Unfair trading practices in the food supply chain

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ABSTRACT
This On-Topic is dedicated to the regulation of unfair trading practices in the food supply chain and brings along selected contributions on different aspects on this highly debated and timely issue. These articles show the complexity in finding a good balance between different policy objectives, such as efficiency, fairness, profit distribution and agricultural policy. We hope they will pave the way for the discussion during the implementation of the new EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

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Controlling unfairness in American agriculture
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National transposition of the unfair trading practices Directive in a Nordic context
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Unfair trading practices in the food supply chain: Economic dependence and the role of competition authorities
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Foreword

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1. Few topics in the world of competition law are debated with as much passion and controversy as fairness. This is the case even more so when the discussion relates to the food supply chain, agricultural producers, supermarkets and end consumers. The debate on and around unfair trading practices—such as unilateral termination of contracts, late payments, uncompensated transfer of profit or risks—combines a myriad of issues of importance, such as contractual balancing, “big vs small,” profit distribution, hard bargaining, producer and consumer welfare, market efficiency, morality and agricultural policy, under a single umbrella.

2. Thus, it is unsurprising that calls for regulatory intervention have been made by policy actors, stakeholders and politicians, at the national and European level, to achieve fairness in the supply chain and protect agricultural suppliers from large buyers. As a consequence of these voices, and also due to the very diverse national regulation, the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain has been adopted, being the first EU-wide common regulatory framework to address practices found to be “unfair” in the food supply chain.

3. This special On-Topic issue features three contributions that deal with the regulation of fairness in the food supply chain from different geographic and professional perspectives in connection to the recently adopted Directive, but also beyond the European discussion. However, because of the Directive’s novelty and importance we include in this foreword a brief introduction to its provisions. Our focus is anchored on its scope, regulated conducts and procedural aspects as a kick-start for the relevant discussions concerning its content, and perhaps more importantly, its implementation at a national stage. In addition, we present a summary of the three articles of the issue and some concluding thoughts on the future of unfairness regulation in the food supply chain.

I. The Directive in a nutshell

4. On 17 April 2019 the EU adopted the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (“the Directive”) with the aim of preventing the abuse of buyer bargaining power. These rules dealing with unfair trading practices are to be implemented by the Member States by 1 May 2021. The Directive will have an important effect in the EU food supply chain’s regulatory landscape because it constitutes the first EU piece of legislation to regulate unfair trading practices between undertakings. The Directive is a breakthrough due to its novelty and because it sets a minimum European standard on certain prohibited practices. Until now, the regulation of bargaining power and fairness in the business-to-business relationship had been left to the national regulator, leading to a fragmented and quite varied landscape of solutions to this issue in the countries that have resorted to regulate them.

5. The Directive’s aim is to address issues of imbalance of bargaining power between suppliers and buyers of foodstuffs that may lead to the imposition of contractual...
requirements found to be unfair, contrary to good faith and fair dealing. It does so by requiring that Member States prohibit a group practices, and subjecting others to previous and clear agreement between the parties. Additionally, it includes an enforcement system based on confidentiality and which aims at addressing fears of retaliation, one of the causes that may contribute to a lack of complaints on behalf of the food suppliers. We briefly discuss these issues further below.

6. A relevant aspect to highlight from the Directive is how its final text transformed from the proposal made by Directorate-General for Agriculture and Rural Development of the European Commission in 2018. The original text proposed a rather “touch-and-go” set of regulation in which only four practices were prohibited and only a few others were subject to written agreement between the parties. Political forces, in particular the Parliament, found these proposed rules insufficient. Based on these proposals and the trilogue between the Parliament, the Council and the Commission the end result is far more detailed, intrusive and strict when compared to the proposal. These changes, in our view, show a clear trend to expand the scope of the rules both for conducts and addressees, which as a result grant greater protection to farmers and limit buyer bargaining power exertion.

II. Scope

7. The Directive applies to undertakings involved in activities related to sales of agricultural and food products by suppliers to buyers, as clarified by its Article 1(2), based on a “cascade” threshold system calculated by annual turnover, including suppliers with up to EUR 150,000,000 when facing buyers of more than EUR 350,000,000. It seems as if the turnover has been used as a proxy for bargaining power, which is rather surprising. The original proposal granted protection to only SMEs, which could have caused a negative effect as large buyers would have resorted to acquiring goods from large producers to avoid the application of the rules.

8. The Directive also applies to sales where any of the parties are located in the Union, which means it could have potential extraterritorial effects, but it does not apply to agreements between suppliers and consumers.

III. Prohibited and regulated practices

9. Article 3 of the Directive creates two types of regulated practices representing a minimum list as Member States are allowed to include further conducts that are deemed unfair. On the one hand, the Directive requires Member States to prohibit nine different practices, from only four originally proposed. Among these are: rules of late payment; cancellation of orders of perishable goods; unilateral contract modifications; requirements of non-sales related payments; requirements for payments over loss of goods at the buyer’s premises; threats or carrying out of commercial retaliation. On the other hand, six other practices, from four originally proposed, are not prohibited, but it is required agreement in clear and unambiguous terms among the parties in the supply or a subsequent arrangement. These include, among others, rules on unsold agricultural and food products being returned; payment for stocking, displaying or making products available on the market; payments by the supplier for the buyer’s advertising or marketing activities.

10. The fact that these rules are a minimum protection standard is reiterated in a rather unnecessary provision in Article 9, indicating that Member States may introduce stricter rules against unfair trading practice to ensure a higher level of protection of food suppliers, as long as those provisions are compatible with the internal market.

IV. Procedural aspects

11. As per the original proposal, the Directive incorporates an enforcement system to increase the rules’ effectiveness, as it was perceived that under the previous national legal landscape suppliers rarely initiated proceedings due to fears of retaliation. To do so, it requires Member States to designate one or more authorities to enforce the provisions, these being sufficiently empowered and with the necessary resources to carry out their duties. Among these, the enforcement agency shall be able to initiate and conduct investigations, require information from buyers, carry out unannounced on-site inspections, take decisions and require buyers to end a conduct, as well as being given the competence to impose fines or other equivalent penalties, including the possibility of adopting interim measures.


9 Article 4 of the Directive.

10 Article 6 of the Directive.
12. To palliate retaliation risks against producers, the Directive includes rules on complaints and confidentiality in its Article 5. According to these provisions, suppliers may address complaints against buyers to the designated enforcer in either the Member State in which they are located or in a different Member State where the buyer is suspected of having engaged in a prohibited practice, which may lead to forms of forum shopping. Also, producer organizations are entitled to submit claims on behalf of one of their members. The Directive requires from enforcers that, when requested, the identity of the complainant should be adequately protected.

13. New to the final Directive’s text is the possibility of resorting to alternative dispute mechanisms, such as mediation, as another possibility to deal with unfair trading practices, as stated by Article 7.

14. The Directive also includes rules concerning reporting obligations for Member States on its application and enforcement in Article 10, as well as an evaluation of the Directive and its impact to be carried out by the Commission by 1 November 2025 as stated in Article 12.

V. Contributions to the On-Topic issue

15. This On-Topic special issue features three contributions from experts in regulation of trading practices in the food supply chain:

- Prof. Peter C. Carstensen, University of Wisconsin, USA, discusses in his article “Controlling unfairness in American agriculture” the regulation of unfair trading practices in the US as a rather neglected topic. Carstensen takes us on a historical and interesting tour through the myriad of rules dealing with fairness and bilateral bargaining in the US to debunk the myth that in the US there are no rules addressing contractual balance. The paper, however, shows that despite the existence of these rules, courts (and agencies) rarely enforce these provisions, for instance because antitrust-like harm thresholds are required, and farmers seldom bring up cases vis-à-vis their buyers. This paper also shows how in the recent years, and coinciding with the change of the US administration, the efforts made during Obama’s presidency towards the protection of agricultural producers have been repelled or watered down by the Trump administration.

- Johan Hedelin, former director of the Advocacy Department of the Swedish Competition Authority and PhD candidate at Stockholm School of Economics, brings us an “insider’s and Nordic view” in his article, “National transposition of the unfair trading practices Directive in a Nordic context.” Hedelin, entrusted by the Swedish government with the drafting of the national act implementing the Directive, discusses interesting, complex and important aspects of the regulation and compares it to the existing or proposed rules in the Nordics. He focuses on the most salient challenges of implementing the Directive. Among these are its scope, whether the threshold system is really a “dynamic” solution, the need for clarification of the rules, whether a general anti-unfair trading practice clause is needed or desirable, the relation of these unfairness provisions with general contract law, and the risks and consequences of forum shopping in the rule enforcement.

- Lastly, Dr. Antonio Miño López, associate professor at the University of Vigo and legal advisor on competition and public procurement law to the Xunta de Galicia, contributes to this issue with an article from a public enforcement perspective entitled “Unfair trading practices in the food supply chain: Economic dependence and the role of competition authorities.” In this piece, Miño López analyzes the regulation of economic dependence as the source of unfair trading practices and its regulation in the Directive, EU competition law, and in Spanish law, this latter as an example of a jurisdiction in which protection to both parties is given. The contribution also discusses which national regulator should be entrusted with the Directive’s enforcement, comparing administrative versus judicial alternatives, with a preference to competition agencies as the adequate candidate.

VI. Conclusion

16. The regulation of fairness, bargaining power and the food supply chain is a legally and economically complex, highly politically sensitive, and a rather under-discussed subject. This is the case in Europe and worldwide, as this On-Topic issue shows.

17. The exertion of bargaining power by large buyers vis-à-vis suppliers is, according to the literature, usually efficient as it neutralizes seller market power and drives prices closer to the competitive level, increasing overall allocative efficiency and societal welfare. However, some practices may be found to be contrary to the idea of “fairness” or good business practices due to them being unilaterally imposed and exploitative, even if they might not be anticompetitive in an antitrust sense. The rules dealing with the food retail chain, including the new European Directive, tend to aim, therefore, to find a hard to achieve balance between economic efficiency, protection of agricultural producers and pursuance of agricultural policy objectives, morality and fairness—all of these rather elusive concepts.

18. It is our hope that this special issue on fairness and trading practices serves as an igniter for further debate, reflection and analysis of this topic, more so in light of the need to implement the Directive into national law and the, perhaps, international effects the adoption of these rules in the EU might have in other jurisdictions.
Controlling unfairness in American agriculture

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I. Introduction and scope

1. The common assertion that the United States does not have laws governing unfair acts and practices is misleading. The Robinson-Patman Act addresses some kinds of discrimination affecting competition. In addition, the Federal Trade Commission Act authorizes the FTC to prohibit "unfair competition." The scope of that prohibition beyond its use to censure conduct that violates antitrust law is the subject of significant debate. The FTC has used it to challenge unfair practices in the patent licensing area. Nevertheless, it is not wholly inaccurate to characterize America as having little by way of general law prohibiting unfair trading practices. At the same time, there are a dispersed group of industries and topic specific laws that attempt to control unfair competitive practices. A central problem with these laws is that they do not dissipate the power held by the dominant party. When a seller or buyer has enough choices, the risk of serious unfair conduct is minimized. Because these laws do not alter the number of choices, they generally have limited effectiveness in controlling unfair conduct.

II. Statutes directed at unfair practices in agriculture

3. American farmers have long seen themselves as caught between concentrated supply markets and concentrated markets into which they sell their products. Farmer unrest was a major factor in the creating support for the Sherman Act and the Clayton Act. However, farmer concerns remained. Starting about the time of World War I, Congress has adopted and amended a group of statutes addressing fairness concerns. It has never, however, sought to create a comprehensive system to control unfair treatment of farmers.

1. United States Grain Standards Act (1916)

4. In 1916, the United States adopted a statute that federalized the inspection, grading and weighing of grains. This standardization replaced grading and weighing done by a variety of market participants including boards of trade at which grain was bought and sold. While the boards had an incentive to use reasonable
standards because their members included agents of both buyers and sellers, each such board had its own standards and this in turn created significant potential for uncertainty for local elevator and their farmer suppliers. The inspection service’s standards, therefore, provide a consistent and reliable basis for trade.

2. The Packers and Stockyards Act (1921)

5. The Packers and Stockyards Act (“PSA”) was a response to the settlement of a major government case against the meat packing industry that Congress concluded was inadequate to fully protect farms. Originally the PSA had as its primary goal regulating the stockyards at which most cattle and hogs were bought and sold. But it also prohibited “unfair” or “discriminatory” conduct affecting farmers. The Department of Agriculture (“USDA”) received authority to adopt rules defining the statutory terms and providing specific standards for conducting producers. The PSA also established a private cause of action for farmers adversely affected by unfair or discriminatory conduct. Later in 1958, Congress added poultry production to the list of covered activities. It also imposed fiduciary duties on buyers, required those buying in any volume to have a bond to cover their obligations in the event of bankruptcy, and conferred on sellers of livestock a preferred position as creditors.

6. The USDA has issued rules implementing some of the general provisions of the PSA. Notably, there are rules governing the financial duties of buyers of livestock and poultry. Rules governing some aspects of the markets for cattle, hogs, and poultry also exist. But until the Obama administration those rules were relatively sparse. In 2008 Congress mandated that the USDA use its rule-making authority to clarify the application of the act. In 2010, the USDA and the Department of Justice held a series of workshops focused on agricultural competition issues around the country. The results demonstrated a great many concerns about unfair and discriminatory treatment of cattle, hog and poultry growers. The USDA responded with a significant set of proposed rules. The proposals provided an overall definition of “unfairness” and substantially more detailed regulations to govern the contracting and marketing practices affecting all types of livestock and poultry.

7. The proposals were controversial. Major meat packers and poultry integrators (processors) objected strongly and had the support of some farm groups although the decision-making by those groups may be questionable. Congress blocked the adoption of most of these rules by denying funding to continue the rule-making process despite its earlier legislation expressly instructed the USDA to develop new rules. Ultimately, that prohibition expired shortly before the end of the Obama administration and a few more of the proposed rules were either adopted on an emergency basis or moved to the final stage for approval. The Trump administration, however, canceled the proposed rules and ultimately withdrew the one key rule which had reversed the judicial interpretation requiring “competitive harm” as a prerequisite to any unfairness claim.

3. The Capper–Volstead Act (1922) and the Unfair Trade Practices Affecting Producers of Agricultural Products Act (1968)

8. A year after the adoption of the PSA, Congress adopted the Capper–Volstead Act. This statute grants an exemption from antitrust law to farm cooperatives with respect to agreements among their members or among cooperatives related to “collectively processing, preparing for market, handling, and marketing” of “agricultural products.” The statute seeks to protect from antitrust challenges farm cooperatives that process and market their members commodities as well as farmer organized cartels that bargain with buyers to set prices for individual sales. The secretary of agriculture has

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11 Id. at § 192.
12 Id. at § 228(a).
13 Id. at § 209.
14 See, Pl. 85-909 (1958) amending § 192 and other sections to include poultry. The amendments did not confer on the USDA the right to bring administrative proceedings to enforce the statute or regulations. See, 7 U.S.C. § 208(a) (administrative enforcement applicable only to “packer or swine contractor”).
15 See, id. at §§ 196 (pork and beef), 197 (poultry).
20 See, e.g., National Pork Producers Council, NPPC Asks USA to Abandon GIPSA Rules (March 24, 2017), available at http://nppc.org/nppc-asks-usda-to-abandon-gipa-rules (lies collected from pork processors to help promote pork consumption fund the NPPC, a majority of hog growers have voted to terminate it and the assessment system because the NPPC has acted primarily in support of packers and not farmers).
24 Id. at § 291.
authority to issue a cease and desist order if a cooperative “unduly enhances” the price of a commodity. But the courts have held that this provision does not exclude application of antitrust law.21

9. In some contexts, farmers are not able to organize as a bargaining cooperative. Poultry growers are an example. They provide housing for the chickens that the integrator owns. The integrator, also, provides the feed, medicine, etc. Hence, such growers cannot engage in collective action as a farm cooperative because they are hired only to grow the poultry belonging to others and, probably, because the owners of the birds do not qualify as “farmers” under Capper–Volstead this would also void the exemption. To address this gap as well as providing some protection for any other group of farmers to engage in collective action, Congress adopted the Unfair Trade Practices Affecting Producers of Agricultural Products Act.28 The statute forbids discrimination against any farmer based on membership in an “association of producers” which includes both cooperatives and other associations “dedicated to promoting the common interest and general welfare of producers of agricultural products.”29

4. Agricultural Marketing Agreement Act (1937)

10. In response to the Great Depression of the 1930s, Congress adopted the Agricultural Marketing Agreement Act (“AMAA”) that authorized a system of market orders to govern some agricultural commodities including potatoes, cranberries, pie cherries, and, most importantly, milk.30 The order system seeks to ensure fair treatment of producers by permitting regulation of the marketing of the commodity. Most orders cover a defined region of the country as well as a specific commodity.31 A super-majority of the farmers in the order area must agree to its terms.32 However, if they market their production through a cooperative, the cooperative has irrevocable proxies for their votes.33 As a result, in the case of milk and some other commodities, one or two dominant cooperatives in many order areas determine the terms of the orders which include the definitions of which producers get the benefit of certain statutory premiums.34

11. The secretary of agriculture has authority to review each order in light of the public interest and can veto some or all of a proposed order.35 To date, this has rarely happened with respect to any order and apparently never with respect to milk orders. In addition, the secretary has authority to consider the competitive and fairness effects of an order.36 The only examination of the use of these powers found that there was no evidence that they had ever been used.37

5. Perishable Agricultural Commodities Act (1930)

12. The Perishable Agricultural Commodities Act (PACA) imposes a licensing requirement on any substantial buyer of fresh and frozen fruits and vegetables.38 The statute defines various “unfair” trading practices.39 The USDA enforces these rules with administrative proceedings. Unlike the PSA, the PACA contains instructive definitions and focuses exclusively on the transactions in which such commodities are sold. The USDA has actively enforced the PACA by imposing repayment obligations on buyers and by banning some from engaging in the business.40

6. The overall lack of a coherent statutory system

13. What should stand out in this review is lack of systematic oversight of abusive trade practices affecting agriculture, something which the new European Directive on unfair trading practices attempts to achieve in the other side of the Atlantic.41 The statutes adopted and modified over 100 years have failed to establish a central enforcement agency and provide varied coverage of specific kinds of harmful practices. Moreover, the statutes rarely reach more remote buyers who can impose unfair terms that are reflected upstream to farmers.42
III. The impact of the regulatory scheme on unfair practices in agriculture

14. The responses to unfair practices in agriculture distinguish between abuses affecting specific transactions and those that seek to regulate the broader relationship. The regulatory regimes appear to make a modestly positive contribution to the protection of farmers in the first category, but overall are much less effective in dealing with unfair practices of the second sort. In part this latter failure is a consequence of the USDA's unwillingness to adopt and enforce rules addressing recurring issues. In addition, as discussed below, the reluctance of the courts to employ the broad, remedial language of the statutes to address the harmfulness of some of the continuing conduct exacerbates the adverse effects of the regulatory failure. But, ultimately, the concentrated nature of the buying markets has significantly constrained any potential to ensure reasonable treatment of producers of many commodities.

1. Transactional fairness

15. The USGSA and PACA provide clear examples of protecting parties from unfair transactional practices. By providing grain standards (grades), inspection, and weighing the government removes a significant set of risks that can affect market participants. Similarly, the list of unfair practices in the PACA provides a framework within which to police the conduct of buyers of perishable crops. Because perishable crops need to be marketed promptly, the seller is potentially at the mercy of the buyer. The PACA provides a way to restore some of the equilibrium that other market contexts provide. The PSA provides similar protection to livestock and poultry producers with respect to the immediate transaction. The USDA enforces those rules and excludes from the market those buyers who fail to make prompt payment, provide inaccurate weights, or misdescribe the nature of their business. This ensures that sellers have a better chance of getting fair dealing.

16. The Capper–Volstead Act has provided a shield for groups of farmers organized as a “cooperative” to bargain over prices with buyers. Where there are numerous producers, each has no capacity to bargain effectively with a monopoly or oligopsony. But collectively, they have both the capacity to be better informed by sharing the costs of information gathering and to exercise effective countervailing power with respect to the bargaining process. Such bargaining cooperatives have had modest success in sugar beets and potatoes. 46

17. Both the market structure of the buying side of most commodity markets and the existence of more competitive downstream markets that dominate the underlying pricing discretion of producers and processors will constrain the capacity of any cooperative or other bargaining entity to increase the prices that producers receive. However, a second advantage of these kinds of negotiation is that they can provide a means to ensure consistent and reasonable treatment of producers. As in the case of unions, the bargains usually call for uniform, non-discriminatory payment and equal treatment.

18. Although poultry growers ought to have been able to use the Unfair Trade Practices Affecting Producers of Agricultural Products Act to support organization and to shield themselves from both antitrust law and integrator opposition, this has not happened. Instead, there seems to have been no successful effort to organize such producers, and there has been only one reported successful case invoking that act to protect efforts to organize poultry growers. 47 Even if organized, poultry growers bargaining capacity would be severely constrained by the fact that integrators operate multiple facilities and have the capacity to close a facility and transfer its production to other facilities.

19. Overall, the protection of narrow transactional fairness appears to have been moderately successful only for some types of agriculture.

2. Broader issues of unfairness

20. Where the legal regime has been largely unsuccessful is in dealing with the broader negative consequences of buyer power in agricultural commodity markets. Moreover, some of these statutes have been used with varying degrees of success to exploit either producers or consumers or both.

21. In the case of Capper–Volstead, sometimes in conjunction with use of the AMAA, large producers have tried to use the exemption to coordinate prices and production. 48 In response the courts have taken a narrow view of the scope of conduct exempted. 49 Agreements to limit production fall outside the exemption. In other cases, the presence of even one non-farmer voided the exemption. 50 In the case of dairy, there was evidence that the dominant cooperatives both exploited their members and consumers. These cooperatives have so many members and operate under governance laws and internal constitutions that make member collective decision making difficult.
action. These results limit the overall utility of the statute to facilitate efforts by groups of farmers to advance their own economic interests.

22. The PSA provides an even more dramatic example of failure. Here the forces frustrating its utility are judicial and political as well as the underlying market structures. The transformation of commercial livestock and poultry production contributed to a surge in claims of unfair conduct. The poultry business changed from individuals raising their own chickens to an integrated factory type operation in which farmers raised birds belonging to the integrator using that company’s feed and following its directions.53 Meat packers similarly moved to the use of supply contracts awarded to some but not all producers while also engaging in open market purchases that in turn set the base price for many of the contract sales. These arrangements also gave rise to many claims of unfair and discriminatory practices.

23. Although the USDA has authority under the PSA to adopt rules that would define unfair conduct, prior to 2010, it had failed to adapt its rules to the evolving market conditions, and there was an unwillingness to prohibit even blatantly questionable business practices.54 As a result, individual farmers initiated law suits claiming that various practices were “unfair” or discriminatory and so violated the PSA. This confronted the courts with the necessity of defining unfairness without any explicit statutory definitions or administrative regulations to guide them. The resulting decisions analogized the PSA to antitrust law and then imposed a requirement that there be “harm to competition” and not just injury to a competitor;55 moreover, the cases seem to require that this harm result in losses to consumers and not just to farmers.56 A second restriction in a class action on behalf of cattlemen excluded from access to contracts was to exempt from “unfairness” any conduct for which a plausible business justification might exist even if a less restrictive alternative was also available.57

24. The requirements of harm to competition, and losses to end consumers as well as the broad exception for business justification misread the goals of the PSA and its appropriate application to these cases. The statute was to supplement the antitrust laws explicitly to protect the interests of individual producers as the financial integrity and related regulations as well as their enforcement make clear. Even if one were to accept the analogy to antitrust, the focus on “consumer harm” is wrong because antitrust is equally concerned with adverse effects on producers.58 Moreover, the refusal to recognize that discrimination against the cash market participants by the use of selective contracts offered selectively is unduly burdensome and that less exclusionary strategies could obtain any putative benefits is also contrary to the standard analysis used in antitrust. Finally, in a few cases, the plaintiff pointed to the violation of specific PSA regulations that resulted in harm to the plaintiff. In antitrust law, such conduct would be “per se” illegal as by definition it harms the competitive process. But courts enforcing the PSA have failed to impose this standard.59 Overall, it is very exceptional when a plaintiff prevails in a PSA case.60

25. Thus, the courts using the false analogy to antitrust claims have largely evinced the PSA’s intended goal of protecting individual livestock and poultry producers from unfair and discriminatory conduct.

IV. Conclusion

26. The central lesson from the effort to police unfair trade practices in agriculture is that while policing transactional misconduct is feasible, the political and legal challenges of developing broader standards to address serious fairness issues have been overwhelming. Moreover, core market power is left undisturbed by any regulation.61 A powerful firm will have great incentives to seek ways to exploit its power that avoid violating the regulations. Moreover, farmers as a numerous and dispersed community have serious collective action problems, which means that individual farmers have a self-interested incentive to get along and not complain so long as they seem themselves as treated better than others. Only restructing the buying side of the market will produce sufficient competition among buyers so that sellers can avoid unfair treatment by the use of “exit.”62

52 Christiansen, supra note 25, at 478–481.


54 For example, at a USDA workshop in the late 1990s all participants in a panel discussing cattle buying agreed that the practice of pricing contract purchases based on contemporary cash prices at the same facility should be forbidden because of the incentives to manipulate cash prices. The USDA administrators present agreed there should be a prohibition, but nothing was ever done.

55 See, London v Fieldale Farms Corp., 410 F.3d 1295, 1302–1305 (11th Cir. 2010).

56 See, e.g., Wheeler v Pilgrim’s Pride Corp., 591 F.3d 355 (5th Cir. 2009) (en banc) (rejecting a discrimination claim based on the lack of harm to consumers).

57 Packetts v Tyson Fresh Meats, 420 F.3d 1272 (11th Cir. 2005) (rejecting class action claim based on proven discrimination among sellers of cattle because the discrimination had a rational business purpose).


59 See, e.g., Terry v. Tyson, 604 F.3d 272 (6th Cir., 2010).

60 One exception is Beno v. O.K. Industries, 396 Fed. Appx 382 (10th Cir. 2010), 2010 WL 3959981 (reported affirmation of damages to poultry growers resulting from unfair treatment).

61 Where there is a more competitive structure PSA regulations have improved the contracting process by ensuring producers access to better information and advice. See, 7 U.S.C. §§ 191-190b (providing for collection and publication of hog raising contracts and allowing farmers to consult with lawyers or others about the merits of such contracts).

National transposition of the unfair trading practices Directive in a Nordic context

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I. Introduction and contribution’s scope

1. On April 17, 2019, the new EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (“the Directive”) was adopted.1 Although the name of the Directive indicates a more general application, the new rules basically protect sellers from buyer’s practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another.2

2. National parliaments have often been eager to get such a new regulation in place, dealing with the food supply chain. Governments, on the other hand, have been more careful or reluctant to do so. In the Nordic countries in particular, parliaments have seen it necessary to ask for the new legislation. The Finnish Parliament called for “necessary legislative measures” and the Norwegian Parliament urged the government “to propose a law on good trading practice.”3

3. On June 7, 2016, a European Parliament resolution called on the Commission to present a proposal for Union legislation. During the legislative process, the proposed Directive was extended to cover not only foodstuffs, but all agricultural and food products, which is the same scope as the existing Finnish Food Market Act, but narrower than the recently presented Norwegian proposal that includes all groceries. In Denmark and Iceland no proposals have yet been published.

4. Comparing the law set by the Directive with the Norwegian proposal—which can be drafted independently of the Directive as it might not be EEA relevant4—also casts pedagogical light on the thoughts that lie behind each of these two regulations as well as on the issues that come to the fore during the envisaged national transpositions. A comparison with the Finnish national rules is also productive, as they supplement the Directive in an interesting way. Focus is on the substantial issues, while the procedural issues—how to supervise and enforce the new regulations—are briefly touched upon.

II. Existing and proposed regulation in the Nordics

5. In the Nordic countries, so far, only Finland has, since January 1, 2019, regulated unfair trading practices in the food sector.5 The recruitment of a food market “ombudsman” is in full swing at the time of writing. The provisions are considered supplementary to the new

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* Former Director of the Advocacy Department, Swedish Competition Authority, presently assisting the Swedish Ministry of Enterprise and Innovation with drafting the Swedish transposition of the Directive. In this article I write, without prejudice to all the decisions that must ensue, about what, in my opinion, must be considered when transposing nationally. The author would like to thank Professor Gunnar Karnell, Professor Ulf Bernitz, Professor Lars Henriksson and Dr. Ignacio Herrera Anchustegui for their much appreciated and useful inputs.


2 Recital 1 of the Directive.


4 The Directive has been adopted in particular with regard to Article 43(2) TFEU.

5 Livsmedelsmarknadsutgåva, 1121/2017 (the Finnish food market act).
Directive and the procedural arrangements will already be in place when the Directive starts to apply.

6. In addition to a general requirement to provide contracts in writing, applying to all buyers of food in Finland who are medium-sized or larger (according to the traditional SME categorization), the new ombudsman will monitor two existing general clauses in Finnish market law, which so far have been sparingly applied.6 Also, since 2013, national competition law states that a company with a market share of at least 30% shall be considered dominant.7

7. In the case of Norway, the proposal expresses the principle of loyalty among the parties in contractual relations.8 Words like “reasonable” and “fair” are avoided; instead uprightness, predictability, legitimate expectations and mutual respect for intellectual property rights are made the cornerstones of a general clause.

8. However, as stated in the preamble to the Directive, some trading practices may be manifestly unfair even when both parties have agreed upon them.9 The Directive contains a number of rules on cost allocation, more specifically nine, and this number has increased since the Commission’s original proposal,10 reflecting the outcome of the EU trilogue. As the Directive stands, the intention is to counteract the unfair trading methods and their contractual content, whereas the Norwegian proposal rather aims at changing negotiation behavior in order to produce a different and more balanced outcome.

9. Common to the Directive and the Norwegian regulation are only three basic components: the prohibition of unilateral changes in contract terms, protection of certain business secrets and a ban on commercial retaliation. In the Norwegian proposal, the issue has been turned to promoting good trading practices, instead of tackling unfair ones. The proposed Norwegian regulatory framework applies to all companies regardless of size—buyers as well as sellers. There is no distinction between perishable and other foods—all groceries are covered, not only food and agricultural products.

10. A very central formulation in the Norwegian proposal is that the rules should enable the parties to achieve effective solutions among themselves, and not to dictate how these solutions should look, but be neutral with regard to the distribution between different levels of trade.11 That is far from the ambitions of the Directive.

III. Unfair trading practices and competition

11. Several Nordic reports have concluded that unfair trading practices are not directly linked to competition problems.12 On the other hand, these studies have not ruled out that contractual relations may be such, with a distrust among parties, as hinder the socio-economic efficiency, simply by the fact that transaction costs rise which indirectly leads to higher prices and/or lower supply. The higher transaction costs can ultimately lead to a lessening of competition, for example through vertical integration to cope with the increased transaction costs.13 This is also how the Norwegian proposal for legislation in this area is explained. The proposal clearly distinguishes these effects from the effects of competition, which make sure that the increased socio-economic efficiency is shared with consumers.

12. The links between socio-economic efficiency and unfair trading practices are questioned in the economic literature and unfair trading practices tend primarily to have effects “inter partes” in the sense that they affect the distribution of profits between different entities. They can sometimes have more far-reaching effects if they are used broadly and in an exploitative manner by dominant companies.14 But, according to Herrera Anchustegui, it is not clear whether unfair purchasing practices constitute a core competition problem for which EU competition law is the adequate tool. As a consequence, EU competition law will rarely and should rarely apply to cases dealing with the imposition of unfair purchasing practices, as the very few cases confirm.15

13. The question then becomes whether the legislator should go further than the Directive requires when transposing nationally (gold plating)? Even under the Directive’s recitals this is hinted. National rules may extend beyond their scope concerning the size of buyers and suppliers, the protection of buyers, the scope of products and the scope of services, as well as the number

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6 RP 121/2018 rd, pp. 45-47 (the bill proposing the Finnish food market act).
7 Konkurranseog bygningens regler – om den internasjonale tråden i norsk konkurranse lov og lov om frilans og friske leverandører (the bill proposing the Norwegian food market act).
8 Forslag til lov om god handelsevne i dagligvaresekten, “Proposal for a law on fair trading practices in the groceries chain”), Nærings- og fiskeridepartementet, Oslo, 26 april 2019, pp. 5 and 21.
9 Recital 1 of the Directive.
11 Forslag til lov om god handelsforskjell i dagligvaresektoren, supra note 8, at p. 22.
13 Forslag til lov om god handelsforskjell i dagligvaresektoren, supra note 8, at p. 38.
and types of unfair trading practices prohibited thereby offering a more stringent protection.

14. The new Directive’s rules also fit perfectly when reading Council Regulation (EC) No. 1/2003, under which Member States are allowed to apply stricter national legislation prohibiting or sanctioning unilateral behavior. Also, Member States are allowed stricter rules if these predominantly serve other objectives than the competition rules of the Treaty. This calls for the delimitation of other objectives from competition objectives and for the distinction of unilateral behavior from other (coordinated) behavior.

15. Pursuant to the intention of the legislator, the Commission’s practice and the Member States interpretations, it has been argued by Gjendemsjø and Herrera Anchustegui that the term “unilateral” should be interpreted broadly in this context, so that it includes practices and clauses which are imposed on one of the parties to an agreement.

IV. Which sellers should be protected from which buyers?

16. An important decision when transposing the Directive is how to limit its scope of application; i.e., which sellers should be protected and from which buyers? In the preamble, the scope of the Directive is termed “dynamic” in the sense of being based on the relative size of the supplier and the buyer. This is actually a poor description of the model. The basic idea is understandable—one should not protect larger suppliers against smaller buyers. However, it is substantially more difficult to make the delimitations in practice and it is apparent that the model was a compromise made at the end of the negotiations on the Directive.

17. According to the Directive’s preamble, the annual turnover is a suitable approximation for relative bargaining power. But in addition to being sensitive to fluctuating exchange rates, the model also causes threshold effects when turnover changes. These effects become considerable because the intervals used in the Directive when taking into account turnover are very wide. In fact, sellers who are significantly smaller than the buyer may not benefit from the Directive’s application. Instead, companies that are about the same size, measured in turnover, may be protected against each other. Obviously, turnover does not say anything about the market power of the undertaking in question and therefore not very much about the bargaining power either. Finally, everyone must keep track of not only their own but also of the turnover of all business partners.

18. In contrast to the Directive, neither the Finnish regulation nor the Norwegian proposal have a similar model. The obvious risks of trade being adapted or trade patterns altered to avoid the application of the Directive—in particular by choosing larger trading partners—have already been recognized. Such a development would obviously be counterproductive. In my opinion, it may also seem like a pedagogical challenge to tell the world that “this is a good regulatory framework” but we nevertheless only demand that it be applied if the seller’s turnover is below x EUR and the buyer’s turnover is over y EUR. Also, the numbers x and y cannot be specified in advance, since the model is “dynamic.”

19. The general question becomes whether the Directive needs a “relative small buyer” exception? It may require some extra red tape for small buyers to provide the written contracts. But, on the other hand, many Member States have already imposed such requirements for contracts in writing (see below part VI.).

V. Should we clarify the Directive?

20. All of the substantial issues raised by the Directive are covered in the preamble in just under seven pages. Of these, two pages concern exceptions for grapes, musts, school milk and healthcare, and almost one whole page is about the definition of “perishable” food products, the sellers of which are in some circumstances—but not very many—afforded extra protection. The four pages of the preamble that remain do not provide much guidance in the delimitation of the substantial provisions.

21. When transposing it may be possible to make the national law more precise and easier to apply and to fill out the missing parts. Swedish transpositions typically tend to be extensively motivated in the preparatory works and the courts tend to attach much importance to these wordings. Obviously, this will always come at a risk of creating conflicts with the future case law of the EU Court of Justice.

22. The need to clarify the provisions of the Directive is most obvious when it comes to changes in contract terms. These changes are explicitly dealt with in the ban on unilateral changes to the contract terms. But the prohibition of late cancellations for perishable food
products also prohibits a specific type of unilateral change in contract terms—a change of volume. The Directive, on the other hand, lacks explicit rules on so-called delisting (the discontinuation of purchasing from a seller). But delisting is obviously a unilateral change in contract terms. In addition, some unilateral changes may be considered as commercial retaliation and should be examined as such.

VI. Do we always need contracts in writing?

23. Already before the adoption of the Directive, written contracts were required in, inter alia, the food chains of the UK, Ireland, Spain, Czech Republic and France. The Directive, however, only requires the supplier to confirm the contractual terms in writing if the supplier so requests. Will suppliers be courageous enough to request this, that is to bite the hand that feeds them? Some people doubt this. Both Norway and Finland have proposed or implemented an absolute requirement of a written contract, regardless of whether the seller asks for it. Finland applies an opt-out in which the supplier—in writing—may renounce the right to a written agreement.24

24. According to the preamble to the Directive, the written form may help prevent unfair trading practices24 and, in general, great hopes are set that many problems could be overcome if the contractual conditions were clarified in writing to both parties. The Finnish legislator looked at the written form as a protection for the weaker of the contracting parties since the absence of written agreements could make it easier to unilaterally change the contractual terms or to notify the price only after the delivery or sale. Also, proving the breach of a contract could be easier.25

25. Consequently and assuming that the now proposed Norwegian regulation is implemented, and Finland does not replace but adds to its existing legislation when transposing, an absolute requirement of a written contract will apply in both Norway and Finland.

VII. Do we need a general clause against unfair practices?

26. The Directive lacks a general clause against unfair trading conditions, which would obviously have been a mixed blessing. This deviates from national regulations proposed or applied in Norway and Finland.

27. One view is that a general clause would have been too vague to be workable.26 With a precise set of rules there may be no need for a general clause. If, on the other hand, companies adapt their behavior to circumvent the new rules and find loopholes, such clauses may appear to be appropriate.

28. General clauses have not always had the impact the legislator expected or aimed for. On the other hand, one can point to the entire EU regulation of state aid and competition, which has the obvious character of a general clause, but has nevertheless been very successful.

29. The new Finnish legislation refers to two already existing laws that have so far had scant application in the food sector, but which are nevertheless judged to be appropriate to be placed under the supervision of the new food market ombudsman. These are the Act on the Regulation of Contract Terms Between Commercial Operators,27 and the Act on Improper Procedures in Commercial Operations.28 According to the latter, a commercial operator must not use procedures that violate good business practice or otherwise be unfair to another trader.

30. The Act on the Regulation of Contract Terms Between Commercial Operators states that such terms or conditions may not be used, in agreements or in practice, that are unfair to the counterpart when taking into account the need for protection which the latter has as a result of its weaker position and other circumstances that affect the case at hand.

31. Both laws have similar Swedish counterparts—namely, the Marketing Act and the Act on Contract Terms among Commercial Operators. These laws also contain general clauses.29

23 Livsmedelsmarknadsföring (the Finnish food market Act), 1121/2018, Section 3(1).
24 Recital 23 of the Directive.
25 RP 121/2018 rd. s 30 (the bill proposing the Finnish food market Act).
27 Lagen om reglering av avtalsvillkor mellan näringsidkare, 1062/1993.
28 Lagen om otillbörligt förfarande i näringsverksamhet 1061/1978.
32. The Norwegian proposal for a general clause summarizes what constitutes “good trading practice” as follows: “Business relationships must be based on uprightness, predictability and mutual respect for intellectual property rights.”

33. According to the Norwegian proposal, it can be questioned whether the proposed regulation actually adds new legal content beyond what already follows from the Marketing Act, intellectual property law and other legislation. However, as stated by the proposal, the principle of predictability in contractual relations and the need to make relevant information accessible to the counterpart need to be clarified, although an obligation to provide information can already be derived from the principle of loyalty in contractual relations. The general clause should not function as a “classic” general clause, which establishes a general standard with a blurry content, intended to change over time. Such an arrangement is often seen as an advantage when regulating what is reasonable or fair. In this case, however, still according to the proposal, it is not a question of such subjective assessments and the general clause should not be understood as the starting point for the interpretation of what constitutes “good trading practice” but instead represent the sum of the proposed regulation.30

34. Obviously, the need for a general clause will be judged differently in different jurisdictions. General clauses already exist, in Finland as in Sweden; however, they are rarely applied. Maybe, with a precise regulation of unfair trading practices in the food sector, these general clauses will continue to have limited application. On the other hand, it is difficult to know what a regulator could do with the general clauses that have, at least openly, been applied so sparingly—maybe only because they have not had any supervisory authorities to monitor them.

VIII. The relation to general contract law

35. Problems arise when regulating matters already covered by other existing legislation. This has been described as a myriad of laws with varying formulations, different regulatory authorities and in a combination of private and public law, which may lead to confusion and legal uncertainty. The goals for the different regulations also vary: efficiency in competition law, fairness when counteracting unfair trading practices and balance between the two parties within contract law.

36. The rationale for new national legislation in this area has been that much protection is already afforded by existing law, which, however, is not always fully applied because it is fragmented and not always known to the parties who can also be reluctant to go to court and afraid to demand their rights. The new European rules are meant to create a comprehensive framework and create a common public-law mechanism to ensure that they are complied with. This is intended to counteract the systematic underapplication of existing law.31

37. An obvious question is whether the new rules can be invoked before general courts if the regulator does not intervene. Does a seller have to pay for the marketing expenses, as promised, even if this would be contrary to the Directive? Does the requirement of a written contract automatically result in an oral agreement being invalid? How would it influence the courts’ appreciation of the parties standing, and what would be the evidentiary value of an agreement not expressed in a written contract, as required by the Directive?

38. In Swedish and Finnish law, oral agreements will not automatically become null and void. The Finnish contract law32 contains, like the Swedish one,33 an adjustment clause according to which a condition can either be adjusted or left without effect, if the condition is unreasonable or its application would lead to unreasonable effects.

39. Another important issue is whether the supervisory authority can consider general contract law, insofar as it imposes substantive or procedural requirements on the agreement. And does an answer to this depend on whether or not a general clause covers the entire field?

40. Here there certainly is no need for uniform solutions within the EU, but the need is evident to resolve such issues as mentioned when transposing.

IX. Forum and regulatory shopping?

41. The preamble to the Directive states that suppliers, for example for linguistic reasons, may prefer to lodge complaints in their own Member State, but that it may be more effective to file a complaint with the supervisory authority of the Member State where the buyer is established.44 In my opinion, this is good advice for individual companies and for Member States when they transpose the Directive.

42. In the example of trade in salmon from Norway to Sweden one can observe that the Norwegian salmon traders will be protected by Swedish rules on unfair trading practices as well as by their own Norwegian rules on “good trading practices.” Here there is a double opportunity for forum and regulatory shopping by

30 Forslag til lov om god handelskikk i dagligvarekjeden, supra note 8, at p. 48 et seq.
31 Recital 8 to the Directive & Forslag til lov om god handelskikk i dagligvarekjeden, supra note 8, at p. 24.
32 Lag om råtshandlinger på förmögenhetsrättens område, 226/1929, Section 36 (the Finnish contract law).
33 Lag (1915:218) om avtal och andra råtshandlingar på förmögenhetsrättens område, Section 36 (the Swedish contract law).
34 Recital 36 of the Directive.
the seller. The seller can claim protection from either the Norwegian national regulation or from the EU Directive, as transposed in Sweden. Since they offer different and not necessarily overlapping protection, this is double protection, in addition to the forum-shopping opportunity. It was a deliberate choice in deciding on the Directive to provide the same protection to suppliers outside the Union, partly for reasons of principle, but also to avoid redistribution of trade to non-protected suppliers.

43. Also, the Swedish buyers will be able to claim protection from sellers according to the Norwegian national regulation. So, will Swedes be able to buy Norwegian salmon in the future? Yes, very likely. The Norwegian sellers will receive guarantees about timely payment and will avoid costs that they might otherwise have been forced to absorb. The Swedish buyers are guaranteed that they are themselves met with “good trading practices” from the Norwegian sellers—guarantees that they do not have when purchasing in Sweden. Perhaps the Norwegian salmon will become somewhat more expensive in Sweden, which is difficult to avoid considering the purpose of the new EU regulation: that the primary producer should be paid a little more.

44. What needs to be in focus when the Directive is transposed is how the practices of buyers are regulated in their own Member States. Adapting transposition to all envisaged national transpositions within the Union, in order for it to work well for all sellers in all different member countries, is hardly realistic. In the end, a directive is meant to be transposed differently in different states. Nevertheless, a Member State can and should try to avoid obvious distortions, at least in relation to the country’s largest trading partners.

45. In practice, much will depend on the regulators and to what extent they will want to and succeed in cooperating. They will meet at least once a year to discuss the application of the Directive on the basis of annual reports and discuss best practices, new cases and new developments. The Commission will organize these meetings. The Commission and the Member States’ supervisory authorities should work closely together to ensure that they have a common approach to the application of the provisions of the Directive.

46. But the supervisory authorities must also have the legal ability to cooperate in the application of the Directive. The Directive does not explicitly impose any such requirements. Two important questions are whether the authorities may legally submit information to a supervisory authority in another Member State and if the receiving supervisory authorities may keep the information secret, so that the first country will be able to share it.

X. Final remarks

47. Overall, this article identifies some crucial issues when transposing the Directive on unfair trading practices and it outlines various options for the national legislature to approach them. Urgent issues in connection with the national transpositions must come on the table in good time to enable fruitful discussions between Member States. On May 1, 2021, the new national regulations that implement the Directive must be in place.

48. Having been skeptical of the Directive when it was drafted is no reason not to engage in its transposition. The new rules—at least in a Nordic context—will constitute the first piece of market law specific to a sector of the economy and may therefore fall “between the chairs” of existing supervisory authorities. In the debate it has been warned that an assignment to the competition authorities would risk entailing too limited an application of the new regulations, taking into account these authorities’ focus on socio-economic efficiency, which is not the focus of the new regulations. On the other hand, the same analysts believe that designating sectoral authorities in agriculture could have the opposite effect: an unnecessarily far-reaching application.

49. The question at the end becomes what is to be deemed most important: that the competition authorities address the right “target companies” at the outset, or that the new regulations are very different from those the competition authorities are accustomed to apply? Will the new regulations be better applied by those who see and acknowledge its limitations, or would it be better to start with, so to speak, “a blank sheet of paper”?

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35 Recital 12 of the Directive.
36 Recital 1 of the Directive.
37 Article 8(2) and recital 36 of the Directive.
Unfair trading practices in the food supply chain: Economic dependence and the role of competition authorities

I. Overview

1. This brief study holds that the behaviours laid down in the Directive on unfair trading practices in business-to-business relationships in the food supply chain (“the Directive”) find their natural location within the category of abuse of economic dependence. On that basis, Spain, among other Member States, set out in 2013 a regulation partially coincident with that of the Directive, the Law 12/2013, of 2 August, of measures to improve the functioning of the food supply chain (thereinafter, “LISCh”). The paper also argues that these unfair practices have a particularly favourable ecosystem in markets prone to or (massively) affected by anti-competitive behaviours. Therefore, the public authority that each Member State shall designate to enforce the prohibitions laid down in Article 3 should focus on those markets. Such a strategy should lead to foster a privileged collaboration with competition authorities or, even better, to entrust them with the powers conferred on the enforcement authorities.

II. Natural position among unfair practices: Abuse of economic dependence—the Spanish precedent

2. The Directive aims to protect “suppliers”—defined as the agricultural producers who sell food products—against “buyers”—that is, the natural or legal persons who buy food products by the way of trade (Article 2). But the sheer fact of being an agricultural producer does not ensure that the provider will always be under the protective umbrella offered by the Directive, because it only covers small and medium-sized suppliers against not small and medium-sized buyers according to the threshold system [Article 1(2)]. Even though the text includes some practices absent in the Spanish legislation on unfair practices in the supply chain, this latter one is much broader, since it rules on all commercial operations that occur at any point in the chain. On the contrary, the Directive does not contain any rule prohibiting or fining buyers’ unfair behaviours. This deliberate slip will surely attract criticism of “unbalanced,” “disproportionated,” “biased” and “discriminatory” on the part of the buyers’ side.
3. The Directive takes for granted that buyers have the upper hand within the food supply chain because high concentration in the stages downstream of primary production provides them with the bulk of relative bargaining power. This power allows them to impose their rules to a greater or lesser number of business relationships. Some agricultural sectors have seen how concentration on the buyer's side has reached European or even worldwide levels.

4. On the contrary, agri-food producers are usually SMEs or even micro-firms, whose difficulties to gain economies of scope and scale arise out of several factors, such as scarcity of capital, attachment to traditions and even environmental issues. Concentration on the buyers' side requires the accumulation of capital and its destination to the acquisition and distribution of agricultural products, which has been favoured by the extent to which the free movement of capitals in the European Union is recognized. However, agricultural producers must abide by multiple regulations, such as agricultural, environmental and urban planning. In the Preamble to the LISCh, the Spanish legislator states that the high level of atomization that affects the agrarian producer sector is due to the rigidity of the demand, the seasonality and atomization of the supply side, the territorial dispersion and the generation of jobs linked to the rural environment. For its part, the agri-food industry is integrated mainly by SMEs, along with some large national and international industrial groups.

5. The obvious field for the Directive to be applied is that of abuse of economic dependence, which occurs when the buyer is in a position of strength in relation to the agricultural producer, without necessarily holding a dominant position on a pertinent market. The supplier is dependent when breaking off the commercial relations with the company with relative market power (strong company) will seriously compromise its competitive capacity.

6. The agri-food industry in Spain has an undeniable strategic value for the national economy. However, it is a vulnerable sector due to its own characteristics, since it integrates a wide variety of agents from the sectors of production, transformation and distribution, which in turn are individually limited by their idiosyncrasies. As it was advanced, in 2013, the LISCh intended to provide a balanced answer to the same issues as the Directive: to overcome the blatant asymmetries present in the food supply market. But its scope of application is wider than that of the Directive; particularly, the buyer is also protected when the producer engages in the behaviours laid down in the law, and not only awarding protection to the supplier as the Directive does. On the one hand, the Spanish law covers the commercial relations between all the operators that intervene in the food supply chain, from production to the distribution of food or food products. On the other hand, it is limited to the commercial relations, continuous or recurring, whose price is higher than 2,500 euros, provided that only one of the operators—the supplier, but also the buyer—has the status of SME or has a situation of economic dependence regarding the other operator. Such dependence will exist where the turnover of the former’s product is at least 30% of the former’s turnover in the previous year.2

7. The LISCh builds the protection of the weakest party on four pillars: “sanctification” of the contract terms; setting of important obstacles for its modification; creation of a code of good commercial practices in food procurement; and a penalty system.

8. Regarding the first feature, supply food contracts must be formalized in writing, unless the price is paid in cash. Formalization has to be made before the implementation of the contract (delivery of goods). Non-formalization does not affect the existence or validity of the contract but entails an administrative infraction.3 The first infringement, consistent in the non-formalization of the contract, is sanctioned as a minor infraction (and fined with up to 3,000 euros). Two or more minor infractions within a period of 2 years is a serious infraction (the penalty ranges from 3,001 to 100,000 euros).4

9. Every written contract must lay down several statutory clauses, summarized in Article 9:

- identification of the contracting parties;
- object of the contract;
- price (with precise indication of all payments, including the applicable discounts, which will be determined in a fixed or variable amount. In the latter case, the price will be determined based solely on objective, verifiable, non-manipulable factors expressly established in the contract, such as the evolution of the market situation, the volume delivered and the quality or composition of the product, among others);
- payment conditions;
- conditions of the delivery and provision of products;
- rights and obligations of the parties;
- information to be provided by the parties, with special provisions for the transmission of sensitive commercial information;
- duration of the contract, as well as the conditions of renewal and modification;
- causes, formalization and effects of the contract termination.

10. The high importance for the weakest party of the literal terms of the written agreement for the weakest party makes cumbersome and formalistic any modification of the above

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2 Article 2, Law 12/2013, of 2 August, measures to improve the functioning of the food supply chain.

3 For theoretical foundations on the validity of non-formalized contracts, see R. Tommasini, La nuova disciplina dei contratti per i prodotti agricoli e alimentari, in I contratti del mercato agralimentare; F. Albuoni, M. Guiffrida, R. Sannia and A. Tommasini (eds.) (Edizioni Scientifiche Italiane, 2013), pp 119–152.

4 A. Sánchez Hernández, Los contratos alimentarios en la Ley de la cadena alimentaria – referencia a la normativa y doctrina italiana “de contratti di cessione dei prodotti agricola e alimentarini,” Actualidad civil, ISSN 0213-7100, No. 3, 2015.
clauses, which has to be agreed on by both signatories; especially when the change involves the payments made by one or both contractors. On the first hand, Article 12 prohibits to alter the contractual conditions established in the contract, unless the modification arises out of the mutual agreement of the parties and the contract sets its procedure and retroactive effectiveness. Therefore, what is actually prohibited is not the “contractual modification” eventually agreed by the parties but that the “strong party” engages in abusive behaviour consisting of imposing the variation of the content of the relationship in a manner detrimental to the “weak party.”

11. It is difficult to draw the line between an imposition of contractual changes and a mere invitation formulated by a party, possibly the “strong” one of the relationship, in order to obtain a modification of the contract; an invitation that can encounter many levels of opposition from the counterpart. The valuation will depend on the wording of the modification clause in the contract. But the importance of the text is not absolute since it does not prevail in two cases. The first one happens when, despite the provision authorizing the change clearly appears in the contract, the “weak party” bluntly opposes to the modification, and there are evidences to sustain that the warnings of the “strong part” in favour of the alteration are excessive, too demanding or conducive to the unequal share of charges. The second situation regards to the admission of retroactive modifications, which must be considered with special severity and only admitted whether they appear in the contract.

12. On the other hand, additional payments beyond the price are forbidden, unless agreed in a written contract and related to the reasonable risk of referencing a new product or to the partial financing of a commercial promotion of a product reflected in the retail price. Lastly, the contract must establish the mechanisms for returning the whole amounts of the payments already made for remunerating activities never carried out. Protection favours the buyer in this case, but it adds nothing to the contractual rules of reciprocity and resolutory condition (the Roman law actio non adimpleti contractus).

13. The third pillar is the Code of Good Commercial Practices in Food Procurement. The law outlined the Code’s principal features, stressing that it must be written in accordance with all the public and private entities with interests in the food supply chain. The Code summarizes the basic principles and details of the trade practices to promote fair, balanced and loyal relations between the operators. Adherence to the Code is free, but the participants are obliged to abide by its principles and rules in their commercial relations and to use its systems of resolution of conflicts. To implement the clauses of the Code, the LISCh designed the Observatory of the Supply Food Chain, dependent on the Department of Agriculture.

14. The Spanish Competition Authority (CNMC) issued a favourable report on the Code, but highlighted some elements that must be taken into account for its accurate application. First and foremost, all the Code’s clauses must ensure that operators are free to adopt it. This finding is obvious but essential, since the LISCh was to some extent the normative answer to a conflicting situation in the Spanish primary sector. Hence, membership is voluntary to individual companies but not for associations of operators. Direct and indirect impositions are rejected by the CNMC, such as excessive pressure or suggestions of punishment. The same aetiology inspires the interpretation on the mechanisms of collaboration between operators; which are admissible provided that they do not introduce restrictions on competition. Regarding questionable business practices, the Code contains references to information exchange practices, sale at a loss, collective recommendations and proximity references that could have a negative impact on competition and efficiency. Finally, the CNMC recalled that the risk of reducing competitive tension among operators, the possible direct or indirect fixing of prices, or the alteration of the free will of the Code should be avoided in order to favour competition in this market and, consequently, to consumers and the general interest.

15. Lastly, the LISCh laid down a system of penalties. It should be stressed that the failure to comply with payment periods in commercial operations of food or food products is considered a serious offence. The law presumes, unless there is evidence to the contrary, that certain categories of operators are guilty of not setting the contracts in writing or of not including the compulsory clauses laid down in Article 9, those who do not have the status of SMEs, those who do not have the status of primary agricultural producers, of livestock, fishing or forestry and operators in respect of which the other operator involved in the relationship is in a situation of economic dependence, when any of them is related to other operators that have the status of SME or primary producer or is in a situation of economic dependence.

III. Unfair practices in anti-competitive environments

16. The buyers have two—illegal—ways to expand the control from a set of producers to the whole market (or to a segment), so turning their relative bargaining power into significant market power. These ways are collusion and abuse of dominant position. Regarding collusion, where concentration in the upstream market increases to the point of oligopoly, buyers find strong incentives to replace competition for any form of pacific coexistence. Where synergies among the upstream rivals surpass
the level of tacit collusion and entail the adoption of agreements or the development of concerted practices to cooperate in the exploitation of producers, we are in the realm of Article 101 TFEU. On the other hand, one or more operators can take on the control of the industry. In that case, not only do they keep their prevalent positions regarding specific producers (relative bargaining power), but they are able to spread their strength to the whole market, as single or collective dominants (significant market power). Article 102 TFEU must be enforced whether they engage in abuse of their dominant position.

17. EU institutions neither ignore nor underestimate the importance and proliferation of both types of behaviours; mainly because several decisions and judgements have already been issued. In horizontal agreements, the anti-competitive risk is high when large buyers are involved in joint purchasing agreements to impede rivals from buying essential inputs at competitive conditions and/or are vehicles for engaging in collusive behaviour on downstream markets. On the contrary, agreements between SMEs are normally pro-competitive thanks to the efficiency gains resulting from economies of scale. Regarding vertical agreements, resale price maintenance and market partitioning are hard-core restrictions of competition. But a large group of them (exclusive distribution, single branding, tying, exclusive customer allocation, selective distribution, franchising, exclusive supply agreements and recommended and maximum resale prices) require a case-by-case assessment.

18. A cursory look to Articles 101 and 102 TFEU shows that collusive or dominant buyers’ strategies are far more aggressive, disruptive and far-reaching than the unfair practices described in the Directive. They can impose or agree on the prices of agricultural products or on areas of influence or expansion (tantamount to market sharing). They can also inflict disciplinary measures on disobedient or restless producers; rejecting, for example, to purchase their products or applying prices or unfavourable conditions. Buyers engaging in anti-competitive behaviours may view the unfair practices as a means to implement the collusion or the abuse. They make a tactical use of them to subdue the stubborn providers to the will of the cartel or the dominant buyer. In that case, unfair conducts hold a subordinate role of anti-competitive behaviours; which means that antitrust laws will displace those of unfair competition.

19. The above finding has been acknowledged by the LISC, whose Article 23(5) states that when, as a consequence of the breach of the obligations contained in this law, the effective competition of the markets is affected, the provisions contained in Law 15/2007, of July 3, on the Defense of Competition will be applicable. By virtue of Article 23(5), Competition law “displaces” the sanctioning provisions of the LISC. But, should we understand that the former also bans a complaint based on the unfair competition law? Although relations between both legislations are not pacific, the answer must be affirmative, since the behaviour does not only concern the relations between both parties but distorts the market as well, so increasing the degree of harmfulness.

IV. Competition agencies as enforcement authorities

20. The connection of unfair practices with anti-competitive behaviours is a factor to be considered when Member States develop the institutional architecture that comes with the Directive. The Directive entrusts them with the power to set up the public authorities that will enforce at national level the prohibitions laid down in Article 3. With this statement, Article 4 gives internal legislations leeway to design their own enforcement authorities. Transposition laws must only ensure that they belong to the public sector (“public” entities) and that are crystal clearly endowed with some enforceable decision-making powers (“authorities”). Articles 5 and 6 summarize their core competences: reception of complaints, investigation, decision and enforcement (fines). Article 8 authorizes national laws to lay down harsher rules to cope with specific scenarios or other unfair trading practices, provided that these rules are compatible with the ones on the functioning of the internal market.

21. What the Directive neither pre-arranges nor imposes to national transposition laws is the creation of new administrative entities. Therefore, Member States (i) are free to trust either judicial or administrative authorities. Within each group they can (ii) confer the powers to a sole and central authority or (iii) share them among multiple geographically decentralized entities. In the three cases, internal rules are free to (iv) add these tasks to the competences of existent courts or administrative bodies, without altering their organizations; (v) devise a new wing within their ordinary internal structures; (vi) set up brand-new and specialized judicial or governmental authorities. On that basis, a not insignificant number of combinations among the above-mentioned factors seems possible. This study does not develop a comprehensive account of the Articles the Directive devotes to organizational issues. Moreover, each Member State will choose a model on the basis of practical considerations...
as well as coherence with its principles of organization. However, it is useful for the thesis of this paper to compare the systems that confer the powers to courts and to competition agencies.

22. The judicial model has some convincing reasons to be adopted. Since the infringements described in Article 3 are unfair behaviours, it seems obvious that they should be prosecuted by the same courts and with the same procedures as common unfair practices. Moreover, those behaviours concern commercial relationships and potentially take place in any place of the State. Courts are scattered around all the territory and their high number (hundreds) and degree of specialization make them the only state bodies capable of dealing with all the complaints wherever they are filed. Compared to them, competition agencies, whose suitability for becoming enforcement authorities is supported in this paper, are only one (national level) or a few (regional level) entities. Experience shows how the shortage of staff and the short duration of the procedures limit the number of cases and have prompted watchdogs to become masters in the case selection art. For that reason, the impact of their sanctions increases where promotion policy is prioritized. Finally, by appealing to existent judicial authorities there is no need of creating new bodies and training their staff, saving public funds.

23. For all these features, national laws may easily entrust courts with the task of enforcing the Directive’s rules. In fact, the behaviours described in its Article 3 could already be included among the infractions laid down by Member States’ unfair practices laws. But, when setting the functions of the enforcement authority, the literal wording of Articles 4 and 6 does not seem to describe the way courts usually work. In short, judicial processes in cases of unfair competition primarily decide private trade conflicts, so they are legal battles between two businessmen. Judges and courts adopt a quasi-arbitral role, because they only solve the issues raised by the complaint; but they cannot go further and decide on those not posed during the litigation. On the contrary, the Directive designs an active enforcement entity. It can initiate and conduct investigations based on a complaint or on its own initiative [Article 6(1)(a)]; which means that it does not have to stay put while knowing that infringements are grooming. Following that, the procedure development is not determined by the participation of claimant. In case that the latter decides to give up after filing the complaint, the procedure will continue between the defendant and the enforcement power, who has to issue the decision and take all necessary measures to ensure its enforcement. Moreover, not only is the enforcement power entitled to investigate and fine; Article 6 imposes on it a twofold duty of transparency: to publish its decisions and to inform buyers and suppliers about its activities [Article 6(1)(e), (f)].

24. All these features lead to think that the Directive depicts an administrative body endowed with the faculties usually conferred on agencies.11 The reason is that agencies embody the determination of the European Union and the Member States to fix practices that attempt against specific public interests, represented in the case by the “food supply chain” and the strategic importance of the agri-food industry. Therefore, national transposition laws do not seek to lawfully decide scores of private complaints; they must tend to implement a consistent policy. This model adopted, the first decision Member States must make is whether to create an ex novo agency or to provide an existing one with the powers sketched in Article 6. The choice is up to politicians on the basis of political as well as administrative reasons (expenditure, administrative rationality, territorial organization, etc.). For those Member States which opt for the second option, this paper holds that competition authorities are the most suitable entities for dealing with Article 3 infringements and carry out the powers set in Articles 4 and 6.

25. At least four points make it advisable that competition authorities be the agencies entrusted with the tasks of investigating and fining unfair trading practices in business-to-business relationships in the food supply chain. The first one comes from the sheer fact that the EU enacted a Directive with a clear and very specific subject, which has to be transposed by Member States. The reason for such individualization is the existence of a prevalent public interest at EU level that goes beyond the private interests of the companies involved. The second one relates to the very topic of this paper: the presence of the behaviours described in Article 3 of the Directive in sectors prone to anti-competitive or highly cartelized scenarios. In those cases, the unfair practices tend to be constituent or ancillary parts of the anti-competitive conduct; or disciplinary actions against stubbornly insubordinate producers. Third, by giving this preeminent role to competition authorities, their specific teams would take on the task of notifying and enforcing the prohibition decisions as well as collecting fines. Fourthly, sending the cases to competition watchdogs allows them not only to implement a systematic policy of investigation and punishment but also to use their competition advocacy units to promote better regulation, to foster good practices and to warn the firms on the bad consequences infringement have for them. As a matter of fact, the sheer policy of prohibition and sanction of singular cases will not likely bring about an ultimate structural solution to the behaviours set in the Directive.

26. Therefore, competition authorities are suitable candidates to take on the defence of the food supply chain against unfair practices. They can do it with disrupting neither the structure nor the design of the procedures. As regards the institutional side, the most obvious solution would be to set up a new

division staffed with experts on unfair competition and agriculture. Regarding the procedure, national legislators may lay down a specific one, but it is not strictly necessary. The typical sanctioning procedure complies with the requirements outlined in the Directive: *ex officio* and induced initiative, participation of the subjects involved, investigation leading to a (sanctioning) decision and protection of confidentiality. The reduction of its duration could be assessed (18 months in Spanish Competition Act).

27. Besides stressing the pros, it is worth mentioning that this solution shares a disadvantage with every other conflict-resolution centralized system: to place a sole entity at a central level, with limited staff and resources is tantamount to claim that many (perhaps most) complaints will be neither investigated nor fined. Competition agencies will set preference criteria, taking account of factors such as the number of participants and/or harmed operators, territorial extension of the infraction, impact on the national economy, participation of public entities, etc. Cases that do not fulfil a significant number of criteria will be discarded, channelled through regional competition agencies or sent out to courts. This side effect, though important, cannot be the ultimate argument against the proposed option, because it is structural to the regular operations of competition authorities, concerning Articles 101 and 102 TFEU, without there being a broad discussion on the viability of the competition defence system. Moreover, in Member States with a decentralized system of competition agencies (for example, Spain or Germany), regional antitrust authorities are entitled to receive the complaints, carry out the first investigation and send the file to the national agency whether the case reached a national or EU level.

V. Conclusions

28. It is expected that the regime described by the Directive will improve the position of weak agri-food producers in the food supply chain. A correct evaluation of the Directive requires differentiating between the prescriptive and institutional levels. With regard to the first, the Directive has been preceded by national laws in several Member States, with the intention of regulating this issue in a comprehensive manner. From this point of view, it is questionable to consider it a true point of inflection on the way to prevent the commission of unfair practices in this field. This contribution shows how the Spanish law, enacted in 2013, deepens the protection of any weak contracting party, whether producer or buyer, subject to abuse of economic dependence. The solution to prevent the infractions foreseen in Article 3 of the Directive consists of making unquestionable the imperative nature of the contract, making its terms sacred for both parties and requiring an explicit agreement to accept any modification of its clauses.

29. As regards the institutional level, the Directive seeks to involve public administrations in the work of prevention and punishment of unfair behaviours. But it leaves to each Member State the definition of the enforcement authority. This paper briefly analysed the judicial and administrative models. And it pronounces itself in favour of the second one. Specifically, it proposes assigning the powers of the enforcement authority to national (and regional) competition defence agencies. This choice would be easy to implement since neither the internal structure nor the sanctioning procedures would need much change. ■
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