

Discussion Paper Series – CRC TR 224

Discussion Paper No. 304
Project B 05

**The Directive on Unfair Trading Practices in the Agri-Food Supply
Chain: Regulatory Ambitions and Legal Instruments**

Jens-Uwe Franck ¹

June 2021

¹ Department of Law and MaCCI, University of Mannheim

Funding by the Deutsche Forschungsgemeinschaft (DFG, German Research Foundation)
through CRC TR 224 is gratefully acknowledged.

The Directive on Unfair Trading Practices in the Agri-food Supply Chain: Regulatory Ambitions and Legal Instruments

Jens-Uwe Franck*

21 June 2021

ABSTRACT

The Directive on Unfair Trading Practices in the Agri-food Supply Chain is characterized by its objective to increase agricultural producers' income by redistributing the gains from trade along the supply chain. In this article, arguments are advanced that make it doubtful whether this goal can be achieved: the Directive's restrictions will (at best) only slightly increase the suppliers' relative bargaining power. Neither the attempt to limit the Directive's scope to cases of unequal bargaining power nor the ban of only those practices that are regarded as particularly "egregious" will ensure that the Directive's restrictions do not also preclude efficiency-enhancing practices. Nonetheless, given the legislature's wide discretionary power, the Directive could legally be adopted on the basis of Article 43(2) TFEU. While the Directive's focus is entirely on public enforcement, there are sound reasons to believe that the Directive assigns implicit rights to those parties that are within the Directive's protective scope and that are (potentially) aggrieved by infringements. The consequences of the incorporation of prohibited contract terms are analysed and potential legal bases for private rights of action are discussed.

Keywords: Directive (EU) 2019/633, European Union, Common Agricultural Policy, Unfair Trading Practices, Agri-food Supply Chain, Distribution, Retailing, Buyer Power, Contracts

JEL classification: K12, L14, Q18

* Department of Law and MaCCI, University of Mannheim. The author gratefully acknowledges funding by the Deutsche Forschungsgemeinschaft (CRC TR 224, project B05). I wish to thank Martin Peitz for initial discussion and comments on an earlier draft. I am grateful to Maximilian Schipke, Nils Stock and Simon Wizemann for valuable research assistance.

CONTENTS

I. INTRODUCTION	3
II. REDISTRIBUTING THE GAINS FROM TRADE AS THE DIRECTIVE'S PRIOR POLICY OBJECTIVE	4
1. On the distributive objective, its underlying assumptions and its policy background	4
2. Why the Directive's redistributive ambitions stand out	6
3. Why the redistributive ambitions are met with scepticism: raising crucial questions	9
a) Poor targeting?	9
b) Lack of effectiveness?	10
c) Indifference to efficiency?	11
III. TAKING A CLOSER LOOK AT THE DIRECTIVE'S RESTRICTIONS ON CONTRACTUAL FREEDOM	12
1. Can the Directive increase suppliers' bargaining power?	12
a) Determinants of bargaining power	13
b) How the Directive's restrictions may shift bargaining power	13
c) Implications	15
2. Is the Directive's scope limited to cases of unequal bargaining power?	16
a) Asymmetry in size and inequality in bargaining power	17
b) Implications	18
3. Exploring efficiency effects	19
a) Buyers' bargaining power and (in)efficient supply agreements	19
b) (In)efficiencies and per se unfairness	20
c) Implications	22
IV. IS THE DIRECTIVE'S LEGAL BASIS ADEQUATE?	22
1. The promotion of a fair standard of living for the agricultural community as a legitimate regulatory objective in its own right	23
2. On the coverage of non-Annex I products and the adoption of "other provisions" under Article 43(2) TFEU	24
3. Implications	26
V. ENFORCEMENT ARCHITECTURE	26
1. Explicit public enforcement – implicit private enforcement?	26
2. Elements of private enforcement	32
a) Effects on the contract	33
b) Actions for injunctive relieve and damages	37
VI. TOWARDS COMPREHENSIVE EU LAW ON UTPS IN B2B RELATIONSHIPS?	39
VII. CONCLUDING REMARKS	40

I. Introduction

The EU Directive on Unfair Trading Practices in the Agri-food Supply Chain¹ intervenes in business relationships along the agri-food supply chain. It prohibits certain contractual terms and other practices² on the basis of a presumed imbalance in power between “suppliers” and “buyers”. In view of this basic setting, with its focus on bilateral relations between businesses, one might imagine that the Directive could easily be understood and conceptualized as a private law measure, albeit with a regulatory impetus – a feature that, however, especially in the EU context, can hardly be regarded as extraordinary. Yet, at second glance, the Directive is characterized by some particularities that might amaze even the long-time observer of EU private law.

To begin with, the Directive is designed as an instrument of the EU’s Common Agricultural and Fisheries Policy and seeks to protect the interests of persons engaged in agricultural production: horticulture, livestock, aquaculture, cereals, dairy. More specifically, the principal aim of the measure is to increase these producers’ income. To attain such a redistributive effect, not only does the Directive intervene in the business relationships involving these producers; it also applies to the entire supply chain. Therefore, to increase the earnings of the agricultural producers, the Directive also applies further down the supply chain: food retailers are prohibited from certain practices towards manufacturers where an imbalance in power is presumed. What is more, while the Directive contains detailed provisions on public enforcement, private rights and remedies appear to be virtually absent. Thus, as regards its underlying political motivation, the implied regulatory mechanism and the envisaged enforcement instruments, the Directive appears quite exceptional.

Analysing these fundamental aspects of the Directive is essential to make sense of the Directive’s instruments and to develop normative guidance that can facilitate applying its rules and transposing them into Member States’ laws. As regards the latter aspect, it is clear that a sector-specific measure does not fit easily into domestic legal categories; one should indeed be beware of hasty classifications and attributions. Nevertheless, one way or the other, the Directive must be integrated into domestic law by the Member States’ legislatures³ and courts, and any gain in conceptual clarity may be of assistance in this respect.

¹ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. O.J. 2019 L 111/59. Hereinafter referred to as “the Directive” or “the UTP Agri-food Supply Chain Directive”. A detailed account of the preliminary work on the Directive and its legislative history is to be found in *Jan Ackermann, Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, 192–215; for an overview see *Hanna Schebesta/Tom Verdonk/Kai P. Purnhagen/Bert Keirsbilck*, Unfair Trading Practices in the Food Supply Chain: Regulating Right? (2018) 9 EJRR, 690 (690 ff.) (European Journal of Risk Regulation).

² While the majority of the unfair trading practices prohibited in Article 3 of the Directive can best be understood as mandatory contract law, others such as the ban on unlawful acquiring, use or disclosure of trade secrets (Article 3(1)(g) of the Directive) and the prohibition of commercial retaliation (Article 3(1)(h) of the Directive), can be conceived as business torts and/or as an infringement of a contractual duty to have regard for the rights and (legal) interests of the other party.

³ Member States must adopt the necessary measures to transpose the Directive by 1 May 2021. The respective measure must be applicable not later than 1 November 2021. See Article 13(1) of the Directive. The German legislature has implemented the Directive in the “Gesetz zur Stärkung der Organisationen und Lieferketten im Agrarbereich” (Act on the Strengthening of Organizations and Supply Chains in the Agricultural Sector), hereinafter referred to as the “Agri-Organizations and Supply Chains Act

II. Redistributing the gains from trade as the Directive's Prior Policy Objective

1. On the distributive objective, its underlying assumptions and its policy background

The EU legislature is explicit about the Directive's prime objective: benefiting agricultural producers by shifting profits generated through the sale and processing of agricultural products further up the supply chain. The first recital in the preamble to the Directive states that the "protection against unfair trading practices should be introduced to reduce the occurrence of such practices which are likely to have a negative impact on the living standards of the agricultural community". In this way, the legislature echoes the language of one of the objectives of the Common Agricultural Policy as laid down in Article 39(1)(b) TFEU,⁴ which together with Article 43(2) TFEU serves as the legal basis for the Directive.

In order to achieve the desired redistributive effect, the Directive focuses not only on the transactions in which agricultural producers are directly involved but also on those further down the supply chain. The legislature assumes an indirect negative impact on the living standards of the agricultural community "through a cascading of the consequences of the unfair trading practices occurring in the agricultural and food supply chain".⁵ Taken together, the redistributive mechanism intended by the Directive to enhance agriculture producers' welfare rests on essentially two assumptions. First, the ban of certain commercial practices results in a redistribution of the gains from trade⁶ from buyers to suppliers. Second, intermediary suppliers, such as food manufacturers, who benefit from the regulatory intervention, pass this benefit (at least in part) through to the agricultural producers ("trickle-up effect").

This distributive policy objective of the Directive is to be understood against the background of a transition in the EU's Common Agricultural Policy:⁷ while a large part of agricultural producers' income still stems from direct transfers,⁸ this share has been declining for years. What is more, in recent years the agricultural markets in the EU have been significantly liberalized. Certain quantitative restrictions, for instance the milk quota, have been abolished. Prices are closer to world market prices,⁹ a development the Commission regards as positive because the alignment "indicates that EU farmers are growing more competitive

(Agrarorganisationen-und-Lieferketten-Gesetz)". See Article 1 of the Zweites Gesetz zur Änderung des Agrarmarktstrukturgesetzes of 2 June 2021, Bundesgesetzblatt 2021 I 1278. The German Federal Government had submitted the underlying draft law and the explanatory memorandum on 25 January 2021. See Gesetzentwurf der Bundesregierung, Entwurf eines Zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, BT-Drs. 19/26102, available at <<https://dip21.bundestag.de/dip21/btd/19/261/1926102.pdf>>.

⁴ Article 39 TFEU reads: "The objectives of the common agricultural policy shall be: ... to ensure a fair standard of living for the agricultural community." See in more detail below sub IV.1.

⁵ Recital 7 of the UTP Agri-food Supply Chain Directive.

⁶ The term denotes the difference between the supplier's cost to deliver a product and the value that the buyer attaches to the product (in other words, the parties' "joint profits"). The price that the parties agree on determines how the gains from trade are split between supplier and buyer.

⁷ See *Rudolf Mögele*, Was tun gegen „UTPs“ in der Lebensmittelversorgungskette? – Eine neue EU-Richtlinie gibt Antworten, *EuZW* 2019, 481.

⁸ In claim year 2018, direct payments constituted on average 40 per cent of farming income. *European Commission, Directorate-General for Agriculture and Rural Development*, 2019 Annual Activity Report, Ref. Ares(2020)2219554 - 24/04/2020, 23.

⁹ See *European Commission* (fn 9) 20 (noting that "[i]n 2019, a weighted average of the EU market prices of various commodities was at 113% of equivalent world market prices").

internationally”,¹⁰ which is necessary because the “sector has moved away from trade-distorting support”.¹¹ Producers have increasingly turned to markets outside the EU. Quite a few producers have at times benefited from this development but also felt the negative effects of market volatility. Exchange-rate fluctuations, weather-related fluctuations in supply on the world markets, important bans because of infectious animal diseases and other political decisions on the international level may result in lower incomes.¹² For these and other reasons, the income situation of agricultural producers in the EU appears to be quite heterogenous; it differs significantly between regions and Member States, farm types and individual farms.¹³ All in all, however, the Commission assumes that the agricultural sector has a profitability problem. In an overarching view, the Commission noted that, between 2016 and 2018, farmers’ incomes were only 47 per cent of the average wage in the whole economy,¹⁴ a gap that in the vast majority of the Member States is only partially filled by subsidies.¹⁵

Against this background, the Commission sees a need to assist agricultural producers in securing a greater share of the gains in trade generated in the agri-food sector. Three mechanisms have been envisaged to this end: alongside the attempt to redistribute profits through the Directive, agricultural producers were given more freedom by way of exemptions¹⁶ to the competition rules to coordinate their sales and other activities via producer organizations.¹⁷ Moreover, as a third element, the Commission adopted a new regulatory measure to improve market transparency in the agri-food supply chain.¹⁸

¹⁰ *European Commission* (fn 9).

¹¹ *European Commission* (fn 9) 21.

¹² Given this increased risk exposure of European farms, there is an increasing need for risk management which is supported by the CAP. *Robert Finger/Nadja El Benni*, *Farm Income in European Agriculture: New Perspectives on Measurement and Implications for Policy Evaluation*, (2021) 48 ERAE, 253 (257) (*European Review of Agricultural Economics*).

¹³ *Berkeley Hill/Dylan Bradley*, *Comparison of Farmers’ Incomes in the EU Member States*, Study for the European Parliament’s Committee on Agriculture and Rural Development, 2015, 12–15, in particular at 13 (“The distribution of income at the farm level is very unequal”). See also *European Commission, Directorate-General for Agriculture and Rural Development, Developments in the income situation of the agricultural sector*, December 2010, 2 (“the income situation of farms ... is highly heterogenous”).

¹⁴ *European Commission* (fn 9) 19. Note that this figure reflects the income situation of farmers and farm households only to a limited extent. It does not take into account direct payments or sources of income outside farming (such as power generation), pensions or income of other household members (*id.*, fn 33). Looking at the household disposable incomes, it has been concluded that “the evidence points to farmers NOT being a particularly low-income sector of society in most Member States”: *Berkeley Hill/Dylan Bradley* (fn 13) 12.

¹⁵ *Id.* The Commission notes that between 2016 and 2018, only in Estonia, Slovakia and the Czech Republic farming income *including* subsidies went beyond the average wage in the whole economy.

¹⁶ The so-called Omnibus Regulation (EU) 2017/2393 introduced, among other things, a horizontal competition derogation. O.J. 2017 L 350/15. See Article 152(1a) of Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products (as amended): “By way of derogation from Article 101(1) TFEU, a producer organisation recognised under paragraph 1 of this Article may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production.”

¹⁷ The potential impact of producer organizations on the farmers negotiation power has been analyzed by *Alessandro Sorrentino/Carlo Russo/Luca Cacchiarelli*, *Market Power and Bargaining Power in the EU Food Supply Chain: The role of Producer Organizations*, *New Medit* 4/2018, 21–31.

¹⁸ *Commission Implementing Regulation (EU) 2019/1746* of 1 October 2019 amending *Implementing Regulation (EU) 2017/1185* laying down rules for the application of Regulations (EU) No 1307/2013 and (EU) No 1308/2013 of the European Parliament and of the Council as regards notifications to the Commission of information and documents. O.J. 2019 L 268/6.

2. Why the Directive's redistributive ambitions stand out

The Directive on UTPs in the Agri-food Supply Chain is not the first EU law measure that bans certain business practices, categorizing them as “unfair”. The best-known examples are the Directive on Unfair Terms in Consumer Contracts¹⁹ and the Unfair Commercial Practices Directive (“UCP Directive”).²⁰ Both directives are in the area of business-to-consumer (“b2c”) protection. Commercial practices in business-to-business (“b2b”) transactions are less frequently regulated; this is particularly the case at EU level, apparently because the harmonization of such rules has been considered less pressing for the functioning of the internal market. The few exceptions include the Directive on Misleading and Comparative Advertising²¹ and the Late Payment Directive.²²

What distinguishes these instruments from the Directive on UTPs in the Agri-food Supply Chain, however, is that they are not driven by an ambition to redistribute surpluses generated by transactions to the benefit of a defined group of market participants. This is also true in particular for consumer protection measures, as can be illustrated with a look at the UCP Directive. The Directive aims to protect consumers against commercial practices that “distort” their “economic behavior”²³ by way of “influencing” their “transactional decisions in relation to products”.²⁴ Thus, the UCP Directive bans business practices that restrict consumers’ freedom of choice and decision-making. Consumers shall be empowered to make transaction decisions that meet their preferences. In that sense, the UCP Directive’s approach can be characterized as “market-rational”: it intends to facilitate market mechanisms and guarantee market transparency but does not aim to rectify market results.²⁵ This regulatory concept is further reflected by the fact that the UCP Directive identifies misleading and aggressive commercial practices as the two types of (unfair) commercial practices that are “by far the most common”²⁶ and, therefore, are specifically addressed in Articles 6, 7 and 8 of the UCP Directive.

Hence, while the UCP Directive seeks to facilitate “fair” market transactions between consumers and businesses, it does not pursue a redistributive agenda. Certainly, the UCP Directive is meant to serve the economic interests of the consumers and a ban on certain business practices will have distributional consequences. Nonetheless, this does not change the fact that the UCP Directive is in essence neutral as to what is a “fair” split of the surplus generated by the covered transactions.

¹⁹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. O.J. 1993 L 95/29.

²⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”). O.J. 2005 L 149/22.

²¹ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. O.J. 2006 L 376/21.

²² Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. O.J. 2011 L 48/1.

²³ Article 5(2)(b) and Recital (13) 2nd sentence UCP Directive.

²⁴ Recital (7) 1st sentence UCP Directive.

²⁵ This terminological dichotomy between market-rational and market-rectifying regulation I have borrowed from *Thomas Wilhelmsson*, *Social Contract Law and European Integration*, 1995, 126.

²⁶ Recital 13, 4th sentence UCP Directive.

This is in marked contrast to the Directive on UTPs in the Agri-food Supply Chain: here the regulatory intervention is driven by the assumption that agricultural producers do not receive a fair share of the economic surplus generated by producing, processing and selling agricultural products and foodstuffs. The prohibition of certain commercial practices on the part of the buyers along the supply chain is intended to remedy this unwanted outcome of market processes.

This is also a categorical difference from Member States' laws that are meant to protect businesses from unfair contract terms. The majority of the EU Member States provide for such protection in some form,²⁷ typically by way of judicial review of general terms and conditions.²⁸ Standard justification²⁹ for the latter instrument is Akerlof's "lemon market" model of adverse selection due to the systematic information asymmetries that result from prohibitive transaction costs.³⁰ Ideally, the yardstick for the judicial review should therefore be the contractual terms on which reasonable and fair parties would have agreed in the absence of transaction costs. There are good reasons to assume that those parties would have opted for terms that maximize the joint profits produced by their contractual relationship.³¹ It is certainly difficult for courts to identify the allocation of contractual risks that would be most efficient and it is probable that judges will in fact also use their power to review b2b contracts to implement their individual ideas of equitable justice. However, in contrast to the concept that underlies the Directive on UTPs in the Agri-food Supply Chain, there seems to be consensus that the judicial review of standard terms, while meant to prevent an inefficient allocation of costs and risks, should not be conceptualized as an instrument for redistributing the gains from trade to the benefit of a party assumed to be "inferior" or "weaker".

Finally, conceptual differences from competition law, which is frequently concerned with buyer power in distribution chains,³² should be pointed out. As competition law is, first and foremost, concerned with the protection of consumer welfare, the focus is on theories of harm, which are indifferent to how the gains from trade are divided between various businesses along the

²⁷ The Commission has noted that only seven Member States do not provide for any form of protection against unfair terms in b2b contracts. Commission Staff Working Document, Impact Assessment, Annexes, Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (26 April 2018), SWD(2018) 138 final, Part 2/2, 91.

²⁸ See, for instance, section 307(1) of the German Civil Code (Bürgerliches Gesetzbuch), which also applies to b2b contracts. While EU secondary legislation contains a prohibition of unfair terms not individually negotiated that applies only to consumer contracts (see above fn 19), under both the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) the judicial review of standard terms is also applicable to b2b contracts. See PECL, art 4:110, and DCFR, arts II. – 9:405 and II. – 9:408.

²⁹ See *Ole Lando*, Is Codification Needed in Europe? Principles of European Contract Law and the Relationship to Dutch law, (1993) (ERPL) 1, 157 (165) (European Review of Private Law); *Hans-Bernd Schäfer/Claus Ott*, The Economic Analysis of Civil Law, 2004, 370–73; *Jürgen Basedow*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, 8th ed. 2019, Vor § 305 paras 4–8.

³⁰ *George A. Akerlof*, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, (1970) 84 QJE, 488–500 (Quarterly Journal of Economics).

³¹ Note that assuming that the parties' common interest lies in a maximization of the gains from trade cannot only be defended on grounds of efficiency but also on grounds of fairness as it requires each party to give the respective other party's interest equal weight with her own interest. *Charles J. Goetz/Robert E. Scott*, Principles of Relational Contracts, (1981) 67 Va L. Rev., 1089 (1114) (Virginia Law Review).

³² On the overlap between the UTP Agri-food Supply Chain Directive and EU competition law see *Victoria Daskalova*, The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks? (2019) 10 JECLAP, 281–296 (Journal of European Competition Law and Practice).

supply chain.³³ For competition law analysis, positive effects on producers are generally not regarded as relevant welfare enhancements per se, but only insofar as they are assumed to (indirectly) benefit the final consumers.³⁴ While it is true that Article 102 TFEU also prohibits the imposition of “unfair purchase or *selling prices* or other unfair trading conditions”, it is not clear to what extent this category of abuse protects suppliers’ interest in receiving a fair share of the gains from trade.³⁵ Nevertheless, competition authorities and courts in the Member States have repeatedly signalled their readiness to use competition law instruments to address imbalances in bargaining power in the food-retail sector.³⁶ For instance, with a view on an abuse of buyer power by retailers in the agri-food supply chain, the German Federal Court of Justice (Bundesgerichtshof) has clarified that the category of abuse enshrined in Article 19(2) no. 5 of the Competition Act (the so-called “*Anzapfverbot*”)³⁷ is meant not only to protect competing buyers from distortions of competition but also to directly protect suppliers from unfair terms and conditions imposed on them by retailers with buyer power.³⁸ This practice shows that there are indeed overlaps between the regulatory approach of the Directive and competition enforcement.

Owing to these overlaps, the German legislature considered procedural precautions necessary to avoid inconsistencies in the enforcement of the two legal regimes:³⁹ the authority responsible for the enforcement of the Directive’s prohibitions (as transposed into German law)⁴⁰ may establish an infringement and issue orders to remedy an infringement only “in consultation

³³ See, for instance, *Stefan Thomas, Ex ante and ex post control of buyer power*, in Fabiana Di Porto/Rupprecht Podszun, *Abusive Practices in Competition law*, 2018, 283, 291–299 (downstream exclusion), 300–302 (allocative efficiency), 309–315 (dynamic efficiency); *Sarah Legner, Schadenstheorien bei Nachfragemacht im europäischen und deutschen Kartellrecht*, 2019, 84–119, 176–182. But see also *Ioannis Lianos/Claudio Lobardi, Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law? (N°1-2016) Concurrences 22–35* (stressing the significance of the concept of superior bargaining power for competition law, first, from a normative perspective, considering a “holistic” competition law model and adopting a “global value chain approach”; second, from a descriptive perspective, as legislatures, competition authorities and courts are engaging with the concept; and third, as new tools of competition law are framed “in order to deal with situations of unequal bargaining power in specific setting related to the food value chain”).

³⁴ This can be seen, for instance, in the EU competition practice on Article 102 TFEU, which is said to be “concerned with the protection of competition [for the benefit of consumers] rather than the protection of competitors”. *Richard Whish/David Bailey, Competition Law*, 9th ed. 2018, 202 f. (referring to the ECJ’s judgments *Deutsche Telekom, TeliaSonera, Post Danmark I, Post Danmark II* and *Intel* and the Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, paras 5, 6, and 23).

³⁵ For a critical position in this respect see, for instance, *Thomas* (fn 33) 302–308, and *Legner* (fn 33) 158–173. In any case, the prohibition of exploitative abuse pursuant to Article 102 TFEU would apply only to market-dominant buyers and arguably only in cases of entrenched market dominance.

³⁶ See *Ioannis Lianos/Claudio Lobardi (N°1-2016) Concurrences 22, 27–32; Ioannis Lianos/Valentine Korah/Paolo Siciliani, Competition Law: Analysis, Cases & Materials*, 2019, Supplement to Chapter 10, S.10.8.2.2. (“Superior bargaining power and the emergence of fairness-driven competition law”).

³⁷ Article 19(2) no. 5 of the Competition Act reads: “An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services ... 5. requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.” Note that the provision does not only address market dominant firms but is also applicable to “undertakings in relation to [other] undertakings which depend on them”. Article 20(2) of the Competition Act. The translation of the provisions is taken from <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0057>.

³⁸ *BGH 23.1.2018 – KVR 3/17 – Hochzeitsrabatte I*, *Juris*, paras 33–57.

³⁹ *Gesetzentwurf* (fn 3) 48.

⁴⁰ The competent authority is the Federal Agency for Agriculture and Food (Bundesanstalt für Landwirtschaft und Ernährung). See section 3(3) and (3) of the Agri-Organizations and Supply Chains Act (*Agrarorganisationen-und-Lieferketten-Gesetz*) and *Gesetzentwurf* (fn 3) 40.

with” (“*im Einvernehmen mit*”) the German competition authority (the Bundeskartellamt).⁴¹ It was also stipulated that the same Higher Regional Court that decides on appeals against the Bundeskartellamt’s decisions has jurisdiction for actions against these decisions of the enforcement authority.⁴² The Bundeskartellamt is a party to these court proceedings.⁴³

3. Why the redistributive ambitions are met with scepticism: raising crucial questions

The Directive seeks to redistribute the gains from trade in the agri-food supply chain by restricting the (non-price) terms of bilateral transactions. For several reasons, this ambition should be treated with scepticism.

a) Poor targeting?

Redistribution can be targeted precisely via taxation and direct transfer payments to those agricultural producers that have to cope with low revenues or those that are in serious financial trouble. By contrast, if we assume that the redistributive mechanism envisaged by the Directive is effective, it will potentially benefit all agricultural producers, regardless of their actual income situation, which is in fact quite heterogenous.⁴⁴

In particular, it is important to note that the limitations on the scope of the Directive’s restrictions on the terms of bilateral relations do not limit which agricultural producers might ultimately benefit from the intervention. If, for example, these restrictions result in a redistribution of the gains from trade from a large retailer to a medium-sized manufacturer, it is plausible to assume that parts of those shifted profits will be passed through to the latter’s suppliers. Thus, in line with the trickle-up effect assumed and intended by the Directive, agricultural producers whose annual turnovers exceed EUR 350,000,000 and who, therefore, are not within the scope of the Directive,⁴⁵ may also expect to benefit from it.

The point here is not to query whether or not the redistribution of gains from trade is less legitimate when it is (very) large agricultural producers⁴⁶ that benefit; in fact, there seems to be a societal preference for subsidizing small family farms rather than (very) large farms.⁴⁷ The crucial insight at this point is that the legislature was not concerned with precision in terms of neediness. Rather, the Directive is designed to redistribute profits to the benefit of all agricultural producers, regardless of their size or how profitable their businesses actually are.

⁴¹ Section 26(2), 2st sentence of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

⁴² Section 30(1), 2st sentence of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

⁴³ Section 34 no. 3 of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

⁴⁴ See for a general account of the argument that the promotion of distributional equity via the legal system is less precise than the use of the tax and transfer system *A. Mitchell Polinsky, An Introduction to Law and Economics*, 5th ed. 2019, 162–164.

⁴⁵ Article 1(2) of the Directive.

⁴⁶ See *European Commission* (fn 10) 24: “Big farms managing over 250 ha represent 1.3% of farms, manage 28.2% of the total farmland and receive 23.0% of total direct aid.”

⁴⁷ *Finger/El Benni*, (2021) 48 ERAE, 253 (254–255).

b) *Lack of effectiveness?*

Whether the intended redistribution of profits can really work essentially depends on two preconditions: first, the Directive's restrictions on bilateral contractual relations ensure that suppliers get a larger share of the joint profits and, second, in cases where it is intermediary suppliers that benefit from this, this share will be passed through to the agricultural producers.

As regards the latter condition, in its proposal for the Directive the Commission indeed relied on a trickle-up effect, claiming that "UTPs occur along the food supply chain and have repercussions that are likely to be passed through to agricultural producers".⁴⁸ It has been critically noted⁴⁹ that the Commission could not substantiate this claim with solid empirical evidence.⁵⁰ Nevertheless, depending on the competitiveness of the respective upstream markets and the individual bargaining power of the respective parties,⁵¹ it is plausible to assume that intermediary suppliers let their upstream suppliers participate in the higher revenues that might result from the Directive's restrictions of their downstream contractual relations.

The first precondition, however, is rather more critical: might the Directive's restrictions indeed trigger a shift of profits from buyers to sellers in a given bilateral relationship? There is no doubt that the Directive bans practices that would allow buyers to shift risks and costs and, therefore, to reduce suppliers' profit margins. The *black list* in Article 3(1) of the Directive prohibits payment delays, order cancellations at short notice, unilateral changes of contract terms and so forth. Article 3(2) of the Directive contains a *grey list* of practices through which buyers may also pass on risks and costs to suppliers. These practices are not illegal per se but they are only enforceable if they have been "previously agreed in clear and unambiguous terms". In this way, buyers are prevented from deliberately leaving terms of supply initially open and incomplete, only in order to require payments afterwards, for instance for promotion, advertising or marketing.

Hence, to be sure, the Directive hinders certain practices that have "distributional consequences"⁵² as they would allow buyers to extract higher profits from their suppliers. Yet, if the EU legislature's assumption is correct that, within the Directive's scope, buyers may impose these terms due to their superior bargaining power, what would then prevent these buyers from "compensating" for the prohibited practices through lower prices or equivalent (non-regulated) non-price terms?

First of all, one might argue that, as these practices appear to be widespread, their use seems to be a convenient way for buyers to shift the gains from trade to their benefit. But, apart from

⁴⁸ *European Commission*, Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, 6 (see also at 2, 13 and 16).

⁴⁹ *Schebesta/Verdonk/Purnhagen/Keirsbilck*, (2018) 9 EJRR, 690 (698).

⁵⁰ See Commission Staff Working Document, Impact Assessment, "Initiative to improve the food supply chain (unfair trading practices)", SWD(2018) 92 final, 15 (noting that "there is little empirical data going beyond a few case studies which makes it difficult to establish the overall harm caused by UTPs").

⁵¹ See on the concept of "bargaining power" below sub III.1.a).

⁵² *Fabrizio Cafaggi/Paola Iamiceli*, Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive, (2019) ERPL, 1075 (1091) (European Review of Private Law).

the fact that the prevalence of these practices can just as well be seen as an indication that they are efficiency-enhancing contractual arrangements,⁵³ even if buyers under the Directive would have to resort to less efficient mechanisms to extract profits from suppliers, that would only slightly reduce their incentives to do so. Moreover, one might speculate that it is easier for buyers to impose profitable non-price terms than lower prices, because the distributive effects of the former are less easily recognizable and assessable for the suppliers. However, this presupposes assumptions about information deficits, cognitive biases and behavioural patterns on the part of the suppliers that may be true in individual cases but which cannot be assumed to be systematic or, at most, may account for only a small fraction of the redistribution effects through terms that are presumed to be “unfair”. The suppliers to whom the Directive applies might be relatively small, but they are nonetheless professional businesspeople.⁵⁴ They are repeat players in trade just like the buyers. There is therefore little reason to assume that they could not appreciate that they have to agree to conditions unfavourable to them.

In the light of this, the crucial question to assess the prospect of effective redistributions is: can the Directive’s restrictions actually not only try to cure symptoms but strengthen the bargaining power of the suppliers vis-à-vis the buyers? The answer to this requires a more detailed consideration of the phenomenon of bargaining power and of the content of the terms prohibited by the Directive. As will be shown below,⁵⁵ the Directive’s bans of certain practices will (at best) only slightly increase the suppliers’ relative bargaining power by increasing the value of their outside options.

c) Indifference to efficiency?

From a social welfare perspective, contractual terms are efficient if they maximize the gains from trade. This requires that contractual risks have to be borne by the party that is in the best position to avoid, minimize or insure against them. Given that the Directive restricts the parties’ contractual freedom to distribute risks and does so based on a redistributive agenda, that may raise suspicion that the Directive entails systematic inefficiencies and, thus, welfare losses. What is more, an inefficient risk distribution is also hazardous with regard to the Directive’s redistributive objective: if, as a consequence of the Directive’s intervention, the terms of the trade are suboptimal, there is less surplus to be divided between the parties and, therefore, even if suppliers acquire a better bargaining position through the intervention, they might nonetheless be worse off. The Union legislature was aware of this potential objection to the Directive’s approach:

When deciding whether a particular trading practice is considered unfair, it is important to reduce the risk of limiting the use of fair and efficiency-creating agreements agreed between parties.⁵⁶

However, the legislature presumes that this risk is to be reduced so that promotion of efficiency and the pursuit of distributive justice go hand in hand:

⁵³ See below sub III.3.b).

⁵⁴ But note that economies of scale and scope may explain that larger supplier negotiate more sophisticatedly. See on the relation between size and bargaining power below sub III.2.a).

⁵⁵ See below sub III.1.b).

⁵⁶ Recital 16, 1st sentence of the UTP Agri-food Supply Chain Directive.

This proposal aims at limiting UTPs in the food supply chain by ensuring a minimum level of protection across the EU through a framework that outlaws the most egregious UTPs and provides possibilities for redress. By removing an impediment to efficiency, the proposal would also improve the functioning of the food supply chain in general.⁵⁷

According to the Directive's concept, the suspected trade-off can be avoided in two ways. First, as already indicated in the aforementioned quote ("most egregious UTPs"), from the legislature's point of view the Directive bans only those practices that entail an evidently inefficient allocation of risks.⁵⁸ Second, it is emphasized that the Directive's intervention is limited to situations where these practices are the result of an exercise of superior bargaining power:

imbalances in bargaining power are likely to lead to unfair trading practices [that] may ... impose an unjustified and disproportionate transfer of economic risk from one trading partner to another.⁵⁹

Against this background, a denial of a trade-off between efficiency and the pursuit of distributive justice can be substantiated based on three questions to be discussed below: is the scope of the Directive's intervention in fact limited to situations of unequal bargaining power?⁶⁰ And, if so, does this allow the conclusion that the banned practices are to be considered efficiency-decreasing throughout?⁶¹ Or does the Directive only ban practices that are inefficient per se anyway?⁶²

III. Taking a closer look at the Directive's restrictions on contractual freedom

1. Can the Directive increase suppliers' bargaining power?

The phenomenon of buyer power in the agri-food supply chain, as addressed by the Directive, relates to a reality of markets in which more or less tight oligopolies face each other, where contracts are individually negotiated between buyers and sellers who know each other, where, consequently, price and non-price terms for each transaction may differ substantially and where, moreover, parties typically negotiate non-linear tariffs (including slotting allowances, rebates for various commercial services etc.). In such a setting, standard monopsony modelling,⁶³ which rests, inter alia, on the assumptions that prices are uniform and that buyers and sellers meet each other on anonymous markets, is not a particularly helpful tool. Instead, recourse to a bilateral bargaining approach is promising.⁶⁴

⁵⁷ *European Commission* (fn 48) 27, see also at 1 ("The proposal should ensure that these [firms operating in the food supply chain] are able to compete on fair terms, thereby contributing to the overall efficiency of the chain.") and at 13 ("UTPs that occur at subsequent chain levels may have a negative impact on agricultural producers and in general on the efficiency of the food supply chain").

⁵⁸ See also the characterization of the practices that are blacklisted under the Directive in recital 16, 3rd sentence of the UTP Agri-food Supply Chain Directive ("However, certain trading practices are considered as unfair by their very nature and should not be subject to the parties' contractual freedom").

⁵⁹ Recital 1, 2nd and 3rd sentences of the UTP Agri-Food Supply Chain Directive.

⁶⁰ See below sub III.2.a).

⁶¹ See below sub III.3.a).

⁶² See below sub III.3.b).

⁶³ See *Roger D. Blair/Christine Piette Durrance*, *The Economics of Monopsony*, in *American Bar Association, Issues in Competition Law and Policy*, Vol. III, 2008, 393–407. See also *Jeffrey Church*, *Background Note, OECD Policy Roundtable, Monopsony and Buyer Power*, 2008, 19 (39–42).

⁶⁴ *Patrick Rey*, *Retailer Buying Power and Competition Policy*, in *Barry Hawk* (ed.), *Annual Proceedings of the Fordham Corporate Law Institute*, 2001, 487 (488).

a) *Determinants of bargaining power*

Bargaining theory⁶⁵ has developed a model of bilateral negotiations according to which the concept of bargaining power is understood as determining how the realized gains from trade are split between two contracting parties. Viewed from this angle, the bargaining power of each party depends, first of all, on the *value of its best outside option*. This is based on a consideration of opportunity costs: why should a party settle for a smaller profit than it could acquire through an alternative transaction?

This is true both for buyers and sellers along the supply chain: the bargaining power of manufacturers or retailers as buyers depends on the expected profits if they changed their suppliers or their product portfolio. For example, some products may have the status of “must stock items” because a retailer can scarcely afford to do without them owing to consumer brand loyalty. If, in contrast, consumers have no strong preferences for one brand, suppliers have a relatively weak bargaining position vis-à-vis the retailers.⁶⁶ Moreover, the sale of own brands may bestow substantial bargaining power on retailers.⁶⁷

Conversely, producers’ and manufacturers’ bargaining power as sellers is determined by how much profit they could make when selling their products to other buyers or by reducing their quantity. Retailers may therefore benefit from a gatekeeper position as they effectively control access to a certain group of consumers. This may be the case, for instance, because of a one-stop shopping effect (where consumers do not switch retailers just because one product is unavailable) or if they face little or no competition in some local areas.⁶⁸ Retailers may successfully promote consumer loyalty by offering reliable services, quality certification, loyalty programmes or other benefits.⁶⁹

If the value of both parties’ best outside option is deduced from the total surplus of the transaction, a residual surplus should be left to make the transaction worthwhile; otherwise, parties would be better off not contracting but using their respective outside option. This residual surplus will be divided according to a sharing rule, which is determined by each party’s *patience*, i.e. the costs incurred if the transaction is delayed. This may depend, for example, on a party’s liquidity or whether perishable products⁷⁰ are involved. Besides this ability to delay a transaction, the sharing rule also depends on other factors such as the parties’ negotiation skills.

b) *How the Directive’s restrictions may shift bargaining power*

According to the bargaining theory as outlined above, the Directive’s capacity to effectively improve suppliers’ bargaining position depends on whether it increases the value of suppliers’ outside options (and/or reduces the value of buyers’ outside options) or allows the supplier to

⁶⁵ The following application of bargaining theory to the agri-food supply chain draws on *Roman Inderst/Nicola Mazzarotto*, Buyer Power in Distribution, in American Bar Association, Issues in Competition Law and Policy, Vol. III, 2008, 1953–1978.

⁶⁶ *Rey* (fn 64) 487 (489–490).

⁶⁷ *Rey* (fn 64) 487 (497); *Inderst/Mazzarotto* (fn 65) 1953 (1963).

⁶⁸ *Inderst/Mazzarotto* (fn 65) 1953 (1960).

⁶⁹ *Rey* (fn 64) 487 (491–492).

⁷⁰ A sector-specific liquidity risk is due to the high price volatility, which in turn is the result of the short-term inelasticity of supply in case of perishable goods. *Rey* (fn 64) 487 (491 f.).

be more patient when bargaining.⁷¹ Looking at the practices prohibited, it appears that there is indeed some plausibility of this happening. Pursuant to Article 3(1)(b) of the Directive, buyers will be prohibited from cancelling:

orders of perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products; notice of less than 30 days shall always be considered as short notice; Member States may set periods shorter than 30 days for specific sectors in duly justified cases.

Accordingly, as a matter of principle, no buyer of perishable goods may contractually secure the right to cancel an order with a notice period of less than 30 days. This restriction guarantees suppliers a reasonable period of time to find an alternative outlet for their products. At the same time, it takes away the buyers' leverage to threaten to cancel an order for perishable products at short notice.⁷² The value of the parties' respective outside options may thus change in such a way that the suppliers have more bargaining power.⁷³

Another instance is the inclusion of unlawful acquiring, use or disclosure of the supplier's trade secrets in the Directive's *black list*.⁷⁴ This reinforcement of the protection of suppliers' know-how and business information is aimed at preventing a buyer from using this information in negotiations with its supplier or with competing suppliers or to create or strengthen (competing) own brands.⁷⁵ Thus, this ban has no impact on bargaining power in a simple bargaining model as outlined above; it only bites if one considers dynamic bargaining. In its scope, the provision is aligned with the Trade Secrets Directive.⁷⁶ The case of a buyer to whom the supplier discloses a trade secret in the course of their business relationship, and who either reveals this secret in negotiations with third parties or uses it to develop or improve her own (competing) products, may fall under the prohibition of unlawful use and disclosure of trade secrets pursuant to Article 4(3)(b) and/or (c) of the Trade Secrets Directive. However, this presupposes that the buyer thereby breaches a duty not to disclose the trade secret or to use

⁷¹ *Inderst/Mazzarotto* (fn 65) 1953 (1975).

⁷² Recital 20, 1st sentence of the UTP Agri-food Supply Chain Directive.

⁷³ To be sure, if, as a consequence of the intervention, terms are suboptimal, there is less surplus to be divided and therefore, suppliers may have a better bargaining position but might nonetheless be worse off. See on efficiency effects below sub III.3.

⁷⁴ Article 3(1)(g) of the UTP Agri-Food Supply Chain Directive. The Commission's proposal did not contain a corresponding provision. Its insertion was proposed by the European Parliament's Committee on the Internal Market and Consumer Protection. See *European Parliament*, 10.10.2018, A8-0309/2018, Report on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (72–73), Amendment 29 (87) and Amendment 53 (143). The Committee does not give reasons for the proposed amendments, but remarks that the "practice was in the Commission's Green paper" (see below fn 75). Note that the final text of the provision deviates from the proposed amendments. Unfortunately, there is no further explanation on this in the subsequent legislative documentation.

⁷⁵ See *European Commission*, 31.1.2013, COM(2013) 37 final, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, 19 ("While it is legitimate for a party to request some information on the products proposed, the details received should not be used, for example, to develop its own competing product, which would deprive the weaker party of the results of its innovation").

⁷⁶ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. O.J. L 157/1.

it in this way.⁷⁷ Such a duty may arise in particular from an implied term of the supply agreement.

Yet another instance concerns late payments for agricultural and food products, prohibited by Article 3(1)(a) of the Directive. The provision defines mandatory payment periods of 60 days or (in case of perishable products) 30 days, starting *either* with the date of the end of the delivery period (in the case of delivery on a regular basis) or the delivery date *or* with the date on which the amount payable is set, whichever of those dates is the later. This restriction of contractual payment terms is intended to protect suppliers' liquidity.⁷⁸ It may contribute, therefore, to prevent buyers from putting pressure on suppliers by delaying payments and exploiting their financial fragility. In this regard, it should also be regarded as a measure to strengthen suppliers' and weaken buyers' bargaining power.

Other restrictions foreseen by the Directive, however, seem only to ban terms that shift risks and costs to the suppliers, leaving the distributions of bargaining power essentially untouched. There is a real risk here that the redistributive objective of the Directive will not be achieved as buyers will ultimately only be forced to resort to less efficient mechanisms to extract profits from their suppliers.

c) *Implications*

At best, the prohibitions in the Directive can only be expected to shift bargaining power in favour of suppliers to a small extent. It is therefore not clear why it should not be feared that buyers will compensate for possible losses from the Directive's bans by even higher price pressure on suppliers or by imposing other (non-regulated) non-price terms. The EU legislature seems indeed to have been aware that at this point the Directive runs the risk of falling short of its redistributive objective. In particular, where supply agreements provide for products to be delivered regularly, suppliers' bargaining power could have been strengthened by mandatory notice periods being introduced, which would have given suppliers more time to find alternative sales opportunities and would make threats to delist them less intimidating when a buyer tries to negotiate a price discount. Remarkably, even so, in its Green Paper, the Commission had stated that:

Sudden and unjustified termination of a commercial relationship without a reasonable period of notice may also be a major type of UTPs. While ending a relationship is part of business life, it should not be used as a means to bully a contracting party by refusing to justify this decision or by not complying with a reasonable notice period.⁷⁹

⁷⁷ Article 4(3) of the Trade Secrets Directive reads: "The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions: ... (b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret; (c) being in breach of a contractual or any other duty to limit the use of the trade secret."

⁷⁸ See Recital 17, 8th sentence of the UTP Agri-food Supply Chain Directive ("In order to provide increased protection to farmers and their liquidity, suppliers of other agricultural and food products should not have to wait for payment longer than 60 days after delivery, 60 days after the end of an agreed delivery period where products are delivered on a regular basis, or 60 days after the date on which the amount payable is set").

⁷⁹ *European Commission* (fn 75) 19.

While this aspect was not inserted in the Commission's proposal, the unilateral termination of supply agreements was taken up in the legislative process⁸⁰ but ended up not being implemented. The Directive ultimately only points to the Member States in this regard, stating that they:

might identify, share and promote best practices concerning the conclusion of long-term contracts aimed at *strengthening the bargaining position of producers* within the agricultural and food supply chain.⁸¹

This remark is also significant as it can be seen as indicating that, looking at the restrictions that are actually established in the Directive, those that have the potential to effectively shift bargaining power are of particular importance to the legislature. Given that the Directive's principal objective is to redistribute, their enforcement should be given priority by the Member States' authorities.

2. Is the Directive's scope limited to cases of unequal bargaining power?

The Directive's intervention into the bilateral business relationships along the agri-food supply chain is legitimized with the assumption of unequally distributed bargaining power. As is stated in the Directive's ninth recital,

Differences in bargaining power, which correspond to the economic dependence of the supplier on the buyer, are likely to lead to large operators imposing unfair trading practices on smaller operators. A dynamic approach, which based on the relative size of the supplier and the buyer in terms of annual turnover, should provide better protection against unfair trading practices for those operators who need it most.⁸²

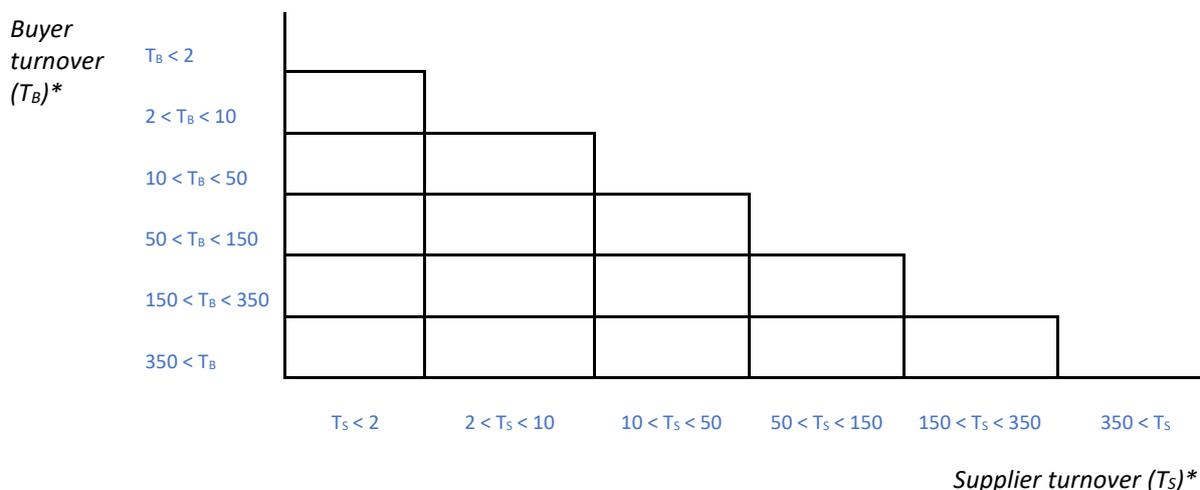
The legislature assumed that difference in size, measured by annual turnover, may serve as a suitable proxy to identify a difference in bargaining power.⁸³ Consequently, Article 3(2) of the Directive determines the scope of application depending on the relative size of supplier and buyer in terms of annual turnover.

⁸⁰ See European Parliament, 10.10.2018, A8-0309/2018, Report on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, Draft European Parliament Legislative Resolution (5–6), Amendments 46 (“a buyer unilaterally terminates the supply agreement”) and 47 (“a buyer unilaterally terminates supply agreements in response to falling prices”) (28).

⁸¹ Recital 23, 4th sentence of the UTP Agri-food Supply Chain Directive (emphasis added).

⁸² Recital 9, 2nd and 3rd sentences of the UTP Agri-food Supply Chain Directive.

⁸³ Recital 14 of the UTP Agri-food Supply Chain Directive.

Scope of application of the UTP Agri-Food Supply Chain Directive⁸⁴

*Annual turnover in millions of euros

a) *Asymmetry in size and inequality in bargaining power*

If it is the value of outside options, the capacity to negotiate patiently and individual negotiation skills that essentially determine bargaining power,⁸⁵ then the question is how these factors relate to the size of a market operator. In fact, the economic literature has pointed to some aspects that explain why the size of a buyer can be relevant for its bargaining power.⁸⁶ First, the larger a buyer is, the more credible its threat to integrate backwards, rendering the supplier redundant.⁸⁷ Looking at the agri-food supply chain, it can be said that the large retailers often sell a broad range of their own brands (and in any case have the capacity to do so) with which they can compete with their suppliers. This may increase their outside options considerably, because, should it come to a situation where a supplier's (branded) goods were (temporarily) not stocked, some of the lost sales would be recaptured through higher sales of the retailer's own label. What is more, the distribution of own brands (which are often purchased from second- or third-tier brand manufacturers) enhances a retailer's knowledge of the production side and can thus enable it to negotiate more aggressively with its first-tier brand suppliers.⁸⁸ Second, switching to another supplier may result in significant one-off costs. However, the larger a buyer is, the more products it will typically purchase per supplier and the more products these one-off switching costs will be spread over. Therefore, larger buyers can more credibly threaten to break off the business relationship with a certain supplier. Third, the larger the buyer, the greater the potential difficulties for a supplier when its products are delisted.⁸⁹

⁸⁴ Inspired by *Daskalova*, (2019) 10 JECLAP, 281 (283).

⁸⁵ See above sub III.1.a).

⁸⁶ *Inderst/Mazzarotto* (fn 65) 1953 (1958).

⁸⁷ See for a formalized presentation of this argument *Michael L. Katz*, *The Welfare Effects of Third Degree Price Discrimination in Intermediate Goods Markets*, (1987) 77 AER, 154 (American Economic Review), and *David T. Scheffman/Pablo T. Spiller*, *Buyers' Strategies, Entry Barriers and Competition*, (1992) 30 EI, 418 (Economic Inquiry).

⁸⁸ *Inderst/Mazzarotto* (fn 65) 1953 (1962).

⁸⁹ *Rey* (fn 64) 487 (490).

Fourth, large retailers can afford to facilitate market entry by new (competing) suppliers, either by directly sponsoring parts of their set-up costs or by their commitment to purchase a certain part of the production.⁹⁰ Fifth, the larger a retailer's assortment of goods is, the greater the one-stop shopping effect tends to be on the part of its customers, which means that the retailer can more easily afford to delist a certain brand. Finally, economies of scale and scope allow larger retailers to invest more in optimizing their purchasing policies and, in particular, to improve their negotiation skills.

However, notwithstanding those factors that explain that bargaining power may indeed increase with the size of the operator, it is important to note that a buyer or supplier's bargaining power depends to a large extent on circumstances that are *not* related to size: a small supplier that delivers its entire output to a much larger buyer still does not have to fear superior bargaining power if another buyer would be available to take the same quantity from the supplier on substantially the same terms. Thus, the value of outside options largely depends on the overall market conditions at the respective level of production or trade and, therefore, on factors such as the buyer's share of the overall market or whether a buyer controls some geographic (sub-)market.⁹¹ This is why economists stress that size should not be used mechanically as a synonym for bargaining power. Rather, it is suggested that a difference in size should only be used to infer an imbalance in bargaining power after examining the mechanisms that determine the value of the respective outside options in an individual case.⁹²

b) *Implications*

The Directive infers an imbalance in bargaining power from a difference in annual turnover. Such an "approximation" has been regarded as "suitable" because it can be implemented straightforwardly, so that market operators may easily predict whether or not they fall within the Directive's ambit.⁹³ The approach is indeed a mechanical one as an asymmetry in size triggers an irrebuttable presumption of an imbalance of bargaining power. While Article 1(1) of the Directive describes its subject matter as "combatting practices ... that are unilaterally imposed by one trading partner on another", this criterion bears as such no relevance for the Directive's actual scope of application: where a contractual relationship is covered by Article 1(2) of the Directive, a buyer cannot defend itself against the prohibition of a practice laid out in Article 3(1) and (2) of the Directive by arguing that the practice was in fact not unilaterally imposed on the other party. What is more, the mechanics used by the Directive yield very

⁹⁰ In addition, due to specific investments, buyers may be in a strong bargaining position vis-à-vis those suppliers whose market entry they have fostered. *Rey* (fn 64) 487 (492).

⁹¹ Moreover, it has been argued in the economic literature that manufacturers may have incentives to negotiate more firmly with larger than with smaller buyers, because they have to rely on the former to cover a significant part of their fixed costs or even to contribute up front to new product developments so that smaller buyers effectively free ride on the deliveries to large buyers. *Alexander Raskovich*, Pivotal Buyers and Bargaining Position, (2003) 51 *JIO* 405 (*Journal of Industrial Organisation*). See *Inderst/Mazzarotto* (fn 65) 1953 (1973, fn 17) with more references to the relevant technical literature.

⁹² *Inderst/Mazzarotto* (fn 65) 1953 (1973). See also *Roman Inderst/Christian Wey*, Die Wettbewerbsanalyse von Nachfragemacht aus verhandlungstheoretischer Sicht, *Perspektiven der Wirtschaftspolitik* 2008, 465 (475); *Justus Haucap/Ulrich Heimeshoff/Susanne Thorwardt/Christian Wey*, Die Sektoruntersuchung des Bundeskartellamts zur Nachfragemacht im Lebensmitteleinzelhandel, *Wirtschaft und Wettbewerb (WuW)* 2015, 605 (609).

⁹³ Recital 14, 2nd and 3rd sentences of the UTP Agri-food Supply Chain Directive.

crude results: a buyer with an annual turnover of EUR 51 million is presumed to have superior bargaining power over a supplier with an annual turnover of EUR 49 million.⁹⁴

In light of the above, it is obvious that this approach entails a substantial risk of generating false positives; in other words, the Directive will to a considerable extent apply to relationships in which suppliers are in fact *not* exposed to the superior bargaining power of their buyers. This weakens the Directive's legitimacy in two respects.

First, the EU legislature denies that there is a trade-off between, on the one hand, the distributive goal of its intervention into the supply agreements and, on the other hand, the parties' freedom to agree to efficient contractual arrangements. It is argued that the prohibited practices are inefficient anyway, particularly as they are the result of unequal bargaining.⁹⁵ While this latter argument will be discussed more in detail below,⁹⁶ the said denial of a trade-off between redistribution and efficiency is already less convincing where there is no imbalance in bargaining power in the first place.

Second, the Directive rests on the assumption that, owing to the inferior bargaining power on the part of the suppliers, the gains from trade are not fairly distributed along the agri-food supply chain. Given, however, the way the imbalance-in-power criterion has been implemented, it can hardly be contended that the Directive aims to redistribute profits *only* where there is a firm presumption that the distribution was already unfair due to asymmetries in bargaining power. The legislature has thus been settling for a rather crude mechanism for determining which bilateral business relations should be interfered with in order to redistribute in favour of agricultural producers.

3. Exploring efficiency effects

Restricting contractual freedom risks efficiency losses, a reduction in the gains from trade and, consequently, also a failure to achieve the redistributive objective even if there is a shift in bargaining power to the benefit of suppliers. The EU legislature's response, as we have seen,⁹⁷ is essentially twofold: the banned practices are considered inefficient, first, as they are the result of an exercise of superior bargaining power on the buyers' part and, second, as they involve an allocation of risks that can be characterized as inefficient *per se*.

a) *Buyers' bargaining power and (in)efficient supply agreements*

There is no doubt that buyers' superior bargaining power enables them to push through lower prices and that they have every incentive to do so. However, whether an imbalance of bargaining power also leads the buyers to enforce inefficient contract terms is another matter altogether. Assuming fixed demand by final consumers, a buyer will maximize her profits if she can squeeze a supplier to a price equal to marginal costs, i.e. to a price at which the latter can just cover her costs. Since an inefficient allocation of risks would lead to higher marginal costs on the supplier's side, a rational buyer with bargaining power has no interest in imposing

⁹⁴ Example borrowed from *Jochen Glöckner*, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, *Wettbewerb in Recht und Praxis (WRP)* 2019, 824 (833, para. 64).

⁹⁵ See above sub II.3.c).

⁹⁶ See below sub III.3.a).

⁹⁷ See above sub II.3.c).

inefficient conditions on its suppliers. Therefore, as a matter of principle, profit-maximizing buyers with bargaining power have an interest in maximizing the gains from trade through an efficient allocation of risks.

Certainly, there are real-world complications that indicate why buyers might in fact impose inefficient terms on their suppliers. To begin with, it is uncertain whether their negotiators have the relevant information to allocate risks efficiently. In case of doubt, they may be inclined to use their bargaining power and shift risks onto the suppliers whether or not they are more likely to be the cheapest cost avoiders, cheapest insurers or superior risk bearers. Moreover, prohibitive transaction costs or simple carelessness might prevent buyers from drafting and negotiating contracts that are tailored to the individual transaction. For example, a buyer's standard supply contract might be biased towards relatively large suppliers as it may seem more worthwhile investing in negotiations and drafting with regard to high contract values. Yet, given economies of scale and scope, large suppliers might well be able to absorb certain risks efficiently, which a buyer should not, however, shift to its smaller suppliers if it does not want to sacrifice efficiency.

For this and other reasons, it is not to be doubted that real-world scenarios can be found where buyers use their superior bargaining power to shift risks that they themselves could absorb more efficiently. However, as a general principle, the finding of unequal bargaining power can only indicate the buyer's capability to do so. Given the incentive structure of a profit-maximizing buyer, superior bargaining power as such is not a suitable indicator that risk allocation in a particular bilateral relationship will in fact turn out to be inefficient.

b) (In)efficiencies and per se unfairness

Looking at the black list in Article 3(1) of the Directive, it becomes apparent that the drafters acknowledged the risk of efficiency losses and were anxious to ban only the practices they considered to be the "most egregious".⁹⁸ An example of the legislature's effort to leave the door open for efficiency-enhancing terms is the opening clause in Article 3(1)(b) of the Directive: notices of cancellation for perishable goods of less than 30 days are generally regarded as unfair because they would leave suppliers with insufficient time to find alternative buyers. However, as shorter cancellation periods might be acceptable for certain product categories, Member States may set periods shorter than 30 days "for specific sectors in duly justified cases".⁹⁹ Yet, while the practices banned under Article 3(1) of the Directive might appear bluntly "egregious", they may well have efficiency-enhancing potential. Two examples should be singled out here. Article 3(1)(c) of the Directive bans:

unilateral changes to the terms of a supply agreement ... that concern the frequency, method, place, timing or volume of the supply or delivery ... the quality standards, the terms of payment or the prices.

Pursuant to Article 3(1)(e) of the Directive, the buyer must not require the supplier

to pay for deterioration of loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier.

⁹⁸ See above quote at fn 57 and accompanying text.

⁹⁹ Article 3(1)(b) of the Directive.

It is evident that these practices would give buyers wide scope for opportunistic behaviour. Therefore, at first glance, their outright prohibition might seem reasonable from an efficiency point of view. However, one should not overlook the fact that we are dealing with commercial contracts that govern continuing relations. In those business contexts, to deal with information and implementation problems, parties often find mechanisms that may turn out to be efficient at second glance. Given the longevity of typical supply contracts, adjustments to changing circumstances may be necessary in order to maximize the total benefit to the parties. If one party has superior knowledge of the relevant factors, it may be reasonable to entrust (more or less) complete discretion to this party to change terms during the agreed contract period.¹⁰⁰ In the context of the agri-food supply chain, it may be assumed that manufacturers and retailers have considerable information advantages over their respective suppliers, especially about changes in consumer behaviour and competitors' reactions. What is more, a major challenge to all contractual transactions lies in the fact that some contingencies are effectively "non-contractible" because a party's expected costs to (try to) prove them exceeds the expected gains and, therefore, they cannot effectively be verified by the courts.¹⁰¹ Yet, if it is not worth proving non-compliance, parties cannot write legally enforceable contracts. This insight is relevant for the supply of agricultural products. Their quality is naturally subject to fluctuations. Manufacturers and retailers purchase them en masse processed or resell them quickly. A comprehensive and thorough quality control by the buyer, including any necessary measure to collect evidence, may prove practically impossible as it involves prohibitively high costs. In order to prevent product quality from falling to the level where the deficiencies become effectively verifiable, it might be an efficient strategy to entrusting buyers with a broad discretion to define and adjust the required level of quality, to reject deliveries that do not have the necessary quality or to claim damages due to insufficient product quality.

The discussed practices, however, only unfold their efficiency-enhancing potential if buyers do not opportunistically exploit the discretion assigned to them. This assumption seems at any rate plausible with a view to the agri-food supply chain, which is characterized by long-term contractual relations. Buyers have thus an interest in maximizing the total benefit to the parties in the long run and in maintaining their reputation and the relationship with the suppliers. Yet, given decentralized decision-making and other factors that might cause short-sightedness in profit maximization on part of the buyers, a perfect safeguard against opportunism cannot be expected.¹⁰²

In sum, we may conclude that certain practices that are blacklisted by the Directive can in fact be part of an efficiency-enhancing and mutually beneficial scheme to which both parties have

¹⁰⁰ Benito Arruñada, *The Quasi-judicial Role of Large Retailers: An Efficiency Hypothesis of Their Relation with Suppliers*, (2000) 92 REI, 277 (280) (*Revue d'Économie Industrielle*).

¹⁰¹ See *Alan Schwartz*, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, (1992) 21 J. Leg. Stud. 21, 271 (279–280) (*Journal of Legal Studies*) ("There is a standard distinction in economic theory between information that parties can observe and information that is verifiable by a third party. The distinction is drawn because the costs of proving to a third party that a particular state of the world existed or a particular action was taken can exceed the gains"). See also *Richard Craswell/Alan Schwartz*, *Foundations of Contract Law*, 1994, 200–201 (clarifying that observability and verifiability are generally matters of degree).

¹⁰² *Arruñada* (2000) 92 REI, 277 (292–293) (emphasizing that measures to reduce such failures are costly and thus, residual distortions may be efficient).

(implicitly) committed themselves. Hence, there are situations in which the enforcement of the Directive's restrictions will prevent parties from maximizing the gains from trade.¹⁰³ This is not to suggest that the aggregate efficiency effects of the Directive's restrictions are indeed negative; we are not in a position to estimate whether this is the case or not. Yet, the EU legislature has not presented any convincing explanations why the opposite should be true. With a view to the Directive and its underlying rationale, the essential takeaway, therefore, is that, at any rate, the tailoring of the banned practices does not guarantee that their prohibition does not entail a decrease in efficiency.¹⁰⁴

c) *Implications*

Neither the attempt to limit the Directive's scope to cases of unequal bargaining power nor the ban of only those practices that are regarded as particularly "egregious" may ensure that the Directive's restrictions do not preclude also efficiency-enhancing contractual arrangements. In light of this, it is at least doubtful whether the restrictions on the parties' contractual freedom yield a positive net effect in terms of efficiency. In any case, it seems apparent that the Directive is not based on a sound rationale as to why the presumed imbalances in bargaining power along the agri-food supply chain may in fact lead to an inefficient risk allocation.

To be sure, efficiency concerns do not lie at the heart of the Directive. Yet, as mentioned before, if the Directive's restrictions reduce the gains from trade, suppliers may ultimately be worse off even if they are in a better bargaining position and therefore receive (in relative terms) a greater share of the profits generated by the transaction. Moreover, efficiency effects are important from a policy point of view, because presumed efficiency gains are mentioned as a positive side-effect of the Directive,¹⁰⁵ and because ultimately it will be the final consumers who will have to pay the price for inefficient supply agreements. In a perfect world, when exercising their discretionary power, authorities could on a case-by-case basis consider the efficiency effects of a certain practice and its prohibition when deciding whether or not to intervene in a certain relationship.

IV. Is the Directive's legal basis adequate?

The Directive is based on Article 43(2) TFEU, according to which the EU legislature may establish the "common organization of agricultural markets ... and the other provisions necessary for the pursuit of the objectives of the common agricultural policy". These objectives are laid out in Article 39(1) TFEU. As clarified in the fifth recital,¹⁰⁶ the Directive refers to the objective of ensuring a "fair standard of living for the agricultural community" pursuant to Article 39(1)(b) TFEU. Whether this legal basis is adequate has been doubted and (critically) assessed in the academic literature because, first, the intended increase in income for

¹⁰³ To be sure, given the self-enforcing character of the described efficiency-enhancing arrangements, they can even prevail against mandatory law that gives a party a remedy against the prohibited practice. See *Arruñada* (2000) 92 REI, 277 (281). However, this mechanism for "correcting" inefficient mandatory law can be thwarted by the public enforcement provided for in the Directive.

¹⁰⁴ See also *Glöckner*, WRP 2019, 824 (833, para. 67).

¹⁰⁵ See, for instance, *Cafaggi/lamiceli*, (2019) ERPL, 1075 (1077–78).

¹⁰⁶ Recital 5, 5th sentence of the Directive reads: "A minimum Union standard of protection against unfair trading practices should be introduced to reduce the occurrence of such practices which are likely to have a negative impact on the *living standards of the agricultural community*" (emphasis added).

agricultural producers is not based on efficiency gains in production and, second, because the Directive also affects the marketing of products that are not “agricultural products” as defined in Article 38(1), 2nd sentence, and (3) with Annex I TFEU.¹⁰⁷ As we shall see, both objections are unfounded.

1. The promotion of a fair standard of living for the agricultural community as a legitimate regulatory objective in its own right

The wording of Article 39(1)(b) TFEU (“thus”) suggests a (mandatory) linkage to Article 39(1)(a) TFEU, so that the objective of ensuring a fair standard of living for the agricultural community could only be pursued through measures that enhance the farmers’ productivity.¹⁰⁸ According to such a reading, Article 39(1)(b) TFEU would no longer have any stand-alone meaning,¹⁰⁹ which is a kind way of saying that the provision would in fact have no practical relevance at all: any measure that aims to enhance agricultural productivity will by definition, if effective, result in lower costs and will therefore practically always lead to higher profits. In other words, it seems impossible that the EU legislature might intend the former without having the latter consequence in mind.

However, to assume that the promotion of a “fair standard of living” should be a legitimate objective in its own right is conclusive, especially in the light of the exceptional position of the agricultural sector enshrined in primary law: although agriculture is part of the internal market,¹¹⁰ essential rules of internal market law, in particular of competition law (antitrust and state aid),¹¹¹ may be restricted in their application.¹¹² The Common Agricultural Policy is conceived as a complement to the internal market for agricultural products,¹¹³ which makes it clear that it does not (necessarily) follow its rationalities. In fact, promoting consumer welfare is not the (sole) principal aim of the Common Agricultural Policy. The existence of a thriving agricultural sector that provides income for entrepreneurs and employees is conceived of as a value in itself and thus its promotion as an objective of at least equal importance to the consumer welfare objective.

This is also the view taken by the ECJ in its case law on Article 39 TFEU. While the Court acknowledged that the wording of the provision establishes a certain link between subparagraphs (b) and (a), it did not conclude that the desired income increases on the part of the agricultural producers were to be intended *only* through productivity gains.¹¹⁴ In a legal dispute between the Commission and the Council about the legitimate scope of exemptions from EU state aid law, which arose in a case that concerned the grant of special aid for the distillation of certain wines, the Commission made the criticism that the Council’s measure

¹⁰⁷ See, for instance, *Schebesta/Verdonk/Purnhagen/Keirsbilck*, (2018) 9 EJRR, 690 (695–697); *Ackermann* (fn 1) 276–283.

¹⁰⁸ *Schebesta/Verdonk/Purnhagen/Keirsbilck*, (2018) 9 EJRR, 690 (695–696).

¹⁰⁹ *Jürgen Basedow*, *Zu Handelspraktiken in der Lebensmittelversorgungskette*, EuZW 2019, 137 (138).

¹¹⁰ Article 38(1) TFEU.

¹¹¹ Article 42 TFEU.

¹¹² Article 38(2) TFEU.

¹¹³ Article 38(4) TFEU.

¹¹⁴ *European Court of Justice (ECJ) 26.10.1983 – C-297/82 EU:C:1983:298 para. 8 – Danske Landboforeningen* (“the very wording of Article 39(1)(b) shows that the increase in individual earnings of persons engaged in agriculture is envisaged as being *primarily* the result of the structural measures described in subparagraph (a)” (emphasis added)).

gave “priority, amongst the aims laid down in Article 39 of the Treaty, to protecting farmers’ incomes”.¹¹⁵ The Court rejected the argument, ascertaining that:

It must be borne in mind in this regard that in pursuing the various aims laid down in Article 39 of the Treaty the Community institutions must constantly reconcile any conflicts between those aims taken individually and, where necessary, give any one of them the temporary priority which the facts or circumstances, in view of which their decisions are made, require ... Consequently, the Council committed no manifest error of assessment when deciding, in giving particular attention to the aim of guaranteeing wine producers a fair income, that the aid in question was to be considered to be compatible with the common market.¹¹⁶

Here, as in other judgments,¹¹⁷ the Court assumed without further ado that Article 39(1)(b) TFEU constitutes an objective in its own right. What is more, the Court provided the legislature with certain leeway to give priority to this distribution objective over the other objectives. In order to increase farmers’ income, the EU legislature may also adopt measures that result in a price increase for consumers and thus conflict with Article 39(1)(e) TFEU. Doubts about the alleged efficiency-enhancing effects of the Directive¹¹⁸ can therefore in any case not undermine its legal basis.

2. On the coverage of non-Annex I products and the adoption of “other provisions” under Article 43(2) TFEU

Article 38(3) TFEU limits the scope of the provisions of Title III TFEU to products that are listed in Annex I to the Treaty. This list specifies the definition of “agricultural products” given in Article 38(1) TFEU as “products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products”. Margarine and artificial honey are also listed, which illustrates that the list includes at least a few products from other processing stages and thus goes beyond the definition. However, as the Directive regulates transactions along the entire agri-food supply chain, it also widely affects the trade with products that are not listed in Annex I to the Treaty. In the explanatory memorandum to the proposal for the Directive,¹¹⁹ this potential objection was rejected, referring to the case law of the ECJ, which ruled in *Bavaria* that:

legislation which contributes to the achievement of one or more of the objectives mentioned in [now Article 39 TFEU] must be adopted on the basis of [now Article 43 TFEU], even though, in addition to applying essentially to products falling within Annex I to the Treaty, it also covers incidentally other products not included in that annex.¹²⁰

Applying this criterion, the Court concluded that:

In the present case, it is established that [the] regulation covers principally products included in Annex I to the Treaty. Furthermore, although it is true that beer is not expressly mentioned in that annex, the fact

¹¹⁵ *ECJ* 29.2.1996 – C-122/94 EU:C:1996:68 para. 23 – *Commission v Council*.

¹¹⁶ *ECJ* 29.2.1996 – C-122/94 EU:C:1996:68 paras 24–25 – *Commission v Council*.

¹¹⁷ See also *ECJ* 14.1.1987 – C-281/84 EU:C:1987:3 para. 23 – *Zuckerfabrik Bedburg v Council and Commission* (note in particular that in its listing of the objectives covered by (now) Article 39(1) TFEU, the Court omitted the connecting “thus” between the “rational development of agricultural production” and ensuring “a fair standard of living”); *ECJ* 19.9.2013 – C-373/11 EU:C:2013:567 para. 54 – *Panellinos Syndesmos Viomichanion Metapoiisis Kapnou*; *ECJ* 26.10.1983 – C-297/82 EU:C:1983:298 para. 8 – *Danske Landboforeningen*.

¹¹⁸ See above sub III.3.

¹¹⁹ *European Commission* (fn 48) 4.

¹²⁰ *ECJ* 2.7.2009 – C-343/07 EU:C:2009:415 para. 50 – *Bavaria and Bavaria Italia* (references omitted); see also *ECJ* 5.5.1998 – C-180/96 para 134 – *United Kingdom v Commission*.

remains that most of its ingredients are, and that its inclusion in the scope of Regulation No 2081/92¹²¹ is consonant with the purpose of that regulation and in particular with the achievement of the objectives mentioned in [now Article 39 TFEU].¹²²

While the Court in *Bavaria* did not explain under which circumstances a measure should be regarded as “principally” covering Annex I products and only “incidentally” non-Annex I products, this argument can certainly not be invoked with regard to the Directive. It is not “incidental” that the Directive also covers transactions between manufacturers and retailers and thus also goods at a more advanced stage of manufacture. The intended trickle-up effect along the entire agri-food supply chain to redistribute the gains from trade to the benefit of agricultural producers lies at the heart of the Directive; it is not a component of the Directive that could be regarded as secondary or indirect.

The legitimacy and significance of the second (additional) argument provided by the Court in the above quotation taken from the *Bavaria* case is not obvious at first glance: the fact that a good consists of processed agricultural products does not make it a product as defined in Article 38(1) and (3) with Annex I TFEU. The argument that the measure “principally” concerns Annex I products would no longer be relevant.¹²³ It is also a prerequisite in any case that the measure promotes the objectives of Article 39 TFEU.

However, the viability of the Court’s second argument becomes clear if one recognizes that a distinction has to be made between the various provisions of Title III TFEU as regards the question of how Article 38(3) TFEU limits the scope of the Common Agricultural Policy. Insofar as these provisions are limited in their application to “agricultural products” or “agricultural markets”, it is immediately obvious that the measures taken on their basis must be limited in the same way. For example, a common organization of agricultural markets (Article 40 TFEU) may only be established for products listed as agricultural products. Correspondingly, the power to establish such a common organization as laid out in the first alternative of Article 43(2) TFEU is also limited to agricultural products (with the Court’s exception that other products are only “incidentally” covered).

In contrast, insofar as the scope of legislative powers is drafted in terms of *policy objectives*, there is no reason to assume that the measures to be adopted should a priori apply only to agricultural products. It will then have to suffice that the objective pursued by the measure is actually directed at agricultural markets and products. Therefore, if measures are adopted on the basis of the second alternative laid out in Article 43(2) TFEU (“other provisions ...”), they must not be limited in their scope to agricultural markets and products as long as they are adopted in “the pursuit of the objectives of the common agricultural policy”. This explains why the Court in *Bavaria* saw it as legitimate to include foodstuffs such as beer in the Regulation on the Protection of Geographical Indications and Designations on the grounds that these foodstuffs resulted from the processing of agricultural products. The protection granted should make it easier to market these foodstuffs at a higher price and this would indirectly also benefit

¹²¹ Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. O.J. 1992 L 208/1 (no longer in force).

¹²² *ECJ* 2.7.2009 – C-343/07 EU:C:2009:415 para. 51 – *Bavaria and Bavaria Italia*.

¹²³ See *Ackermann* (fn 1) 277–279 (who, for this reason, rejects Article 43(2) TFEU as an adequate legal basis for the Directive).

agricultural producers. Thus, the Court's second argument in *Bavaria* must be read as a recognition of the trickle-up effect (very similar to that intended by the Directive) the legislature relied upon to achieve its objective to benefit "the rural economy ... by improving the incomes of farmers".¹²⁴ From this, the Court correctly drew the conclusion that the Regulation's scope must not be limited to agricultural products but may also include processed products (regardless of whether the coverage is merely "incidental"), as long as the said mechanism to benefit farmers is strived for.

In the light of the Court's statements in *Bavaria*, it is thus clear that the Directive could be adopted on the basis of Article 43(2) TFEU, even though it extensively (and not only incidentally) covers transactions on non-Annex I products. It is true that there are considerable doubts as to whether the Directive will actually trigger a redistribution of the gains from trade as intended by the EU legislature. However, as acknowledged by the Court, the legislature enjoys "wide discretionary power in matters concerning the common agricultural policy" and, thus, judicial review is limited to verifying whether the measure adopted "was manifestly inappropriate".¹²⁵ Measured by this yardstick, in any case, the legislature did not manifestly exceed its discretionary power when adopting the Directive in order to attain the objective set out in Article 39(1)(b) TFEU.

3. Implications

Article 43(2) TFEU is an adequate legal basis for the Directive. If it were otherwise, the Court would have to annul the Directive. It could not replace the legal basis or provide an additional legal basis (such as Article 114(1) TFEU) for the Directive.¹²⁶ An inadequate legal basis cannot be regarded as an insignificant formal error, even if a (possibly) necessary complementary legal basis would also have required the (same) ordinary legislative procedure.¹²⁷ This is because an alternative or complementary legal basis would also have required additional substantive preconditions, the existence of which should have been raised in the course of the legislative process.¹²⁸ Such a discussion might have steered the political discussion in a different direction. For this reason, but also because the legislature enjoys certain discretionary power as regards the substantive conditions of a legal basis, it would not be sufficient for the Court only to (retrospectively) examine the existence of these conditions.

V. Enforcement architecture

1. Explicit public enforcement – implicit private enforcement?

The Directive mandates that Member States establish a system of administrative enforcement: one or more enforcement authorities have to be designated.¹²⁹ The authorities must be able to initiate an investigation on their own initiative or on the basis of complaints.¹³⁰ Such complaints

¹²⁴ *ECJ* 12.7.2001 – C-189/01 EU:C:2001:420 para. 80 – Jippes and Others.

¹²⁵ *ECJ* 12.7.2001 – C-189/01 EU:C:2001:420 para. 83 – Jippes and Others.

¹²⁶ See *ECJ* 10.1.2006 – C-94/03 EU:C:2006:2 paras 34–56 – Commission v Council.

¹²⁷ But see *Ackermann* (fn 1) 283.

¹²⁸ See Article 296(2) TFEU.

¹²⁹ Article 4 of the UTP Agri-food Supply Chain Directive.

¹³⁰ Article 6(1)(a) of the UTP Agri-food Supply Chain Directive.

may be issued not only by suppliers,¹³¹ their organizations¹³² or other parties claiming to be affected by an infringement but also by (anonymous) whistle-blowers.¹³³ The Directive prescribes detailed investigation powers, namely the power to request information and to carry out unannounced on-site inspections.¹³⁴ The authorities shall have the power to impose interim measures,¹³⁵ to find infringements and to require that they be brought to an end.¹³⁶ As regards sanctions, the Directive leaves it at the general requirement, as already established in the ECJ's *Greek Maize* judgment,¹³⁷ that Member States must provide for sanctions in the form of fines or of other kinds of penalty that "shall be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement".¹³⁸

The Directive's focus on public enforcement¹³⁹ has its roots in the perceived "fear factor":

General (contract) law may prohibit certain practices and those who have faced UTPs have the option to seek redress before a court of civil law. But general contract law, to the extent that it covers the practice at issue, may de facto be difficult to enforce: a weaker party to a commercial transaction is often unwilling to lodge a complaint for fear of compromising an existing commercial relationship with the stronger party ("fear factor").¹⁴⁰

If, thus, in the Commission's view, the described "fear factor" gave cause for intervening in the first place,¹⁴¹ it is a logical step¹⁴² to provide for mandatory public enforcement:

Certain procedural powers for authorities that are competent to monitor UTP rules – and the existence of such an authority in the first place – have proven important for the perception of operators that effective enforcement exists and is apt to address the root causes for those who have been faced with UTPs not to seek redress (fear factor). Member States are therefore required to designate a competent authority for UTP enforcement that is given certain minimum enforcement powers inspired by best practices in Member States' existing regimes.¹⁴³

Another reason why public enforcement seems to be particularly adequate lies in the fact that the effectiveness of the Directive's intervention as intended by the EU legislature depends (at least in part) on positive externalities: food manufacturers' incentives to enforce the Directive's prohibitions against their buyers, i.e. the food retailers, might be inefficiently low as the former

¹³¹ Article 5(1) of the UTP Agri-food Supply Chain Directive.

¹³² Article 5(2) of the UTP Agri-food Supply Chain Directive.

¹³³ Recital 28, 2nd sentence of the UTP Agri-food Supply Chain Directive.

¹³⁴ Article 6(1)(b) and (c) of the UTP Agri-food Supply Chain Directive.

¹³⁵ Article 6(1)(e) of the UTP Agri-food Supply Chain Directive.

¹³⁶ Article 6(1)(d) of the UTP Agri-food Supply Chain Directive.

¹³⁷ *ECJ* 21.9.1989 – C-68/88 EU:C:1989:339 para 24 – *Commission v Greece* ("[W]hilst the choice of penalties remains within [the Member States'] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive").

¹³⁸ Article 6(1), 2nd sentence of the UTP Agri-food Supply Chain Directive.

¹³⁹ For a critical view on the Directive's focus on public enforcement see *Glöckner*, WRP 2019, 824 (833–834, paras 69–70).

¹⁴⁰ *European Commission* (fn 48) 2. See also Recital 8 of the Directive.

¹⁴¹ Another implication of the expected "fear factor" is that upon a complainant's request her identity or certain information provided by her must be kept confidential by the authority. See Article 5(3) of the UTP Agri-food Supply Chain Directive.

¹⁴² Alternatively, to give producer organizations the right to bring actions and other instruments of collective redress also have the potential to overcome the perceived "fear factor". See below text accompanying fns 195 and 202.

¹⁴³ *European Commission* (fn 48) 10.

anticipate that they will have to pass on parts of the gains to the agricultural producers (their suppliers). What is more, manufacturers and retailers might even collude at the cost of agricultural producers. To prevent such scenarios, public enforcement may step in to close enforcement gaps. While the perceived “fear factor” and other possible enforcement gaps should therefore be seen as crucial when defining an authority’s enforcement priorities, the Directive makes it clear that the authorities do not have to take up each infringement they will become aware of:

An enforcement authority might find that there are not sufficient grounds to act on a complaint. Administrative priorities might also lead to such a finding.¹⁴⁴

It is thus assumed that a mechanism of administrative enforcement that will not respond to each individual complaint neither contradicts the general requirements for an effective protection of (implicit) individual rights conferred by the Directive (as transposed into national law) nor fails to meet the conditions for safeguarding an adequate level of overall enforcement of the prohibitions contained in the Directive. This presumption is in line with EU jurisprudence – but arguably only provided that the parties affected by an infringement have access to effective instruments of private enforcement. This point is well illustrated using two examples of the EU courts’ adjudication.

The first example relates to the enforcement of Articles 101 and 102 TFEU. The power for this lies with the Commission, among others.¹⁴⁵ Any natural and legal person that may show a legitimate interest can lodge a complaint to persuade the Commission to open proceedings.¹⁴⁶ In *Automec II* the General Court ascertained that it is in the Commission’s discretion to deny a Community interest in further investigating a case if the complainant is in a position to assert the alleged infringement by way of private litigation before a national court.¹⁴⁷ The Court’s reasoning rests on the premise that the available remedies are indeed arranged in such a way that they can operate as a potent enforcement tool in their own right.

The second illustrative case concerns the enforcement of the Flight Compensation Regulation.¹⁴⁸ In accordance with Article 16 of this Regulation, each Member State has to designate an authority that is responsible for the enforcement of the Regulation, to which passengers can complain about alleged infringements and which is responsible for ensuring that infringements are adequately sanctioned (“sanctions ... shall be effective, proportionate and dissuasive”). In the context of a reference for a preliminary ruling by the Dutch Raad van State, the ECJ held that the designated national authorities are under no obligation to initiate

¹⁴⁴ Recital 28, 3rd and 4th sentences of the UTP Agri-food Supply Chain Directive.

¹⁴⁵ Article 4 of Regulation 1/2003. In addition, the provisions can be enforced by the Member States’ competition authorities or through private litigation before national courts. See Articles 5 and 6 of Regulation 1/2003.

¹⁴⁶ Article 7(2) of Regulation 1/2003 and Articles 5 to 9 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. O.J. 2004 L 123/18.

¹⁴⁷ *ECJ* 18.9.1992 – T-24/90 EU:T:1992:97 paras 87–96 – *Automec v Commission*. See also *European Commission*, Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004 C-101/65, para. 44, first indent (“The Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts”).

¹⁴⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. O.J. 2004, L 46/1.

administrative enforcement action in each individual case.¹⁴⁹ Essential for the Court's finding was that passengers could invoke the rights conferred by the Regulation before the national courts in disputes between individuals, ensuring that passengers enjoyed effective judicial protection.¹⁵⁰

Both judgments illustrate that an enforcement authority's discretion not to have to take up each infringement rests on the premise that those affected by an infringement are guaranteed effective legal protection via private rights of action. Conversely, with a view to the UTP Agri-food Supply Chain Directive, we may conclude that the fact that the Directive explicitly leaves it up to the authorities not to pursue a complaint for reasons of "administrative priorities" can be understood as tacitly assuming that the complainant will have private remedies at its disposal.

In fact, there are sound arguments that the EU legislature implicitly assumed the availability of private rights of action under national law and tacitly¹⁵¹ envisaged such remedies as a necessary element of the enforcement architecture: the Directive's prohibitions of certain trading practices directly interfere with bilateral contractual relations. This is true for the outright prohibitions enshrined in Article 3(1) of the Directive, as well as for the practices under Article 3(2) of the Directive, which are prohibited "unless they have been previously agreed in clear and unambiguous terms". As the EU legislature thus ties in with existing restrictions enshrined in domestic contract law,¹⁵² and as the Directive's prohibitions are by their very nature embedded in contractual relationships,¹⁵³ it appears inevitable that (implicit) private rights of action for the contractual parties aggrieved by an infringement go hand in hand with them. Another indication is provided in Recital 10 of the Directive, which states:

The protection provided by this Directive should benefit agricultural producers and natural or legal persons that supply agricultural and food products ... subject to their relative bargaining power. ... Those producers and persons are particularly vulnerable to unfair trading practices and least able to weather them without negative effects on their economic viability.

The Directive expressly defines its protective scope and identifies the suppliers along the agri-food supply chain as beneficiaries of the prohibitions contained in the Directive. This special emphasis on the Directive's protective purpose may be interpreted as indicating that the obligation imposed on the buyers not to engage in certain practices must be read as being accompanied by (implicit) rights of action of the respective suppliers along the supply chain.

¹⁴⁹ *ECJ* – C-145/15 EU:C:2016:187, paras 30–32 – Ruijssenaars and Jansen.

¹⁵⁰ *ECJ* – C-145/15 EU:C:2016:187, paras 38 – Ruijssenaars and Jansen.

¹⁵¹ A reference to the importance of private law enforcement can only be found in the Opinion of the European Economic and Social Committee on the "Proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain" (COM(2018) 173 final). O.J. 2018 C 440/165, sub 5.7.1.

¹⁵² See above quote at fn 140.

¹⁵³ As they are inherently connected with contractual relationships, the prohibitions contained in the Directive move away from the model of an "incomplete" rule, which imposes an obligation on a market participant without prescribing legal consequences in the event of a breach of this obligation. There is, however, still a striking difference from the obligations that are only established by a contractual agreement. The idea of a purely administrative enforcement of such duties would indeed appear to be an oxymoron. See *Jens-Uwe Franck*, Private Enforcement versus Public Enforcement, in Franz Hofmann and Franziska Kurz, *Law of Remedies. A European Perspective*, 2019, 107 (108–109).

In the light of the ECJ's adjudication, however, these features do not necessarily lead to the conclusion that the Directive must be interpreted in such a way that, in conjunction with the principle of effectiveness, it defines implied rights and requires Member States to ensure the availability of private remedies. First of all, it is remarkable that the ECJ in *Schmitt*, when asked for contract or tort law liability of a notifying body that violates its obligations under the Medical Devices Directive,¹⁵⁴ stated that:

it does not necessarily follow from the fact that ... one of the objectives of the directive is to protect injured parties that the directive seeks to confer rights on such parties in the event that those bodies fail to fulfil their obligations, and that is the case especially if the directive does not contain any express rule granting such rights.¹⁵⁵

Moreover, in *Bankinter* the ECJ had to consider whether an infringement of the assessment requirements laid down in Article 19(4) and (5) of the Directive on Markets in Financial Instruments (MiFID),¹⁵⁶ as part of the conduct of business obligations imposed on firms that provide investment services, must result in contractual consequences under national law. The ECJ essentially left it to the Member States to decide whether or not they wanted to rely on instruments of private enforcement:

It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness.¹⁵⁷

It should thus be noted that the ECJ is hesitant to infer implicit rights from obligations contained in Directives or to read the necessity of private remedies into unspecified requirements of effective sanctioning. Indeed, the direct horizontal effect produced by obligations imposed on market participants under EU law – whether as primary law, as in Articles 101 and 102 TFEU, or by way of a regulation¹⁵⁸ – seems to have been a key factor for finding that the infringement of a prohibition or of any other obligation must trigger private rights of action for aggrieved parties.¹⁵⁹ Thus, the Court had already argued in *BRT*:

¹⁵⁴ Council Directive 93/42/EEC of 14 June 1993 concerning medical devices. O.J. 1993 L 169/43.

¹⁵⁵ *ECJ* 16.2.2017 – C-219/15 EU:C:2016:694, para. 55 – *Elisabeth Schmitt v TÜV Rheinland LGA Products*.

¹⁵⁶ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. O.J. 2004 145/1.

¹⁵⁷ *ECJ* 30.5.2013 – C-604/11 EU:C:2013:344, para. 57 – *Genil 48 and Comercial Hosteleria de Grandes Vinos*

¹⁵⁸ See, for instance, *ECJ* 18.3.1997 – C-282/95 P EU:C:1997:159, para. 39 – *Guérin automobiles v Commission*; *ECJ* 20.9.2001 – C-453/99 EU:C:2001:465, paras 23 and 26 – *Courage v Crehan*; *ECJ* 17.9.2002 – C-253/00 EU:C:2002:497, paras 27 and 30 – *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd*.

¹⁵⁹ *Jens-Uwe Franck*, *Marktordnung durch Haftung*, 2016, 266–267; *Thomas Ackermann*, *Sektorielles EU-Recht und allgemeine Privatrechtssystematik*, ZEuP 2018, 741 (776) (*Zeitschrift für Europäisches Privatrecht*); *Gerhard Wagner* in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th ed. 2020, BGB § 823 para. 542.

As the prohibitions of Articles [now 101(1) and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.¹⁶⁰

The ECJ's restrictive approach in cases such as *Schmitt* and *Bankinter* may thus (at least in part) be explained by the peculiarities of directives as instrument of EU legislation, which does not produce (horizontal) direct effect¹⁶¹ and which is binding (only) "as to the result to be achieved" but leaves "to the national authorities the choice of form and methods".¹⁶² Hence, on the one hand, the EU legislature's silence on the Directive's private enforcement may be understood as signalling that it wanted to leave the question of (implicit) rights conferred on aggrieved parties and in particular private rights of action resulting from infringements entirely in the hands of the Member States. In fact, it is also conceivable that a sufficient level of overall enforcement can be achieved through public enforcement alone. In particular, the Member States are free to go further than the Directive by providing parties that claim to be affected by an infringement with the option to file suit against the authority to force it to take enforcement measures.

On the other hand, there are good arguments to distinguish the question of whether the Directive implicitly confers rights upon aggrieved parties from the restrictive approach adopted by the ECJ in *Schmitt* and *Bankinter*. *Schmitt* involved the sanctioning of a breach of a surveillance obligation and, therefore, a variety of gatekeeper liability,¹⁶³ whereas the Agri-food Supply Chain Directive addresses the parties considered to be directly responsible for the imposition of unfair contract terms and other unfair trading practices along the supply chain. And, unlike the obligations that were the focus in *Bankinter*, the context of the Agri-food Supply Chain Directive is about the interpretation and enforcement of rules of conduct, which, by their very nature, are embedded in a contractual relationship. In this respect, a parallel can be drawn with the ECJ's adjudication in *Schulte* and *Crailsheimer Volksbank*. In these judgments the Court held that in the case of an infringement of the duty enshrined in Article 4 of the (then) Doorstep Selling Directive¹⁶⁴ to inform a consumer about her right of withdrawal from a contract,

Article 4 [of the Doorstep Selling Directive] requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.¹⁶⁵

In practice, this meant that the ECJ required Member States to provide for damages liability in the event of a breach of the duty to inform about the withdrawal right.¹⁶⁶

¹⁶⁰ *ECJ* 30.1.1974, C-127/73 EU:C:1974:6, para. 16 – BRT v SABAM ("BRT I").

¹⁶¹ *ECJ* 7.6.2007, C-80/06 EU:C:2007:327, para. 20.

¹⁶² Article 288(3) TFEU. See *Jens-Uwe Franck*, *Marktordnung durch Haftung*, 2016, 267–269.

¹⁶³ *Gerhard Wagner*, *Marktaufsichtshaftung produktsicherheitsrechtlicher Zertifizierungsstellen*, JZ 2018, 130 (134–136) (*Juristenzeitung*)

¹⁶⁴ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. O.J. 1985 L 372/31 (no longer in force).

¹⁶⁵ *ECJ* 25.10.2005, C-350/03 EU:C:2005:637, para. 101 – *Schulte*; *ECJ* 25.10.2005, C-229/04 EU:C:2005:640, para. 48 – *Crailsheimer Volksbank*. See *Jens-Uwe Franck*, *Marktordnung durch Haftung*, 2016, 279–280.

¹⁶⁶ Alternatively, Member States could also provide for an unlimited right of withdrawal for transactions that are causally linked to the withdrawable transaction.

In sum, we may conclude not only that there are sound reasons for assigning implicit rights to the parties aggrieved by infringements of the prohibitions enshrined in the Directive and for establishing an obligation on the Member States to provide effective remedies to these parties, but that there is also a realistic chance that the ECJ, if asked, will see it that way.¹⁶⁷

2. Elements of private enforcement

Even though the Directive does not contain any express rules granting private rights of action or governing contractual or other private law consequences of non-compliance, it is not left to the Member States to determine whether or not aggrieved parties may invoke infringements in private law litigation and, in particular, whether non-compliance triggers private rights of action. First of all, in addition to the elements of public enforcement explicitly envisaged in the Directive, instruments of private enforcement may be needed to ensure an adequate level of overall enforcement.¹⁶⁸

Moreover, and perhaps even more importantly, as we have seen, there are good reasons to believe that the prohibitions laid down in Article 3 of the Directive have to be construed in a way that, if transposed into national law, they create rights for parties aggrieved by an infringement that must be safeguarded by the Member States' courts. It is true that the design and enforcement of these rights are, as a matter of principle, left to Member State law. However, according to a longstanding adjudication based on the principle of loyal cooperation,¹⁶⁹ Member States must ensure that the applicable national rules are not "less favorable than those governing similar domestic situations (principle of equivalence)" and that they are not "framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)".¹⁷⁰ Thus, the principles of equivalence and effectiveness provide an important yardstick against which the civil law consequences of a breach of the Directives' prohibitions (as transposed into national law) must be measured.¹⁷¹

¹⁶⁷ In fact, various authors have criticized the considerable uncertainty regarding the criteria that are ultimately decisive from the ECJ's point of view of whether or not an EU measure, in particular in case of a Directive, contains implicit private rights of action. See *Wagner* JZ 2018, 130 (132); *Oliver Mörsdorf*, Private Enforcement im sekundären Unionsprivatrecht: (K)eine klare Sache?, (2019) 83 *RabelsZ* 797 (817–819) (*Rabels Zeitung für ausländisches und internationales Privatrecht*).

¹⁶⁸ See above fn 137 and accompanying text. The legal debate on this issue should ideally be informed by the various comparative advantages of private and public enforcement. See for an overview *Franck* (fn 153) 107 (121–128).

¹⁶⁹ Article 4(3) TEU.

¹⁷⁰ See, e.g., *ECJ* 11.11.2015 – C-505/14 EU:C:2015:742, para. 40 – *Klausner Holz Niedersachsen*. This case law was first laid down in *ECJ* 16.12.1976 – C-33/76 EU:C:1976:188, para. 5 – *Rewe v Landwirtschaftskammer für das Saarland*, and *ECJ* 9.11.1983 – C-199/82 EU:C:1983:318, para. 14 – *Amministrazione delle finanze dello Stato v San Giorgio*. See on the interrelation between *Rewe*-effectiveness and the *Greek Maize* test *Michael Dougan*, Who Exactly Benefits from the Treaties? The Murky Interaction Between Union and National Competence over the Capacity to Enforce EU Law, (2010) *CYELS* 73 (106–107) (*Cambridge Yearbook of European Legal Studies*); *Christian Heinze*, Schadensersatz im Unionsprivatrecht, 2017, 42–44.

¹⁷¹ In addition, the principle of effective judicial protection, as established in the case law starting from *Johnston* (*ECJ* 15.5.1986 – C-222/84 EU:C:1986, 206, paras 18–19) and now enshrined in Article 47 of the EU Charter of Fundamental Rights and Article 19(1) TEU, must be observed. The scope of *Rewe*-effectiveness and the principle of effective judicial protection partially overlap; both doctrines are in part functionally interchangeable. See on intersections and differences between these general principles *Sacha Prechal/Rob Widdershoven*, Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection, (2011) 4 *Review of European Administrative Law*, 31–50; *Jens-Uwe Franck*, Rights, Remedies and Effective Enforcement in Air Transportation: *Ruijssenaars*, (2017) 54 *CML Rev.* 1867 (1876

a) *Effects on the contract*

(1) *Two base scenarios: invalidity as shield and sword in the hands of the suppliers.* The invalidity of a contractual term for breach of the Directive may be relied upon by a supplier in a contractual dispute, both defensively and offensively. In the first base scenario, the supplier may invoke invalidity to defend herself against an action brought by the buyer. If, for instance, a buyer demands, as agreed upon in the contract, payment for a service not related to the sale of the delivered goods, the supplier may invoke the voidness of such a term pursuant to the national rule transposing Article 3(1)(d) of the Directive. In the second base scenario, a supplier invokes invalidity to substantiate an action brought against the buyer. Thus, for instance, if a supplier sues for the purchase price and the buyer argues that they have cancelled the order in a timely manner as agreed upon in the contract or that the delivered goods do not meet the quality standards as defined by the buyer, the supplier may rely on the invalidity of the pertinent contract terms pursuant to the national rules implementing Article 3(1)(b) or (c) of the Directive.

(2) *Ex officio judicial review and “automatic” ineffectiveness of prohibited terms.* Courts are required to consider *ex officio* whether contractual terms are prohibited per se (Article 3(1) of the Directive) or lack the required transparency (Article 3(2) of the Directive) and, if prohibited, courts must regard those terms as ineffective irrespective of whether the suppliers have in any way relied on the terms’ invalidity. This appears to be the mandatory legal consequence as it relieves the supplier from having to explicitly invoke invalidity or even to avoid¹⁷² the contract.

This coincides with the ECJ’s interpretation of Article 6(1) of the Directive on Unfair Terms in Consumer Contracts (“UTCC Directive”),¹⁷³ which provides for the (relative) invalidity of the clauses captured by this Directive. Remarkably, the ECJ describes the reasons that legitimize the judicial control of consumer contracts in a fairly similar way as they are, according to the EU legislature, also underlying the UTP Agri-food Supply Chain Directive.¹⁷⁴ As regards “automatic” ineffectiveness, the ECJ relies on considerations that are thus equally applicable to clauses prohibited under the UTP Agri-food Supply Chain Directive:

the aim of Article 6 of the Directive would not be achieved if the consumer were himself obliged to raise the unfairness of contractual terms, and that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

The fact that the courts must not apply a term prohibited by the Directive without the supplier having to invoke its unfairness also takes into account the “fear factor” assumed by the EU legislature.¹⁷⁵ The supplier should be relieved as much as possible from having to actively turn against the buyer.¹⁷⁶

–1878) (Common Market Law Review); *Christian Heinze*, *Schadensersatz im Unionsprivatrecht*, 2017, 45–47.

¹⁷² Note that the Principles of European contract law provide for mere voidability in case of “unfair terms not individually negotiated”. See Article 4:110 PECL.

¹⁷³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. O.J. 1993 L 95/29.

¹⁷⁴ *ECJ* 4.6.2009 – C-243/08 EU:C:2009:350 para 22 – *Pannon GSM* (“the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms”).

¹⁷⁵ See above fn 140 and accompanying text.

¹⁷⁶ This aspect, however, no longer plays a significant role when both parties are already involved in litigation.

(3) *Relative ineffectiveness or absolute nullity?* A concept of relative ineffectiveness is expressly enshrined, for instance, in Article 6(1) of the UTCC Directive, according to which “Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall ... not be binding on the consumer”. The same concept has also been adopted in Article II. – 9:408 DCFR, which is also applicable in b2b contexts and which states that a “term which is unfair ... is not binding on the party who did not supply it”. The stipulated relative ineffectiveness leaves the other party the choice of whether or not she wants to invoke the clause in question. This is to take account of a scenario where a term that is overall to be considered unfair works in favour of the party who has not supplied it. Given that the courts are obliged to consider ineffectiveness *ex officio*, this effectively means that this party may oppose a term’s disapplication by the court.¹⁷⁷

Although the rationalities that legitimize the judicial control of standard terms and the regulatory intervention by the Agri-food Supply Chain Directive are similar insofar as it is presumed that the party to be protected cannot effectively influence the contractual terms, it seems doubtful whether the concept of relative ineffectiveness adequately serves the objective of the latter. First of all, the concept seems to be tailored to unfair terms in standard contracts. It rests upon the assumptions that one party can be identified as the party that has supplied the term and that the relevant terms have not been individually negotiated.¹⁷⁸ Although this may often be the case with the terms captured by Article 3 of the Agri-food Supply Chain Directive, this is not necessarily so. In particular, the prohibitions of the Directive apply even if a term has been individually negotiated. But, certainly, the concept of relative ineffectiveness can be adapted in accordance with the Directive’s regulatory approach: as the contractual party to be protected by the Directive is the supplier, it should then be the latter who remains free to rely on the terms considered to be unfair.

However, such an adapted concept of relative ineffectiveness could not ensure the effectiveness of the prohibitions laid down under Article 3 of the Directive insofar as they are designed to benefit third parties as well. As we have seen, it is an essential element of the regulatory concept that underlies the Directive that it intervenes, for example, in the contractual relationship between a retailer and a manufacturer in order to ultimately favour the agricultural producers that supply the manufacturer. This objective would be thwarted if the manufacturer, for instance in the context of an action for damages for non-performance by its supplier, could claim reimbursement of expenses that she has incurred vis-à-vis her buyer (the retailer), but which are based on a contractual term the latter could in any case not enforce against her.¹⁷⁹ This illustrates that, first of all, based on legal grounds, intermediate suppliers may be in a position to pass on costs entailed by retailers’ use of (prohibited) trading costs to the agricultural producers. Yet, aside from those scenarios, it is of more fundamental importance

¹⁷⁷ See *ECJ* 4.6.2009 – C-243/08 EU:C:2009:350 para. 33 – *Pannon GSM*; 21.2.2013 – C-472/11 EU:C:2013:88 para. 35 (“the obligation on the national court ... to take into account ... the intention expressed by the consumer when, conscious of the non-binding nature of an unfair term, that consumer states nevertheless that he is opposed to that term being disregarded, thus giving his free and informed consent to the term in question”). See *Balázs Fekete/Anna Maria Mancaleoni*, in Arthur Hartkamp, Carla Sieburgh and Wouter Devroe, *Cases, Materials and Text on European Law and Private Law*, 2017, 421 (430).

¹⁷⁸ See Article II. – 1:109 of the DCFR.

¹⁷⁹ See, for instance, Article 3(2)(d), (e) and (f) of the Agri-food Supply Chain Directive.

that the Directive's regulatory concept rests on the assumption that intermediate suppliers will often operate in market realities that enable (or force) them to pass on costs resulting from practices prohibited under the Directive to their own suppliers.¹⁸⁰ This is what an intermediate supplier will take into account when she considers to accept a prohibited clause imposed by her buyer, a retailer, which might offer to (partially) compensate her elsewhere. In order to impede such transactions to the detriment of third parties, in particular the agricultural producers, and to give full effectiveness to the Directive, Member States' laws must foresee that no party should be allowed under any circumstances to rely on a contractual term prohibited under Article 3 of the Directive.

(4) Partial nullity: remaining parts of the contract continue to be binding. It is the Directive's essential objective to redistribute the gains from trade generated by the various transactions along the supply chain to the benefit of agricultural producers. Therefore, in order for the intervention to be effective in this respect, the invalidity of particular terms that transfer costs and risks to the suppliers must not render the agreement as a whole invalid. In the light of the regulatory objective of the Directive, it is not apparent that the ineffectiveness of any practice captured by its Article 3 could lead to an unacceptable burden for the affected buyers. In particular, the latter must not have the option to avoid the (regulated) contracts on the ground that they are now less profitable for them.

Emerging gaps in the contracts may be filled by default rules provided by domestic law. This can be considered a generally accepted principle to ensure the practical effectiveness of the prohibition of certain contractual clauses. While the precise criteria that should guide default rules in contract law remain controversial,¹⁸¹ they can in any case be regarded as representing a balance of interests between the parties that has been legitimized by the legislature and/or the courts. This is in line with other interventions that are designed to protect parties who have no (substantial) influence on the content of the relevant contractual terms. Thus, for instance, Article 6(1) of the UTCC Directive provides that "the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair term".¹⁸²

(5) Nullity as a sanction: unfair terms must not be reduced to their lawful core. In view of the UTCC Directive, the ECJ has stipulated that national courts must not save a contractual clause by revising its content so that it does not contradict the UTCC Directive's requirements. To substantiate this position, the Court referred to the Directive's objective, which it described in

¹⁸⁰ See *European Commission*, Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, 13 and Commission Staff Working Document, Impact Assessment, "Initiative to improve the food supply chain (unfair trading practices)", SWD(2018) 92 final, 27 ("SME operators negatively affected in their bottom line by the exercise of UTPs in the food supply chain are unlikely to be able to simply absorb such costs. They will pass them on to their trading partners such as farmers who often are their upstream suppliers and do not normally have sufficient bargaining power to resist such pressure"). See also above fn 48 and accompanying text.

¹⁸¹ See for an overview of diverging approaches *Richard Craswell/Alan Schwartz*, *Foundations of Contract Law*, 1994, 27–30.

¹⁸² See also Article II. – 9:408(2) DCFR ("If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties").

remarkable parallelism to the policy goals pursued by the Agri-food Supply Chain Directive,¹⁸³ and, moreover, to the preventive effect intended by the nullity of unfair contractual terms:

[The power] to revise the content of unfair terms ... would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms ... in so far as those sellers or suppliers would remain tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.¹⁸⁴

The same considerations must apply to the Agri-food Supply Chain Directive. Courts must not reinterpret or reduce a clause captured by Article 3 of the Directive such that a lawful core remains.

(6) *Transposition into domestic law.* Member States' laws typically provide a general provision on the invalidity of contractual agreements infringing mandatory rules,¹⁸⁵ which will give the national courts sufficient flexibility¹⁸⁶ to comply with the aforementioned requirements. Nonetheless, not only does a legislative implementation often seem preferable but it may indeed be mandatory to meet the EU law conditions for a correct transposition. As stipulated by the ECJ,

it is essential for national law to guarantee ... that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights.¹⁸⁷

It should therefore be explicitly clarified under national law that the prohibition of a term results in its invalidity. Thus, in the German law implementing the Directive, the invalidity of the prohibited terms follows directly from each individual provision, all of which state: "The buyer cannot validly agree with the supplier that ..."¹⁸⁸

Moreover, an explicit amendment of domestic law is particularly required where the generally applicable default rule deviates from the requirements under EU law. If, for instance, as a general rule, the entire legal transaction should be considered void if (only) a part of a contract violates mandatory law,¹⁸⁹ the national legislature must clarify that an infringement of Article 3 of the Directive must be considered an exception in this respect. Consequently, the German transposition law explicitly provides that, if a contractual term turns out to be invalid, the contract remains valid in all other respects and gaps are to be closed by application of statutory provisions.¹⁹⁰

¹⁸³ ECJ 14.6.2012 – C 618/10 EU:C:2012:349 para. 67 – Banco Español de Crédito ("[the] directive as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Union and, in particular, to raising the standard of living and the quality of life throughout the European Union").

¹⁸⁴ ECJ 14.6.2012 – C 618/10 EU:C:2012:349 para. 69 – Banco Español de Crédito.

¹⁸⁵ See Article 15:102 of the Principles of European Contract Law (PECL) and Article II. – 7:302 DCFR.

¹⁸⁶ The insight, that there is "often ... considerable flexibility in the law" is indeed the essence of the analysis of how the Member States' laws deal with contracts that contravene some rule of law provided in *Christian von Bar/Eric Clive*, Principles, Definitions and Model Rules of European Contract Law, Draft Common Frame of Reference (DCFR), Full Edition, 2009, Volume I, Notes accompanying Article II. – 7:302 DCFR, 544–547.

¹⁸⁷ ECJ 10.5.2001 – C-144/99 EU:C:2001:257 para. 17 – Commission v Netherlands.

¹⁸⁸ See sections 12 to 16 of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

¹⁸⁹ See, for instance, section 139 of the German Civil Code (Bürgerliches Gesetzbuch).

¹⁹⁰ See section 21(2) of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz).

b) *Actions for injunctive relieve and damages*

As has been pointed out,¹⁹¹ there are good reasons to believe that the prohibitions contained in Article 3 of the Directive (as transposed into domestic law) must be understood as conferring (implicit) rights on the parties to be protected and (potentially) affected in case of an infringement.¹⁹² Consequently, affected suppliers (and their organizations) must be able not only to invoke the invalidity of the prohibited clauses in court but also to bring actions for injunctive relief and damages.¹⁹³ Moreover, private rights of action may also be considered necessary to guarantee an adequate level of overall enforcement as required by general principles of EU law.

During the legislative process, the European Economic and Social Committee emphasized that, given the presumed “fear factor”,¹⁹⁴ remedies by individual parties could only be of “rather minor importance”. Therefore, “all associations concerned should be able to apply for prohibitory and eliminatory injunctions”.¹⁹⁵ The Directive takes this into account by naming as beneficiaries, and thus as parties to be protected, not only the (individual) agricultural producers and persons that supply agricultural and food products but also expressly “producer organisations, whether recognized or not, and associations of producer organisations, whether recognized or not”.¹⁹⁶ Therefore, based on the assumption that the Directive contains implicit private rights of action, the latter may also derive rights from the prohibitions laid down in the Directive and, thus, must have the possibility to bring injunctions against buyers that engage in prohibited practices. What is more, assigning such rights could significantly contribute to an effective overall enforcement of the Directive’s prohibitions as transposed into national law.

The design of these private law remedies is in any event left to the Member States, which, however, must observe the general principles of EU law, in particular the principles of effectiveness and equivalence à la *Rewe* and *San Giorgio*.¹⁹⁷ Depending on the law of the Member State, various legal bases can be considered as potential sources for these remedies.

(1) *Remedies available under general private law.* First, with regard to suppliers affected by unfair trading practices of the other party, general contract remedies may be applicable. The invocation of unfair clauses by buyers may constitute a breach of a contractual duty so that the

¹⁹¹ See above sub V.1.

¹⁹² See above sub V.1.

¹⁹³ Certainly, to ensure the practical effectiveness of the implicit rights contained in the Directive’s prohibitions, national law could also confer a right to administrative enforcement on parties affected by an infringement. However, this is not inherent in the Directive and seems also a rather theoretical option in the light of existing Member State laws.

¹⁹⁴ See above fn 140 and accompanying text.

¹⁹⁵ Opinion of the European Economic and Social Committee on “Proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain” (COM(2018) 173 final). O.J. 2018 C 440/165, sub 5.7.1. (“In relation to private-law enforcement, the party concerned should have access to prohibitory and eliminatory injunctions and claims for damages. But because of the ‘fear factor’, such remedies are of rather minor importance. Moreover, all associations concerned should be able to apply for prohibitory and eliminatory injunctions. This would guarantee special protection of the party concerned with regard to anonymity, in the event that the unfair trade practice is directed at several undertakings”).

¹⁹⁶ Recital 10, 1st sentence of the Agri-food Supply Chain Directive.

¹⁹⁷ See above fn 170 and accompanying text.

suppliers are entitled to claim damages.¹⁹⁸ What is more, the imposition of unfair contractual terms on suppliers may also be considered a breach of a pre-contractual obligation the buyers owe towards their suppliers, which may result in liability under the doctrine of *culpa in contrahendo*.¹⁹⁹

Second, as we have seen, the Directive identifies the persons to be protected irrespective of a contractual relationship linking them to the buyers who are prohibited from certain practices: agricultural producers and natural or legal persons that supply agricultural and food products, including producer organizations and associations of producer organizations.²⁰⁰ Given this explicit emphasis and definition of the Directive's protective purpose, an infringement of these prohibitions of unfair trading practices can result in liability in delict for breach of a statutory duty and corresponding provisions and doctrines as provided under national law, which may establish a basis for both damages actions and actions for injunctive relieve. The relevant basis for claims under German law would in this respect be section 823(2) of the Civil Code²⁰¹ for damages claims and, in conjunction with section 1004 of the Civil Code, for actions for injunctive relieve.

If interpreted in view of the requirements of EU law stemming from the Directive and general principles, these remedies available under general private law will typically be adequate to guarantee both an effective protection of implicit rights conferred by the implementing prohibitions of unfair trading practices under national law and, together with the available mechanisms of public enforcement, a sufficiently effective overall enforcement of these prohibitions. However, this may require in particular that the (associations of) producer organizations are indeed given the option to seek injunctions based on general tort law or other non-contractual rights conferred upon them through domestic law. This opens up the possibility of collective redress, which, in view of the "fear factor" identified by the EU legislature, must be regarded as necessary for an effective (private) enforcement of the Directive's prohibitions.²⁰²

(2) *Unfair competition law*. Effective legal protection can also be provided through remedies that are part of unfair competition law or other national laws that specifically address unfair trading practices, including in b2b contexts. Thus, for instance, section 3a of the German Act against Unfair Competition provides that an unfair commercial practice occurs where "a person violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors".²⁰³ In this regard, the German Federal Court of Justice (Bundesgerichtshof) has held that the imposition of contract terms that violate mandatory consumer protection laws²⁰⁴ and, more particularly, the use of general terms and

¹⁹⁸ Thus, for instance under German law, sections 280(1) and 241(2) of the Civil Code (Bürgerliches Gesetzbuch) would be the legal basis for contractual claims for damages.

¹⁹⁹ Embodied under German law in section 311(2) in conjunction with sections 241(2) and 280 of the Civil Code (Bürgerliches Gesetzbuch).

²⁰⁰ Recital 10, 1st sentence of the Agri-food Supply Chain Directive.

²⁰¹ See Gesetzentwurf (fn 3) 47.

²⁰² See above fn 195 and accompanying text.

²⁰³ Translation taken from <https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0034>.

²⁰⁴ *BGH* 31.03.210 – I ZR 34/08, *Juris*, paras 26–30 – Gewährleistungsausschluss im Internet; *BGH* 19.05.2010 – I ZR 140/08, *Juris*, paras 22–23 – Vollmachtsnachweis.

conditions prohibited in the context of b2c contracts²⁰⁵ are to be regarded as violations of market conduct rules in this sense.

Against this background there can be little doubt that violations of sections 11 et seq. of the German Agri-organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz) have to be regarded as unfair “breaches of law” within the meaning of section 3a of the German Act against Unfair Competition: while it is true that the regulatory rationalities underlying consumer contract law or the prohibition of certain standard terms classified as unfair differ significantly from the regulatory objective pursued by the Directive,²⁰⁶ it cannot be denied that the latter is also intended to regulate “market conduct in the interest of other market participants”,²⁰⁷ namely in the interest of the suppliers of agricultural products along the agri-food supply chain. Therefore, a violation of the prohibitions of Article 3 of the Directive (as transposed into national law) is to be considered unfair²⁰⁸ according to sections 3 and 3a of the Act against Unfair Competition and, consequently, the remedies of unfair competition law become applicable. Private rights of action are thus also available in particular to competitors of the infringers.²⁰⁹

VI. Towards comprehensive EU law on UTPs in b2b relationships?

The adoption of the Directive has fuelled speculation as to whether the measure could be seen as a step towards broader EU legislation on unfair b2b trading practices.²¹⁰ This would certainly be welcomed by all those who have been advocating an EU-wide approach to unfair practices that integrate b2c and b2b relationships.²¹¹ Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services²¹² has been viewed as a further indication that the EU legislature might “test the waters” for a more comprehensive measure on unfair b2b trading practices.²¹³

On the other hand, the adoption of the UTP Agri-food Supply Chain Directive and Regulation 2019/1150 can also be seen as a deliberate choice for a sector-specific approach that allows for more precisely tailored interventions. What is more, regulatory restraint is also reflected in the fact that the legislature refrained in both measures from adopting a general clause to

²⁰⁵ BGH 31.05.2012 – I ZR 45/11, Juris, paras 45–48 – Missbräuchliche Vertragsstrafe.

²⁰⁶ See above fn 29 and 30 and accompanying text.

²⁰⁷ See above fn 203 and accompanying text.

²⁰⁸ Note that the use of the term “unfair” (“*unlauter*”) in section 19 of the Agri-Organizations and Supply Chains Act (Agrarorganisationen-und-Lieferketten-Gesetz) must not be understood as a shortcut to substantiate remedies under the Act against Unfair Competition. The terminology at this point is borrowed from the Directive. See Gesetzentwurf (fn 3) 45.

²⁰⁹ Section 8(1) and (3) no. 1 of the Act against Unfair Competition.

²¹⁰ See, for instance, *Christian Twigg-Flesner*, Towards a European Law on Unfair B2b Trading Practices?, (2018) EuCML, 93–95 (Journal of European Consumer and Market Law).

²¹¹ See, for instance, *Palle Bo Madsen*, B2B and B2C Marketing Practices – the Case for an Integrated Approach, in *Ulf Bernitz/Caroline Heide-Jørgensen*, Marketing and Advertising Law in a Process of Harmonisation, 2017, 171 (173); *Jules Stuyck*, The Court of Justice and the Unfair Commercial Practices Directive, (2015) 52 CML Rev., 721 (748 and 752) (Common Market Law Review).

²¹² O.J. 2019 L 186/57.

²¹³ *Twigg-Flesner*, (2018) EuCML, 93 (95).

prohibit unfair practices. The regulation's focus is almost entirely on ensuring fairness through disclosure and transparency of platforms' terms and conditions.²¹⁴

Moreover, given the various idiosyncrasies in the Directive's regulatory objective, it seems rather far-fetched to see momentum for the horizontal harmonization of b2b unfair trading practices. The fact that regulatory intervention into bilateral business relationships is bluntly driven by redistributive ambitions can only be explained by its exceptional position as part of the Common Agricultural Policy. The Directive's approach differs conceptually quite fundamentally from not only the UCP Directive but also the interventions into b2b relationships under domestic laws, whether in the form of the prohibition of unfair trading practices or unfair terms and conditions in (standard) contracts.²¹⁵ Whether or not one considers more far-reaching EU-wide legislation covering these fields desirable depends largely on the answers to three questions: how significant are the detriments to the EU internal market that the heterogenous approach in the Member States entails? Should one approve of a more interventionist approach to b2b transactions, as it would most probably follow from an EU-wide harmonization? How well suited is the institutional framework, in particular the preliminary reference procedure, for case-by-case rule-making on the basis of an EU-wide general clause prohibiting unfair trading practices or unfair contract terms? Observers will find very different answers to these questions; the adoption of the UTP Agri-food Supply Chain Directive does not in any case predetermine the EU legislature's position on this.

VII. Concluding remarks

It is the Directive's principal aim to increase agricultural producers' income by redistributing the gains from trade along the agri-food supply chain. This redistributive objective separates the Directive fundamentally from other measures that address unfair trading practices and/or unfair (standard) terms. The assumption of unfair distribution of gains from trade is based on the premise of suppliers' inferior bargaining power. However, the scope of the Directive is not limited to such cases.²¹⁶ The Directive will to a considerable extent apply to relationships in which suppliers are in fact *not* exposed to superior bargaining power by their buyers. Therefore, the intervention seems to be really about increasing farmers' income without providing and implementing any consistent justification for why under the status quo the gains from trade are not equitably distributed.

Leaving this general issue of legitimacy aside, considerable doubts remain over whether the Directive will actually increase producers' income. First of all, if we assume that the assumption underlying the Directive is correct that suppliers along the entire agri-food supply chain only accept the practices classified as unfair because they are exposed to superior bargaining power, one can expect a redistributive effect only if the intervention also increased the suppliers' (relative) bargaining power. However, such an effect will only be achieved to a small extent (at best).²¹⁷ It therefore remains unclear why it should not be expected that the buyers

²¹⁴ See *Jens-Uwe Franck/Nils Stock*, What is "Competition Law"? – Measuring EU Member States' Leeway to Regulate Platform-to-Business Agreements, (2020) 39 YEL, 320, 381–384 (Yearbook of European Law).

²¹⁵ See above sub II.2.

²¹⁶ See above sub III.2.

²¹⁷ See above sub III.1.

will compensate for possible (and indeed intended) losses from the Directive's bans of a limited number of practices (which indeed shift costs and risks onto the suppliers) by even higher price pressure on suppliers or by imposing other non-price terms.²¹⁸

Moreover, the Directive rests on the assumption that the prohibited practices are already inefficient. Yet, as it was demonstrated, neither the attempt to limit the Directive's scope to cases of unequal bargaining power nor the ban of only those practices that are regarded as particularly "egregious" can ensure that the Directive's restrictions do not also preclude efficiency-enhancing practices.²¹⁹ On the one hand, this is critical from a policy point of view, because it indicates that the intervention may lead to higher consumer prices. Above all, however, the findings also call into question whether the bans can in fact lead to income gains on the part of agricultural producers: even if one assumes that their relative bargaining power will increase and that they therefore receive a higher share of the gains from trade, it is possible that this will not improve their overall income as the pie to be distributed may become smaller.

The courts, which will have to deal with the practices captured by the Directive, will have no leeway to address these concerns. The Directive neither foresees an option to reject the assumption of unequal bargaining power nor contains any kind of "efficiency defence". The Directive's regulatory technique of using lists of prohibited practices is precisely meant to guarantee straightforward implementation by courts and authorities. The latter, however, will typically enjoy a certain discretion in respect to their enforcement activities. Authorities that wish to be faithful to the Directive's redistributive agenda should, in light of the above, primarily enforce those bans that may actually shift bargaining power to the benefit of suppliers. What is more, in an ideal world they should defer enforcement in scenarios where it is apparent that the practices covered by the Directive plausibly appear to be an element of an efficiency-enhancing arrangement between the parties to a transaction.

Although the Directive's regulatory concept essentially rests on framing the content of contractual relationships, it does not contain any express rules on the private law consequences of non-compliance. The Directive remains silent about private rights of action in case of non-compliance. In fact, its focus is entirely on public enforcement. Nevertheless, there are good reasons to believe that the Directive confers (implicit) rights including the option to bring injunctions and to claim damages upon aggrieved parties. Moreover, there are sound arguments to distinguish the question of implicit rights conferred by the Directive from the rather reluctant approach as regards private rights of action adopted by the ECJ in *Schmitt* and *Bankinter*.

Although there are considerable doubts as to whether the intended increase in agricultural producers' income can be achieved, this ultimately depends on the circumstances of the transactions covered by the Directive. It is therefore submitted that, given the legislature's wide discretionary power, the Directive could legally be adopted on the basis of Article 43(2) TFEU in conjunction with Article 39(1)(b) TFEU. However, given the uncertainties on the Directive's effectiveness and the considerable implementation costs that come along with it, it is another

²¹⁸ See above sub II.3.b).

²¹⁹ See above sub III.3.

matter altogether whether it was wise to attempt to improve farmers' income situation by banning certain non-price practices: a critical look at the Directive reveals once again the limits of what can reasonably be expected from regulatory intervention in bilateral business relationships.