Court of Justice noted in *Delimitis* that the fact that a brewery could unilaterally change the contract with respect to the products covered and their prices removed the benefit of a block exemption regulation with respect to exclusive purchasing obligations.<sup>67</sup>

From a competition law perspective, it may be problematic that one party has the power to change the core terms of the agreement unilaterally. This may be the case when that party possesses market power and when it pursues goals which run contrary to the interest of its partners (exploitation) or to the interest of competition (exclusion). In the case of *Delimitis*, the Court was concerned that competition might be limited because the type of agreement which had triggered the case was common between breweries and publicans. Although the Court did not engage with the factual question of market power, it was concerned about the cumulative effect of such vertical restraints. Competition law has developed rather sophisticated theories, methods, and filters (such as market share thresholds) for testing whether power is likely to be misused. The danger with the prohibition in the UTP Directive is that it applies to a wide variety of situations, without clear indication if there is actually a problem of market power or not. An unwelcome side effect may be that contracts between parties of similar market strength become unnecessarily rigid with respect to the core terms. As a result, parties may resort to other solutions – such as decreasing the duration of the contracts and having frequent renegotiations – in order to be able to respond to rapidly changing market circumstances.

- *Prohibition of payment requests unrelated to the sale of agricultural and food products*

The prohibition of unrelated payment requests raises some questions: which payments are unrelated, which are related, and how to tell the two apart? This question is not always relevant because some payments are already *per se* prohibited – for instance, Article 3(1)(e) and (i) prohibit payment requests respectively for shrinkage and for examining consumer complaints

61 Article 3(1)(c) of Directive 2019/633 on UTPs in food.

62 European Commission, Green Paper On Unfair Trading Practices In the Business-to-Business Food And Non-Food Supply Chain In Europe [31.1.2013] COM(2013) 37 final.

63 Preamble of Directive 2019/633 on UTPs in food, paragraph 21.

64 Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 – Tetra Pak II) [18.3.1992] OJ L 72/31, paragraph 145.

65 Case T-83/91 *Tetra Pak International SA v Commission of the European Communities* [1994] ECLI:EU:T:1994:246, paragraph 140.

66 Case T-83/91 *Tetra Pak International SA v Commission of the European Communities* [1994] ECLI:EU:T:1994:246, paragraph [140].

67 Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECLI:EU:C:1991:91, paragraph 36.

related to the supplier's goods. For other types of payments, some uncertainties remain – for instance, regarding the payments listed in Article 3(2) of the UTP Directive. The Preamble of the UTP Directive clarifies that payments such as listing, marketing and promotion are to be expected in the course of negotiations between buyers and sellers.<sup>68</sup> Such contributions, together with payments for staff which fits out the shop for the supplier's products, requests to co-sponsor discounts, and non-payment for unsold products, are included in the grey list of practices, regulated in Article 3(2). This raises the question as to where the grey zone ends and where the 'prohibition zone' begins. Assuming that the drafters did not aim to create contradictions, one may understand that any practice listed under Article 3(2) falls outside the scope of Article 3(1)(d).

Unhelpfully, there are no examples of unrelated payment requests in the UTP Directive or its preamble. The question is important because practices such as buyer requests for lump sum contributions or for fictitious services are reported to be commonplace in practice. This question was at the heart of the German Competition Authority's case against supermarket chain Edeka. The issue was whether so called 'wedding rebates' – requests for payment for refurbishing shops following a merger of two supermarket chains – could count as abuse of relative market power. These contributions were framed as a partnership fee (*Partnerschaftsvergütung*) and were calculated as 'a fixed percentage of [the suppliers'] turnover generated with Edeka'.<sup>69</sup> The German Supreme Court decided that such a clause did not provide proper consideration because the benefit it could actually generate would be too remote, and hence it would be difficult to show how it accrues to a specific supplier, product or product group.<sup>70</sup> The EU competition law doctrine also takes a suspicious stance against terms which are not related to the subject matter of the transaction. Article 101(1)(e) and Article 102(d) TFEU use identical wording to prohibit practices which 'make the conclusion of

contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts'. In the context of a dominant position, both the Commission and the Court have declared that requests for payment for unrelated services or for services not rendered, can be considered abusive. In a commitment decision against Microsoft, the Commission sought to remedy a situation in which Microsoft required original equipment manufacturers to pay royalties on all computers put on the market regardless of whether they contained Microsoft's software, a competitor's software, or no software.<sup>71</sup> The contracts requested payment for a fixed minimum quota of products, without taking into account the actual number of products used.<sup>72</sup> In *TNT Traco SpA*, the former Italian postal incumbent requested payments from a competitor in order to cover its costs for complying with universal service obligations. The Court ruled that a request to pay for services which have not been supplied is abusive.<sup>73</sup> In its decision against Deutsche Post, the Commission considered that requests for additional payments were abusive: Deutsche Post had, acting on an (erroneous) assumption that certain types of international mail represented 'remai' (domestic mail in disguise), requested that users pay the higher domestic tariffs.<sup>74</sup> Finally, in the *DSD* case payment requests for services not required by the trading partner and not rendered by the undertaking were also condemned. DSD, a dominant company on the market for recovering product packaging, financed its activities by charging a license fee for the use of its trademark, thereby guaranteeing that each package bearing the trademark would be collected. The company calculated the license fee on the basis of the total packaging of the client as opposed to the amount actually recovered, regardless of whether the client had proof that some of its packaging was recovered by a competing provider. The Commission declared that DSD's terms were unfair,<sup>75</sup> and its

68 Preamble of Directive 2019/633 on UTPs in food, paragraph 22.

69 SLM Kahmann and K-S Janutta, 'Update: EDEKA 'Wedding rebates' – German Federal Supreme Court answers key questions on abuse of relative market power' (29.03.2018) *Kluwer Competition Law Blog* <<http://competitionlawblog.kluwercompetitionlaw.com/2018/03/29/update-edeka-wedding-rebates-german-federal-supreme-court-answers-key-questions-abuse-relative-market-power/>>.

70 SLM Kahmann and K-S Janutta, 'Update: EDEKA 'Wedding rebates' – German Federal Supreme Court answers key questions on abuse of relative market power' (29.03.2018) *Kluwer Competition Law Blog* <<http://competitionlawblog.kluwercompetitionlaw.com/2018/03/29/update-edeka-wedding-rebates-german-federal-supreme-court-answers-key-questions-abuse-relative-market-power/>>.

71 Europa Press Release on settlement with Microsoft [1994] IP/94/653 <[http://europa.eu/rapid/press-release\\_IP-94-653\\_en.htm](http://europa.eu/rapid/press-release_IP-94-653_en.htm)>.

72 Europa Press Release on settlement with Microsoft [1994] IP/94/653 <[http://europa.eu/rapid/press-release\\_IP-94-653\\_en.htm](http://europa.eu/rapid/press-release_IP-94-653_en.htm)>.

73 Case C-340/99 *TNT Traco SpA v Poste Italiane SpA* [2001] ECLI:EU:C:2001:281, paragraphs 46–47.

74 Case COMP/C-1/36.915 – Deutsche Post AG – Interception of cross-border mail [2001] OJ L 331/40.

75 Commission Decision of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/34493—DSD) [21.06.2001] OJ L 166/1.

decision was upheld on appeal by the General Court and by the Court of Justice, judging in Grand Chamber.<sup>76</sup>

Requests for payments for services which do not benefit the supplier or which are not rendered are suspect under the contract law doctrine of consideration as well as under the competition law doctrine of exploitative abuse. At the same time, compliance with such requests could also have exclusionary effects. If one retailer demands exaggerated fees or payment for fictitious services, the supplier has less budget available to pay the fees of other retailers, and may therefore be forced to deal primarily with the dominant retailer, thereby becoming more dependent.

With respect to Article 101 TFEU, the exclusionary dimension of payment requests is discussed in some depth in the Vertical Restraint Guidelines under the heading ‘upfront access payments’.<sup>77</sup> The Guidelines describe two types of exclusionary problems which may arise when such fees are requested. Firstly, the payments may foreclose other distributors when the amount requested incentivizes the supplier to channel a substantial volume of its products through one distributor (a limitation of intrabrand competition).<sup>78</sup> This resonates with the discussion of the *DSD* case above, in which competitors were arguably foreclosed because their clients were required to pay fees to DSD on the basis of their entire output. Eventually, such payment requests may make the supplier more and more dependent on one distributor, while simultaneously contributing to the weakening of the competition among distributors.

Secondly, payment requests may foreclose suppliers who cannot afford to pay (a limitation of inter-brand competition).<sup>79</sup> This practice has the effect of raising entry barriers for suppliers, thereby limiting entry on the market to those companies with a broad range of products or with deep pockets. Although the Guidelines note that this second situation may

be ‘exceptional’, they also caution that such payments may harm consumers and smaller competitors. The Guidelines warn that such payments increase the expenses of the supplier, thereby causing it to charge higher prices and reducing its incentive to compete downstream.<sup>80</sup> Lump sum transfers may, of course, be volunteered – as a classic form of rebate – by large companies as a way to induce distributors to prefer their products. In other cases, lump sum transfers may simply be part of a two-part tariff, consisting of a price per unit and a lump sum transfer; this is a rather common way for companies to take uncertainty into account when contracting, eg. when the product in question is new and neither party knows how well it will perform.<sup>81</sup>

Importantly, the prohibition of unrelated payment requests does not amount to an excessive pricing prohibition. The Preamble of the UTP Directive affirms that buyers and suppliers should remain free to negotiate the terms of their agreements, including the price terms.<sup>82</sup> The UTP Directive thus does not seem to cover requests to ‘improve the offer’ in the context of supplier-buyer negotiations. In practice, however, this is a common situation. The business model of some retail chains is such that requests for a better price are a regular part of contract renegotiation. Wal-Mart, for instance, is reported to ask for improvements to the price on an annual basis.<sup>83</sup> This practice is also reflected in some of the national cases in this area, such as *Keti-94/Kaufland* in Bulgaria.<sup>84</sup> To the extent that the UTP Directive does not prohibit excessive pricing, complaints about the price remain to be covered by EU competition law for those cases in which dominance can be shown.

- *Prohibition of requests to pay for shrinkage and prohibition of requests for compensation for the cost of examining customer complaints*<sup>85</sup>  
The first prohibition targets the practice of imposing charges on the supplier for the deterioration or loss

76 Case T-151/01 *Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2007] ECLI:EU:T:2007:154; Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland GmbH v Commission of the European Communities* [2009] ECLI:EU:C:2009:456.

77 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraphs 203–208.

78 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraph 204. In this case, the analysis applied in the case of exclusive supply restraints can be adopted.

79 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraph 205. In this case, the analysis applied in the case of single branding obligations can be adopted.

80 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraph 206.

81 European Commission, Guidelines on Vertical Restraints [19.5.2010] OJ C 130/1, paragraph 207. See also Federal Trade Commission, Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories. An FTC Staff Study’ (November 2003).

82 Preamble of Directive 2019/633 on UTPs in food, paragraph 22.

83 On Walmart’s approach to suppliers, see B Javorcik, W Keller and J Tybout, ‘Openness and Industrial Response in a Wal-Mart World: A Case Study of Mexican Soaps, Detergents and Surfactant Producers’ *The World Economy* (2008), 1558, 1563–1564; C Fishman, ‘The Wal-Mart You Don’t Know’ (12.01.2003) *FastCompany*, <<https://www.fastcompany.com/47593/wal-mart-you-dont-know>>

84 Case *Keti-94/Kaufland*, Decision № 1111 of the Bulgarian Commission for the Protection of Competition taken in Sofia, Bulgaria on 20.12.2016.

85 These prohibitions are respectively found in Article 3 (1) (e) and 3 (1) (i) of Directive 2019/633 on UTPs in food.

of goods which takes place on the buyer's premises. This phenomenon is referred to, among retailers, as 'shrinkage'. There are a number of reasons why stock may 'shrink': theft by consumers or by employees of the retailer, loss and misplacement, consumers tampering with the product or workers damaging the goods in the process of handling.

Is it ever okay to ask suppliers to pay for shrinkage or should the buyer always carry that risk? The father of law and economics, Ronald Coase, might rephrase the question as: which party is best positioned to mitigate or bear this risk? Asking suppliers to bear the cost can be a sensible practice when it helps to align the incentives between producers and suppliers. For instance, it may incentivize a producer to develop more robust packaging which prevents spills, deterioration, or risk of damage to the product in the process of handling by consumers or shop employees. Such a provision could also stimulate suppliers to innovate in order to prevent consumer theft, as is the case with anti-theft innovations in the packaging of razor blades (among the most frequently stolen grocery items). On the other hand, innovations to prevent theft and to improve product handling can also be introduced by retailers. For shrinkage which cannot be prevented by means of better packaging, e.g. shrinkage caused by employee theft or negligence, retailers might be in a better position to mitigate or bear the risk.

Whereas a careful law and economics analysis can determine situations in which one party is better positioned to bear the risk than the other, the task of assigning responsibility for shrinkage is daunting. Moral hazard is one reason why this is the case. On the one hand, suppliers who bear no responsibility for shrinkage may choose shoddy packaging. On the other hand, moral hazard applies equally to the buyers, who, if able to transfer the costs back upstream, are not incentivized to properly supervise their customers, their employees, and their premises. The prohibition in the UTP Directive aims to balance these two risks by qualifying that requests to pay for shrinkage are prohibited when the shrinkage is not the result of fault or negligence on the part of the supplier. In practice, this caveat means that the prohibition is not absolute, which might deter some suppliers from invoking it.

Although the general case for prohibiting payments for shrinkage may be controversial, the case for doing so in the case of food and agricultural products is probably not exaggerated. Unlike razor blades and cosmetics, food products such as fruit and vegetables may be more difficult to protect against theft and damage by means of packaging or other innovations. Furthermore, given that shrinkage may simply be a pretext for an unjustified payment request, it is helpful that the UTP Directive clarifies the legal ground. From a competition law perspective, to the extent that there is no objective commercial justification, the practice can be viewed as exploitative. In cases where shrinkage reducing innovation is not likely, this payment request can have the effect of bestowing commercial advantages on the stronger buyers, while smaller purchasers would have to bear the costs of their own shrinkage.

With respect to the prohibition of payments for examining complaints related to the supplier's products, the same line of reasoning can be applied.

- *Prohibition of refusal of a written confirmation of the terms*

In principle, contracting parties should be free to choose in what form to make their agreements. The UTP Directive does not seem to alter this possibility; rather, it introduces a requirement for written confirmation to be provided upon request. This implies that oral agreements may continue to be made as long as the possibility for written confirmation, when such is requested, is not refused. The UTP Directive strengthens the already existing provisions under the common agricultural policy regulations, the latest one being the Omnibus Regulation of 2018,<sup>86</sup> which empowers farmers to ask for a written contract.<sup>87</sup> This provision, which was originally introduced in 2012 for the milk sector,<sup>88</sup> was subsequently extended to other primary agricultural producers; with the UTP Directive, this possibility is now available to other producers.

Competition law does not take a stance on the form that agreements take. However, in some cases, the fact that a written agreement was missing was considered a relevant factor. The Commission's 1981 decision against French tyre manufacturer Michelin noted that Michelin's dealers had oral, but not written, agreements; as a result, dealers struggled to

86 Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 [29.12.2017] OJ L 350/15.

87 European Commission Press release, 'EU farm policy rules to be further simplified' (13.12.2017) <[http://europa.eu/rapid/press-release\\_IP-17-5242\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5242_en.htm)>.

88 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.

understand what they were actually earning on Michelin tyres.<sup>89</sup> The dealers did not like the uncertainty, but they were reluctant to complain for fear of being replaced with more cooperative dealers.<sup>90</sup> In the Commission's decision against Intel, the restrictive contractual clauses were unwritten, and they were found to be often diametrically opposite to the written conditions.<sup>91</sup> These are examples of how the absence of a written agreement, or clarity with respect to the terms of contract, can facilitate an anticompetitive scheme.

Refusal to provide a written confirmation or a written contract is related to the idea of procedural justice, an issue that antitrust has not paid full attention to. Nonetheless, procedural irregularities in commercial dealings – such as intentionally keeping the terms of contract vague or without confirmation – can play a role in sustaining abusive schemes, be they exclusionary or exploitative. Although this provision does not change the substance of agreements between buyers and suppliers, it can prove key in facilitating enforcement of the rest of the UTP Directive. By making the contracts between buyers and suppliers more transparent, this provision might also inadvertently facilitate the enforcement of competition law.

- *Prohibition of unlawfully acquiring, using or disclosing trade secrets*

This prohibition seems to target the alleged misuse by supermarkets of confidential supplier information in order to develop competing private label brands. It is no secret that copycat private label products proliferate side-by-side with the branded goods they so cunningly imitate. However, it remains puzzling that little is known about legal actions undertaken by suppliers against retailers under unfair competition laws.<sup>92</sup> Although for years suppliers have complained – vociferously – that supermarkets misuse their confidential business information, information about litigation is hard to find.<sup>93</sup> Suppliers claim fear of

reprisals as the reason why they have been reluctant to assert their intellectual property rights.

The prohibition in Article 3(1)(g) of the UTP Directive is not likely to solve the problem of fear of reprisals. It simply prohibits the unlawful acquisition, use, or disclosure of trade secrets, as defined in the already existing Directive 2016/943 on the protection of undisclosed know-how and business information (the Trade Secrets Directive). The latter sets a list of criteria clarifying when the above are considered unlawful, which includes: breach of contract, confidentiality or non-disclosure agreements, conduct contrary to honest commercial practice, and knowledge that the trade secret was being used unlawfully.<sup>94</sup> Given that the UTP Directive merely reiterates what is provided in the Trade Secrets Directive, the value added of including the provision is probably the fact that it falls under the strengthened enforcement mechanism.

Although the antitrust literature has discussed extensively a variety of issues at the interface of competition law and intellectual property rights, surprisingly little has been written on the topic of misuse of trade secrets.<sup>95</sup> However, there may be good reason to pay attention to the topic, especially in the context of private labels. A 2014 econometric study sponsored by the European Commission showed that a larger share of private label products was negatively correlated with levels of consumer choice.<sup>96</sup> Thus, the experience with enforcing the UTP Directive could provide useful information about areas in which competition law enforcement may be lagging behind.

- *Prohibition of commercial retaliation and the threat thereof*

Article 3(1)(h) prohibits buyers from retaliating, or threatening commercial retaliation, against suppliers who exercise their legal rights, e.g. by suing for breach of contract or by complaining to collaborating with authorities. The Preamble of the UTP Directive

89 Commission Decision IV.29.491—Bandengroothandel Frieschebrug BV/ NV Nederlandsche Banden-Industrie Michelin [1981] OJ L 353/33, paragraph 28.

90 Commission Decision IV.29.491—Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin [1981] OJ L 353/33, paragraph 28. The Court, however, did not find sufficient proof that lack of clarity on the terms prevented dealers from complaining. Case C– 322/ 81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECLI:EU:C:1983:313, paragraph 69.

91 Commission Decision (COMP/C-3 /37.990 – Intel), [13.5.2009] D(2009) 3726final, e.g. paragraphs 167–191.

92 The EUIPO Report on Member State Litigation regarding trade secrets, for instance, does not discuss the matter. European Union Intellectual Property Office, 'The Baseline of Trade Secrets Litigation in the EU Member States' (2018) <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2018\\_](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf)

[Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States\\_EN.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf)>

93 For an excellent overview of competition issues, see A Ezrachi and U Bernitz, *Private Labels, Brands and Competition Policy* (Oxford University Press 2009).

94 See Article 4, subparagraphs (2) – (5) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [15.6.2016] OJ L 157/ 1.

95 H First, 'Trade Secrets and Antitrust Law' (2011) *New York University Law and Economics Working Papers* N 255, 1.

96 EY, 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>>, 32.

gives the following examples of reprisal: delisting of products, reducing the quantities of products, or suspending the provision of certain services such as marketing or promotion of supplier products.<sup>97</sup> This provision addresses the so called ‘fear factor’, which is deemed to be one of the major reasons why contract law enforcement, private voluntary schemes, and stricter unilateral conduct laws have failed to discipline buyers which systematically breach their contracts or act in bad faith toward their suppliers.

Punishing partners for exercising their legal rights or collaborating with authorities is hardly compatible with the idea of competition on the merits to which EU competition law subscribes. Fear of retaliation can obstruct enforcement, thereby enabling undesirable conduct to continue. In the framework of EU competition law, the instigation of competitors (or partners, in a hub-and-spoke context) to refuse to deal would amount to orchestrating a boycott which can be captured under Article 101 TFEU. The role of reprisal as part of an anticompetitive scheme, was also discussed in the Court judgment in *United Brands*<sup>98</sup> and in the Commission’s decision against GlaxoWellcome<sup>99</sup>. The possibility of using refusal to deal in order to implement retaliation is acknowledged in the Guidance Paper on Article 102 TFEU; however, there are no specific criteria for assessment in this type of situation.<sup>100</sup>

This is a crucial gap, because in the absence of precise criteria, it may be impossible to distinguish reprisal from normal commercial decision making. The danger in this case is that the provision in the UTP Directive could slide into one of two extremes: in the case of standards of proof set too low, enforcement of the provision can essentially mutate into a *de facto* duty to deal, making suppliers who complain untouchable; in the case of standards of proof set too high, the risk is that the provision would essentially be useless.

According to Temple Lang, the existing EU competition law doctrine may accommodate ‘overreactions’ such as a refusal to deal; however, there is

more work to be done to ensure complaints to competition authorities do not incur penalties.<sup>101</sup> This is an area in which the European Commission is expanding its activities. Currently, a directive aiming to better protect whistleblowers who inform authorities about breaches of EU law, including EU competition law, is under discussion.<sup>102</sup> This is an area in which EU competition law enforcement can learn from the experience with the new UTP Directive.

- *Practices prohibited unless clearly agreed*

Article 3(2) of the UTP Directive contains the so called ‘grey practices’: those considered prohibited unless agreed ‘in clear and unambiguous terms’ either at the outset or in a subsequent agreement. The practices covered include: a) returns of unsold products to the supplier without payment (or without payment for disposal or both), b) payments requested as a condition for stocking, displaying, listing, and making supplier’s products available on the market, c) requests to bear all or part of the costs of discounts by the buyer in the course of promotion, d) requests for payment for advertising, e) requests for payment for marketing, and f) payments for staff who fit out the premises used for the sale of supplier’s products. With respect to provisions b), c), d), e) and f), Article 3(3) of the UTP Directive requires that a supplier should be provided, upon request, with an estimate – in writing – of the payments (per unit or overall); and, in all situations except c), the buyer should also provide the basis for the estimates. The Preamble of the UTP Directive states that contributions ‘should be based on objective and reasonable estimates’.<sup>103</sup>

This provision essentially imposes requirements only with respect to procedural fairness. It does not outlaw payment requests for promotions, listing and advertising, nor does it outlaw product returns or requests to co-sponsor promotions. Article 3(2) does not take a stance as to whether the requests specified in its subparagraphs are fair or not, exploitative or exclusionary. This is where competition law can play a more active role, e.g. by scrutinising the exploitative nature of certain practices and business models, as

97 Preamble of Directive 2019/633 on UTPs in food, paragraph 25.

98 A Jones and B Sufrin, *EU Competition Law: Texts, Cases, and Materials* (OUP 2011), 364; J Temple Lang, ‘Reprisals and Overreaction by Dominant Companies as an Anti-Competitive Abuse under Article 82(B)’ (2008) 29(1) *European Competition Law Review*, 13.

99 Commission Decision of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty Cases: IV/36.957/F3 Glaxo Wellcome (notification), IV/36.997/F3 Aseprofar and Fedifar (complaint), IV/37.121/F3 Spain Pharma (complaint), IV/37.138/F3 BAI (complaint), IV/37.380/F3 EAEPCC (complaint) [17.11.2001] OJ L 302/1.

100 Communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive

exclusionary conduct by dominant undertakings [24.2.2009] OJ C 45/7, paragraph 77.

101 J Temple Lang, ‘Reprisals and Overreaction by Dominant Companies as an Anti-Competitive Abuse under Article 82(B)’ (2008) 29(1) *European Competition Law Review*, 13.

102 European Commission Press release, ‘Whistleblower protection: Commission sets new, EU-wide rules’ (23.04.2018) <[http://europa.eu/rapid/press-release\\_IP-18-3441\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3441_en.htm)>. Some of the scandals referred to include Facebook and Volkswagen.

103 Preamble of Directive 2019/633 on UTPs in food, paragraph 26.

well as their exclusionary potential. As discussed in the preceding subsections, the Vertical Restraint Guidelines consider that payment requests – such as listing fees and slotting allowances – can lead to exclusionary effects, both in terms of interbrand competition and in terms of intrabrand competition. If properly complied with, the provision in Article 3 (2) can provide the necessary evidence to strengthen competition law enforcement regarding this issue, as well as the enforcement of national rules on stricter unilateral conduct.

## V. Conclusions

Vertical restraints have generally been considered benign in terms of effect on welfare and efficiency. It is also often assumed that they are desired by both parties and are therefore sufficiently fair. The UTP Directive challenges this assumption by pointing to buyer-led vertical restraints and practices which could be considered unfair, especially in the context of power imbalances. As the analysis in this article has shown, these practices and restraints raise not only exploitative, but also exclusionary concerns. The practices raise important questions of both intrabrand and interbrand competition and therefore deserve further scrutiny under a competition law lens. So does the exploitative dimension of vertical restraints in the context of oligopolistic markets. This issue is increasingly relevant given developments in a number of sectors in the economy. Although the language of the UTP Directive is quite distinct from the language of competition law, the UTP Directive aligns well with ongoing policy initiatives of the Commission such as the proposed regulation on fairness and transparency for online search intermediaries<sup>104</sup> and the growing appetite for pursuing exploitative abuse cases.

How revolutionary is the UTP Directive? For the most part, the UTP Directive aims to address enforcement gaps in already existing legislation such as the late

payments directive, the common agriculture policy regulations, the trade secrets directive, national contract law, and national stricter unilateral conduct rules. Although the notion of a ‘black list of practices’ sounds rather menacing, a closer look at the wording of the provisions has shown lurking problems of interpretation, which may detract from the UTP Directive’s ability to achieve its goals. A guideline on its interpretation and enforcement could help clarify its substantive scope. But even so, the UTP Directive does not provide a fully elaborate normative framework for assessing UTPs. It does not provide any analytical tools to distinguish fair from unfair practices, so it does not give insight as to how future problems of substantive fairness in the food supply chain, or in other sectors, could be resolved. The UTP Directive does have added value with respect to procedural justice – especially regarding written terms and conditions and the need for clarity in agreements. These requirements, although they create a compliance burden, will facilitate data gathering by public authorities and may help gain a better understanding of the exclusionary, as well as the exploitative aspects of the practices concerned.

Perhaps the most interesting part of the UTP Directive is its enforcement architecture. It aims to achieve active and well-coordinated enforcement and effective remedies. Of course, implementation of EU law often lags behind expectations. It might be helpful that more than twenty Member States already address the issue of UTPs in the food chain in one form or another but it remains to be seen if the UTP Directive can deliver on its promise. For practitioners, the challenges only seem to grow exponentially: they will have to organise compliance with several distinct, yet partially overlapping, normative frameworks at the EU and at the national level, each with its own language, objectives, and methods of assessment.

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104 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). As of April 12, 2019, the European Parliament and the Council have reached an agreement on the text, and the proposal awaits final vote in

Parliament and in the Council before it becomes law. See European Parliament Think Tank, ‘Fairness and transparency for business users of online services’ (12.04.2019) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference = EPRS\\_BRI\(2018\)625134](http://www.europarl.europa.eu/thinktank/en/document.html?reference = EPRS_BRI(2018)625134)>.