

# Counterproductive Regulation? The EU's (mis)adventures in regulating Unfair Trading Practices in the Food Supply Chain

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## **Abstract**

Ever since the 1970s, the grocery retail sector in the EU has experienced substantial concentration. Concentration has resulted in a change in the balance of power between retailers and producers. For decades already, EU food producers have complained about increasing concentration on the purchasing markets for food in Europe, aggressive bargaining on the part of retail chains, including ever increasing demands for low prices and dubious commercial practices such as unfair use of proprietary information and unilateral changes to contract terms. Complaints have resulted in much discussion both at the EU level and at the Member State level. Members of the European Parliament have pressed for enforcement of the competition rules and for reform of the Common Agricultural Policy (CAP). Additionally, a pan-European private self-regulatory initiative has been in place since 2013. However, where complainants have had the most success is at the national level. Making use of the exception in Art. 3(2) of Regulation 1/2003, EU Member States have introduced of a variety of new laws, in particular stricter competition rules and rules on unfair B2B contractual practices, in order to regulate the exercise of buying power in the food supply chain. These laws deviate from 'mainstream' EU competition law and may even be seen as a form of protectionism-in-disguise. Today only 5 out of 28 Member States have no specific regulation, with some Member States having put several types of legislative instruments in place.

This paper raises the question about the appropriate role of *EU competition law* in addressing concerns with unfair trading practices (UTPs) in the food supply chain *in the context of an integrated market*. It will firstly explain the background to the problem and what the role of EU competition law has been until now. Firstly, it will map the developments at the Member State level. Next, the paper will discuss some of the curious side effects which have surfaced in enforcing stricter national rules. By referring to Grabosky's typology of counterproductive

regulation (1995), the paper will shed light on some of the important yet overlooked perverse side effects which arise when regulation of buyer power or UTPs occurs at the *national level* in the context of an *integrated* market like the EU. The paper concludes with the argument that, although the key to UTP regulation may not be exclusively tied to competition law, EU competition law should perhaps play a more prominent role in regulating the conduct of powerful buyers operating in an integrated market.

## 1. Introduction

For more than a decade now there have been allegations that the food supply chain in the EU is not functioning optimally.<sup>1</sup> Falling prices for agricultural products, increased globalization, climate change and speculation in commodities have put pressure on the margins of farmers and other food suppliers.<sup>2</sup> On the one hand side, farmers face powerful input suppliers – for fertilizer and seeds, for instance.<sup>3</sup> On the other hand, their profit margins are also squeezed by powerful buyers – such as processors, wholesalers and retailers. The issue that has been attracting the most attention, it seems, has been the issue of buyer power, in particular, as manifested in the ability to impose unfair trading terms (known as unfair trading practices or UTPs).<sup>4</sup> Indeed, what seems to be at the heart of the debate on the functioning of the food supply chain in the EU has been the imbalance of power between suppliers (farmers and food producers) and purchasers (processors, refineries, wholesalers and food retailers), leading to various so-called unfair trading practices. Investigations in EU Member States (but also elsewhere) have shown that suppliers dealing with supermarkets often face difficult trading conditions and are subject to practices that some describe as “mafioso”.

What seems common to all these practices is that 1) they contravene basic principles of good faith contracting and fair dealing and 2) that they take place in a context of power imbalance.

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\*\* I would like to thank Wolf Sauter for comments on an earlier draft of this paper. The paper was substantially reworked following my research stay in Melbourne Law School in 2017. I would like to thank Caron Beaton-Wells, Jo Paul and the other members of the Supermarket Power Project at Melbourne Law School for the inspiring research environment and helpful comparative insights, and the University of Twente Incentive Fund for the material support. The usual disclaimer applies.

<sup>1</sup> See e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A better functioning food supply chain in Europe” (2009) COM/2009/0591 final < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0591> >

<sup>2</sup> See e.g. Commission Staff Working Document, ‘Evolution of the market situation for milk and milk products’ (2014). The document discuss milk price developments in light of climate, animal feed prices, energy costs, global consumption and production trends, trends for using land (eg for biogas production), etc.

<sup>3</sup> W. Schanbacher (ed), *The Global Food System: Issues and Solutions* (Praeger, ABC-Clio, 2014), p. 35. The book points to the cartels in potash and potassium, as well as the stronghold of DuPont and Monsanto over seeds.

<sup>4</sup> European Commission. ‘Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe’. COM (2013) 37 final.

Furthermore, these practices, outlined in the Commission's 2013 Green Paper on the topic,<sup>5</sup> are not of the one-time, 'hit-and-run', opportunistic, type of one-sided deals. Under normal circumstances, such deals would be punished by the market as a trader who has had a bad experience with another trader could 'vote' with her feet and seek a different contractual partner next time. Rather, the unfair trading practices in question seem to be a structural issue and perhaps even embedded in the modern retailers' business model. Given the concentrated purchasing markets for food in the EU,<sup>6</sup> better alternative contracting partners seem to be hard to find. In this situation, the market fails to discipline the trader who disrespects fair dealing. The practices are widespread and reports indicate that they occur in other sectors<sup>7</sup> and jurisdictions such as Australia<sup>8</sup> and Japan<sup>9</sup>.

To make matters worse, the dependency on a given contractual partner hinders enforcement via contract (private) law and even public enforcement<sup>10</sup>. In theory, a disgruntled trader could take her contracting partner to court for breach of (general principles of) contract. In some countries, courts are comfortable assessing the bargain for compatibility even with such general principles such as 'fair dealing'.<sup>11</sup> However, there seems to be a climate of apprehension among traders

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<sup>5</sup> A list of practices is attached in Annex I.

<sup>6</sup> According to a report prepared for the European Commission by researchers at Wageningen University in the Netherlands, 'It is estimated that the majority of the European food is bought by the retail through about 110 buying desks (Grievink, 2003), where perhaps about 3 million farmers produce three quarters of our food (EU SCAR, 2012).' See J Bijman et al., 'Support for Farmers' Cooperatives' (2012) < [https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext_en.pdf) >

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

<sup>8</sup> See eg. Beaton-Wells, C. and Paul-Taylor, J. (2017), Codifying supermarket-supplier relations: A report on Australia's Food and Grocery Code of Conduct <https://law.unimelb.edu.au/centres/cen/research/supermarket-project/developments/publications/codifying-supermarket-supplier-relations> , with a focus on the regulatory measure in Australia.

<sup>9</sup> See eg. Wakui, M. and Cheng, T. (2015). 'Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?' *Journal of Antitrust Enforcement*, 1-32.

<sup>10</sup> Apparently, the Australian Competition and Consumer Commission (ACCC) lost the case against supermarket giant Woolworths not for lack of a legal instrument but for lack of proof. Notably, the authority mainly depended on documents for its decision. The reason was inability to call witnesses and provide sufficient evidence since the small suppliers on whose behalf the case was brought did not want to come forth due to fear of commercial retaliation. Australian Competition and Consumer Commission against Woolworths Ltd (Woolworths) [2016] FCA 1472. See the Press Release 'ACCC won't appeal Woolworths unconscionable conduct decision' (16.12.2016) <https://www.accc.gov.au/media-release/accc-won%E2%80%99t-appeal-woolworths-unconscionable-conduct-decision>

<sup>11</sup> In the *Peijnenburg* case, a Dutch court relied on a general principle of 'fair dealing' in Dutch contract law in deciding on a dispute between a supplier and supermarket chain Albert Heijn. See *Albert Heijn BV tegen Koninklijke Peijnenburg BV* ( ECLI:NL:RBSHE:2005:AS5628) and the news item 'Albert Heijn verliest van

who are in a position of economic dependency. Such traders fear that they would suffer commercial reprisals - e.g. in the form of delisting of products- should they submit a complaint (what the Commission refers to as “fear factor”). Consequently, few claims are launched and data is difficult to gather. Thus, it is not only the market which fails to discipline the misbehaving trader; traditional legal courses of action – such as private law procedures – seem hard to access.

## 2. The rise of stricter unilateral rules in the EU

The issue of the buying power retail chains is not entirely new but in the past two decades, it has escalated. Ever since one-stop-shop chains started transforming the food retail landscape in Europe, legislators have paid close attention. Germany was the first to introduce special provisions in its competition law already in the 1970s in response to the growing power of the chains.<sup>12</sup> France followed. Spain, Portugal and Italy also enacted similar provisions in the 1990s. However, research reveals that these national provisions were rarely enforced.<sup>13</sup> A number of impediments to the effective use of these laws have been identified: normative content which sets the criteria for proving ‘economic dependence’ impossibly high or procedural burdens of bringing a case making it impossible for the small enterprises affected by such conduct to invoke the provisions in Court.<sup>14</sup> Despite concerns about the effectiveness of these laws, in the past 15 years, more than ten Member States have enacted special laws or regulations to deal with the issue of buyer power in the food supply chain or the unfair trading practices that retailers are accused of.<sup>15</sup> Whether sector-specific or general, the laws are generally one of two varieties: they come as amendments of the competition law (e.g. as lower market dominance thresholds) or as

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Peijnenburg in koekstrijd’ (*Trouw*, 11.02.2005) <https://www.trouw.nl/home/albert-heijn-verliest-van-peijnenburg-in-koekstrijd~a42fadce/>.

<sup>12</sup> D Gerber, *Law and Competition in Twentieth Century Europe : Protecting Prometheus* (OUP 1998), 315. See also College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <[http://ec.europa.eu/internal\\_market/retail/docs/140711-study-utp-legal-framework\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf)>, 1-440.

<sup>13</sup> See Laraine L. Laudati (ed), *Proceedings of the European Competition Forum 1995*, Roundtable on Economic Dependence. See also SEO Economisch Onderzoek (Barbara Baarsma and Nicole Rosenboom), *Oneerlijke handelspraktijken: voldoet bestaande (zelf)regulering?* (2013) Report prepared for the Dutch Ministry of Economic Affairs (SEO Report) [http://www.seo.nl/uploads/media/2013-04\\_Oneerlijke\\_handelspraktijken.pdf](http://www.seo.nl/uploads/media/2013-04_Oneerlijke_handelspraktijken.pdf)

<sup>14</sup> See the contributions in Laraine L. Laudati (ed), *Proceedings of the European Competition Forum 1995*, Roundtable on Economic Dependence. Also, SEO Report, pp. 39-47. The report looks into some of the older economic dependency laws as well as some of the newer laws. It notes the challenges for enforcement. For instance, in France, abuse of economic dependence – in Law L420-2 (2), sets a tough list of requirements including effect on competition on the market. In Germany, Article 20(2) of the competition law prohibits abuse of economic dependency; however, in the context of a civil procedure, it is difficult for the plaintiff to prove that the other party is in a dominant position; it is also reported that judges find it difficult to distinguish between an unfair advantage and a hard-bargained price; as a result this provision is mostly invoked in combination with other provisions. In Portugal, complainants under the Portuguese competition law no 19/2012, Article 12 have to show that the unfair trading practice has an effect on competition on the market and the supplier has to show that it does not have any other alternative purchasers.

<sup>15</sup> Examples: UK (Code and Ombudsman: 2013), Slovakia (on and off since the early 2000s – see further in this paper), Czech Republic (2010), Latvia (2009), Finland (2014), Bulgaria (2015), Ireland (2016), Poland (2017).

amendments of the contract or commercial law (e.g. by introducing special rules on business-to-business transactions or by extending the consumer protection rules to small businesses). In the current European Union of 28 Member States, all but five Member States,<sup>16</sup> currently have some sort of legislation, and sometimes a mix of several types of legislation, in place that aim to solve the issue of UTPs in the food supply chain.

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

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<sup>16</sup> The Member States with no such legislation are: Estonia, Luxembourg, Malta, the Netherlands and Slovenia. The latter two, however, do seem to have some form of private regulation in this field. In the Netherlands, there is even a portal at which ‘abuse of buying power’ can be notified. The Portal, operated by the Chamber of Commerce, aims to gather data on the use of buying power. See MKB Press Release, ‘MKB Servicedesk opent Meldpunt Inkoopmacht’ (5 October 2012) <https://www.mkb servicedesk.nl/6583/mkb-servicedesk-opent-meldpunt-inkoopmacht.htm>.

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

	<b>YES</b> <i>Consumer protection extended to B2B<sup>17</sup> (or other legislation covering UTPs in B2B)</i>	<b>NO</b> <i>Special contractual provisions on B2B or UTPs or extension of consumer protection to B2B (general contract law applies)</i>
<b>YES</b> <i>Stricter rules on unequal bargaining power in competition law<sup>18</sup></i>	Austria (all UCPD provisions + economic dependency) France (Art. 6 and Annex I UCPD <sup>19</sup> + rules on economic dependency) Germany (partial UCPD extension + stricter dominance) Hungary (food; other B2B) Italy (UCPD for micro-enterprises + economic dependence) Finland (stricter dominance threshold; Unfair B2B Act)	Bulgaria (superior bargaining power) <sup>20</sup> Croatia Cyprus Czech Republic (food) Greece (economic dependence) Latvia (retail) Lithuania (retail) Poland (unfair contractual advantage in food) <sup>21</sup> Portugal (economic dependence) Romania (food) Slovakia (food) Spain (food)
<b>NO</b> Stricter competition rules (general competition law applies)	Belgium (some Annex I UCPD practices) Denmark (aggressive and misleading practices, UCPD) Ireland (food) <sup>22</sup> Sweden (all UCPD provisions) UK (food; Grocery adjudicator)	Estonia Luxembourg Malta Netherlands Slovenia

Two issues are remarkable about the Commission's tolerance and perhaps tacit encouragement of the adoption of such laws. One has to do with the compatibility between such provisions and 'mainstream' competition laws. A second one has to do with their compatibility with the EU internal market objectives.

<sup>17</sup> European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final, footnote 13 on p.10.

<sup>18</sup> College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <[http://ec.europa.eu/internal\\_market/retail/docs/140711-study-utp-legal-framework\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf)>, 1-440

<sup>19</sup> Unfair Commercial Practices Directive. The Directive is only applicable in the case of business-to-consumer relations; however, Member States have the options to extend the provisions to business-to-business transactions as well.

<sup>20</sup> Art. 37a on Superior Bargaining Power of the Act on Protection of Competition (Bulgarian State Journal No. 102 of 2008).

<sup>21</sup> A Stawicki, 'Polish Competition Authority Gains New Powers to Fight Unfair Practices in the Food Industry' *Kluwer Competition Law Blog* (19.01.2017)

<sup>22</sup> SI No 35 of 2016 Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 <https://dbei.gov.ie/en/Legislation/SI-No-35-of-2016.html>.

Generally, superior bargaining power and economic dependence laws are criticized by the antitrust community. These laws, which essentially aim to correct for bargaining power inequalities in a commercial context – have been controversial in mainstream competition law.<sup>23</sup> Some competition lawyers view these laws as clumsy attempts to fill gaps in the competition law framework.<sup>24</sup> For others, they are clumsy attempts of competition law to fill in what is essentially a gap in *contract* law enforcement<sup>25</sup> or a sector-specific market failure<sup>26</sup>. Tougher market share thresholds have also been criticized in terms of their suitability to address the problem of buying power, and especially the fear factor.<sup>27</sup> Finally, codes of conduct imposing requirements for B2B relations in the food supply chain have also been attacked by antitrust scholars.<sup>28</sup> Given the controversy, it is remarkable that the European Commission has supported, if not encouraged, these national developments.

Indeed, a puzzling element in debates on UTPs has been the reluctance of the Directorate General for Competition to take action – in the form of sector inquiry or enforcement of the antitrust provisions. Quite to the contrary, EU competition enforcers and often national ones, too, have sought to distance themselves from the issue and to reframe it as involving ‘contractual disputes’ rather than competition law issues.<sup>29</sup> One reason seems to be the focus on consumer welfare - competition authorities have tended to be concerned with the outcome for consumers in keeping with the modern approach to competition law as a vehicle for improving consumer

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<sup>23</sup> International Competition Network (Task Force for Abuse of Superior Bargaining Position), ‘Report on Abuse of Superior Bargaining Position’ (2008) <http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf>; College of Europe, European University Institute and Center for European Policy Studies. (2014). Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014).

<sup>24</sup> Jenny, F. (2008). ‘The “Coming Out” of Abuse of Superior Bargaining Power in the Antitrust World’ (paper delivered for the UNCTAD Ad-Hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development), Takigawa, T. (2015). ‘Regulating Abuse of Bargaining Position through the Competition Law: Japanese Regulation in Comparison with the EU’s Exploitative Abuse Regulation’ (ASCOLA Tokyo Conference Paper), Cheng, T. and Gal, M. (2016). ‘Abuse of Superior Bargaining power: Dealing with Aggregate Concentration Concerns’ in Iwakazu Takahashi and Paul Nihoul (eds), Abuse of Dominance. Edgar Elgar, Cheltenham.

<sup>25</sup> Wakui, M. and Cheng, T. (2015). ‘Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?’ *Journal of Antitrust Enforcement*, 1-32; Wagner-von-Papp, F. (2015); ‘Unilateral conduct by non-dominant firms: a comparative reappraisal’ (ASCOLA Tokyo Conference Paper); Hou, L. (2017). ‘Superior Bargaining Power: The Good, the Bad and the Ugly’ (SSRN Working Paper) <http://dx.doi.org/10.2139/ssrn.3024015>.

<sup>26</sup> Bosco, D. (2015). ‘Abuse Regulation in Competition Law: Past, Present, Future’ (2015) (ASCOLA Tokyo Conference Paper).

<sup>27</sup> Mika Oinonen, ‘The New 30% Rule: A Viable Solution to Detrimental Buyer Power in the Finnish Grocery Retail Sector?’ (2014) 10 (1) *European Competition Journal*, 97-121, criticizing the workability of the solution.

<sup>28</sup> See notably, P. Gorecki, “A Code of Practice for Grocery Goods Undertakings and An Ombudsman: How to Do a Lot of Harm by Trying to Do a Little Good” (2009) 40 *The Economic and Social Review*.

<sup>29</sup> Consider the statements of national authorities in European Commission, *The Interface between Eu Competition Policy and the Common Agriculture Policy (CAP): Competition Rules Applicable to Cooperation Agreements between Farmers in the Dairy Sector* (Working Paper, 2010) <[http://ec.europa.eu/competition/sectors/agriculture/working\\_paper\\_dairy.pdf](http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf)>, 28-30. An Excerpt is included in Annex I.

welfare.<sup>30</sup> In the absence of convincing evidence of imminent consumer harm as a result of UTPs, authorities seem to have been reluctant to act. In fact, national and European competition authorities have retained a somewhat guarded attitude and have emphasized often that the problem of UTPs is not a *competition* law problem and that it is a problem best handled by “other laws and means”.

Importantly, the relationship between “standard EU competition law” and these “other” legislative developments remains understudied. It may, though need not, be the case that such laws serve protectionist goals or seek to soften competition for local operators to the detriment of consumers and retailers. However, it is also possible that they can play an important role in correcting problems that competition law is unable to deal with, and that they can play a complementary role. Such complementarity, however, cannot be assumed.

Secondly, the trend of adopting diverging rules on competition (or rules which could have an impact on competition) or unfair business-to-business practices, stands in stark contrast with the modernization agenda of EU competition law and with the broader goals of harmonizing trading rules within the EU. One of the main tasks for the competition law modernization program was to achieve decentralization *while ensuring uniform application* of the competition rules throughout the EU.<sup>31</sup> Arguably, the seeds for divergence were already in the modernization regulation itself – according to Art. 3 (2) of Regulation 1/2003 which holds that “Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.” Thus, while strict uniformity is required for enforcing Art. 101 TFEU or national equivalents thereof, legislative divergences from the European norms on unilateral conduct are permitted. Rumor has it that the derogation in Art. 3(2) of Regulation 1/2003 was inserted because German and French delegations insisted on the possibility to preserve their laws on economic dependence. Yet, other Member States have also decided to make use of this derogation. Out of 13 new Member States who joined after 2004, 10 Member States have introduced new, diverging legislation. Counterintuitively, given the modernization agenda, the European Commission has welcomed these national initiatives.<sup>32</sup>

From a EU integration perspective, the developments are also curious. The EU Treaties are meant to create a level playing field by means of strict internal market rules (prohibiting *states* to take measures which directly or indirectly may put in place barriers to cross-border trade in goods, services, and capital, among others)<sup>33</sup> and by means of competition law and state aid

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<sup>30</sup> J Stefanelli and P Marsden (British Institute of International and Comparative Law), *Models of Enforcement in Europe for Relations in the Food Supply Chain* (23 April 2012).

<sup>31</sup> European Commission, *White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, (Brussels, 28.04.1999) [http://europa.eu/documents/comm/white\\_papers/pdf/com99\\_101\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf)

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

<sup>33</sup> These provisions, so-called free movement provisions, are found in Art. 28 TFEU (goods), Art. 45 TFEU (workers), Art. 49 TFEU (freedom of establishment), Art. 56 TFEU (services), Art. 63 TFEU (capital).

rules (the former prohibiting *private parties* from partitioning the internal market, the latter ensuring state resources are not used to distort the market)<sup>34</sup>. With respect to competition law, the Court has played its part – it has interpreted Regulation 1/2003 in such a way as to privilege a harmonized version of what competition law is about in the EU.<sup>35</sup>

The EU has also made a lot of effort to promote harmonization in more difficult terrains – namely, by stimulating harmonization of private law, and especially of contract law, in Europe.<sup>36</sup> A 2011 report revealed that uncertainty about foreign contract law constituted an important barrier to cross-border trade within the EU.<sup>37</sup> Such uncertainties are undoubtedly augmented given the adoption of a variety of new laws and initiatives aiming at improving relations in the food supply chain. As a result, the playing field seems to be far from level. According to the researchers carrying out a mapping of the stricter laws on unilateral conduct per Member State, the legislative developments have resulted in a “conundrum of public and private regulatory initiatives, which [...] forms a unique mix for each Member State of the European Union.”<sup>38</sup>

### 3. Smart regulation, better regulation, and counterproductive regulation

Previous research has shown concern with the effectiveness of some of the older laws on superior bargaining power and economic dependence. For many of the newer laws, enacted over the past decade, evidence has yet to be gathered. It thus remains an issue for empirical research to show what their effectiveness has been. At this point, it is not clear which regulatory design is the most advantageous one and whether any of these regimes can – on its own – make the problem of buyer power and UTPs go away.

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<sup>34</sup> Articles 101-106 TFEU on competition and 107-109 TFEU on state aids.

<sup>35</sup> For instance, the Court’s decision in C-375/09 *Tele2 Polska* [2011] ECLI:EU:C:2011:270.

<sup>36</sup> Notably there is the DCFR initiative which aimed to identify common European private law principles. See Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, European Law Publishers 2009) [https://www.law.kuleuven.be/personal/mstorme/2009\\_02\\_DCFR\\_OutlineEdition.pdf](https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf). Another initiative aimed to facilitate cross-border contracting by means of harmonization via an optional instrument was the Common European Sales Law for the EU. The law would provide an alternative contracting regime for SMEs and consumers purchasing digital products from abroad. However, the initiative failed to receive sufficient legislative support from the Council and has stalled since December 2014. See the legislative train schedule at <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law>. See also Green Paper from the Commission of 1 July 2010 on policy options for progress towards a European Contract Law for consumers and businesses [COM(2010) 348 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010DC0348>>

<sup>37</sup> See The Gallup Organization Hungary, European contract law in business-to-business transactions: Analytical Report (Report prepared for DG JUSTICE of the European Commission) 2011; [http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl\\_320\\_en.pdf](http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_320_en.pdf).

<sup>38</sup> College of Europe, European University Institute and Center for European Policy Studies, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain* (Report prepared for the European Commission, DG MARKT/2012/049/E, 2014) <[http://ec.europa.eu/internal\\_market/retail/docs/140711-study-utp-legal-framework\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf)>, p. 21.

This paper will not zoom in on any particular law or private initiative. Rather, it aims to assess the sum of these developments as a whole and raise questions about the desirability of the approach underlying these legal developments: namely, the separation between competition law and ‘other laws’, be they laws on UTPs or subsidy measures; and an explicit choice for non-enforcement of competition law in a given sector or for a given issue. It aims to assess these developments in light of the smart regulation and market integration objectives of the European Union.

The goal of smart regulation has been embraced by the EU and many of its Member States. At least since the early 2000s, the EU has made efforts to improve its regulatory performance, the most recent of which is the Better Regulation initiative<sup>39</sup>. The EU’s concern with improving its governance has evolved in parallel with a steadily growing body of literature on regulatory governance, which includes theories of smart regulation and responsive regulation. Smart regulation is one of these theories which calls for a careful tailoring of regulation by observing the following five principles: 1) preferring ‘complementary instrument mixes over single instrument approaches, while avoiding the dangers of ‘smorgasbordism’; 2) starting with less interventionist measures; 3) building in responsiveness in a regulatory regime which would allow for ‘early warning of instrument failure’, 4) involving and empowering surrogate regulators, and 5) maximizing opportunities for win-win.<sup>40</sup>

The case of regulating UTPs and buyer power in the food supply chain in Europe reveals that a number of these ‘design principles’ have been overlooked: a number of instruments have been adopted but their complementarity is assumed, instead of carefully studied. There is evidence of smorgasbordism with some Member States having layers and layers of regulation (both public and private regulation), while others have none – as evident from table 1. The EU did give a try to ‘less interventionist’ measures – notably by stimulating a pan-European voluntary initiative in the grocery sector, known as the Supply Chain Initiative.<sup>41</sup> However, its efforts seem to have stopped there. No escalation of regulatory response has taken place – despite persistent claims about UTPs and exploitation in the food supply chain.<sup>42</sup> Escalation of regulatory response did take place in given Member States – for instance, in the UK where a voluntary Grocery Code of Practice was replaced with a government-instituted Adjudicator; however, the escalation of

<sup>39</sup> See European Commission, *European Governance: A White Paper* (2001) COM(2001) 428 final [https://ec.europa.eu/europeaid/sites/devco/files/communication-white-paper-governance-com2001428-20010725\\_en.pdf](https://ec.europa.eu/europeaid/sites/devco/files/communication-white-paper-governance-com2001428-20010725_en.pdf). The acknowledgment of the subsidiarity and proportionality principles in the 1992 Treaty of Maastricht as a sign of thinking about better regulatory performance; the principles are found in Art. 5(1) TEU. Most recently, the European institutions have promoted ‘better regulation’. See European Commission, *Better Regulation: Why and How* (website) [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en).

<sup>40</sup> N Gunningham and D Sinclair, ‘Smart Regulation’ in P Drahos, *Regulatory Theory: Foundations and Applications* (ANU 2017), 134-135.

<sup>41</sup> See <http://www.supplychaininitiative.eu/>. Although the Initiative has had some success in improving awareness of companies and providing possibility for complaints, the SCI has yet to be fully developed – the initiative needs to increase its member base and to improve the dispute resolution possibilities especially with respect to confidentiality. See <http://www.supplychaininitiative.eu/news/press-release-five-years-supply-chain-initiative-and-future-prospects> and the annual report at [http://supplychaininitiative.eu/sites/default/files/sci\\_-\\_4th\\_annual\\_report\\_-\\_march\\_2018.pdf](http://supplychaininitiative.eu/sites/default/files/sci_-_4th_annual_report_-_march_2018.pdf).

<sup>42</sup> On responsive regulation, see the seminal work of Ayres and Braithwaite, *Responsive Regulation*.

regulatory responses as a whole has not been coordinated at the EU level. Finally, one may also wonder whether the sum of regulatory responses (at the national level and at the EU level) meets the criteria of subsidiarity and proportionality. Considering the cross-border nature of the food purchasing and the significant divergences in legal frameworks, the cost of non-Europe seems to have been underestimated.

But in addition to the question whether the sum of regulatory responses meets the Better Regulation criteria, this article argues that the result is even worse: counterproductive regulation. The argument is that lack of vigorous enforcement of EU competition law in cases involving powerful purchasers has triggered a number of regulatory responses, which, taken together, undermine the goals of competition law, the goals of EU market integration, and which, furthermore, are not effective at solving the core policy problem. To make this argument, the article builds on the regulatory studies typology of counterproductive regulation in order to tell a cautionary tale about the perverse effects of regulating UTPs and buyer power in the food supply chain in the EU.

In a seminal article, regulatory studies scholar Peter Grabosky affronted the equivalent of iatrogenesis<sup>43</sup> in a regulatory context: counterproductive regulation.<sup>44</sup> Grabosky presents a typology summing up five scenarios in which a regulatory intervention (or failure to intervene) plays out otherwise than intended, in a negative way.<sup>45</sup> In evaluating antitrust interventions, competition law and economics scholars often discuss ‘type II’ (over-enforcement/over-deterrence) versus ‘type I’ errors (under-enforcement/under-deterrence) errors. In Grabosky’s typology, over-deterrence is but one of the several ways in which regulatory interventions go wrong. As it happens, the typology can help shed light on a European paradox: if all is fine with the way unfair trading practices are regulated at the national level as suggested by the Commission’s report,<sup>46</sup> then how come pressure for protection of agricultural producers at the EU level continues to rise?<sup>47</sup>

The scenarios in Grabosky’s framework include: 1) escalation, 2) displacement, 3) over-deterrence, 4) perverse incentives and 5) opportunity costs. These will briefly be described before delving into the examples. **Escalation** is the example of regulation aimed at solving a problem (e.g. eliminating X), which inadvertently escalates the issue (e.g. increases the number of X). **Displacement** occurs when regulation, instead of solving the problem, shifts it to another

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<sup>43</sup> Disease brought about or aggravated by medical intervention.

<sup>44</sup> PN Grabosky, ‘Counterproductive Regulation’ (1995) 23 *International Journal of the Sociology of Law*, 347-369.

<sup>45</sup> Of course, Grabosky concedes, regulatory intervention can surprise us in positive ways, too, but this topic is not discussed in the article.

<sup>46</sup> European Commission. ‘Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain’ COM(2016) 32 final.

<sup>47</sup> Phil Hogan (Commissioner for Agriculture), ‘Safeguarding The Food Chain’(Speech At FSAI Conferenc, 6th October 2017, Dublin Castle) [https://ec.europa.eu/commission/commissioners/2014-2019/hogan/announcements/speech-fsai-conference-safeguarding-food-chain-6th-october-2017-dublin-castle\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/hogan/announcements/speech-fsai-conference-safeguarding-food-chain-6th-october-2017-dublin-castle_en) . According to Mr. Hogan, ‘every significant stakeholder is in favour of action at EU level’ including farmers, processors, NGOs and a majority of Member States are in favor; only the retailers are against.

policy area or another jurisdiction. **Over-deterrence** is failure to properly ‘calibrate’ regulation – thus, regulation aimed at decreasing X might decrease it by too much, to a level that is not desirable. **Perverse incentives** is a scenario featuring well known regulatory pitfalls such as moral hazard. Finally, **opportunity costs** refers to the idea of regulation striving for a perfect result to the point where the marginal costs of securing additional compliance are not justified.

Grabosky’s framework may not exhaust the topic of counterproductive regulation but it provides a useful frame through which some of the experiences of individual Member States’ actions in the UTP arena can be analyzed. It can thus help explain why national efforts at regulating UTPs in the food supply chain may be perceived as ineffective, and why pressure for EU-level action continues.<sup>48</sup> In considering stories from the European Member States’ experience with regulating UTPs in the food supply chain, we find evidence of at least four of the five types of counterproductive regulation in Grabosky’s typology. These examples will be discussed in the sections that follow.

## 4. Displacement

In Grabosky’s typology, one of the ways in which regulation can backfire is by displacing non-compliance ‘into other areas within or beyond a regulatory jurisdiction or policy domain.’<sup>49</sup> For instance, companies may choose to offshore to avoid far-reaching environmental or health and safety regulation, thereby exporting the problem to a different jurisdiction instead of solving it. Another example of displacement is when the problem for one policy area is solved but a problem for another policy area is created. For instance, improving outcomes for the environment might come at the expense of human health and safety - thereby solving problems in one policy domain but causing problems in another. The idea of national regulation resulting in ‘exporting’ the problem to another jurisdiction or another policy (displacement) helps shed light on the ambivalent experiences of some Member States with stricter national legislation against UTPs in the food supply chain. The case of Slovakia illustrates how *de facto* and *de jure* circumvention can take place in the case of national legislation targeting UTPs imposed by multinational retail chains, operating in an integrated market.

### 4.1. The Retail Act Strikes Back

At the turn of 2000-2001 – just four years before it became a member of the European Union – the Slovakian food retail market experienced profound changes. The country, a member of the former Eastern Bloc, which had been making strides in terms of economic development, was penetrated by foreign grocery retail chains. As with any major change, there were both winners and losers. While this development brought benefits for Slovak consumers in terms of low prices

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<sup>48</sup> Agricultural Markets Task Force, ‘Enhancing the Position of Farmers in the Supply Chain’ (Report, 2016) < [https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf) >,

<sup>49</sup> Grabosky, 351.

and more choice, concerns were raised about the power of the foreign chains – in particular, their buying power vis-à-vis local suppliers. As a result of concerns about the power and the practices of the retail chains, there was social and political pressure for some sort of solution – be it legislation or regulation.<sup>50</sup> In response to the pressure in 2003 Slovakia adopted the Act on Retail Chains.<sup>51</sup> The Act was to be enforced by the Ministry of the Economy, not by the competition authority.<sup>52</sup> The Act adopted the “economic dependency” criterion.

The high expectations of the act were disappointed. Firstly, already in 2007 suppliers of food products started complaining about buyer power again.<sup>53</sup> These complaints led to a revision of the act and its replacement by another piece of legislation – the Act on Inappropriate Conditions in Business Relations which entered into force in 2008.<sup>54</sup> The Act did not apply only to the food sector, but to any commercial relations.<sup>55</sup> However, this Act was also found ineffective primarily due to difficulties in enforcing it – notably, the economic dependency criteria were difficult to satisfy.<sup>56</sup> In 2010, Slovakia adopted yet another piece of legislation, the “Unfair Terms in Foodstuff Act”.<sup>57</sup> The new act focused only on the food sector and removed the economic dependency criterion. It targeted specifically unfair contract terms and prohibited 30 types of such terms. The Act was to be enforced by the Ministry of Agriculture.

Yet, even this reform was unsuccessful. Already at the time of its adoption, many feared that the Act would damage domestic producers by prompting the retail chains to source from abroad.<sup>58</sup> Less than a year after its adoption, the act was repealed.<sup>59</sup> The Ministry of Agriculture argued that following the adoption of the Act, multinational retail chains had started avoiding Slovak producers; by repealing the act, they hoped more national producers would have access to the domestic market.<sup>60</sup>

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<sup>50</sup> This paragraph is based on OECD Roundtable on Monopsony and Buyer Power (2008), 215. According to Slovakia’s submission: “This changed the long-time pattern of the Slovak retail trade considerably. As retail chains introduced new relations, cooperation forms and trade practices, discussion on contributions or defectiveness of their buyer power was opened.”

<sup>51</sup> Act No. 358/2003 Coll. on Retail Chains (amended).

<sup>52</sup> Much of this paragraph is also based on the information available in OECD Roundtable on Monopsony and Buyer Power (2008), 215.

<sup>53</sup> OECD Roundtable on Monopsony and Buyer Power (2008), 215-216.

<sup>54</sup> Act No. 172/2008 Coll. on Inappropriate Conditions in Trade Relations; see OECD (2008), pp. 215-216. See also Z Hodonova and R Oleksik (Kinstellar), “Slovakia’s Unfair Terms in Business Contracts Between Resellers and Suppliers of Foodstuffs” (<http://www.kinstellar.com/insights/detail/100/slovakias-unfair-terms-in-business-contracts-between-resellers-and-suppliers-of-foodstuffs> ; published in Concurrences under N 31177 under the title “The Slovak Parliament draws rules on unfair supply contract terms for foodstuffs (Act n° 140/2010)”. <http://www.concurrences.com/Bulletin/News-Issues/May-2010/The-Slovak-Parliament-draws-rules-31177?lang=en> (May 2010)

<sup>55</sup> Hodonova and Oleksik (above)

<sup>56</sup> See also Zuzana Hodonova and Roman Oleksik (Kinstellar). The authors argue that the main reason for the limited effectiveness of the Act was the fact that it adopted an ‘economic dependency’ approach; without a proper definition of and criteria for economic dependency, enforcement was encumbered.

<sup>57</sup> Act No. 140/2010 Coll. on Unfair Terms in Business Contracts between Reseller and Supplier of Goods that are Foodstuffs, in effect as of 1 May 2010. See Hodonova and Oleksik.

<sup>58</sup> Hodonova and Oleksik.

<sup>59</sup> The Act entered into force on 1 May 2010 and was repealed on 12 January 2011.

<sup>60</sup> PMR Newsletter, “Slovakia’s retail law repealed” (18.01.2011) <<http://www.ceeretail.com/news/97676/slovakia-8217-s-retail-law-repealed>>.

The Slovakian example shows how enacting stricter legislation in an integrated market can backfire. More evidence pointing to a similar concern in the EU comes from Ireland. According to Paul Gorecki, former member of the Irish Competition Authority, one of the reasons behind the lobbying for a code on UTPs in Ireland was increased competition from goods sold in the UK.<sup>61</sup> Both consumers and supermarkets found it more attractive to purchase across the border when the euro appreciated; the supermarkets apparently used sourcing from abroad as a threat in negotiation with local suppliers. Suppliers pressed the government for protection.

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

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

*"[...] responses by public authorities to the Green Paper consultation reported isolated cases of 'forum shopping', i.e. a practice whereby the stronger contractual party unilaterally determines in which Member State, and hence under which regulatory framework, the contract is applied in order to avoid the national frameworks with stricter measures against UTPs. This issue was explicitly raised by 5 Member States in the public consultation and during discussions in various stakeholder fora organised by the Commission."*<sup>62</sup>

It is plausible that retailers are able to circumvent – *de jure* (via choice of jurisdiction clauses) or *de facto* (by sourcing from abroad) – the stricter rules to which they are now subject in many EU jurisdictions. Of course, the issue merits in-depth empirical research. But it also raises an important theoretical question: can national legislation on UTPs imposed by powerful buyers ever be effective in an integrated market? The principle of subsidiarity requires that problems be solved at the most appropriate level; with respect to UTP legislation, the question what the best level is apparently needs further consideration.

#### 4.2. Compromising the CAP (policy area displacement)

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<sup>61</sup> P. Gorecki, "A Code of Practice for Grocery Goods Undertakings and An Ombudsman: How to Do a Lot of Harm by Trying to Do a Little Good" (2009) 40 *The Economic and Social Review*.

<sup>62</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Tackling unfair trading practices in the business-to-business food supply chain" (COM(2014) 472 final) [http://ec.europa.eu/internal\\_market/retail/docs/140715-communication\\_en.pdf](http://ec.europa.eu/internal_market/retail/docs/140715-communication_en.pdf), 6-7.

It is a peculiarity of the EU Treaties that farmer welfare is explicitly protected by law. Put simply, the drafters of the EU Treaties (and all subsequent and preceding treaties) have instituted individual farmer welfare as an objective of EU common agricultural policy<sup>63</sup> – an objective on par with other ones such as efficiency,<sup>64</sup> consumer welfare,<sup>65</sup> and food security<sup>66</sup>. Of course, one might argue, this goal is highly controversial – a textbook example of rent-seeking whereby a well-organized group of economic actors extracts benefits from the rest of society – in this case, dispersed consumers and taxpayers. One may criticize the legislator’s choice but from a positive law perspective, it is valid law which needs to be respected – the Treaties’ commitment to farmer welfare mean there is a legal basis and, in fact, a legal imperative, for policy-makers to intervene in case this objective is compromised.

The non-enforcement of EU competition law against powerful purchasers contracting with primary producers, has led to a problem for meeting the policy objective of this policy area - the Common Agricultural Policy (CAP) which protects, among other things, farmer welfare. Additionally, other goals – also achieved through the CAP – may be compromised. Such is the case, for instance, with environmental goals<sup>67</sup> and perhaps even rural development goals. Arguably farmers are important in the EU not just because they produce food. Although originally established to ensure food security in a post-World War II Europe, the Common Agricultural Policy has taken on other objectives. One may think that in addition to producing food, today European farmers are responsible for providing other goods: such as preserving the traditional landscapes of Europe, local knowledge about small-scale food production and perhaps even traditional lore; increasingly, one might view farmers as custodians of the land.<sup>68</sup> Thus, farmer struggles jeopardize not only the EU agricultural policy, but also aspects of environmental policy or the EU policies aiming to develop poor regions of the EU. Farmers’ incomes are made up of receipts from sales of what they produce and of subsidies. Allowing farmers to be squeezed by powerful contractual partners does not necessarily make farmers more efficient or more resilient. Given the existing legal framework, it leads to demands for further protection, further subsidization, and further derogations from competition law.

## 5. Escalation: more regulation, stricter rules, more subsidies, less competition

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<sup>63</sup> Art. 39(b) TFEU includes ‘to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;’ as an objective of the common agricultural policy.

<sup>64</sup> Art. 39(a) TFEU.

<sup>65</sup> Art. 39(e) TFEU.

<sup>66</sup> Art. 39(d) TFEU speaks of the need to ‘assure the availability of supplies’.

<sup>67</sup> Speech by Commissioner Phil Hogan at EU Agricultural Outlook Conference 2017 (18 December 2017), < [https://ec.europa.eu/commission/commissioners/2014-2019/hogan/announcements/speech-commissioner-phil-hogan-eu-agricultural-outlook-conference-2017\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/hogan/announcements/speech-commissioner-phil-hogan-eu-agricultural-outlook-conference-2017_en)>.

<sup>68</sup> Agricultural Markets Task Force, ‘Enhancing the Position of Farmers in the Supply Chain’ (Report, 2016) < [https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf) >, Annex E: Contribution by Mr. Sarmir.

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

Regulation done wrong might escalate the risks or problems it is trying to eliminate. Grabosky notes that 'stringent regulation of new risks may exacerbate existing risks',<sup>69</sup> and that under-enforcement may result in a problem which then becomes so complex as to no longer be tractable.<sup>70</sup> Thus, regulation – too much or too little of it – may result in the problem escalating and becoming much more complex to deal with than it would have been in the first place. The escalation perspective essentially asks regulators to consider: is the problem likely to become worse *because of* what the regulators are doing or not doing?

There are two ways in which Grabosky's 'escalation' lens can help shed light on developments in the EU. One is to consider whether the regulatory instruments employed to tackle buying power and UTPs might actually aggravate the consequences of buying power instead of alleviating them – we already saw that displacement as a result of legislation may cause more harm to those needing protection than the unfair practices themselves. The second thing to consider is whether the sum of policy responses at the national level and at the EU level (in the area of the CAP) has not escalated far beyond what would have been necessary, thereby inflicting negative consequences more broadly in society.

### 5.1. Raising the cost of good contracts

Discussions about unfair trading practices can rarely be seen separately from discussions on price. The discourse on unfair trading practices, is, of course, ultimately about 'who gets what' in the food supply chain and how the gains from trade are split among the actors in the food supply chain. Barring some blatant breaches of *procedural* justice (e.g. using violence or threats to force someone to enter into a contract), it is difficult to determine *in abstracto* – absent commercial context – whether a contractual practice is fair or not. Contract law doctrines may be helpful in determining what conduct is unfair – for instance one-sided clauses imposed on a party in a weaker bargaining position which make it possible to retroactively change core terms of trade without a legitimate business reason have been recognized by some jurisdictions to be unfair even in a business-to-business context.<sup>71</sup> Yet, the core terms of the contract – how much is to be delivered, at what price – are something courts are wary of intervening on.

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<sup>69</sup> Grabosky, 348.

<sup>70</sup> Grabosky, 350.

<sup>71</sup> For instance, the Australian Competition and Consumer Act 2010 includes provisions prohibiting unfair trading practices in the context of B2B relations when one of the parties to the transaction is a small business.

One way in which laws on UTPs can backfire is when the laws specify the forbidden practices to such a degree that circumvention by means of slightly changing or relabeling a practice, whereby nominal compliance is ensured. By contrast, open-ended norms may give a willing and capable enforcer sufficient ground for intervention.

An interesting case to consider in this respect is the UK Grocery Code Adjudicator's investigation into Tesco's practices. The (GCA) found that UK retailer Tesco 'knowingly delayed paying money to suppliers in order to improve its own financial position.'<sup>72</sup> Notably, the UK GCA found that:

*'[Tesco's] Buyers frequently sought to use money owed to a supplier as leverage in negotiations for future agreements or promotions.[...] Tesco acted unreasonably when seeking to bring the resolution of debts into other commercial negotiations and delaying payment of monies owed until other negotiated terms were agreed.'*<sup>73</sup>

Although the notion of a 'reasonable payment term' is not defined in the Code, the GCA managed to find support for the unreasonableness of the practice. However, the GCA's investigation did not find sufficient support for the other allegation that Tesco had breached the ban on requests for payment in order to improve the positioning of the suppliers' goods or increase the allotted shelf space (paragraph 12 of the Code). Importantly, there was no evidence of direct requests for improved shelf position as such, although payments for other services seemed to coincide with better positioning. According to the GCA, Ms. Tacon, this evidence of other 'practices' might amount to 'indirect requests', but she did not make a conclusive finding to this effect:

*'[These practices] include requests for "investment" by Tesco in exchange for benefits to be agreed with the supplier. The benefits sought by suppliers included better positioning or increased shelf space. This may amount to an indirect requirement by Tesco for payment contrary to paragraph 12 of the Code. I also received evidence during my investigation of payment by suppliers of large sums of money in exchange for category captaincy or participation in a range review. The evidence suggests that this may have become common practice in Tesco. I received some evidence that the benefits that suppliers derive from these arrangements may include maintained or improved share of shelf or better positioning.'*<sup>74</sup>

Tesco was apparently clever enough to refrain from directly breaching the provision<sup>75</sup> but the suspicion remains that the company disguised its payment requests so they would just fall outside the scope of the text of the code. The GCA's experience shows how well-meaning

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<sup>72</sup> Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494840/GCA\\_Tesco\\_plc\\_final\\_report\\_26012016\\_-\\_version\\_for\\_download.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf), p. 6

<sup>73</sup> Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494840/GCA\\_Tesco\\_plc\\_final\\_report\\_26012016\\_-\\_version\\_for\\_download.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf), p. 7.

<sup>74</sup> Groceries Code Adjudicator, *Groceries Code Adjudicator Investigation into Tesco plc* (26 January 2016) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494840/GCA\\_Tesco\\_plc\\_final\\_report\\_26012016\\_-\\_version\\_for\\_download.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/494840/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf), p.6.

<sup>75</sup> Tesco was already found in breach of this provision in 2014. See <https://www.gov.uk/government/case-studies/code-clarification-charging-for-optimum-shelf-positioning>

provisions targeting specific practices may be circumvented even when enforced by a committed regulator.

Another way in which efforts to improve contracting conditions for disadvantaged trading partners may be circumvented is by putting pressure on supplier prices. Contract terms and price are not always substitutes but sometimes they can be. Limiting the possibility to extract a rent *ex post*, in light of actual sales performance, might lead purchasers to extract the rent *ex ante*. Inability to impose one unfair contractual term due to a ban might lead to imposing another. Given the close link between retroactive demands for discounts, promotion money, and price, one may fear that powerful buyers– faced with rigid regulations on unfair trading practices – will use their muscle to obtain lower prices or advantages by other means. A forbidden UTP may be substituted by one that is less strictly regulated or by attacking other terms of the contract, notably – the price.<sup>76</sup>

There is no readily available evidence on the impact on prices paid to producers in the aftermath of regulatory action on UTPs. However, a useful case to consider is the milk sector following the adoption about the Milk Package. The Milk Package was introduced following the crisis in the dairy sector in 2009. It allowed Member States<sup>77</sup> to introduce strict requirements for the contracting process between milk producers and first purchasers. The contracts would have to meet the following criteria: to be concluded in advance of delivery, be made in writing, include the price payable (static or calculated by a formula, the ingredients of which must be clarified in the contract itself), the volume and timing of deliveries, duration of the contract (including termination clauses for indefinite contracts), clarifications about payment periods and procedures, milk collection and deliveries, and force majeure provisions.<sup>78</sup> Where such contracts are mandated the Member states may establish minimum duration which may not be less than six months.<sup>79</sup> Essentially, the measures aimed to intervene on the contract law part of the problem – by ensuring bargaining power imbalances are not misused for the purpose of bad contracting which leaves scope for uncertainty and exploitation.

Additionally, the regulation aimed to address the bargaining power issue itself by allowing for collective bargaining by recognized producer organizations<sup>80</sup> under certain conditions, notably that the volume of raw milk covered by the negotiations does not exceed 3.5 % of total EU production and 33% of total volume produced or delivered in that Member State.<sup>81</sup> The Regulation also strengthens the possibilities for so called ‘interbranch organizations’. These are

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<sup>76</sup> Similar conclusion is reached in Wakui and Cheng, , ‘Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity’ (2015) *Journal of Antitrust Enforcement*. This is one of the author’s criticisms of the Japanese law on superior bargaining power.

<sup>77</sup> Not all Member States have taken advantage of the possibility to introduce such contracting requirements.

<sup>78</sup> See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, Article 148.

<sup>79</sup> Art. 148 of Regulation 1308/2013.

<sup>80</sup> The provision only applies for producer organizations which are recognized under Article 152(3) of Regulation 1308/2013.

<sup>81</sup> Article 149 of Regulation 1308/2013. As per Art. 149 (3), for Member States with volume of raw milk production of less than 500 000 tonnes, the applicable threshold is 45% of national production.

organizations which cover at least two different stages in the supply chain – producing, processing, and distribution.<sup>82</sup> Under Article 210 of Regulation 1308/2013, Article 101(1) TFEU does not apply to agreements and concerted practices of recognised interbranch organisations provided that they are notified and exempted by the European Commission for meeting some basic requirements.<sup>83</sup>

The Milk Package has been deemed relatively successful – its main goal was to strengthen the producer’s position in the supply chain and, according to a report by the European Commission, ‘[t]here is evidence that it has done so to some extent, including through various other collective actions of producers going beyond the milk package’<sup>84</sup>. Currently, 13 member states have introduced the possibility of compulsory contracts and as a result, 41% of milk deliveries in the EU are covered by compulsory written contracts. Additionally, other laws or private voluntary codes of practice provide similar contracting conditions to the ones previewed in the Milk Package. Taking these other instruments into account, ‘95% of total EU milk deliveries are covered under a formal agreement, in one form or another.’<sup>85</sup> The strengthening of Producer Organizations, in particular by providing the possibility of collective bargaining, has also been relatively successful. According to the survey carried out by the Commission, the main objectives of POs are: better prices, more stable prices, and ‘overall improvement of the producer’s position in the supply chain’, and ensuring milk collection for all members.<sup>86</sup> Of the respondents, almost 70 % reached a better price and about 60 % partially achieved a more stable price. However, 20% of respondents informed that they had absolutely failed to achieve both of these goals.<sup>87</sup>

Have these measures – better contracting provisions, derogations from competition law<sup>88</sup> allowing for collective bargaining and vertical agreements within interbranch organizations – resolved the problem of low prices? The reality is that despite these measures, in addition to safety nets, and subsidy payments, milk farmers in the EU continue to struggle. The combination of measures has not been successful in stabilizing milk prices. Farmers continue to protest their problematic relationship with buyers and the low purchasing prices for milk.<sup>89</sup>

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<sup>82</sup> Art. 157 (a) of Regulation 1308/2013.

<sup>83</sup> The following are forbidden: partitioning of the internal market, affecting the operation of the market organization, are disproportionate (not necessary for achieving the objectives of the CAP that interbranch organizations are meant to achieve, are fixing prices or quotas, are discriminatory, eliminate competition on a substantial portion of the market. See Art. 210 (4) of Regulation 1308/2013.

<sup>84</sup> See REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Development of the dairy market situation and the operation of the "Milk Package" COM(2016) 724 final {SWD(2016) 367 final} [https://ec.europa.eu/agriculture/sites/agriculture/files/milk/milk-package/com-2016-724\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/milk/milk-package/com-2016-724_en.pdf), 14.

<sup>85</sup> Ibid, 6.

<sup>86</sup> Ibid, 8.

<sup>87</sup> Ibid, 8.

<sup>88</sup> Under the regulation, the competition authorities may intervene to oppose certain negotiations even if the thresholds are not met ‘in order to prevent competition from being excluded or in order to avoid seriously damaging SME processors of raw milk in its territory’. See Art. 149 (6) of Regulation 1308/2013. In the case of milk, no competition enforcement actions under this provision were undertaken. See Report above, p.9.

<sup>89</sup> Media items are too numerous to mention. See eg. Graham Ruddick, ‘UK farmers join Brussels protest over milk and meat prices’ (*The Guardian*, 6.09.2015)

It is important to tackle unfair trading practices. Yet, it is important to recognize that UTP regulation on its own does not tackle the concentrated nature of the market, only its consequences - just as it is recognized that only consumer protection rules are not sufficient to protect consumers if markets are monopolized. We might consider that rules on unfair B2B practices play an important complementary role but they are not a substitute for vigorous competition law enforcement, aimed to keep markets open – where sufficient choice of contracting partners would push unfair traders out of the markets.

## 5.2. Escalating ‘other’ solutions : the case of the CAP and its reform

Arguments about UTPs in the food supply chain are often framed as a ‘distributive justice issue’ rather than issues of market structure and abuse of economic power. Framed as such, these issues are to be delegated to other policy fields. The suggestion often made is that non-competition problems are best tackled by other instruments<sup>90</sup> – such as the taxation system or targeted support (e.g. subsidies). The question is: have these solutions perhaps gone too far? Is the sum of regulatory responses proportionate to the problem addressed?

In addition to UTP legislation, another type of ‘other remedy’ is subsidization. In this respect, it is worth considering the evolution of the Common Agricultural Policy (CAP), which covers primary agricultural producers. The CAP – which provides extensive subsidization for farmers – has been evolving over the years to become more aligned with market principles.<sup>91</sup> Quotas have been abolished and the goal is for producers to be less dependent on public support. A notable exception to this liberal market-oriented trend is the relation between the competition law provisions and the CAP. In the midst of CAP liberalization and claims of abuse of buying power, farmer lobbies have been successful in bargaining for far-reaching derogations from the competition provisions. As mentioned above, the Milk Package of 2012 provided for the possibility of mandating written contracts and a derogation from Article 101 TFEU for certain collective bargaining agreements between recognized milk producer organizations and

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

<sup>90</sup> At a conference in 2014, the author of this paper asked a public question in response to former Commissioner Almunia’s speech that other laws were available to correct for issues related to power imbalances in the food supply chain. The Commissioner was not able to clarify what other laws measures were available.

<sup>91</sup> See e.g. J Blockx and J Vandenberghe, ‘Rebalancing Commercial Relations Along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013’ (2014) *European Competition Journal*, 387.

purchasers.<sup>92</sup> With the general CAP reform in 2013, further derogations from Article 101 TFEU were included and the position of producer organizations and associations for producer organizations was strengthened. The possibility for recognized producer organizations<sup>93</sup> and associations of producer organizations<sup>94</sup> to collectively negotiate contracts for the supply of olive oil,<sup>95</sup> beef,<sup>96</sup> and certain arable crops<sup>97</sup> was introduced subject to certain conditions.<sup>98</sup> Supply management measures were provided for ham<sup>99</sup> and cheese<sup>100</sup> with protected designation of origin or a geographical indication. A provision on so called 'crisis cartels' providing producer organizations and interbranch organizations to take collective measures in order to stabilize markets in case of disturbance.<sup>101</sup>

These changes sound suspicious from a competition law perspective. Essentially, they aimed to consolidate producers in certain sectors in order to improve the prices and contracting conditions for producers. Surely, consolidation on the producer side may solve the problem of *farmers*, but at whose expense? Likely, the outcome will involve the consumers' paying high prices. A joke told by economists is that 'the only thing worst than a monopolist is two monopolists' – a humorous hint at the problem of 'double marginalization'. Double marginalization is but one of the problems with bilateral monopoly. The theory of bilateral monopoly teaches us that the outcomes are sub-optimal in terms of efficiency. A bilateral monopoly solution is second-best to a solution which aims to de-concentrate markets on both sides. Despite this, a preference was made for strengthening producers, rather than weakening purchasers.

This is not the end of the story. The CAP has once again experienced significant reform with the entry into force of the so called Omnibus Regulation on January 1<sup>st</sup>, 2018.<sup>102</sup> The Regulation aims to further strengthen the position of producers – for instance, by ensuring there is funding and

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<sup>92</sup> The sugar sector also enjoyed exemptions even prior to these reforms. See Art 125 of Regulation 1308/2013.

<sup>93</sup> The criteria for recognized producer organizations are defined in Art. 152 of Regulation 1308/2013.

<sup>94</sup> As defined in Art 156 of Regulation 1308/2013.

<sup>95</sup> Article 169 of Regulation 1308/2013.

<sup>96</sup> Article 170 of Regulation 1308/2013.

<sup>97</sup> Article 171. of Regulation 1308/2013.

<sup>98</sup> For an overview and examples, see European Commission, *Commission Notice: Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors* [2015] OJ C/431, 1. Broadly, these requirements include: the PO or APO must be recognized by the competent authorities of the relevant Member State; there is "The PO must pursue one or more of the objectives of concentrating supply, the placing on the market of the products produced by its members or optimising production costs;" the integration of activities leads to efficiencies; "The volume of a given product subject to negotiations by a particular PO must not exceed 20 % (for olive oil) of the relevant market/15 % of the total national production (for arable crops and for beef and veal);" producers cannot be members of more than one PO which bargains collectively on their behalf; POs are required to notify the volume of product covered by the collective bargaining to the competent national authorities.

<sup>99</sup> Article 172

<sup>100</sup> Article 150.

<sup>101</sup> See European Commission, 'CAP Reform – an explanation of the main elements' (Memo, Brussels, 26 June 2013); [http://europa.eu/rapid/press-release MEMO-13-621\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-621_en.htm) .

<sup>102</sup> Regulation 2017/2393 of 13 December 2017.

support available for coaching initiatives to encourage farmers to join producer organizations.<sup>103</sup> The provisions on written contracts have been strengthened and expanded. In the case of milk producers, even where Member States choose not to mandate contracts, individual producers, POs or APOs, may require a written contract fulfilling the criteria of minimum duration.<sup>104</sup> This possibility is also open to producers, POs, or APOs, of other agricultural sectors (not only milk and sugar) thanks to an amendment of Article 168 of Regulation 1308/2013.<sup>105</sup> The value-sharing agreements which were previously only available for the sugar sector, have been further extended. Under a new Article 172(a), introduced by the Omnibus, farmers, associations of farmers and their first purchasers, are now allowed to establish “standard value sharing clauses” – agreements about how to cope with changes in market prices of the products, including bonuses and losses.<sup>106</sup> This option is also available to interbranch organizations.<sup>107</sup>

Perhaps most importantly, the Omnibus Regulation expands the scope of derogations from competition law and makes these derogations explicit. For instance, Art. 152 of Regulation 1308/2013 which deals with producer organizations now includes an explicit derogation from Article 101 TFEU.<sup>108</sup> The collective bargaining exemption is thus not only available for specific sectors such as milk, beef and veal, olive oil and certain arable crops, but for all recognized POs and APOs. Importantly, whereas such activities in the past were subject to an efficiency criterion and market share thresholds, these criteria are no longer present. Farmers, POs and APOs may request an opinion from the Commission about the compatibility of their agreements with Art. 39 TFEU.<sup>109</sup>

Furthermore, the conditions for crisis cartels, introduced with the reform in 2013, are relaxed. Under the new rules, crisis cartels are open not only to recognized POs, APOs, and interbranch organizations but more generally to farmers, farmers’ associations, or associations of such associations.<sup>110</sup> Following the Omnibus regulation, the preconditions for granting an exception have been scrapped, so a crisis cartel is no longer a measure of last resort.<sup>111</sup>

The sacred cow of competition law – collective action by competitors – took a stab with the entry into force of the milk package. It has taken a serious blow with the 2017 CAP reform. According to the evaluation reports of the milk package, collective bargaining has succeeded in improving the position of milk producers. The question is: at whose expense? Consumer welfare

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<sup>103</sup> See for instance, the amendments to Articles 33, 34, and 35 of Regulation 1308/2013 – explained in Article 4(1), (2) and (5) of Regulation 2017/2393.

<sup>104</sup> Article 148 of Regulation 1308/2013 as amended by Art. 4 (8) of Regulation 2017/2393.

<sup>105</sup> See Art. 4 (15) of Regulation 2017/2393.

<sup>106</sup> See Art. 4 (17) of Regulation 2017/2393.

<sup>107</sup> See Art. 4 (12) of Regulation 2017/2393.

<sup>108</sup> See Article 4 (10) of Regulation 2017/2393.

<sup>109</sup> See Art. 4 (20) of Regulation 2017/2393.

<sup>110</sup> See Art. 4 (21) of Regulation 2017/2393 amending Art. 222 of of Regulation 1308/2013.

<sup>111</sup> See Art. 4 (21) of Regulation 2017/2393 amending Art. 222 of of Regulation 1308/2013. The requirement that a crisis cartel can only be approved if the Commission has ‘already adopted one of the measures referred to in this Chapter, if products have been bought in under public intervention or if aid for private storage referred to in Chapter I of Title I of Part II has been granted’ (former Art. 222(2) of Regulation 1308/2013) has been deleted. This means there is a shorter pathway to granting approval for limitation of competition.

may not be the only concern of EU competition law, but it remains an important one. Food, unlike brand-name cosmetics or smartphones, is essential to survival and consumers, especially the poorest consumers, spend a disproportionate amount of their income on food. Yet, oversupply of milk leading to low farmgate purchasing prices does not necessarily translate into lower consumer prices for milk and milk products because supermarkets do not pass the lower prices on.<sup>112</sup> Consider the preamble of the Milk Package Regulation introducing higher contractual standards for the milk sector:

*‘This sharp decline in dairy commodity prices failed to fully translate into lower dairy prices at consumer levels, generating, for downstream sectors, a widening in the gross margin for most milk and milk sector products and countries, and preventing demand for them from adjusting to low commodity prices, slowing down price recovery and exacerbating the impact of low prices on milk producers, the viability of many of whom was put at serious risk.’<sup>113</sup>*

Taking stock of all the regulatory developments, one may conclude that not intervening with competition law has ultimately played against the consumer interest, has failed to discipline retailers, and has secured support for farmers seeking far-reaching protection. The result has ultimately been to the dislike of the Commission which noted its concern about the producer cooperation provisions in the new Omnibus regulation.<sup>114</sup> Consumers have not necessarily benefitted from lower purchasing prices and have also been faced with shortages and price hikes for some products.<sup>115</sup> The quality of food in the EU has also become a major political issue, as reports have shown that manufacturers skimp on ingredients in the ‘poorer’ EU Member States.<sup>116</sup> It seems that non-enforcement of competition law in cases of buyer power on the grounds that doing so would hurt consumers has not achieved its professed goal of preserving consumer welfare.

## 6. Perverse incentives or who is milking the CAP?

Speaking of the CAP, there is probably no better example to add to Grabosky’s category of ‘perverse incentives’. In this category Grabosky includes cases in which the regulation put in place makes matters worse by distorting markets and incentives. Examples include cases of ‘moral hazard’ – such as when rebates for toxic waste lead to purposeful waste production and

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<sup>112</sup> See Report on Milk,

<sup>113</sup> Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector OJ L 94/38, Para 2.

<sup>114</sup> See Regulation 2017/2393, Commission statements on OJ L 350/49.

<sup>115</sup> See also <https://www.euractiv.com/section/agriculture-food/news/spreading-thin-france-grapples-with-butter-shortage-price-hike/>

<sup>116</sup> See Euractiv, ‘EU bans dual quality food after pressure from eastern members’ (12.04.2018) <https://www.euractiv.com/section/agriculture-food/news/eu-bans-dual-quality-food-after-pressure-from-eastern-members/> ; European Commission, ‘Dual quality food products: Commission guides Member States to better tackle unfair practices’ (Press release, Brussels, 26 September 2017) [http://europa.eu/rapid/press-release-IP-17-3403\\_en.htm](http://europa.eu/rapid/press-release-IP-17-3403_en.htm) and European Commission, ‘Dual quality of food products: New guidance for EU Member States’ (26 September 2017); <https://euobserver.com/business/141352> .

cases where the presence of insurance or a guarantee results in excessive risk taking on the part of the insured.<sup>117</sup> In the case of buying power and UTP regulation, we might also say that perverse incentives have been created which not only do not diminish the problem of buyer power or UTPs, but which also imply inefficient use of public funds.

Farmer struggles have put pressure on the the Common Agricultural Policy of the EU (CAP) and the CAP has an explicit commitment to farmer welfare. The way the CAP achieves this objective is by means of the following instruments: income support, market interventions ('market measures'), and rural development programs.<sup>118</sup> Firstly, the CAP offers income support to the farming community in the form of direct payments.<sup>119</sup> Compliant farmers receive a 'basic payment', the average payment being '€267 per eligible hectare'.<sup>120</sup> Farmers can also apply for additional payments available under other schemes: a green payment, a young farmers' subsidy, support for small and medium-sized farms, and support for farmers in areas with difficult farming conditions, etc. Market intervention measures include purchasing excess quantities of products in order to improve the market price.

EU farmers receive massive amounts of financial support despite recent trends of making the policy more market-oriented. In fact, the CAP has traditionally absorbed more than 50% of the total EU budget – ranging from above 70% in the 1980s to just under 50% in recent years.<sup>121</sup> This makes the EU farmers among the most heavily subsidized in the world.<sup>122</sup> These heavy subsidies have led to much criticism about their distortionary impact on world trade. Despite this, it appears that CAP subsidies are not enough to ensure support for farmers. How come farmers are complaining of insufficient income if they are already so heavily subsidized?

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<sup>117</sup> Grabosky, 354-355. In Grabosky's view, the Reagan administration's policy of deposit insurance for small financial institutions combined with under-enforcement of prudential controls led to a the Savings and Loan Scandal of the 1980s. The story prompts one to wonder if the case of agriculture might be following the same line.

<sup>118</sup> CAP Overview, [https://ec.europa.eu/agriculture/cap-overview\\_en](https://ec.europa.eu/agriculture/cap-overview_en) . See also Regulation (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) OJ L 347/487 as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 OJ L 350/15 (Omnibus Regulation).

<sup>119</sup> Previously, income support was achieved through a generous pricing mechanisms – namely, guaranteed purchasing prices for farmers. As the CAP has become more market-based, subsidies are '*decoupled from production*'. See also Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy as amended by the Omnibus Regulation.

<sup>120</sup> Direct payments explained at [https://ec.europa.eu/agriculture/direct-support/direct-payments\\_en](https://ec.europa.eu/agriculture/direct-support/direct-payments_en) . An overview is also available in Annex I to Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy as amended by the Omnibus Regulation, OJ L 347/654.

<sup>121</sup> See Annex 4 which shows that at its high, farmer subsidies absorbed more than 70 % of the total EU budget. The percentage has shrunk over time to just under 40% of the total budget, but the absolute sum of money spent on agriculture has grown due to the larger number of Member States. Although the percentage of EU budget devoted to agriculture is shrinking in relative terms, it has grown in absolute terms - due to the more countries following accession of new Members.

<sup>122</sup> See OECD chart featured in 'Malcolm Turnbull correct: Australian farmers among world's least subsidised' (ABC News Item, 3 March 2014) < <http://www.abc.net.au/news/factcheck/2014-02-14/malcolm-turnbull-correct-on-farmers-subsidies/5252596> >.

Strangely enough, perhaps one of the reasons has to do with structural issues, one of which is buying power of processors and retailers<sup>123</sup>. The economic argument goes that even a monopsony buyer would not push prices too low because a rational buyer would have an incentive in keeping a competitive supplier base in business in the long run. But what about a buyer who knows that regardless of how hard it pushes, farmers *will* stay in business thanks to generous government support backed by a legal commitment to intervene?<sup>124</sup> A clever buyer will learn to incorporate this knowledge and will adjust its strategy accordingly. Given a serious commitment by the public to continue to subsidize one's suppliers, it is only rational that the purchaser will take this into account just as a bank which knows it is going to be bailed out runs the risk of taking too much risk. There is no need to worry about starving the goose that lays the golden eggs – because the goose will be resuscitated, fed, and propped back on its feet thanks to generous taxpayers' support.

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

According to an OECD Roundtable Report on Subsidies:

*'Another weakness of the use of subsidies as a redistributive tool, rather than direct income taxation and redistribution, is that subsidies often miss their goals because they may end up being appropriated by agents that are not the intended beneficiaries. Again, aid to agriculture is a case in point.'*<sup>125</sup>

Subsidies and related support measures such as intervention measures<sup>126</sup> may play a useful role in correcting market outcomes and achieving socially (or politically) palatable results. Yet, as it turns out, subsidy policies cannot be viewed in isolation from structural issues on markets, and thus, by implication, from competition policy. In this case, it is evident that the CAP cannot fulfill

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<sup>123</sup> Similarly, the argument can be made that powerful suppliers also extract 'rents' from farmers by squeezing their margins.

<sup>124</sup> Additional argument that is valid regardless of the presence of income support is that a monopsonist who lacks the knowledge about supplier cost structures or a monopsonist with short-term management horizons may indeed press too hard. The result is akin to 'killing off the goose that lays golden eggs', namely eroding a reliable and dependent supplier base, thereby also weakening the monopsonists' position.

<sup>125</sup> OECD on subsidies, p. 39.

<sup>126</sup> Farmers have also lobbied governments in order to promote the consumption of certain foods among the public. There is plenty of evidence of the influence of farmer lobbies on the US nutritional pyramid and other jurisdictions' public health initiatives which have to do with food consumption. For instance, changes in dietary guidelines to encourage people to consume less dairy and meat are met with resistance by industry. See the discussion of the US nutritional pyramid in M Pollan, 'Unhappy Meals' (28.01.2007, *The New York Times*) <https://www.nytimes.com/2007/01/28/magazine/28nutritionism.t.html> and M Nestle, 'Food lobbies, the food pyramid, and U.S. nutrition policy' (1993) 23(3) *International Journal of Health Services*, 483-96 at <https://www.ncbi.nlm.nih.gov/pubmed/8375951>

its goal of transitioning to a more market based regime if suppliers need to 'bailed' out every so often.

According to Motta, objectives other than economic efficiency are best met with 'policy instruments that distort competition as little as possible'.<sup>127</sup> The opposite may also be true – non-enforcement of competition policy may distort other policy areas, thus jeopardizing their ability to meet other important objectives.

## 7. Over-deterrence and opportunity-costs: rethinking type I v type II error debates

The remaining two forms of counterproductive regulation have to do with over-deterrence and opportunity costs. The concern raised by the former is regulation that is not properly calibrated resulting in over-deterrence, the concern of the latter – inefficient enforcement, where striving for perfection in enforcement backfires. Both types are known to antitrust scholars whose concern with properly calibrated approach to antitrust enforcement and procedural efficiency often coincide in debates on type I and type II errors. One strand of arguments prompts enforcers to choose between the risk of chilling competition and the risk of letting some anticompetitive behavior continue; the other strand of arguments are about procedural efficiency – whether it is best to invest resources in a couple of well-done investigations or pursue many investigations without investing properly in gathering evidence and performing economic analysis. Both types of debates invoke the choice between type I v type II errors.

Type I errors refer to under-enforcement, namely – letting some harmful practices continue; type II errors refer to over-enforcement, namely – prohibiting harmless practices. The question is: given uncertainty about a practice, is it better to err on the side of prohibiting potentially innocuous or even procompetitive practices, thereby risking to 'chill' competition or is it better to err on the side of letting some anticompetitive practices continue until we have gathered more knowledge and more data about their 'likely' (as opposed to 'potential') market impact?

The essence of the debate is well summed up in the Speech by Johannes Laitenberger on the tension between accuracy and administrability.<sup>128</sup> As Mr. Laitenberger notes, the debate often hinges on whether one accepts that 'false convictions are more of a problem than false acquittals'. Firstly, in his view, the truthfulness of this proposition would depend on the sector – in some sectors, non-enforcement for fear of Type I error essentially kills market incentives to entry – because entrants know that the threshold for triggering competition law is high, they will not dare to challenge incumbents or will have trouble obtaining financing. Secondly, Mr.

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<sup>127</sup> M Motta, *Competition Policy: Theory and Practice* (CUP 2004), 30.

<sup>128</sup> Johannes Laitenberger (Director-General for Competition, European Commission), 'Accuracy and administrability go hand in hand' (Speech at CRA Conference Brussels, 12 December 2017) [http://ec.europa.eu/competition/speeches/text/sp2017\\_24\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf)

Laitenberger proposes that the way we count false acquittals is misleading – in his view, the concept of false acquittals should not only include illegal practices being let go, it should also include ‘the group of cases that are never even detected or investigated for lack of resources, or that are punished too late.’ In his view, the latter group of cases is ‘a much more serious issue’. In this light, the scales seem to tip in favor of more enforcement of competition law, rather than less. He suggests that the tradeoff between accuracy and administrability is ‘dated’ and that given legal devices (such as presumptions) and diligent work,<sup>129</sup> it is possible for DG competition to achieve results of high accuracy without significant burdens in terms of administrability.

However, with respect to the issue of buying power and unfair trading practices in the food sector, the Commission’s approach has consistently been set in favor of non-intervention. Many national studies have been carried out in the past years,<sup>130</sup> signaling problematic practices, but the Commission has remained guarded in its approach. Concern with chilling competition and ensuring accuracy has prompted the Commission to order an extensive study on the impact of retail concentration on choice and innovation,<sup>131</sup> but the Commission did not undertake dawn raids or sector inquiries, as it has done in other sectors in the past.<sup>132</sup> No big case was pursued, no formal sector inquiry was opened, and no guidelines were amended or published.

This stance is especially peculiar when contrasted with the approach of the Commission to similar practices in other sectors. Let us consider the issue of private labels, for instance. The issue of supermarkets replacing ‘tier-B’ brands with own label products which compete head-to-head with other brands or using the introduction of such products as threat in negotiations, has

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<sup>129</sup> Mr. Laitenberger used the Google Shopping case as an example. In the case, more than 5 terabytes of data were analyzed.

<sup>130</sup> For instance, the UK Competition Commission carried out two market investigations in the grocery sector – in 1999-2000 and in 2006-2007. See UK Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000) available at [http://webarchive.nationalarchives.gov.uk/+http://www.competition-commission.org.uk/rep\\_pub/reports/2000/446super.htm](http://webarchive.nationalarchives.gov.uk/+http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm) and UK Competition Commission, *Groceries market investigation* (2008) <http://webarchive.nationalarchives.gov.uk/20140402194746/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry> ; Nordic Competition Authorities Joint Report, *Nordic Food Markets - a taste for competition* (2005) [https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic\\_food\\_markets.pdf](https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic_food_markets.pdf) ; Baltic International Center for Economic Policy Studies (BICEPS), *Competition in Baltic Grocery Retail Markets* (2006) [http://www.biceps.org/assets/docs/izpetes-zinojumi/Competition\\_in\\_Baltic\\_Grocery\\_Retail\\_Markets.pdf](http://www.biceps.org/assets/docs/izpetes-zinojumi/Competition_in_Baltic_Grocery_Retail_Markets.pdf). In the Netherlands, see EIM, *De aard en omvang van inkoopmacht: Onderzoek naar de perceptie van leveranciers* (2009) Report prepared for the Dutch Ministry of Economic Affairs, SEO Economisch Onderzoek (Barbara Baarsma and Nicole Rosenboom), *Oneerlijke handelspraktijken: voldoet bestaande (zelf)regulering?* (2013) Report prepared for the Dutch Ministry of Economic Affairs [http://www.seo.nl/uploads/media/2013-04\\_Oneerlijke\\_handelspraktijken.pdf](http://www.seo.nl/uploads/media/2013-04_Oneerlijke_handelspraktijken.pdf) and TISCO, “Eerlijk, scherp en betrouwbaar. Een interactieve verkenning naar ijkpunten voor eerlijk zakendoen en effectieve conflictoplossing” (2012) Report prepared for the Second Chamber of the Dutch Parliament <https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vix1ordxlvvi> .

<sup>131</sup> Cambridge Econometrics Ltd. and Arcadia International, *The economic impact of modern retail on choice and innovation in the EU food sector* (2014, Report prepared for the European Commission), <http://ec.europa.eu/competition/publications/KD0214955ENN.pdf> .

<sup>132</sup> The Directorate General for Competition has carried out market inquiries for energy (2005), retail banking and business insurance (2007), pharmaceutical sector (2009), e-commerce (2015).

been widely discussed in the competition law literature.<sup>133</sup> Although there is discussion on the impact of private labels on choice and innovation, a prohibition of the practice can be reconciled under existing EU competition law. Even though the study on choice and innovation revealed that under some circumstances, the presence of private labels might result in less innovation,<sup>134</sup> no action was taken by the Commission against the practice of supermarkets self-preferencing their own products in terms of shelf-space or payment for services. By contrast, the *Google Shopping* case,<sup>135</sup> is all about self-preferencing. Even though there are debates as to the extent to which the existing EU competition law doctrine covers this theory of harm,<sup>136</sup> the Commission proceeded with the case.

When it comes to unfair trading practices, the Commission has also taken steps which might be criticized by some as deviating from ‘mainstream’ competition law doctrine. For years now, the Commission has investigated the issue of breach of FRAND (fair, reasonable and non-discriminatory) licensing obligations in the case of licensing for Standard Essential Patents. The issue has provoked debate in the competition law community with some commentators suggesting it is essentially about distributive justice rather than classic competition issues. This did not prevent the Commission from intervening in a number of cases involving exploitative terms of contract.<sup>137</sup> Notably, in these cases, the parties were not necessarily unequal in terms of bargaining positions.<sup>138</sup> In 2017, the Commission published Guidelines on the issue.<sup>139</sup> The most

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<sup>133</sup> Ariel Ezrachi, “Unchallenged Market Power? The Tale of Supermarkets, Private Labels and Competition Law” [2010] *World Competition* 33(2), 13. See also the contributions in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy. The Changing Landscape of Retail Competition* (OUP, Oxford 2009); V Daskalova, ‘Private labels (Own Brands) in the Grocery Sector: Competition Concerns and Treatment in EU Competition Law’ (2012) TILEC Discussion Paper 2012-02 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1981958](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981958); H Nevo and R van den Bergh, ‘Private Labels: Challenges for Competition Law and Economics’ (2017) 40(2) *World Competition*, 271.

<sup>134</sup> *Ibid.*, 34. The study concludes about the impact of private labels as follows: ‘We did not find evidence generally that a larger share of private labels (at national or local level) curbed choice. If anything, at least up to a moderate level, it is associated with slightly more choice, except in the case of the range of product prices where a larger share of private labels in a given product category and shop was associated with slightly less choice. However, beyond a certain level (which varies depending on the product category) it appears that a higher share of private labels is associated with less product variety.’

<sup>135</sup> Commission decision in Case AT.39740 *Google Search (Shopping)*, C(2017) 4444 final.

<sup>136</sup> See Bo Vesterdorf, ‘Theories of Self-Preferencing and Duty to Deal – Two Sides of the Same Coin’ (2015) 1 (1) *Competition Law and Policy Debate*, 4. The doctrinal accuracy of this piece has been criticized in Nicolas Petit, ‘Theories of Self-Preferencing Under Article 102 TFEU: A Reply to Bo Vesterdorf’ (2015) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2592253](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592253)

<sup>137</sup> See European Commission, ‘Antitrust: Commission initiates formal proceedings against Qualcomm’ (MEMO/07/389 (2007) [http://europa.eu/rapid/press-release\\_MEMO-07-389\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-07-389_en.htm?locale=en) ; Case COMP/38.636 – RAMBUS (2009); European Commission, ‘Antitrust: Commission welcomes ICom’s public FRAND declaration’, MEMO/09/549 (2009); Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents C(2014) 2892 final [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39985/39985\\_928\\_16.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf) ;Case AT.39939 - Samsung - Enforcement of UMTS standard essential patents (2014) C(2014) 2891 final [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39939/39939\\_1501\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf) .

<sup>138</sup> In *Huawei*, the Court of Justice of the EU observed that the parties, ‘it must be recognised, have equivalent bargaining power.’ See Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp* [2015] ECLI:EU:C:2015:477 [37].

<sup>139</sup> European Commission, *Setting out the EU approach to Standard Essential Patents* (Communication, Brussels, 29.11.2017) COM(2017) 712 final).

recent development has been the Commission's push for legislation on unfair platform-to-business trading practices.<sup>140</sup>

One might wonder if the fact that the claims involve buyer power is the reason why enforcers are uncertain about intervening. Although there is limited guidance on the assessment of buyer power at the EU level, the concept of buyer power is no stranger to EU competition law. It has been invoked in a number of cases<sup>141</sup> and has been investigated in merger control<sup>142</sup>. A growing body of literature suggests that buyer power is a competition law issue as much as seller power – be it from an economic or legal point of view.<sup>143</sup> Even if there may be some doctrinal uncertainty about buyer power or unfair trading practices and the scope of EU competition law, there is also sufficient scope for testing the limits of the law. Given the existing case law, the open-ended texture of the antitrust provisions and the antitrust scholarship available, the Commission's reluctance to take action is difficult to comprehend.

Failure to properly calibrate regulation or rushing enforcement in the absence of evidence can be damaging to the market, to stakeholders and to the regulator's reputation. At the same time, failure to act in the presence of convincing theory and evidence can also damage the reputation of the regulator. Enforcement without solid evidence may result in chilling competitive effects, but non-enforcement also sends a message. As Mr. Laitenberger notes, not prosecuting sends signals to incumbents and can result in companies not entering the market. Not investigating cases due to lack of resources (absorbed by efforts invested in perfecting other cases) means breaches are not discovered or are punished too late. In his words 'one must be as concerned about under-enforcement as about over-enforcement'.<sup>144</sup> Although these are the words of the Directorate General, this has not been the attitude of DG COMP in the food sectors. The authority

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<sup>140</sup> European Commission, *Online platforms: Commission sets new standards on transparency and fairness*, (Press release, Brussels, 26 April 2018) [http://europa.eu/rapid/press-release-IP-18-3372\\_en.htm](http://europa.eu/rapid/press-release-IP-18-3372_en.htm). Notably, however, this is not an initiative of DG COMP.

<sup>141</sup> Case 298/83 *Comité des industries cinématographique des Communautés européennes (CICCE)* [1985] ECLI:EU:C:1985:150; Case T-219/99 *British Airways Plc v Commission of the European Communities* [2003] ECLI:EU:T:2003:343 and Case C-95/04 P *British Airways Plc v Commission of the European Communities* [2007] ECLI:EU:C:2007:166; Case 08/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343. Recently, the Commission fined for participation in a buyer cartel, see European Commission, 'Antitrust: Commission fines three companies €68 million for car battery recycling cartel' (Press release, 8.02. 2017) [http://europa.eu/rapid/press-release-IP-17-245\\_en.htm](http://europa.eu/rapid/press-release-IP-17-245_en.htm)

<sup>142</sup> Case IV/M.784 – *Kesko/Tuko*, Commission Decision 97/277/EC (1997); Case No IV/M.890 – *Blokker/Toys "R" Us* (1997); Case No IV/M.877 – *Boeing/McDonnell Douglas* (1997); Case No IV/M.1225 – *Enso/Stora* (1998); Case IV/M.1221 – *Rewe/Meinl* (1999) ; Case IV/M.1684 – *Carrefour/Promodes* (2000); Case COMP/M.3968 *Sovion/Südfleisch* (21.12.2005); Commission Decision M.7000 – *Liberty Global/Ziggo* (2014).

<sup>143</sup> In addition to a number of journal articles addressing topical issues in buyer power (cartels, abuse of buyer dominance, foreclosure, and merger control), a number of books and PhD thesis have addressed the issue. Blair R and Harrison J, *Monopsony in Law and Economics* (1st edn, CUP 2010) F van Doorn, *Buyer Power in EU Competition Law and Economics* (Eleven, 2015); V Daskalova, *The Monopsony Paradox Buyer Power and Enforcement of the EU Antitrust Provisions* (dissertation, 2016); Peter Carstensen, *Competition Policy and the Control of Buyer Power: A Global Issue* (Edward Elgar 2017). Notably, Prof. Carstensen argues that buyer power is even more problematic than seller power.

<sup>144</sup> Johannes Laitenberger (Director-General for Competition, European Commission), 'Accuracy and administrability go hand in hand' (Speech at CRA Conference Brussels, 12 December 2017) [http://ec.europa.eu/competition/speeches/text/sp2017\\_24\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2017_24_en.pdf)

has chosen to ‘play it long’, gather evidence, and err on the side of non-enforcement and non-investigation. The result – as noted above – has been that the focus of the debate has shifted – from competition law enforcement to ‘other remedies’. Farmers and food producers have been much more successful to obtain protection on the basis of respectively the common agricultural policy and the exception for stricter national rules in Regulation 1/2003. The sum of regulatory responses is arguably much more damaging to competition and consumer welfare than a measured intervention with the tools of EU competition law would have ever been.

## 8. Conclusions

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

*‘...farming in the United States (and Europe too) has experienced a seemingly unending series of problems that have precipitated massive governmental interventions. These problems can be grouped under four main headings: unstable prices, an historical tendency toward poverty, wide swings in the financial fortunes of farm enterprises, and new problems introduced by the government in its attempts to solve the first three problems.’<sup>145</sup>*

These words ring true for the EU of today. It seems that regulating agricultural markets is a difficult task. There is a lot at hand that complicates the seemingly simple goal of sustaining an adequate standard of living for the farming community – there is the unpredictability of nature, all the more challenging due to climate change, there is the threat of pests and diseases; there are economic factors such as global trends and fashions in food and nutrition, the perishability of products, the availability of substitutes, the possibilities for export, the availability of imports. Amid these many global forces (of nature and markets), the buying power of contracting partners seems to be but one of many farmer woes. Nonetheless, the power of buyers is an important factor because the price that producers fixate the most on is the one ultimately received for the product – the purchasing price. Failing to address concentration on the purchasing may jeopardize the regulator’s ability to intervene to correct for other challenges in the sector (unpredictability of supply, unpredictability of demand, fickle global markets) or to achieve other goals within a given sector such g. environmental goals, rural development and social cohesion goals.

Concentration in purchasing markets has increased over the past decades with processors and retailers becoming major bottlenecks in the food supply chain. Arguably, this concentration is consistent with legal thresholds and the unfair trading practices are consistent with a competition culture which suggests that driving a hard bargain is okay as long as the consumer benefits. At the same time, the buyer power argument has not been vigorously studied – especially the issue of relevant market definition for purchasing markets, despite a number of

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<sup>145</sup> Frederik M. Scherer, *Industry Structure, Strategy, and Public Policy* (Pearson, 1997), p. 17.

contributions in the literature, pointing to a gap in existing doctrine.<sup>146</sup> EU competition law has the tools to intervene against buying power and unfair contractual practices. In fact, as argued, the EU has not shied from using these tools creatively in other sectors, even where the doctrinal boundaries have been less clear. It was only recently that rumors surfaced of the Commission intervening to investigate the purchasing practices of buying alliances in the food sector in Belgium and France.<sup>147</sup> So far, no abuse of dominance case has been pursued. No mergers of processors have been blocked; and of retail mergers, only two have been blocked.<sup>148</sup> No guidelines have been issued, or amended to reflect the concern with buying power and unfair trading practices. Until now, the Commission's stance has been that, when it comes to non-competition law issues, 'other' laws can be introduced.

This paper has taken a look at the consequences of delegating it all to 'other laws' – unfair trading laws, stricter competition rules and private regulatory schemes at the national level, and the reforms of the Common Agricultural Policy at the EU level, and argued that the sum of regulatory interventions has been counterproductive. It concluded that national-level legislation has not been entirely effective, given that purchasing markets for many products are EU-wide and purchasers have presence in multiple Member States or operate internationally via buying alliances. As for unfair trading laws, although they are important, they do not eliminate the bargaining power imbalance and they do not regulate the sensitive issue of price; therefore, even strict enforcement of good contracting practices might backfire with requests for lower price. Such legislation may help improve conditions of trade but it does not resolve the fundamental bargaining power imbalances which shape the content of the bargain. This is where competition law should play a role – by ensuring deconcentrated markets in which both buyers and sellers have a choice of contracting partners.<sup>149</sup>

As to the CAP, non-enforcement of the competition rules has played handsomely into the hands of farmer lobbies. Despite the EU's commitment to progressively transition from the era of subsidies to a more liberalized market with free competition, the CAP has taken a turn. Starting

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<sup>146</sup> Especially in the writings of Roger Blair, the combined insights of which are reflected in R Blair and J Harrison, *Monopsony in Law and Economics* (1<sup>st</sup> edn, CUP 2010). See also Ioanis Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (2006) 29(1) *World Competition*, 139. V Daskalova, *The Monopsony Paradox: Buyer Power and Enforcement of the EU Antitrust Provisions* (dissertation, 2016).

<sup>147</sup> There is no official press release yet. However, the news was spread on MLex. See Lewis Crofts, 'French, Belgian retailers face EU cartel probe over consumer-goods buying' (*MLex Market Insight*, 5 May 2017) <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/french-belgian-retailers-face-eu-cartel-probe-over-consumer-goods-buying>. Apparently, the Commission has concluded a number of dawn raids over suspicions about the activities of buying alliances in fast-moving consumer goods such as 'food, beverages, home care and personal care products'.

<sup>148</sup> With the notable exception of Kesko/Tuko in 1997 and the Blokker/Toys R Us acquisition in 1997 (related to the toy market, not food). No mergers in the food and agricultural sector have been blocked at the EU level since then. At time of writing, a merger between UK retailers Sainsbury and Asda, currently 'numbers 2 and 3' on the market is currently subject to controversy in the UK. See Jonathan Ford 'Watchdog needs to check out merits of supermarket merger' (29.04.2018 *Financial Times*) < <https://www.ft.com/content/d643b1ca-4b8e-11e8-97e4-13afc22d86d4> >.

<sup>149</sup> D Zimmer, 'The Basic Goal of Competition Law: To Protect the Opposite Side of the Market' in D Zimmer (ed), *The Goals of Competition Law* (Edward Elgar, 2012).

with the Milk Package, the 2013 CAP reform, and the Omnibus regulation of 2018, the CAP has strengthened the position of producers and their organizations, with the express goal of consolidating the supply side so that the buying power of other actors in the supply chain can be counterbalanced. Even so, CAP reforms have not succeeded to fully rid farmers of their troubles; calls for public support and measures against powerful contracting partners have not subsided. One definite loser of the combination of these policies is the consumer and the citizen<sup>150</sup>.

Finally, EU competition law – as a policy area and discipline of EU law – must also recognize some strategic losses. Much of the attention of the European Parliament in the 2000s was on the activities of DG Competition. Questions from Members of the European Parliament and framed the issue of UTPs and exploitation of buyer power in terms of competition law and requested that the Commission would intervene with the tool of competition law. Interest in deconcentrating markets and addressing unfair trading practices has not subsided, but it has shifted to other, more receptive, Commission services. A new study is launched into the possibility of regulating unfair trading practices in the food sector, notably by DG Agriculture.<sup>151</sup> In the digital sector, a regulation is proposed to tackle unfair platform-to-business practices; the initiators are DG CONNECT and DG GROW (responsible for Internal Market). At the national level, divergence from the standard EU competition law provisions has been normalized.

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

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<sup>150</sup> Although, surprisingly, a 2016 Eurobarometer study has found that ‘four out of five EU citizens believe it is important to strengthen farmers’ role in the food chain.’ See Samuel White, ‘Commission launches public consultation on food chain fairness’ (*Euractiv*, 16.08.2017) and also the website of the survey <http://ec.europa.eu/COMMFfrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2087>

<sup>151</sup> See the Inception Impact Assessment.

## Annex 1

Excerpts of a summary of “the views of NCAs expressed at the first meetings of the Joint Working Team on Milk (November 2009 and January 2010) converg[ing] on the following points”.<sup>152</sup> The NCA officials stated:

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

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

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

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

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

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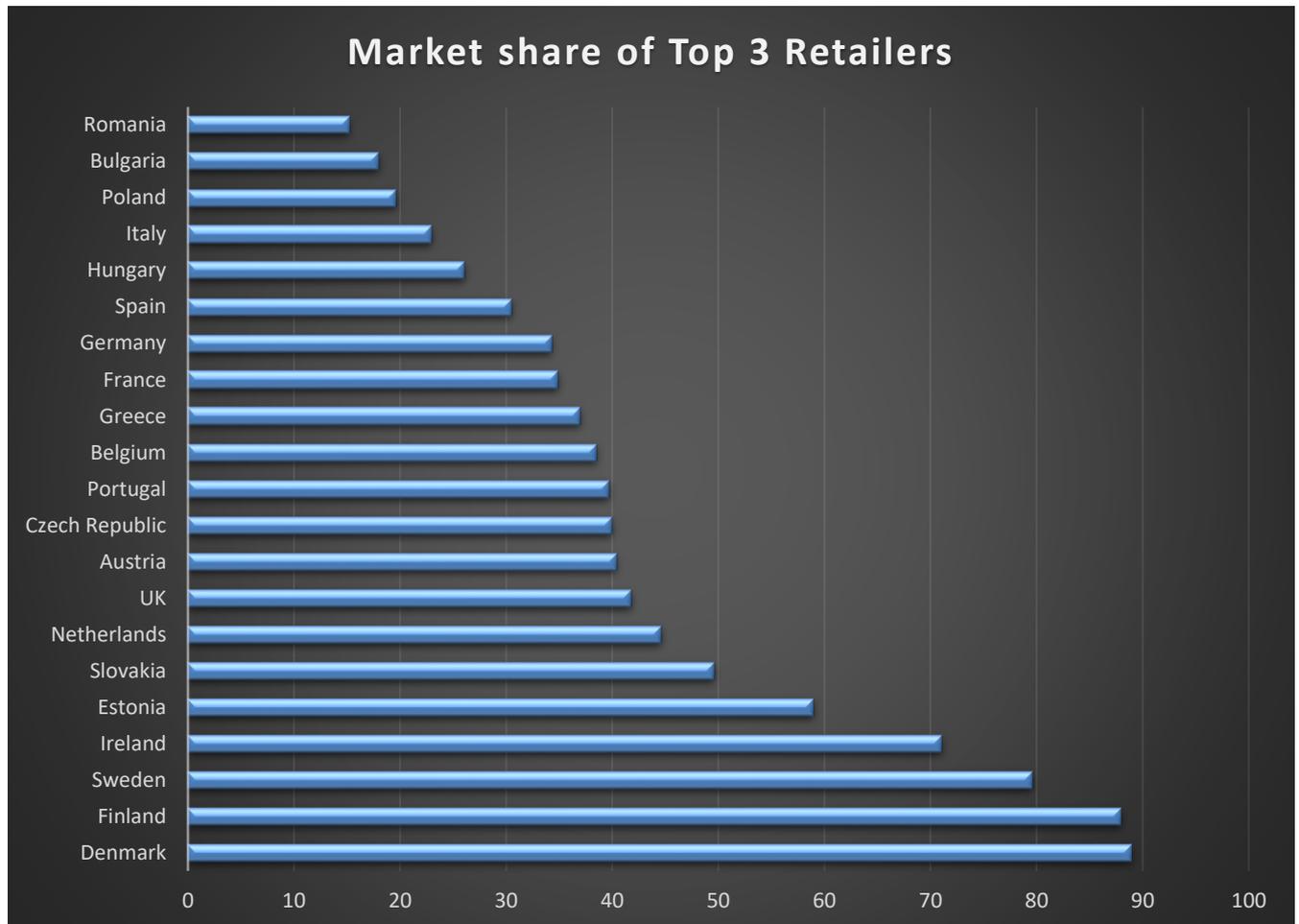
<sup>152</sup> European Commission, *The Interface between Eu Competition Policy and the Common Agriculture Policy (CAP): Competition Rules Applicable to Cooperation Agreements between Farmers in the Dairy Sector* (Working Paper, 2010) <[http://ec.europa.eu/competition/sectors/agriculture/working\\_paper\\_dairy.pdf](http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf)>, 28-30.

## Annex 2: UTPS

The Green Paper identifies the following UTPs:

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

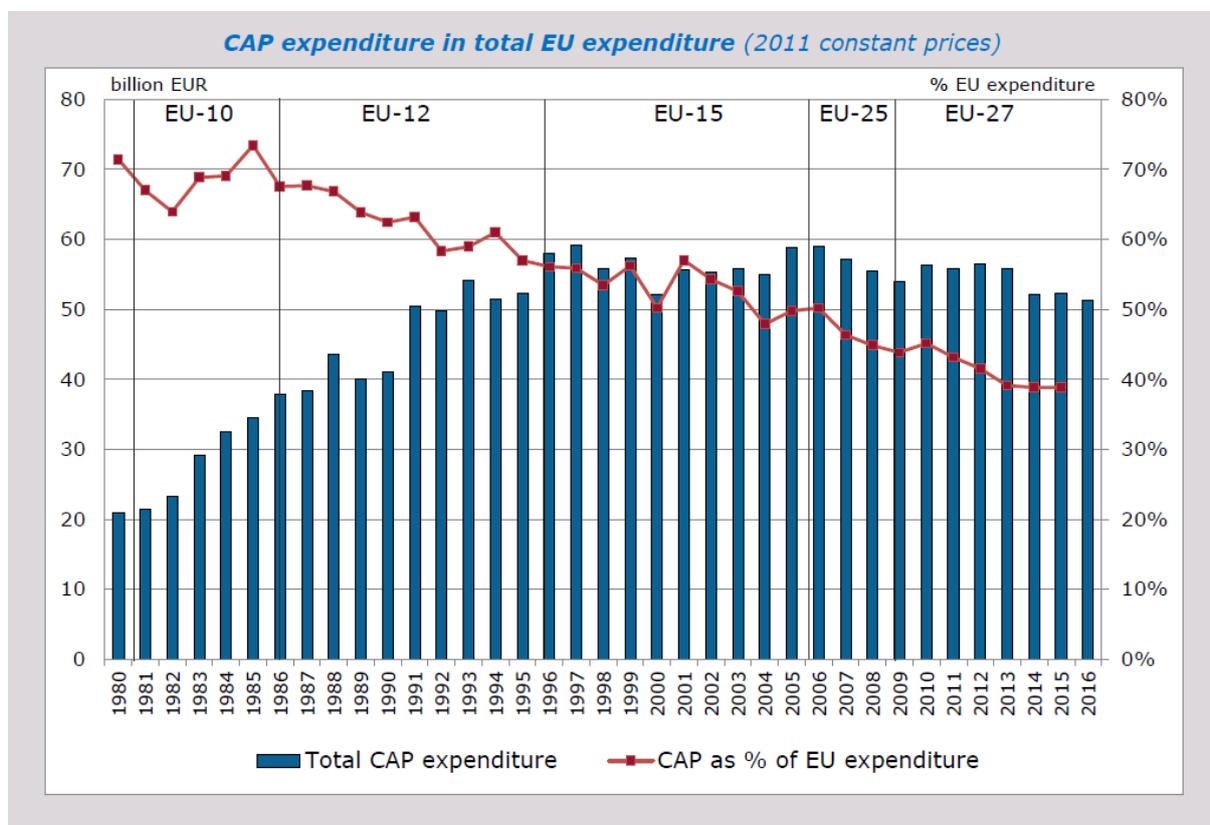
### Annex 3: Market Share of Top 3 Retailers per Country in the EU



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

[http://www.fooddrinkeurope.eu/uploads/publications\\_documents/Final\\_Data\\_Trends\\_30.4.2012.pdf](http://www.fooddrinkeurope.eu/uploads/publications_documents/Final_Data_Trends_30.4.2012.pdf), p. 19

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



Source of the table: European Commission, 'CAP post-2013: Key graphs & figures' (March 2017)  
[https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1_en.pdf) >