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Unfair Trading Practices in the Business-to-Business Retail Supply Chain

An overview on EU Member States legislation and enforcement mechanisms

Authors

Fabrizio Cafaggi; Paola Iamiceli

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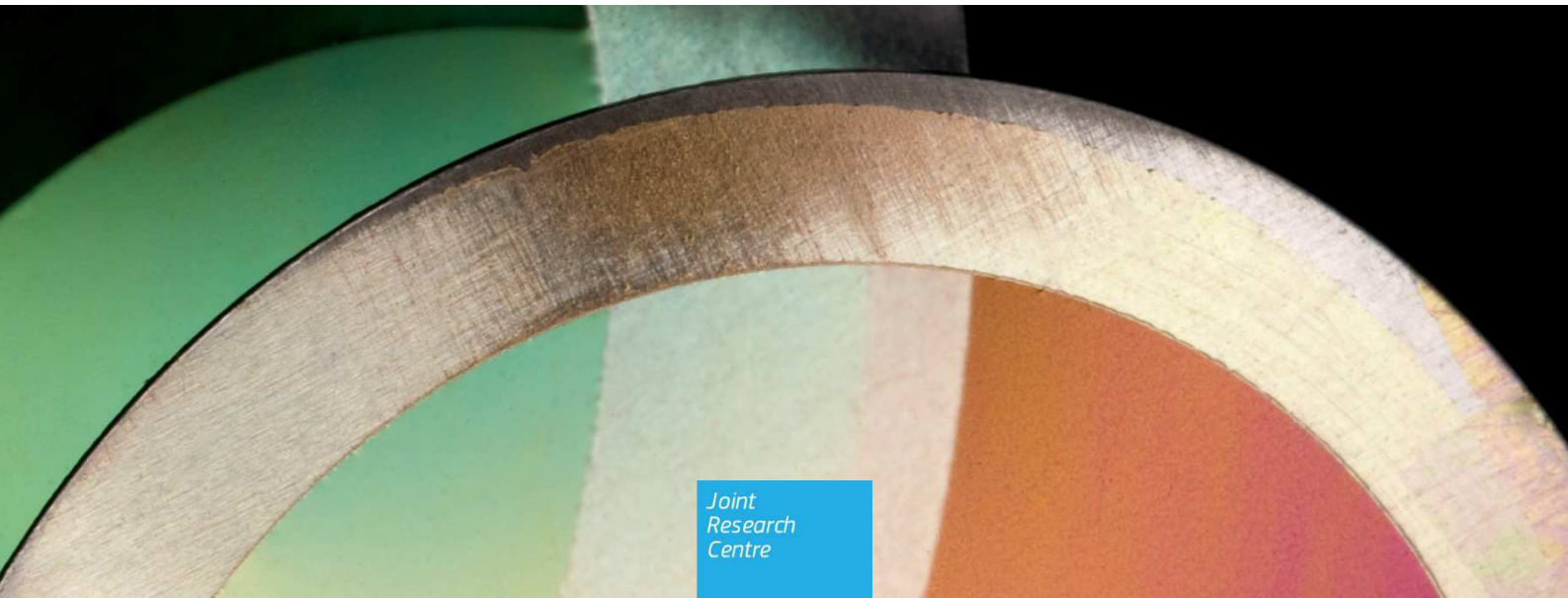

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Contact information
Pavel Ciaian
Address: Edificio Expo. c/ Inca Garcilaso, 3. E-41092 Seville (Spain)
E-mail: pavel.ciaian@ec.europa.eu
Tel. +34 954488429
Fax +34 954488300

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List of abbreviations

AMTF	Agricultural Markets Task Force
B2B	business-to-business
EU	European Union
FSCI (or SCI)	Food supply chain initiative
GCA	Groceries Code Adjudicator
JRC	Joint Research Centre
MS	Member State(s)
UTPs	unfair trading practices

Unfair Trading Practices in the Business-to-Business Retail Supply Chain: An overview on EU Member States' legislation and enforcement mechanisms

Fabrizio Cafaggi[1] and Paola Iamiceli[2]

[1] Italian Council of State, former professor at the University of Trento

[2] University of Trento, Faculty of Law

1 Introduction

The reaction to unfair trading practices (UTPs) in agri-food supply chains has become a key feature of agricultural policies at state, regional and global levels. It is part of a more general phenomenon concerning the governance of global chains[1]. The increased level of global trade in agriculture has called for new approaches to tackle unfair practices beyond states' boundaries. Increasingly, bargaining power is unevenly distributed along global supply chains. There has been a growing concentration at the retailer and processor levels while producers remain relatively small and fragmented[2]. The distribution of value along agri-food supply chains has changed in recent years[3]. Low prices at production level make farmers more vulnerable to UTPs[4]. Costs generated by regulation have been shifted. Regulatory burdens, imposed by countries of the product's final destination, are often borne by suppliers and farmers. In such an environment the likelihood of UTPs in global supply chains increases; the lack of adequate institutional responses does not allow the significant market failures related to UTPs to be addressed.

UTPs hinder trade in agricultural commodities, negatively affect competition and burden producers with additional risks and costs that may undermine the objectives of the European common agricultural policy (CAP). UTPs can condition access to the supply chain and determine exit from the chain, reducing farmers' market opportunities to grow or even to survive[5].

The EU has long engaged in a policy aimed at strengthening farmers' position in supply chains. Combating UTPs is part of this policy. The EU approach has been incremental, moving from soft law and private regulation to harder instruments; in the food sector particularly, the desirability of legislation has been considered several times over the last five to ten years. In July 2014, the Commission adopted a Communication on tackling

[1] See A. Renda, F. Cafaggi and J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, Final Report, 26 February 2014, Prepared for the European Commission, DG Internal Market (DG MARKT/2012/049/E), available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf.

[2] See OECD, 15 May 2014, Competition issues in the food chain industry.

[3] This distribution can be evaluated by comparing commodity prices at production and consumption levels.

[4] See European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling unfair trading practices in the business-to-business food supply chain, Strasbourg, 15.7.2014, COM 2016 (472) final: 'While UTPs are not the cause of the recent price declines, the low prices have made farmers more vulnerable to potential unfair behaviour by their trading partners.'

[5] See J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards: challenges and possibilities for smallholders in developing countries, *Proceedings of the National Academy of Science*, 109(31): 12326-12331, 2012; OECD, 15 May 2014, Competition issues in the food chain industry; P. Verbruggen and T. Havinga (eds.), *Hybridization of Food Governance: Trends, Types and Results*, Elgar, Cheltenham, UK – Northampton, MA (USA), 2017.

UTPs in the business-to-business (B2B) food supply chain[6]. Meanwhile, Member States (MSs) have adopted different measures, often combining legislation and forms of steered private regulation.

Legislation exists at MS level but regulatory approaches diverge in terms of both instruments and practices[7]. So far, 24 MSs have legislated on UTPs, and 12 specifically in food chains[8]. In some MSs, legislation is principle-based, with general clauses that prohibit unfair practices, leaving the enforcers with the task of determining specific prohibited practices. In other MSs, legislation is very detailed, and deploys blacklists to exemplify prohibited practices[9]. Many legislations combine general clauses with lists of practices. In these cases, enforcers have less discretion but the risk of under-deterrence is higher when new unfair practices emerge. Principle-based legislation, in contrast, leaves more discretion to enforcers but it can address new forms of UTPs as they arise. Differences also concern the instruments. A few countries have simply extended consumer protection legislation to farmers and producers. The majority have opted to take a different route, enacting specific B2B legislation motivated by the different types of practices and the need for specific supply-chain remedies. The private regulation regime, introduced with the *Principles of good practice*, also reflects a combination of general principles and a list of unfair practices paired with good practices[10].

There is no full consensus over the definition of UTPs or how different trade practices are recognised as unfair (see below, section 3.2). There is also no agreement over the instruments additional to competition law, law whose effectiveness was questioned by a European Competition Network (ECN) study in 2012[11]. MSs diverge not only on the relative weight of competition law versus contractual or extra-contractual liability to counteract UTPs but, even for violations that are addressed with the same instrument (contract, unfair competition), sanctions and remedies may differ (see below for in-depth analysis). As will be shown, both the level of penalties and the scope of imposed injunctions vary between administrative enforcement systems. These differences, and the ensuing fragmentation, has stimulated the debate over the desirability of EU intervention in order to have minimum common standards to tackle UTPs in the agri-food sector.

The European Commission had first promoted a self-regulatory regime that was consistent with the inter-professional approach that characterises European agriculture. A set of principles was developed by a range of stakeholders in the agri-food chain in 2011. This was followed by an initiative for implementation and enforcement in 2013. The food supply chain initiative (FSCI or SCI) arose out of a proposal by the Commission's High

[6] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling unfair trading practices in the business-to-business food supply chain, Strasbourg, 15.7.2014, COM(2014) 472 final.

[7] See A. Renda, F. Cafaggi and J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, February 2014; Johan Swinnen and Senne Vandevelde, 'Regulating UTPs: diversity versus harmonisation of Member State rules', in Federica Di Marcantonio and Pavel Ciaian (eds.), *Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects*, JRC technical report, 2017, pp. 39-59, available at http://www.centromarca.pt/folder/conteudo/1772_7_JRC_report_utps_final.pdf (hereinafter A literature review), pp. 41 ff.

[8] Among MSs having some type of UTP legislation we also include four MSs (Belgium, Denmark, Finland, Sweden) whose legislation is merely focused on some pre-contractual practices, mainly tailored around the concept of misleading and aggressive practices inherited from consumer law and based on 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 (hereinafter Directive 2005/29/EC). A part of the in-depth analysis below will focus on only the remaining 20 MSs' legislation. Grounds for this decision are explained below (see section 3).

[9] See European Commission Communication, Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final, pp. 5-6.

[10] See B2B Platform of the High Level Forum for a Better Functioning Food Supply Chain, *Vertical Relationships in Food Supply Chain: Principles of Good Practice*, 29.11.2011, available at http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain (hereinafter *Principles of Good Practice*).

[11] See ECN, *ECN Activities in the Food Sector*, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012.

Level Forum for a Better Functioning Food Supply Chain[12]. It represents a form of 'governed self-regulation', with the European Commission playing an important role as a facilitator. One of the problems in the FSCI is the absence of farmers' associations, which decided to pull out of the initiative right after its creation. The FSCI monitors and enforces the principles of the code of practice[13]. The results of this approach are unclear; whether self-regulation delivers the expected results with a significant reduction of the number and intensity of unfair practices is debated[14]. It appears that it can properly work as a complement to legislation in terms of both regulatory and enforcement practices.

In January 2016, the Commission published a report on unfair trade practices in the food supply chain[15]. The report focused on the MSs' regulatory frameworks and the impact of the FSCI[16]. It concluded that, 'given the positive developments in parts of the food chain and since different approaches could address UTPs effectively, the Commission does not see the added value of a specific harmonised regulatory approach at EU level at this stage. However, the Commission recognises that, since in many Member States legislation was introduced only very recently, results must be closely monitored, and reassessed, if necessary'[17].

Soon thereafter, in June 2016, the European Parliament issued a resolution encouraging the Commission to act[18]. The European Parliament underlined the fragmentation and divergences across MSs[19]. There was subsequently a report by the Agricultural Markets Task Force (AMTF) with recommendations on various issues, including UTPs[20]. Very recently (2017), the Commission published an inception impact assessment for consultation that defined different regulatory options[21]. The two main variables in the inception impact assessment concern the nature of the instruments and their coverage. Regarding the instruments, the alternatives proposed were non-binding instruments, such as guidelines or recommendations (option 2) or framework legislation (options 3 and 4). As to the coverage, the choice is between (1) an instrument to protect weaker parties and (2) an instrument regulating the relationships within the whole food chain. The results of the consultation suggest that the opportunity for a legislative intervention should be reconsidered.

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[12] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A better functioning food supply chain in Europe*, Brussels, 28.10.2009, COM(2009) 591.

[13] See *Principles of Good Practice*.

[14] See Agricultural Markets Task Force, *Improving Market Outcomes. Enhancing the Position of Farmers in the Supply Chain*, Report of the Agricultural Markets Task Force, Brussels, November 2016, available at https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-.

[15] See European Commission Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, January 2016.

[16] See European Commission (2016): 'This report concentrates on the existing frameworks for tackling UTPs. It has two main elements: (1) an assessment of the existing regulatory and enforcement frameworks in the Member States; and (2) an assessment of the impact of the voluntary EU-wide Supply Chain Initiative (SCI) and the national SCI platforms that have been set up.'

[17] For an analysis concerning the existence of national legislation addressing UTPs in supply chains, see section 3.

[18] See European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

[19] See European Parliament resolution of 7 June 2016: '41. Notes that, in adopting measures to counter UTPs within the food supply chain, due account must be taken of the specific features of each market and the legal requirements that apply to it, the different situations and approaches in individual Member States, the degree of consolidation or fragmentation of individual markets, and other significant factors, while also capitalising on measures already taken in some Member States that are proving to be effective; takes the view that any proposed regulatory efforts in this area should ensure that there is relatively broad discretion to tailor the measures to be taken to the specific features of each market, in order to avoid adopting a 'one-size-fits-all' approach, and should be based on the general principle of improving enforcement by involving the relevant public bodies alongside the concept of private enforcement, thus also contributing to improving the fragmented and low level of cooperation that exists within different national enforcement bodies and to addressing cross-border challenges regarding UTPs; *42. Points out that the existing fragmented and low level of cooperation within different national enforcement bodies is not sufficient to address cross-border challenges regarding UTPs'* (emphasis added).

[20] See the Report of the Agricultural Markets Task Force, Brussels, November 2016.

[21] See Inception Impact Assessment, Initiative to Improve the Food Supply Chain, 25 July 2017.

2 A supply chain approach to UTPs regulation

Unfair trade practices in supply chains are quite common in the agri-food sector. In the field of agriculture, the definition provided by the EU Commission in its 2014 Communication represents a useful starting point: 'UTPs can broadly be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another'[22]. UTPs may result in civil, administrative and at times criminal infringements. As we shall see, these three dimensions often co-exist and the three enforcement regimes can be in place in relation to the same UTP.

In its 2016 Report, the Commission paid special attention to the supply chain dimension: 'Looking ahead, given that UTPs can potentially occur at every stage of the chain, Member States that have not yet done **so should consider introducing legislation that covers the entire B2B food supply chain**. This is important in order to ensure that all smaller market operators have adequate protection from UTPs, as many small market operators do not deal directly with retailers. Member States should also ensure that their legislation covers operators from non-EU countries (for example, primary producers from Africa or Latin America)' '(emphasis added).

The supply chain approach also characterises private regulation. The FSCI defines principles and rules to be applied all along the chain. The regulatory perspective combines general principles related to risk allocation along the chain with specific rules prohibiting contractual clauses that distribute risks (and costs) unfairly[23]. The principle of proportionality indirectly emerges from the description of the unfair practice, where a disproportionate risk is imposed on producers[24].

Who are the infringers in supply chains? UTPs within a supply chain may be decided by the chain leader and applied all along the chain. Depending on the decision-making power held by each party within the chain, the participants in the chain may either be co-infringers or mere 'agents' of the chain leader's illegal behaviour. These different positions may have an effect on their liability, on sanctions and on civil remedies. When infringers are located in different MSs or where some are in MSs and some are located outside the EU, the definition of laws applicable to the same infringement committed by multiple infringers can become highly complex.

Taking a supply chain approach to legal regulation has important implications. UTPs have both efficiency effects and distributional effects concerning costs and risks. They redistribute value along the chain, frequently penalising producers and the upstream part of the chain while benefiting large buyers in the downstream part. Unfair distribution of both risks and costs often occurs through contractual provisions reproduced along the chain that may qualify as UTPs. Contract clauses may permit unilateral changes, raising costs and increasing requirements that producers have to meet without a corresponding increase in prices. These contractual clauses may be voided and their effects removed. While it is claimed that UTPs occur throughout the chain, the most significant ones happen in the upper part of the chain.

Different policy options might be taken to correct unfair distribution. A first option regulates UTPs along the chain regardless of the potentially injured party's economic function; a second option instead focuses on UTPs specifically against producers. Some

[22] See European Commission Communication, Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final.

[23] According to the code of practice general principle 'RESPONSIBILITY FOR RISK: All contracting parties in the supply chain should bear their own appropriate entrepreneurial risks'. From the general principle the good practice is distilled 'Different operators face specific risks at each stage of the supply chain – linked to the potential rewards for conducting business in that field. All operators take responsibility for their own risks and do not unduly attempt to transfer their risks to other parties'. See *Principles of Good Practice*.

[24] In relation to entrepreneurial risk allocation the code states: 'Transfer of unjustified or disproportionate risk to a contracting party, for example imposing a guarantee of margin via payment for no performance'.

recent legislation at MS level applies to the entire chain[25]. Others apply only to the relationship between retailers and their direct suppliers.

Conceptually different approaches might be used. The most radical approach provides a legal definition of a supply chain and applies to all the relationships within the chain[26]. The least radical approach focuses on bilateral relationships between producers and buyers, but considers the effects of the UTP along the chain[27]. An intermediate approach focuses on bilateral relationships but considers the harmful consequences for the entire chain. The intermediate approach seems to be the most popular in recent legislation. Within the bilateral approach there are differences between legislation that applies only to producers of agricultural commodities and legislation (as in Ireland) that applies only to a specific contractual relationship between retailers or wholesalers and suppliers (see, more extensively, below, section 3.1).

According to the supply chain approach, if the large buyer exercises the UTP in agreement with first-tier suppliers, the impact of the unfair practice on the second- and third-tier suppliers would need to be considered. For example, retroactive conditions after the contracts are concluded, delay of payments and/or wrongful contractual terminations may have created cascade effects on the upstream part of the chain even if they do not directly apply to them. **These effects have to be considered when imposing punishment for the infringement and providing remedies for those harmed by the UTP**.

The supply chain approach has been prominent in some MSs within the EU[28]. For example, in 2013 Spain subscribed to a supply chain approach that regulated UTPs along the chain[29]. Moving from this perspective, Spanish legislation takes into due consideration situations in which an SME is in a relationship with a buyer that is characterised by economic dependence or at least one of the two conditions occurs (nature of SME or economic dependence). According to the Spanish legislation, economic dependence exists when the supplier sells at least 30% of its overall production to a single buyer[30]. The European Commission encourages MSs that are going to introduce new legislation to adopt a supply chain approach[31].

The supply chain approach to UTPs is not necessarily associated with trans-border infringements. It can apply to both domestic and trans-border chains. Legal aspects

[25] For example, in Spain and Italy. The scope of some legislation instead is more restricted and excludes cooperatives. See section 3.1.

[26] See F. Cafaggi, Regulation through contracts: supply-chain contracting and sustainability standards, *European Review of Contract Law*, 2016, pp. 218-258.

[27] These two approaches are captured by options 3 and 4 of the European Commission's Inception Impact Assessment, 2017.

[28] According to the European Commission 'The laws in the majority of the Member States apply to business–to-business (B2B) relationships in all stages of the supply chain. Some Member States apply legislation only to relationships in which one party is a retailer'. See European Commission Report 2016. p. 4.

[29] See in Spain, Article 3, Law 12/2013, of 2 August 2013, measures to improve the functioning of the food supply chain: 'This Act aims to: ... Improve the functioning and structuring of the food supply chain to the benefit of both consumers and operators, while ensuring a sustainable distribution of value added across the sectors comprising it.' See also Article 5. Definitions: 'For the purposes of this Act, the following definitions shall apply: Food supply chain: The set of activities carried out by the various operators involved in the production, processing and distribution of food or food products, excluding transportation, hotel and restaurant activities'.

[30] See Article 2(3), Law 12/2013: 'The scope of Title II, Chapter I of this law [*on legal form and minimum content of agri-food contracts*] is limited to the commercial relations of operators engaging in commercial transactions the value of which exceeds €2 500, provided that said operators find themselves in any of the following situations of imbalance: operators find themselves in any of the following situations of imbalance: a) One of the operators is an SME and the other is not. b) In the case of the marketing of unprocessed agricultural products, perishable goods and food inputs, one of the operators has primary agricultural, livestock, fishery or forestry producer status, or is a group having such status, and the other does not. c) One of the operators is economically dependent on the other operator, meaning that the total sum for which the former invoiced the latter accounts for at least 30% of the former's turnover during the previous year'.

[31] See European Commission Report 2016. p. 5. 'Looking ahead, given that UTPs can potentially occur at every stage of the chain, Member States that have not yet done so should consider introducing legislation that covers the entire B2B food supply chain.'

concerning trans-border infringements require decisions about applicable laws and criteria to identify the competent enforcer(s). A supply chain approach in trans-border infringements should definitely distinguish between EU infringements and those that affect enterprises and farmers operating beyond the EU territory. Even though there is no dedicated research comparing UTPs within and outside the EU, it is likely that both the nature and the enforcement may vary depending on whether they are addressed to EU or non-EU producers.

3 The current legal framework at national level

3.1 National legislation addressing UTPs in supply chains

Although most MSs have adopted some legislation in the area of unfair trade practices in B2B relations, the legal landscape is rather diverse across the EU.

Among those which have introduced new rules:

— some have opted for legislation;

— some have opted for a pure self-regulatory option (e.g. Belgium, Estonia, the Netherlands);

— many have chosen a hybrid approach that combines legislation and self-regulation.

The hybrid approach has taken different forms: in some cases (Spain, Portugal, Slovakia), there is a double track system which includes both legislation and codes, with the latter playing a complementary role that is explicitly acknowledged in legislation; in other cases, the code definition of UTPs has been incorporated by reference in legislation (Italy); in others, the hybridity results in private rule-making and public enforcement (UK Grocery Code and Adjudicator).

This section is focused on legislation. Private regulation, including the EU platform established with the FSCI, will not be specifically addressed, although it will be occasionally referred to.

Within the context of legislative instruments, the present analysis **will not consider legislation exclusively based on competition law** and tailored upon Article 102 of the of the Treaty on the Functioning of the European Union (TFEU), even when the concept of dominant position and the relevant market thresholds have been stretched beyond the EU definition (e.g. as is the case for Finland). As acknowledged in previous reports and studies, a legislative approach exclusively based on competition law may fail to capture most relevant UTPs in national and global supply chains[32]. By contrast, the present analysis will consider legislation that, although introduced within a competition law framework, does not require a specific UTP's impact on market competition: this may be the case when national competition law expands beyond the boundaries of Article 102 TFEU, sometimes through the concepts of abuse of bargaining superior power or abuse of economic dependence (e.g. in Germany).

Other 'borderline' approaches are taken by those MSs that have addressed only **a very limited range of unfair practices** in the area of pre-contractual information, advertising and unsolicited offers, mostly as a spill-over effect of consumer law in the field of unfair commercial practices, although not necessarily through explicit extension of business-to-consumer (B2C) legislation to the B2B domain. This is the case for Belgium, Denmark, Finland and Sweden. Among these, Denmark, Finland and Sweden have extended, at least in part, legislation implementing the consumer directive on UTPs (Directive 2005/29/EC) to B2B relationships. In Sweden, such extension has explicitly included Annex I of the Directive, listing the per se prohibited practices. In Belgium, Articles VI.104-109 of the *Code de droit économique* (Book VI, Title 4, Chapter 2) specifically address unfair market practices towards persons different from consumers and provide for a general prohibition of business acts infringing honest market practices and harming other businesses; however, the type of practices addressed remains within the limited range described above with regard to pre-contractual information, advertising and unsolicited offers. A fifth MS, namely Austria, has taken a similar approach by extending the consumer unfair practice legislation to B2B relations, including the list of

[32] A. Renda, F. Cafaggi, J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, February 2014. See also ECN, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, p. 11.

per se unfair practices[33]. It departs from the approach taken in Denmark, Finland and Sweden for two reasons: (i) because it makes unfair practices in B2B relations subject to civil remedies (namely injunctions and damages) only to the extent that they materially distort competition; (ii) because Austria also addresses UTPs in another piece of legislation (the Local Supply Act), examined below.

As a result of its limited scope, MSs legislation that is exclusively focused on pre-contractual information, advertising and unsolicited offers will not be examined within the variety of legislative instruments specifically addressing unfair trade practices in B2B relations[34]. Nor will advertising legislation (including implementation of Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising be specifically considered in the present analysis. Indeed, as shown below, policy debate on B2B UTPs in global supply chains focuses on practices different from those addressed by this type of legislation.

Last but not least, in order to maintain a sufficient degree of specificity and comparability, the present analysis **will not specifically examine the role played in MSs by general contract law and general tort law**, although acknowledging that this role may be very important, especially when no specific legislative instrument is adopted.

Within the boundaries just defined, the analysis leads to the observations that:

- 4 MSs (Estonia, Luxembourg, Malta, the Netherlands) do not have any specific legislative instrument to address UTPs in B2B relations;
- 4 MSs (Belgium, Denmark, Finland, Sweden, as just described) address a very limited range of practices mainly focused on pre-contractual information, advertising and offer design;
- 20 MSs have some type of legislation specifically addressing unfair trade practices in B2B relations.

[33] See also the German Unfair Competition Act addressing misleading and aggressive practices in the contexts of both B2C and B2B relations; the list of per se unfair practices is applicable only to consumers, however. See Act against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette I p. 254), as last amended by Article 4 of the Act of 17 February 2016 (Federal Law Gazette I p. 233).

[34] See EU Commission Communication, Tackling unfair trading practices, p. 3, acknowledging that practices addressed by 2005/29/EC Directive are rather different from the ones discussed as UTP in B2B chains.

Table 1. MSs by UTPs legislation

No legislation on UTPs	Limited scope legislation (mainly consumer-type UTP approach)	Specific legislation on UTPs
Estonia	Belgium	Bulgaria
Luxembourg	Denmark	Czech Republic
Malta	Finland	Germany
Netherlands	Sweden	Greece
		Spain
		France
		Ireland
		Croatia
		Italy
		Cyprus
		Latvia
		Lithuania
		Hungary
		Austria
		Poland
		Portugal
		Romania
		Slovenia
		Slovakia
		United Kingdom

For the reasons above explained, the analysis below will focus on the legislation in the 20 MSs mentioned in the third column of Table 1.

Different approaches may be distinguished. In some cases (e.g. in Germany and Cyprus), UTPs have been addressed by **stretching the scope of competition law** beyond the boundaries of Article 102 TFEU, and applying the concept of abuse to economic dependence or superior bargaining power. This approach has been taken by other MSs, such as Bulgaria, where more focused and sector-specific legislation has also been adopted, namely in the food sector. In other cases (representing the vast majority of MSs that have legislative instruments on UTPs), dedicated legislation has been adopted **outside the scope of national competition law**. This legislation tends to focus on contractual relations between suppliers and processors or retailers, and covers the several stages of such relations: from pre-contractual, to contract negotiation and drafting, execution and termination, therefore going well beyond the scope of legislation tailored on the consumer protection approach taken in some other MSs (as in Belgium, Denmark, Finland, Sweden; see above, in this section)[35].

Among the 20 MSs mentioned, 12 have adopted legislative instruments specifically applicable to the **food supply chain**, whereas in 8 MSs the UTP legislation is applicable to all sectors, although sometimes including specific provisions on practices in food and groceries trade (e.g. in France, Latvia and Portugal; in Latvia and in Portugal a specific list of prohibited UTPs has been provided for the food sector). Table 2 shows these distinctions.

[35] In these countries, the application of consumer legislation to B2toB relationships may not allow the consideration of some of the practices concerning contractual activities. See Directive 2005/29/EC, which applies without prejudice to contract law (Article 3(2)).

Table 2. Cross-sector or agri-food sector-specific legislation on UTPs

Cross-sector legislation on UTPs	Specific legislation on UTPs in the agri-food sector
Germany Greece France Cyprus Latvia Lithuania Austria Portugal	Bulgaria Czech Republic Ireland Spain Croatia Italy Hungary Poland Romania Slovenia Slovakia United Kingdom[36]

Other variables concern the **addressed segment of supply chains**. As shown in table 3, in five MSs (Czech Republic, Ireland, Lithuania, Hungary, United Kingdom), examined legislation is applicable only *to retailers*; this is mostly the case for MSs that have adopted specific legislation in the food sector, although in one case (Lithuania) retailers' practices are addressed regardless of the economic sector.

Table 3. Cross-sector or agri-food sector-specific legislation on UTPs along the chain or applicable to retailers only

	Cross-sector legislation on UTPs	Specific legislation on UTPs in the agri-food sector
LEGISLATION APPLICABLE ALONG THE WHOLE CHAIN	Germany France Greece Cyprus Latvia Austria Portugal	Bulgaria Spain Croatia Italy Poland Romania Slovenia Slovakia
LEGISLATION APPLICABLE TO RETAILERS ONLY	Lithuania	Czech Republic Ireland Hungary United Kingdom

In all the other cases, legislation is applicable at all stages along the chain. It is remarkable that, even within this set of legislative instruments, variations emerge depending on the supply chain structure. For example, the Croatian Act on the prohibition of unfair trading practices in the B2B food supply chain provides both general and specific lists of prohibited UTPs based on the type of relationship (between the

[36] More precisely, the UK Groceries (Supply Chain Practices) Market Investigation Order 2009 refers to groceries going beyond the food sector as strictly intended: 'Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), cleaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products, and Grocery shall be construed accordingly' (§ 2(1)).

supplier and the buyer or processor, and between the supplier and the re-seller). In comparison, the French Commercial Code includes both general scope provisions (e.g. Article 442-6) and specific provisions on distribution contractual relations, therefore concerning the last segment of the chain only (e.g. Article 441-7).

The supply chain structure also comes into consideration when transactions are dealt with within *cooperative companies*, which allow the setting of different contract terms, more stable relationships and different modes of monitoring over trade compliance. As a consequence, some legislation excludes these transactions from the scope of application of laws on unfair trade practices; this is, for example, the case in Spain and Poland.

A third type of variable is the **size of business**. Indeed, the size of potential infringers is sometimes considered a proxy for bargaining power, and the size of potential injured party is considered a further proxy for an unbalanced relationship. As a consequence, some MSs have limited the scope of legislation:

(i) to businesses exceeding a certain size or
(ii) to relationships in which only one party is a small or micro-enterprise.

The approach under (i), restricting the scope of application of UTP legislation to 'large enterprises' only, is, for example, taken in:

— *Croatia*, whose legislation applies to resellers whose turnover in Croatia exceeds approximately EUR 132 500, and to processors whose turnover in Croatia exceeds approximately EUR 66 250;

— *Lithuania*, whose legislation applies to retailers with significant market power, defined as retailers with at least 20 stores and a surface footprint of at least 400 square metres in Lithuania and with an aggregate income in the last financial year that is not less than EUR 116 million;

— *Poland*, whose legislation applies when the business's trade value in the past 2 years or within the UTP practices exceeds approximately EUR 11 900 and when the infringer's (group's) turnover exceeds approximately EUR 23 867 100;

— the *United Kingdom*, whose Groceries (Supply Chain Practices) Market Investigation Order 2009 applies to any retailer with a turnover exceeding GBP 1 billion with respect to the retail supply of groceries in the United Kingdom, and which is designated in writing as a Designated Retailer.

The approach under (ii), taking into account the position of SMEs as the potentially injured party, is taken (again) in *Lithuanian legislation*, which does not apply to relationships between retailers having significant market power and *suppliers whose aggregate income during the last financial year exceeds EUR 40 million*: larger suppliers, as potential victims, are then excluded from the scope of application of the law. A comparable approach is only partially taken in *Spanish legislation* on the functioning of the food supply chain, when regulating formal and content requirements of supply contracts: indeed, these apply only to transactions whose value exceeds (or is expected to exceed) EUR 2 500 and when one of the proxies for unbalanced relations occurs; among these proxies, the size of the harmed business as a SME is also considered. Rather similarly, in Article 20 of the *German Act against Restraints of Competition*, abuse of relative market power is prohibited only when it involves SMEs as 'dependent' enterprises. In the *Portuguese Decree-Law no 166/2013*, whose scope of application is general, specific provisions have been provided for the protection of small and micro-enterprises; moreover, fines are adapted to the size of the infringers.

As the German and Lithuanian examples show, the reference to the size of involved enterprises may be combined with a reference to a situation of superior bargaining power of the potential injurer or the economic dependence of the potential injured party. Other pieces of legislation specifically focus on **abuse of superior bargaining power or abuse of economic dependence**, so they indirectly exclude from their scope of application more equal or balanced relations. This is the case of one of the pieces of

legislation in Bulgaria, and in the Czech Republic, Greece, Croatia, Cyprus, Poland and Slovenia.

The scope of application of the examined legislation is only sometimes tailored on the **national v. transnational** dimension of the supply chain. Recent legislative interventions (e.g. in the *UK* and *Ireland*) have expressly expanded the scope of application of legislation on unfair trade practices in favour of suppliers located outside of the national territory. By contrast, the *Portuguese Decree-Law no 166/2013* on individual restrictive commercial practices used to be applicable only to companies established within national territory. Here, a recent reform by Decree-Law no 220/2015 has repealed a former provision excluding from the scope of application of Decree-Law no 166/2013 the purchase and sale of goods and the provision of services originating or terminating in a country outside the EU or the European Economic Area. Now, similarly to the Irish law, the Portuguese law would apply, for example, to UTPs that occurred within the relationship between a Portuguese retailer and a Brazilian supplier. In comparison, in Poland, the law on the fraudulent use of contractual advantage in trade and agricultural products and groceries applies only to UTPs whose effects occur in Poland; therefore, one could argue that it could apply, for example, to UTPs enacted by a foreign retailer against a Polish supplier. A similar approach is taken in the Czech Republic. In practice, this situation could entail some need for cooperation among administrative authorities in different EU countries, whenever, for example, an injunction should be enforced against a foreign supplier, if ever admissible. In the Italian legislation, the scope of application is linked to the place of the delivery of goods; indeed, the norms apply to the extent that such a place is in Italy (see Article 1, Ministerial decree no 199/2012): here the provision focuses on the place of delivery rather than on the place in which the UTP effects are generated.

More generally, it should be noted that the 'source' of UTPs, especially when based on the use of contract terms or business protocols, may be traced back in a different MS from the one where the harmed business(es) is/are located and the effects of UTPs are produced, either because the supplier trades with a foreign client or because, although the contract is stipulated with a local buyer, the latter is 'controlled' by a foreign company that imposes the contested practice along the chain. Defining the scope of application of national legislative instruments and disregarding the international dimension of supply chains may lead to relevant practices being left out of the reach of the adopted instruments.

3.2 Modes and extent of prohibition of UTPs

National legal frameworks are also rather diversified in respect of the modes and extent of prohibition of UTPs. As specified above, the present analysis is limited to the legislation identified in the 20 MSs that have legislative instruments on UTPs in supply chains, without being limited to pre-contractual aggressive and misleading practices or misleading advertising (see Table 1).

UTPs are often prohibited through the use of **general clauses and general principles**. Examples include:

- prohibition of unequal treatment of entrepreneurs unless objectively justified (Austria);
- prohibition of every act/omission by an undertaking with a stronger bargaining position when in conflict with fair business practice and damaging or impairing the interest of a weaker party (Bulgaria);
- prohibition of abuse/exploitation of superior/significant bargaining power (Czech Republic, Croatia, Italy, Slovenia);
- prohibition of abuse of relative market power, consisting of unfair treatment or objectively unjustified discrimination in cases of economic dependence of SMEs (Germany);

— prohibition of abuse of economic dependence (Greece, Cyprus);

— liability for imposing significant imbalance between parties' rights and obligations (France, Italy);

— prohibition of imposing unfair contractual advantage contrary to the principles of morality and threatening the essential interest of the other party (Poland);

— prohibition of unfair conduct (Italy, Hungary) or conducts in contrast with fair practice (Latvia), of actions contrary to fair business practices (Lithuania), and of unfair contractual conditions and unfair trade practices (Slovakia);

— duty to conduct trading relationships in good faith and in a fair, open and transparent manner and to respect the terms and conditions of the agreed contracts (Ireland);

— duty to comply with principles of transparency, fairness, proportionality and reciprocity in contractual obligations (Italy);

— duty to comply with the 'Principles of good practice in vertical relationships in the food supply chain', developed by the European Commission in the B2B Platform of the High Level Forum for a better functioning food supply chain (Italy);

— duty to comply with principles of balance and fair reciprocity between parties, freedom to enter into agreements, goodwill, mutual interest, equitable sharing of risks and responsibilities, cooperation, transparency and respect for free market competition (Spain);

— duty to comply with the principle of fair dealing (United Kingdom).

As shown above, the use of principles and of general clauses are rather diversified across MSs not only because different ones are referred to in different systems but also because they are differently defined in each legislation. For example, the *concept of superior bargaining power* may be defined as having regard to the volume of sales (as in Slovenian law); as the characteristics of the structure of the relevant market and the particular legal relationship between the enterprises, taking into consideration the level of dependence between them, the nature of their business and the difference in the scale thereof, the probability of finding of an alternative trade partner, including the existence of alternative supply sources, distribution channels and/or customers (as in Bulgarian law); or as having exclusive regard to cases in which economic dependence involve SMEs (as in German law).

As shown in table 4, in only a few cases (Portugal, Romania) prohibitions are listed with regard to specific conducts without relying on general clauses and general principles. Also rare is the use of general clauses that are not coupled with a **list of prohibited conducts** (e.g. in the German Act against Restraints of Competition). Indeed, *in the large majority of systems, general principles and general clauses are always complemented by either examples or more structured lists of prohibited practices falling under the umbrella of the general prohibition*. In some cases, it is specified that the list is not complete and any other conduct infringing the general prohibition must be penalised (e.g. Italy) or that the list provides only examples of prohibited conducts (e.g. Poland); in other cases, it is more doubtful *whether unlisted conducts may be sanctioned* under the general prohibition, especially when the general prohibition is very open and the list of prohibited conducts rather detailed (as is the case for Hungary). This extension may be particularly critical in systems in which enforcement is mainly criminal (Ireland, Romania) and the principle of legality may reduce extensive interpretation of law identifying crimes.

The use of lists does not totally eliminate the need for discretionary powers when interpreting and applying the rules. Indeed, even when prohibited conducts are listed, the use of **open terms** (such as 'proportional', 'reasonable', 'justified', 'significant imbalance', etc.) is very common, although diversified across countries.

Table 4. Degree of detail and specificity of the legislation on UTPs

Only general clauses and general principles	Only lists of prohibited practices	General principles, general clauses, examples or lists of prohibited practices
Germany	Portugal Romania	Bulgaria Czech Republic Spain France Ireland Greece Croatia Italy Cyprus Latvia Lithuania Hungary Austria Poland Slovenia Slovakia United Kingdom

When it comes to the **specific UTPs covered** by examined legislation (dedicated UTP legislation in the 20 abovementioned MSs), fragmentation is even wider.

Table 5 addresses the following practices:

1. payment periods longer than 30 days;
2. unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices);
3. contributions to promotional or marketing costs;
4. claims for wasted or unsold products;
5. last-minute order cancellations concerning perishable products, or unfair contract termination in general;
6. requests for upfront payments to secure or retain contracts.

This list of practices is mainly based upon the one proposed in the Report of the Agricultural Markets Task Force[37], partially complemented by the shorter list of UTPs identified by the EC Report in 2016 as 'core types of UTPs broadly covered by all regulatory frameworks'[38]. It also draws on the FSCI code and the annexed list of practices included therein, whose development has contributed to the definition of relevant practices.

[37] Report of the Agricultural Markets Task Force, Enhancing the position of farmers in the supply chain Brussels, November 2016. This is the list of prohibitions proposed therein: 'i. no payment periods longer than 30 days; ii. no unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices); iii. no contributions to promotional or marketing costs; iv. no claims for wasted or unsold products; v. no last-minute order cancellations concerning perishable products; vi. no requests for upfront payments to secure or retain contracts' (p. 34, § 113).

[38] See European Commission Communication, Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final, listing the following prohibitions: '- one party should not ask the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked; - one party should not make unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions; - there should be no unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship' (p. 5).

More specifically, in the present analysis the concept of 'last-minute order cancellations concerning perishable products', used by the AMTF, has here been expanded towards a more general concept of 'unfair termination of a contractual relationship' along the lines of the shorter EC list. Compared with the latter, the AMTF list is more selective and less dependent on open terms and concepts. So, for example, the AMTF reference to prohibition of contributions to promotional or marketing costs could be linked with the more general prohibition of asking 'the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked', identified in the 2016 EC report; and the AMTF reference to prohibition of unilateral and retroactive changes to contracts, claims for wasted or unsold products, and requests for upfront payments to secure or retain contracts could be read within the more general prohibition of 'duly or unfairly shifting its own costs or entrepreneurial risks to the other party', identified in the 2016 EC report. The reference to unilateral and retroactive changes to contracts is common to both lists, although the Commission report explicitly considers the possibility that changes may be admitted through contract clauses (this possibility will be separately examined below). Payment delays are addressed in only the AMTF list.

Table 5. UTPs covered by specific national legislation on UTPs

Selected practices	**MSs whose UTP legislation covers the selected practices**
PAYMENT PERIODS LONGER THAN 30 DAYS	Bulgaria, Czech Republic, Ireland, Spain, France, Croatia, Italy, Latvia, Hungary, Poland, Romania, Slovenia, Slovakia, UK *In other MSs, provisions on late payment are addressed in the legislation implementing the Late Payment Directive*
UNILATERAL AND RETROACTIVE CHANGES TO CONTRACTS (CONCERNING VOLUMES, QUALITY STANDARDS, PRICES)	Bulgaria, Ireland, Spain, Croatia, Italy, Latvia, Lithuania, Hungary, Portugal, UK
CONTRIBUTIONS TO PROMOTIONAL OR MARKETING COSTS	Bulgaria, Ireland, Spain, Czech Republic, France, Italy, Latvia, Lithuania, Hungary, Portugal, Romania, Slovenia, UK
CLAIMS FOR WASTED OR UNSOLD PRODUCTS	Bulgaria, Ireland, Spain, Czech Republic, Croatia, Latvia, Lithuania, Hungary, Portugal, Slovenia, UK
LAST-MINUTE ORDER CANCELLATIONS CONCERNING PERISHABLE PRODUCTS, OR UNFAIR CONTRACT TERMINATION IN GENERAL	Bulgaria, Czech Republic, Ireland, Greece, France, Croatia, Italy, Cyprus, Poland, Romania, UK
REQUESTS FOR UPFRONT PAYMENTS TO SECURE OR RETAIN CONTRACTS	Czech Republic, Ireland, Spain, France, Croatia, Italy, Latvia, Lithuania, Hungary, Poland, Portugal, UK

Particularly in this case, figures must be considered as showing general trends rather than conclusive evidence. Indeed, some of the listed practices (e.g. payment periods longer than 30 days) may be prohibited in other pieces of legislation than those here examined (e.g. legislation implementing the Late Payment Directive), or some of the specific conducts here considered (e.g. imposition of contribution to promotional marketing costs) may be ignored as such by the lists under scrutiny although they are addressed through more general prohibitions (e.g. concerning imposition of costs not related to the services provided) or through the use of general clauses (e.g. abuse of superior bargaining power), as seen above.

Moving from this clarification and within these limitations, one could observe that even a relatively commonly addressed practice (e.g. unfair contract termination) is not

specifically referred to in almost half of MSs that specifically regulate UTPs in B2B relationships. Other UTPs mentioned (e.g. unilateral and retroactive changes to contracts, contributions to promotional and marketing costs, and requests for upfront payments to secure or retain contracts) are addressed in fewer than two thirds of these MSs' legislations. No specific prohibition is common to all legal systems, even though, once again, the presence of general prohibitions based on fairness may permit coverage of these UTPs.

Even when the same type of practice is covered in several MSs, the mode of regulation varies. For example, in Slovenia, payment periods are targeted when they are longer than 45 days (rather than 30).

Another major distinction regards the possibility that some UTPs are **exempted** if business conduct is expressly regulated **through contract clauses** that parties have agreed upon. Two types of provisions should be distinguished in this case:

— *Mere exemption*, as shown in the following example: 'The contract for purchase of food for resale cannot: […] 4. be amended unilaterally, **unless this is explicitly provided for in the contract**' (Article 19.1 of the Bulgarian Foodstuff Act; similar provisions are adopted in Latvian and Lithuanian legislation, which also include examples of the second type here below).

— *Exemption subject to compliance with contract regulation*, as shown in the following example: 'This Regulation prohibits a retailer or wholesaler from varying, terminating or renewing a contract with a supplier **unless the contract expressly provides for such variation, termination or renewal or agreed circumstances when such variation, termination or renewal can occur**. Thus, unilateral retrospective variations are not permitted. In addition, the agreed contract must specify the period of written notice that must be given prior to any such variation, termination or renewal. The period of such notice will be reasonable and have regards to all the circumstances of the contract, including:

- the duration of the contract;
- the frequency with which orders are placed by the retailer or wholesaler for the grocery goods concerned;
- the characteristics of the grocery goods concerned including the durability, seasonality and external factors affecting their production; and
- the value of any order relative to the annual turnover of the supplier in question'.

(Regulation 5, Irish Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (S.I. No 35 of 2016); emphasis added). Similar provisions are adopted in Spain and the United Kingdom, and, together with examples of the first type of provisions above, in Latvian and Lithuanian legislation.

Whereas the former type of exemption may create room for abuse when drafting contract clauses, the latter type limits this risk by adopting contractual procedures or specifying requirements for contractual exemption.

4 The enforcement triangle and its current weaknesses

The enforcement of UTPs is decentralised. It is based on a triangle including administrative, judicial and private dispute resolution. MSs are responsible for detecting and sanctioning both domestic and trans-border infringements. Not only substantive rules describing unfair trade practices but also enforcement mechanisms have been introduced by the MSs' legislations to address an enforcement gap. The new legislation adds to and does not replace general rules in civil codes or statutory instruments.

The enforcement mechanisms comprise adjudication by courts aimed at compensation for damages, restitution of unduly paid sums and invalidity of clauses in contracts. Some MSs also include a criminal aspect and consider UTPs civil, administrative and criminal infringements. Increasingly, judicial enforcement has been complemented by administrative enforcement with sanctioning powers, including fines and, to a limited extent, injunctions. Administrative enforcers include competition authorities, ministries of agriculture and national agencies[39]. Often, multiple administrative bodies with enforcement powers are in place. Competition authorities are responsible both for unfair practices that constitute anticompetitive infringements and for non-competition aspects of UTPs when, for example, the infringer that engages in unfair practices is not in a dominant position. In addition, some MSs have identified other administrative authorities, complementing the competition authorities, that either focus on the protection of SMEs in agriculture or deliver recommendations and opinions using cooperative rather than command-and-control enforcement. The introduction of administrative enforcement is mostly linked to the adoption of dedicated legislation on UTPs in supply chains. Indeed, in all MSs adopting such legislation, some type of administrative enforcement has been provided. Whereas in several cases existing authorities have been empowered (mainly competition or consumer and competition authorities), in other cases newly dedicated administrative authorities have been established, as shown in table 6.

[39] See European Commission Report (2016): 'Member States have appointed different national enforcement authorities to address UTPs. This is sometimes the national competition authority and in other cases a dedicated body, such as a national ministry, a national food agency, or a national anti-fraud agency'.

Table 6. MSs and main enforcing authorities

MS	**Main enforcing authority as regards UTP legislation**
BULGARIA	Commission of Protection of Competition (CPC)
CZECH REPUBLIC	Office for the Protection of Competition
GERMANY	Competition Authority (CA) (*although injunctions are imposed by courts; the CA may file a request*)
IRELAND	Competition and Consumer Protection Commission
GREECE	Court
SPAIN	Administration of Autonomous Community or General State Administration (d*epending on territorial dimension of UTPs*:)
FRANCE	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF, General Directorate for Competition Policy, Consumer Affairs and Fraud Control, within the Ministry for the Economy and Finance)
CROATIA	Competition Authority
ITALY	Competition Authority
CYPRUS	Commission for the Protection of Competition
LATVIA	Competition Council
LITHUANIA	Competition Council
HUNGARY	National Food Chain Safety Office
AUSTRIA	Court *(administrative authorities, e.g. Federal Competition Authority, have standing to start judicial proceedings)*
POLAND	Office of Competition and Consumer Protection
PORTUGAL	ASAE (*Autoridade Administrativa Nacional Especializada*, Specialised National Administrative Authority)
ROMANIA	Consumer Protection Authority and Ministry of Finance (*depending on UTP*)
SLOVENIA	Slovenian Competition Protection Agency
SLOVAKIA	Ministry of Agriculture And Rural Development
UNITED KINGDOM	Grocery Code Adjudicator
MS HAVING LIMITED-SCOPE LEGISLATION (MAINLY FOCUSED ON CONSUMER-TYPE MISLEADING AND AGGRESSIVE PRACTICES)	
BELGIUM	Commercial Court
DENMARK	Court
FINLAND	Market Court
SWEDEN	Market Court

Other features of administrative enforcement concern the possibility of investigating and penalising multiple infringements with multiple injured parties. Administrative enforcement can focus either on single infringers and single injured parties or on multiple ones. In the latter case, the effects on markets are wider and deeper. Administrative enforcement, unlike judicial enforcement, takes account of repeat infringements. Power to punish can be adjusted accordingly when the infringer has previously engaged in the same or similar unlawful conduct.

Administrative bodies may (1) either only have investigative powers and refer to courts for enforcement, or (2) hold both investigative and sanctioning powers. When they can

only investigate, they may bring actions before the court without prejudice to the rights to effective judicial protection of individuals injured by the UTPs [40]. In the latter case, these powers have to be exercised by separate units or legal entities in order to comply with due process and good administration requirements.

The complement of enforcement mechanisms also includes private regimes that can be either voluntary or mandatory, and are characterised by the extensive use of market and reputational sanctions. The pillar of private bodies applying codes of conduct represents the third side of the triangle. This is supported at EU level by the Food Supply Chain Initiative (FSCI)[41]. Enforcement of codes of practices may follow a different path. Compliance with codes of practice can be ensured by private bodies such as the FSCI platforms, by public enforcers, including administrative bodies (UK Grocery Code Adjudicator) and courts, and by hybrid bodies composed of members of the public administration and representatives of the various interests involved, such as the Code Oversight Committee in Spain.

What is the relative weight of each of the enforcement mechanisms? Why and how do they complement each other? No legislation imposes alternative routes. Injured parties can access the three enforcement mechanisms. The enforcement triangle, including judicial, administrative and private resolution mechanisms, represents a relatively common feature in MSs (see Figure 1). What differs is their combination and modes of interaction. Hardly any national legislation coordinates judicial and administrative enforcement. Similarly, no effective coordination exists between the enforcers of the supply chain initiatives (FSCI national platforms) and the judicial and administrative enforcers.

The relative weight of each enforcement mechanism has changed over time. Administrative enforcement has gained more importance in comparison with adjudication. The rise of administrative enforcement can partly be explained by the lack of incentives for producers' and more generally 'victims' to use the judicial system. In long-term relationships characterised by economic dependence between the parties, litigation is generally regarded as the final option, and farmers might not be able or willing to afford such a risk. Administrative enforcement with *ex officio* power shields farmers from the danger of retaliation and better preserves the continuation of the business relationship with large buyers.

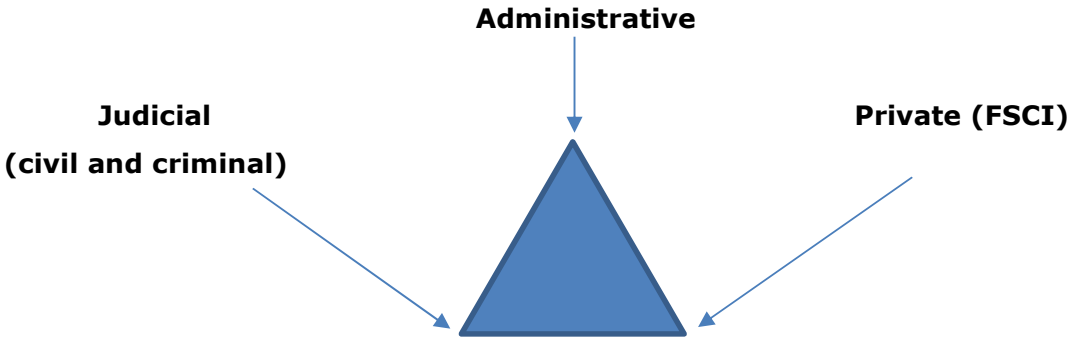
The complementarity concerns both procedures and sanctions/remedies.

Complementarity implies differences in approaches and in instruments. The resolution of private disputes is usually characterised by a strong(er) collaborative approach between enforcers and parties. Sanctions are limited whereas remedies are primarily reputational, although some private adjudicators can also issue injunctions and fines. Administrative enforcement features both collaborative and command-and-control enforcement depending on the approach. The principal instruments used to prevent and deter are fines and injunctions. Adjudication before courts follows the adversarial model and focuses on injunctions, restitution and compensation.

[40] See, for example, France, where the DGCCRF can start a civil action and seek judicial remedies including civil penalties (*ammèndes civiles*) (see Article 442-6, Code de commerce); for different UTPs, the Competition Authority can impose administrative sanctions (see Articles 470-2 and 441-7, Code de commerce). See Ireland, where the Competition and Consumer Protection Commission monitors compliance with the regulations (including through the Annual Reports of enterprises), whereas criminal and civil courts adjudicate the criminal sanctions (criminal courts) and civil remedies (restitution and damages, civil courts). See also, for the UK, Draft Groceries Code Adjudicator Bill,§ 36. 'If the Adjudicator concludes that a large retailer has broken the Groceries Code it may make recommendations under clause 8, require information to be published under clause 9 or impose financial penalties under clause 10 (but financial penalties may only be used if the Secretary of State has made an order allowing this — see also Schedule 3).'

[41] See www.supplychaininitiative.eu.

Figure 1. The enforcement triangle



The three pillars constitute the enforcement triangle that should address the enforcement gap in UTPs. Their coordination at MS level is currently very limited. A lack of coordination, together with some design fallacies, undermines the effectiveness of decentralised enforcement and prompts the call for a better integrated approach at both MS and EU levels. An integrated approach requires coordination between enforcement mechanisms to ensure that each performs its functions without duplications and overlaps. But the most important feature is coordination among MSs, both among administrative enforcers and between them and criminal and civil courts. In each enforcement mechanism it is necessary to define a sequence of administrative and judicial procedures and to regulate the legal force of administrative decisions in judicial proceedings, the possibility of using evidence and the solution of potential conflicts between final decisions.

The operation of the enforcement triangle becomes even more problematic when multiple injurers and multiple injured parties belonging to **different MSs** or to states **outside the EU** are involved. Administrative and judicial enforcement mechanisms have different rules concerning extraterritoriality. Their complementarity when injured parties and infringers are located in different states may have different features from those related to UTPs whose geographic scope rests within a single MS.

In the case of trans-border infringements within the EU, one of the open questions is that of the extent of the power of national enforcers to investigate and punish infringements that start from a foreign MS and have effects in their own state or start from their own MS and have effects in other MSs.

Administrative enforcers can fine traders for UTPs whose effects are outside their MS. Some MSs specifically provide for this power even in relation to outside EU producers (*UK, Ireland*). Other MSs establish a principle of reciprocity (*Austria*). Accordingly, protection of non-national producers is warranted as long as the same protection would be granted to national producers before the foreign administrative authority. Other MSs explicitly circumscribe the scope of protection to their national businesses injured by UTPs (*Poland*). At the moment, administrative authorities normally do not pursue infringements that start in a different jurisdiction. For example, under the current legislation the Italian administrative enforcer can take action against infringements committed by Italian retailers against foreign producers but does not generally take action against infringements committed by foreign retailers against Italian producers. It is generally believed that action should be taken against infringements where the infringers are legally established or where the decision to infringe has been made. In addition, even if authorities order a fine they lack power to enforce it if the infringer does not pay.

Judicial enforcement against UTPs becomes problematic when there are multiple infringers and multiple injured parties located in different MSs[42]. Whether a single law could be applicable to the same infringement or different laws should be applied depending on where the infringers are located is an open question. Even more problematic is the case when injured parties are partly located in EU MSs and partly outside the EU. Access to enforcement systems by non-EU producers follows different patterns in judicial and administrative enforcement. Some new legislation (e.g. that of the UK) has broadened the scope of enforcement beyond EU borders, making it accessible for non-EU producers.

4.1 Administrative enforcement

As shown in Table 6, the most recent MS legislation has introduced forms of administrative enforcement in addition to judicial enforcement and to private dispute resolution mechanisms. It is an attempt to address the enforcement gap related to the very limited use of courts and the low effectiveness of private dispute resolution mechanisms. It is partly driven by the so called 'fear factor' that prevents farmers from using courts, as they fear commercial retaliation with the termination of the commercial relationship and their forced exit from the chain.

When established, administrative authorities generally have both investigatory and sanctioning powers. However, in some cases the power to impose injunctions and/or sanctions is conferred on the court while the administrative authority holds only investigative power (Ireland) and the power to start the judicial procedure (e.g. France for practices under L-442-6, Code de commerce). Table 7 provides additional evidence on this aspect.

[42] With special regard to applicable law, see S. Clavel, *Cross-border B2B unfair trading practices*, in A. Renda, F. Cafaggi and J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, 2014, section 2.3, pp. 84-88.

Table 7. Enforcement, authorities and relative power

N/A: information not available

Type of enforcement	MS	Main enforcing authority	Injunctive power	Power to impose fines
ENFORCEMENT BY COURTS	**GREECE**	Court	N/A	N/A
	AUSTRIA	Court	Court (*Competition Authority, among other interested parties, may seek injunction*)	
ENFORCEMENT BY COMPETITION AUTHORITIES	**BULGARIA**	Commission of Protection of Competition (CPC)	CPC	CPC
	CZECH REPUBLIC	Office for the Protection of Competition	Office for the Protection of Competition (*may assess and accept voluntary commitments*)	Office for the Protection of Competition
	CROATIA	Competition Authority	N/A (*CA may assess and accept voluntary commitments*)	Competition Authority
	ITALY	Competition Authority	Competition Authority	Competition Authority
	LATVIA	Competition Council		Competition Council
	LITHUANIA	Competition Council	Competition Council	Competition Council
	POLAND	Office of Competition and Consumer Protection	Office of Competition and Consumer Protection (*may assess and accept voluntary commitments*)	Office of Competition and Consumer Protection
	SLOVENIA	Slovenian Competition Protection Agency		Slovenian Competition Protection Agency
ENFORCEMENT BY CONSUMER PROTECTION AUTHORITY	**ROMANIA**	Consumer Protection Authority		Consumer Protection Authority
ENFORCEMENT BY DEDICATED ENFORCING AUTHORITIES	**HUNGARY**	National Food Chain Safety Office	National Food Chain Safety Office (*at least for prohibition of using unfair terms*)	National Food Chain Safety Office
	PORTUGAL	Autoridade Administrativa Nacional Especializada		ASAE

Type of enforcement	MS	Main enforcing authority	Injunctive power	Power to impose fines
		(ASAE)		
	UNITED KINGDOM	Grocery Code Adjudicator	Grocery Code Adjudicator (*may issue recommendations*)	Grocery Code Adjudicator
ENFORCEMENT BY STATE OR LOCAL ADMINISTRATION				
	SPAIN	Administration of Autonomous Community or General State Administration		Administration of Autonomous Community or General State Administration
	SLOVAKIA	Ministry of Agriculture and Rural Development		Ministry of Agriculture And Rural Development
COMBINED ENFORCEMENT BETWEEN COURTS AND COMPETITION AUTHORITIES				
	GERMANY	Competition Authority	Court (*CA may seek injunction*)	Competition Authority
	IRELAND	Competition and Consumer Protection Commission		Court
	FRANCE	DGCCRF (Ministry for the Economy and Finance)	Court (Article 442-6, Code de commerce) (*Ministry for the Economy and Finance and CA, among other interested parties, may seek injunction*)	Competition Authority (Article 470-2, Code de commerce)
	CYPRUS	Commission for the Protection of Competition	Court	Commission for the Protection of Competition

4.1.1 Investigative powers

Administrative enforcers are required to apply rules based either on legislation or on private regulation. Often, as is the case in the UK, the enforcer solves disputes related to the application of a code of conduct.

Limited resources and the necessity to identify priorities in tackling UTPs require strategic decision making on the part of the administrative enforcer. The investigation strategy is generally determined by the enforcer, which defines priorities and scope of investigations. In some legislation, priorities are statutorily defined; in others, they are determined on a case-by-case basis. Only a few countries (such as the UK) have defined criteria and priority setting to be followed in the legislation, including the impact of the practice and the effects of its removal. Administrative enforcers publish an annual report

in which they specify their strategic priorities for the future and their past achievements[43].

Enforcers use primarily inspections but can also promote self-reporting by retailers in order to reduce asymmetry of information and save costs. Those enforcers that engage in a continuous dialogue with the infringers rely more on self-reporting and surveys than on individual inspections. Collaborative models first address the potential infringer and ask them to investigate and report[44]. If the investigation is inadequate or the reported infringement does not stop, the enforcer can switch to inspections and other more intrusive monitoring instruments, moving from a cooperative to a command-and-control enforcement approach.

During investigations, enforcers have to respect procedural rules based on national administrative laws and the right to good administration, a general principle recognised at both EU and MS levels. Procedural guarantees for the potential infringer increase at the enforcement level if the administrative body decides that there are sufficient grounds to proceed.

Typically, enforcers can act *ex officio* or on the basis of parties' complaints[45]. More specifically, in almost all MSs, UTP legislation empowers administrative authorities to act *ex officio*[46]. In most MSs (see Table 8) complaints can be anonymous in order to protect the complainants from retaliation, although confidentiality needs to be balanced with the effectiveness of the investigation and the right of defence of potential infringers[47]. Many administrative enforcers allow anonymous complaints but preserve the discretionary power to start investigations.

[43] See, for example, in France the DGCCRF, which has established each year a programme for investigation (source: questionnaire-based DG AGRI consultation of MS experts, October-November 2017, see Acknowledgments at the beginning of this Report).

[44] See UK Department for Business, Energy & Industrial Strategy and Groceries Code Adjudicator, Statutory Review of the Groceries Code Adjudicator: 2013-2016, July 2017, available at https://www.gov.uk/government/publications/groceries-code-adjudicator-statutory-review-2013-to-2016: 'GCA approach to investigations: 42. The Adjudicator has chosen to take a collaborative approach and describes a three-stage process that is designed to address and resolve issues quickly whilst retaining the option to move to an investigation if necessary. This process consists of: • Alerting large retailers when Code-related issues are raised with the Adjudicator by suppliers; • Requesting that the large retailer Code Compliance Officers (CCOs) internally look into the issues; and • Report back to the Adjudicator, identifying any business changes made to address the issue raised (if necessary).'

[45] See European Commission Report (2016) p. 7: 'Own-initiative investigations launched by the enforcement authority are another important element in addressing the fear factor. They enable the victim of an unfair practice to inform the authority about alleged UTPs imposed by a stronger party, thereby triggering an own initiative investigation if the enforcement authority believes that there are sufficient grounds.'

[46] Austria would represent the only exception as shown by the data collected within the Directorate-General for Agriculture and Rural Development survey (2017) mentioned in the Acknowledgments at the beginning of this Report. However, in this case, the Local Supply Act, § 14, vests associations representing business collective interests with the power to start proceedings before the court for a cease and desist order.

[47] See, for example, in the Lithuanian law on the prohibition of unfair practices of retailers, Article 5.2: 'Upon a reasoned request of a supplier who has submitted to the Competition Council the application specified in Article 8(1) of this Law and/or the documents and other information necessary for performing the functions of the Competition Council, the data identifying the supplier shall not be made public and disclosed.'

Table 8. Confidentiality of complaints lodged with administrative authorities and *ex officio* investigative powers in UTP legislation examined (N/A: information not available)

MS	Confidential complaints	*Ex officio* investigative powers
BULGARIA	YES	YES
CZECH REPUBLIC	YES	YES
GERMANY	YES	YES
IRELAND	YES	YES
GREECE	N/A	N/A
SPAIN	YES	YES
FRANCE	YES	YES
CROATIA	N/A	YES
ITALY	YES	YES
CYPRUS	N/A	YES
LATVIA	YES	YES
LITHUANIA	YES	YES
HUNGARY	YES	YES
AUSTRIA	YES	*No, but law provides standing of administrative authority and business organisations*
POLAND	YES	YES
PORTUGAL	NO	YES
ROMANIA	NO	N/A
SLOVENIA	YES	YES
SLOVAKIA	NO	YES
UNITED KINGDOM	YES	YES

The possibility of lodging a complaint does not necessarily imply the status of a party within the administrative proceeding concerning the potential infringement. When no specific provisions exist, national administrative laws determine who can lodge a complaint and who can be a party to the proceeding. Among the parties that can lodge complaints before administrative authorities, some MSs include producers' organisations and farmers' associations, as shown in Table 9. Moreover, in some MSs the producers' organisations lodging the complaints can also participate in the proceedings (e.g. Hungary, Italy)[48]. Their role may be extremely useful to present the views of those harmed by the practices, who generally do not have the right to participate. Examples include those presented in Table 9.

[48] See for example section 5 of the Hungarian Act (2009): '(1) The professional organisation representing the interest of suppliers may assume the position of a client (*melius* party) in any administrative proceeding initiated for the violation of this Act' (unofficial translation); Article 8, Italian Competition Authority Regulations on investigation procedures in the field of UTPs in agri-food contractual relationships: 'Participation into the investigation phase. 1. Public or private stakeholders established as associations, that may be prejudiced by the infringements addressed by the investigation, may intervene in the pending procedure' (unofficial translation).

Table 9. Empowerment of enterprises' associations in the administrative enforcement of UTP legislation (examples)

MS	Power of trade or professional associations to lodge complaints for the enforcement of UTP legislation before administrative authorities (examples)
CYPRUS	Power to lodge complaints with the Competition Commission
CZECH REPUBLIC	Power to lodge complaints with the Competition Commission
GERMANY	Power to lodge complaints with the Federal Cartel Office
HUNGARY	Power to be party to administrative proceedings for enforcement of UTP legislation, representing collective interests
ITALY	Power to seek injunctions before the CA in representation of collective interests; power to lodge complaints and to intervene in investigation procedures

In some models, the enforcer engages with suppliers and meets regularly with them or their representatives to learn about UTPs[49].

4.1.2 Enforcement *stricto sensu*

Administrative enforcement includes a number of approaches from soft to hard. As we suggested in relation to investigation, enforcement *strictosensu* can include both a collaborative and a command-and-control approach. The former tries to establish a cooperative relationship between enforcers and infringers before and after the infringement. The latter does not engage with the infringer before any infringement has taken place and, within the due process guarantees, proceeds with sanctions and injunctions after the infringement has materialised. The collaborative approach addresses both causes and consequences of the infringement. The command-and-control approach focuses on the consequences but does not address the causes.

Some MSs have legislatively defined general principles that should guide administrative authorities exercising sanctioning powers, including deterrence or dissuasiveness and proportionality (e.g. the UK). In other MSs, the specific criteria have been determined by the competent authority in guidelines or similar soft law instruments (e.g. Ireland).

MSs practices show that collaborative approaches may deliver better results than conventional sanctioning regimes. The different tools are often combined and scaled. In some cases, the enforcer can first issue recommendations and advice and, if they are not followed, can impose penalties. In other cases, the enforcer can only penalise. However, even in the latter case, cooperative enforcement takes place informally at the stage of investigation. On the infringer's side, there can also be an alternative to sanctions, an alternative which is normally limited to non-serious infringements. The infringer is given the possibility to propose commitments and the enforcer has discretionary power to either accept the proposal without declaring the infringement or reject the proposal and move to the sanctioning stage once the infringement has been ascertained.

We distinguish between enforcement *stricto sensu* and forms of public dispute resolutions mechanisms that include negotiations. Within enforcement we include conventional command-and-control approaches as well as forms of cooperative enforcement, where

[49] This is the case for the Grocery Code Adjudicator in the UK, where promotion of dialogue between suppliers and retailers is one of the main tasks.

there is joint problem-solving between enforcer and infringer. In the cooperative approach, the enforcer preserves the power to accept or reject proposals made by the infringer. We do not include conciliation procedures promoted by administrative bodies.

Administrative enforcement varies according to both practices and the seriousness of the infringement. Some MSs distinguish between major and minor infringements and adapt the sanctioning policy accordingly[50]. Other MSs do not expressly make the distinction in legislation but adopt it in practice by scaling the type and the amount of sanctions (e.g. in the case of fines) according to the gravity of the violation (see Table 11).

Some MSs distinguish the seriousness of infringements by 'ranking' them; the sanctioning system reflects these ranked differences. Certain infringements result in harder sanctions than others (see below, section 4.1.3 and Table 11).

When UTP legislation has been specifically adopted, there is usually at least one administrative enforcer at MS level. Even when the enforcer is the competition authority, it should be clarified that its power to act is based not on competition law but on specific legislation to combat UTPs. Competition authorities can therefore pursue different routes against the same UTP with different units or a general unit can investigate both the competition and the non-competition facets of the infringement. When no specific legislation on UTPs exists, competition authorities can verify and punish only anticompetitive aspects, while the other aspects are left to adjudication before courts. Sometimes an additional enforcer is identified to focus on specific questions, related, for example, to SMEs' protection.

The administrative enforcer follows an administrative procedure in which it performs both investigation and adjudication. The two phases are procedurally distinguished in order to guarantee due process rights. A situation where the same entity investigates and adjudicates on its own investigation must be avoided. This separation can be structural, when two different bodies are in charge of investigation and adjudication; or it can be functional, when, within the same entity, two separate units are in charge. Procedural guarantees include the right to be informed, the right to be heard, the right of defence and the right to appeal. The procedure ends with an administrative decision that can be appealed before a court.

4.1.3 The correlation between practices and sanctions

Sometimes, legislations provide different types of enforcement depending on the type of practices, as shown in Table 10. For example, in France, restrictive practices addressed by Article 442-6, Code de commerce, are subject to judicial injunctions and *ammendes civile* (civil fines). Other practices, for example in the area of payment delays or negotiation of distribution contracts (Article 441-7 and 441-8, Code de commerce), are subject to administrative fines by administrative authorities.

Moreover, not all the practices are equally serious violations. Some MSs, such as Spain, explicitly determine the seriousness of the violation in relation to the specific practice. For example, under Spanish law, violation of the written form of a contract constitutes a minor infringement, whereas delay of payment constitutes a serious infringement. The legislative technique usually deployed is the distinction between major and minor or serious and non-serious infringements. When the legislator does not explicitly make these differences, the enforcer, exercising discretion, can use the general principles of proportionality and deterrence to distinguish among practices and define some kind of hierarchy.

[50] This is the case for Spain, as shown in Table 10, here below.

Table 10. Examples of correlation between practices and fines

MS	Practices/fines
CROATIA	Depending on the gravity and the significance of the infringement, the UTPs Act recognises fines for most serious infringements, serious infringements, minor infringements and other infringements. Most serious infringements: - up to EUR 662 556.81 equivalent (legal persons); - EUR 331 278.41 equivalent (physical persons). Lower caps are listed for serious and minor infringements.
FRANCE	Administrative fines (infringements of Article L441-7,8, retail contracts). *Ammende civile* (civil fines) (infringements of Article L 442-6, restrictive practices).
ITALY	Different fines depending on UTP (contracts vs practices vs payment delay/practices). Infringements concerning the use of written form for agri-food contracts and the contents requirements of such contracts: EUR 1 000-40 000. UTPs during execution and in cases of unfair termination: EUR 2 000-50 000. Violation of payment terms: EUR 500-500 000.
SPAIN	Distinction between minor and serious offences is based on the type of UTPs: EUR 3 000 (minor offences) EUR 100 000 (serious offences) EUR 1 000 000 (very serious offences) Examples of minor food procurement contracting infringements: failure to draw up a written food procurement contract as specified in the specific legislation; introducing changes in the terms of the contract that were explicitly agreed by the parties; requiring additional payments over the price agreed in the contract, except in the cases provided for in this law. Example of serious infringements: failure to comply with payment periods in commercial transactions involving food or food products. Repeat infringements: two or more minor offences within 2 years as from the date of issue of the final administrative decision of the first one: a serious offence. Two or more serious offences within 2 years as from the date of issue of the final administrative decision of the first one: a very serious offence.

4.1.4 Commitments, recommendations and sanctions

Following a consolidated trend in administrative enforcement, some new legislations provide the infringer with the possibility to voluntarily cease the infringement and provide compensation for the infringement . The possibility to undertake commitments is generally associated with the (low) gravity of the violation and is an alternative to

sanctions. In some MSs, the infringers can submit a proposal that can be accepted or rejected by the enforcer (e.g. Croatia, Hungary). When the infringement is serious, commitments may not be allowed and the enforcer issues both a fine and an injunction. In other MSs, the enforcer issues recommendations which are not legally binding. Following the recommendations, the infringer submits an action plan, the implementation of which is monitored by the enforcer[51]. If the action plan is not complied with, the enforcer can move to conventional enforcement practice and order a sanction.

Commitments

Commitments represent a cooperative approach to enforcement. Commitments can result in an undertaking from the infringer to cease and desist from the violation and to remove the consequences of the infringement. Commitments may be offered by the infringer and evaluated by the enforcer (which can accept them, or reject them if they seem inadequate)[52]. Commitments can be part of an agreement between the authority and the infringer that is legally binding and judicially enforceable. However, the incentives to comply with commitments are related to the possibility of scaling up to sanctions by the administrative authority. Indeed, commitments are often backed by conditional fines (*astreintes*) (e.g. in Polish legislation).

One of the open questions concerns the effects of commitments on the injured party, especially when commitments become binding. Can the 'victim' of the infringement bring a civil action for failure to comply with the commitments, or does the implementation of the commitment remain an issue between the administrative enforcer and the infringer? The answer to this question depends on whether or not national legal systems qualify the binding agreement with the commitment as an enforceable agreement or even a contract and whether or not the third party beneficiary doctrine applies. If the agreement can be considered a third party beneficiary contract, the victim should be able to sue for the breach of the commitment before a civil court. On the one hand, this can provide additional incentives to the infringer and increase monitoring by the parties who suffer harm in the event of non-compliance. On the other hand, the infringer may consider this too high a burden and decide not to propose the commitment in the first place. If the agreement is not a third party beneficiary contract, enforcement is left exclusively to the administrative enforcer.

Clearly, even if the commitments produce no direct effects on the victim, failure to comply may be taken into account by the civil court when compensation and/or restitution is sought by the injured party.

Recommendations

In the UK model, the enforcer makes (**not** legally binding) recommendations at the end of the investigation. Compliance with recommendations is driven by persuasion rather than by legal authority. After an investigation, the Grocery Code Adjudicator (GCA) can

[51] This is the model of the Grocery Code Adjudicator in the UK.

[52] See, for example, the Croatian legislation, Act on the prohibition of unfair trading practices in the business-to-business food supply chain, Official Gazette 117/17: 'Within the investigation the CCA [Croatian Competition Authority] decides whether the proposed measures are sufficient for the elimination of the UTPs, **taking into account the gravity, scope and the duration of the infringement. If** the CCA finds the proposed commitments acceptable and sufficient for the elimination of the UTPs, it **issues an interim decision on the basis of which these commitments become binding for the party** that must provide evidence on the fulfilment of these measures within a prescribed deadline. Where the party submits this evidence, the CCA decides to terminate the proceeding without establishing the infringement of the rules concerned and without imposing any sanctions' (unofficial translation, emphasis added). A similar provision is in the Hungarian Act XCV of 2009 on the prohibition of unfair distributor conduct vis-à-vis suppliers regarding agricultural and food industry products. Section 8.1 states: '(1) If, prior to the adoption of a resolution by the agricultural administrative authority on the merits of the case, the trader affected undertakes in writing to align its conduct to the provisions of this Act in a set manner, and public interest can be served this way, the agricultural administrative authority may adopt an order that renders the performance of the undertaking obligatory, simultaneously terminating the proceeding, ordering the trader to pay the procedural costs, without including the establishment of infringement or non-infringement in the order' (unofficial translation).

decide to issue a report and make recommendations or use its sanctioning power[53]. It generally follows a scaling strategy and issues recommendations that ask the infringer to report on their progress.

A partially similar model is used in France, where a Commission for unfair trade practices (*Commission pour pratiques deloyales*) issues opinions (*avis*) that are not legally binding but generally followed by the courts. The difference between recommendations and commitments is that recommendations are usually issued by the 'enforcer', whereas commitments are usually submitted by the infringer and either accepted or rejected by the administrative body. Recommendations concern not only the substantive part (e.g. what constitutes a UTP) but can also deal with the remedial side of the issue. For example, the French Commission for unfair trade practices has explicitly stated that it is possible to combine injunctive relief and invalidity[54]. The *Cour de Cassation* in France makes references to the opinion of the Commission when deciding about remedies related to UTPs.

Sanctions

The new legislation regulating UTPs introduces administrative sanctions. All include financial penalties in the form of fines. Some also add injunctions and declaratory decisions. Damages and restitution are instead usually left to judicial enforcement.

Regarding fines, variations across different MSs' legislations are remarkable. Most MSs have determined both a minimum and a maximum level of fine. Some MSs define only a maximum. In some instances, the maximum fine can be the lower sum between a threshold and the amount of revenues of the infringer[55].

When infringers do not comply with the administrative orders to cease the UTP, they can be charged with additional fines for non-compliance. The amount of these fines varies quite significantly, as shown in Table 11. In some cases, it is a daily sum for each day of non-compliance, in other cases it is a lump sum.

[53] See, for example, the case of Tesco, which was found in breach of the code. See UK Department for Business, Energy & Industrial Strategy and Groceries Code Adjudicator, Statutory Review of the Groceries Code Adjudicator: 2013-2016, cit., p. 37: "The GCA made five recommendations, requiring Tesco to: 1) pay money owed to suppliers in accordance with the agreed terms of payment; 2) not make unilateral deductions; 3) resolve promptly data input errors identified by suppliers; 4) provide transparency and clarity in dealings with suppliers; 5) train finance teams and buyers in the findings from the investigation. Tesco was required to submit an implementation plan within four weeks of publication of these recommendations and to provide regular reports on progress to the GCA. Tesco accepted and implemented all the recommendations in full. The GCA's full report is available at www.gov.uk/government/publications/gca-investigation-into-tesco-plc".

[54] See *CEPC, avis n° 14-02, 13 févr. 2014*, holding that, when a UTP consists in an unfair clause the injured party can seek both an injunctive relief and the nullity of the specific clause.

[55] See, for example, section 6 of the Hungarian Act on the prohibition of unfair distributor conduct vis-à-vis suppliers regarding agricultural and food industry products. Section 6.2 states '(2) The minimum amount of the product path supervisory fine is one hundred thousand Hungarian forints, while its maximum amounts to five hundred million Hungarian forints; however, it may not exceed ten percent of the net revenue attained by the trader in the business year preceding the issue of the resolution that establishes the violation'.

Table 11. Minimum and maximum thresholds for the imposition of fines (UTP legislation examined; when applicable, currency exchange rates refer to January 2018)

MS	Pecuniary sanctions	Minimum/maximum/ no thresholds	Minimum pecuniary sanctions	Maximum pecuniary sanctions	% turnover (t.o.)
BULGARIA	X	Minimum/maximum thresholds	EUR 5 000	EUR 25 000 (in case t.o. is 0)	Up to 10% (t.o. of the product concerned)
CZECH REPUBLIC	X	Only maximum thresholds		EUR 39141000	Up to 10%
GERMANY	X	Only maximum thresholds		EUR 1 million	Up to 10%
IRELAND	X (criminal)	Minimum/maximum thresholds	EUR 3 000	EUR 100 000	
GREECE	N/A	Only maximum thresholds		EUR 50 000	N/A
SPAIN	X	Minimum/maximum threshold	EUR 3 000 (minor offences)	EUR 1 000 000 (very serious offences) EUR 100 000 (serious offences)	
FRANCE	X Administrative fines (infringements of Article L441-7,8) *Ammende civile* (infringements of Article L 442-6)	Only maximum thresholds		Administrative fines: EUR 75 000 (individuals) EUR 375 000 (entities) Civil sanctions (*ammèndes civiles*): EUR 5 million	
CROATIA	X	Only maximum threshold		Most serious infringements: up to EUR 662 556.81 (legal persons); EUR 331 278.41 (physical persons). Lower caps for serious and minor infringements	
ITALY	X	Minimum/maximum thresholds	EUR 2 000 (EUR 500 for payment delay)	EUR 50 000 (EUR 500 000 for payment delay)	
CYPRUS	X	Only maximum threshold			Up to 10%
LATVIA	X	Minimum/maximum thresholds	EUR 70		Up to 0.2% of net t.o.
LITHUANIA	X	Only maximum threshold		EUR 120 000	
HUNGARY	X	Minimum/maximum thresholds	EUR 318	EUR 1 591 000	Up to 10%
AUSTRIA	*Infringement*				

MS	Pecuniary sanctions	Minimum/maximum/ no thresholds	Minimum pecuniary sanctions	Maximum pecuniary sanctions	% turnover (t.o.)
	s of sections 1-4, Local Supply Act, are addressed, resorting to only civil remedies (injunctions, damages)				
POLAND	X (to the entity and to managers)				Up to 3%
PORTUGAL	X	Minimum/maximum thresholds	EUR 250 for natural persons EUR 500 for micro-enterprises EUR 750 for small enterprises EUR 1 000 for medium-sized enterprises EUR 2 500 for large enterprises	EUR 20 000 for natural persons EUR 50 000 for micro-enterprises EUR 150 000 for small enterprises EUR 450 000 for medium-sized enterprises EUR 2.5 million for large enterprises	
ROMANIA	X (criminal sanctions imposed by Consumer Protection Authority)	Minimum/maximum thresholds	EUR 10 756.15	EUR 21 512.31	
SLOVENIA	X	Minimum/maximum thresholds	EUR 6 000	EUR 18 000	
SLOVAKIA	X	Minimum/maximum thresholds	EUR 1 000	EUR 300 000	
UNITED KINGDOM	X	Only maximum threshold			1% of t.o. in UK

As Table 11 suggests, the variations within fining rules are remarkable. Not only is there a difference between MSs that define only a maximum fine and those that also define a minimum, but the amounts also vary from EUR 18 000 (Slovenia) to EUR 2 500 000 (Portugal). When the maximum fine level is high, variations occur within the national system and often the sanctioning criteria are not very detailed. Both within and between MSs, these variations may relate to the gravity of the infringements and the characteristics of the infringer. Different approaches concern the link between sanctioning and the status of the infringer. In most MSs, no direct and specific relevance seems to be attributed to the victim's status (e.g. it does not matter, when establishing the amount of a fine, whether the victim is a medium, small or micro-enterprise). However, in some MSs, for the same UTP, the amount of a fine can be higher for a large

enterprise than for a medium or a small one[56]. Clearly, the status of an enterprise is relevant when the legislation applies to protect only micro-enterprises or it excludes cooperatives. The amount of the fine can vary depending on the number and size of the producers affected when the consequences of the UTP on the market are taken into account[57].

In some MSs, fines are related to the infringer's turnover, normally as a reference for the maximum amount of fines (Bulgaria, Czech Republic, Germany, Cyprus, Latvia, Hungary, Poland, UK). In other MSs, fines are related to the benefits accrued from engaging in the UTPs (e.g. in Italy[58]). Some MSs (Croatia, France, Portugal) distinguish between natural and legal persons and define the maximum amount accordingly (higher for legal than for natural persons)[59]. More rarely, the maximum fine amount is explicitly linked to the magnitude of the consequences of the UTP and the impact on the fairness along the chain or the market. References are made to the effects of the practice on the market in relation to fairness and competitiveness, which allow the economic impact of the UTPs to be captured. In some cases, sanctioning is correlated to the gravity of the infringement, based on the distinction between minor, major or serious offences[60]. In some countries, the fine amount is determined not only by reference to the seriousness of the infringement but also to the conduct of the infringer after the infringement and its availability to voluntarily stop the unlawful conduct and remove the consequences[61]. The

[56] See Portuguese Decree-Law no 166/2013.

[57] See, for example, Article 25, Spanish law no 12/2013, on the scale of penalties, according to which penalties shall be scaled mainly on the basis of the degree of intentionality or the nature of the damage caused.

[58] See Italy: 'art. 62. 6. **Unless the fact constitutes a crime**, the contract party, except for the end consumer, that breaches the duties established by par. 2, is punished by means of administrative fine from eur 2.000,00 to eur 50.000,00. The amount of fine is determined having regard to the benefit obtained by the person that has breached the duties established by par. 2 (unofficial translation, emphasis added'.

[59] See Croatian Act on the prohibition of unfair trading practices in the business-to-business food supply chain, Official Gazette 117/17: 'The cap amount of the fine for a most serious infringement may amount to up to HRK 5 million for a legal person and HRK 2.5 million for a natural person, where a legal or a natural person is a buyer and/or processor or re-seller within the meaning of the UTPs Act and sells the product under the price which is lower than any other purchase price in the product purchase chain, as referred to in Article 12 item 14 of the UTPs Act.'

[60] See, for example, Spanish Law 12/2013, of 2 August, measures to improve the functioning of the food supply chain (emphasis added). 'Article 23. Infringements with regard to food procurement contracting. 1. The following are **minor food procurement contracting infringements**: a) Failure to draw up a written food procurement contract as specified in this Act. b) Failure to include at least the minimum required details in the food procurement contract. c) Failure to meet the conditions and requirements applicable to electronic auctions. d) Failure to keep obligatory documents on file. e) Introduce changes in the terms of the contract that were explicitly agreed by the parties. f) Require additional payments over the price agreed in the contract, except in the cases provided for in this law. g) Require or disclose sensitive commercial information from other operators obtained in the negotiation process or implementation of a food procurement contract, breach of confidentiality and the use of said information for purposes other than those expressly agreed in the contract. h) Failure to comply with the obligation to provide the information that is required by the competent authorities in the exercise of their duties. 2. The commission of two or more minor offences within two years as from the date of issue of the final administrative decision of the first one is considered a **serious offence**. Failure to comply with payment periods in commercial transactions involving food or food products is considered a serious offence in accordance with Law 15/2010 of 5 July 2010, amending Law 3/2004 of 29 December 2004 establishing measures to combat late payment in commercial transactions. 3. The commission of two or more serious offences within two years as from the date of issue of the final administrative decision of the first one is considered a **very serious offence**.'

[61] See under the Polish law (OJ 2017 Item 67 ACT of 15 December 2016 to prevent the fraudulent use of contractual advantage in trade in agricultural products and groceries): 'In fixing the amount of the fines imposed in accordance with paragraph 1, paragraph 1, the President of the Office **shall take into account attenuating or aggravating circumstances** in the case.
Examples of mitigating circumstances referred to in paragraph 2, are in particular:
1) voluntary removal of effects of the infringement;
2) failure by the supplier or buyer, on its own initiative, the practice of using the contractual advantage unfairly before proceedings are instituted or immediately after its initiation;
3) on its own initiative to take action to stop the infringement or remedy the effects thereof;
4) working together, the President of the Office in the course of proceedings, in particular to contribute to a rapid and smooth conduct of proceedings.
Aggravating circumstances referred to in paragraph 2 shall be the intentional nature of the infringement and a previous similar infringement.'

nature of the sanctions and the size of imposed fines can vary depending on whether or not the infringer is a repeat infringer (e.g. Greece, Spain).

In the absence of a reliable study concerning fining practices, the anecdotal evidence suggests that strong variations occur between MSs. These variations are also correlated with different interpretations of the principle of proportionality that informs the exercise of sanctioning power by administrative authorities. This principle and its diverse application between MSs also relates to the relationship between penalties and corrective remedies when provided[62].

Sanctions' effectiveness may be complemented by the publication of the administrative decision[63]. When legislation explicitly provides for it, a balance between the punitive/deterrent function of publication and procedural guarantees for the sanctioned party is ensured, for example by giving evidence on judicial review and revocation[64].

There is no clear evidence on the effectiveness of fines and financial penalties in the agri-food sector. The complementarity approach suggests that these sanctions might be necessary but are not sufficient to deter offenders and to compensate victims. The reputational sanctions might have as significant a deterrent effect, especially when issued against retailers affected by consumers' behaviour. This happens when they are public and reach a wide number of consumers.

4.1.5 Administrative injunctions

Together with fines, administrative enforcers can also issue injunctions that prohibit the unfair practice and order the removal of the consequences of the infringement. Injunctive powers are often explicitly conferred on administrative authorities (e.g. Bulgaria, Czech Republic, Italy, Lithuania), sometimes only on courts (Cyprus) and sometimes on the basis of requests filed by administrative authorities or other eligible entities (Germany, France, Austria). Depending on national procedural laws, courts may order injunctive relief on the basis of general administrative rules.

Injunctions may be prohibitive and/or affirmative, with orders to modify the current practices. Unfair practices involve transferring costs and risks along the supply chain. While unlawful cost transfer may be tackled by monetary transfers, the unfair distribution of risks may require more structural intervention in the organisation of the supply chain. This is the case for perishable goods where the issue related to disposal includes significant organisational changes both on the suppliers' side and on the retailers' side.

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[62] See, for example, the UK's Draft Groceries Code Adjudicator Bill (available at https://publications.parliament.uk/pa/bills/cbill/2012-2013/0062/en/cbillen_2012-20130062_en_1_content.htm), Schedule 3: Order conferring power to impose financial penalties:

79. The Government considers that financial penalties may not be necessary in order to secure a high level of compliance with the Groceries Code by large retailers.
80. The Secretary of State would need to authorise financial penalties by order under clause 10, approved by each House of Parliament (see clause 24).
81. Under paragraph 1 of Schedule 3, the Secretary of State could only make an order if, following consultation under paragraph 6, he or she thought the Adjudicator's other powers (including recommendations and requirements to publish) were inadequate. The order would need to specify the maximum penalty that could be imposed or how to calculate the maximum: for example, by reference to the retailer's groceries turnover or the value of relevant supply arrangements. The order could also require the Adjudicator to publish guidance about the criteria the Adjudicator intends to adopt in deciding the amount of a financial penalty. By delaying and leaving open the question of whether financial penalties are needed, clause 10 and Schedule 3 allow the Secretary of State to take into account the history of enforcement of the Groceries Code by the Adjudicator, together with the views of those affected.

[63] See section 4.1.7 below and Table 12.

[64] See, for example, Article 6(8), Hungarian Law XCV 2009: '(8) The name (company name) and address (registered office) of the trader that assumed unfair distributor conduct, the infringement established, the amount of fine imposed and, if the resolution is revoked, this fact, the fact that the judicial review proceeding has commenced, the content of the final judgment, and the resolution that makes the undertaking as per section 8(1) obligatory shall be published by the agricultural administrative authority on its website and by the Minister responsible for agricultural policy in the Ministry's official gazette and on its website. The data shall be removed from the website two years after the final establishment of the violation and they cannot be published again following this date.' For more examples see section 4.1.7 below and Table 12.

This is an issue that touches on the broader question related to waste disposal[65]. Cost and risk transfers can both be addressed by injunctions but with different content. Prohibition of clauses transferring costs have to be combined with *astreintes* and restitution if the injunction is not complied with. Risk transfer may force organisational changes in the supply chain. The injunction should not only prohibit the transfer but also force organisational changes that prevent such transfers in the future.

The practice of enforcement suggests that, both at the investigation level and the sanctioning stage, the scope remains relatively limited and a thorough analysis of the effects along the supply chain by the enforcer is missing. Indeed, administrative authorities still focus on the impact of UTPs on single producers without engaging in an analysis of the effects along the chain.

4.1.6 The boundaries between administrative and criminal sanctions and the principle of *ne bis in idem*

For the most part, the MSs legislation has introduced administrative sanctions and conferred enforcement power on existing or, in some cases, new authorities. This leaves open the issue of the possible criminal nature of the administrative sanctions and the ensuing question about *ne bis in idem*, for example whether criminal sanctions can be combined with administrative sanctions. A prominent exception is Ireland, where UTPs are considered criminal offences and the sanctions are criminal. In the Irish case, the Competition and Consumer Authority can issue a decision with findings concerning the UTP but it has to refer the case to the criminal court that can order the criminal sanction[66]. The qualification of UTP as a criminal offence is featured in other MSs (e.g. Austria and Romania).

In other MSs, serious infringements may also constitute criminal offences. Depending on the gravity of the UTP, it can be classed as criminal or administrative. MSs seem in this case to embrace various sanctions including administrative fines and convictions (e.g. Ireland). When the same offence can have both an administrative and a criminal facet, the administrative enforcer has to take into account the administrative sanction. In the case of a fine, the enforcer should discount the amount paid under the criminal proceeding from the total if that is higher. Otherwise, no administrative fine can be ordered. Whether ancillary administrative sanctions can be ordered in addition to criminal ones varies across MSs.

4.1.7 Reputational sanctions via administrative enforcement

It is generally believed that reputational sanctions associated with market consequences (such as blacklisting) are generally the domain of private regulation and enforcement by

[65] See European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

[66] See Irish legislation: CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 S.I. NO 35 OF 201 'This Regulation sets out the provisions of the overall Regulations that will be treated as penal provisions for enforcement purposes. Breach of the cited provisions (including failure to comply with any contravention notice issued by the CCPC under the Consumer Protection Act 2007) may result in prosecution, either by summary or indictment with potential penalties as follows:
(1) A person guilty of an offence is liable on summary conviction to the following fines and penalties:
(a) on a first summary conviction for any such offence, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both;
(b) on any subsequent summary conviction for the same offence to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.
(2) If, after being convicted of an offence, the person referred to in subsection (1) continues to contravene the requirement or prohibition to which the offence relates, the person is guilty of a further offence on each day that the contravention continues and for each such offence is liable on summary conviction to a fine not exceeding €500.
(3) A person guilty of an offence is liable on conviction on indictment to the following fines and penalties:
(a) on a first conviction on indictment for any such offence, to a fine not exceeding €60,000 or imprisonment for a term not exceeding 18 months or both;
(b) on any subsequent conviction on indictment for the same offence to a fine not exceeding €100,000 or imprisonment for a term not exceeding 24 months or both.

private actors. However, administrative enforcers are considering the possibility of using reputational sanctions in addition to the more conventional array of measures. In particular, the reputational sanction may consist of the publication of the administrative decision.

A similar reputational effect is attained through the publication of decisions by enforcing authorities, as illustrated in Table 12.

Table 12. Publication of enforcement decisions of administrative authorities. Summary information (examples, not necessarily exhaustive)

MS	PUBLICATION OF ADMINISTRATIVE AUTHORITY'S DECISIONS ON UTP ENFORCEMENT	HIGHLIGHT IN ADMINISTRATIVE AUTHORITY'S ANNUAL REPORT OR ON ITS WEBSITE
BULGARIA	X	
CZECH REPUBLIC		X (*de facto – no legislative reference available*)
SPAIN	X	
FRANCE	X	
CROATIA		X (*de facto – no legislative reference available*)
ITALY	X	
CYPRUS	X	
LITHUANIA		X
POLAND		X
UNITED KINGDOM	X	

4.1.8 The practices of administrative enforcement in Member States

The practice of administrative enforcement depends on national administrative substantive and procedural laws that differ significantly[67]. As was shown in the previous tables, significant variations across MSs within administrative enforcement concern not only the number of investigations but also the outcome of the enforcement action (the type and intensity of sanctions). These divergences are partly determined by the legislative frameworks and are partly related to the approach taken by individual enforcers. Divergences in practices may occur even when legislation is similar.

The European Commission reported a significant variation across MSs regarding the UTPs evaluated through the number of investigations. It stated: 'The actual number of investigations into alleged unfair trading practices differs significantly across Member States. Around a third of Member States with public enforcement had no cases in the last few years (AT, BG, FI, HR, LV, RO, SI); another third just investigated a few cases (CY, DE, IE, LT, UK); and the remaining third dealt with dozens or even more (CZ, ES, FR, HU, IT, PT, SK). To some extent, this could be attributed to the different salience of the problem in the different Member States'[68].

More recent data suggest that no relevant changes have occurred since the EC report was published (see table below). Indeed, most of the MSs where the case rate is still low, or at zero, have adopted legislation very recently (e.g. Ireland, Croatia) or are still relying on existing legislation with limited scope (e.g. Austria, Finland) and some of them are considering the adoption of new more focused legislation (e.g. Finland).

[67] See European Parliament Resolution, A regulation for an open, efficient and independent European Union Administration, European Parliament Resolution of 9 June 2016 (2016/2610(RSP)).
[68] See European Commission Report (2016), p. 7.

Table 13. Enforcement practices during 2015-2016

MS	Number of complaints (2015-2016)	Number of complaints resulting in further action after complaints	Investigation conducted by enforcement bodies (2015-2016)	Results of investigation/proceedings
BULGARIA	8	8	8	- 5 pending investigations - 2 infringement decisions (fines applied)
CZECH REPUBLIC	22	18	31	- 2 closed proceedings (no infringement found) - 2 closed proceedings (commitment accepted) - 0 fines
GERMANY	10	Few cases	1	Annulled by the Higher Regional Court of Düsseldorf
IRELAND	0	0	0	N/A
GREECE	N/A	N/A	N/A	N/A
SPAIN	98	98	1 784	- 43 sanctions proceedings based on confidential complaints - by December 2016, 347 sanctions proceedings based on *ex officio* investigations - 95 fines applied
FRANCE	595 (2015); 494 (2016)		2015: 36 national, 25 regional; 2016: 32 national, 20 regional; 2016	8 civil proceedings in 2015, 6 in 2016; 158 criminal sanctions applied in 2015; 134 criminal sanctions applied in 2016
CROATIA	N/A	N/A	N/A	N/A
CYPRUS	0	0	0	N/A
LATVIA	2	2	2	Pending
LITHUANIA	0	0	1	Injunction and fine
HUNGARY	41	41	152	-29 fined undertakings - 11 investigations ended (commitments accepted) - 67 ended (no infringement found)
AUSTRIA	6	6	6	Fines
POLAND	0	0	0	N/A
PORTUGAL	80 (2015); 46 (2016)	26 (2015); 20 (2016)	2 (2015); 2 (2016)	- 42 impositions of sanctions - 33 without any sanctions
ROMANIA	0	0	0	N/A
SLOVENIA	N/A	N/A	0	N/A
SLOVAKIA	9	9	39	-12 (infringement found; 4 fines applied) - 18 (no infringement found) - 9 pending
SWEDEN	0	0	0	N/A
UK	- 0 request for arbitration	0	1	Pending

4.1.9 Conciliation and mediation by public bodies

In addition to conventional administrative enforcement in its different facets, public bodies also engage in various forms of amicable dispute resolution (ADR). Private ADR mechanisms have long been used. Publicly managed dispute resolution systems are entering the scene and are likely to develop further. They represent a different facet of the cooperative approach. The promotion of amicable resolution between enterprises promoted by the administrative enforcers is more effective, since it operates in the shade of conventional enforcement: parties are asked to reach amicable solutions. If they do not achieve that result, the enforcer can shift into applying the more conventional array of instruments.

This is a grey area for at least two important reasons. Firstly, institutionally, there are many instances where bodies in charge may have a hybrid identity and the enforcement body is composed of both public and private actors. Secondly, functionally it is a grey area because the evolution of administrative enforcement into forms of cooperative enforcement between enforcers and infringers makes the boundaries between enforcement and ADR blurrier. However, as the Bulgarian example shows, there is room for public bodies to engage in mediation and conciliation. The Bulgarian legislation has opted for a relatively formal approach: the Reconciliation Commission, sitting at the Ministry of Agriculture, can conclude its proceedings with a written binding agreement between the two or more litigants[69]. In other cases, in which the code is enforced through legislation (as is the case in the UK), retailers are under a duty to negotiate in order to solve the dispute 'amicably'. If this attempt fails, an arbitration procedure is started[70].

4.1.10 Monitoring compliance by administrative bodies

Monitoring compliance is part of the enforcement function in both administrative and private dispute resolution mechanisms. It is not generally part of judicial enforcement, where it is for the potentially injured parties to raise the issue of non-compliance. Within administrative enforcement, compliance monitoring includes pre- and post-infringement actions.

4.1.10.1 Pre-infringement monitoring compliance

Enforcers can ask potential infringers to adopt a compliance governance that enables them to detect and remove UTPs. The compliance can either refer exclusively to the large buyer (chain leader) or include the various segments of the supply chain[71].

[69] See Bulgarian Law on Protection of Competition (LPC),, 'Article 37k. (1) The reconciliation procedure shall be completed by concluding a written agreement between the parties. The agreement shall be drawn up by the commission within a 3-month time limit from instituting the reconciliation procedure and shall be provided to the parties to the dispute. (2) The parties to the dispute shall conclude the agreement within a 10-day time limit of receiving it. (3) In case that within the time limit under Paragraph 1 the reconciliation commission has not provided a written agreement or the agreement is not accepted by the parties to the dispute, the procedure shall be terminated.'

[70] UK, THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009, Sec. 11. Dispute resolution scheme.

[71] See the UK's GCA compliance tips: 'Compliance tips. Retailers should take the following steps to ensure they comply with the Code, and mitigate the financial and reputational risks of non-compliance:

1. Start at the top – all compliance efforts stand or fall based on whether they are supported (and, crucially, seen to be supported) by senior management. Regular and unequivocal reminders from senior management about both the terms of the Code, and the business's commitment to compliance, are essential.
2. Appoint a Code Compliance Officer – to raise awareness of the Code both internally and externally, and report to internal Compliance and Audit Committees. The GCA expects Code Compliance Officers to be proactive in identifying, pursuing and resolving potential Code issues across the business.
3. Encourage and facilitate internal communication of Code issues – proper compliance requires engagement and a joined-up approach from all the business areas to which the Code is relevant (e.g. buyers, finance and marketing may all be affected by the rules against recharging design costs to suppliers). The GCA

4.1.10.2 Post-infringement monitoring compliance using scorecards

Enforcers have to monitor compliance after the infringement. Post-infringement monitoring encompasses not only monitoring compliance with commitments, recommendations and sanctions but also the infringer's own efforts to remove the primary causes of the infringement. Enforcers not only have to ensure that sanctions are complied with and that the infringement is terminated; they also have to make sure that the causes of the infringement, such as the transactional model along the chain, are removed and transactional practices are modified. Monitoring the behaviour of the infringers over time is important to verify compliance with the specific order (for example an injunction) and to evaluate improvements over time to ensure a fairer distribution of risks along the supply chain. The majority of enforcers do not have a stable system to monitor infringers' conduct. The GCA in the UK adopts the continuous improvement approach and monitors the conduct of the infringers over time[72].

The continuous improvement approach is especially important when collaborative modes are adopted. Often changes requested by the enforcer after the infringement call for an adaptation of the supply chain. The sanctions and the remedies focus on the UTPs but the causes of the practice may lie in the organisational structure of the chain. Specific instruments, such as scorecards, are required to monitor the changes designed to prevent UTPs in the future. Scorecards with indicators measure improvements over time when the removal of infringement's causes requires structural changes that are hard to implement instantly. Scorecards look at the behaviour and its impact on the entire chain. Monitoring compliance should look at improvements made by the chain leader in organising exchanges along the chain by involving first-, second- and third-tier suppliers together with multiple intermediaries.

For example, addressing UTPs related to the payment system along a supply chain requires time. The payment system in long-term business relationships may require deep reorganisation. For example, payments often include some degree of input financing, some contribution to new technologies and/or premiums for sustainability achievements. These may be factored into the price or may be paid separately; they may be paid before or after performance. In the former case they provide resources and represent an investment. In the latter case they simply reward the performance and its quality. Modes

found that Tesco's buyer and finance teams were not co-ordinating on Code issues, so were not fully aware of what each other were doing.

4. "Hardwire" the Code into supplier agreements – retailers should review their agreements, both standard Ts & Cs and bespoke supplier agreements, to ensure that they reflect the Code obligations (including by being clear and transparent) and that all the terms of each supplier's agreement are captured in writing. Each supplier should have a copy of their agreement.
5. Be clear and consistent with suppliers – if you do not already use standard wording on invoices and other communications concerning payments and charges, consider adopting that to ensure suppliers will always understand what they are being told.
6. Review existing supplier payment processes – it is vital to ensure that payments to suppliers are not delayed unreasonably, whether deliberately or just due to systemic failures, inefficiencies or weaknesses.
7. Avoid unilateral deductions from money owed to suppliers – give suppliers clear notice and explanations of proposed deductions, and a chance to dispute them before they are imposed.
8. Consider an independent complaints procedure – ideally, this should be separate from the buyer who usually deals with the supplier. Tesco has created a Supplier Helpline with the aim of dealing with invoice queries and other supplier issues within 48 hours.
9. Review performance against compliance goals – an effective compliance program needs regular reviews of the business's performance against its key goals. Tesco committed to introduce regular audits throughout the year, and make bi-annual compliance declarations. It also committed to taking disciplinary action against employees responsible for breaching the Code, where necessary.
10. Train staff – every good compliance programme requires regular, ongoing training of new and existing staff (particularly senior management, those dealing with suppliers and – as the Tesco case made clear – finance teams) to ensure familiarity with and understanding of their obligations. To be truly valuable, training must never be generic. It should be tailored to the circumstances of the retailer in question, and delivered to different internal audiences in ways that reflect their specific roles, responsibilities and practical experiences.'

[72] See Grocery Code Adjudicator Annual Report and Accounts 2016/2017, available at https://www.gov.uk/government/publications/groceries-code-adjudicator-annual-report-and-accounts-2016-17.

of payment and timing of payment have deep influences on the investment strategies of farmers, with repercussions along the entire supply chain.

Measuring compliance in the medium term presupposes a set of targets and indicators that buyers and chain leaders have to put in place with the collaboration of all the actors along the chain.

What are the elements that should be measured? What are tools to measure improvements? These are among the issues that deserve more in-depth analysis but are beyond the boundaries of the present study.

4.2 Judicial enforcement

Judicial enforcement complements administrative enforcement. It covers remedial areas that are not affected by administrative proceedings and it provides the potential injured party with a much more active role than they can play in administrative proceedings, where the relationship is between enforcer and infringer(s).

Judicial enforcement may include criminal and civil UTPs. It may concern one or multiple infringers and one or multiple affected producers. When multiple infringers cooperate in deciding and operationalising the UTP, joint and several liability can be applied[73]. Many specific legislations define UTPs as civil or administrative infringement. However, some MSs (notably Ireland and, partly, Austria and Romania) emphasise the criminal aspects of UTPs and designate them as criminal offences. In other legal systems, the possibility to issue criminal sanctions in addition to administrative sanctions and civil remedies reflects the different facets of UTPs. Italy, for example, regulates UTPs and makes criminal offences an alternative to administrative infringements. The nature of the infringement results in an enforcement mechanism. If the infringement can be characterised at the same time as administrative, criminal and civil, then multiple enforcers can act. The multiplicity of enforcement systems reflects the importance of complementarity among the various pillars of the enforcement triangle.

The new legislations mainly refer to administrative enforcement against UTPs. Those UTPs that are not specifically included in that legislation can still be tackled through general judicial enforcement when they represent a breach of contract or an act of unfair competition. That is to say, the MSs' new legislation has not replaced the general clauses that were used before to address UTPs[74]. Judicial enforcement therefore applies to the new legislation for aspects concerning restitution and compensation which are not covered by administrative enforcement, and as a general form of enforcement for the UTPs not included in the new legislation.

Judicial enforcement plays an important role in MSs that have not adopted a dedicated legislation on UTPs, as – for the most part – it represents the only means of protection for the injured parties in UTPs. In these cases, courts apply general contract or tort law and, when relevant, competition law. The lack of a dedicated enforcing authority and the costs and length of judicial proceedings may represent one of the drawbacks of not adopting dedicated legislation on UTPs. This conclusion may also apply to those MSs that have adopted only a limited set of provisions that mainly deal with pre-contractual misleading and aggressive commercial practices and rely only on judicial enforcement. This is the case in *Belgium, Denmark, Finland and Sweden*, whose legislative approach, mainly drawn from consumer law, has been described above (see section 3). In these four MSs, the prohibition of unfair commercial practices is enforced by courts. In some cases, specialised courts (such as commercial or market courts) have jurisdiction (as is the case in Belgium, Finland and Sweden). Otherwise, general courts are competent. Courts have the power to impose injunctions (often reinforced through *astreintes*) and

[73] See, for example, § 13, Austrian Unfair Competition Act.

[74] See, for example, section 6(5), Hungarian Law (Act XCV 2009): 'Notwithstanding any proceeding pursuant to this Act, the injured supplier may enforce its claim based on the distributor's unfair conduct directly before court in a civil procedure.'

fines. In some legislation, the right to damages and restitution is specifically recognised (Denmark).

Access to judicial enforcement is primarily granted to those injured by UTPs. They can act individually or jointly when the same UTP has affected multiple producers or even multiple enterprises along the chain.

Producers' organisations may play different roles.

(1) They may be granted an autonomous right to access courts. In some MSs, the law specifically defines the associations and public bodies entitled to bring a civil action before the court[75]. In the absence of specific legislation, general provisions of civil procedure apply to regulate standing and the possibility for producers' organisations to seek remedies. In this case, they protect the collective interests of producers or more broadly of parties along the chain.

(2) Alternatively, they may be granted a right to represent producers in the proceedings, filing a claim in their own interest.

(3) Finally, there are MSs that do not allow producers' associations to take part in the judicial proceeding. When they are not granted a right to be a party to the proceeding they may be enabled to intervene in the proceeding. Third party intervention warrants not a right to seek an independent remedy but simply a right to take part in the judicial proceedings and to present evidence on the existence of the practice and its harmful consequences.

Table 14. Empowerment of enterprises' associations in judicial enforcement of UTP legislation (examples)

MS	**Power of enterprises' associations in the enforcement of UTP legislation before courts (examples)**
FRANCE	Power to start civil proceedings before the court
AUSTRIA	Power to file suits for cease and desist orders before the court

Judicial enforcement is also open to administrative authorities and branches of executives[76]. In some MSs, such as in France, the Ministry of Economy is granted the possibility to seek remedy that would not be available to the injured parties. This is the case for *amende civile* (civil fine) and for *repetition de l'indu* (restitution of undue perfomance)[77]. Other MSs, such as Austria, grant several bodies the possibility to seek judicial remedies[78].

Judicial enforcement includes primarily compensation and restitution. To a limited extent, especially when unfair competition is applicable, judicial injunctions can also be issued. Judicial injunctions are granted in those systems that have extended the consumer

[75] See, for example, France L. 470-7 of code de commerce; Austrian Unfair Competition Act General provisions, Claim for an injunction: '§ 14. (1) In the cases referred to in Sections 1, 1a, 2, 2a, 3, 9c and 10, an injunction for cessation may be sought by any trader who offers goods or services of the same or related species or in the commercial market (competitor) or by associations promoting the economic interests of businesses, provided these associations represent interests that are affected by the action. In the cases referred to in Sections 1, 1a, 2, 2a and 9c, an injunction may also be claimed by the Federal Chamber for Workers and Employees, the Austrian Economic Chamber, the Conference of Chairs of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation or the Federal Competition Authority. In cases of aggressive or misleading commercial practices under § 1 para. Point 2, paragraph 1 2 to 4, Section 1a or Section 2, an injunction may also be claimed by the Association for Consumer'.

[76] See France Code de Commerce, Article 442/6.III. ; Austrian Unfair Competition Act, Article 14.

[77] See France, Article 442-6, Code de commerce.

[78] See section 14, Austrian Unfair Competition Act.

regulation implementing Directive 2005/29/EC[79]. Other MSs explicitly grant the judge the power to issue an injunction and other corrective measures (e.g. Germany, France, Cyprus)[80]. In some limited cases, judicial remedies also include civil penalties (*amendes civiles*)[81]. Moreover, in France the *code de commerce* imposes a renegotiation clause whose absence can be punished with an administrative penalty[82]. Publication of the judgment is allowed in some MSs. The party that suffered harm and/or producers' associations can ask to publish the judgment at the expense of the infringer[83].

[79] See, for example, section 14, Austrian Unfair Competition Act.

[80] See France Article 442-6, Code de commerce: 'IV. - Le juge des référés peut ordonner, au besoin sous astreinte, la cessation des pratiques abusives ou toute autre mesure provisoire.'

[81] See France Article 442-6, Code de commerce: 'Ils peuvent également demander le prononcé d'une amende civile dont le montant ne peut être supérieur à cinq millions d'euros. Toutefois, cette amende peut être portée au triple du montant des sommes indûment versées ou, de manière proportionnée aux avantages tirés du manquement, à 5 % du chiffre d'affaires hors taxes réalisé en France par l'auteur des pratiques lors du dernier exercice clos depuis l'exercice précédant celui au cours duquel les pratiques mentionnées au présent article ont été mises en œuvre.'

[82] See French Code de commerce 'Article L441-8, Cour de Cassation, *Com., 21 janvier 2014, pourvoi n° 12-29.166, Bull. 2014, IV, n° 11.* Art. 441-8, Modifié par Ordonnance n° 2017-303 du 9 mars 2017 - art. 2: Les contrats d'une durée d'exécution supérieure à trois mois portant sur la vente des produits figurant sur la liste prévue au deuxième alinéa de l'article L. 442-9, complétée, le cas échéant, par décret, dont les prix de production sont significativement affectés par des fluctuations des prix des matières premières agricoles et alimentaires comportent une clause relative aux modalités de renégociation du prix permettant de prendre en compte ces fluctuations à la hausse comme à la baisse.

Cette clause, définie par les parties, précise les conditions de déclenchement de la renégociation et fait référence à un ou plusieurs indices publics des prix des produits agricoles ou alimentaires. Des accords interprofessionnels ainsi que l'observatoire de la formation des prix et des marges des produits alimentaires peuvent proposer, en tant que de besoin et pour les produits qu'ils visent, des indices publics qui peuvent être utilisés par les parties, ainsi que les modalités de leur utilisation permettant de caractériser le déclenchement de la renégociation.

La renégociation de prix est conduite de bonne foi dans le respect du secret en matière industrielle et commerciale et du secret des affaires, ainsi que dans un délai, précisé dans le contrat, qui ne peut être supérieur à deux mois. Elle tend à une répartition équitable entre les parties de l'accroissement ou de la réduction des coûts de production résultant de ces fluctuations. Elle tient compte notamment de l'impact de ces fluctuations sur l'ensemble des acteurs de la chaîne d'approvisionnement. Un compte rendu de cette négociation est établi, selon des modalités définies par décret.

Le fait de ne pas prévoir de clause de renégociation conforme aux deux premiers alinéas du présent article, de ne pas respecter le délai fixé au troisième alinéa, de ne pas établir le compte rendu prévu au même troisième alinéa ou de porter atteinte, au cours de la renégociation, aux secrets de fabrication ou au secret des affaires est passible d'une amende administrative dont le montant ne peut excéder 75 000 € pour une personne physique et 375 000 € pour une personne morale. L'amende est prononcée dans les conditions prévues à l'article L. 470-2. Le maximum de l'amende encourue est doublé en cas de réitération du manquement dans un délai de deux ans à compter de la date à laquelle la première décision de sanction est devenue définitive' (emphasis added)**.**

[83] See, for example, the French Code de commerce, Article 442/6: **'La juridiction ordonne systématiquement la publication, la diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci selon les modalités qu'elle précise.** Elle peut également ordonner l'insertion de la décision ou de l'extrait de celle-ci dans le rapport établi sur les opérations de l'exercice par les gérants, le conseil d'administration ou le directoire de l'entreprise. **Les frais sont supportés par la personne condamnée**.' (emphasis added).

See, for example, the Austrian Unfair Competition Act: '25. (1) In the cases of §§ 4 and 10, publication of the sentence may be ordered at the expense of the sentenced party. (2) In the cases of §§ 4 and 10, the court may, upon application by the acquitted party, authorise such party to have the acquittal published at the expense of the plaintiff in the private prosecution within a specified period of time. (3) Where, except in the cases of §§ 11 and 12, a suit for a cease-and-desist order is undertaken, the court shall, upon application, authorise the prevailing party, if such has a legitimate interest in it, to have the sentence published at the opposing party's expense within a specified time limit. (4) The publication shall comprise the wording of the sentence. The manner of publication shall be defined in the sentence. (5) In civil proceeding[s], the court may, upon application by the prevailing party, define a text of the publication which varies from or supplements the scope or wording of the sentence. Such application shall be filed not later than four weeks after the sentence has become final. If such application is only filed after the end of the hearing, it shall be decided by the court of first instance by an order after the sentence has become final.'

Table 15. Publication of enforcement decisions by courts. Summary information (examples, not necessary exhaustive)

MS	PUBLICATION OF COURT'S DECISIONS ON UTP ENFORCEMENT
GERMANY	X *(for injunctions)*
FRANCE	X
HUNGARY	X
AUSTRIA	X

Judicial enforcement varies across MSs but is generally used less than administrative enforcement. In addition to the low level of litigation, there are noticeable variations concerning the legal basis to bring civil actions. In some MSs, the source is contract law; in others, tort or extracontractual liability; in others, unfair competition and restitution. Different causes of action may bring about differences in the availability of injunctive relief and the level of compensation. The new legislations seem to converge towards a 'contractualisation' of UTPs but differences remain within and between legal systems about injunctions and civil penalties.

Judicial enforcement includes litigation with multiple infringers. Multiplicity of infringers can materialise in at least two different ways: one where the infringers are all part of a supply chain (vertical multiplicity); the other where they are competitors but all engage in the same conduct against the same producers (horizontal multiplicity, as in a cartel). When the UTPs are committed by multiple infringers they can be severally and jointly liable for damages and be the joint addressees of an injunction ordering them to stop the practices and remove the harmful consequences. For example, in a supply chain the UTP may be the result of complicit behaviour of the retailer and the traders against the producers. Are the effects of the remedy relevant to all the infringers? Is there a difference generated by different levels of bargaining power?

As to the injunction, the bargaining power distribution and the fault of each party plays no decisive role in defining the effects. All the infringers have to comply with the injunctions. Some differences may occur if the injunction has not only a prohibitive (negative) but also an affirmative facet. For example, if the injunction includes an order to modify the procurement policy within the chain, then targets may be differentiated according to their decision-making power along the supply chain.

A more complicated case concerns damages when multiple infringers are involved. Several models can be deployed. It is often the case that damages can be awarded where the infringer is at fault or there has been an intention to cause harm. Joint and several liability can be granted if all the parties are at fault or some have committed an intentional tort and others a negligent tort. When the chain leader can be strictly liable for a UTP there can be joint and several liability of first- and second-tier suppliers based on fault, combining strict liability and negligence. But what if there is a considerable power imbalance in the supply chain and the chain leader has imposed the UTP on the suppliers, which, as a result, have imposed it on the producers? Damages could be paid only by the chain leader if the practice towards producers has been imposed by the chain leader onto the processors that were 'forced' to apply the practice. The other participants in the chain have to show that they were forced to adopt the practice under the threat of contractual termination or similar threats. Only coercion might enable exemption from liability; otherwise, joint and several liability applies. When multiple infringers are at fault, differences in bargaining position may result in different degrees of culpability, which in turn may determine an uneven allocation of the burden to pay compensating damages.

Proving the amount of damages – at least for some UTPs – is a significant difficulty, which explains the low level of judicial enforcement. While clearly UTPs shift costs along

the supply chain, it might not be easy to determine the amount of unlawful cost shifting for any practice. It is considerably easier to determine, for example, compensation for late payment, retroactive conditions, unilateral modifications of contracts and unlawful termination of the business relationship.

The difficulties increase even further if the consequences of UTPs have to be evaluated at the chain level (multiple injured parties) rather than at the level of the specific bilateral relationship. At the chain level, the interdependent effects of UTPs may have a very wide reach and the distribution of costs may include several stages of the chain.

Lack of a clear legislative framework (until the specific legislations were enacted), the lack of incentives to use the court system, the fear factor and the concern about disruptive consequences in the business relationship have all contributed to a limited use of adjudication as an enforcement mechanism. The weaknesses of judicial enforcement should not lead to the conclusion that it is useless. On the contrary, many consequences of UTPs can be tackled only through judicial enforcement. Judicial enforcement needs some reform that has not been addressed by the new legislation, which focuses mainly on administrative enforcement.

Complementarity poses challenges to the modes of coordination between various enforcement systems. National legislations do not effectively address the issue of coordination among enforcement mechanisms and between different judicial disputes. An interesting exception to this is the Irish system, where it is expressly stated that findings of an infringement by a retailer constitute *res judicata* and can be used by different parties in subsequent litigation[84]. Here, the relationship is between criminal findings and a right of action for civil remedies. If the criminal offence has been ascertained, the civil action can be based on those findings. Hence, when the large retailer engages in criminally relevant behaviour, all those affected can bring civil actions asking for damages. In the Irish legal system, the civil action seems a 'follow on' from the criminal prosecution[85]. Coordination between judicial and administrative enforcement is needed both (1) when the UTP constitutes a criminal offence to regulate *ne bis in idem* consequences and (2) when a civil remedy may be sought to complement an administrative sanction to ensure consistency between the administrative decision and the judgment.

4.3 Dispute resolution mechanisms

The third pillar of the enforcement architecture is private dispute resolution. Enforcement systems exist at national level and have been adopted more recently at EU level. The model is collaborative and combines monitoring with informal enforcement. Formal enforcement is left to administrative authorities and to courts.

The Food Supply Chain Initiative (FSCI or SCI) is a joint initiative developed by eight EU-level associations that represent the food and drink industry (FoodDrinkEurope), branded goods manufacturers (AIM), the retail sector (the European Retail Round Table (ERRT), EuroCommerce, EuroCoop and Independent Retail Europe), the European Association of

[84] CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 S.I. NO 35 OF 2016: 'The Act also provides anyone who is aggrieved by the failure of a retailer or wholesaler to comply with any regulations or with any compliance notice issued under the relevant Section of the Act, shall have the right of action for relief against that retailer or wholesaler in the Circuit Court (any such relief, including exemplary damages, not being in excess of the limits of the jurisdiction of the Circuit Court in an action founded on tort).'

[85] CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 S.I. NO 35 OF 201. 'Finally, the Act also provides that, where a Court has made a final finding in a particular case under these Regulations, that finding is res judicata for the purpose of subsequent proceedings whether or not the parties to those subsequent proceedings are the same as the parties to the first mentioned proceedings. **Private litigant, relying on this legal doctrine, will not be required to prove the contravention of the relevant provisions afresh in a follow-on action in respect of the same contravention. Rather he or she will be able to rely on that earlier finding for the purpose of an action for damages**.'

Craft, Small and Medium-sized Enterprises (UEAPME) and agricultural traders (CELCAA). The FSCI is managed by a governance group.

'The SCI, a voluntary framework for implementing the principles of good practice was launched in September 2013. Individual companies may join the SCI once they comply with the principles of good practice. Under the SCI, disputes between operators can be addressed through mediation or arbitration'[86].

The FSCI is organised in a multi-level structure with an EU platform and national platforms. The FSCI does not engage in adjudication. It monitors compliance with principles of the code of practice and, when violations are in place, tries to resolve them informally. The platform acts not *ex officio* but on the basis of complaints lodged by members. Only disputes among members can be brought before the governance group.

'The SCI focuses on organisational requirements at company level to prevent UTPs, including staff training and participation in dispute resolution mechanisms. Breaches of these organisational requirements can lead to the concerned company being excluded from the SCI. However, the SCI does not provide for any other type of sanction. Members of the SCI must ensure that the weaker parties using the dispute resolution mechanisms are not subject to commercial retaliation'[87].

Sanctions for non-compliance are membership-based and lack of compliance can lead to exclusion. No fining or injunctive power is conferred on the governance group.

The regulatory approach is based on the identification of the unfair practices and the recommendation of best practices[88]. When, as it is the case in Italy, the code is incorporated into legislation, this becomes the regulatory approach in administrative enforcement. The FSCI distinguishes between minor and major breaches. The former do not result in any public statement while the latter do.

It was shown that, in principle, administrative enforcement can be applicable both to a single infringement, involving one or multiple farmers and other players along the chain, and multiple infringements committed by different parties along the same chain or by several buyers. The most innovative contribution is the FSCI aggregated dispute regime. Aggregated disputes before the governance group concern infringements that affect multiple members and are committed by one or several members. They are dealt with by the EU governance group when infringers are located in different MSs or by national platforms when they all operate in the same MS.

A variety of private enforcement mechanisms can be triggered, from internal dispute resolution (when the large enterprises have their own) to mediation and arbitration.

[86] See European Commission Report (2016), p. 8.
[87] See European Commission Report (2016), p. 8.
[88] See Supply Chain Initiative, *Principles of Good Practice* (2011). See specifically Recommendation for Good Practice in applying the SCI principles of fair dealing, information, confidentiality, and justifiable request, enacted at the end of 2017.

5 Rethinking the policy options for UTPs in agri-food supply chains: an agenda for future research

The analysis shows a significant amount of unfair practices along agri-food supply chains and an apparent growing disjunction between the economic evolution of supply chains and their legal regulation. We are confronted with both a regulatory and an enforcement gap. This is certainly true for UTPs but it probably applies to other issues concerning contracting along agri-food supply chains.

The gap is caused more by legal fragmentation than by the absence of any legislative framework. Differences in the EU concern both the relevant UTPs, the legal techniques to prohibit or control the practices, the enforcement toolkit, the distinction between individual and mass infringements, and those between single and multiple infringers. Remarkable differences also exist in the scope of application of MSs legislation. These differences reflect alternative regulatory objectives and coverage; examples include whether general rules should regulate UTPs in all sectors or the agri-food supply chain requires specific rules; whether the same rules should apply in both domestic and trans-border UTPs; whether they should cover the entire chain or only some segments; and whether they should apply equally along the chain or stronger protection should be granted to small producers at the upstream part of the chain.

A sub-question about the scope of application is related to extraterritoriality, for example the desirability of extending legal protection to non-EU agricultural producers. Should EU and MS legislation tackle UTPs against non-EU producers? Should access to enforcement mechanisms be granted to producers from all over the world that sell products in the EU market? A global supply chain approach that features the EU as a global regulatory player should certainly move in this direction. EU law should control the global supply chains from every perspective, including risk and power allocation, and potential abuses. However, such a policy change could increase the costs of enforcement and translate into a less effective enforcement system for EU producers. There are therefore costs of adopting extraterritorial scope. One possible solution to ameliorate the cost of enforcing practices extraterritorially might be to differentiate the relevance of enforcement mechanisms and make extraterritorial enforcement available only for significant and widely spread infringements that include both EU and non-EU producers. This option would leave minor and individual infringements against non-EU producers out of the scope of EU intervention.

Variations in legal protection represent a positive ground for experimentation; however, they also make it more difficult to tackle cross-border violations. Fragmentation makes enforcement difficult, especially in trans-border infringements that occur in the EU and within global supply chains. A decentralised enforcement mechanism does not provide effective solutions for UTPs that occur in global markets where agricultural commodities come from countries different from those where the food is processed or consumed.

The four dimensions that need to be redefined in a legislative intervention concern the national versus European dimensions and the public versus private dimensions in both regulation and enforcement. It is clear that the solution is not about choosing between them but about their combination. How to combine MS and EU level approaches and how to combine public and private regimes are the most urgent policy questions related to a possible legislative intervention.

The most urgent issues concern whether or not EU legislative intervention and impact would be useful to reduce and mitigate UTPs and, if so, what its determinant features should be. An EU intervention would be useful to guarantee a common ground in terms of principles related to forbidden UTPs and enforcement mechanisms, with identification of priorities over modes of infringement and sanctioning policies. It would be a useful opportunity to define coordination mechanisms among enforcers, which would be especially relevant in trans-border multi-party infringements.

An EU legislative intervention could provide principles that MSs' legislation and private regulation have to follow. If it provides only minimum harmonisation, MSs are free to broaden the scope of intervention, the coverage of UTPs and the strictness of enforcement. A softer approach could be limited to principles, leaving details to MSs' legislation. A harder approach could also include descriptions of (some) prohibited practices. In this case, the alternative would be between a list that exemplifies and a list that constitutes a mandatory floor to be expanded on by adding prohibited UTPs at MS level.

Current variations in MSs' legislation concern the combination and interaction between principles such as the duty to act in good faith and engage in fair dealing and specific forbidden practices. These distinctions result in different allocations of power between rule-makers and enforcers. Some legislations are more principle-based and the identification of practices is mainly left to the enforcers. Other legislations are more specific and the general principles have interpretative rather than creative functions. In the latter case, enforcers enjoy less discretion. Differences between MSs also occur in specific rules, as the late payment example shows (MSs have different thresholds of numbers of days to define what constitutes a late payment). Whereas different MSs' legislative techniques may reflect alternative policy options, some limits to legal differentiation should be drawn within the boundaries of subsidiarity and proportionality. In other words, differentiation of legal instruments across MSs should not undermine the consistency of policy goals and results at EU level.

Within the array of different legislative techniques, the choice between mandatory and default rules becomes very relevant. It is necessary to move away from a crude alternative between mandatory rules and freedom of contract, towards a wider set of options. In some areas, including default rules that parties can deviate from by using, for example, a 'comply or explain' technique would certainly increase the effectiveness of legislation. A good illustration of a combined use of mandatory and default rules is provided by the FSCI regulatory approach. Within the FSCI, prohibitive mandatory rules define unfair practices, and default rules recommend good practices. A more complex architecture could also include default rules in relation to UTPs prohibition. In this case, the prohibited practices may be differentiated between those regulated by mandatory rules and those regulated by default rules. Default rules may permit parties' negotiations over contractual terms as long as certain procedures detailed in the contract are met, as exemplified in the above analysis (see section 3.2). Default rules may allow parties to reallocate the risks and costs as long as redistribution is made transparently and within the parameters of proportionality. Default rules permit taking into account chains' specificities concerning the commodities, the level of industry concentration and the role of large distribution. The use of contractual clauses alternative to the legislative default should be carefully monitored to ensure that no abuses take place and that the default clearly represents the majoritarian best option. One possibility is the creation of a EU observatory of agri-food trade practices that collects information about contractual clauses deployed along the supply chains. This approach could be based on self-reporting by large retailers and buyers and should at least distinguish between horticulture, crops, aquaculture and livestock.

On the substantive side, a clearer regime of private international law to regulate applicable law in trans-border infringements involving both multiple infringers and multiple injured parties is needed. A second, related, dimension concerns individual versus multi-party infringements and, in the latter case, the different regimes concerning multi-party infringers when they operate in different MSs. It is highly recommended that a few general rules about **multi-party trans-border infringements** to be implemented by MSs at national level are introduced.

Enforcement includes public and private regimes with a remarkable variety of instruments and practices.

There is clearly an enforcement gap in tackling UTPs. The gap stems from ineffective coordination within and between MSs. This enforcement gap increases even more in

relation to trans-border infringements. As to the enforcement framework, decentralised enforcement, both administrative and judicial, should be complemented by stronger coordination mechanisms among MSs. The new EU legislation should provide coordination instruments among administrative enforcers similar to those deployed in competition law under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty or those just introduced in consumer law by Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004. An EU legal intervention could define one or more options for coordination in cases of cross-border infringements involving several MSs. Coordination should encompass investigations, sharing information and evidence, sanctioning practices, and remedies, especially when multiple infringers and multiple injured parties are located in various MSs.

Sanctioning practices differ across administrative enforcers. This makes inconsistencies between MSs likely to occur. The same infringements in two or more MSs may be subject to different sanctions, or within the same 'sanction family' (financial penalties) significantly different amounts can be determined. Some legislations introduce differences between UTPs with major and minor infringements. Others do not differentiate between infringements having regard to their seriousness. The principles of effectiveness, proportionality and dissuasiveness should be applied consistently by enforcers in all countries. Even if the sanctioning power is left to national enforcers, coordination may help to avoid inconsistencies and ensure a uniform deterrent effect.

A second issue about enforcement is the coordination between administrative and judicial enforcement. Unlike competition law, where sequentiality has become the rule with Directive 2014/104/EU, with a few exceptions no coordination mechanisms have been introduced either at EU or at national level. In most jurisdictions, claimants may lodge complaints before an administrative enforcer and before courts simultaneously or sequentially. If no coordination is in place, administrative enforcers can start *ex officio* investigations even if a judicial dispute is in place. No consistency between the outcomes of parallel proceedings concerning the same UTP would be ensured. The same practice could be considered a UTP for the purpose of damages and not for that of administrative sanctions, leaving aside instances of criminal offences. The problem becomes even more significant when administrative and judicial enforcers belong to different MSs. Given the interaction between administrative and judicial enforcement, closer coordination between national administrative bodies and courts would also be highly desirable. A EU legislative intervention should at least clarify what the alternative options are, leaving MSs to choose based on the principle of procedural autonomy.

The other relevant macro-question is whether or not the current complementarity between public and private regimes delivers the best results. If not, what are the changes that can make complementarity work better? The two dimensions concern substantive and remedial rules.

As to the substantive rules, reinforcing the promotional role of private regulation may have positive effects if it is better coordinated with legislation. As previously described, there are very different approaches: some integrate private regulation and the code of practice in legislation; others keep a strong and stark separation between legislation and private regulation. To incorporate different admissible regulatory options into an EU rule may permit limited and consistent regulatory alternatives. The flexibility of private regulation can permit faster and more effective adaptation to the changing world of agri-food supply chains. Monitoring by private regulators can provide rule-makers and enforcers with up-to-date information about the evolution of practices along global supply chains. UTPs are not stable over time, and new practices develop as markets change structure to reflect different production technologies and different consumer preferences.

On the remedial side, the current national enforcement regimes are not very effective. A reform should include the possibility of private sanctions based on market mechanisms.

The reputational lever can be used more widely both in private regimes and in public enforcement systems. Reports made publicly available on the existence of UTPs and the applied sanctions may dissuade the infringer much more than any administrative sanction or injunction. This is even truer for repeat violations. Private regulation is the ideal environment to further develop the use of scorecards to measure improvements over time. Often, enforcement focuses on the consequences of UTPs and does not address the causes. Private regulation and forms of cooperative enforcement in the administrative domain may shift the focus and try to address the causes together with the consequences of infringements. Removing the causes of unfair practices may require significant adaptations of supply chain governance, which will take time. For this reason, the use of scorecards with appropriate indicators and targets may contribute to a more effective market regulation and to a better institutional environment for fair and sustainable agricultural growth.

What are the possible effects of EU legislation regarding UTPs on the MSs' current legal frameworks? An EU legislative intervention would not replace MSs' current legislation. It would either fill in the gaps or complement the existing legislation. The use of general civil law and competition law should be considered inadequate to meet the implementation requirements of an EU legislative instrument. These MSs will be obliged to approve new rules on both the substantive and the remedial side. The impact on MSs with existing UTPs legislation would differ. Possibly the most significant impact would be more effective coordination of the enforcement bodies and increasing the influence of Court of Justice of the European Union (CJEU) judgments if preliminary references about UTPs were submitted. It would be the beginning of the process of soft harmonisation with both an impact on intra-EU trade in agricultural products and an impact on trade between non-EU countries and the EU, affecting both the structure of global supply chains and the exercise of unequal bargaining power.

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