

Market Power, Economic Dependence, or Bargaining Power: Why Do Titans Still Enjoy Protection in Several Member States?

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Abstract

The paper addresses a long-standing discussion on what are the major sources of power asymmetry among the suppliers and the buyers in the agri-food chain, and thus, a primary cause of pursuing various kinds of so-called unfair trading practices. Basically, three theoretical frameworks stay beyond combating against these practices: market power, economic dependence, and bargaining power approach. The setting of personal scope in the new EU Directive 2019/633 profoundly prefers the lastly mentioned theoretical framework. But does such a preference signify the true triumph of the bargaining power conception? The paper intends to scrutinize it using an evaluation of the major traits of the frameworks, stressing that some of them may allow for the protection of those entrepreneurs who are not in need of it. The analysis of the ways how the Directive has been implemented in the Member States then indicates that such giant suppliers continuously enjoy protection in several countries. A special attention is devoted to Czech legislation whose development may serve as a kind of a natural experiment of how these competing conceptions function in the practice.

Keywords

Bargaining Power; Market Power; Economic Dependence; Supplier and Buyer; Buyer Power; Agri-food Chain; Unfair Trading Practices.

Introduction

The issue of buyer power does not seem to be a new topic. It can be even said that it is a fairly well described concept reflected in a large number of scientific papers, but also in a decision-making practice of public authorities across Europe. For example, the buyer power has been examined in the seminal work of John K. Galbraith from the early 1950s discussing the pivotal traits of American economy. It can be also seen as the basis for the well-known Porter's five forces model, which provides a comprehensive theory for analysing a competitive environment of economic units in a market.¹

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¹ GALBRAITH, J. K. *American Capitalism: The Concept of Countervailing Power*. Boston, Houghton Mifflin, Cambridge: Riverside Press, 1952, 220 p. ISBN 978-15-60-006749; PORTER, M. E. *Competitive Strategy: Techniques for Analyzing Industries and Competitors*. New York: Free Press, 1980, 416 p. ISBN 978-07-43-26088-6.

The buyer power mostly arises from a power imbalance among the undertakings in the market. The uneven subjects' positions during the negotiation process appear to be a natural phenomenon in a vast majority of the markets. Although it is sometimes anticipated that private law rests on the principle of subjects' parity², in fact, the trading partners are not perfectly equal in terms of their skills, financial abilities, assets etc. Normally, moderate disparities in an economic importance of these partners do not cause a significant issue. In some specific cases, however, the imbalance is overly sharp, which encourages state intervention using various kinds of legal instruments to protect a weaker contracting party.

In the agri-food chain, the need for a protection of a weaker party is even amplified by a nature of the sector. In the twentieth century, many countries have experienced a rapid growth of several entrepreneurs in both food processing and retail.³ These leading forces in business at the state level have then transformed themselves into the multinational corporations whose brands are nowadays well-known across many societies. At present, almost every consumer in Europe can unequivocally identify brand products from Nestlé, CocaCola or Danone, and likewise, he or she can quickly recognize a trademark of Lidl, Tesco or Billa. These companies have simply become 'too big to fail', which reinforces the necessity of a special legal treatment, a so-called special responsibility.

In the previous paragraph, one of the key sources of the buyer power has been already described: a market power. When some corporation occupies the position of a market leader, it may negatively influence the fundamental competitive conditions in that market, the prices and quantity in particular. To combat effectively with various kinds of a misuse of the market power, competition law has been developed and still functions in all of EU member states (based on Article 101 a 102 of the TFEU⁴, accompanied by the respective national legislation). Nevertheless, such an institutional setting enables state authorities to restrict an economic power of the true giants, but not all those who have sufficient abilities to act more or less unfairly towards their partners in trade.⁵

It is common in the agri-food chain that despite the absence of any market leader, the one party's power is so high that it is capable of achieving a diverse set of counterparty's concessions.

² HURDÍK, J., LAVICKÝ, P. The System of Principles of Private Law. *Časopis pro právní vědu a praxi*. Brno: Masaryk University, 2008, Vol. 16, no. 3, pp. 230–235; KNAPP, M. Protection of a Weaker Party in Public Interest – Material Scope of the Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain. *Public Governance, Administration and Finances Law Review*. Ludovika: Ludovika University Press, 2020, Vol. 5, no. 1, pp. 62–72. ISSN 2786-0736. DOI: <https://doi.org/10.53116/pgafrr.2020.1.4>

³ SEXTON, R. Market Power, Misconceptions, and Modern Agricultural Markets. *American Journal of Agricultural Economics*. Milwaukee: Agricultural & Applied Economics Association, 2013, Vol. 95, no. 2, pp. 209–219. ISSN 1467-8276. DOI: <https://doi.org/10.1093/ajae/aas102>; TEN KATE, G., WAL, S. van der. Eyes on the price: International supermarket buying groups in Europe. *SOMO Paper* [online]. March 2017 [cit. 10. 10. 2022]. Available at: <https://www.somo.nl/international-supermarket-buying-groups-in-europe/>; MARKOU, M., STYLIANOU, A., GIANNAKOPOULOU, M., ADAMIDES, G. Identifying business-to-business unfair trading practices in the food supply chain: the case of Cyprus. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2020, Vol. 19, no. 1, pp. 19–34. ISSN 2611-1128.

⁴ See Article 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), dealing with the prohibited agreements and the abuse of dominant position.

⁵ DASKALOVA, V. The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks? *Journal of European Competition Law & Practice*. Oxford: Oxford University Press, 2019, Vol. 10, no. 5, pp. 281–296. ISSN 2041-7764.

The present belief of the EU institutions, and the majority of the member states as well, is that such practices should be also forbidden, albeit it brings, besides the need for some other piece of legislation for B2B relationships, the introduction of solid theoretical framework to justify public intervention into the market.⁶ In addition to market power, thus, another two conceptions have been discussed in the existing literature on the food supply chain, i.e., an economic dependence and bargaining power approach.

Since the special responsibility in the EU Directive 2019/633 rests on a turnover proportion between the buyer and the supplier, it may appear that the EU law prefers the lastly mentioned approach focusing on the bargaining process and its consequences. On the other hand, the Directive represents just a minimum standard of harmonization, and therefore, each member state may, to some extent, select its own approach which is more stringent in terms of the personal scope of the legislation.

The aim of the paper is to show to what extent this choice may influence the behaviour of the buyers and the suppliers nested in the national markets concerning agricultural and food products and why is it that. The decision to be stricter may very often arise from the recent national legislation on unfair trading practices (path dependency). It may also have some other reasons, for example, to avoid the complicated calculations of the undertaking's turnover. In some cases, however, this decision also causes that the titans from the supply side of the market are gaining an excessive and needless protection. Thus, this paper contains an overview of how the Directive's conception of buyer's special responsibility has been implemented in the EU member states and where the giant suppliers are enjoying legal benefits due to their status of the weaker contracting party.

1 The Puzzle of Buyer Power

This chapter should look for a persuasive reply on what might be the major source of the power asymmetry in the agri-food chain. Of course, numerous views on that question have been presented in the existing literature.⁷ These views substantially differ in the concepts

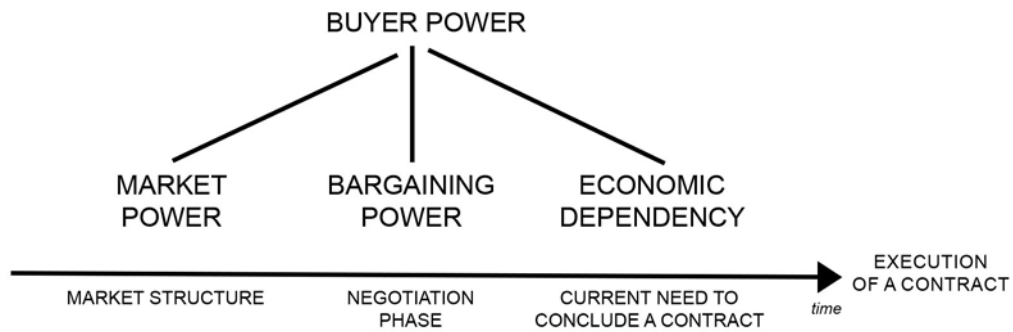
⁶ E.g. EUROPEAN COMMISSION. Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe. In: *EUR-Lex* [online]. Brussels: European Commission, 2013, 22 p. [cit. 10. 10. 2022]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0037&from=EN>

⁷ E.g. KIRKWOOD, J. B. Consumers, Economics and Antitrust. In: KIRKWOOD, J. B. *Antitrust Law and Economics. Volume 21*. Oxford: Elsevier JAI, 2004, pp. 35–41. ISBN 978-07-62-31115-6. DOI: [https://doi.org/10.1016/S0193-5895\(04\)21001-6](https://doi.org/10.1016/S0193-5895(04)21001-6); CHEN, Z. Defining Buyer Power. *The Antitrust Bulletin*. London: SAGE, 2008, Vol. 53, no. 2, pp. 241–249. ISSN 1930-7969; DECONINCK, K. Concentration and Market Power in the Food Chain. *OECD Food, Agriculture and Fisheries Paper* [online]. 2021, no. 151, 52 p. [cit. 10. 10. 2022]. Available at: https://www.oecd-ilibrary.org/agriculture-and-food/concentration-and-market-power-in-the-food-chain_3151e4ca-en; ANCHUSTEGUI, I. H. *Buyer Power in EU Competition Law*. Bergen: University of Bergen, 2017, 563 s.; DOBSON, P. W., CHAKRABORTY, R. Buyer Power in the U.K. Groceries Market. *The Antitrust Bulletin*. London: SAGE, 2008, Vol. 53, no. 2, pp. 333–368. ISSN 1930-7969; BEJČEK, J. *Smluvní svoboda a ochrana slabšího obchodníka*. Brno: Masaryk University, 2016, 516 p. ISBN 978-80-210-8185-7; DASKALOVA, V. Regulating Unfair Trading Practices in the EU Agri-Food Chain: A Case of Counterproductive Regulation? *Yearbook of Antitrust and Regulatory Studies*. Warsaw: Centre for Antitrust and Regulatory Studies, 2020, Vol. 13, no. 21, oo. 7–53. ISSN 1689-9024. DOI: <https://doi.org/10.7172/1689-9024.YARS.2020.13.21.1>

used for explaining it, as well as in their definitions, which may potentially bring confusion and very diverse interpretation of the same phenomenon.

Above all, since the role of the *buyers* as a more powerful party in the agri-food supply chain is under scrutiny, the buyer power should represent a so-called umbrella concept which generally describes the power imbalance in the B2B relationships among the undertakings. The buyer power can be regarded very generally as the asymmetry of the powers between the supplier and the buyer, in which the position of the buyer is pivotal due to a diverse set of specific traits.⁸ It is therefore a kind of a superiority of a contracting party on the demand side of the market, which can be based on very different foundations that are determined by somewhat more specific subtypes of the buyer power clarifying the mechanism of the buyers' influence on the suppliers.

Figure no. 1: *The Puzzle of the Buyer Power*



Source: Author

Figure 1 summarizes three specific conceptions of the buyer power. It presumes a potential existence of the market power, bargaining power and economic dependence. According to Figure 1, the sources of an uneven position of the buyer can be primarily the market structure (present and potential competition in the market), circumstances related to the bargaining phase (the imbalance in initial bargaining positions of the contracting parties in particular), and the acute need to conclude a contract (in relation to the existential issues of the weaker contracting party's business). These circumstances, which are described below in a detailed way, are usually settled in a different distance from the moment of a conclusion and execution of an individual contract.

At the same time, it should not be overlooked that in general, there are many more types of the buyer power to be found in the literature, apart from those presented in Figure 1. For the sake of comprehension, e.g. a dominant position, which represents a kind of a qualified

⁸ See CHEN, Z. Defining Buyer Power. *The Antitrust Bulletin*. London: SAGE, 2008, Vol. 53, no. 2, pp. 241–249. ISSN 1930-7969.

market power, or a countervailing power, which has been included below in the section dealing with the economic dependence, can be mentioned as the potentially distinctive approaches to tackle an unfairness in the B2B relationships concerning the agricultural and food products. Nonetheless, Figure 1 contains what can be perceived to be the mainstream approaches in this field of research and intends to show some tacit ties among them, based on a time perspective.

1.1 Structural Approach: The Market Power as a Part of Competition Law

The primary reason for which state intervention in the market can be convincingly justified can be seen in the existence of the market failures. These are a variety of situations resulting into an inefficient allocation of the resources, i.e., a deviation from the assumption of how the market would function under the regular conditions. The market concentration (and the consequent forms of an ineffective competition) is one of the basic market failures identified in lots of markets.⁹

If the market structure does not guarantee at least an effective competition, which ensures an acceptable market equilibrium by smooth functioning of the main competitive constraints (pressures)¹⁰, the small number of the privileged entities will have the opportunity to act independently on the other market participants, particularly in terms of setting prices and quantities of the output. Both the supply and demand side of the market can therefore be classified by using a continuum with the ends representing a perfect competition and a monopoly (or, in the case of concentration on the demand side, a monopsony).

According to some authors, the structure of the markets aimed at foodstuff in the EU member states can be often associated with the market failure in the form of an oligopsony, i.e., a significant concentration of the entities on the demand side of the market.¹¹ As a result of the concentrated market, the largest buyers should then have the so-called market power. The market power is usually defined as an ability of a particular competitor to modify and maintain prices above the level that would exist under the conditions of the effective competition, or, more broadly, to rule the market and its basic parameters owing to its own size.¹²

⁹ MANKIW, G.W. *Principles of Economics*. Mason: Thomson Higher Education, 2007, 888 p. ISBN 978-05-38-45305-9.

¹⁰ These pressures include particularly an actual or potential competition and countervailing power of the counterparty. See Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02). Available at: <https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX%3A52009XC0224%2801%29>

¹¹ DOBSON, P.W., CHAKRABORTY, R. Buyer Power in the U.K. Groceries Market. *The Antitrust Bulletin*. London: SAGE Publications, 2008, Vol. 53, no. 2, pp. 333–368. ISSN 1930-7969; BEJČEK, J. *Smluvní svoboda a ochrana slabšího obchodníka*. Brno: Masaryk University, 2016, 516 p. ISBN 978-80-210-8185-7.

¹² SORRENTINO, A., RUSSO, C., CACCHIARELLI, L. Market Power and Bargaining Power in the EU Food Supply Chain: The Role of Producer Organizations. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2018, Vol. 17, no. 4, pp. 21–31. DOI: <https://doi.org/10.30682/nm1804b>; VELÁZQUEZ, B., BUFFARIA, B., EUROPEAN COMMISSION. About Farmers' Bargaining Power within the new CAP. *Agricultural and Food Economics*. 2017, Vol. 5, no. 16, pp. 1–13. ISSN 2193-7532. DOI: <https://doi.org/10.1186/s40100-017-0084-y>

The idea of the ‘subdominance’ of the largest buyers in the market has moved the regulation of the unfair trading practices very close to the competition law. However, the competition law as such often fails to regulate the market power of the buyers in the agri-food chain.¹³ This is because the powerful entities (the retail chains and large food processors in particular) do not fulfil the standard criteria to achieve the dominant position, which is characterised by a high degree of the market concentration (for example, the most significant retail chain in the Czech Republic has the market share of around 15 per cent). Given the ineffective competition in these markets, characterised by the alleged presence of the so-called gatekeepers (i.e., irreplaceable distribution channels), some member states introduced the legislation to cope with not dominant, but still significant market power.¹⁴

In recent years, such a structural approach (i.e., based primarily on the assessment of the market structures), assuming that the market power lies on the buyers’ side, has been subject to a criticism. Above all, some authors have pointed out that the above assumptions do not generally correspond to the actual conditions of the market. As emphasized above, the degree of concentration of the buyers in food markets is normally not very high. For example, the standard indicators of the market structures suggest that the EU has, on average, just moderately concentrated national foodstuff markets.¹⁵

Moreover, the degree of concentration of the retail market is mostly lower than the concentration of the suppliers (especially the food processing corporations and food brokers) in some specific product markets. Purely from the view of the market structure analysis, the market in which the retail chains are theoretically supposed to have the market power often is characterized by more favourable competitive conditions than the markets where the entities protected by the respective legislation are operating. Thus, the empirical implications of the structural approach tend to weaken rather than support the argument for the existence of the market power of a group of the most significant buyers.

Summing up, even though it can be concluded that the structure of several markets in the agri-food chain shows certain, but not very high level of concentration on the demand side, this finding does not establish the need for the specific legislation on the unfair trading practices by itself.

¹³ E.g. DASKALOVA, V. The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks? *Journal of European Competition Law & Practice*. Oxford: Oxford University Press, 2019, Vol. 10, no. 5, pp. 281–296. ISSN 2041-7764. DOI: <https://doi.org/10.1093/jeclap/lpz032>; KNAPP, M. Protection of a Weaker Party in Public Interest – Material Scope of the Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain. *Public Governance, Administration and Finances Law Review*. Ludovika: Ludovika University Press, 2020, Vol. 5, no. 1, pp. 62–72. ISSN 2786-0736; CSIRSZKI, M.M. Unfair Trading Practices in the Agriculture and Food Supply Chain – Comparing the 2019/633 EU Directive with the Hungarian Regulation. *European Integration Studies*. Kaunas: Kaunas University of Technology, 2021, Vol. 17, no. 1, pp. 191–197. ISSN 2335-8831. DOI: <https://doi.org/10.46941/2021.se1.191-197>

¹⁴ Cf. RENDA, A., CAFAGGI, F., PELKMANS, J., IAMICELI, P., CORREIA DE BRITO, A., MUSTILLI, F., BEBBER, L. Study on the Legal Framework Covering Business-to-business Unfair Trading Practices in the Retail Supply Chain. *European Commission* [online]. 2014. [cit. 10. 10. 2022]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en>

¹⁵ DECONINCK, K. Concentration and Market Power in the Food Chain. *OECD Food, Agriculture and Fisheries Paper* [online]. 2021, no. 151, 52 p. [cit. 10. 10. 2022]. Available at: https://www.oecd-ilibrary.org/agriculture-and-food/concentration-and-market-power-in-the-food-chain_3151e4ca-en

Despite the criticism, the concept of market power or significant market power in the agri-food chain appeared in several EU member states' laws on the unfair trading practices. One of the examples is Czechia¹⁶, but significant market power had been also adopted in Slovenia¹⁷ and Hungary¹⁸. At the same time, however, it should be emphasized that after the transposition measures were enacted, it usually lost its original theoretical substance based on the market power conception (see below).

1.2 The Economic Dependence as an Ideal-type Construction

In contrast to the market power, the advocates of the economic dependence conception may emphasize that the privileged position of the buyers in the food supply chain is not determined by the market constellation of the competitors in the first place. For them, it is suitable to take into account of who has the ability to enforce unilaterally unfair contractual terms *against whom*. This corresponds with the assumption that one of the fundamental competitive restraints in the markets is, in addition to the actual and potential competition, the countervailing power of the counterparty.

The emphasis on the countervailing power gives the concept of the economic dependence a high added value. There is no doubt that the look on the balancing power of the supplier should form an integral part of any consideration of the regulation of the supplier-buyer asymmetry in the agri-food chain. Of course, the countervailing power is not a new discovery. In his study from the 1950s, Galbraith clarifies that in the American economy, a sophisticated way of forming sufficient countervailing power appears to be the 'best response' to the emerging economic power in concentrated markets, the power of the largest corporations in particular.¹⁹

The interesting fact from Galbraith's seminal work is that although he addresses the possibilities of countervailing forces to the emerging big concerns, he considers them in the reversed way to that envisaged in the recent papers and legislation. In his view, the right answer to the rapid growth of the large food producers (i.e., the suppliers) at that time was to build the chains (or the networks) in the retail sector, giving some Scandinavian countries as an example. Here, the network of consumer cooperatives appropriately balanced the power position of the largest producers.

Following Galbraith's findings, van den Maelen and her colleagues also underline the role of the 'all-powerful' food producers, pointing out that one of the main instruments for promoting the interests of the food companies are brands.²⁰ These authors metaphorically label the negotiations between the large food companies and the retail chains as a 'clash of the titans', whereby the termination of cooperation and delisting of the branded products from

¹⁶ Section 3 of Czech Act on Significant Market Power 2009, as amended.

¹⁷ Article 61.f of Slovenian Act on Agriculture 2008 (zakon o kmetijstvu), as amended.

¹⁸ Hungarian Act on Trade 2006, as amended.

¹⁹ GALBRAITH, J. K. *American Capitalism: The Concept of Countervailing Power*. Boston, Houghton Mifflin, Cambridge: Riverside Press, 1952, 220 p. ISBN 978-15-60-006749.

²⁰ MAELEN, S. van der, BREUGELMANS, E., CLEEREN, K. The Clash of the Titans. On Retailer and Manufacturer Vulnerability in Conflict Delistings. *Journal of Marketing*. London: SAGE, 2017, Vol. 81, no. 1, pp. 118–135. ISSN 1547-7185. DOI: <https://doi.org/10.1509/jm.15.0282>

the shelves is not beneficial to anyone: the supplier loses sales in one of its important distribution channels, but at the same time, the supermarket chain loses the customers due to the absence of the branded products in its stores.

The economic dependence is a concept strongly tied to the countervailing power. It presupposes a very close linkage between the supplier and the buyer, in which the supplier is existentially reliant on the cooperation with one specific buyer.²¹ The potential termination of the mutual contract may plausibly threaten the future business activities of the weaker supplier, making the weaker partner unable to break out this vicious circle voluntarily. For the supplier, there are no other comparable means of selling goods at the same price and quantity, which enables the buyer to set unilateral terms in the contract.

In general, it seems that the economic dependence should be rather exceptional situation in the B2B relationships, because each entrepreneurs should build a broader portfolio of its business partners in order to secure a continuation of its own business activities. However, in the agri-food chain, some special circumstances (shipping costs, perishability of goods etc.) of the business conduct of the vulnerable suppliers, typically by the farmers, may cause that they have only one or at most few selling opportunities (distribution channels) in their perimeter. If they fail to agree with any of them, it is likely that they will be condemned to close down.

Most frequently, the degree of the economic dependence is measured by using the proportion of the turnover with a particular non-substitutable partner to the total turnover of the weaker party. Besides this proportion, it is possible to ascertain some other indicators of the dependence, for example, to evaluate the weaker party's switching opportunities, i.e., the theoretical ability of the weaker party to deliver its goods in a traded volume in a short term through an alternative distribution channel.

In the practice, a fundamental pitfall of the economic dependence is that most of business professionals in the agri-food chain genuinely tend to have a wider portfolio of the buyers and other business contacts ensuring them a relative stability of sales. Since a professional care of the entrepreneur also includes the effort to prevent the risks and uncertainty, just a very small number of the suppliers in the chain fulfil the definition of their dependence on the buyer.²² In such circumstances, the enforcement of the special liability imposed on the buyers could therefore cover a negligible proportion of the practices, which the legislation was intended to eliminate in the agri-food chain. Given its minimal scope, the law using the

²¹ See WAKUI, M., CHENG, T. K. Regulating Abuse of Superior Bargaining Position Under the Japanese Competition Law: An Anomaly or a Necessity? *Journal of Antitrust Enforcement*. Oxford: Oxford University Press, 2015, Vol. 3, no. 2, pp. 302–333. ISSN 2050-0696. DOI: <https://doi.org/10.1093/jaenfo/jnv022>; PETR, M. Právní úprava tzv. ekonomické závislosti. *Právní spravodaj*. Praha: C. H. Beck, 2007, Vol. 8, no. 5, pp. 5–9; DASKALOVA, V. Regulating Unfair Trading Practices in the EU Agri-Food Chain: A Case of Counterproductive Regulation? *Yearbook of Antitrust and Regulatory Studies*. Warsaw: Centre for Antitrust and Regulatory Studies, 2020, Vol. 13, no. 21, pp. 7–53. ISSN 1689-9024.

²² HODONOVA, Z., OLEKSIK, R. The Slovak Parliament draws rules on unfair supply contract terms for foodstuffs (Act No. 140/2010). *E-Competitions* [online]. May 2010 [cit. 10. 10. 2022]. Available at: <https://www.concurrences.com/en/bulletin/news-issues/may-2010/The-Slovak-Parliament-draws-rules-31177>; DASKALOVA, V. Regulating Unfair Trading Practices in the EU Agri-Food Chain: A Case of Counterproductive Regulation? *Yearbook of Antitrust and Regulatory Studies*. Warsaw: Centre for Antitrust and Regulatory Studies, 2020, Vol. 13, no. 21, s. 7–53. ISSN 1689-9024.

economic dependence approach would not be able to fulfil its basic purpose of the elimination of the abusive practices in the markets concerning agricultural and food products.

Notwithstanding this fact, again, there are several member states in which the legislation on the unfair practices was built on such approach in the past decades. For example, one can make a reference to the German legislation, where the concept of the dependence has been successfully established in the law against restrictions of competition, as a supplement to the abuse of dominant position.²³ However, the dependence is conceived here in a somewhat different way than it was explained above: in relation to the sufficient and reasonable possibilities of the weaker party to shift to the third parties, to a significant imbalance of power between the contracting parties and to the countervailing power of these parties, whereby these elements are collectively referred to as a 'relative market power'. Thus, the dependence may be interpreted here very broadly, and in fact, it can be perceived to be a mixture of all of the major sources of power asymmetry that this paper has been jointly referred to as the buyer power. To give another example, in Italy, the legislation employed a broad definition of the economic dependence, too, which enables relatively smooth legal application in the practice.²⁴ And finally, Cyprian legislation also included the economic dependence, which was based primarily on the absence of an equivalent alternative in trade.²⁵

Thus, the concept of the economic dependence in its narrow sense has, on the one hand, been developed in order to respond to some of the shortcomings associated with the concept of the market power (in particular, it has taken into account the neglected issue of the countervailing power). At the same time, however, in its pure definition, it is an example of the ideal-type construction of the supplier-customer linkages that finds almost no empirical response in most of the countries. For this reason, the use of the economic dependence in laws may be a deadlock and can make the enforcement of laws on the unfair trading practices virtually impossible. Of course, someone may say that such a statement is, following the German or Italian model, false, but in fact, these countries did not regulate the economic dependence in its original sense.

1.3 The Bargaining Power: Finally an Anchor for a Protection of a Weaker Party?

Up to now, the paper has tried to outline that in a daily practice, the structural approach, i.e. the concept of the market power, in the environment of the moderate market concentration, as well as the dependence approach coping with the difficulties to meet assumption of an irreplaceability of a distribution channel, cannot be usually regarded as the useful theoretical frameworks for regulation of the special buyers' liability for conducting the unfair trading practices. What is then the suitable alternative that should be used as a ground for

²³ Section 20 of the Act against the Restraints of Competition (GWB).

²⁴ RENDA, A., CAFAGGI, F., PELKMANS, J., IAMICELI, P., CORREIA DE BRITO, A., MUSTILLI, F., BEBBER, L. Study on the Legal Framework Covering Business-to-business Unfair Trading Practices in the Retail Supply Chain. *European Commission* [online]. 2014 [cit. 10. 10. 2022]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en>

²⁵ MARKOU, M., STYLIANOU, A., GIANNAKOPOULOU, M., ADAMIDES, G. Identifying business-to-business unfair trading practices in the food supply chain: the case of Cyprus. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2020, Vol. 19, no. 1, pp. 19–34. ISSN 2611-1128. DOI: <https://doi.org/10.30682/nm2001b>

the formulation of such legislation? As indicated earlier, a kind of a third way of ensuring protection of the weaker party is represented by the concept of the bargaining power.

Kirkwood²⁶ defines the bargaining power as the ability to extract concessions from the other party through the threat of imposing costs or withdrawal of benefits if the party does not concede them. In another study, the same author adds that the bargaining power is by far the most common type of the buyer power, and when this type of the power asymmetry is utilized, the buyers benefit primarily from the ability to shift their purchases easily between the suppliers, which creates incentives for the suppliers to provide various discounts or other concessions, regardless of the specific economic reasons.²⁷

This feature clearly distinguishes the bargaining power from both the market power and economic dependence. Since the lastly mentioned one is rare in the practice, the literature mainly concerns the difference between the bargaining power and market power. As Deconinck²⁸ summarizes: “*As traditionally understood, market power refers to a situation where one firm is so large relative to the market that its decisions on how much to purchase or to sell can influence market prices, which in turn means that the optimal strategy for the firm is to restrict quantities to reduce prices paid to suppliers and/or increase prices paid by its customers. Bargaining power, on the other hand, refers to the power to obtain concessions from another party by the use of threats. In the context of UTPs, firms which are too small to exert market power may nevertheless have bargaining power.*”

Thus, the concept of the bargaining power delimits only the minimum conditions for its application, but at the same time, it contains sufficiently specific traits of the concept (the ability of the buyer to obtain concessions through a threat of switching), which makes it not vague. Although it is not a panacea that would make the determination of the buyer's responsibility a complete routine, the bargaining power finally provides a theoretical approach that is consistent with the reality of the commercial relations in the agri-food chain and is also established in the previous research.

In light of Chen's work, it can be said that the bargaining power has some common features with the countervailing power (see above), probably because it involves the aspect of a sophisticated psychological threat for the counterparty's position, which is also typical of the countervailing power, without requiring complicated indicators.²⁹ Other authors, on the other hand, believe that the potential of the bargaining power lies in its focus on the individual negotiations between the potential trading partners and does not deal with the state of affairs at the market level, which is varying considerably according to the structure of the market.³⁰

²⁶ KIRKWOOD, J. B. Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-induced Price Discrimination and Predatory Bidding? *Antitrust Law Journal*. Chicago: American Bar Association. 2005, Vol. 72, no. 2, pp. 625–668. ISSN 0003-6056.

²⁷ KIRKWOOD, J. B. Consumers, Economics and Antitrust. In: KIRKWOOD, J. B. *Antitrust Law and Economics. Volume 21*. Oxford: Elsevier JAI, 2004, pp. 35–41. ISBN 978-07-62-31115-6.

²⁸ DECONINCK, K. Concentration and Market Power in the Food Chain. *OECD Food, Agriculture and Fisheries Paper* [online]. 2021, no. 151, 52 p., pp. 19–20 [cit. 10. 10. 2022]. Available at: https://www.oecd-ilibrary.org/agriculture-and-food/concentration-and-market-power-in-the-food-chain_3151e4ca-en. See also ANCHUSTEGUI, I. H. *Buyer Power in EU Competition Law*. Bergen: University of Bergen, 2017, 563 p.

²⁹ Cf. CHEN, Z. Defining Buyer Power. *The Antitrust Bulletin*. London: SAGE, 2008, Vol. 53, no. 2, pp. 241–249. ISSN 1930-7969.

³⁰ VELÁZQUEZ, B., BUFFARIA, B., EUROPEAN COMMISSION. About Farmers' Bargaining Power within the new CAP. *Agricultural and Food Economics*. 2017, Vol. 5, no. 16, pp. 1–13. ISSN 2193-7532.

Not surprisingly, the negotiation phase is of key importance for the bargaining power. According to some authors, which present a basic model of bargaining, the bargaining power breaks down into two components, namely the initial bargaining position and the negotiating power.³¹ The initial bargaining position represents the minimum acceptable outcome that a particular party expects from the negotiation. The failure to achieve such bargaining position results in the failure to agree on a contract, which in turn forms a credible threat of mutual losses from the non-execution of the contract.

The negotiating power then allows to shift the initial bargaining position within the bargaining space to an ideal point, so that the stronger party cuts a larger share of the total amount of gains from the trade, and thus actually extracts the maximum possible outcome from the trade. The negotiating power is the ability to achieve the bargaining outcome that is closest to the ideal outcome within the bargaining space. It should be understood as a relational variable, i.e., it always assesses the ability to achieve the ideal outcome vis-a-vis a particular counterparty.

If the bargaining power of the two contracting parties is exactly same, then the initial bargaining positions will be located at the same distance from the centre of the bargaining continuum (and thus, it is assumed that the eventual outcome in the form of a non-agreement on the contract affects both parties equally). Under such conditions, the negotiation outcome is expected to be located exactly at the centre of the negotiation space and both parties are expected to share the gains from the trade equally. This is how the market would operate under conditions of, for example, almost no market concentration and absolute economic independence of the weaker party. This situation is depicted by the continuum A in Figure 2.

Figure no. 2: Modelling bargaining power



Source: Author, inspired by SORRENTINO, A., RUSSO, C., CACCHIARELLI, L. Market Power and Bargaining Power in the EU Food Supply Chain: The Role of Producer Organizations. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2018, Vol. 17, no. 4, pp. 21–31. DOI: <https://doi.org/10.30682/nm1804b>

³¹ SORRENTINO, A., RUSSO, C., CACCHIARELLI, L. Market Power and Bargaining Power in the EU Food Supply Chain: The Role of Producer Organizations. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2018, Vol. 17, no. 4, pp. 21–31.

In fact, the initial bargaining positions of the specific trading partners are not identical, since the assumption of an equality in the private law is simply unfeasible. In the food supply chain, however, only those situations where the bargaining power of one buyer greatly exceeds that of the supplier are identified as an issue. On the continuum dividing the total gains from the trade, this situation causes the rational buyer to be able to set its initial bargaining position closer to the centre of the continuum, thereby narrowing the negotiating space (see situation B in Figure 2).

This positioning of one party is made possible due to the fact that the buyer is not faced with the threat of the losses from a non-agreement, as a broad group of the suppliers compete for an access to the buyer's distribution channel given its size. The buyer is immediately able to compensate for any loss from the non-agreement by contracting with an alternative supplier who accepts its initial bargaining position. On the other hand, especially the smaller suppliers are much more affected by the threat of failing to agree on a contract with the large buyer, since there is virtually no actual buyers' competition for their specific products in the food markets. The suppliers themselves have to make a great effort to acquire a portfolio of the buyers that will ensure them sufficient sales.

The essential question for the bargaining models is how much of narrowing of the bargaining space by the power on the buyer's side can still be regarded as acceptable, without the need for the public law regulation. To some extent, this may return economic reasoning about the buyer power to the level of morals and ethics, which may vary across each society. Anyway, I have also presented the situation C in Figure 2, in which basically no negotiation on the parameters of a contract is made. Here, the supplier may either accept the terms and conditions unilaterally set by the buyer or lose the distribution channel completely (*take it or leave it principle*).

In the Czech grocery market, for example, the extreme situation shown by the situation C has proved to be common in the supplier-retailer relationships in recent years.³² When negotiating especially with small and medium-sized suppliers, the retail chains often used standardized agreements establishing certain imbalance in the parties' rights and obligations, typically in terms of contractual penalties, marketing allowances, fabricated services offered to the suppliers etc. Despite this fact, such agreements have been mostly accepted, which may, given the uneven content of the agreement, seem surprising. However, the reason for the suppliers' consent was just that they were acting under the threat of potential losses from the disagreement.

In addition to the initial bargaining position, the second component of the bargaining power should be also briefly discussed. As mentioned earlier, it is usually referred to as the negotiating power. It is worth noting that the sources of the negotiating power can be exceptionally

³² See the Decision of the Office for the Protection of Competition. *Office for the Protection of Competition* [online]. 21. 10. 2019, S0356/2018/TS-28761/2019/461/MNo [cit. 10. 10. 2022]. Available at: <https://www.uohs.cz/cs/vyznamna-trzni-sila/sbirky-rozhodnuti/detail-16397.html>, or the final report of the Office on the outcome of sector inquiry. Available at: <https://www.uohs.cz/cs/vyznamna-trzni-sila/metodicka-cinnost/vykladova-stanoviska-a-doporuceni.html>

diverse in the individual seller-buyer relationships.³³ In the B2B relationships, factors such as negotiation skills, patience, attitude to risk and availability of sufficient information may play a significant role. This is why the entrepreneurs use research and market analyses, establish the position of a key account manager or negotiate in several rounds in order to seize the largest proportion of the negotiation space.

When thinking about the most important indicators of the bargaining power as a whole, however, it should be stressed that the food supply chain falls into the FMCG (fast moving consumer goods) sector, where the objective of both the suppliers and buyers is to maximise the sales of traded goods, since the high frequency of sales combined with the low unit prices bring the parties the expectation of better profits.³⁴ The basic indicator of the volume of traded goods is the turnover (i.e. the sales expressed in prices), which can be perceived to be by far the most important measure of the bargaining power. But, in light of the fact that the bargaining approach rests on the individual, two-sided relationships, instead of the absolute number, a turnover ratio of the buyer and the supplier may express on which side the bargaining power occurs.

Thus, having the higher turnover usually means being more powerful in the food supply chain and more attractive to the potential contractual partners. This fact may also explain why various kinds of strategic partnership among two or more independent undertakings in the food supply chain are often promoted into the form of the so-called buying or selling alliances. In order to achieve higher volumes and thus better contractual terms when negotiating with the counterparties, the buyers and the suppliers tend to join with each other and form more or less formal organisations such as the buying headquarters, selling cooperatives, producers' associations etc.

In this respect, of course, the question arises whether such alliances do not constitute a horizontal agreement prohibited by the Article 101 of the TFEU, and/or corresponding national legislation. In the case of an aggregation of the suppliers, the answer will be mostly negative, since such cooperation is normally covered by a set of exemptions in the context of the promotion of the objectives of the EU's common agricultural policy.³⁵ Conversely, on the buyer side, such agreements may bring risks to functioning of competition, which need not be covered by the existing exceptions to the general prohibition of the competitors' agreements.³⁶

³³ SORRENTINO, A., RUSSO, C., CACCHIARELLI, L. Market Power and Bargaining Power in the EU Food Supply Chain: The Role of Producer Organizations. *New Medit: Mediterranean Journal of Economics, Agriculture and Environment*. Bologna: Bononia University Press, 2018, Vol. 17, no. 4, pp. 21–31. DOI: <https://doi.org/10.30682/nm1804b>

³⁴ SHAH, J. *Supply Chain Management: Text and Cases*. Chennai: Pearson Education, 2009, 446 p. ISBN 978-81-31-71517-8.

³⁵ Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, as amended.

³⁶ BEJČEK, J. Nákupní aliance po novele zákona o významné tržní síle. *Antitrust*. Praha: Sdružení KAIROS, 2017, Vol. 2017, no. 4, pp. 104–111. ISSN 1804-1183.

What seems surprising is that the bargaining power approach had been implemented in almost none of the EU countries up to 2019.³⁷ This changed rapidly with the adoption of the Directive, whose assessment of the individual power asymmetry derives from the turnover proportion between the supplier and the buyer. Basically, Article 1 (2) of the Directive sets five turnover levels, starting from 2 milion €, to be achieved by the buyer (see Table 1 below). When some of the thresholds is exceeded by the buyer, it takes the special responsibility against not all, but only its weaker suppliers (weaker in terms of their annual turnover). Given the necessary harmonisation of national laws (2019–2022), it was expected that the bargaining power approach should become prevalent in the Member States’ national arrangements.

Table no. 1: Turnover categories expressing the bargaining power in the B2B relationships

Protected supplier’s annual turnover	Buyer’s annual turnover
At most 2 mil. €	More than 2 mil. €
More than 2 to a maximum of 10 mil. €	More than 10 mil. €
More than 10 to a maximum of 50 mil. €	More than 50 mil. €
More than 50 to a maximum of 150 mil. €	More than 150 mil. €
More than 150 to a maximum of 350 mil. €	More than 350 mil. €

Source: Author according to the Article 1 (2) of the Directive 2019/633.

2 The Harmonisation and Member States’ Divergences

After mapping the puzzle of the buyer power in the agri-food supply chain theoretically, some tendencies in the EU member states related to the current use of the conceptions discussed above (as they are fixed in January 2023) should be displayed. Even though the Commission has established a webpage describing the harmonisation outcomes across the member states³⁸ and a preliminary report has been also issued³⁹, there are still cer-

³⁷ RENDA, A., CAFAGGI, F., PELKMANS, J., IAMICELI, P., CORREIA DE BRITO, A., MUSTILLI, F., BEBBER, L. Study on the Legal Framework Covering Business-to-business Unfair Trading Practices in the Retail Supply Chain. *European Commission* [online]. 2014 [cit. 10. 10. 2022]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/c82dc8c6-ec15-11e5-8a81-01aa75ed71a1/language-en>; CAFAGGI, F., IAMICELI, P. *Unfair Trading Practices in the Business-to-Business Retail Supply Chain: An overview on EU Member States legislation and enforcement mechanisms*. Luxembourg: Publications Office of the European Union, 2018. ISBN 978-92-79-92903-8.

³⁸ National transposition measures communicated by the Member States concerning 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. *EUR-Lex* [online]. European Commission, 2022 [cit. 10. 10. 2022]. Available at: <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L0633>

³⁹ EUROPEAN COMMISSION. Report from the Commission on the state of the transposition and implementation of 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. *EUR-Lex* [online]. 27. 10. 2021 [cit. 10. 10. 2022]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0652>

tain obstacles to provide exhaustive information on the issue. Firstly, there are some states in which the harmonisation was substantially delayed (several infringement procedures were initiated by the EU institutions⁴⁰). Secondly, most of the states did not provide an English version of the legislation and a machine translation may not be accurate. And finally, there can be context-biased interpretation of the Article 1 (2) of the Directive, which may result in confusion of which conception is actually preferred by the national legislation.

In light of the wording of the Preamble and the Article 1 (2) of the Directive, one could assume that the harmonisation efforts in the EU should bring almost the unification of the power asymmetry assessment across the member states, arising from the bargaining power approach. Nevertheless, Article 9 of the Directive allows the member states to ensure somewhat higher level of the suppliers' protection, which may mean maintaining or introducing stricter rules aimed at combating unfair trading practices. The possible deflections from the initial principle of the five turnover categories set by the Directive (see Table 1 above) are then covered by this provision.

In most of the EU member states, the national legislation nowadays follows the bargaining power approach (see the overview in Appendix A).⁴¹ More precisely, in fifteen countries⁴², the buyer's special responsibility is derived from the turnover proportion of the individual contracting parties. But there are two specific forms of how the bargaining approach has been implemented. Of course, the first one is a full adoption of the Article 1 (2) of the Directive. Such kind of legislation is now in effect in the countries like Malta or Ireland (a so-called copy-and-paste approach).

For some states, however, this was insufficiently severe, and therefore, they enacted some supplementary provisions that extend the scope of the buyer's responsibility, but without leaving the bargaining power conception. In Germany, for example, the legislation stipulates some additive threshold protecting more powerful suppliers. It deals with the protection of the suppliers reaching turnover up to 4 billion € in the certain sectors⁴³, albeit according to the Directive, only those suppliers, whose annual turnover does not exceed 350 million €, deserve some degree of the protection. Likewise, in Austria, where the additional turnover category has been introduced, the law anticipates the protection of the suppliers reaching the turnover up to 1 billion € against the buyers whose turnover exceeds 5 billion €.⁴⁴

⁴⁰ Commission opens infringement procedures against 12 Member States for not transposing EU rules banning unfair trading practices. *European Commission* [online]. 2021 [cit. 10. 10. 2022]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3903

⁴¹ The presented analysis draws on the data accessible from the webpage of the Commission, which makes reference to respective national legislation. See National transposition measures communicated by the Member States concerning 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. *EUR-Lex* [online]. European Commission, 2022. [cit. 10. 10. 2022]. Available at: <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L0633>

⁴² Bulgaria, Czechia, Finland, Ireland, Lithuania, Luxembourg, Malta, Germany, Netherlands, Poland, Portugal, Austria, Romania, Greece and Slovenia.

⁴³ Section 10 of Zweites Gesetz zur Änderung des Agrarmarktstrukturgesetzes.

⁴⁴ Section 5a of Bundesgesetz zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen, as amended.

Finally, the bargaining power approach, represented by a set of the turnover categories, has been also introduced in Czechia, where the newly enacted national legislation⁴⁵ added one extra provision focusing on the buyers whose *national* turnover exceeds 5 billion CZK (around 200 mil. €). From the wording of the respective provision, it seems that these buyers are perceived to be sufficiently strong in the *national* market to take special responsibility to all of their suppliers, not only those who are weaker in terms of the annual turnover.⁴⁶ But according to the Czech enforcement authority (the Office for the Protection of Competition), this provision should be interpreted in line with the Directive and the remaining turnover categories. Therefore, the buyer's national turnover will be always confronted with the turnover of the suppliers.⁴⁷ The case of Czech Republic is analysed in more detail in the separate section below.

In eight of the remaining countries, a favoured way of the transposition arises from the argument that the unfair trading practices that cause the imbalance in the B2B relationships should be, by their nature, unfair and thus forbidden for all buyers, regardless of their position in the market and/or to a counterparty. On the basis on such finding, the turnover thresholds for both the buyers and the suppliers are not included in the national legislation at all, which implies that all buyers are under the scope of the legislation, and also all the suppliers, including the largest titans, are protected by the national legislation. The 'all-to-all' setting now exists in Italy, Cyprus, Hungary, Spain, Estonia, Slovakia, Belgium and France (see again Appendix A).

To some little extent, this view on unfairness may be close to the market power approach, because it does not take any special effort to examine the supplier's countervailing power into account. However, this conception is even amplified by creating a legal fiction that already the position on the demand side of the agri-food markets enables the buyers to exert an undue pressure on the suppliers. In such an arrangement, thus, a local grocery store owned by one self-employed person is responsible for its business acting to the largest food processing concerns such as Nestlé or CocaCola, but not vice-versa. This setting, which can be named 'general responsibility', is, in my view, completely disproportional and grossly deviates from the purpose of the Directive to protect particularly the small and medium enterprises.

The rest of the EU countries (i.e. Croatia, Sweden, Latvia and Denmark; see Appendix A) also decided to replace the default bargaining power approach with somewhat different conception which, again, has its foundations most likely in the market power conception. In these member states, a special responsibility is applied to all buyers exceeding some modest turnover threshold (usually 2 million € or an equivalent in the national currency). But what is important is that these buyers must refrain from executing the unfair trading practices to all their counterparties, regardless of the supplier's turnover. Such an arrangement

⁴⁵ Section 3 of Act No. 359/2022 Coll. (the 2022 Amendment to Act on Significant Market Power 2009).

⁴⁶ In more detail, see the 2022 Amendment of the Czech Act on Significant Market Power 2009 (§ 3).

⁴⁷ The Statement on the Conception of Significant Market Power. *Office for the Protection of Competition* [online]. [cit. 3. 2. 2023]. Available at: <https://www.uohs.cz/cs/vyznamna-trzni-sila/metodicka-cinnost/vykladova-stanoviska-a-doporuceni/k-pojeti-vyznamne-trzni-sily.html>

has been sometimes entitled as an ‘absolute conception’ of the market power.⁴⁸ In the practice, however, most of the buyers exceeding such a low turnover threshold do not have any capacity to influence the market conditions significantly.

Although the implementation of the Directive has brought some minimum standard of the suppliers’ protection, the previous paragraphs have shown that its extent may vary considerably. In the environment of European internal market, then, the rate of the weaker party’s protection is context dependent, which may negatively affect the competitiveness of some entrepreneurs at the European level of the internal market. Some pundits also note that given its illogical consequences, the general and absolute conceptions of the special buyer’s responsibility fail to meet the basic principles of the Directive. Therefore, they represent an incorrect way of transposition and should be replaced.⁴⁹

3 Czechia: an Experimental Laboratory of the Buyer Power

For the sake of completeness, I present here a brief insight into the evolution of the legislation on the unfair trading practices in the Czech Republic, primarily aimed at the competing conceptions of the buyer power. From the comparative point of view, the case of the Czech law on the unfair trading practices may seem very valuable. This is because in the previous fourteen years (since 2009, when the Act on Significant Market Power was adopted), the legislation has repeatedly changed its approach for assessing the buyer power. These ‘natural experiments’, albeit they were often badly appraised by the legal experts, show the importance of right selection of theoretical justification to existing legal provisions and also the possible implications of the particular approach used to tackle the buyer’s special responsibility.

Up to 2016, the Act on Significant Market Power (hereinafter the Act) had combined the market power and economic dependence approach. As the title of the Act signifies, originally, it had been focused on preventing the largest buyers from the abuse of their significant *market power*. The significant market power was some kind of privileged market position (a sub-dominance) of the most significant retail chains in the national grocery market, achieved by those buyers who exceeded the annual turnover threshold of 5 billion CZK. At the same time, however, the Act described such a buyer’s position as a rebuttable presumption and added that it is the position, in which the supplier becomes *dependent* on the buyer in terms of a possibility of selling his products to the final consumer.

⁴⁸ BEJČEK, J. *Smluvní svoboda a ochrana slabšího obchodníka*. Brno: Masarykova univerzita, 2016, 516 s. ISBN 978-80-210-8185-7; BEJČEK, J., PETR, M., PIPKOVÁ, P. Czech Republic. In: PISZCZ, A., JASSER, A. (eds.). *Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Eastern European Countries*. Warsaw: University of Warsaw, Faculty of Management Press, 2019, s. 85–124. ISBN 978-83-66282-05-6.

⁴⁹ BUTORAC MALNAR, V., BRAUT FILIPOVIC, M., ZUBOVIC, A. Rethinking Unfair Trading Practices in Agriculture and Food Supply Chain: The Croatian Perspective. *EU and Comparative Law Issues and Challenges Series*. Osijek: Faculty of Law Osijek, 2021, Vol. 5, no. speciální, s. 2–28. DOI: <https://doi.org/10.25234/elcic/18812>

This weird mixture of two contradictory conceptions of the buyer power in the same piece of legislation had triggered the debate on whether the buyer's position should be deemed as an absolute market power (i.e. power towards all the suppliers), or rather a relative market power (only to a small group of the economically dependent suppliers).⁵⁰ After some years of uncertainty, the Supreme Administrative Court ruled that a relative conception stressing the supplier's individual dependence should be the preferred one by the enforcement authority, since the criteria of evaluating the buyer power should be always examined in the every single B2B relationship, and also the interpretation methods, according to the Court, tend to prefer the dependence (relative) approach.⁵¹ But the following practical use of the dependence approach in a strict sense had caused that most of the cases of a potentially abusive conduct of the international retail chains was terminated without imposing fine – almost none of the suppliers trading with the particular retailer under scrutiny showed a sufficient level of the dependence on the distribution channel represented by a stocking capacity of the retailer.

Such implications had stimulated the need for better anchoring of the absolute conception based on the assumption of the (significant) market power of a small number of the largest retailers. In 2016, the amendment of the Act had tried to introduce such absolute conception. But surprisingly, this not very elaborated plan failed again: even though the economic dependence had been discharged from the legal definition of the significant market power, the preservation of the rebuttable presumption of the existence of the market power (i.e., turnover exceeding the threshold of 5 billion CZK), supplemented by a set of moderately adjusted criteria that allowed to disprove it, had caused that the enforcement authority faced almost the same situation as before.

Given this fact, since 2016, the concept of the significant market power had been interpreted as an absolute one, but with a relative corrective.⁵² The consequences of the interpretation were slightly different from the previous period. The retailers were required to prove that they do not have the significant market power to some suppliers, the food processing titans in particular. Under such state of the legislation, some cases of the market power abuse were successfully resolved and the enforcement authority also imposed few fines and accepted several commitments.

In 2019, however, the Directive has been adopted at the EU level, and the deadline for its transposition into the national legislation was on 1 May 2021. The legislative bodies in Czechia did not manage to adopt the harmonisation amendment to the Act in time, and therefore, an indirect effect of the Directive was conceded by the enforcement authority.

This circumstance also affected the existing conception of the significant market power. Considering the objective of the Directive, the protection of the small and medium-sized businesses in particular, hence, the euro-conform interpretation of the Act brought significant changes in the conception of the buyer's responsibility. It was assumed that in the

⁵⁰ KINDL, J., KOUDELKA, M. *Zákon o významné tržní síle: Komentář*. Praha: C. H. Beck, 2017, 304 p.

⁵¹ Decision of the Supreme Administrative Court of 31. 10. 2017, file no. 3 As 88/2016-40.

⁵² KINDL, J., KOUDELKA, M. *Zákon o významné tržní síle: Komentář*. Praha: C. H. Beck, 2017, 304 p.

new arrangement, only the weaker suppliers (weaker compared to the suspected buyer, in terms of the annual turnover) need the public-law protection. Given the fact that most of significant retailers exceeded the turnover threshold of 350 million € (i.e. those classified using especially the fifth turnover category established by the Article 1 (2) of Directive), only those suppliers not exceeding the same threshold were considered to be protected by the Act. Using such an interpretation, the market power approach was *de facto* replaced by the bargaining power approach, regardless of what was written in the existing national legislation.

But the interim phase of the indirect effect of the non-implemented Directive cannot last forever. After the 2021 general election, a new proposal of the amendment of the Act took place in the legislative procedure. Despite the fact that the declared aim of the amendment was the full harmonisation of the Czech legislation, the outcome authorized by the legislative bodies again seems to contain a strange combination of two different approaches of examining the buyer power.

On the one hand, the 2022 Amendment (section 3) exhaustively adopts the logic of five turnover categories which are included in the Article 1 (2) of the Directive. From this point of view, it introduces the bargaining power conception. As a result of an amendatory initiative of a small group of deputies, however, the wording of section 3 can be simultaneously regarded as an intention to establish the absolute (market power) conception, but only for the group of the buyers exceeding the *national* turnover threshold of 5 billion CZK. As noted earlier, the enforcement authority issued the statement in which it declares that the 2022 Amendment enacts only the bargaining power conception, not two competing conceptions for different groups of buyers.⁵³ The pundits are now waiting on how such a combination will be interpreted by the courts.

Conclusion

The relationships in the agri-food chain represent a fairly sensitive issue, as their execution ensures the basic necessities of a life for every individual. These relationships are therefore often subject to the stricter regulation, including many specific kinds of public interventions, than it is common in most of other economic sectors. In the past years, the sector regulation of the buyers' unfair trading practices was most frequently justified by the increasing market concentration of the food industry and retail, which has allegedly resulted in establishing the privileged position of some corporations whose economic power now allows them to unilaterally dictate the terms and conditions to their weaker partners in trade. To this, two competing explanations have been gradually added, the economic dependence and bargaining power conceptions.

⁵³ The Statement on the Conception of Significant Market Power. *Office for the Protection of Competition* [online]. [cit. 3. 2. 2023]. Available at: <https://www.uohs.cz/cs/vyznamna-trzni-sila/metodicka-cinnost/vykladova-stanoviska-a-doporuceni/k-pojeti-vyznamne-trzni-sily.html>

This paper has demonstrated that both the market power and economic dependence approach show some flaws that may be hardly fixed by a sophisticated legal interpretation. The first one assumes much higher concentration of the buyers than it actually is in the particular national markets, resulting in a dubious legal fiction that those who reach some turnover threshold automatically have the market power, albeit there is clear evidence indicating that their market power is not sufficient to rule the market. The second conception also poses almost unfeasible requirements, stressing that the supplier should be extremely reliant on the economic intentions of the stronger counterparty which should represent an indispensable distribution channel for that supplier.

Instead of these approaches, the paper has introduced the bargaining power conception as a favoured option that may express of what is actually happening in many markets forming the agri-food chain. The purpose of the article was to emphasize that such a realistic view, assuming that the power imbalance of two entrepreneurs primarily lies in the setting of the initial bargaining positions and the individual contest to seize as much bargaining space as possible, might, after the Directive has been adopted at the EU level, proliferate in most of the national laws, and cause the explanation of buyer's special responsibility much more feasible and convincing.

Following this statement, the empirical part has examined the proliferation of the bargaining power approach into the national laws on the unfair trading practices in the EU. It has been demonstrated that during the harmonisation process, the majority of the member states have accepted the use of the bargaining power framework, which is represented by the set of the turnover categories established in the Article 1 (2) Directive; sometimes with a certain context-biased appendix, sometimes in full.

What may seem slightly disturbing is that few of the member states have decided to introduce the conception of the general (all-to-all) responsibility of all the buyers in the agri-food supply chain (of course, except for customers), or the absolute responsibility of those buyers who exceeds a relatively low turnover threshold. In these legal arrangements, the questionable outcomes of the regulation may be expected in the nearest future, since the large corporations like CocaCola or Nestlé will enjoy protection against those buyers who are obviously lacking enough power to unilaterally dictate terms and conditions to them. In my view, the legislation on the unfair commercial practices should function exactly in the opposite direction than it has been set in these diverging countries.

In this context, the case of Czech Republic, which has been observed more closely, may serve as an example of how creative the legislation can be in the practice. In addition to the bargaining power conception, the Act, as it was amended, nowadays also includes the provision that can be interpreted by some scholars as the absolute responsibility conception for a certain group of the privileged buyers. This causes a considerable degree of legal uncertainty for the buyers in the agri-food chain and remotely resembles the period of 2010–2016 when the legal definition of the significant market power contained references both to the market power and economic dependence approach.

Appendix A: Overview of Transposition of Power Imbalance Issue into National Legislation

Country	Mode of transposition	Relevant legislation
<i>Bargaining power conception</i>		
Lithuania	Similar to Article 1 (2) Directive, copy-and-paste approach	Law on Prohibition of Unfair Trading Practices in the Agricultural and Food Supply Chain (of 17 June 2021, No. XIV-409)
Ireland	Similar to Article 1 (2) Directive, copy-and-paste approach	S.I. No. 198/2021 – European Union (Unfair Trading Practices in the agricultural and food supply chain) Regulations 2021
Slovenia	Similar to Article 1 (2) Directive, copy-and-paste approach	Act on Agriculture, as amended
Greece	Turnover scales almost similar to Art. 1 (2) of the Directive, but the buyer’s responsibility from 0.5 mil. € (not 2 mil. €)	Law 4792/2021 transposing Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain
Bulgaria	Similar to Article 1 (2) Directive, copy-and-paste approach (amounts are in BGN)	Law on Protection of Competition (Amendment SG, issue 17 of 2021)
Poland	Similar to Article 1 (2) Directive, copy-and-paste approach	Act of 17 November 2021 on counteracting contractual advantage in trade in agricultural and food products
Netherlands	Similar to Article 1 (2) Directive, copy-and-paste approach	Act on Unfair Commercial Practices in Agricultural and Food Supply Chain 2021
Romania	Similar to Article 1 (2) Directive, copy-and-paste approach	Law no. 81/2022 on unfair commercial practices between enterprises within the agricultural and food supply chain
Malta	Similar to Article 1 (2) Directive, copy-and-paste approach	Subsidiary Legislation 117.42 on Unfair Trading Practices in the Food Supply Chain Regulations
Portugal	Similar to Article 1 (2) Directive, copy-and-paste approach	Decree-Law No. 76/2021 of August 27
Luxembourg	Similar to Article 1 (2) Directive, copy-and-paste approach	Law of 1 June 2021 on relations between companies within the supply chain agricultural and food
Finland	Act is applied when the buyer’s turnover exceeds 2 mil. € and is higher than the supplier’s turnover. The suppliers achieving turnover of 350 mil. € and more are not protected	Food Market Act 2018, as amended (Amendment No. 116/2021)

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Country	Mode of transposition	Relevant legislation
Austria	Turnover scales almost similar to Art. 1 (2) of the Directive, but one additional threshold protecting the suppliers up to 1 billion €	Act on Fair Competition, as amended (FWBG)
Germany	Turnover scales almost similar to Art. 1 (2) of the Directive, but one additional threshold to protect the suppliers up to 4 billion € in several sectors (dairy, meat etc.)	Agricultural Organisations and Supply Chain Act 2021
Czech Republic	Ordinary turnover scales supplemented by the additional national threshold of 5 billion CZK for the buyers	Act on Significant Market Power 2009, as amended (Amendment No. 359/2022 Coll.)
<i>Nearly market power conception (absolute responsibility)</i>		
Croatia	Responsibility imposed on all buyers reaching turnover of approx. 2 mil. € (15 mil. HRK)	Act on prohibition of unfair trading practices in the business-to-business food supply chain (Amendment NN 52/2021 of 14 May 2021)
Latvia	Responsibility imposed on all buyers reaching turnover of 2 mil. €	Law on Prohibition of Unfair Trading Practices 2021
Sweden	Responsibility imposed on all buyers reaching turnover of 2 mil. €	Act on Prohibition of improper trade methods between companies in the agricultural and food production chain (Lag 2021:579)
Denmark	Responsibility imposed on all buyers reaching turnover of 2 mil. € to the suppliers with the turnover up to 350 mil. €	Act on unfair trade practices in relations between companies in the agricultural and food supply chain 2021
<i>All-to-all conception (general responsibility)</i>		
Italy	No consideration of turnover, all-to-all approach	Legislative Decree no. 198/2021, implementing Directive (EU) 2019/633 on unfair commercial practices in the agri-food sector
Cyprus	No consideration of turnover, all-to-all approach	Law no. 200 of 2021 concerning Unfair Commercial Practices in the Agricultural Products and Food Supply Chain
Hungary	No consideration of turnover, all-to-all approach	Act No. XCV of 2009 on the prohibition of unfair distribution practices against suppliers of agricultural and food products, as amended

Country	Mode of transposition	Relevant legislation
Spain	No consideration of turnover, all-to-all approach	Law 16/2021, amending Law 12/2013 on measures to improve the functioning of the food supply chain (LCA)
Estonia	No consideration of turnover, all-to-all approach	Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain 2021
Slovakia	No consideration of turnover, all-to-all approach	Act No. 91/2019 Coll. on inappropriate conditions in the grocery market
Belgium	No turnover scales, protection to all suppliers up to 350 mil. €	Act of 28 November 2021 on unfair trading practices in business-to-business relationships within the agricultural and food supply chain
France	No consideration of turnover, all-to-all approach	Commercial Code (Article L441 to L443), Amendment No. 2021-859 of 30 June 2021

Source: Author, according to the national transposition measures displayed in the table and National transposition measures communicated by the Member States concerning 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. *EUR-Lex* [online]. European Commission, 2022 [cit. 10. 10. 2022]. Available at: <https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L0633>