

Anna Piszcz and Adam Jasser (eds.),
Legislation Covering Business-to-business Unfair Trading Practices
in the Food Supply Chain in Central and Eastern European Countries,
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Unfair trading practices (hereinafter: UTPs) in business-to-business relationships in the food supply chain are a traditional source of controversies and, at the same time, a very hot legal and political topic in view of the adoption of EU Directive 2019/633 in April 2019. After years of discussions, the EU has proceeded to a partial harmonization consisting of a ban, or a conditional ban, of selected practices whereby large buyers of agricultural and food products make life difficult for their smaller suppliers. These are abuses well-known from business interactions between different ‘weight categories’: late payments for deliveries, canceling orders for perishable goods at short notice, unilateral changes to terms of supply, requirements for payments not related to the sales of supplied agricultural and food products etc.

Although such practices are, at first glance, a matter of the law of unfair competition, or even protection of economic competition, the new EU Directive has no ambition to complement EU competition law or to further harmonize trade conditions of the EU Internal Market in general. Its legal basis is Article 43 (2) TFEU and this new piece of law, therefore, represents a sectorial harmonization measure under the common agricultural policy (CAP). Significant imbalances in bargaining power between buyers and suppliers within the agricultural and food supply chain are characterized in the preamble of the Directive as the core of the problem whose negative manifestations are the practices that ‘grossly deviate from good commercial conduct’, that are ‘contrary to good faith and fair dealing’ being ‘unilaterally imposed by one trading partner on the other’. All the complexity of existing relationships in the food supply chain, as well as of the efforts to modify their content with legal tools, has thus been expressed already in the first recital of the preamble.

In the food supply chain, functionally related, but structurally very different, worlds collide, maybe more than anywhere else. A world of producers tied to the land and a specific place, whether they are independent farmers or large holdings, do face a world of globalized distribution, represented primarily by multinational retail chains with their international brands and purchasing strategies. Although we all somehow feel that agriculture and food production are the foundation we cannot do without, as without them there would be no healthy nutrition, no food security, no cultural landscape and countryside as part of society and its economy, the reality is

that distribution chains have won the game of these two worlds and we have profited from their victory. Food retail chains can get the production of scattered producers to customers on time, in the necessary quantities, in an attractive package and, which is not insignificant, at prices that would not be possible without optimized wholesale distribution. Thus, on the one hand, consumers sympathize with hard-working farmers and admire picturesque landscapes of a cultivated country; on the other hand, they would not give up large retail chains with their diverse offerings, endless opening hours, discount events etc.

Attempts to regulate this structurally unbalanced relationship thus have to cope with the limits given by their practical effects. It is possible to tie retail chains with stringent regulation – but often to the detriment of consumers and also to at least one part of their smaller suppliers who, due to the burdening legal requirements, will be avoided by large buyers in favor of equally large suppliers. And one cannot forget also the conceptual-doctrinal pitfalls of such a regulation. The prohibition of certain content of concluded contracts is undoubtedly a restriction of the freedom of contract, a kind of ‘social engineering’ that may be difficult to keep within the limits of the minimum necessary regulation, and which, by consequence, can lead to more bureaucracy and corruption, with all conceivable impacts on the freedom, prosperity and stability of societies.

With all this in mind, it is no wonder that a pressure has existed for decades (from the moment when there were enough goods produced and the question arose how to sell them effectively) to regulate the imbalance between sellers and buyers of agricultural and food products, and in parallel, a restraint or even a resistance to respond to this pressure by means of public law regulation. Therefore, until now, at national level, solutions have been sought to find a way out of a maze of conflicting interests and negating each other benefits, by combining private and public law instruments, measures of varying aim and scope, promoted by both private actions and administrative decisions.

The reviewed book is a kind of interim report on looking for, and finding, these national solutions. It emerged at the moment when the EU adopted the harmonization measure, that has set a common minimal standard for everyone in the field. Thus, the book provides information on the starting point for implementing the 2019/633 EU Directive in selected EU Member States, on their current national experience with UTPs regulation and its application in practice. On 278 pages of the text, it provides detailed country reports from Poland, the Czech Republic, Slovakia, Hungary, Croatia, Bulgaria, Estonia and Lithuania (written by authors from these countries). Beyond these country reports, it contains summary studies presenting both UTPs in food supply chain in general (authors A. Piszcz, D. Wolski) and their current regulation in France, Germany, UK, Italy, the Netherlands and Portugal, as well as the draft EU directive (D. Wolski). The final summary (A. Jasser, A. Piszcz) offers a thorough comparison of national approaches towards UTPs regulation in the countries of Central and Eastern Europe.

The main part of the book content thus consists of national reports from eight CEE countries. Their value lies, first, in the fact that they represent the part of the EU that

quite often falls out of comparative studies of European legislation, carried out in the western part of the continent. Thanks to this, the book completes in a unique way the ongoing debate on the regulation of significant market power and its unfair trading practices. Second, the information provided by the book is itself very interesting and useful. The editors succeeded in gathering contributions from local experts on the issue, who thoroughly analyzed the factual and legal status of unfair trading practices in their respective countries, as well as the tools and methods used to combat them. Some of these national reports are very thorough and detailed (Lithuania, Czech Republic) while some others (Hungary) focus more on summarizing basic facts and principles. Although the extent of (and depth of) each national report varies slightly, these differences are quite acceptable, since each report performs well as an up to date guide to country specific legislation and its enforcement. One can only regret that, for instance, the Estonian contribution lacks the final part (Conclusion), which the other reports are equipped with, since, especially in the concluding remarks, the overall assessment of the national experience is usually provided.

On the one hand the book can be praised as a detailed and updated encyclopedic guide to regulations of UTPs in the food retail sector in the aforementioned CEE countries. On the other, this main part of the book is framed by very insightful analyses that widen its focus significantly. The comparative information on eight national regulations is not only summarized and evaluated there, but also juxtaposed with a brief outline of similar regulations in selected West-European countries, as well as to the first assessment of the draft EU Directive. These introductory and summarizing studies themselves bring a number of empirically based findings and conclusions that retroactively help to evaluate the information and experience described in the national reports.

It is thus clearly shown that, in 2018, only 5 out of the 28 Member States did not have specific regulations addressing UTPs, however, in spite of that, there is still no empirical evidence that the issue of extensive bargaining power and economic dependency can be solved by the means of legislation! A perceived occurrence of UTPs in the supply chain of food remains roughly the same in the countries that regulate them most strictly (France) and those that do it rather leniently (the Netherlands). Local political culture and relative strength of organized group interests correlate more with the intensity of existing national regulation than statistic-based data on the level of concentration (and possible dominance) in the food retail sector.

Among the CEE countries analyzed, there are many similarities that could be expected. In debating the necessity to regulate, a certain role has been played in this part of Europe by politically significant arguments about massive food imports imposed by foreign-owned large retail chains. All of these countries, with the exception of Estonia, have now relatively recent regulations in place (Slovakia from 2003, Hungary, Czech Republic and Lithuania from 2009, Bulgaria 2015, Poland 2016, Croatia 2017). They still need to be verified in practice, as the already existing experience remains in many (not all) of the countries limited to only low numbers of final decisions enforced by administrative authorities or courts. Similar UTPs are prohibited in all jurisdictions, such as late payments for delivery, return on perishable goods, or slotting fees. As

a rule, an administrative agency (quite often the national competition authority) is entrusted with the enforcement of their ban.

There are also quite interesting differences that authors of the final summary rightly highlighted. Some countries have food sector-limited laws against UTPs (Croatia, Czech Republic, Hungary, Lithuania, Poland, Slovakia), whereas others do not limit them to food supply chains. Although the most popular solution in CEE countries is ‘one-sided’ protection, that is, the protection of suppliers against the buyers (Croatia, Czech Republic, Hungary, Lithuania, Slovakia), there are also countries (Bulgaria, Poland) that introduced ‘two-sided’ protection of both suppliers and buyers etc.

The wealth of information contained in the book offers so many opportunities to think, to compare, to argue, to propose... that any reader, whether coming from legal or business practice, political or academic environment, would undoubtedly benefit from it. Even though the information provided would become quickly outdated due to the duty of all EU Member States to implement EU Directive 2019/633 by mid-2021, this interim report decisively has the quality to become an important milestone on the road leading to the next European-wide stages of UTPs regulation. The conclusion of the review cannot be different from the following: the book is a success in terms of its content and structure. One cannot but wish it to reach quickly interested specialists in the field throughout Europe.

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