UNIVERSITY OF TRENTO - Italy
Faculty of Law
Department of Legal Sciences

lawtech

Trento Law and Technology Research Group
Student Paper n. 61

# UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD SUPPLY CHAIN BETWEEN PUBLIC AND PRIVATE REGULATION

MARIA VITTORIA BORGHETTO

ISBN: 978-88-8443-933-8

About the author

Maria Vittoria Borghetto (maria.borghetto@alumni.unitn.it) graduated in Law at the University of Trento, under the supervision of Prof. Umberto Izzo and Prof. Matteo Ferrari (December 2020).

The opinion stated in this paper and all possible errors are the Author's only.

**UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD SUPPLY CHAIN BETWEEN PUBLIC AND PRIVATE REGULATION**


## ABSTRACT

This paper addresses the phenomenon of Unfair Trading Practices (hereinafter, UTPs) in the business-to-business EU agri-food supply chain, stressing the need of combining both public and private interventions to effectively tackle the issue.

These unfair behaviours can be understood only in light of the dynamics that govern the current agri-food supply chain; therefore, the analysis will initially focus on the chain's structural characteristics.

The UTPs' potential consequences on businesses, consumers, and on the functioning of the internal market will reveal the severity of this issue and the call for a targeted intervention. It will be stressed, in particular, how UTPs negatively affect the agricultural community, putting at risk the stability of the whole sector, thus re-proposing a food security issue.

Some possible remedies will be investigated, such as the restoration of a short food supply chain and product differentiation. Nonetheless, the ones capable of tackling more deeply this issue are the public ones, in particular the regulatory intervention on competition law and the one on the content of B2B agreements.

The paper will then survey the path that led to the Directive (EU) 2019/633 on UTPs, also considering EU private regulatory actions on the topic, such as the Principles of Good Practice and the Supply Chain Initiative. The investigation will disclose the shortcomings of the Directive, highlighting its complementary role in the current EU legal framework and the potentiality of private interventions in overcoming its deficiencies.

Finally, the additional role of transnational private regulation in the fight against UTPs will be explored. In this regard, the analysis will especially consider two private initiatives: the Oxfam's Supermarket Scorecard and the "NoCap" ethical certification scheme



## KEY WORDS

Agrifood supply chain - Unfair trading practices - Directive 2019/633 - Private regulation - B2B

**PRATICHE COMMERCIALI SLEALI NEI RAPPORTI TRA IMPRESE NELLA FILIERA ALIMENTARE TRA REGOLAMENTAZIONE PUBBLICA E PRIVATA**

## ABSTRACT

Le pratiche commerciali sleali (PCS) nei rapporti tra imprese nella filiera agroalimentare sono un fenomeno tendenzialmente nuovo, che trae origine dalla progressiva globalizzazione del sistema agroalimentare.

Per comprendere la vera essenza di questa problematica, è necessario analizzare la conformazione della filiera agroalimentare; dunque, il primo capitolo si concentra sugli attori e sulle dinamiche che la caratterizzano, nonché sulla distribuzione del valore lungo la stessa.

L'attuale filiera agroalimentare è contraddistinta da una natura transnazionale e dalla presenza di una moltitudine di soggetti economici che operano al suo interno. In condizioni ideali di mercato, il valore generato lungo la filiera dovrebbe essere distribuito equamente tra gli operatori commerciali, sulla base del loro singolo contributo al prodotto finale destinato al consumo. Ciononostante, il valore è spesso distribuito iniquamente, soprattutto a discapito della comunità agricola.

Uno dei fattori che incide maggiormente su questo risultato è la progressiva concentrazione di attori ai margini della filiera. A valle, vi sono dei grandi colossi industriali che ormai controllano il mercato sementiero e agrochimico europeo. A monte, le imprese di trasformazione e distribuzione, oggi conosciute come grande distribuzione organizzata (GDO).

Questi soggetti economici, in particolare, sono in grado di influenzare le dinamiche dell'intero settore agroalimentare, in virtù della loro posizione di prossimità ai consumatori. Pertanto, detengono un potere contrattuale più "forte" rispetto alle loro controparti più "deboli": i produttori agricoli.

Questa situazione di asimmetria di potere contrattuale implica, nella maggior parte dei casi, che la GDO sfrutti il potere acquisito per imporre unilateralmente condizioni ingiuste alle sue controparti, mettendo in atto, dunque, delle pratiche sleali. Lo scopo è quello di catturare la più ampia fetta di valore generato lungo la filiera, *ergo*, di incrementare sempre di più i profitti.

Le conseguenze di queste pratiche minacciano il funzionamento dell'intero mercato agroalimentare, perché alterano la distribuzione di risorse e incoraggiano comportamenti distorsivi lungo tutta la filiera, con effetti negativi anche sui consumatori.

Fatta questa premessa, l'analisi si concentra successivamente sui potenziali rimedi contro le PCS.

Il primo rimedio esaminato consiste nel ritorno a una filiera agroalimentare "corta"; ripristinare però a livello globale un tale sistema sembra, oggi, alquanto impossibile.

La seconda soluzione, in grado di aumentare la competitività dei piccoli agricoltori e il valore aggiunto delle loro produzioni, consiste nella differenziazione dei prodotti sul mercato. Ciononostante, se continua ad esservi una concentrazione di acquirenti potenti, i fornitori di prodotti agroalimentari rimarranno comunque subordinati a decisioni negoziali altrui, e il valore aggiunto dei loro prodotti potrà ugualmente disperdersi. Per beneficiare realmente di questa condizione privilegiata, gli agricoltori dovrebbero a loro volta concentrarsi, per rafforzare contestualmente la loro posizione contrattuale.

Quest'ultima considerazione sottolinea come sia necessario, dunque, un intervento pubblico sulla disciplina della concorrenza, al fine di incentivare forme di aggregazione tra

produttori agricoli. Il legislatore europeo è quindi intervenuto sulla disciplina antitrust prevedendo una serie di deroghe a beneficio della comunità agricola, tentando di riequilibrare la situazione di diseguaglianza contrattuale presente tra fornitori e acquirenti di prodotti agroalimentari.

Senza un intervento adeguato, diretto a tutelare *in primis* gli agricoltori, questa situazione di disparità potrebbe comportare anche la riemersione di un problema di sicurezza alimentare. Considerando che l'accesso al cibo è un bisogno primario e essenziale dell'uomo, questo risultato deve essere assolutamente evitato.

Le politiche europee hanno sempre sostenuto pertanto il settore agricolo e la sua comunità, attraverso un cosiddetto approccio di "eccezionalismo agricolo". Il sostegno agli agricoltori, e di conseguenza alla sicurezza alimentare, giustifica infatti un intervento pubblico di tipo "eccezionale", non solo sulla normativa antitrust, ma anche sulla disciplina contrattuale, da sempre espressione dell'autonomia privata.

Il primo tipo di intervento, infatti, tenta di dirimere la problematica delle PCS all'origine, rafforzando la posizione degli agricoltori lungo la filiera. Tuttavia, è indispensabile un'ulteriore azione pubblica diretta a regolare il contenuto degli accordi tra imprese, al fine di eliminare, in un'ottica *ex post*, le conseguenze negative delle pratiche negoziali scorrette.

In quest'ultimo rimedio di natura pubblica, il tema dell'"eccezionalismo agricolo" si intreccia con quello della giustizia contrattuale, permettendo al legislatore di perseguire una giustizia di tipo distributivo.

L'articolo 39 del TFUE prevede tra gli obiettivi della PAC quello di assicurare un equo tenore di vita alla comunità agricola. Alla luce dell'attuale squilibrio nella distribuzione del valore lungo la filiera, questa "equità" può essere garantita solamente attraverso contratti che realizzano un tipo di giustizia distributiva, vale a dire, un'equa distribuzione di valore e risorse.

Ed è proprio questa crescente consapevolezza che ha determinato l'intervento regolatore del legislatore comunitario sui rapporti tra imprese lungo la filiera agroalimentare, con la Direttiva (UE) 2019/633.

Il primo capitolo si conclude sottolineando la necessità di un intervento pubblico su vari livelli per contrastare le PCS; da subito, dunque, si percepisce la complessità di questo fenomeno.

Il secondo capitolo indaga invece il quadro giuridico europeo sulle pratiche sleali, partendo dalla comunicazione della Commissione del 2009, fino ad arrivare alla Direttiva (UE) 2019/633. Negli anni, la Commissione ha sempre favorito interventi di *soft law*, inizialmente, perché le PCS rappresentavano un problema recente e ancora poco investigato per poter intervenire diversamente.

Infatti, nella prima comunicazione analizzata, la Commissione sottolinea l'importanza di condurre ulteriori studi su queste pratiche, riconoscendo comunque il loro potenziale effetto negativo sulla filiera agroalimentare e sui suoi attori. La Commissione si impegnava, in questa occasione, anche a implementare entro il 2010 delle iniziative a livello europeo per trovare dei possibili rimedi.

In quell'anno viene dunque costituito il Forum di Alto livello sul migliore funzionamento della filiera alimentare, all'interno del quale, viene elaborato un codice di condotta: i *Principles of Good Practice*. Nello specifico, si tratta di una serie di principi che le imprese agroalimentari dovrebbero applicare nelle loro relazioni commerciali, per garantire maggiore equità lungo la filiera. Questi principi contengono esempi di pratiche sia sleali che leali, rappresentando una sorta di manuale per le aziende. Per questo motivo, l'analisi

condotta evidenzia spesso l'importanza di includere questo codice di natura privata in un eventuale intervento pubblico di *hard law* a livello UE.

Anche il Parlamento europeo infatti espresse il suo parere positivo in relazione a questa prima forma di regolamentazione privata, sottolineando però al tempo stesso la necessità di un intervento legislativo sulla contrattazione tra imprese, per rispondere efficacemente agli squilibri strutturali della filiera. Questa divergenza di opinioni tra Parlamento e Commissione europea, sull'approccio pubblico alle PCS, durerà fino alla Direttiva (UE) 2019/633.

Nel 2013, di fatto, la Commissione interviene con un'altra comunicazione: il Libro verde sulle pratiche commerciali sleali nella catena di fornitura alimentare e non alimentare tra imprese in Europa. Il principale merito di questo ulteriore provvedimento di *soft law* è quello di identificare e definire il cosiddetto "fattore paura", che consiste nel timore della parte contrattuale più vulnerabile della cessazione del rapporto commerciale, in caso di denuncia di una pratica sleale. Fattore di cui si deve tener conto nell'elaborazione di una regolamentazione sulle PCS, al fine di introdurre un meccanismo di *enforcement* efficace.

Sempre nello stesso anno, la Commissione, insieme al Forum, lancia un'iniziativa privata volontaria a livello europeo, la *Supply Chain Initiative*, per dare fondamentalmente attuazione ai *Principles of Good Practice*. Le aziende agroalimentari aderenti all'Iniziativa erano infatti tenute a implementarli e rispettarli nelle loro relazioni commerciali. Inoltre, l'Iniziativa prevedeva dei meccanismi di risoluzione delle controversie alternativi ai riti ordinari, apparentemente validi, ma purtroppo poco utilizzati, anche a causa della breve durata della *Supply Chain Initiative*.

La potenzialità di questo intervento privato a livello europeo era notevole; tuttavia, l'Iniziativa presentava anche molte lacune che l'hanno resa complessivamente inefficiente e che ne hanno determinato la fine. Tra queste, vi è la mancata partecipazione degli agricoltori e dei loro rappresentanti all'Iniziativa, un difetto di parzialità legato al sistema di *governance*, infine, la più rilevante, la carenza di un adeguato sistema di *enforcement*, in grado anche di contrastare il "fattore paura".

Nel corso degli anni sono state ovviamente individuate diverse soluzioni a questi problemi che, se attuate, avrebbero potuto rafforzare il ruolo dell'Iniziativa nella lotta contro le PCS. Ovviamente, sempre in una prospettiva di complementarietà rispetto agli altri fondamentali interventi di natura pubblica.

Dopo le pressanti richieste per un'azione più incisiva sulle PCS, provenienti sia dalle altre Istituzioni europee, che dagli attori della filiera, la Commissione ha lanciato l'Iniziativa per migliorare la catena di approvvigionamento alimentare. Questa iniziativa prevedeva tre consultazioni, una aperta al pubblico, due rivolte direttamente alle imprese agroalimentari e alle organizzazioni dei consumatori, con lo scopo di stabilire definitivamente se fosse necessario procedere con un intervento di tipo legislativo.

La Commissione predispose innanzitutto una valutazione di impatto iniziale, la quale includeva quattro diverse opzioni di *policy* sulle PCS, in modo che le parti interessate potessero esprimere le loro preferenze a riguardo.

Le risposte e i dati raccolti sono poi confluiti nel report finale sulla valutazione di impatto, che contiene un'analisi specifica dei singoli elementi delle politiche prese in considerazione, e una valutazione dei loro effetti potenziali sul funzionamento della filiera agroalimentare.

In generale, l'intervento ritenuto più idoneo è stato quello di tipo legislativo, in grado di introdurre un quadro giuridico comune sulle PCS a livello europeo, con un approccio di armonizzazione minimo. Infatti, diversi Stati membri avevano già adottato nei loro

ordinamenti nazionali dei rimedi specifici contro le pratiche sleali, anche in virtù delle iniziative private europee sviluppate in precedenza.

Sulla base dei risultati della valutazione di impatto, la Commissione ha presentato una proposta di Direttiva, giustificata dall'esigenza di ridurre le divergenze tra le normative sviluppate dai singoli Stati membri in materia di PCS, nonché di rimediare alle inefficienze della *Supply Chain Initiative*.

La Proposta conteneva una breve lista di pratiche commerciali sleali vietate, la previsione di un sistema di *enforcement* decentralizzato, con un ruolo centrale affidato alle autorità nazionali competenti nei singoli Stati membri, e l'ambito di applicazione era limitato alla tutela delle piccole-medie imprese fornitrici di prodotti agroalimentari.

La Proposta di Direttiva risultava, però, del tutto estranea ai precedenti interventi di regolamentazione privata incoraggiati dalla Commissione. Infatti, non solo non riprendeva il contenuto del codice di condotta precedentemente elaborato a livello europeo, ma non includeva anche la *Supply Chain Initiative* come parte integrante della nuova *policy*. Purtroppo, il testo finale della Direttiva (UE) 2019/633 presenterà le medesime mancanze.

Prima di giungere a questa conclusione, l'analisi si concentra anche sugli altri difetti della Direttiva, che riguardano rispettivamente il suo ambito di applicazione, declinato questa volta sulla base del fatturato annuale delle imprese agroalimentari, e la lista di PCS vietate. In entrambi i casi, l'assenza di un effettivo approccio di filiera e di tutela della comunità agricola compromettono l'intera base giuridica della Direttiva: l'Articolo 43 paragrafo 2 del TFUE.

La nota positiva di questo intervento pubblico è l'introduzione di un sistema di *enforcement* in grado di contrastare il cosiddetto "fattore paura", superando così il principale *impasse* della *Supply Chain Initiative*.

Ciononostante, questa azione pubblica a livello comunitario, diretta finalmente a regolare il contenuto degli accordi tra imprese nella filiera agroalimentare, non è in grado di garantire quella giustizia contrattuale di tipo distributivo necessaria per contrastare il fenomeno delle PCS. Uno dei motivi è la mancanza di un effettivo approccio di "eccezionalismo agricolo", dato che in tutto il testo legislativo i grandi assenti sono proprio gli agricoltori.

L'intervento del legislatore europeo presenta molte lacune, e invece di raggiungere il risultato prospettato di introduzione di un quadro normativo completo e uniforme a livello europeo sulle PCS, per alcuni aspetti, finisce in realtà per complicarlo ulteriormente.

In questo contesto, dunque, iniziative di regolamentazione privata potrebbero assumere un ruolo fondamentale nel colmare i vuoti di tutela lasciati da questa nuova legislazione. La Direttiva tuttavia non ha valorizzato quelle già esistenti a livello europeo, che avrebbero potuto assolvere questa funzione, ossia i *Principles of Good Practice* e la *Supply Chain Initiative*. Questa ulteriore azione avrebbe infatti ovviato alle problematiche principali della Direttiva, ampliando rispettivamente il suo ambito di applicazione e la lista di pratiche sleali vietate.

Dal momento che ciò non è stato fatto, il terzo capitolo indaga le potenzialità della regolamentazione privata transnazionale, nell'azione contro le PCS e nel colmare le lacune dell'intervento pubblico. Adottando un approccio di tipo "complementare", infatti, la Direttiva lascia ampio spazio a questo tipo di regolamentazione privata, che ben si adatta al fenomeno delle pratiche sleali.

Le PCS interessano una filiera agroalimentare ormai altamente globalizzata, quindi le loro implicazioni transfrontaliere potrebbero essere regolate in modo efficace con un intervento di tipo transnazionale.

Inoltre, la natura tipicamente ibrida della regolamentazione privata transnazionale permette di adottare un approccio integrato, sia pubblico che privato, nell'azione di contrasto alle PCS.

In particolare, sono state analizzate due forme di intervento privato, sviluppate essenzialmente con l'obiettivo di monitorare il comportamento delle aziende nella filiera agroalimentare: il *Supermarket Scorecard* dell'Oxfam e la certificazione etica "NoCap". Entrambi, si sono rivelati potenzialmente efficaci nel colmare i vuoti di tutela lasciati dal legislatore europeo, nonché fondamentali per sensibilizzare i consumatori sulle problematiche che riguardano la filiera agroalimentare.

Quest'ultimo punto, infatti, rappresenta un altro di quegli aspetti completamente dimenticati dal legislatore europeo nella Direttiva (UE) 2019/633. Per rispondere efficacemente al problema delle PCS, è necessario includere nelle azioni di intervento tutti gli attori della filiera, dunque, anche i consumatori. D'altronde, essi rappresentano uno dei fattori più importanti in grado di influenzare le dinamiche commerciali lungo la filiera agroalimentare.

In conclusione, la Direttiva (UE) 2019/633 rappresenta un debole tentativo di intervento pubblico a livello europeo. I legislatori nazionali hanno ora il compito di attuare la Direttiva adottando un approccio di filiera e di complementarietà di tipo "orizzontale", integrando dunque l'azione pubblica con quella di tipo privato. Questa potrebbe rappresentare anche l'ultima possibilità per creare finalmente un quadro giuridico uniforme a livello europeo, in grado di proteggere i produttori agricoli dai comportamenti commerciali sleali, in linea anche con la base giuridica scelta dalla Direttiva.

Solo attraverso un tale approccio, infatti, sarà possibile non solo contrastare efficacemente le pratiche commerciali sleali, ma anche lo squilibrio di potere contrattuale e l'iniqua distribuzione di valore lungo la filiera. In questo modo, si potrà garantire un effettivo ed equo tenore di vita alla comunità agricola, impedendo la riemersione della problematica della sicurezza alimentare.

**PAROLE CHIAVE**

Filiera agroalimentare – Pratiche commerciali sleali - Direttiva 2019/633 – Regolamentazione Privata- B2B

# TABLE OF CONTENTS

## ABBREVIATIONS

| | |
|---|---|
| AMTF | Agricultural Markets Task Force |
| APOs | Associations of Producers Organisations |
| B2B | Business-to-business |
| B2C | Business-to-consumer |
| CAP | Common Agricultural Policy |
| CMO | Common Market Organisation |
| COMAGRI | Committee on Agriculture and Rural Development |
| CoR | European Committee of the Regions |
| EESC | European Economic and Social Committee |
| EU | European Union |
| FAO | Food and Agriculture Organization |
| GI | Geographical Indication |
| HLF | High Level Forum |
| IBOs | Interbranch Organisations |
| IIA | Inception Impact Assessment |
| JRC | Joint Research Centre |
| MEP | Member of the European Parliament |
| MSs | Member States |
| PAPs | Processed Agricultural Products |
| PDO | Protected Designation of Origin |
| PGI | Protected Geographical Indication |
| POs | Producers Organisations |
| RSB | Regulatory Scrutiny Board |
| SCI | Supply Chain Initiative |
| SDGs | Sustainable Development Goals |
| SMEs | Small and Medium-sized Enterprises |
| SPS | Single Payment Scheme |
| TFEU | Treaty on the Functioning of the European Union |
| UTPs | Unfair Trading Practices |

# Introduction

This paper analyses Unfair Trading Practices in the B2B relationships along the EU food supply chain, focusing on public and private intervention on the topic. Starting from the structural characteristics and the intrinsic issues affecting the current agri-food supply chain, it will survey the origins of the phenomenon and its possible consequences on businesses, consumers and, last but not least, on the entire functioning of the internal market.

Some general remedies will be examined, such as the restoration of a short food supply chain and product differentiation. However, the first chapter will concentrate mainly on public countermeasures, since capable of tackling more deeply this issue. In particular, the regulatory intervention on competition law and the one on the content of business-to-business agreements will be investigated.

Concerning this last public action, two intertwined themes will be discussed: "agricultural exceptionalism" and contractual justice.

The potentiality of this last solution will be further argued in the second chapter, which analyses the overall European legal framework on unfair trading practices and the path that led to the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

Specifically, the role of European private regulatory initiatives will also be examined, such as the Principles of Good Practice and the Supply Chain Initiative, as additional tools to tackle unfair commercial behaviours.

The chapter will highlight the shortcomings of both public and private interventions at European level, but also the potentiality of combining them through a "complementary" approach, in order to effectively eradicate the investigated issue.

Since the European legislator did not successfully foster this approach, the third chapter will focus on transnational private regulation and on its possible filling role in tackling unfair trading practices. The typical features of this form of regulation perfectly suit this issue, since both have a transnational trait and produce cross-borders effects. Moreover, the chapter will also examine the hybrid nature of transnational private regulation, which makes it possible to combine both a public and private approach towards unfair trading practices.

Finally, two private regulatory initiatives will be investigated: the Oxfam's Supermarket Scorecard and the "NoCap" ethical certification scheme.

# FIRST CHAPTER

# UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD SUPPLY CHAIN

**Summary:** 1.1 Defining the subject: actors and distribution of value in the food supply chain – 1.2 The potential effects of UTPs in the B2B food supply chain – 1.2.1 Possible consequences on businesses – 1.2.2 Possible consequences on consumers – 1.3 Potential remedies – 1.3.1 Restoration of a short food supply chain – 1.3.2 Product differentiation – 1.3.3 Regulatory intervention on competition – 1.3.4 Regulatory intervention on B2B agreements

## 1.1 Defining the subject: actors and distribution of value in the food supply chain

Since 2009[1], during the years the European Union has addressed the issue of Unfair Trading Practices in the business-to-business food supply chain, due to the importance of the subject from a public and economic perspective. Nonetheless, it is still difficult to generally define these practices because of lack of empirical researches and limited knowledge on the subject[2]. The problems underlying the difficulty of finding a common significance of Unfair Trading Practices (hereinafter, UTPs) are the complexity of the food supply chain and the insufficient apprehension of the relationships between its actors, likely caused by its lack of transparency, but also of general investigations on the topic.

Therefore, in order to understand what are UTPs, where possible, it is fundamental to primarily analyse how the food supply chain actually works, who are the actors involved and how value and resources are distributed among them.

The food supply chain comprises all actors and activities from primary agricultural production to food processing, distribution, retailing and consumption, and it ensures that food products are delivered to the public for personal or household consumption[3]. Of course, the complexity of the chain complicates the analysis, being characterised by a transnational nature and a large diversity of players. More precisely, in Europe seed, agrochemical and farm machineries companies supply almost 11 million farms, whom agricultural products are processed by about 300 thousand enterprises in the food and drink industry. Food processing enterprises sell their products through the over 2 million companies within the food distribution and food service industry, which deliver food to 500 million European consumers[4]. At first sight, looking at the structure of the chain, we notice at opposite poles agricultural input companies and big food manufacturers together

---

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

[2] See J. Falkowski, C. Ménard, R. J. Sexton, J. Swinnen, S. Vandevelde, *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects*, eds. F. Di Marcantonio, P. Ciaian, European Commission, Joint Research Centre, 2017.

[3] European Commission's Directorate-General for Agriculture and Rural Development*, Inception Impact Assessment on the Initiative to improve the food supply chain*, 2017.

[4] Id., Unit Farm Economics, *The Food Supply Chain,* 2017.

with large retailers, while farmers and small food producers are placed in the middle between them.

Concerning the distribution of value, under perfect market conditions it should be normally allocated among those operators on the base of everyone's single contribution to the chain. However, because of different factors, value is usually inadequately distributed, and this unequal distribution has often been associated with the manifestation of UTPs.

One of the factors affecting the allocation of resources is linked to the globalisation of markets and the creation of a "global" agri-food system. This phenomenon has considerably increased the concentration of players at the extremities of the food supply chain, such as big agrochemical and seeds corporations, large retailers and food processing industries. Instead, farmers are not only placed, but rather compressed between those industrial giants. The so-called "Big Six" agrochemical and seed firms (Monsanto, Bayer, Syngenta, Dow, DuPont, and BASF) are great examples of the power acquired by input suppliers. Today, these firms are controlling more than 60 percent of global proprietary seed sales, more than 75 percent of the agrochemical market and of all private sector research in seeds and pesticides[5].

Then, with the latest Bayer's acquisition of Monsanto, it is today undeniable the concentration of this market. Bayer is the second largest supplier of pesticides worldwide and an important globally active seeds supplier for a number of crops, while Monsanto is the world's largest supplier of seeds and of Glyphosate, one of the most used pesticides in agriculture[6]. This undertaking has again reduced the number of actors who are competing in these sectors, consequently leading to higher prices and further reduction of options for farmers when it comes to decide what seed varieties and pesticides utilize. Alongside massive industrialisation of food production, the occurrence of seed patents and the merger of seeds suppliers with herbicides ones have gradually eliminated farmers' privileges, creating a profitable system just for the first ones. The outcome is agriculture becoming a bare employment of a ready to use "kit" made of seeds and pesticides[7]. Farmers are now completely subordinated to others' choices, while in the past they used to be an irreplaceable well of knowledge with full control over their production.

In the International Treaty on Plant Genetic Resources for Food and Agriculture, adopted in 2001 by the Food and Agriculture Organization (FAO) of the United Nations, article 9 states that "In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights". Between those "Farmers' Rights", there is "the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture". Unfortunately, the contemporary food system is in a quite evident collision with the recognition of such kind of right to farmers. The inefficiencies of distribution of resources among the chain show how there is not an equitable participation of farmers in sharing those benefits; actually, they do not have even access to them. Then, by looking at the food supply chain from a global point of view, also consumers who are at the very top of it are suffering the consequences of this aggregation of input suppliers. This because one of its shortcomings is the decrement of biodiversity in the camps, that means a reduction of food product varieties in the marketplace and on

[5] S. H. Bragdon, C. Hayes, *Reconceiving public-private partnerships to eradicate hunger: recognizing small-scale farmers and agricultural biological diversity as the foundation of global food security*, «Georgetown Journal of International Law», 49 (2018), n. 4, p. 1292.

[6] European Commission. 2018. *Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions*. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282. Accessed 14 June 2020.

[7] S. Masini, C. Scaffidi, *Sementi e Diritti. Grammatiche di libertà*, Bra, Slow Food Editore, 2008, pp. 27-28.

consumers' tables. Indeed, data reveals that of the 80,000 species that can be used for food purposes today, only 150 are cultivated, and just 8 of which are marketed all over the world[8].

In like manner, globalisation has caused an extremely high level of concentration of food processing enterprises and large retailers at the end of the chain. Before 1950 there was not such an issue, since the majority of the agri-food production was reserved for auto-consumption, due to the high percentage of people living in rural areas[9]. The radical transformation of this picture originates from the structural changes regarding the use of lands, together with the evolution of transportations and of storage and processing technologies. Those aspects have been fundamental for the development of the food processing and distribution sector, and they implicated a modification of the negotiation's systems between businesses along the chain[10]. Nowadays, people shop food products mostly in supermarkets, and before arriving to consumers, they usually pass through many stages placed in different locations, each one guided by distinct operators and based on a peculiar contractual relationship.

Firstly, the industrialisation of agri-food production has strengthen the food processing industry, thanks to the demand's growth for highly processed food products. The perfect example of this tendency is the significant request for the so-called convenience food, defined as "food that is almost ready to eat when it is bought and can be prepared quickly and easily"[11]. The socio-economic changes in the population have incremented the need and the will to buy food ready to eat, in order to reduce the time earmarked to meal preparation[12].

Food processing enterprises assumed a key role in meeting this consumers' need, becoming one of the most powerful actors of the current food supply chain. Of course, those enterprises require agricultural products with precise characteristics to their sellers, to achieve homogenous final products. This way of producing food heavily effected the structure of contracts in the B2B chain, since food-processing corporations have to make sure that they are buying agricultural products that meet their standards. In fact, they have in turn to guarantee a uniform product to their purchasers, which are large retailers.

Secondly, this phenomenon has also caused the acquisition of a dominant position by the food distribution industry in the agri-food market. Being the nearer actors to consumers in the food supply chain, supermarkets and large retailers have an incredible ability in influencing their preferences, because they are in the best position to impose their control over that part of the chain that goes from fields to their shelves. This talent is then accentuated by their digital and marketing resources; industrial food colossuses have mastered the skill of predetermine, sometimes manipulate, and then response to consumers' needs. In recent years, retailers' alliances have also increased due to digitalisation of economy, adding more complexity to the structure of the food supply chain.

E-commerce platforms are evolving realities gaining more and more strength, thanks to their partnership with large-scale distribution. The rising issue is to find a system to control this digital revolution, which has many unclear and intricate implications. There is

---

[8] M. Messa, F. Sottile, *Slow Food's Position Paper on Seeds*, 2015, p. 3.

[9] U. Sorbi, *Aspetti della dinamica della distribuzione dei prodotti agricoli alimentari*, «Giornale degli Economisti e Annali di Economia», 11/12 (1964), pp. 870-871.

[10] Ibid.

[11] Definition of Convenience Food from the Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press.

[12] G. Galizzi, L. Venturini, *L'innovazione nel sistema agro-alimentare*, «Rivista Internazionale di Scienze Sociali», 3 (1995), p. 551.

no doubt that those enterprises hold an excessive market power, which in most cases is unfortunately employed to set unilateral conditions, terms and prices to their seller counterparts, without leaving them different available options. The aim of large retailers is to persuade consumers with lower prices, and since the majority of consumers do not shop directly from producers, those low prices are forced to farmers and small food manufacturers in order to get access to their glorious shelves.

We can define farmers as "small actors", in comparison with other ones in the chain, because in Europe the nature of farms is actually small. The vast majority of European farms are family-based, since family members provide 50 percent or more of the regular agricultural labour force, and two thirds of European farms are less than 5 hectares in size[13]. Therefore, some giants located at the extremities of the food supply chain rule this system, squeezing central parties that cannot compete with them, or at least that are not provided with the right means to compete. Indeed, farmers and small producers have serious difficulties in finding alternatives, facing high switching costs due to the concentration of markets. Furthermore, agricultural and food products are characterized by perishability, which means that by their nature or at their stage of processing are liable to become unfit for sale within 30 days after harvest, production or processing[14].

This intrinsic quality hampers their reuse or transfer to third parties, evidencing the difficulties of circulation of these goods. The European Union often stresses how farmers are the first link in the food production chain, how they are strategic economic players whom the EU cannot afford to lose[15]. Nonetheless, these small actors are actually staring at their portion of value being progressively eroded through the chain by other big players due to the globalisation of food production, while they have an essential and necessary role in protecting biodiversity and in guaranteeing our daily access to food.

The dispersion of resources through the chain affects farmers mostly because of their limited contractual power in face of the dominant position acquired by other industrial actors. The result is a situation of contractual asymmetry, where who has the strongest bargaining power can establish unilateral conditions to his vulnerable counterparts. These conditions can go from the definition of the organoleptic characteristics of food products, to the settling of terms of purchase of those products, and they are often unfairly applied. In other terms, farmers entirely depend on others' outcomes; from the choice of seeds and pesticides, to the choice of what and how to produce, those who have the control over the chain drive everything. In the majority of cases, such a concentration of power and control leads to an abuse of it, at the expenses of farmers and small food producers. This situation creates a fertile soil for 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 its counterparty[16].

Nevertheless, as the Technical Report by the Joint Research Centre (JRC) of 2017 points out[17], there is a serious lack of systematic evidences on the real impacts of UTPs. It

---

[13] Eurostat*, Agriculture, forestry and fishery statistics*, Luxembourg, 2019, p. 18.

[14] As "perishable agricultural and food products" are defined at Art. 2, par. 5, of the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter, Directive (EU) 2019/633 on UTPs).

[15] European Commission's Directorate-General for Communication, *The European Union Explained: Agriculture. A partnership between Europe and farmers,* Luxembourg, 2017, p. 8.

[16] As UTPs are defined in the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Tackling unfair trading practices in the business-to-business food supply chain*, COM(2014) 472 final.

[17] J. Fałkowski et al., op. cit.

is still problematic to understand if a certain issue happening along the chain is due to an unfair practice or to another factor. In addition, in some cases unequal distribution of value and contractual power does not result into UTPs and does not negatively affect small food producers and farmers. Rather, this stronger bargaining power is used by large retailers and big firms to impose more sustainable ways of production to their suppliers, as it will be deeply discussed in the last chapter.

## 1.2 The potential effects of UTPs in the B2B food supply chain

Bearing in mind that the state of proceedings does not permit to jump to definitive conclusions, since the insufficiencies of studies on UTPs' effects, the following sections will investigate their general potential outcomes. When they take place, UTPs can be unfavourable both to businesses and to consumers.

UTPs can generate economic inefficiencies and market uncertainty, influencing the allocation of resources and affecting the food supply chain in its entirety. They can distort the behaviour of various economic agents through the chain and altering the functioning of the internal market[18]. Those practices can encourage a system and a production process based on lack of transparency and labour exploitation; their negative outcomes can involve the society as a whole.

### 1.2.1 Possible consequences on businesses

In order to remain and compete in an agri-food market characterised by those economic inefficiencies, small producers and farmers must reduce their production costs and meet the conditions dictated by their buyers. Considering that input suppliers are extremely concentrated and that inputs' choice in agriculture is limited and driven by those operators, farmers are pushed to lower the quality of production or to cut labour costs. The result is the reduction of wages for agricultural workers, and in worst cases the encouragement of illegal employment and work exploitation. Then, the increase of market uncertainty has also an impact on farmers' investment choices. It alters especially their willing to invest and innovate, influencing the competitiveness of the agri-food sector as a whole and limiting its way to modernization[19]. As a matter of fact, the shift of costs and risks caused by several UTPs can alter small businesses' capacity of planning production in long terms, affecting their natural decision making process and undermining their aptitude to renovate.

Obviously, UTPs can cause various negative effects depending on what type of UTP and in what kind of chain or stage of the chain is occurring, what are its features or what are the circumstances of the concrete case[20]. Starting from this assumption, UTPs can be distinguished in "systematic" versus "isolated" ones[21]. This discrimination relies on how the consequences of the unfair practice are spread along the food supply chain, whether

[18] P. Iamiceli, *Unfair Practices in business-to-consumer and business-to-business contracts: a private enforcement perspective*, «Revista da Faculdade de Direito da UFMG», Special Edition for the 2nd Conference Brazil-Italy, 2017, p. 335 ff.
[19] J. Falkowski et al., op. cit., p. 25.
[20] F. Cafaggi, P. Iamiceli, *Unfair Trading Practices in food supply chains. Regulatory responses and institutional alternatives in the light of the new EU Directive*, 2019, p. 2.
[21] Id., p. 6.

they affect just a single actor, such as an individual food supplier, or a substantial part of the chain and, in worst cases, all of it. If the impact of the practice is limited as in the first case, the practice is isolated; otherwise, it is defined as systematic. Between the practices prohibited by the new Directive (EU) 2019/633 on UTPs, there is the cancellation of orders for perishable agricultural and food products with a too short notice[22]. If this cancellation comes from a large retailer, it firstly affects the single supplier of the food product, but then negative consequences can propagate to others operators along the chain, from the company who has processed that product, all the way to farmers who have grown its main ingredients. If this event happens, the unfair trading practice is systematic.

Another distinction depends on the negative effects of UTPs, which can be "direct" or "indirect"[23]. Concerning this differentiation, the seventh recital of the Directive (EU) 2019/633 on UTPs states that "Unfair trading practices are likely to have a negative impact on the living standards of the agricultural community. That impact is understood to be either direct, as it concerns agricultural producers and their organisations as suppliers, or indirect, through a cascading of the consequences of the unfair trading practices occurring in the agricultural and food supply chain in a manner that negatively affects the primary producers in that chain*"*. Adopting the example previously made, the single distributor of a perishable food product whose order was cancelled, in most of the cases will probably transfer "through a cascading of the consequences" the effects of the single UTP to his suppliers, such as food manufacturers. In this case, that systematic UTP produces also an indirect effect, because the actor of the food chain directly affected transmits its negative consequences to other ones along the chain. While, if a large retailer unilaterally changes the terms of supply of all his agreements concerning the delivery of agricultural and food products[24], the UTP is still systematic, since it is affecting more than one contractual relation and spreading to more than one distributor, but its repercussions are direct and limited to these operators of the chain.

Again, regarding the consequences of UTPs, a final discrimination can be done between "exclusionary" and "distributional" ones. Exclusionary effects implicate the exclusion of a supplier from the chain by forcing his exit or inhibit his entry, whereas distributional ones imply a redistribution of risks and costs along the chain among its different actors[25]. Taking as example another practice prohibited by Directive (EU) 2019/633 on UTPs, it can happen that a buyer requires a supplier to pay for the deteriorations or losses that occur after the agri-food products have been transferred. This peculiar clause becomes unfair when it states that the supplier shall pay also for those losses that are not caused by his negligence or fault. This unfair and unbalanced condition can be imposed due to the bargaining power of the buyer, and it is defined as distributional. The stronger contractual party extracts surplus from the transaction[26], determining a shift of costs and risks to the trading partner who his less capable of bearing them. Then again, in this particular case the supplier can be brought to conclude the agreement since otherwise he would be unable to entry the chain or the business, and in this sense the unfair practice can also produce an exclusionary effect.

### 1.2.2 Possible consequences on consumers

[22] Art. 3, par. 1, letter b) of the Directive (EU) 2019/633 on UTPs.
[23] F. Cafaggi et al., op. cit., p. 7.
[24] Art. 3, par. 1, letter c) of the Directive (EU) 2019/633 on UTPs.
[25] F. Cafaggi et al., op. cit., p. 7.
[26] J. Fałkowski et al., op. cit., p. 15.

UTPs' effects often overcome the B2B relationship involving consumers too. For instance, the before mentioned JRC's Technical Report distinguishes between numerous outcomes of UTPs on consumers, from the possible impact on their surplus to the one on products' variety.

Considering consumers' welfare, the repercussions of the so-called "reverse margin" practices have been particularly investigated. These practices consist in bundling the purchase of goods with some additional services, which large retailers offer to suppliers for a charge[27], meaning an extra cost that businesses have to cover. A reverse margin practice can be peacefully lawful when it has been negotiated with clarity, while it can become unfair when there is a lack of transparency in the agreement and it has been arbitrarily charged, with an inequitable shift of costs and risks. Of course, the very likely result of these conducts is the rise of food products' prices, implying an obvious impact on consumers' surplus. One of those supplementary services that big firms offer to their counterparts is the use of a certain shelf space in supermarkets, which leads to a phenomenon where only big food manufacturers are well disposed to pay more in order to have access to those shelves. The practice influences the variety of products sold in supermarkets and in these terms can have an impact on consumers too. When it comes to shop in supermarkets, consumers' alternative is limited to those food products linked to powerful suppliers who are capable to handle an additional charge. Due to this mechanism, small food producers are cut off the market together with many food varieties, and in the end, consumers' utility is downsized.

Overall, when occurring UTPs can extend their negative impact to consumers affecting prices, availability and quality of food products.

### 1.3 Remedies

As previously pointed out, there are some structural and intrinsic issues in the agri-food sector, demonstrating the urge to proceed with a diversified economic and legal approach, compared to the one generally provided for other economic sectors. This differentiated treatment has to be applied also to the potential remedies against the occurrence of UTPs. It means that in order to effectively tackle the problem, the EU legislator shall provide some specific and adequate remedies, which have to suit the peculiarities of the food supply chain.

Being at the foundation of the Common Agricultural Policy (CAP) and in general of agricultural policies, this *modus operandi* is well known in this field, and it is commonly defined as "agricultural exceptionalism"[28]. The exceptionality of this approach to the agri-food sector relies on the awareness of two of its fundamental aspects. Firstly, agriculture ensures our daily access to food, satisfying one of our essential needs, nutrition[29]. Secondly, because of the factors described above, agricultural producers are the weakest actors of the food supply chain, consequently they need a special form of protection.

Since UTPs are a recent phenomenon, initially the "agricultural exceptionalism" has been a way to react to other historical problems affecting this sector, especially the ones

[27] European Commission, *Green Paper on UTPs in the business-to-business food and non-food supply chain in Europe*, COM (2013) 37 final.
[28] See A. Jannarelli, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, Bari, Cacucci Editore, 2016, p. 9 ff.
[29] Ibid.

concerning the increasing demand for agri-food products in Europe. From this perspective, the role of farmers has been revaluated. In particular, the EU legislator has concentrated his action on their remuneration, to prevent the abandonment of this crucial activity and to guarantee an increase of the food supply[30]. Indeed, two of the main objectives of the CAP are "to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture" and "to assure the availability of supplies"[31].

To meet these purposes, for many years the CAP has been focusing on the direct support for farmers, mainly intervening on the prices of agricultural products. In the end, the achieved result was the growth of the internal supply, in line with the aim of the legislation. However, soon the system of subsidies of the CAP caused food surpluses in the European Union; the production of agri-food products began to exceed the actual market's demand. This circumstance implied a reconsideration of the "agricultural exceptionalism", since it seemed more appropriate to leave the agricultural sector to the dynamics of the free market, in order to restore the supply-demand balance.

Actually, it has been highlighted that this special treatment usually applied to the agriculture sector has always alternated between periods of stronger presence, and other ones of stagnation[32]. This transition happened with the CAP's reform of 2003. The reform limited the subsidies and the public intervention on the agri-food sector, replacing many direct aids to farmers with the introduction of the "Single Payment Scheme" (SPS), payments independent of production, defined as decoupled aids. The scope of the SPS was to remove the links between production and subsidies, allowing farmers to produce according to market demand[33]. Then, decoupled aids to farmers were subordinated to the fulfilment of several conditions, known as "cross-compliance" standards, concerning environmental, public, plant and animal welfare. The new CAP of 2003 drastically modifies the before provided "agricultural exceptionalism", reducing the direct support for farmers in a sensitive moment for the agricultural sector. As a matter of fact, globalisation was expanding the market, and the radical changes in food production were weakening farmers' position in the food supply chain. The reform determined a lessening of the protection of agri-food producers, representing another factor that influenced the development of UTPs.

Currently, the inefficiencies of the agri-food system and the problems affecting the agricultural community, such as UTPs, have emphasised the need to readopt this exceptional approach. In particular, today it seems necessary to provide special support for farmers, in order to reinforce their weak position along the chain and to overcome the situation of disparity of bargaining power.

Further, food security is now again a raising issue, because of the increment of global food demand[34]. In the report "Achieving Zero Hunger" of 2015[35], FAO estimated that if the current situation does not change by 2030, more than 650 million people will be undernourished due to population growth, dietary choices, climate change, etc. The fact

---

30 N. Lucifero, *Le pratiche commerciali sleali nel sistema delle relazioni contrattuali tra imprese nella filiera agroalimentare*, Milan, Wolters Kluwer, 2017, p. 28.

31 Art. 39, par. 1, letter b) and d) of the Treaty on the Functioning of the European Union (TFEU).

32 A. Jannarelli, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, cit., p. 10.

33 European Commission's Directorate-General for Agriculture and Rural Development, *The 2003 CAP reform. Information sheets*, 2005, p. 7.

34 As defined by FAO in the World Food Summit of 1996 "Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life".

35 FAO, IFAD, WFP, *Achieving Zero Hunger: the critical role of investments in social protection and agriculture*, Rome, FAO, 2015.

that agriculture and farmers are fundamental when it comes to food security validates every discrimination and difference in application of rules, given that they guarantee availability and daily access to food to the whole society and that they are a key element to reach the second Sustainable Development Goal of the 2030 Agenda, "Zero Hunger"[36].

Therefore, considering the actions against the occurrence of UTPs, an "agricultural exceptionalism" approach would benefit not only agricultural producers, but also consumers. The analysis carried out in the previous paragraphs has indeed revealed that unfair commercial behaviours have a negative impact on consumers too. Moreover, UTPs can compromise in a long-term perspective also their access to food, thus re-proposing a food security issue[37].

Nonetheless, these consequences on consumers are essentially indirect, since UTPs arise from the imbalance of power among operators along the chain and directly affect, *in primis*, farmers. For this reason, only by directly supporting and strengthening the agricultural community this problem can be tackled at its source, with positive outcomes also for consumers and for the overall functioning of the agri-food market.

The next paragraphs will investigate some potential solutions to UTPs, focusing on the legislative interventions on competition law and on the content of B2B agreements. In both cases, the European legislator did not actually apply this exceptional approach towards the agricultural sector. As a matter of fact, the main concern was to guarantee the correct functioning of the EU market and to avoid distorting behaviours to the detriment of consumers, rather than supporting agricultural producers as a weak category of the food supply chain.

As it will be further discussed, the CAP's objectives have been used as a declaration of intent in order to justify the public interventions on those fields, but none of them were able to ensure a fair standard of living for farmers, or the availability of food supplies to consumers in a long-term perspective. This last objective, indeed, can be pursued only by guaranteeing the attractiveness and the competitiveness of the agricultural sector, which is today missing. This failure in the support towards the farming community puts at risk the future of agriculture and of our food security. That is also why modern agricultural law is now deeply investigating B2B relationships and UTPs, since they represent an actual and serious threat to each CAP's objective[38].

In conclusion, the exceptional support to the agricultural community, crucial in the fight against UTPs, needs to be reconsidered in light of the previous common agricultural policies' shortcomings. There is no point in returning to a pure protectionism approach, since it historically led to an overproduction issue. As well as there is no need in continuing with a neoliberalism approach towards the agricultural sector, since it is leading to the collapse of agriculture and of the whole agri-food system[39].

The following analysis will indeed reveal how "agricultural exceptionalism" is now experiencing a new season, where farmers' support has to be provided through multiple forms of interventions, arising from both public and private actors.

---

[36] The SDGs are a universal call to action to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere. They were adopted by all UN Member States in 2015, as part of the 2030 Agenda for Sustainable Development which set out a 15-year plan to achieve the Goals. See the Resolution of the United Nation General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015.

[37] A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, «Rivista di Diritto Agrario», 1 (2019), p. 16.

[38] A. Jannarelli, *Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, «Rivista di Diritto Agrario», 4 (2018), p. 532 ff.

[39] Id., p. 543 ff.

Finally, as argued, UTPs can happen in every stage of the chain but also in every phase of the B2B relationship, from the negotiation of contracts to the contract itself, as well as being imposed in the post-contractual phase[40]. Because of UTPs' variety, diverse remedies have been examined and implemented to prevent or response to them. However, the general lack of knowledge surrounding UTPs is also reflected in the possible effects of the reactions to them. For this reason, the premise of the following analysis is that there is still a paucity of empirical evidences when it comes to determine the concrete effectiveness of each remedy investigated[41].

### 1.3.1 Restoration of a Short Food Supply Chain

A proposed solution is to move back to a short food supply chain, since globalisation and propagation of actors among the chain is causing such issues.

Nevertheless, the complexity of the current agri-food system makes it almost impossible to legally define what is "local food", a "local food system" or a "short food supply chain"[42]. The term "short food supply chain" evidently suggests less phases and stages occurring through the chain, with a reduction of distance between producers and consumers. The aim of short chains is to recognize the central role of small farmers and food producers, to create an "independent" food system by eliminating those large buyers and other intermediaries, commonly considered at the root of market inefficiencies[43].

This intent is realised through farmers' markets, direct on-farm sales, ethical purchasing groups and cooperative points of sales; all manifestations of the growing need among people of social proximity. Through these selling methods, a community can support its local farmers and food producers, increasing the value of their agri-food products. Moreover, these initiatives create a conscious involvement and a sense of belonging to a particular territory and culture, while encouraging its preservation. Consumers who privilege a short food supply chain are aware of the real price of products and they do not look only to the quantity they can buy at a certain (low) price. Here, the price variable unlikely prevails over other ones. Direct sale allows consumers to understand the actual efforts and resources employed in the production process, thanks to communication and to the relationship of trust that arises between them and the sellers.

From this perspective, a short food supply chain generates a concrete benefit for small farmers and food producers, since consumers are willing to pay a fair and often higher price for their products. The dialectic relation between the two actors of a short chain is the bedrock of its functioning, and it realises not only an exchange of goods, but also of values and knowledge. Certainly, today a rising contrast between local and global chains exists[44]; consumers are looking for alternatives, they are aware of the productive potential of their place of belonging and they want to support it, by becoming an essential part of the local economy.

---

[40] European Commission, *Green Paper on UTPs*, cit.

[41] J. Fałkowski et al., op. cit., p. 23.

[42] See B. Balázs, M. Blackett, E. Bos, T. Eyden-Wood, M. Kneafsey, U. Schmutz, G. Sutton, L. Trenchard, L. Venn, *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics*, eds. S. Gomez y Paloma, F. Santini, European Commission, Joint Research Centre, 2013, p. 23.

[43] Slow Food Foundation for Biodiversity. 2020. *Short Food Chain*. Available at: https://www.fondazioneslowfood.com/en/what-we-do/earth-markets/producers-and-co-producers/short-food-chain/. Accessed 17 June 2020.

[44] S. Masini et al., *Sementi e Diritti*, cit., p. 93.

However, even if short and local chains are currently a trend, it seems problematic to globally restore such kind of system, since food chains are still driven by consumers mostly used to industrialised food products, low prices and the convenience of buying everything needed in the same place. Those responsible consumers who recognise the real value of food products are still the minority. Once again, this underlines how consumers' decisions weigh on the whole food system. Moreover, food has always been travelling long distances since ancient times[45], what has changed during years is rather the lack of control of this process by public authorities, which leaded to a new agri-food system governed by giant private entities who arbitrarily dominate at the expenses of others.

### 1.3.2 Product Differentiation

Although residual, another remedy to increment producers' bargaining power is the differentiation of their products. The competitiveness of small actors along the chain and the added value of their outputs usually raise thanks to diversification, which can be determined by various factors. A food product can be unique due to its intrinsic qualities, or to the particularities of its production process, or again because of its limited presence in the market.

When it comes to agri-food products, one of the main elements of differentiation is their geographical origin, as demonstrated by the copious European legislation on the topic. In fact, when the organoleptic qualities are connected by an indissoluble bond to the territory's morphology and to the traditional production process embedded in a particular area, the contractual power of the supplier is usually strengthen[46]. The prerequisite for this favourable situation is consumers' awareness of the superior quality of a certain product, which can be reached with quality assurance systems and schemes. Consumers can be informed of distinctive aspects of a product thanks to certifications, traceability and labels that reduce the information asymmetry between them and producers.

The most remarkable examples are the EU quality schemes, such as geographical indication (GI), protected designation of origin (PDO) and protected geographical indication (PGI), which protect the names of peculiar agri-food products that stand out because of their uniqueness, associated with their geographical provenience. Indeed, the recent study on economic value of EU quality schemes[47] shows that the sales value of a product with a protected name is on average double the related ones not protected by the EU. Therefore, product differentiation often implies access to a niche market with less competitors, and consumers willing to pay higher prices; a great advantage for small food producers and manufacturers. The growth of consumers' demand for differentiated products proves their awareness of the radical changes of the food production process. Agriculture has always been strictly connected with the land and its specific traits, but globalisation, along with the transformation of our eating habits, has modified this natural conjunction. The reverse trend is the desire to buy and consume food that is not standardised.

---

45 S. Liberti, *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*, Rome, Minimum Fax, 2016, p. 143.

46 G. Benedetto, R. Furesi, L. Idda, *Il marketing territoriale per il settore agroalimentare*, inside *Marketing Agroalimentare. Specificità e temi di analisi,* ed. G. Antonelli, Milan, Franco Angeli, 2004, p. 120.

47 AND International, European Commission's Directorate-General for Agriculture and Rural Development, ECORYS, *Study on economic value of EU quality schemes, geographical indications (GIs) and traditional specialities guaranteed (TSGs). Final report*, 2020.

However, large retailers are taking advantage of this favoured circumstance too. Being nearer to consumers, they acknowledged this tendency, using marketing strategies to anchor the food products they sell to bucolic locations and process, through a "geography that does not exist"[48]. The high level of competition between the few big firms controlling the global food distribution has increased their need of products' differentiation. Because they are all capable of obtaining low prices from their sellers, they are working towards "non-price" strategies[49], since price is not the only variable affecting consumers' demand.

Thanks to their privileged access to information regarding consumers' behaviour, large retailers are able to distinguish between different types of consumers. There are consumers who focus only on the price/quantity *ratio*, others who pay attention to the qualities of products, and then the ones who are mainly brand oriented. This awareness acquired by big firms has been decisive for the development of private-labels; food products sold with the name of the large retailer which sells them, rather than the name of the manufacturer[50]. Through private-labels they are able to gain the loyalty of consumers to their stores, strengthening their market power[51]. Then, due to their favourable position of proximity to consumers, they do not have to invest a lot on advertisement or to worry about the market's access of their products. As a matter of fact, these food products are the only ones that have straight access to the highly-desired shelves of supermarkets, since they carry their names on the label[52].

Everything considered, product differentiation is not the only element influencing the bargaining power of agri-food suppliers. If powerful buyers are highly concentrated at the end of the food supply chain, those suppliers of high-quality goods are still subordinated to others' decisions, and the added value of their products can disperse through the chain. Consequently, to truly benefit from this privileged condition in the food market, small food producers should also aggregate in order to balance and reinforce their contractual position[53].

### 1.3.3 Regulatory Intervention on Competition

Considering the analysis of the food supply chain, UTPs seem to take place where there is a situation of asymmetry of power between contractors, suggesting that a potential way to restore equity is to focus on the legal framework regarding the ability to compete on food markets[54]. This approach targets the problem at source, focusing on the causes of UTPs, therefore intervening on competition and antitrust law in order to remove unequal disparities among suppliers and buyers. Such a legislative intervention regards the economical aspect of the B2B relationship and encourages a collective action, adjusting farmers and small producers' status of powerlessness, which makes them essentially price-takers.

European antitrust policy is mainly based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Respectively, they prohibit agreements

[48] S. Masini et al., *Sementi e Diritti*, cit., p. 90.
[49] G. Galizzi et al., op. cit., pp. 557-558.
[50] Definition of Private-label from the Cambridge Business English Dictionary, Cambridge University Press.
[51] G. Galizzi et al., op. cit., pp. 557-558.
[52] F. Ciconte, S. Liberti, *Il grande carrello. Chi decide cosa mangiamo*, Bari, Laterza, 2019.
[53] A. Frascarelli. 2008. *Differenziazione, tutela della qualità e concentrazione dell'offerta: come riprendersi il valore*. Available at: https://agriregionieuropa.univpm.it/it/content/article/31/15/differenziazione-tutela-della-qualita-e-concentrazione-dellofferta-come. Accessed 17 June 2020.
[54] J. Falkowski et al., op. cit., p. 24.

between two or more market operators, which restrict competition, and firms that hold a dominant position on a given market in order to abuse it. These articles potentially embrace every economic sector, with a general indifference towards the specific features of each of them.

However, as regards to the agriculture and food sector, the Article 42 TFEU states that those competition rules shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council, taking into account the CAP objectives set out in Article 39 TFEU. This means that EU antitrust and competition rules do not directly apply to our subject of investigation, but the European legislator can decide to extend their application to the agricultural sector to pursue one of the five scopes of the CAP. Therefore, in order to increase agricultural productivity, to ensure a fair standard of living for agricultural communities, to stabilise markets, to assure the availability of supplies or to ensure that supplies reach consumers at reasonable prices. The logic underneath this exemption is that if generally EU competition policy does not consider the diversities between market's operators, goods, etc.,[55] in this context the exchange concerns primary goods and operators that have a crucial function for the society.

That said, the EU legislator has dedicated a part of the Regulation (EU) 1308/2013 (hereinafter, CMO Regulation) to competition rules, and *de facto* Article 206 of the CMO Regulation extends the application of Article 101 to 106 TFEU to the production of, or trade in, agricultural products. *Prima facie*, this legislative choice seems to be contradictory with the exemption made by Article 42 TFEU for the agricultural sector, since it entails a *tout court* extension of the EU competition and antitrust policy to agricultural goods, making the article worthless. However, there are some historical reasons underlying behind Article 206. In the years preceding the CMO Regulation, food production has particularly increased because of various factors, which privileged the expansion of the agri-food market, generating a situation of food surpluses exceeding the general demand.

Among those factors, there is the system of subsidies initially provided by the CAP for the agri-food sector. As already mentioned, this circumstance leaded to believe the problem of food security as overcome, lessening the urge of a specific treatment when it comes to competition for this sector. Instead, to restore freedom of competition appeared as a concrete solution for rebalancing demand and supply, while different issues were surfacing with the intensification of international food trading, like the food safety one[56].

Nonetheless, the following Articles of the CMO Regulation set a series of relevant derogations to that apparently paradoxical extension made by Article 206. Firstly, Article 209 of the CMO Regulation establishes some exceptions, allowing agreements, decisions and concerted practices between agricultural producers, provided that there cannot be an obligation to charge an identical price, an exclusion of competition and that they cannot jeopardise CAP objectives. Obviously, those requirements' aim is to impede that the exceptions of Article 209 obstruct completely freedom of competition. Secondly, Article 210 of the CMO Regulation sets some other derogations, allowing instead agreements, decisions and concerted practices of recognised interbranch organisations (IBOs), with the intent of carrying out the various activities listed in point C of Article 157 of the same Regulation. While the subjective scope of application of Article 209 is limited to farmers, farmers' associations, associations of such associations, producer organisations (POs) or

[55] A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, cit., p. 13.

[56] A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, cit., p. 12.

associations of producer organisations (APOs), the one of Article 210 is wider, since it refers to IBOs.

Indeed, these organisations are not only made up of representatives of the production sector, such as farmers, but also of representatives of at least one other part of the agri-food supply chain, such as food manufacturers and distributors[57]. Consequently, IBOs are able to find agreements and to proceed with concerted practices within an overall view of the food supply chain, since representing actors of different stages and phases of it, while promoting a dialogue between them. It must be underlined that these Articles were amended by the Regulation (EU) 2393/2017, the so-called Omnibus Regulation, which has strengthen the system of agricultural organisations and the strategic role of recognised POs and APOs.

Hence, in recent years there has been a turnaround to the original scope of Article 42 TFEU, based on the recognition of the weakness of farmers' position within the food supply chain, and on the essential role of POs and APOs as a tool to support and empower them. This different and privileged treatment encourages forms of aggregations between farmers, contributing to the reduction of their contractual costs and of the divergences in concentration existing between them and other contracting parties. Of course, the primarily outcome is the increase of their bargaining power. Indeed, in the latest study on POs published by the European Commission[58], one of the main findings is that they are being established mainly to support the market position of farmers "both through increased market access due to possibilities to supply greater volumes and, simultaneously, due to strengthened bargaining positions vis-à-vis buyers and suppliers". At the same time, these results are not so surprising. Already in 1960, academics stressed the need of a public intervention to promote associations between agriculture producers[59].

That said, some large retailers and distributors are actually encouraging these forms of cooperation between suppliers with the aim of reducing costs of negotiations, due to the advantages of contracting with a single representative organisation instead of many single individuals. Although, this tendency can have some potential negative consequences. For example, an organisation can decide to gather only producers who are meeting the quality standards required by a certain firm, restraining the market's access for others[60].

In conclusion, collective contracts carried out by POs and APOs are the right tools for planning the agri-food production in advance and for eliminating some of the uncertainties entrenched in this sector. Through cooperation, small sellers can guarantee the allocation of their production ahead of the final exchange with their buyers, along with the price setting.

Certainly, these agreements are a form of protection for the weak actors of the chain, but this remedy alone does not solve the intrinsic problem of imbalance of bargaining power affecting the whole agri-food sector. What is missing is a further intervention on competition law, in order to tackle those forms of aggregation among big industrial players at the end of the chain[61]. The UE legislator has been more concern about reinforcing the position of farmers in the market, than preventing the acquisition of an uncontrolled power

---

[57] European Commission. *Producer and interbranch organisations. European Union's policy on producer and interbranch organisations.* Available at: https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/producer-and-interbranch-organisations_en. Accessed at 18 June 2020.

[58] European Commission Directorate-General for Competition, ECORYS, Wageningen Economic Research, *Study on Producer Organisations and their activities in the olive oil, beef and veal and arable crops sectors*, 2018.

[59] U. Sorbi, op. cit., p. 878.

[60] J. Falkowski et al., op. cit., p. 27.

[61] A. Jannarelli, *Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, cit., p. 536.

by industrial agri-food buyers. That is why, despite their gathering, agricultural producers can still be submitted to their powerful buyers' choices, with important and negative repercussions on their businesses.

Moreover, aggregations between producers and the resulting contracts are still expression of private autonomy, in this case collective one, and without a proper intervention on this aspect too, it would be difficult to see a concrete change and resolution of the situation of contractual asymmetry[62].

### 1.3.4 Regulatory Intervention on B2B Agreements

As thoroughly discussed above, the intervention on competition and antitrust regulation tackles UTPs at their origin, and it could prevent their occurrence thanks to the fortification of farmers' position in the food supply chain, if jointed with other remedies. The other decisive countermeasure is to intervene directly on agreements concluded by the chain's actors, shifting the focus from the causes of UTPs to their consequences. The target here is essentially the legal content of the B2B agreements. Of course, the interference by the public authority has to be deeply justified, since it has to deal with the principles of markets and contracts' freedom and with private autonomy.

In this context, the problem of "contractual justice" emerges, closely related to the never-ending debate on the relationship between law and justice. Before analysing this issue, a distinction has to be outlined between distributive and commutative justice. As suggested by the name, distributive justice refers to a fair distribution of resources; its purpose is to adjust and modify the allocation of resources between parties in order to reach equity and proportionality. While the scope of commutative justice is to maintain unaltered the relationship established in a single agreement, regardless of its actual fairness[63]. Concerning contracts, they normally pursue commutative justice rather than distributive one. Indeed, it is difficult to ascribe to contracts, which are manifestations of private autonomy, the arduous task of realising equitable sharings among society[64].

The main principle ruling contractual law is freedom of contracts, expression of individual autonomy. Consequently, the legislative authority can intervene in those private assets only when they involve interests that go beyond the individual relationship, or when the specific case requires the application of different principles, which legitimately restrain freedom of contracts. An emblematic example can be found again in the EU antitrust policy; the paragraph 1, letter a), of Article 102 TFEU states that direct or indirect imposition of unfair purchase, selling prices, or other unfair trading conditions shall be prohibited, since representing an abuse of dominant position. In this case, the restriction of private autonomy is justified by a superior interest, the one to avoid market distortions and to guarantee its efficiency[65]. Without doubt, these are problems affecting not only the individuals involved in the single arrangement, but also the whole society.

In recent years, the distributive meaning of justice and the theme of the fair allocation of resources are becoming more and more actual. As illustrated, there are some economic sectors, like the agri-food one, where negotiations take place in situation of

[62] S. Masini, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, «Rivista di Diritto Agroalimentare», 2 (2019), pp. 265-266.
[63] P. Corrias, *Giustizia contrattuale e poteri confermativi del giudice*, «Rivista di Diritto Civile», 2 (2019), p. 346.
[64] G. D'amico, *Giustizia contrattuale e contratti asimmetrici*, «Europa e Diritto Privato», 1 (2019), pp. 4-5.
[65] P. Corrias, op. cit., pp. 350-351.

structural disparity between contracting parties. The current agri-food system is characterised by a well-established asymmetry of power among its actors, highlighting the necessity of an intervention on contracts capable to restore an equitable distribution of benefits. Between the objectives of the CAP, Article 39 TFEU states that one of its aims shall be "to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture". In light of the current state of imbalance of distribution of value among the chain, this "fairness" to the agriculture community can be ensured through contracts that achieve distributive justice. With the right legal instruments, agri-food contracts could reduce and correct this unfair situation, "providing a more equitable distribution of the profits in the market among those active within it"[66].

In general, legal rules on contracts usually seek a procedural type of justice[67]. The common legislative choice was to set up just some procedural rules, like the ones that guarantee the capacity of parties and their willingness to conclude agreements, with the prospect to reduce the public control on private affairs. Even if these norms attempt to realise contractual justice, in the cases described above, where there is an asymmetry of bargaining power embedded in the structure of an economic sector, they have proved to be ineffective. The considerable changes in the global agri-food system demand a more incisive intrusion of public authorities in private autonomy, and on the content of the agreements. Since giant corporations are taking advantage of their dominant position, forcing to their small sellers unfair conditions and terms, an intervention is necessary to prevent such abuses. In these particular situations, the limitations of freedom of contract become necessary to guarantee the effective autonomy of the vulnerable contracting parties, ensuring the genuine explication of their will.

The transformation of economy and of the relationships between businesses, driven by globalisation, should be followed by an evolution of contract law, since legal systems should always respond to new issues, evolving along with the evolution of society. This evolvement requires a transition from an undisturbed explication of freedom of contract, to a limitation of it, seeking distributive contractual justice in the B2B relationships, rather than commutative one. Undoubtedly, this concept was at the base of the change of mind-set of the European legislator towards UTPs and of the Directive (EU) 2019/633 on UTPs. Even if this was the initial intent of a public intervention on UTPs, in the end it was not concretely realised. In the second chapter, the analysis of the Directive will reveal its shortcomings, demonstrating that the provided regulatory regime is not even close to answer to the structural issues affecting the chain.

It must be mentioned that even before the Directive (EU) 2019/633 on UTPs, there have been other interventions by the EU legislator targeting the content of B2B agreements, although in most cases barely effective[68]. Among these, there is the repealed Directive 2000/35/EC on combating late payment in commercial transactions, which applied to all commercial transactions, including the ones occurring in the agri-food chain. According to the Recital 19 of the Directive, it attempted to avoid the abuse of freedom of contract to the disadvantage of the creditors, with the aim of protecting the weaker parties in the transactions. However, some critical points have determined its ineffectiveness, for

---

66 A. Albanese, *Contractual Justice and Market Efficiency in the Supply Relationships within the Agro-Food Chain*, «Rivista della Regolazione dei mercati», 2 (2016), p. 84.

67 G. D'amico, op. cit., p. 12 ff.

68 L. Russo, *La Direttiva UE 2019/633 sulle pratiche commerciali sleali nella filiera agroalimentare: una prima lettura*, «Rivista di Diritto Civile», 6 (2019), p. 1421 ff.

example the insufficient degree of harmonisation and the excessive subsidiarity of its provisions[69].

Then, the Regulation (EU) 261/2012 as regards contractual relations in the milk and dairy products sector was a turning point. From 2007, the European Union witnessed a crisis of the milk sector, due to price volatility and to a general drop of demand. In 2009, the High Level Expert Group on Milk was established to find some solutions to stabilise the market, also by increasing the bargaining power of milk and dairy products producers. One of the main results was the Regulation (EU) 261/2012, which recognised that formalised written contracts with a minimum standard content could be a possible solution to the main problems affecting this sector[70].

Once again, the EU legislator decided to maintain a certain level of subsidiarity, leaving to Member States the decision whether to adopt as compulsory the written form and the basic prearranged content in their national contract law system, or not. Therefore, also this Regulation raised some questions concerning its actual effectiveness and, above all, it was only sector-based and exceptionally provided for a peculiar situation.

However, these contracts' requirements were soon perceived as potentially beneficial for the whole agri-food sector[71]. Indeed, in 2013 the CMO Regulation introduced the same provision for all agricultural products linked to the sectors listed in Article 1, paragraph 2, of the same Regulation. Article 168 of the CMO Regulation states that Member States can decide to make written contracts compulsory for the delivery of agricultural products, and in this case the contracts shall also fulfil the conditions laid down in the following paragraphs of the same Article. In particular, the written contract or offer for a contract shall contain: the price payable for the delivery, the quantity and quality of the products concerned which may or must be delivered and the timing of such deliveries, the duration of the contract, details regarding payment periods and procedures, arrangements for collecting or delivering the agricultural products, and rules applicable in the event of force majeure.

Certainly, these requirements guarantee more transparency in the agreements, but still, as it has been done for the milk sector before, the EU legislator has decided to renounce to a decisive harmonised intervention, giving too much discretion to Member States. The Omnibus Regulation has then amended Article 168 adding the paragraph 1a, which allows producers, POs and APOs to require the conclusion of written contracts for any delivery of their products, together with the other compulsory content's conditions listed above. *Ergo*, if a Member State does not implement its contract law system, its national agri-food producers can apply the provision at Article 168 to their single arrangements. This opportunity has a limit though, since the precondition is that the other contracting party cannot be a micro, small or medium-sized enterprise[72]. Consequently, the protection is guaranteed only to sellers of agricultural products whose buyers are big enterprises, making even less effective the already weak provision.

In conclusion, the illustrated regulatory framework shows how the EU legislator has attempted to intervene on the contents of contracts, also on the ones concluded within the food supply chain, before the Directive (UE) 2019/633 on UTPs. However, those interventions have proved to be ineffective, highlighting the growing need of a more

[69] Ibid.

[70] See Recital 8 of the Regulation (EU) No 261/2012.

[71] A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, cit., p. 24 ff.

[72] See Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

penetrating regulation, capable to solve the inefficiencies of the agri-food market. This awareness leaded to the start of a legislative process ended with the Directive, whose steps will be deeply analysed in the following chapter.

# SECOND CHAPTER

# THE EU LEGAL FRAMEWORK: FROM A SOFT LAW AND PRIVATE REGULATION COMBINATION TO THE DIRECTIVE (EU) OF 2019

**Summary:** 2.1 Introduction - 2.2 2009 Commission Communication "A better functioning food supply chain in Europe" - 2.3 High Level Forum for a Better Functioning Food Supply Chain and the Principles of Good Practice - 2.4 Green Paper on Unfair Trading Practices in the Business-to-business Food and Non-Food Supply Chain in Europe - 2.5 The Supply Chain Initiative - 2.6 The road to the Directive (EU) 2019/633 on UTPs: from the Initiative to Improve the Food Supply Chain to the Commission's Proposal – 2.6.1 The Inception Impact Assessment and the consultation process – 2.6.2 Impact Assessment Report: the policy's choice – 2.6.3 The Commission's Proposal – 2.7 The Directive (EU) 2019/633 on UTPs in B2B relationships in the agricultural and food supply chain – 2.7.1 The Scope of the Directive and its deficiencies – 2.7.2 Prohibited Unfair Trading Practices – 2.7.3 The enforcement challenge: addressing the "fear factor" – 2.7.4 The complementary role of the Directive in the current EU legal framework

## 2.1 Introduction

The first chapter focused on the structural issues of the food supply chain and of the relationships between businesses, which represent the fertile ground for the development of UTPs. Some potential remedies have been examined, and the necessity of combining them in order to effectively tackle this issue has been deduced. Neither the intervention on competition, nor the one on the content of the B2B agreements, seemed to determine substantial changes taken individually.

Starting from these conclusions, the scope of this second chapter is to investigate the EU legal framework on UTPs, from the 2009 first Commission Communication on the topic, to the latest Directive (EU) 2019/633 on UTPs. During this timeframe, the Commission has always maintained a mild approach towards UTPs, fostering interventions of soft-law, rather than ones that are more intrusive. In particular, the role of private initiatives at EU level will be examined, as an additional tool to tackle UTPs.

This analysis will also reveal their shortcomings, showing the growing need for a harmonised EU legal framework to solve the problem of unfair commercial conducts. To conclude, the last section will mainly concentrate on the Directive (EU) 2019/633 on UTPs: on the path towards the legislation, on its positive and negative aspects, and on its complementary role in relation to national jurisdictions and private regulations developed over the years on the subject.

## 2.2 2009 Commission Communication "A better functioning food supply chain in Europe"

The 2009 Commission Communication to the European Parliament, the Council, the European Economic and Social Committee (EESC) and the Committee of the Regions, "A better functioning food supply chain in Europe", was the first European act that recognised UTPs as an actual problem. As the title suggests, the Communication refers to the general functioning of the EU food supply chain, highlighting the main problems of that historical period. Before the Communication, the EU agri-food market witnessed a period of price fluctuation that heavily affected both consumers and agricultural producers. In particular, the Commission identified the complexity of the food supply chain, and the unequal distribution of bargaining power between its actors, at the root of the market's inefficiencies.

Based on this assumption, the EU legislator addressed UTPs for the first time. Due to the lack of research on the subject, the Communication does not contain a definition of UTPs; rather, it lists some of them. Among these, there are late payments, unilateral modifications in contracts, ad-hoc changes to contractual terms and upfront payments as entry fees to negotiations[73].

Even if the Commission finally perceived UTPs as a problem to tackle, it did not deeply investigate this phenomenon. Firstly, because the Communication does not specifically concern this topic, secondly, because of the insufficient knowledge about it in 2009. The Commission stressed the importance of further studies, especially concerning "contractual practices and their link to asymmetries in bargaining power within the food supply chain", because "they might indeed lead to unfair and inefficient outcomes, depending on each individual situation"[74]. Therefore, the Commission committed to working with Member States for this purpose, in order to intervene at EU level, providing some effective solutions[75].

Specifically, when it comes to the part of the implementation of policy initiatives, the Commission committed to undertake with priority the ones regarding the B2B contractual relationships, before the end of 2010[76]. This means that despite the generality of the act, already in 2009 UTPs were identified as a preeminent issue to solve, since their negative impact on the functioning of the food supply chain.

### 2.3 High Level Forum for a Better Functioning Food Supply Chain and The Principles of Good Practice

The Commission's commitment to implement policy initiatives by 2010 was partially respected, since by that year only the High Level Forum for a Better functioning of the food supply chain (hereinafter, Forum) was established[77]. Its aim was to ensure and to follow the development of EU policies in the agri-food sector, including the ones proposed in the 2009 Communication. Definitely, the Forum promoted an active dialogue on UTPs between its members, who were national authorities for the food sector from all Member States, with representatives of relevant stakeholders and civil society organisations. The Forum actually contributed to the improvement of the B2B relationships in the food

[73] European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions*, A better functioning food supply chain in Europe*, cit., p. 5.
[74] Id., p. 6.
[75] Id., p. 7.
[76] Id., p. 12.
[77] European Commission Decision establishing the High Level Forum for a Better Functioning Food Supply Chain, 2010/C 210/03.

supply chain, being the place of origin of the voluntary Principles of Good Practice and of the Supply Chain Initiative.

Firstly, in November 2011 the dialogue raised from the Expert Platform on B2B Contractual Practices of the Forum led to the development of the Principles of Good Practice; a series of general and specific principles, which contracting parties should apply to their vertical relationships to guarantee fairness to their agreements. Moreover, this first outcome of the Forum contains a list of examples of both unfair and fair practices, representing a sort of manual for agri-food enterprises in their negotiations. The aim is to find a solution to the asymmetry of bargaining power between the chain's actors, providing a "framework for conducting business that respects contractual freedom and ensures competitiveness"[78].

Initially, only eleven organisations working in the agri-food sector adopted the Principles[79]; then, this number increased mainly thanks to the creation of the Supply Chain Initiative. Today, despite the closure of both the Forum and the Supply Chain Initiative, the Principles are still in force and are even included in some national legislations. In the last paragraph of this chapter, their potential positive role in complementing the Directive (EU) 2019/633 on UTPs will be also discussed.

In 2012, the European Parliament published a resolution regarding the imbalances in the food supply chain[80], showing a general concern for the problems affecting the agri-food market. In this document, the Parliament expressed support for the work of the Forum, requiring effective measures to implement the Principles of Good Practice at the same time. It stressed the need for a common definition of UTPs, for specific intervention, supervision and objective sanctions. *Ergo*, the Parliament acknowledged the positive function of that first self-regulation's initiative, while emphasizing that hard law was also strongly required to tackle the imbalances affecting the chain. The Parliament called for a more incisive regulation on the subject, while the Commission was essentially promoting soft measures together with voluntary compliance. This divergence of opinions on the approach towards UTPs between the two EU Institutions will last until the Directive (EU) 2019/633.

## 2.4 Green Paper on Unfair Trading Practices in the Business-to-business Food and Non-Food Supply Chain in Europe

After that Parliament resolution, the Commission published another communication on January 2013, this time directly referred to UTPs: the Green Paper on Unfair Trading Practices in the Business-to-business Food and Non-Food Supply Chain in Europe[81]. However, the Commission missed the opportunity to address the issue specifically with regard to the food supply chain only, adopting a more general approach. The focus of the Green Paper is on UTPs as a problem affecting various economic sectors, not only the agri-food one. Definitely, that "agricultural exceptionalism" discussed in the first chapter is

[78] Supply Chain Initiative, *Vertical relationships in the Food Supply Chain: Principles of Good Practice*, 2011, p. 2.
[79] The eleven organisations were AIM, CEJA, CELCAA, CLITRAVI, Copa Cogeca, ERRT, EuroCommerce, Euro Coop, FoodDrinkEurope, SMEunited (formerly UEAPME) and Independent Retail Europe (formerly UGAL).
[80] European Parliament Resolution of 19 January 2012 on the imbalances in the food supply chain, P7_TA(2012)0012.
[81] European Commission, *Green Paper on UTPs*, cit.

missing here, since the challenges of the agri-food sector are dealt together with the ones of other EU economic sectors, despite their structural differences.

In the introduction, the Commission points out the work done by the Forum and by its Expert Platform on B2B Contractual Practices, established with the purpose of finding a possible solution to UTPs in the food supply chain. The Commission also recognises that the enforcement mechanism concerning the Principles of Good Practice was not so effective, and that the adhesion of the chain's actors to the Principles was unsatisfactory. Because of this, the Commission extended the mandate of the Forum to 2014, urging its members to reach a new and more fruitful agreement.

The Green Paper analyses the legal framework on UTPs, considering both competition law and civil law on the topic. It distinguishes between competition law and laws specifically aimed at preventing UTPs[82], stating that they pursue different objectives. In particular, rules concerning UTPs address the B2B relationship and its conditions, without worrying about the potential consequences on competition. Instead, competition law can prevent the occurrence of certain UTPs, but it does not apply to many unfair practices, since its scope is to protect the competition in the market from a more general perspective. Indeed, as mentioned in the first chapter, competition law can be a possible solution to UTPs, but only if joined with other more specific remedies. The Commission stressed in various occasions that EU antitrust law alone could not be a successful remedy, since it requires that one of the businesses in the commercial relationship hold a dominant position[83]. This situation does not often occur, meaning that the capability of antitrust law in tackling UTPs is limited. Indeed, UTPs are the result of unequal distribution of bargaining power, which is a condition that goes beyond the concept of dominance in antitrust law[84].

While concerning civil and commercial law, the Green Paper underlines that civil rules can also guarantee a form of protection against UTPs. In fact, they often require the conclusion of agreements in line with some basic principles of good faith, good morals, fairness or loyalty[85]. At that time, some Member States also extended the protection provided by their national civil law specifically against UTPs, with various mechanisms. However, the Commission identified this fragmented national intervention as a potential issue for the Single Market[86]. Indeed, this last consideration will be the main reason behind the Commission's Proposal for a Directive on UTPs.

Furthermore, in the Green Paper the Commission committed to carry out an impact assessment to examine possible solution against the occurrence of UTPs, and to evaluate the potentiality of an intervention at the EU level. The Commission stated that every hypothesis should have been considered, from self-regulation to public rules. Based on the outcomes of the impact assessment, the Commission guaranteed the launch of new proposals in the second half of 2013. In the end, self-regulatory intervention will prevail, since the Supply Chain Initiative's launch in September of that year. Once again, this outcome demonstrates how the Commission did not believe in the necessity of a public action to overcome the problem, underestimating its real impact.

---

[82] Id., p. 10.

[83] CEPS, Council of Europe, Directorate-General for the Internal Market and Services (European Commission), Financial Services and Capital Markets Union (European Commission) , European University Institute, University of Valencia, Université de Versailles, *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain. Final Report*, 2014, p. 7.

[84] Ibid.

[85] European Commission, *Green Paper on UTPs,* cit., p. 11.

[86] Id., p.12.

The Green Paper also attempts to give a common definition of UTPs, as "practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing", adding that "UTPs are typically imposed in a situation of imbalance by a stronger party on a weaker one and can exist from any side of the B2B relationship and at any stage in the supply chain"[87]. Nonetheless, this explanation was perceived as unsatisfactory, *in primis* by the European Economic and Social Committee (EESC), as it will be further examined.

The Commission highlighted that a party's freedom of contract can be obstructed due to differences in bargaining power, explaining how this situation of disparity can lead to the conclusion of agreements with clauses that are unilaterally imposed to the weaker party, rather than being the result of a fair negotiation. These conclusions are not new; instead, the relevant element of this analysis is the acknowledgment that UTPs can take place in every stage of the B2B relationship, not only in the contract *stricto sensu*. As mentioned in the first chapter, this point is fundamental, because it allows distinguishing between various types of UTPs, depending on the phase of the relationship in which they occur. Moreover, the Commission understood that UTPs could have a negative impact on EU citizens and on the functioning of the agri-food economic sector. Therefore, the Green Paper not only takes into account UTPs' direct effects on the commercial parties of the single agreement, but also their indirect effects on the market and on the entire society[88].

Then, the Commission also examines the so-called "fear factor", defining it as the fear of the weaker party of a termination of the B2B relationship, due to a complaint regarding an UTP. Undoubtedly, this factor entails an obstacle to complaints from the victim of an unfair practice, which has to be taken into consideration when developing an effective enforcement mechanism. As a potential solution, the Green Paper suggests the conferment of the power to launch ex-officio actions and to accept anonymous complaints to national authorities. Even if the Commission mentions these tools as a way to contrast the "fear factor", after the publication of the Green Paper it did not implement them. Actually, their lack has been the main reason of the failure of the subsequent "soft" interventions on UTPs supported by the Commission.

The last section of the Green Paper classifies some UTPs, mainly identified thanks to the activity of the Forum. The investigation on those practices is definitely more detailed than the one contained on the first 2009 Commission's Communication, due to the research on the topic pursued over the years. More precisely, the examined UTPs are ambiguous contract terms, lack of written contracts, retroactive contract changes, unfair transfer of commercial risk, unfair use of information, unequal termination of a commercial relationship and territorial supply constraints. This list is not exhaustive; rather, it only exemplifies some of the recurring UTPs in the B2B relationships[89].

If, *prima facie,* it seems that the Commission decided to address directly the problem of UTPs, due to the Parliament's resolution, this actually did not happen. After the Green Paper, once again the Commission encouraged the creation of a private and voluntary initiative to tackle UTPs. From the beginning, the Commission believed that voluntary actions could be adequate and sufficient to address the problems emerging along the food supply chain, while the Parliament was stressing the need to proceed with a different

[87] Id., p. 3.
[88] N. Lucifero, op. cit., p. 15.
[89] Id., p. 21.

approach. The EESC soon endorsed the Parliament's perspective. In March 2013, the Commission consulted the Committee[90], which gave his opinion on the Green Paper[91].

According to the EESC, one of the consequences of the mergers and acquisitions between large retailers in the food supply chain was the occurrence of UTPs. The consolidation of these actors at the end of the chain resulted in a reduction of market competition, and the Committee literally defined this situation as an oligopoly[92]. As underlined in the first chapter, the shortcomings of retailers' aggregations not only affect agri-food producers, but also consumers. Thanks to the power acquired, these enterprises can obtain low prices from their suppliers, while still increasing the final price of the food product presented to their customers. The EESC noticed that the Green Paper did not sufficiently highlight how consumers are also victims of UTPs. However, it is a fundamental aspect in order to understand the potential range of UTPs' effects. Finding remedies against UTPs also means to intervene also in favour of consumers and to ensure a balanced agri-food system, increasing the efficiency of the internal market.

The Committee recognised that those unfair practices contribute to the exit from the EU market of many domestic producers. Because of this, some Member States have seen their domestic production being progressively replaced by imports; if they were before self-sufficient in their national food production, they now have lost their food security[93].

Among its recommendations, the Committee urged the Commission to encourage further initiatives, since the results of the Forum were perceived as inadequate. Concerning the Green Paper, as mentioned before, the EESC did not endorse the embedded definition of UTPs. More precisely, according to the Committee the definition should have covered "any cases that fail to meet the broad definition of good business practice in terms of good faith, contractual balance and the common rules of businesses in the relevant sectors of the economy"[94].

Above all, the Committee stressed the need for a binding EU legislation, prohibiting those trading behaviours identified as unfair, in order to harmonise the fragmented EU legal framework on the subject. According to the EESC, this intervention has also to address effectively the so-called "fear factor" mentioned in the Green Paper, therefore that climate of fear among businesses that limits the submission of complaints. Then, the Committee specified that an EU legislation on the topic had to contain a list of banned UTPs regularly updated, together with an exemplifying list of fair conducts. Unfortunately, the final Directive (EU) 2019/633 on UTPs will only provide a list of prohibited UTPs at EU level, with no examples of what commercial conducts can be considered "fair" instead.

### 2.5 The Supply Chain Initiative

The EECS shared the belief of the EU Parliament on UTPs; in 2013, both required a cohesive and compulsory intervention on the content of the B2B relationships in the food supply chain at EU level. Nonetheless, in September of that year the Commission decided to launch together with the Forum a voluntary framework, the "Supply Chain Initiative:

[90] Under Art. 304 TFEU, the EESC can be consulted by the EU Institutions, included the Commission, in all cases in which they consider it appropriate.
[91] European Economic and Social Committee, *Opinion on the "Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe"*, COM(2013) 37 final.
[92] Id., p. 2.
[93] EESC, *Opinion on the Green Paper*, cit., p. 4.
[94] Ibid.

together for food practices" (hereinafter, SCI or Initiative). Based on voluntary compliance, this Initiative was created to implement the Principles of Good Practice, through the commitment of signatories to those fair standards of conduct. Then, it provided some measures aimed at integrating the Principles in the businesses' transactions and at controlling their effective implementation[95].

To meet this purpose, the SCI provided signatory companies with a voluntary self-assessment tool, taking into account also the peculiarities of small and medium-sized enterprises (SMEs). Even if the Initiative was open to every business in the food and drink supply chain, regardless of their sizes, a special treatment was reserved to SMEs. Indeed, they also benefited from a simplified/light registration procedure.

Initially, the SCI was signed by some EU-level organisations, which represented the food and drink industry (FoodDrinkEurope), branded goods manufacturers (AIM), the retail sector (EuroCommerce, ERRT, Independent Retail Europe, Euro Coop), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) and agricultural traders (CELCAA). The role of these signatory organisations was to contribute to the funding of the SCI (since the registration and participation for enterprises was free), to appoint the members of the Governance Group, and to approve eventually any revision of the Principles or Rules of Governance of the SCI.

In particular, the Governance Group was made up of representatives of the different interests in the chain, such as the food and drink industry and brand manufacturers, retailers, agricultural traders and crosscutting groups representing SMEs. The Governance Group administered the SCI, following the general Rules of Governance, which were developed on the basis of four criteria set out by the then Commissioner for Internal Market, Michel Barnier. These criteria were efficiency, cost-effectiveness, effective control and transparency. However, the non-members of the Initiative perceived the fact that the Governance Group consisted of those EU stakeholders as a negative aspect. This was defined as a "two-hats issue"[96], since they were holding two different positions in the Initiative at the same time: one as representatives of the SCI's members, the other one as administrators of the SCI.

In 2016, the Commission identified some of the weaknesses of the SCI, including the externally detected lack of impartiality of the Governance Group[97]. Therefore, the Commission encouraged an improvement of the Initiative, recommending the establishment of an independent Chair, not affiliated to any stakeholder group[98]. The SCI's structure was actually implemented with that suggested modification, however the Chair was still appointed by the Governance Group, making the adjustment practically useless. The Group's decision-making process had a disadvantage too, being limited by the need to take unanimous decisions[99].

This requirement complicated and slowed down the execution of decisions, affecting the entire functioning of the Initiative, since it translated into a reduction of the number of

---

[95] The Supply Chain Initiative. *Questions and answers on The Supply Chain Initiative*. Available at: https://www.supplychaininitiative.eu/faq. Accessed 29 July 2020.

[96] Agra CEAS Consulting, Areté srl, European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, IFAU, *Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain. Final report - Revised version*, Luxembourg, Publications Office of the European Union, 2016, p. 16 ff.

[97] European Commission Report to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, COM(2016) 32 final.

[98] Ibid.

[99] Agra CEAS Consulting et al., op. cit., p. 16 ff.

disputes submitted[100]. Between the criteria listed above there is the "cost-effectiveness" one, which is at the foundation of the internal monitoring system of the SCI. Unfortunately, this mechanism also had some deficiencies, making it difficult to concretely verify the implementation of the commitments required by the Initiative to the signatory companies. Indeed, all these lacks compromised the efficiency of the SCI as a whole.

The SCI focused on the mechanisms to solve disputes between businesses, identifying various options, also depending on the occurrence of an individual or aggregated dispute. The aim of these tools was to avoid an interruption of the B2B relationship in case of UTPs' complaints, while promoting a way of resolving conflicts based on mutual agreement. Commercial retaliation, because of using one of these mechanisms, indeed determines a serious breach of the Principles of Good Practice[101]. In particular, the options provided by the SCI to the registered enterprises, in order to solve individual disputes were commercial track, contract options, internal dispute resolution, mediation or arbitration and judicial methods. Of course, these mechanisms were only useful in case of no violation of national law; otherwise, the dispute would have been solved according to the means prescribed by each internal legislation.

From this perspective, the SCI filled in the gaps left by national legislators and contributed to the development of alternative ways of resolving disputes, surely less onerous, both in time and in costs, compared to traditional legal actions. The same reasoning can be done for aggregated disputes, which were the ones submitted by more than one company or association to the SCI Chair. Indeed, they had to be introduced to the Chair only in case of absence of a platform established at a national level in order to handle them. The creation of national platforms or similar structures to implement the Principle of Good Practice is one of the positive outcomes of this Initiative, which were established in six EU countries (Belgium, the Netherlands, Finland, Portugal, Germany and Slovakia)[102].

In the Member States devoid of such a national tool, businesses had to bring an aggregated dispute to the SCI Chair for its resolution. Nonetheless, during the years, there has been no practical implementation of this mechanism, increasing the scepticism of the non-members towards the Initiative's enforcement instruments. Indeed, the fact that the Governance Group appointed the Chair that received the confidential complaints was one of the main factors that determined the malfunctioning of those mechanisms. This was considered as a partiality defect, mainly due to the composition of the Group and to the related "two-hat issue" described above[103].

A potential solution to these deficiencies could have been the introduction of an independent and third-party body, replacing the SCI Chair, with *ex-officio* powers to investigate effectively the occurrence of UTPs[104]. Then, concerning the sanctions in case of a dispute, the SCI proved again to be ineffective, because it renounced to predetermine mandatory remedies, leaving that task to the applicable law in the given jurisdiction[105].

Since its launch in 2013, the Initiative registered the participation of 412 groups and companies, and of 1,198 national operating enterprises in the EU agri-food market[106]. Despite these numbers, data revealed that the majority of registered businesses were in the

[100] Ibid.
[101] Agra CEAS Consulting et al., op. cit., p. 16 ff.
[102] The Supply Chain Initiative, *5th Annual Report*, 2018.
[103] Agra CEAS Consulting et al., op. cit., p. 18.
[104] Ibid.
[105] The Supply Chain Initiative. *Individual Disputes*. Available at: https://www.supplychaininitiative.eu/dispute/bilateral-disputes. Accessed 29 July 2020.
[106] The Supply Chain Initiative, *5th Annual Report*, cit.

manufacturing, wholesale and retail sectors. Therefore, farmers were absent, even if they should have been the first ones to benefit from an initiative tackling UTPs. Since UTPs are mostly affecting agricultural workers, being the weakest actors of the food supply chain, this was one of the most relevant shortcomings of the SCI. The fact that the agricultural sector was in a certain way left out from the Initiative indicates that the SCI's actual effectiveness was not the one expected. Actually, between the signatory organisations of the SCI, the one representing EU farmers and agri-cooperatives, COPA-COGECA[107], is missing.

This demonstrates that farmers' representatives believed that the voluntariness of the Initiative was inadequate to solve the problem of UTPs. Their disappointment regarded the lack of an effective enforcement mechanism, in particular.

Furthermore, even if called "Supply Chain Initiative", the SCI did not include another substantial part of the food chain: agricultural input suppliers. A practical "supply chain approach" was also missing in this Initiative. As argued in the first chapter, farmers' vulnerability is also due to the extreme concentration of big agrochemical and seeds corporations, and to their acquired power in the chain. Without including these actors in the SCI, it is difficult to reinforce farmers' condition. Unfortunately, during the years, the attitude towards UTPs has not changed, since even in the latest Directive (EU) 2019/633, the EU legislator did not consider this issue, as it will be discussed in the last paragraphs of this chapter.

In the end, the Supply Chain Initiative had a fundamental role, because it boosted the dialogue on UTPs and it encouraged the creation of national platforms aimed at tackling them. Nevertheless, the discussed shortcomings determined its failure. Already in a 2014 communication[108], the Commission noticed some of the Initiative's weak points; sadly, they have never been strengthened. In its communication, the Commission clearly stated that at that time it did not foresee a regulatory intervention at EU level, despite the already evident shortcomings of the SCI, such as the low participation of agricultural producers in the Initiative. Rather, the Commission encouraged Member States to develop enforcement mechanisms to implement the SCI, recognising its limitations on this particular aspect.

Without doubts, the most important outcome of the 2014 communication has been the definition of UTPs 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". Actually, this is still the main definition of UTPs, being included at Article 1 of the latest Directive (EU) 2019/633. After two years, the situation did not improve. In a 2016 report, the Commission listed again the weaknesses of the Initiative[109]. Nevertheless, it still did not believe as necessary a harmonised intervention on UTPs, mainly because it acknowledged a positive development of regulatory interventions on the subject in various Member States.

On the contrary, in March of the same year the EU Parliament's Committee on Agriculture and Rural Development asked the Commission to present a legislative proposal regarding UTPs. The Committee published an opinion on UTPs in the food supply chain, addressed to the Committee on the Internal Market and Consumer Protection, extremely

[107] COPA (Committee of Professional Agricultural Organisations) is the first EU representative organisation of farmers, while COGECA (General Confederation of Agricultural Cooperatives) is the EU representative organisation of agricultural cooperatives. In 1962, they merged, becoming COPA-COGECA.

[108] 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*, cit.

[109] European Commission Report to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, cit.

concerned about the negative outcomes of UTPs, which affected (and are still affecting) the internal market as a whole[110]. The Parliament's Committee stressed that EU competition law alone was not enough to eradicate UTPs, urging the Commission to prohibit a list of recognised UTPs with compulsory rules at EU level. In the opinion, the Committee also highlighted the shortcomings of voluntary initiatives, questioning "the Commission's unwavering support for the SCI, given its limitations"[111].

After three months, the EU Parliament published another resolution on UTPs[112], noticing that many Member States had introduced some mechanisms to tackle the problem, also thanks to the positive influence of the SCI. Nevertheless, once again the Parliament reminded the inadequacy of the Initiative. The resolution welcomed the Commission's Report of January in the part where it encouraged an improvement of the SCI, while disapproving the Commission's conclusion that an EU common framework regarding UTPs was not necessary at that moment[113]. The opinion of the Parliament's Committee and the resolution of the Parliament had more or less the same content; both acknowledged SCI's weaknesses and the lack of a proper enforcement mechanism, inviting the Commission to submit a proposal of an EU framework legislation on UTPs as soon as possible.

The same year, the EU Commissioner for Agriculture and Rural Development Phil Hogan established an expert group, the Agricultural Markets Task Force (AMTF), to advise the Commission concerning the issues affecting farmers and the agricultural sector. The Task Force was set up to monitor the functioning of the agri-food chain in a particular period of expansion of the internal market and of an ongoing process of globalisation, which resulted mainly into the weakening of farmers' position. Therefore, the AMTF's task was to make recommendations and to encourage the adoption of initiatives to support these powerless actors of the chain.

In its November 2016 Report[114], the AMTF analysed EU farmers' condition and suggested some necessary actions in order to improve it, dedicating an entire section to trading practices in agricultural markets. After reminding that its function was complementary to the one of the Forum, the AMTF endorsed the positive results of the Supply Chain Initiative. However, the Report highlighted that such voluntary initiatives by themselves have proved to be ineffective, since UTPs were still an insidious problem affecting the chain. Therefore, the AMTF recommended to enhance the SCI, but also to provide a harmonised EU legal framework with a basic list of prohibited UTPs[115]. The report stressed the importance of enforcement, stating that "rules have doubtful value if they are not enforced or are not enforceable"[116].

In fact, this "doubtful value" was at the base of the distrust towards voluntary codes of conduct, especially expressed by farmers and their representatives. Because of this, the AMTF also advised the Commission to take into account the "fear factor" in drafting a legislative proposal, when it comes to the enforcement part. In particular, the Report specified that anonymous complaints regarding UTPs should have been included in a

---

[110] Committee on Agriculture and Rural Development Opinion for the Committee on the Internal Market and Consumer Protection on unfair trading practices in the food supply chain, 2015/2065 (INI).
[111] Ibid.
[112] European Parliament Resolution of 7 June 2016 on unfair trading practices in the food supply chain, 2015/2065 (INI).
[113] Ibid.
[114] Agricultural Markets Task Force, *Improving market outcomes. Enhancing the position of farmers in the supply chain*, Report, Brussels, 2016.
[115] Id., p. 32.
[116] Ibid.

framework legislation, also if submitted by POs and APOs, and that enforcement authorities should have been provided with *ex-officio* investigative powers. Then, the Report recognised the importance of sanctions in guaranteeing the implementation of rules, and above all their dissuasive function, since capable of preventing the occurrence of UTPs[117].

The provisions suggested by the AMTF were not a big news. During the years, several actors had made clear the necessity of appropriate enforcement mechanisms in the fight against UTPs, since their lack was the main factor that determined the failure of the SCI. One of these actors is the Council. In its conclusions at the end of 2016[118], the Council expressed is awareness of the limitations of the SCI and of the urgency of an EU regulation on UTPs, not to replace, but to complement the existing voluntary initiatives. Then, the Council called the Commission "to undertake, in a timely manner, an impact assessment with a view to proposing an EU legislative framework or other, non-legislative measures to address UTPs"[119].

The Supply Chain Initiative ended in 2019, when, finally, the Commission and the Parliament reached an agreement with the Directive (EU) 2019/633 on UTPs. Despite its shortcomings, the SCI had many positive outcomes, raising consciousness among the actors of the food supply chain on the problem of UTPs. For this reason, throughout the years, its improvement has always been advised, but not its suppression. In demanding an EU intervention on the topic, the Council underlined the potential complementarity of a harmonised legislation in relation to the already functioning Initiative. Indeed, the choice of a mixed approach towards UTPs seemed to be the most required one even by stakeholder groups. They particularly expressed a clear preference for a combination of voluntary initiatives, such as the SCI, and public enforcement[120].

## 2.6 The road to the Directive (EU) 2019/633 on UTPs: from the Initiative to Improve the Food Supply Chain to the Commission's Proposal

After the wake-up call by the Council, the Commission launched the "Initiative to Improve the Food Supply Chain", to finally assess the need for EU action and to proceed accordingly. UTPs were not the exclusive target of the Initiative, since it addressed other structural problems affecting the agri-food chain and farmers' condition, such as market transparency and cooperation between agricultural producers[121]. The Initiative included three surveys: one open public consultation and two targeted ones, concerning undertakings in the food supply chain and consumer organisations.

### 2.6.1 The Inception Impact Assessment and the consultation process

Firstly, the Commission's consultation strategy implied the publication of an inception impact assessment, where various policy options were examined, so that stakeholders could express their preferences during the subsequent period. Of course, the

---

[117] Ibid.

[118] Council Conclusions of 12 December 2016 on strengthening farmers' position in the food supply chain and tackling unfair trading practices, 15508/16.

[119] Id., p. 6.

[120] Agra CEAS Consulting et al., op. cit., p. 20 ff.

[121] European Commission's Directorate-General for Agriculture and Rural Development, *Inception Impact Assessment: Initiative to improve the EU food supply chain*, cit., p. 3.

goal was to gather feedback on UTPs from all the actors of the food supply chain, consumers and public authorities in Member States. To achieve this, not only a public consultation was launched, but also some specific surveys involving targeted parties of the chain, and a scientific workshop on UTPs, whose significant outcome was the well-known Technical Report by JRC. Certainly, the scope was to get the full picture from the parties whose interests were involved[122].

The first policy option on UTPs proposed by the Commission in the Inception Impact Assessment (IIA) was to maintain the combination of a voluntary initiative at EU level (the SCI) and public interventions at national level, with the intention of improving both of them. The second suggestion was the non-legislative option, which implied the promotion of EU soft-law measures, such as recommendations, to guide MSs in developing effective tools at national level to tackle UTPs, encouraging coordination between their policies and exchanges of better practices. Option three was a EU framework legislation on UTPs to protect the most fragile actors of the chain (farmers and SMEs). It had to include a list of prohibited trading practices generally identified as unfair and common minimum enforcement standards, in addition to the already existing national rules and the SCI. The last option was again the introduction of an EU framework legislation, this time embracing the agri-food supply chain as a whole, comprehensive of a general binding definition of UTPs[123].

The first stakeholder survey was carried out between 17th July and 6th December of 2017. The participants could give their opinion not only on the policies suggested in the IIA, but also on the real need for a harmonised intervention, with the possibility of making other specific considerations on the topic. The consultation's results shown a great participation of farmers and their representatives in submitting contributions[124]. Here, they could finally express their concerns on UTPs, since their absence in the Supply Chain Initiative. In particular, almost all respondents agreed that UTPs happen along the food supply chain and that they represent a serious issue; consequently, they believed that an EU action was needed[125]. The most interesting data is that only agricultural workers were convinced of the indispensability of this action, while food retailers answering the survey did not see the necessity of a legal intervention on UTPs[126].

This outcome indicates again how UTPs are perceived as a problem mainly by farmers, who are those parties of the chain with less bargaining power, *ergo* the ones mostly affected by their occurrence. Then, a substantial part of the answers took into account the enforcement's issue; nearly all participants believed as fundamental the introduction of proper deterrents and sanctions, the majority of them recognising the importance of making anonymous complaints, and some of them expressing a concern for the so-called "fear factor"[127].

Meanwhile, an open public consultation was held between August 25th and November 17th of the same year. In this occasion, the majority of individuals who participated also affirmed to be involved in the agricultural sector[128]. The answers focused on three points regarding UTPs: the problem definition, the need to act and the

---

122 European Commission, *Consultation Strategy: Initiative to Improve the Food Supply Chain*, 2017, p.7.

123 European Commission's Directorate-General for Agriculture and Rural Development, *Inception Impact Assessment: Initiative to improve the EU food supply chain*, cit., pp. 5-6.

124 European Commission, *Staff Working Document: Stakeholder Consultation - Synopsis Report*, SWD(2018) 91 final, pp. 1-2.

125 Ibid.

126 Ibid.

127 Ibid.

128 Id., pp. 3-5.

enforcement[129]. Concerning the first point, almost all respondents stated that UTPs exist and frequently occur; they were then asked to point out three trading practices they considered to be unfair, leading to negative effects for the chain's actors. The most mentioned ones were unilateral and retroactive changes to contracts, last minute order cancellations concerning perishable products, payment periods longer than 30 days for perishable products and agri-food products in general[130].

Once more, the participants underlined how these practices negatively affect farm workers mostly. On the need to act, the reactions were similar to the ones registered in the previous stakeholder survey. Retailers' organisations had again a divergent opinion as compared to other respondents, since they concluded that voluntary initiatives were sufficient in order to solve the issue of UTPs. While the others believed that an EU intervention was necessary; in particular, 51% thought legislation was the appropriate means, 46% preferred a mix of legislation and non-legislation and 2% preferred a non-legislative action[131]. Then, the majority of participants acknowledged the limits of the SCI in addressing UTPs. About the enforcement part, almost everyone highlighted the potentiality of minimum standards at EU level, believing that some effective tools could be to proceed with collective and confidential complaints, the identification of an authority with *ex-officio* powers to conduct investigations and the introduction of sanctions in case of rules' violations[132].

To complete this frame, agri-food suppliers, consumers' organisations and MSs public authorities were asked to answer targeted questionnaires. The majority of suppliers in the agri-food chain affirmed that they have been victims of UTPs, such as late payments, and that the occurrence of those practices represented an actual cost for their businesses[133]. Consumer organisations mainly believed that a legislative intervention at EU level would have a positive impact on their welfare in the long term, rather than a negative one[134]. MSs finally gave their insight on the predicted costs of implementing mechanisms to enforce a possible EU legislation on UTPs, and they shared data on their national approach towards the issue[135].

Some *ad hoc* bilateral meetings were then organised to discuss the IIA with: Independent Retail Europe, FoodDrinkEurope, EuroCommerce, European Brands Association (AIM), the Danish Chamber of Commerce, the German Retail Federation, the Liaison Centre for the Meat Processing Industry in the European Union (CLITRAVI), the European Livestock and Meat Trading Union (UECBV), Edeka, REWE, *Fédération du Commerce et de la Distribution*, the European Dairy Association, the International Dairy Federation, the United Kingdom's National Federation of Meat and Food Traders, Europatat, and Euro Fresh Foods[136]. To conclude, two meetings with CAP civil dialogue groups (CDGs) were held too[137].

---

[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid.
[133] Id., p. 6.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] "Civil dialogue groups assist the European Commission and help to hold a regular dialogue on all matters relating to the common agricultural policy (CAP), including rural development, and its implementation". European Commission. *Civil dialogue groups explained*. Available at: https://ec.europa.eu/info/food-farming-fisheries/key-policies/committees-and-advisory-councils/civil-dialogue-groups/cdg-explained_en#:~:text=is%20regularly%20updated.-,Overview,rural%20development%2C%20and%20its%20implementation. Accessed 29 July 2020.

### 2.6.2 The Impact Assessment Report: the policy's choice

All the collected feedbacks, data, useful information merged in the Impact Assessment Report[138], which was presented to the Regulatory Scrutiny Board (RSB)[139] on February 21st, 2018. Initially, the RSB negatively evaluated the Report, requesting its revision. Therefore, a second version was submitted to the RSB on March 5th, 2018, this time obtaining a positive opinion, despite some reservations that were addressed in the latest version of the Report, accompanying the Proposal for the Directive.

As mentioned before, the Inception Impact Assessment identified four potential policy options, which were further discussed in the Impact Assessment Report, based on the outcomes of the multiple consultations held during the previous period. The Report focused in particular on the analysis of the specific elements of each single policy, evaluating their probable impact on the functioning of the agri-food supply chain.

Leaving at the end the general issue of the benefits of an EU harmonised action on the topic, the first policy aspect to be examined concerned the scope of UTPs rules: whether it should consist of a specific list of banned UTPs or on a general form of prohibition[140]. In the first chapter, it has been often stressed that the studies on UTPs are still not satisfactory. From this, it comes the need to be particularly careful in drifting the scope of a legislation on UTPs, due to the complexity of establishing what commercial practices do actually have an unfair trait. However, thanks to the data collected during the surveys and to the work of the SCI across the years, there is a list of practices that can be easily detected and classified as UTPs. On the other hand, the draft of a common definition of UTPs, which can act as a general clause, prohibiting every practice that falls into it, has been rather difficult.

Of course, such a wide-ranging scope could capture various practices in a case-by-case perspective, leaving to enforcement authorities the task of determining if a practice has the legislative characteristics to be an UTP in the concrete context[141]. Nonetheless, this option can also have some potential negative effects. For instance, the expansiveness of a generic principle could be counter-productive, mining the EU legislator's intent of harmonisation, by giving too much freedom to Member States' national authorities. Because of this, the Commission went for the first alternative. This choice has some limitations too; as underlined in the JRC's Technical Report, "business relationships could disappear in instances where they were dependent on practices banned as UTPs"[142]. This entails a possible negative outcome that can again affect the weakest actors of the agri-food chain, farmers. Large retailers could decide to change their counterpart in the operation, being more convenient to purchase agri-food products from suppliers located in non-EU countries, where the legislation is less strict and where they can still apply UTPs. To avoid this, it is fundamental to extend the prohibition of unfair behaviours in order to protect

---

[138] European Commission, *Staff Working Document: Impact Assessment*, SWD(2018) 92 final.

[139] "The Regulatory Scrutiny Board is an independent body within the Commission that advises the College of Commissioners. It provides central quality control and support for Commission impact assessments and evaluations at early stages of the legislative process. The Board's work on impact assessments strengthens subsequent evaluations, and vice versa". European Commission. *Regulatory Scrutiny Board*. Available at: https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en#annual-reports. Accessed 29 July 2020.

[140] European Commission, S*taff Working Document: Impact Assessment*, cit., pp. 62-63.

[141] Ibid.

[142] J. Fałkowski et al., op. cit., p. 14.

non-EU countries dealing with enterprises based in the EU, too. As will be seen, this remedy will be included in a specific provision of the Directive on UTPs, fixing that potential fallout. Nevertheless, other serious deficiencies will still affect this chosen policy option.

The second policy aspect to be investigated was the products' coverage[143]. In this case, the discussed issue was whether a regulation on UTPs should include only agricultural products, which means the ones listed in Annex I to the TFEU, or processed agricultural products (PAPs), the so-called "Non-Annex I goods"[144], too. At this point of the analysis, it is a given that farmers are the ones most exposed to unfair practices, and in abstract this would legitimise a regulation on UTPs covering only agricultural products.

Nonetheless, such a legislative option would also lead to an unequal treatment of PAPs' producers, who would be left without protection. This situation would damage especially SMEs involved in the food processing industry, which are often exposed to UTPs, mainly due to the strong bargaining power of their big buyers. Likewise, this coverage's limitation could imply some negative outcomes also for farmers themselves, because their purchasers could decide to buy directly from PAPs producers, in carrying on with their unfair business behaviours. That is why, already in the Report, the policy option preferred was the one that covered both agricultural products and PAPs.

The third investigated element concerned again the coverage's topic, but this time referring to the operators of the food supply chain[145]. So far, the EU "soft" intervention on UTPs was general, since the SCI's scope was to include in the voluntary Initiative every business in the food supply chain, establishing then differentiated and simplified registration procedures for SMEs. Similarly, a binding regulation on UTPs could cover and guarantee a general protection to all the actors involved in the chain, while providing a preferential treatment for SMEs, when it comes to implementation and compliance costs. Alternatively, a policy with a target coverage of operators would take into account just the weakest parties of the chain, the ones easily subjected to UTPs. This legislative choice would better meet the outcomes of the analysis carried out in the first chapter, specifically it would be in line with the main factor causing UTPs: the unequal distribution of bargaining power along the chain. Of course, to meet this purpose the imbalance of contractual power should represent the criterion for deciding who shall be protected by the policy in question. However, the preferred parameter identified in the Report has been the one of the size of the seller enterprise, as it will be discussed afterwards.

Concerning the enforcement's part, two policy options were taken into consideration: the "minimum requirements" and the "minimum requirements plus"[146]. The Report immediately abandoned the idea of a centralised form of enforcement at the EU level, since it would have been difficult for an EU body to control and coordinate national authorities in the application of a set of rules on UTPs that diverges for each MS. The EU intervention aspired to a partial harmonisation, not to a replacement of the existing regulation at national level on UTPs.

For this reason, it seemed more appropriate to leave to MSs authorities the enforcement's duty and to rather discuss the range of powers that had to be conferred to those national bodies. In a decentralised enforcement system, certainly coordination plays a

---

[143] European Commission, S*taff Working Document: Impact Assessment*, cit., p. 63.

[144] PAPs are listed in the Regulation (EU) No 510/2014 of the European Parliament and of the Council of 16 April 2014 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products and repealing Council Regulations (EC) No 1216/2009 and (EC) No 614/2009.

[145] European Commission, S*taff Working Document: Impact Assessment*, cit., p. 64.

[146] European Commission, *Staff Working Document: Impact Assessment*, cit., p. 47 ff.

fundamental role. That is why the Report also evaluated cooperation between MSs as an important policy element, underlying the need of the creation of a "network of authorities"[147] that should exchange information and best practices in the implementation of EU rules on UTPs.

Finally yet importantly, the Report focused on the choice of the adequate legal instrument[148] to intervene on UTPs. After the analysis of the steps that led the Commission to consider a legislative proposal, it is clear that there was a general demand for a legally binding intervention on UTPs. Excluding another "soft" action on the topic, two legislative alternatives remained: Directive or Regulation. The first one will prevail, because of its intrinsic characteristics, perfectly suitable in this particular case. Indeed, the EU Directive leaves to MSs the discretion in the choice of what legal mechanisms to employ in order to achieve the objectives established in it. This solution is perfect in a situation where there are countries that already have a legislation on UTPs and administrative bodies that look after its implementation.

As a legislative act, the EU Directive allows a minimum and common degree of harmonisation, which is the objective of the EU intervention on UTPs. Among the various policy options discussed in the Inception Impact Assessment, and finally in the Report, the "partial harmonisation" alternative has always been the preferred one. Actually, the Report did not deeply investigate other options, rather it considered as the only valid alternative the one of the introduction of a "common minimum standard of protection in the EU"[149]. Therefore, a detailed harmonisation was discarded from the beginning, mainly because of its inadequacy. As a matter of fact, the existence of heterogeneous provisions that already regulated the phenomenon of UTPs, both at national and at EU level, made it difficult to even contemplate a detailed EU regulation on the subject. Instead, it was the development of those provisions and their divergences that seemed to justify a harmonised intervention of the EU legislator.

Indeed, an excessive diversity among MSs jurisdictions has been evaluated as the factor that could lead to some inefficiencies in the functioning of the agri-food single market, altering the competition among operators. The Commission believed that the EU action could assure a higher degree of legal certainty between the actors of the food supply chain. However, this last evidence was not broadly shared. *De facto*, in its Report the JRC revealed also a widespread concern among academics on the probability that an EU intervention on UTPs could rather intensify the heterogeneity and fragmentation of the already in force rules on UTPs, adding complexity to the overall picture[150].

The choice of a partial harmonisation approach deserves also a brief investigation on the pros and cons of such a form of intervention. Indeed, the JRC's Technical Report delineated what were the potential benefits and costs of a harmonised EU framework on UTPs[151]. The first benefit being detected is related to the occurrence of "transboundary phenomena". As described in the first chapter, globalisation has undoubtedly increased economic trade between States, meaning that the current European agri-food supply chain is based on a complex network of relationships between actors located in different countries.

The fact that trading practices have cross-border effects and often involve various jurisdictions somehow calls for a harmonised EU action on UTPs, and on this side it could

147 Ibid.
148 Id., p. 51.
149 European Commission, *Staff Working Document: Impact Assessment*, cit., p. 38.
150 J. Falkowski et al., op. cit., p. 55.
151 Id., p. 52 ff.

have some positive effects. The second benefit of a common EU legislation on UTPs is the potential counter-action against the "race-to-the-bottom" phenomenon. In various acts preceding and leading to the Directive 2019/633 on UTPs, EU Institutions have often stressed how the development of different national regulations could cause some undesirable consequences.

For instance, these negative outcomes are clear when agri-food companies choose to conclude business agreements only with enterprises located in countries where rules on UTPs are less stringent, or even absent, so that they can unfairly behave. Then, the JRC underlined as a potential positive result of harmonisation also the realisation of economies of scale in administration, likely occurring in case of the establishment of a centralised administrative body that substitutes the national ones, when it comes to the enforcement part of the policy. However, this is not what happened afterwards, since a decentralised enforcement system was the option preferred since the Impact Assessment Report.

Finally, a harmonised approach could also reduce transaction costs. Agri-food enterprises involved in cross-border trading would not have to be informed each time on the differences between national regulations on UTPs, and consequently compliance costs would be saved too. At the same time, the JRC identified three main costs that harmonisation could generate. *In primis*, the implementation costs for MSs that do not have any form of regulation on UTPs. *In secundis*, the switching costs for MSs that do already have rules on UTPs, but regardless they need to change their jurisdiction, in order to meet the new uniform standards introduced by the EU law.

The last potential cost analysed by the JRC refers to the "over-regulation" risk, mentioned before since being a widespread concern between academics. This possibility could undermine the benefits of the EU intervention, by creating an overlapping framework, implicating the failure of the main intent of the EU legislator. In particular, the JRC individuated this adverse situation as the potential principal disadvantage of an EU harmonisation on UTPs[152]. Moreover, it was highlighted how MSs have developed during the years their national rules on UTPs, above all taking into account the peculiarities of their specific jurisdictions. Consequently, the introduction of a common framework could not be the best solution in this circumstance. Finally, not only the presence of MSs regulations has been considered, but also the presence of the SCI at EU level. The JRC outlined how an EU action of harmonisation on UTPs would make it useless to proceed with that voluntary Initiative; indeed, with the adoption of the Directive (EU) 2019/633 on UTPs, the SCI actually ended.

Nevertheless, between the final recommendations made by the JRC to the EU legislator, there was the one to maintain in force the Supply Chain Initiative, because of its constructive and helpful role[153]. Specifically, the JRC reminded the paucity of research on UTPs, and consequently on the potential effects of a harmonised EU intervention on the topic. Anyway, it was also acknowledged that an EU action was strongly required both by actors involved in the agri-food supply chain, especially by the most vulnerable ones, and by multiple EU Institutions. The JRC recognised that such an action could be beneficial, if aimed at clarifying the concept of UTPs and at creating an EU arbitrator with specific powers, also to contrast the so-called "fear factor". While again, concerning the SCI, the JRC believed that in this case its function should have been changed and oriented to the encouragement of exchange of views and cooperation between the food supply chain protagonists, but that it should not be in any case suppressed.

[152] J. Falkowski et al., op. cit., p. 55.
[153] Ibid.

| | Package 1 | Package 2 | Package 3 | Package 4 |
|---|---|---|---|---|
| | General coverage & enhanced enforcement and coordination | Targeted coverage all operators & enhanced enforcement and coordination | Targeted coverage - protection of SMEs & enhanced enforcement and coordination | Targeted coverage - protection of SMEs & enforcement and coordination (recommendation) |
| **Scope of UTP rules** | Principle-based prohibition of UTPs | Specific UTPs listed as prohibited | Specific UTPs listed as prohibited | Specific UTPs listed as prohibited |
| **Coverage of products** | Agricultural and processed agricultural products | Agricultural and processed agricultural products | Agricultural and processed agricultural products | Agricultural products |
| **Coverage of operators** | All operators | All operators | Protection of SMEs across the chain | Protection of SMEs across the chain |
| **Enforcement** | Minimum requirements "plus" | Minimum requirements "plus" | Minimum requirements "plus" | Minimum requirements |
| **Coordination** | Network of competent authorities | Network of competent authorities | Network of competent authorities | Baseline (High Level Forum) |
| **Instrument** | Regulation | Directive | Directive | Recommendation |

*Table 5: option packages*

In conclusion, with the adjustments made after the RSB's opinion, the final version of the Impact Assessment Report listed in a table four policy option packages[154]:

After the analysis before made of each component of these policies, it is clear that favoured package was the "Targeted coverage - protection of SMEs & enhanced enforcement and coordination"[155] one. Therefore, it fostered the draft of a Directive comprehensive of a specific list of prohibited UTPs, covering both agricultural products and PAPs, with a protection limited to SME-sellers involved in the agri-food chain, guaranteeing a minimum requirement "plus" enforcement, with a coordinated network of competent national authorities. That being said, this delineated policy distanced itself in various points from the final suggestions made by the JRC in its Technical Report to the EU legislator. Because of this, academics and researchers will continue to stress the importance of some aspects not taken into account, encouraging the Parliament to fill those legislative gaps evident in the Proposal.

### 2.6.3 The Commission's Proposal

The Proposal was presented by the Commission in the Agriculture and Fisheries Council on April 16th, 2018. Introducing the context that led to the Proposal, the

[154] European Commission, *Staff Working Document: Impact Assessment*, cit., p. 67.
[155] Ibid.

Commission recalled some main points of the Impact Assessment Report. Once again, the divergences between MSs regulations on UTPs and the underlined deficiencies of the SCI were identified as the main issues validating the proposal for a Directive. Since it originated from the Impact Assessment Report, the Proposal corresponded to the chosen policy package, with the aim of introducing a common standard of protection with a minimum harmonisation approach[156], leaving in force both national rules on UTPs and the SCI.

Definitely, the Commission's Proposal was influenced by the so-called "Unfair Commercial Practices Directive" of 2005[157], concerning business-to-consumer (B2C) unfair commercial practices. That Directive marked a transition from a bare private form of protection of consumers, to a public one[158]. Indeed, the Directive's objective was to add to the traditional private protection against unfair practices, guaranteed by national legal courts, also a public enforcement, with powers directly conferred to administrative bodies.

The reasons underneath the Directive of 2005 are similar to the ones that brought to the Commission's Proposal in question. As deeply discussed in the first chapter, public interventions on private assets have to be justified by superior interests; otherwise, restrictions of private autonomy and freedom of contracts are illegitimate. Therefore, both in the Directive of 2005 and in the Commission's Proposal on UTPs, the need for stability of the EU single market and for legal certainty were the factors legitimising the EU intervention. Indeed, Article 1 of the Unfair Commercial Practices Directive of 2005 states that its purpose is "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests".

Therefore, also in this context the significant differences between national legislations on the matter were detected as a potential threat for the correct functioning of the internal market. *Ergo*, the EU action was not exclusively aimed at safeguarding the fairness of individual commercial relationships, but it had a widespread noteworthy intent, the same one that supported the Proposal for the Directive on UTPs. In particular, to remove the divergences among national jurisdictions and to introduce a common EU framework. The EU intervention of 2005 changed the contract's paradigm, from an instrument aimed at regulating private autonomy and accomplishing private interests, to a way through which releasing more general and public matters too. In these Directives, the EU action on contractual law is aimed at solving the malfunctioning of the market and competition, due to the asymmetry of information and contractual power between subjects, which result in unfair commercial and trading practices.

Then, of course, both acts should focus on strengthening the market's position of weakest individuals too. If the Directive of 2005 fulfils this task, since consumers represent its target, this cannot be said of the Proposal for a Directive on UTPs. Concerning B2B relationships in the agri-food market, unfair trading practices emerge in a situation where

---

[156] Commission's Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final, 2018/0082 (COD), p. 3.

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

[158] See A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, cit., p. 32 ff.

the imbalance of bargaining power among operators causes an unequal distribution of value along the chain, principally at the expense of farmers. As stated in the first chapter, a public policy against the occurrence of UTPs should concentrate on reinforcing the role of agricultural producers, as the Directive of 2005 did with consumers.

In the Directive of 2005, the EU legislator directly supported and protected consumers against unfair commercial behaviours, as a weak category of the food supply chain. Indeed, this intervention falls under the scope of food law, since it focuses on the protection of final consumers, disregarding the position of other actors operating along the chain[159]. Similarly, in the Proposal for the Directive of 2019, the Commission should have presented a legislation that fell under the scope of agricultural law, therefore capable of supporting *in primis* the agricultural community, through the adoption of an "agricultural exceptionalism" approach.

Although during the path to the Proposal it has been highlighted several times that farmers are the actors of the chain worthy of a special treatment and protection, since often exposed to the negative effects of unfair behaviours, apparently the Proposal did not take this explicitly into account. On the contrary, it equated farmers and other "small" operators identified as "suppliers" in the food supply chain[160] for the purposes of a legal protection against UTPs. Consequently, the Proposal ends up being another act of food law, since its disinterest towards the peculiarities of the agricultural community[161].

This is the first substantial shortcoming of the Commission's Proposal and, as it will be further explained, of the final text of the Directive. Both do not recognise the exceptionality of farmers' condition along the food supply chain and the real cause of the UTPs' issue. Indeed, the Proposal does not subordinate the application of rules against UTPs to the presence of an asymmetric bargaining power among trading partners. Rather, the scope of an application refers only to the dimensions of those commercial contractual parties. Agricultural producers are treated as any other enterprise supplying agri-food products, such as the ones involved in the processing phase. This confirms that what matters is only the size of the supplier. With the adoption of this criterion, the Commission made a presumption that every time a SME concludes a contract with a no-SME buyer in the agri-food supply chain, there is a potential situation of imbalance of contractual power, which requires a public intervention.

Surely, this parameter can assure legal certainty, but it does not coincide with facts and with the diversity of the position of farmers as compared to any other actor along the chain. The protection was not specifically directed to agricultural workers, the weakest actors of the chain together with consumers, but to any enterprise of small size that fell within the scope. Definitely, this choice is not coherent with the EU economic scenario. As deeply discussed in the first chapter, due to the limitation of public subsidies in the agri-food sector and the ongoing phenomenon of globalisation, the crisis in the primary sector has progressively weakened farmers' condition. The outcome is not only an increased price volatility of agricultural products at the detriment of farmers, but also of consumers. Indeed, they did not gain from the drop of prices, as it might be expected. Instead, the only ones that took advantage of this situation were the intermediaries between farmers and

---

159 A. Jannarelli*, Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, cit., pp. 529-530.

160 In the detailed explanation of the specific provisions, the Commission proposed that Article 1 should define "the subject matter of the Directive, which follows a partial (minimum) harmonisation approach to introduce a minimum standard of protection relating to UTPs across Member States. The protection applies only to SME suppliers in the food supply chain as regards their sales to buyers which are not SMEs".

161 A. Jannarelli, *Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, cit., pp. 529-530

consumers in the food supply chain, thanks to their stronger bargaining power, which favours unfair attitudes towards their counterparties[162].

In various occasions, this serious lack has been evidenced and the adjustment of the scope of the Proposal has also been suggested. Firstly, the EESC in its opinion on the Proposal[163] stated that "UTPs in the food supply chain originate in imbalances of power between operators across the chain". The EESC gave a central attention to the issue of the asymmetry of contractual power and to the need for special protection of farmers. Therefore, it recognised the significant limitation of the scope of the Proposal in the part where it did not take this into consideration. Indeed, the EESC recommended providing an all-embracing scope, comprehensive of all actors involved in the agri-food supply chain, regardless of their dimension.

The argument that supports this opinion can be found in the analysis of UTPs' potential consequences made in the first chapter. For instance, it can happen that a large retailer reaches an unfair agreement also with a big food processing company, thanks to its privileged position in the market. In this case, the seller of agri-food products is not a SME, and consequently its protection does not fall into the scope of the Proposal. Moreover, the negative effects of the UTP embedded in that commercial deal can spread all the way through the chain, affecting indirectly other vulnerable actors, such as farmers. This often occurs when an UTP has an "indirect" effect. In this circumstance, the Proposal would fail in its intent, leaving agricultural workers without defence. Secondly, also the European Committee of the Regions (CoR) in its opinion on the Proposal[164] identified the same deficiencies, adding a particular concern for POs and APOs not fitting into the scope because of their sizes, therefore left without protection even if not provided with the same contractual power of the buyers they are negotiating with.

Then, between the policy recommendations, the CoR stated that a public intervention should focus principally on strengthening the position of agricultural workers, noting that "there is a close link between regulating the price volatility of agricultural products and combating unfair trading practices (UTPs) in the food supply chain, because market fluctuations exacerbate power imbalances with regard to the sharing of added value within sectors, and the resulting trade-offs are usually unfavourable to producers, who have limited bargaining power due to the increasing concentration of agri-food industries and, in particular, of large-scale retail"[165]. So, the CoR insisted on the necessity of an intervention particularly attentive to the phenomenon of price volatility in agriculture, capable of stabilising farmers' position in the market and of increasing their commercial power. Indeed, in the agri-food sector the asymmetry of bargaining power affecting farmers is evident mainly in the phase of negotiation of products' prices with their commercial counterparties. This is why the Proposal should have prioritised the issue of "price fairness" and of the equitable distribution of value along the food supply chain[166].

Unfortunately, this not only did not happen in the Commission's Proposal, but also in the final text of the Directive (UE) 633/2019 on UTPs. In particular, the CoR believed

---

[162] A. Jannarelli, *Profili del sistema agro-alimentare e agro-industriale. I rapporti contrattuali nella filiera agro-alimentare*, Bari, Cacucci Editore, 2018, pp. 14-15.

[163] Opinion of the European Economic and Social Committee, *Proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain*, 2018/C 440/28.

[164] Opinion of the European Committee of the Regions, *Unfair trading practices in the food supply chain*, 2018/C 387/09.

[165] Opinion of the European Committee of the Regions, *Unfair trading practices in the food supply chain*, cit., Policy Recommendation n. 3.

[166] A. Jannarelli, *Profili del sistema agro-alimentare e agro-industriale. I rapporti contrattuali nella filiera agro-alimentare*, cit., p. 40.

that without the introduction of rules aimed at increasing price transparency, it would have been difficult to really strengthen farmers' condition. That is why it proposed an extension of the list of banned UTPs, to include some unfair practices related to pricing, identified as the manifestation of the intrinsic phenomenon of information asymmetry between sellers and buyers in the agri-food chain. Therefore, the CoR proposed the addition of the following practices in the prohibited list: "e) a buyer sells on an undamaged product at a price lower than the purchase price, including taxes and transport costs; f) a buyer offers prices for the purchase of foodstuffs that are unreasonably low given the supplier's production costs; g) a buyer charges for a service that does not correspond to any service actually provided or whose cost is manifestly disproportionate to the value of the service provided; h) one of the parties to the contract imposes price criteria and methods whereby the price is not and cannot be determined"[167].

Indeed, the CoR explained these amendments stating that "the price paid to producers must not be unreasonably low in relation to the cost of production. It is unacceptable that farmers are unable to make a living and are forced to sell at a loss. It is therefore important to punish buyers who buy at a price that is unreasonably low or who force their suppliers to buy their agricultural raw materials at unreasonably low prices" and that "the price indicated in a contract must be determinable or determined, in other words both parties should be in a position to know the price at which it will be paid throughout the duration of the contract"[168].

The EESC endorsed these suggestions, since it recognised not only that the price for agricultural products should have been equitable and adequate in order to improve the agricultural workers' actual status, but also the urgency of introducing "the ban on food retailers selling below cost-price"[169]. Today, it is clear that the problem of asymmetric information in the food supply chain affects mainly consumers and farmers, due to their weakest positions in the market. However, even if this issue has been addressed concerning consumers, the same cannot be said in relation to agricultural workers, especially in this Proposal. Indeed, the difference of contractual power between farmers and their buyers can be also linked to the divergence of knowledge on the commercial transaction between the two operators.

Large retailers and big food processing industries have available a range of information that small farmers do not have, which further reduces their bargaining power. This is particularly evident in the phase of price's discussion, as demonstrated by the high concern expressed by both the CoR and the EESC. So, market transparency becomes a fundamental objective to ensure the correct functioning of the food supply chain and the fairness of the commercial B2B relationships. To guarantee information access to farmers is a critical step in order to reach a fair distribution of value along the chain. Nonetheless, the Commission did not deal with this issue, entailing a serious fault in the Proposal, and consequently, in the final Directive too.

The second criticism concerned the absence of a common definition of UTPs; another aspect that differentiates the legislative technique of this Proposal from the one characterising the Unfair Commercial Practices Directive of 2005. *De facto*, even if both

---

[167] Opinion of the European Committee of the Regions, *Unfair trading practices in the food supply chain*, cit., Amendment n. 3.

[168] Opinion of the European Committee of the Regions, *Unfair trading practices in the food supply chain*, cit., Amendment n. 3.

[169] Opinion of the European Economic and Social Committee, *Proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain*, cit., Specific Comment n. 3.

legislative texts contain a specific list of prohibited practices, the Directive 2005/29/EC provides a general clause of prohibition too. Indeed, Article 5 paragraph 1 states that "Unfair commercial practices shall be prohibited", and paragraph 2 that "A commercial practice shall be unfair if: a) it is contrary to the requirements of professional diligence, and b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers". *Vice versa*, this type of provision is missing in the Commission's Proposal on UTPs, due to the policy choice already made in the Impact Assessment Report and to the reasons explained before. This political decision has been strongly rejected by both the EESC and the CoR.

Indeed, the Directive 2005/29/EC demonstrated that a general prohibition could assure a better protection of consumers, capturing future unfair behaviours that could arise with the intensification of global trade. This approach can indeed avoid that an EU policy becomes soon anachronistic and outdated. The EESC clearly objected to the omission of such a clause, and similarly did the CoR, which proposed an amendment to the Proposal: the addition of a binding definition of UTP as "the action of subjecting or endeavouring to subject a trading partner to obligations which would create an imbalance between the rights and obligations of the parties; […]"[170]. The principal risk could have been the creation of an EU framework on UTPs not capable of keeping up with globalisation and the future changes in the negotiation's dynamics among operators in the agri-food supply chain.

These concerns show how the condition of agricultural workers will not be enhanced with the Directive, since even a reference to this category is almost missing in the Proposal. Such inadequacy could undermine the entire legal basis of the Proposal and consequently of the following Directive, which is Article 43 (2) TFEU. To avoid this outcome, fundamental amendments needed to be done; nonetheless, the next Paragraph will reveal their pointlessness in light of this major shortcoming.

## 2.7 The Directive (EU) 2019/633 on UTPs in B2B relationships in the agricultural and food supply chain

On December 19th, 2018, the last trilogue[171] concerning the Proposal took place, where a political agreement was finally reached between the EU Parliament and the Council on the final compromise text. The MEP Paolo De Castro[172] has been the rapporteur for the Proposal in the Parliament, on behalf of the Committee on Agriculture and Rural Development (COMAGRI), and he afterwards narrated the political journey to the Directive[173]. The main concern during this phase was the European Parliament election that had to be held in May 2019. The legislative procedure regarding the Directive on UTPs

[170] Opinion of the European Committee of the Regions, *Unfair trading practices in the food supply chain*, cit., Amendment n. 2.

[171] "Trilogues are informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission. Their purpose is to reach a provisional agreement on a text acceptable to both the Council and the Parliament".
European Parliament. *Interinstitutional negotiations*. Available at: https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations. Accessed 1 October 2020.

[172] Paolo De Castro is a member of the Progressive Alliance of Socialists and Democrats (S&D) group in the European Parliament.

[173] P. De Castro, *La Direttiva UE contro le pratiche commerciali sleali nel settore agroalimentare. Cosa cambia per le imprese e i consumatori italiani*, 2019.

had to be concluded before that, in order to avoid the interruption of the *iter* and to threaten all the work done till that moment.

Because of this ultimatum, the negotiations rapidly proceeded, leading to a legal act rather hasty and incomplete, which will require a significant effort in the implementation by MSs, as it will be further discussed. The Directive was finally published in the Official Journal of the European Union on April 25th, 2019, after that the EU Parliament endorsed the compromise text followed by the Council, and it entered into force on April 30th, 2019, right before the so feared election.

Concerning the issue of the Directive's legal basis, in the analysis of the Proposal it emerged that the legislative text needed a deep review. As said, the chosen legal basis of the Directive is the second Paragraph of Article 43 TFEU, which states: "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy". Therefore, the Directive shall pursue one of the objectives of the CAP, already mentioned in the first chapter and listed at Article 39 TFEU (to increase agricultural productivity, to ensure a fair standard of living for farmers, to stabilise markets, to assure the availability of supplies and that they reach consumers at reasonable prices).

Indeed, the Proposal stated that the Directive's aim was to introduce a common framework at EU level on UTPs, so that divergences between MSs jurisdictions on the issue would be reduced, since undermining the main CAP's objective of ensuring a fair standard of living for agricultural workers[174]. Unfortunately, even with the amendments made during the Directive's negotiations, the final text is rather incoherent in relation to the legal basis, due to the weakness of the link with the agricultural sector. Again, the reference to farmers is veiled. They are mentioned in the first recital of the Directive, which states that "a minimum Union standard of protection against unfair trading practices should be introduced to reduce the occurrence of such practices which are likely to have a negative impact on the living standards of the agricultural community".

At the same time, the sixth recital of the Directive recognises the intrinsic problems affecting the agricultural sector, stating that "while business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes and its exposure to weather conditions. That uncertainty is triggered by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal". However, the recital ends with this statement: "protection against unfair trading practices has become more important for operators active in the agricultural and food supply chain". So, even if it begins focusing on the powerless actors of the chain, the recital then equates all the operators who are active in it when it comes to the protection against UTPs.

Finally, the eighth recital states that UTPs are "likely to have a negative impact on the living standards of the agricultural community". Then, it also adds that this impact can have a direct or indirect effect on farmers, in this last case "through a cascading of the consequences of the unfair trading practices occurring in the agricultural and food supply chain in a manner that negatively affects the primary producers in that chain". The use of the adverb "likely" is disappointing; UTPs always weigh on agricultural workers, whether directly or indirectly, since farmers are the vulnerable part of the chain with less bargaining

[174] Commission's Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, cit., p. 4.

power, and other intermediaries (for example food processing enterprises) can easily pass on them the consequences of unfair practices suffered because of their buyers.

The previous paragraphs highlighted that during the consultation process that preceded the Commission's Proposal, the majority of respondents believed that UTPs affected mostly farmers. The EU legislator somehow forgot this widespread concern. Sadly, the following investigation will reveal that the whole "agricultural community" with its structural weak position in the food supply chain seems to be completely forgotten in the articles that constitute the main core of the Directive too, confirming the doubts on the legality of the connection with the selected legal basis.

### 2.7.1 The Scope of the Directive and its deficiencies

The first article drafts the scope of the Directive and the subject matter, with some substantial differences as compared to the original Commission's Proposal.

Firstly, paragraph 1 provides a general definition of UTPs taken directly from the Commission's communication of 2014[175], which was missing in the Proposal. As previously mentioned, UTPs are defined as "practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another". Then, the paragraph concludes stating that the Directive aims at establishing "a minimum list of prohibited unfair trading practices in relations between buyers and suppliers in the agricultural and food supply chain and lays down minimum rules concerning the enforcement of those prohibitions and arrangements for coordination between enforcement authorities".

Therefore, since introducing a minimum standard of protection, the Directive leaves the opportunity to MSs of extending the list of prohibited practices contained in this legislative text. The definition of UTPs provided by the EU legislator is not a binding general clause prohibiting at EU level every unequal commercial conduct unilaterally imposed. Rather, it is recalled only as a potential guide for MSs in their future policy choices concerning UTPs.

Secondly, paragraph 2 concerns the coverage of operators, which is different from the one originally proposed by the Commission. Indeed, the Parliament strongly supported the idea shared by both the CoR and the EESC of a legislation applying to all businesses involved in the agri-food chain, irrespectively of their sizes. Nevertheless, the Council initially endorsed the scope proposed by the Commission, specifying that in any case MSs could introduce stricter rules, therefore extending the coverage to all operators, also non-SMEs[176]. The found compromise was the identification of some categories of operators protected by the regulation according to their annual turnover; *ergo*, a target coverage was maintained. In particular, paragraph 2 provides that the Directive applies to UTPs occurring "in relation to sales of agricultural and food products by:

a) suppliers which have an annual turnover not exceeding EUR 2 000 000 to buyers which have an annual turnover of more than EUR 2 000 000;

---

[175] 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*, cit.

[176] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain. Confirmation of the final compromise text with a view to agreement*, 5061/19.

b) suppliers which have an annual turnover of more than EUR 2 000 000 and not exceeding EUR 10 000 000 to buyers which have an annual turnover of more than EUR 10 000 000;

c) suppliers which have an annual turnover of more than EUR 10 000 000 and not exceeding EUR 50 000 000 to buyers which have an annual turnover of more than EUR 50 000 000;

d) suppliers which have an annual turnover of more than EUR 50 000 000 and not exceeding EUR 150 000 000 to buyers which have an annual turnover of more than EUR 150 000 000;

e) suppliers which have an annual turnover of more than EUR 150 000 000 and not exceeding EUR 350 000 000 to buyers which have an annual turnover of more than EUR 350 000 000"[177].

In reality, the modification of the Commission's Proposal is not so radical, since in both cases there is an unconditioned presumption that the dimension or the turnover of an agri-food enterprise is synonymous with a certain contractual power. Indeed, in the recitals the Directive itself states that the annual turnover of a company involved in this sector is "a suitable approximation for relative bargaining power"[178]. Consequently, only businesses falling into the above listed categories are worthy of protection according to the EU legislator, being easily subjectable to UTPs. Again, this choice can potentially guarantee more legal certainty than a general parameter, such as the "imbalance of bargaining power", by giving to the actors of the food supply chain "predictability concerning their rights and obligations under this Directive"[179].

In practice, the outcome is not always as predicted and a turnover-based criterion does not always give more certitude to agri-food businesses. Mainly due to the lack of transparency along the food supply chain, sometimes it can be difficult to determine the real annual turnover of the counterpart in the commercial relationship. Therefore, an enterprise can have some problems in understanding if the Directive protects it against the occurrence of UTPs or not. This concept is well explained in the implementation guide of the Directive published by the Fair Trade Advocacy[180]. The guide illustrates that a supplier should answer these questions in order to find out if affected by an UTP in light of the Directive: "Has an unfair trading practice occurred? Does the supplier know the turnover of the buyer? Does the buyer fit into a larger size category than the supplier? Does the supplier know their own turnover?"[181]. Instead, if the EU legislation had a wider and not turnover-related scope, the only question to answer would be "has an unfair trading practice occurred?"[182]. The simplification for businesses is noticeable.

Moreover, this definition of the Scope could cause some discriminatory differentiations in the application of the Directive, since an unfair practice listed among the prohibited ones could become fair, if occurring in a B2B relationship where the commercial parties do not fall into the categories of Article 1 because of their annual turnover[183]. Thus, this Scope determines a fragmented application of the Directive, which

177 Art. 1, par. 2 of the Directive (EU) 2019/633 on UTPs.
178 Recital 14 of the Directive (EU) 2019/633 on UTPs.
179 Ibid.
180 Traidcraft Exchange, IFOAM-EU, Oxfam, SOMO, FTAO, *The Unfair Trading Practices Directive: a transposition and implementation guide*, 2019.
181 Id., p. 11.
182 Ibid.
183 A. Jannarelli, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, cit., p. 48.

will result in more complication when it comes to the enforcement part by MSs authorities. As a further consequence, some actors of the food supply chain could decide to limit or fake their turnover, in order to circumvent this legislation and not be subjectable to it. Or again, they could decide to conclude agreements only with businesses that are not protected by the Directive[184].

The most significant shortcoming of this policy option has already been highlighted during the examination of the Commission's Proposal. This Scope does not sufficiently consider farmers, which should be the real targeted operators in a Directive based on Article 43(2) TFEU. *Ergo*, the consequence could be the illegality of the elected legal basis. Once again, agricultural workers are not distinguished from other actors of the chain, since being treated like common operators and included in the generic category of sellers of agricultural and food products. Even if the tenth recital of the Directive identifies as beneficiaries of the regulation *in primis* farmers and their organisations (POs and APOs, whether recognised or not, including cooperatives), it also states that they are protected since comprehended in the general category of suppliers[185].

This category gathers a huge variety of businesses involved in the food chain, such as food processing industries not exceeding the annual turnovers established at Article 1. For the purposes of the Directive Article 2 defines "suppliers" as: "any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells agricultural and food products; the term 'supplier' may include a group of such agricultural producers or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations"[186]. Against this background, it is difficult to believe that the Directive will meet the objective of ensuring a fair standard of living for the agricultural community. In fact, it does not give the right importance to the intrinsic characteristics of the agriculture sector and it does not adopt that discussed "agricultural exceptionalism" approach, surely required when dealing with issues that strongly affect farmers. Of course, one of the Directive's intents is also to strengthen farmers' position in the market, by increasing their bargaining power *vis-à-vis* other actors of the chain. However, since in reality this objective is pursued in relation to every business involved in the agri-food sector, it cannot sufficiently justify the chosen "agricultural" legal basis.

Another significant fault in the Scope of the Directive is that it does not consider a substantial part of the agri-food chain; farm input suppliers. Again, this lack penalises agricultural workers. As described in the first chapter, they are subjected to stronger bargaining powers not only of their buyers, but also of their input suppliers, due to the market power acquired by these companies during the years. This imbalance of contractual power affecting negotiations between farmers and farm input enterprises is not different from the one affecting their negotiations with big food processing industries or large retailers; both can lead to unfair behaviours by the strongest contractual party. Nonetheless, transactions between agricultural workers and their input suppliers do not fall into the Scope of the Directive, since it applies only to those B2B commercial relationships related to the sale of agricultural and food products.

Agri-food products are defined at Article 2 as the ones "listed in Annex I to the TFEU as well as products not listed in that Annex, but processed for use as food using products listed in that Annex". Indeed, the Annex I of the TFEU do not comprehend farm inputs such as seeds and planting materials, feed, energy, fertilizers, etc. Already in a

[184] Ibid.
[185] Recital 10 of the Directive (EU) 2019/633 on UTPs.
[186] Art. 2 of the Directive (EU) 2019/633 on UTPs.

resolution of 2012[187], the European Parliament recognised that the price for agricultural inputs was increasing as much as the concentration of suppliers of these products, with a direct negative impact on farmers, being essentially price-takers. In particular, the EU Parliament demanded for a better inclusion of the input sector in the HLF for a better functioning of the food supply chain and in the initiatives to enhance the transparency along the chain. Moreover, the EU Parliament believed in the necessity of an intervention on competition "to address the abuses of dominant position of agribusiness traders, food retailers and input companies"[188].

Therefore, it assimilated the dominant position of farm input suppliers and food retailers in the agri-food chain many years ago. This makes even more difficult to understand why these identical matters have not been addressed jointly in the Directive on UTPs. Actually, today market concentration of input suppliers has undoubtedly worsened as compared to 2012. A study of 2015 on the agricultural inputs sector in the EU[189] highlighted that there is a general concern on this downstream concentration issue, since affecting the distribution of value along the chain, meaning higher costs, less product choice and lower profit margins for farmers. Also, from this perspective, the Scope of the Directive on UTPs is rather disappointing. The Commission has recently expressed its worry for this situation of consolidation of powerful input suppliers, while discussing the new key policy objectives of the CAP post 2020[190].

However, nothing has been done yet to contain the issue at EU level. Consequently, it can be affirmed that this Directive does not carry out an actual "supply chain approach", and it missed the chance of delimiting the serious negative effects on farmers of this almost oligopolistic tendency.

An effective position is given in Article 1, where it is stated that the Directive "applies to sales where either the supplier or the buyer, or both, are established in the Union". Of course, it represents a positive outcome of the Directive the extension of the protection to suppliers/buyers established in third countries contracting with EU-based suppliers/buyers, and *vice versa*. This legislative choice can prevent some undesired reactions from the actors of the food supply chain, which could easily occur in the current globalised agri-food market. For example, large retailers could decide to move their registered office in a third country in order to circumvent these provisions, while maintaining commercial relationships with suppliers based in Europe. This policy option avoids the occurrence of such a negative side effect of the legislation.

### 2.7.2 Prohibited Unfair Trading Practices

Initially, the Council enhanced the original Proposal of the Commission, aimed at introducing only six banned UTPs at EU level. The Council endorsed this brief list believing that MSs could later introduce a stricter regulation, since the minimum

[187] European Parliament resolution of 19 January 2012 on the farm input supply chain: structure and implications, (2011/2114(INI)), (2013/C 227 E/02).
[188] Ibid.
[189] See A. Bonanno, D. Drabik, L. Malaguti, V. C. Materia, M. Meyer, T. J. Venus, J. Wesseler, *Overview of the Agricultural Inputs Sector in the EU. Study,* Directorate-General for Internal Policies, Policy Department B: Structural and Cohesion Policies, 2015, p. 15.
[190] European Commission's Directorate-General for Agriculture and Rural Development, *CAP specific objectives…explained. Brief No 3: Farmer position in value chains*, 2018, p. 3.

harmonisation approach of the Directive[191]. Therefore, they could anyway extend this list in order to comprehend more practices and to increase the protection against UTPs in their national jurisdictions. Nevertheless, during the legislative negotiation the EU Parliament required the addition of more than forty prohibited conducts. The found compromise is Article 3 of the Directive, which contains two lists of unfair trading practices: one "black" list of ten and one "grey" list of six unfair behaviours, for a total of sixteen prohibited UTPs.

The first paragraph consists of the practices that are unconditionally prohibited, since manifestly unfair. The first two UTPs of this list are late payments for perishable agricultural and food products and for other agricultural and food products. In particular, it distinguished also if the product delivery occurs on a regular basis or not. In general, for perishable agri-food products the payment of the supplier shall be made no later than 30 days after the end of an agreed delivery, or the date of the delivery, etc. While for other agri-food products, it shall be made no later than 60 days after the end of an agreed delivery, or the date of the delivery, etc. The second prohibited practice is the cancellation of orders of perishable agri-food products at too short notice, identified in less than 30 days.

The recitals of the Directive acknowledged that these three practices have a particular negative effect on sellers of agricultural and food products, for various reasons. For instance, the cancellation of orders damages especially farmers, which can have serious difficulties in finding new buyers for their unsold products within such a limited timer range. The fourth UTP is unilateral changes of the terms of a supply agreement, concerning frequency, method, place, timing or volume of the supply or delivery of the agri-food products, the quality standards, the terms of payment or the prices, or as regards the provision of services. The fifth unfair conduct consists in requiring the supplier payments that are not related to the sale of its agri-food products. The sixth prohibited practice also consists in requiring the supplier extra payments, but in this case for the deterioration or loss, or both, of agri-food products already assigned to the buyer, of course if the deterioration or loss is not due to the negligence or fault of the supplier. The seventh UTP is the buyer's refusal to conclude a written supply agreement when requested by the supplier.

Here, the Directive also specifies that if the agreement concerns the delivery of agri-food products by a member of a PO (cooperatives too) to the PO of which the supplier is a member, and the statutes of that PO contains provisions basically identical to the terms of the supply agreement, in that case this mandatory prohibition does not apply. Concerning this practice, it is clear the intent of the EU legislator of encouraging the conclusion of written agreements among the actors of the food supply chain, since they guarantee legal certainty but also more protection against the occurrence of UTPs. The eighth banned conduct is the abuse of confidential information by the buyer, consisting in the illegal acquisition, use or disclosure of the supplier's trade secrets. The ninth practice is the prohibition of commercial retaliation, so of the buyer's act of threatening to carry out or carrying out commercial retaliation against the supplier when this latter decides to exercise its contractual or legal rights under the Directive.

The prohibition of this UTP is important because it contrasts the so-called "fear factor", ensuring the effectiveness of the legislation enforcement. Finally, the last banned UTP consists in requiring the supplier to pay for customer complaints concerning the sale

[191] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain. Confirmation of the final compromise text with a view to agreement*, cit.

of its agri-food products, given the absence of its negligence or fault. All these unfair trading practices listed in paragraph 1 are always prohibited, even if not embedded in a precise contractual term.

The second paragraph lists some practices that are banned only when they have not been "previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer"[192]. Therefore, the following conducts become tolerable and even fair, according to the EU legislator, when negotiated in advance and in transparency by the commercial parties.

These conducts are: the return of unsold agri-food products to the supplier without paying for them or for their disposal; the charge to the supplier for the stocking, displaying or listing of its agri-food products, or for making such products available on the market; requiring the supplier to bear the cost of discounts on products sold by the buyer as a part of promotion (unless before the start of the promotion, the buyer defines the period of it and the quantity of products to be ordered at the discounted price); requiring the supplier to pay for the advertising costs; requiring the supplier to pay for marketing costs; finally, requiring the supplier to pay for the fitting-out premises used for the sale of its agri-food products. Excluding the first practice of this paragraph, concerning the others the Directive states that the buyer shall also provide the supplier with a written estimate of the payments, if requested by the supplier itself. These last conducts are often called "reverse margin" practices, as explained in the first chapter, in the paragraph regarding the consequences of UTPs on consumers.

Due to the importance of marketing strategies in the current agri-food market, additional charges for services linked to the sale of products became an essential part of the agreements. That is why the recitals of the Directive recognised the importance of including in its scope also these "ancillary services" to the sale of agri-food products[193]. Therefore, if the parties of the agreement deeply discuss its terms and they agree on the payments concerning advertising, marketing and fitting-out premises costs, these practices are legal and not forbidden in light of the Directive. Nevertheless, it is important to note that in the food supply chain the content of the agreement is usually unilaterally determined by the strongest contractual party, hence being imposed on the weakest one.

The negotiation is often driven by large retailers or group purchasing organisations, which have stronger bargaining power also because of their upstream concentration. This grey list has a shortcoming, since it does not take into account that weaker parties are often simple "takers" of the contractual choices unilaterally imposed by their counterparties. Therefore, the paragraph does not give the right attention to the structural imbalance of contractual power existing among operators in the food supply chain. Indeed, this condition makes it almost impossible for suppliers to find other buyers for their agri-food products, or to find agreements with better terms.

Once again, although the intervention on the content of the B2B agreements, the other issue to solve is the extreme aggregation of actors at the end of the chain. To effectively tackle UTPs, the legislator has to proceed with a double action, one on competition and one on the terms of the agreements. As far as this last one is concerned, the addition in this policy of a general clause prohibiting UTPs based on the presence of unequal bargaining power could have been a great solution. Indeed, it could have helped MSs in capturing a wider range of arbitrary commercial conducts. At the same time, the EU legislator's choice to avoid such a general clause and of providing only a short list of

[192] Article 3, par. 2 of the Directive (EU) 2019/633 on UTPs.
[193] Recital 13 of the Directive (EU) 2019/633 on UTPs.

prohibited UTPs could assure more legal certainty to operators, while preventing the issue of over-regulating the phenomenon of UTPs[194].

In fact, the Directive inserts itself in a complex legislative framework made up of national rules and private regulations on UTPs already in force, trying not to further complicate this overall picture. That said, the intervention of the EU legislator could be more audacious. The enterprises that are active in the agri-food sector can actually change their conducts to elude these provisions, in order to still act unfairly. This is why a common binding definition of UTPs could support national authorities in the repression of other discriminatory behaviours, which are not comprehended or that slightly differed from the ones listed in the Directive. The first recital of the Directive points out that MSs are allowed to go beyond the list of prohibited UTPs; in this case more than allowed, almost encouraged, since its shortages.

Then, these two lists of prohibited UTPs at EU level do not contain some conducts that have been generally recognised as unfair. Even the rapporteur of the Directive identified two clearly inequitable practices happening along the food supply chain, which have not been included in Article 3, and consequently should be banned by MSs in the implementation of the legislation. These practices are "below-cost selling" and "double-race auctions"[195]. Double-race auctions are a common mechanism employed by large retailers to get the lowest price from their sellers of agri-food products. Firstly, interested sellers have to make an offer concerning the selling price of their products. Then, once collected these offers, the buyer starts a second race, taking as point of reference the lowest price previously proposed. More than a trading practice, it has been defined as a "gambling", where the lowest price wins[196].

If the race is launched by a powerful group-purchasing organisation, the worst outcome is that this final lowest price could become the leading one for a certain agri-food product in the entire EU market. In the majority of cases, this price is below the production's cost, which means that the consequences of this system are suffered directly by farmers. *Prima facie,* it could be argued that sellers are participating on their own will to double-race auctions; therefore, they should expect these adverse aftereffects. However, also in this context the situation of economic dependence and concentration of buyers affecting the food supply chain influences enterprises' choice, which have difficulties in finding other businesses to trade with. Whereas, below-cost selling consists in the selling of agri-food products below their actual cost price to consumers; a practice often employed by large retailers in order to catch or keep their customers in such a competitive food market.

Unfortunately, these omitted practices in the Directive are the ones that mostly affect the agricultural community, through that "cascading" negative impact mentioned in the eighth recital. Indeed, double-race auctions and below cost-selling force farmers to reduce their production costs in order to survive in the food supply chain. The outcomes are low-quality food products in the shelves of supermarkets together with a reduction of labour costs in the fields, resulting in the incentivisation of illegal work. The choice to exclude from the list these UTPs represents another deficiency of the Directive, which further jeopardises its "agricultural" legal basis. Finally, these two practices have some evident

---

[194] B. Keirsbilck, K. P. Purnhagen, H. Schebesta, T. Verdonk, *Unfair Trading Practices in the Food Supply Chain: Regulating Right?*, «European Journal of Risk Regulation», 9 (2018), Cambridge University Press, p. 699.

[195] P. De Castro, op. cit., p. 87.

[196] F. Ciconte, S. Liberti. *I discount mettono all'asta l'agricoltura italiana.* Available at: https://www.internazionale.it/reportage/stefano-liberti/2018/07/25/passata-pomodoro-eurospin. Accessed 8 October 2020.

negative effects on consumers too. Not only because of the decreased quality of what they consume, but also because these conducts make consumers less aware of what it takes to produce food.

Indeed, while capturing consumers with these marketing strategies based on promotions and low prices, large retailers are miseducating our society on the real cost of food products[197], with an irreparable damage to the agricultural sector. Herein, it has to be noted that also before the Directive, many Member States had already in force some measures to contrast these specific unfair behaviours. However, the aim of the EU intervention was to create a common framework, also to increase the level of protection against UTPs in those countries with a poor legislation on the subject. Therefore, in this case it fails in this objective too.

### 2.7.3 The enforcement challenge: addressing the "fear factor"

The enforcement part of the Directive on UTPs is fundamental in relation to its effectiveness. Indeed, it has been introduced to find a solution to the shortcomings of the Supply Chain Initiative, which did not guarantee an adequate enforcement system, due to its voluntary nature and to the absence of an effective mechanism to address the fear factor. In line with the policy element chosen by the Commission in its Proposal and with the overall choice of a minimum harmonisation approach, the Directive maintains a decentralised enforcement system, coherently with the overall choice of a minimum harmonisation approach and with the reasons before explained.

Firstly, Article 4 of the Directive requires each MSs to designate one or more enforcement authorities to implement the previous legislative provisions that prohibit UTPs. Differently from the Commission's Proposal, it has been recognised to MSs the possibility of identifying more than one enforcement body. In this case, the second paragraph states that it shall be determined a unique contact point for the cooperation among those national authorities and with the Commission, in order to avoid overlaps in the application of the EU legislation.

The implementation of this article, however, may lead to some complications concerning the coordination between enforcement authorities at national level. If a MS decides to appoint more than one authority, it has to clearly predetermine their respective tasks and their scope of action. Otherwise, the designation of two national authorities could cause legal uncertainty and some unpleasant consequences. Among these, the initiation of a double inspection procedure against the same enterprise or, even worse, the imposition of a double fine or another penalty to an agri-food buyer for the same UTP.

For instance, in a recent opinion the Italian Competition Authority has criticised the national government's choice, although not definitive, to appoint two enforcement authorities for the scope of the Directive's enforcement[198]. Specifically, these are the Central Inspectorate of Quality Protection and Fraud Repression (ICQRF), competent for the infringement of the prohibitions laid down in Article 3 of the Directive, and the Italian Competition Authority, which should intervene when other unfair behaviours occur and when they are not included among the Directive's list of prohibited UTPs. The Italian

[197] Id. *Supermercati, il grande inganno del sottocosto*. Available at: https://www.internazionale.it/reportage/fabio-ciconte/2017/02/27/supermercati-inganno-sotto-costo. Accessed 8 October 2020.

[198] Italian Competition Authority, *AS1703 - Recepimento della direttiva UE 2019/633 in material di pratiche commerciali sleali nei rapporti tra imprese nella filiera agricola e alimentare,* 42 (2020).

Competition Authority has highlighted, in particular, the difficulty in autonomously qualifying some trading practices as UTPs and, above all, the potential risk of *bis in idem*[199].

As aforementioned, before the EU intervention various MSs already provided for rules against UTPs and for a national enforcement authority. This was the case for Italy[200]. The Italian Competition Authority, indeed, was charged with the enforcement of those rules and with the power of imposing fines[201]. Therefore, the discretion left to the Italian government by Article 4 of the Directive has actually complicated the national legal framework on UTPs. From one enforcement authority, now two have been appointed and their respective roles are not so easily detectable. This adds more complexity to the overall picture and definitely goes against the intent of the EU legislator.

Then, Article 5 amends the original Proposal too, since it adds the possibility for sellers of agri-food products to choose whether to address a complaint to the competent authority designated by their national legislation or to the national authority of the State in which their buyer is located. Whereas, the initial Proposal of the Commission provided that a complaint could only be addressed to this last authority. Therefore, the sufferer of an UTP can today decide what national jurisdictions will be applied to its specific case. In addition, the second paragraph of Article 5 recognises the right to submit complaints also to POs, APOs, etc., when one or more of their members are victims of UTPs.

This is an important step in order to effectively solve the issue of the fear factor, since it allows keeping the secret on the identity of the selling enterprise and avoiding a potential commercial retaliation, which is any case prohibited under Article 3. To guarantee the confidentiality of the complaint, the third paragraph also states that national authorities "shall take the necessary measures for the appropriate protection of the identity of the complainant or the members or suppliers referred to in paragraph 2 and for the appropriate protection of any other information in respect of which the complainant considers that the disclosure of such information would be harmful to the interests of the complainant or of those members or suppliers".

Therefore, the supplier can demand for extensive protection. The last paragraphs concentrate on some temporal and procedural obligations to assure that national authorities carry out the complaints made in light of the Directive within a reasonable period, also informing the supplier on the state of the proceeding. Once again, these provisions aim at ensuring the effectiveness of the whole regulation and at giving more legal certainty to complainants. Finally, Article 5 states that in case of violation of Article 3, the enforcement bodies shall require the lawbreaker buyers to terminate those unfair behaviours.

In order to achieve this result, Article 6 provides for a series of powers that national authorities shall have to enforce this Directive. In particular, "the power to:

a) Initiate and conduct investigations on its own initiative or on the basis of a complaint;

b) Require buyers and suppliers to provide all necessary information in order to conduct investigations of prohibited trading practices;

c) Carry out unannounced on-site inspections within the framework of its investigations, in accordance with national rules and procedures;

---

[199] Ibid.

[200] See Art. 62 of the Law Decree No.1 of 24 January 2012, *Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività*, converted by Law No. 27 of 24 March 2012.

[201] Id., par. 8.

d) Take decisions finding an infringement of the prohibitions laid down in Article 3 and requiring the buyer to bring the prohibited trading practice to an end; the authority may abstain from taking any such decision, if that decision would risk revealing the identity of a complainant or would risk disclosing any other information in respect of which the complainant considers that such disclosure would be harmful to its interests, and provided that the complainant has identified that information in accordance with Article 5(3);

e) Impose, or initiate proceedings for the imposition of, fines and other equally effective penalties and interim measures on the author of the infringement, in accordance with national rules and procedures;

f) Publish its decisions taken under points d) and e) on a regular basis"[202].

Finally, *ex-officio* powers are provided to national enforcement authorities, as it has long been requested over the years by both EU Institutions and by those supply chain's actors mostly affected by UTPs. Indeed, these powers can prevent and thwart their occurrence along the chain. The lack of these disincentives was one of the factors that led to the overall failure of the Supply Chain Initiative. More precisely, the absence of the power to impose fines and other such measures undermined the credibility of the Initiative, spreading discontent among the weak operators of the food supply chain and resulting in their non-participation in the SCI. Indeed, in the recitals of the Directive these powers are identified as the principal deterrents to unfair trading behaviour[203].

Nevertheless, the Directive was not intended to replace the SCI, but rather to fill its gaps. For this reason, the following Article encourages MSs to promote alternative dispute resolution mechanisms[204], such as the tools provided by the SCI to resolve conflicts based on mutual agreement between businesses. Indeed, even one of the final recitals of the Directive states that "the use of voluntary alternative dispute resolution between suppliers and buyers should be explicitly encouraged"[205]. However, the Initiative ended in 2019. Therefore, this last Article refers only to those dispute resolution tools provided by national legislators thanks to the positive work of the SCI.

Of course, the supplier is free to choose to recur to these alternative mechanisms, so as not to compromise his right to submit a complaint under Article 5, or to turn to civil law courts. Then, even if a UTP's victim chooses an alternative way of resolving the dispute, national authorities can still proceed with their *ex-officio* powers in order to conduct specific investigations. This is a central point, since in this phase a supplier can still be forced by his powerful buyer to mediate, in order to avoid more serious additional consequences. Thanks to the powers listed in Article 6, national authorities can identify this coercion of the victim's will and intervene accordingly with proper measures.

Therefore, this Directive clearly adopts a public enforcement approach, since representing the most effective method to adequately respond to the issue of the fear factor. These last articles purposely aim to help suppliers who have suffered UTPs at overcoming the fear of submitting complaints. Indeed, they avoid the risk of commercial retaliation, by assuring victims of UTPs confidentiality and the chance of submitting complaints indirectly, through their representative organisations. Thanks to these possibilities, it is more difficult to be excluded from the market because of a complaint, and

[202] Art. 6, par. 1 of the Directive (EU) 2019/633 on UTPs.
[203] Recital 34 of the Directive (EU) 2019/633 on UTPs.
[204] Art. 7 of the Directive (EU) 2019/633 on UTPs.
[205] Recital 41 of the Directive (EU) 2019/633 on UTPs.

consequently the report of unfair situations is encouraged. The EU legislator has extended the range of available remedies to tackle UTPs, adding to the private ones also a public form of protection, in line with the peculiarities of the relationships between businesses in the agri-food supply chain. More than focusing on solving only the unfairness of a single transaction, this public remedy has the scope to safeguard and preserve the victim's future commercial deals.

With respect to the cooperation among national enforcement authorities, Article 8 states that they shall collaborate with each other and with the Commission in tackling UTPs. This provision is fundamental in the case of cross-border trading practices, where cooperation is highly required to have access to all information and to effectively stop unfair behaviours. Moreover, the second paragraph of the Article establishes that MSs authorities shall meet at least once per year to share data, best practices, new developments, etc. This should assure an effective implementation of the Directive and a progressive improvement of its enforcement. The last paragraph calls for the Commission to create a private website for all these purposes, and a public one containing useful details for businesses about enforcement authorities and the implementation of the Directive at national level.

Then, Article 10 also provide for specific reporting obligations for MSs authorities, which shall publish an annual report concerning their enforcement activities in light of the Directive, and also for MSs, which shall send to the Commission a general report concerning the application status of the Directive[206].

### 2.7.4 The complementary role of the Directive in the current EU legal framework

Article 9 of the Directive specifies that Member States may maintain or introduce stricter rules or measures to tackle UTPs. As stated several times, the intervention of the EU legislator aims at minimally harmonising national jurisdictions and at introducing a common standard of protection against UTPs, mainly in those MSs that did not have it so far. Actually, after the publication of the Directive, MSs were almost suggested to introduce a stricter national framework to fill those mentioned gaps concerning the Scope of the Directive and the list of specific prohibited UTPs. Of course, these gaps can be filled also by private regulations and initiatives. Therefore, this article simply reaffirms the complementary role of the Directive in relation to national rules on UTPs, which is commonly defined as "vertical" complementarity, because it exists between different levels of jurisdictions (EU/MSs)[207]. Then, as already mentioned, the Directive is also complementary to the before examined EU soft law interventions on UTPs, to the SCI, and to other private initiatives or regulations on the subject. This type of complementarity is defined instead as "horizontal"[208].

Concerning the two main shortcomings of the Directive, identified in the Scope and in the list of banned UTPs, this last “horizontal” type of complementarity could play a key role in solving both of them. In particular, the SCI could have been used to expand the coverage of operators of the Directive, while the Principle of Good Practices to enhance the UTPs’ list provided at Article 3. Member States now have a fundamental task; they should integrate this brand new EU legislation, by employing those codes of conducts

[206] Art.10 of the Directive (EU) 2019/633 on UTPs.
[207] F. Cafaggi et al., op. cit., pp. 8-9.
[208] Ibid.

already developed at European level. Obviously, before the Directive entered in force, some virtuous MSs had already included the Principles in their national jurisdiction. Indeed, the Principles represent a practical and general manual for guiding businesses in their negotiations, which includes examples of unfair and fair-trading practices.

Given the absence of a binding definition of UTPs in the Directive and of what commercial conducts can be instead considered "fair", it could be useful for MSs to add those Principles in their legislation while implementing this Directive. As a matter of fact, also the last press release of the SCI announcing its definitive closure stressed how those Principles should have been promoted as an important standard, encouraging agri-food enterprises to still apply them after the conclusion of the Initiative[209]. The inclusion in national jurisdictions of fair and unfair trading practices' examples can greatly assist enforcement authorities in tackling effectively UTPs, while also helping companies to comply more easily with the new rules.

Then, these codes of conduct seem to take better into account the differences among the various consequences on businesses of UTPs; an approach that is missing in the Directive. In fact, in the first chapter of this analysis various potential effects of UTPs have been distinguished, in particular: isolated *versus* systematic ones; direct *versus* indirect ones; exclusionary *versus* distributional ones[210]. These effects and their divergences should have been considered in the enforcement part of the Directive. Although the Directive has determined an important change of perspective, finally ensuring a public enforcement of the rules on UTPs and overcoming the fear factor issue, it still has a serious limit. In fact, even if it establishes some essential powers that MSs must confer to their national authorities, it also limits itself to regulating only their coordination, with some general obligations concerning their cooperation and the transmission of information. Therefore, the part dedicated to the enforcement is rather hasty. There is no mention of technical and fundamental aspects such as:

a) How national authorities should determine who is the offender;
b) What liability regime should be applied;
c) Who has the burden of proof;
d) Finally, who should be concretely sanctioned[211]; since the effects of UTPs can spread along the chain and be distributed downstream by the actors who are directly affected by them.

By not addressing these points, the Directive has left much of the work to that so-called "vertical" complementarity. From one point of view, each MS can adapt the new European rules to the peculiarities of its own jurisdiction, but on the other hand, this can also lead to a further fragmentation of the current EU legal framework on UTPs. This outcome would be paradoxical, since the intervention of the EU legislator aims at reducing the divergences between national legislations on UTPs, which undermine the proper functioning of the EU food supply chain. In fact, huge differences between MSs jurisdictions, concerning sanctions and liability regimes, could lead to undesirable effects, such as discriminatory treatments and distortions of competition.

In order to avoid this outcome, when defining the specific enforcement's elements national authorities should also take into account the differences between the various

[209] The Supply Chain Initiative. *PRESS RELEASE: European Supply Chain Initiative winds down activities – Principles of Good Practice remain in place*. Available at: https://www.supplychaininitiative.eu/news/press-release-european-supply-chain-initiative-winds-down-activities-%E2%80%93-principles-good-practice. Accessed 15 October 2020.
[210] F. Cafaggi et al., op. cit., p. 7.
[211] Id., pp. 21-22.

effects of UTPs on businesses. In particular, the distinction between "systematic" and "isolated" effects is fundamental. Certainly, "systematic" UTPs have more serious consequences than the other ones, because their negative impact covers a substantial part of the food supply chain, not only the companies involved in the single commercial transaction[212]. In this case, enforcement bodies should identify the ones responsible for passing on the effects of UTPs along the chain, providing for different sanctioning measures, graduated according to the actual role played by each actor in their transmission.

For instance, they should differentiate the liability of a large retailer who abuses his power's position in the chain to unilaterally cancel an order without due notice, from the one of the intermediary forced to pass on the negative consequences of this cancellation to his supplier, usually the farmer. *De facto*, the intermediary enterprise may have no other alternative but to distribute downstream the costs and risks incurred to its suppliers, while the large retailer is just exploiting its strongest bargaining power on purpose. Based on this evidence, both the degree of liability and the sanctions regime should vary. For this purpose, the powers attributed to national authorities in Article 6 of the Directive are crucial, since allowing them to carry out investigations independently and consequently to establish the actual partition of liability among the involved actors, without placing the burden of proving it on the UTP's victim. Indeed, given the lack of transparency of the agri-food supply chain, it would be an arduous and costly task, which would also represent a potential limit to the submission of complaints.

Finally, given the development of a highly globalised agri-food market, the "systematic" effect of an UTP can often affect transnational chains and businesses located in various Member States. This circumstance requires a strong collaboration between national authorities[213], but also a strong degree of harmonisation of national jurisdictions concerning the enforcement, in order to avoid problems in this delicate and essential phase that can guarantee the effectiveness of the whole Directive.

To conclude this analysis, it is clear that the Directive (UE) 633/2019 on UTPs has some serious shortcomings. *In primis*, the Scope of the Directive should be more inclusive, rather adopting the imbalance of bargaining power as a parameter to choose which actors of the food supply chain are worthy of protection. *In secundis*, the list of prohibited UTPs should be extended, to include also those practices that are broadly identified as unfair, together with a binding definition of UTPs or examples of both fair and unfair practices. To solve these deficiencies, an intervention by national legislators and by private regulations or initiatives is required. Therefore, a joint action is needed in both levels of complementarity, the "horizontal" and the "vertical" ones. These interventions should also ensure the effectiveness of that public enforcement system timidly sketched out in the Directive, by adopting a supply chain approach, conscientious of the impacts' differences that an UTP can spread along the food supply chain.

Despite the potentiality of these complementary adjustments, the major defect of the Directive will hardly be solved; the total absence of interest towards the specific weigh that UTPs have on the agricultural community, which consequently undermines the legal basis of the whole Directive, Article 43(2) TFEU. Once again, the European legislator has missed the opportunity to support agricultural producers, and even more regrettable it has been the choice of identifying their protection as the legal basis and as the justification for the adoption of this legislative act. Therefore, it is difficult to affirm that the Directive alone makes a substantial difference concerning those unfair trading dynamics almost

[212] F. Cafaggi et al., op. cit., pp. 21-22.
[213] Ibid.

embedded in the agri-food supply chain. What is necessary is an external and further action to tackle UTPs and to safeguard their main victims, forgotten by the Directive: farmers.

This target becomes more and more indispensable in the current global scenario. Indeed, UTPs and the related phenomenon of unfair distribution of value along the food supply chain are increasingly discouraging EU citizens from working in the agricultural sector, not only driving people away from the fields, but also endangering our daily access to food. Today, food security is again an unsolved issue, calling for a more incisive public intervention in support of the primary sector. An incisiveness that is sadly missing in the Directive (EU) 2019/633 on UTPs.

# THIRD CHAPTER

# THE ROLE OF TRANSNATIONAL PRIVATE REGULATION IN TACKLING UTPS: AN EMERGING TREND

**Summary**: 3.1 - Introduction – 3.2 Transnational Private Regulation and its potential role in tackling UTPs – 3.2.1 The importance of a hybrid intervention on UTPs – 3.2.2 TPR in monitoring compliance – 3.3 Oxfam's "Supermarket Scorecard" – 3.3.1 The focus on the agricultural community: a possible solution to the legal basis' shortcoming of the Directive (EU) 2019/633 on UTPs – 3.3.2 An efficient "supply chain approach": the involvement of consumers – 3.4 The "NoCap" ethical certification scheme – 3.5 Final Remarks

## 3.1 Introduction

The second chapter analysed the path that led to Directive (EU) 2019/633 on UTPs and the main features of this new legislation. Unfortunately, this latest intervention of the EU legislator has many shortcomings. Moreover, instead of achieving the expected result of introducing a complete and uniform regulatory framework at EU level on UTPs, in some aspects, it actually ends up further complicating it. This outcome is paradoxical, given that the decision to act was dictated by the need to reduce the fragmentation of rules governing UTPs' phenomenon. The last paragraph highlighted the fundamental role that regulatory private initiatives could play in remedying these deficiencies; unfortunately, the Directive has not enhanced them.

This chapter will criticise the EU legislator's choice not to adopt an integrated approach, by including those private regulation forms already developed and active at EU level in this public policy. Furthermore, the role of Transnational Private Regulation will be analysed in general, and more specifically, it will be explained how this regulation form can better respond to certain typical needs and structural characteristics of the agri-food supply chain. By adopting a "complementary" approach, the Directive leaves ample room for this type of private regulation. In a context where codes of conduct and alternative forms of dispute resolution had already been developed, the Directive should have boosted them. Due to this enormous lack, national legislators have now the task to implement the Directive (EU) 2019/633 on UTPs by adopting, if possible, an integrated and complementary "horizontal" approach. Indeed, it represents the most suitable and effective action to solve the intrinsic inefficiencies of the agri-food supply chain. This could also be the last solution to finally create a legal framework capable of protecting small farmers against unfair trading behaviours, in line with that much-discussed legal basis chosen by the Directive.

## 3.2 Transnational Private Regulation and its potential role in tackling UTPs

The Directive (EU) 2019/633 on UTPs is a clear demonstration of how such a required public intervention, alone, ultimately proved to be ineffective. One of the reasons

for this failure is to be found in the structure of the current agri-food supply chain, which is highly globalised and characterised mainly by interstate B2B relationships. Of course, transnational chains can be easily controlled through forms of transnational regulation. If adjusted with the improvements suggested over the years, the Supply Chain Initiative could have represented a valid form of transnational private regulation able to stem the problem of UTPs, together with the brand-new public policy provided by the Directive. The choice to suppress and replace the SCI only with a public framework at EU level is therefore questionable. Unfair trading practices are an issue affecting the global food supply chain, with cross-border effects; because of this, they shall be tackled at an interstate level.

An effective solution could have been a complementary approach towards the problem, through both public and private forms of regulation. Therefore, through an integrated approach among the Directive, the SCI and national jurisdictions. Since the end of the Supply Chain Initiative, that "horizontal" complementarity should today be met with other types of transnational private regulation (hereinafter, TPR), capable of filling the huge gaps of the Directive.

TPR has been defined as "a new body of practices, and processes, created primarily by private actors, firms, independent experts like technical standard setters and epistemic communities, exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation"[214]. TPR is the result of an interaction among private actors at an interstate level (NGOs, firms, etc.), aimed at regulating their private, and often divergent, interests. For this reason, it is defined as "private".

TPR principally arises in relation to global value chains, such as the agri-food one, and it is characterised by one regulatory entity, at least, and multiple regulated actors. Its structure and its other typical traits are determined mainly by who the regulators are, the distribution of market and bargaining power between regulators and regulated, and among regulated themselves[215].

Due to the complexity of the private sphere, transnational private regulation can take several forms[216]. The following paragraphs will focus on two private transnational initiatives originating from a NGO and an international association: a third-party assessment mechanism and a certification scheme.

Nevertheless, it is fundamental to distinguish between these types of private interventions and the ones arising from the actors economically involved in the supply chain. Indeed, the latter have often the scope of facilitating commercial practices, expanding businesses' reputation or market shares[217]. Private regulatory schemes resulting from the dialogue among economic players can also be quite effective, especially if they consist of standards embedded in their B2B agreements. In this case, the legal basis of private regulation is the contract; therefore, it is binding on the contractual parties[218]. Private standards are usually developed directly by companies and applied in their commercial transaction, mainly in those fields where the public regulator does not have the

---

214 F. Cafaggi, *New Foundations of Transnational Private Regulation*, «Journal of Law and Society», 1/38 (2011), pp. 20-21.

215 Id., *Regulation through contracts: Supply-chain contracting and sustainability standards*, «European Review of Contract Law», 3/12 (2016), p. 230.

216 Id., *New Foundations of Transnational Private Regulation,* cit., p. 31.

217 F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, International Regulatory Co-operation: Case Studies, Transnational Private Regulation and Water Management, OECD publishing, 3 (2013), pp. 12-13

218 C. Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, «German Law», 12/13 (2012), p.1331.

required technical expertise to intervene. Moreover, they also emerge when the legislator's intervention is slowed down because of the lengthiness of the public decision-making process.

Another type of TPR are codes of conduct, such as the Principles of Good Practice, often arising from the dialogue among stakeholders, NGOs, enterprises, etc., and which may or may not include an enforcement system[219]. Concerning the Principles, the Supply Chain Initiative was actually created to implement them through the commitment of signatory companies and to foster an active discussion among participants too, to eventually improve the code of conduct.

Private standards and codes of conduct are initially voluntary. However, once adopted through a binding agreement they become mandatory, not only if developed by an enterprise, but also from NGOs, associations or initiatives that gather actors with divergent interests. Indeed, the SCI's signatory companies had to comply with the Principles of Good Practice. Nevertheless, the lack of a proper enforcement mechanism undermined the compliance of enterprises and the Initiative's effectiveness.

Different types of TPR can also be distinguished according to "the stage of policy cycle in which they are involved"[220]. In this regard, the next paragraphs will analyse a private regulatory scheme developed by a NGO, which essentially concerns the monitoring phase of businesses' behaviour. On the contrary, technical standards and codes of conduct deal with a different stage of policy cycle, since they lay down the rules to be later implemented, and whose compliance must be finally assessed.

This last distinction, in particular, underlines the difficulty of defining some types of transnational private actions as "regulations". For instance, NGOs often develop private initiatives to raise awareness among civil society on ethical, social and environmental issues, due to the lack of transparency affecting global supply chains. However, the need to report unfair behaviours can sometimes outweigh the creation of an actual regulatory framework.

Therefore, private tools provided by NGOs can be extremely efficient concerning the society's involvement on certain matters, but often they do not represent an effective system capable of regulating those issues. From this, it follows the need for an additional public intervention. For instance, this is the case for UTPs and for the private initiatives that will be further examined.

In fact, it is difficult to define a bare monitoring system or a bare set of rules as a "regulation", such as the Oxfam's Supermarket Scorecard and the Principles of Good Practice. Especially, if they are devoid of an adequate enforcement mechanism. It has been argued that the development of private initiatives "does not of itself indicate the existence of a regulatory regime"[221]. Its existence is, indeed, related to the presence of a whole set of elements, not only rules, but also the process for setting those rules, their compliance assessment mechanism and, finally, the enforcement system.

The following examples of private transnational initiatives mainly assess and monitor the behaviour of private enterprises along the food supply chain. For this reason, the reference to them as "regulations" is weak, but somehow present. In the fight against UTPs, they can be defined as forms of private initiatives complementary to the Directive (EU) 2019/633. Therefore, both public and private actions together constitute the regulatory regime on UTPs. On one side, the Directive provides for a common set of rules at EU level and for a decentralised enforcement system, on the other side, private tools

[219] Id., p. 1332.
[220] F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, cit., p. 14.
[221] C. Scott, *Beyond Taxonomies of Private Authority in Transnational Regulation*, cit., p. 1333.

monitor and assess compliance, raising at the same time society's awareness on the UTPs' phenomenon.

Private transnational actions have also a fundamental function of compensation for those gaps left by public legislation, and particularly in relation to this aspect, it is easy to understand the differences between a TPR where the regulators are a group of large retailers, and a TPR coming from NGOs. When developed by NGOs, especially, TPR generally addresses some critical outcomes that are unlikely to be regulated spontaneously by those powerful economic actors involved in their occurrence, or in any case by a public authority, given the persuasive capacity of the first ones at an interstate level. In the majority of cases, the public legislator does not intervene also because of its lack of capacity in order to effectively manage problems with global implications. That is why the EU legislator attempted to tackle UTPs also fostering vertical and horizontal integration, because it acknowledged the potential limits of its single intervention in the current global food supply chain. In such a globalised economy, state legislators and, more generally, state themselves, have lost much of the regulatory power they once had. Indeed, this power is often left in the hands of big firms capable of influencing the entire global market with their decisions.

Due to this peculiar situation, NGOs have begun to tackle those new negative outcomes affecting value chains, mainly social and ethical issues, produced by private and transnational commercial actions, which are not addressed, or poorly addressed, at public level. TPR discloses a significant change of position of private actors; from being mere beneficiaries or rule-takers, they are now developing rules that govern their business relationships[222]. As highlighted in the first chapter, UTPs affect agreements among enterprises, where the public hand has a limited space of intervention. For this reason, a regulation coming directly from privates has the possibility to intervene with a greater incidence. Moreover, this form of regulation is "transnational" because it controls transborder actors and actions, while also generating regulatory cross-borders effects[223]. Because of this, TPR perfectly responds to those phenomena with similar characteristics, such as UTPs.

### 3.2.1 The importance of a "hybrid" intervention on UTPs

TPR often represents a mixture between public and private interventions; therefore, it is characterised by a "hybrid" nature[224]. Already in the first chapter, it has been deduced the vulnerable border between these two areas, concerning the analysis of the public regulatory intervention on the B2B agreements. Indeed, it entails a public intrusion in freedom of contracts, the main and most important expression of private autonomy.

Such an intervention has however proved to be essential in order to reinforce the contractual position of the weakest actors of the chain, farmers and small-scale producers. In this case, the choice to cross the line between public and private was driven by the new globalised structure of the agri-food supply chain, which has radically modified the relationships among businesses. Since occurring in this transnational and complex reality, UTPs are the perfect example of how new issues affecting interstate trading should be tackled through both public and private actions, leaving behind those rigid boundaries that

[222] F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, cit., pp. 12-13.
[223] F. Cafaggi, C. Scott, L. Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, «Journal of Law and Society», 1/38 (2011), p. 3.
[224] Id., p. 11.

have always delimited them. In fact, a transnational private intervention often arrives in those areas difficult to be regulated univocally, where a public approach alone is not sufficient and requires an integration.

Therefore, in the majority of cases private regulation has a high complementary potentiality in relation to general public policies, above all, when the topic requires a targeted two-tier action. This is the case of unfair trading practices occurring along the food supply chain. Therefore, TPR can fill the gaps left by public policies, and it can be a successful remedy in relation to their negative and not predicted outcomes[225].

This "hybrid nature" of TPR could also be beneficial towards the enforcement of UTPs' rules. Indeed, it has been argued that TPR could strengthen the enforcement provided by public regulation in certain matters, mainly when they have transnational implications and they are difficult to control at state level[226]. Concerning UTPs, the long debate on finding an effective enforcement mechanism led to the choice of a decentralised system. The decision was also driven by the proven failure of the SCI in relation to this particular aspect. Preceding the Commission's Proposal for a Directive, the Inception Impact Assessment analysed the possible consequences of two different policy options regarding the enforcement. As previously discussed, the most suitable solution was the decentralisation of the enforcement's duties among MSs national authorities, since best fitting the current EU legal framework on UTPs.

Indeed, many MSs already had rules against unfair trading behaviours in their jurisdictions before the entry into force of the Directive, and consequently they provided for competent national authorities to implement them. In the end, the Directive actually creates a system of transnational enforcement, since it also requires close cooperation among national authorities, aiming at cohesion in the application of the rules on UTPs in all MSs. It should be noticed that, if improved, the SCI could have however continued to play an important role, because of the alternative dispute resolution mechanisms explained in the second chapter. Unfortunately, due to the lack of participation of the representatives of UTPs' victims in the Initiative, the SCI has never been able to demonstrate its actual effectiveness in relation to those enforcement tools. If the SCI had been kept functioning and its weak aspects had been improved, then its effectiveness could have been assessed from this last perspective too.

TPR is a modern form of regulation, which expresses not only the complexity of the relationship among privates, but also between public and private actors. That is why it perfectly adapts to UTPs, since being an effective tool to combine private subjects with divergent interests, and potentially public ones too. Only a TPR gathering all the actors involved in the food supply chain can overcome the main deficiencies that affected the SCI, while tackling UTPs efficiently. Indeed, if TPR on UTPs comprehended not only representatives of the manufacturing, wholesale and retail sector, but also of the agricultural one, it could encourage the adoption of an effective enforcement system too. It could recover those alternative dispute resolution mechanisms provided by the SCI, this time ensuring their effectiveness, by eliminating that mentioned "two-hats issue" that particularly undermined their credibility.

Therefore, some of the main defects of the SCI could disappear, by rethinking its Governance and by giving equal weight to each stakeholder on the decision-making process. In doing so, TPR could be complementary to the national enforcement mechanism introduced by the Directive (EU) 2019/633 on UTPs, by implementing Article 7 of the Directive, which encourages the promotion of alternative dispute resolution

[225] F. Cafaggi, *New Foundations of Transnational Private Regulation*, cit., p. 26.
[226] Ibid.

mechanisms. At the same time, TPR on UTPs should also recover the basis of the SCI, which are the Principles of Good Practice. This choice could enhance the list of prohibited UTPs at Article 3 of the Directive, overcoming the deficiencies pointed out in the second chapter and consequently ensuring greater protection against the occurrence of unfair behaviours.

Finally, maintaining the inclusive approach of the SCI, such a TPR should apply to buyers and suppliers regardless of their annual turnover, in order to overcome those described deficiencies of the Scope of the Directive on UTPs. Therefore, TPR could also be complementary to the UTPs' coverage of the Directive. Obviously, if it originates and gathers only retailers' stakeholders, or only farmers' representatives, its effectiveness would be limited, as it has been the one of the SCI. For instance, if a private regulation is developed and participated only by a network of "chain leaders", it could be discriminatory and it may not achieve actual fairness in the B2B relationships. At the same time, without the participation of public bodies it would also be not so effective, since lacking authority.

Concerning the fight against UTPs, the perfect model of TPR seems to be the "multi-stakeholder" one[227], since it gathers not only "both the regulated and the beneficiaries" (in our case, large retailers and farmers), but also public entities. This means that EU Institutions should link TPR to the implementation of the Directive on UTPs as a complementary action recognised at EU level, together with national ones. For this reason, the suppression of that interstate private initiative strictly connected to EU Institutions is difficult to understand.

Indeed, the SCI could have been rather improved and strengthened in the light of the new Directive (EU) 2019/633 on UTPs, becoming a strong transnational private form of regulation, accompanied by a public endorsement. If the SCI was still in force, today it could represent a functional private interstate initiative, enforced by a public-decentralised system.

### 3.2.2 TPR in monitoring compliance

Finally, TPR could also play a crucial role in monitoring the rules on UTPs. The last articles of the Directive emphasise the exchange of information between the national authorities and the Commission, concerning their enforcement activities in light of the new EU legislation. In fact, the Commission should be constantly informed in order to monitor the effective implementation of the rules on UTPs. However, since these rules contain some major shortcomings, as mentioned above, an additional intervention also by private regulation is required.

Among other things, such a private intervention could also guarantee a constant monitoring of the enforcement of UTPs' regulation. Indeed, it has been highlighted that an increasing number of private regulators decided to address also monitoring issues, principally in relation to the compliance with private and public standards[228]. In particular, this continuous assessment can take place in the form of labels, certifications schemes and scorecards[229].

[227] Id., p. 35.
[228] F. Cafaggi, A. Renda, R. Schmidt, *Transnational Private Regulation*, cit., p. 14.
[229] J. Falkowski et al., op. cit., pp. 63-65.

### 3.3 The Oxfam's "Supermarket Scorecard"

A good example of such a monitoring tool is given by the Oxfam's "Supermarket Scorecard", which identifies some critical points that generally affect the decision-making process of enterprises involved in the agri-food market[230], in particular in the retail sector. The Scorecard is actually a model of transnational private regulation governed by a NGO, Oxfam[231], where the beneficiaries are essentially farmers, small-scale producers, agricultural workers, women working in the food supply chain, supermarkets' employees, but also consumers. The aim of this private initiative is to evaluate over the years the improvement, or worsening, of supermarkets' impact on the beneficiaries of the regulation. More specifically the aspects evaluated are those concerning: transparency and accountability, workers, farmers, and finally women. For each of these "themes", almost seven scorecard indicators are provided, each of which have in turn other three sub-indicators. These indicators are the result of a joint discussion between Oxfam and other NGOs, agri-food enterprises, technical experts and other actors involved in the agri-food sector[232]. Therefore, Oxfam's Scorecard monitors the sustainability of the agri-food supply chain, in particular concerning those social elements that characterise this concept, such as working conditions, workers' rights, freedom of association, etc.[233].

Concerning the subjects of the investigation, the Scorecard focuses on the most powerful and consolidated large retailers in the US and EU agri-food market, i.e. the actors that influence the entire global food supply chain with their business decisions. To identify them, criteria such as revenue, market share of the groceries sector, and growth were used. These indicators allowed selecting the following retailers for the evaluation: Ahold Delhaize, Albertsons, Aldi North, Aldi South, Costco, Edeka, Jumbo, Kroger, Lidl, Morrisons, Plus, Rewe, Sainsbury's, Tesco, Walmart, Whole Foods[234]. These retailers were indeed defined as the "biggest and fastest growing supermarkets in Germany, the Netherlands, the UK and the US"[235].

Among the Oxfam's reasons for launching this private initiative, there is the encouragement of a form of constructive competition between enterprises; that "race to the top" phenomenon already mentioned in the second chapter. Consequently, the indicators linked to the four main aspects of the scorecard become key performance indicators (KPIs), which supermarkets can use to differentiate themselves from less virtuous retailers, but also to demonstrate their improvement over the years on those crucial points to their customers[236].

Through this scorecard, Oxfam ensures a continuous and steady assessment; an essential effort, in order to determine whether the rules on UTPs are actually producing some positive effects on the B2B relationships occurring along the chain. Nonetheless, Oxfam itself believes in the necessity of an additional action, meaning that this

---

[230] Oxfam International, *Ripe for change: methodology note*, 2018, p. 3.

[231] "Oxfam International was formed in 1995 by a group of independent non-governmental organizations. They joined as a confederation to maximize efficiency and achieve greater impact to reduce global poverty and injustice. Today, there are 19 member organizations of the Oxfam International confederation, and they are working in more than 90 countries, with thousands of partners, allies, and communities". Oxfam International. *Our history*. Available at: https://www.oxfam.org/en/our-history. Accessed 22 October 2020.

[232] Oxfam International, *Ripe for change: methodology note*, cit., p. 5.

[233] F. Cafaggi, *Regulation through contracts: Supply-chain contracting and sustainability standards*, cit., p. 225.

[234] Oxfam International, *Ripe for change: methodology note*, cit., p. 5.

[235] T. Gore, R. Willoughby, *Ripe for change. Ending the human suffering in supermarket supply chains. Report*, Oxfam International, 2018, p. 23.

[236] Oxfam International, *Ripe for change: methodology note*, cit., p. 5

transnational private initiative alone represents just a small part of a much-needed change. This joint action should involve all the actors of the food supply chain, both governments and consumers, in order to effectively restore fairness among the relationships occurring along the chain.

In particular, Oxfam identified some solutions that should be implemented both on the supply and demand side of the chain. Concerning the supply side, citizens should urge governments to enhance agricultural workers protection, while public regulation should ensure proper living conditions and wages to the agricultural community, and invest in the fostering of food chains that are more equitable. Finally, as previously stated, large retailers should redistribute even a small part of the huge portion of captured value, to the vulnerable actors of the chain, and work synergistically with public bodies to reinforce the farmers' position[237].

At the same time, concerning the possible solutions on the demand side, consumers should stress supermarkets to act fairly in their relationships with the agricultural sector, while governments should proceed with various actions on competition law, on B2B agreements, on the implementation of due diligence, etc.[238].

As highlighted in the previous analysis, the EU legislator intervened in almost all these areas. Nevertheless, the results were not overwhelming. Perhaps, also because of the timidity of those interventions. Moreover, mandatory provisions on due diligence at EU level are still missing. Because of this, Oxfam invited the EU Commission to take a step further, and to introduce new due diligence binding rules, in order to make businesses feel responsible for their decisions and for the impact that these have on workers' conditions. Indeed, due diligence is generally defined as that "action considered reasonable for people to be expected to take in order to keep themselves or others and their property safe"[239].

Through such an endorsement, agri-food buyers would have to implement in their decision-making process some methods to identify and remove potential negative outcomes on farmers and workers' rights. This year the European Commission has actually published a "Study on due diligence requirements through the supply chain"[240], which concluded that mandatory due diligence could improve the impact that enterprises have on human rights in general, and finally labour rights too. Even if the EU legislator has not provided for a legislation on the topic, various States have autonomously adopted due diligence regulations in their jurisdictions. Furthermore, in 2014 the Human Rights Council of United Nations established an open-ended intergovernmental working group[241], to elaborate an international legally binding instrument, in order to regulate enterprises' activities with respect to human rights.

Finally, Oxfam highlighted that large retailers must implement due diligence in their decision-making process, even if not mandatory, increase their transparency and guarantee more fairness in the negotiations with their suppliers[242]. Otherwise, it is difficult to prospect

---

[237] T. Gore et al., op. cit., p. 20.

[238] Ibid.

[239] Definition of Due Diligence from the Cambridge Advanced Learner's Dictionary & Thesaurus, Cambridge University Press.

[240] F. Alleweldt, D. Baeza-Breinbauer, M. Bauer, C. Bright, H. Deringer, S. Kara, R. McCorquodale, C. Salinier, L. Smit, H. Tejero Tobed, F. Torres-Cortés, *Study on due diligence requirements through the supply chain. Final report*, European Commission Directorate-General for Justice and Consumers, Brussels, 2020.

[241] United Nations Human Rights Council. *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. Available at: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx. Accessed 25 October 2020.

[242] T. Gore et al., op. cit., p. 20.

an actual revolution of the current agri-food system. This last consideration is indeed at the basis of Oxfam intervention through the Supermarket Scorecard. For instance, concerning the "transparency and accountability" theme, in the first year of assessment eight supermarkets scored zero[243].

This data reveals the general absence of due diligence systems engaging human rights, especially the ones of agricultural workers, and the difficulties in supervising supermarkets' negotiations. The "transparency and accountability" theme is strictly connected also to the "workers" and "farmers" ones, where low scores are often the consequence of lack of transparency and accountability. Nonetheless, in relation to workers' conditions, some supermarkets implemented codes of conduct applying to their suppliers, in order to make sure they respect the workers' rights through the chain. Unfortunately, the compliance is often poorly checked, explaining the general low scores gained by supermarkets also in this field. Indeed, Oxfam underscores that "corporate social responsibility or ethical trade teams are often under-resourced and lack power in relation to supply chain and commercial buying teams. Suppliers, in turn, typically lack adequate support to meet code of conduct standards"[244].

Today, supermarkets protect the farmers' category mainly by buying and selling agri-food products with fair trade certifications in their stores, while not engaging in other more effective activities to reinforce their weak position in the chain. Large retailers, in fact, gained few points also in this aspect, which indicates that they do not actually bear the negative outcomes that their business decisions produce on the actors placed at the end of the food supply chain.

If the Supermarket Scorecard became mandatory and endorsed by a public authority, such as the European Union, the results would surely be fruitful, covering a larger number of businesses involved in the agri-food supply chain. The Scorecard could therefore be complementary to the Directive (EU) 2019/633 on UTPs, also in monitoring the evolution of the B2B trading habits in the food supply chain. Future unfair commercial practices could be progressively identified, thanks to the dynamicity of this assessment mechanism. Indeed, it could grant a continued improvement of the public and private mixed approach towards UTPs, thanks to that "hybrid" nature typical of TPR.

The Oxfam Scorecard could also respond to the need for greater research and clarity on the distribution of bargaining power and value among the actors of the supply chain. The lack of access to this kind of information generates serious difficulties in defeating UTPs. For this reason, the work carried out by NGOs such as Oxfam is extremely important, as they collect fundamental data that are often difficult to acquire, due to the opacity of the food supply chain.

Thanks to its public campaigns, Oxfam denounces the lack of transparency and of information made available by powerful actors involved in the food supply chain. Consequently, consumers demand for more clarity and companies are almost forced to expand their business information in the public domain[245].

However, that data should be processed and evaluated by competent third parties, in order to give greater authority to the research results obtained. The intervention of research bodies linked to the European Union would therefore be beneficial in order to give an impartial vision to the whole outcome. If the Supermarket Scorecard was supported and improved by EU Institutions, in a perspective of "horizontal" complementarity with the Directive, this would certainly help the success of the EU intervention on UTPs.

---

[243] Id., p. 23.
[244] Id., p. 43.
[245] Oxfam International, *Ripe for change: methodology note*, cit., p. 3.

Again, if the SCI was still functioning, this Scorecard could have been incorporated into that private Initiative at EU level, along with the Principles of Good Practice. This potential framework would combine a public interstate and private transnational intervention, in order to tackle UTPs effectively, since representing a phenomenon with cross-border effects. The four themes provided by Oxfam could be certainly expanded to comprehend specifically the compliance with EU rules on UTPs, but also with the Principles of Good Practice.

As previously stated, the Principles constitute a general code of conduct for businesses with examples of virtuous and fair practices, which allow to better evaluate the comprehensive behaviour of a buyer. Moreover, originating from EU Institutions and being independently transposed by some MSs in their national jurisdictions, these Principles are broadly shared at interstate level. Because of this, they could better adapt to this type of transnational private assessment scheme.

### 3.3.1 The focus on the agricultural community: a possible solution to the legal basis' shortcoming of the Directive (EU) 2019/633 on UTPs

This scorecard originates from the Oxfam campaign "End the suffering behind your food"[246], which focuses on the agricultural community and on those workers often called "invisibles", because of the society's unawareness and carelessness towards their working and living conditions. Indeed, that much-discussed food security issue is nowadays essentially affecting the agricultural community. The ones who produce our food are also the ones who have more difficulty in having access to it. Surely, this is one of the biggest paradoxes of our current global agri-food system. In 2017, Oxfam monitored the access to food of farmers and agricultural workers involved in B2B relationships with supermarkets, across five different countries, thanks to the Household Food Insecurity Access Scale (HFIAS) method[247].

The results demonstrated that the majority of respondents experienced food insecurity. Every day, we are unfortunately complicit, together with large retailers, in the exploitation of these people and in the annihilation of their rights and dignity, through a very simple and natural gesture: eating. As stated by the campaign, "human suffering should never be an ingredient in the food we eat"[248]. The Supermarket Scorecard explicitly refers to "farmers", as one of the four critical assessed aspects in the decision-making process of large retailers. This private initiative could therefore be the appropriate response to the non-inclusion of these subjects in the Directive on UTPs, and to the consequent inconsistency of its legal basis: Article 43(2) TFEU.

---

[246] Oxfam International. *End the suffering behind your food*. Available at: https://www.oxfam.org/en/take-action/campaigns/end-suffering-behind-your-food. Accessed 25 October 2020.

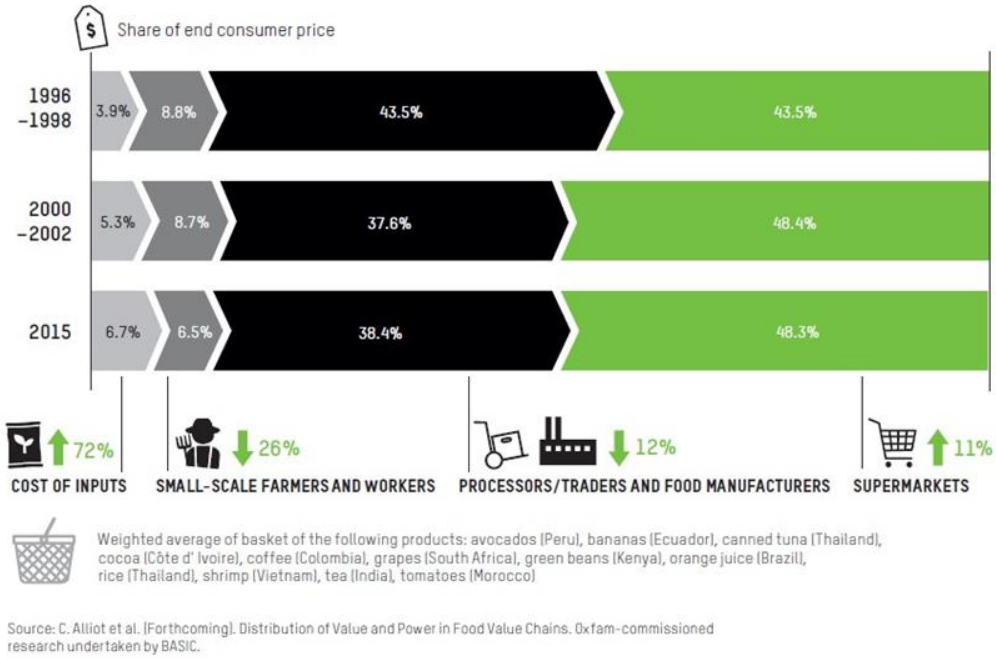
[247] "The Household Food Insecurity Access Scale (HFIAS) provides a simple and user-friendly approach for measuring the impacts of development food aid programs on the access component of household food insecurity. The HFIAS is composed of a set of nine questions that have been used in several countries and appear to distinguish food insecure from food secure households across different cultural contexts. The information generated by the HFIAS can be used to assess the prevalence of household food insecurity (access component) and to detect changes in the food insecurity situation of a population over time". The Food and Nutrition Technical Assistance (FANTA). *Household Food Insecurity Access Scale (HFIAS) for Measurement of Food Access: Indicator Guide*. Available at: https://www.fantaproject.org/monitoring-and-evaluation/household-food-insecurity-access-scale-hfias. Accessed 22 October 2020.

[248] Oxfam International. *End the suffering behind your food*. Available at: https://www.oxfam.org/en/take-action/campaigns/end-suffering-behind-your-food. Accessed 25 October 2020

Indeed, the focus on the poor conditions of this category of workers is missing in the Directive, although its aim should also be to ensure a fair standard of living for the agricultural community. The first chapter highlighted the potential UTPs' negative effects on farmers, which force them to minimise their production costs in order to survive in the agri-food market. This means, *in primis*, the reduction of their employees' wages, the encouragement of illegal employment and of work exploitation. The campaign stresses that "as corporate food giants exercise more power over our food supply, an increasingly small portion of the money we pay for our food actually reaches hard-working farmers, fishers and workers at the start of the chain - in many cases, less than 10 percent"[249].

At the heart of UTPs, there is hence the unfair distribution of value along the supply chain. Oxfam highlighted this issue, disclosing some meaningful pieces of data, which demonstrates clearly the huge gap between the value captured by supermarkets and the one left to farmers. Between 1995 and 2011, large retailers have been able to catch and hold the "greatest share of any supply chain actor of the money their customers spent at the checkout"[250]. At the same time, they also increased their share, while agricultural workers' profits were progressively diminishing. The following Oxfam's table[251] demonstrates the evident inequality generated by this system, confirming also the considerations made in the first chapter.

In fact, also farm input suppliers are steadily acquiring more and more power together with the food distribution industry, since most of the end consumer price is shared between them:




Source: C. Alliot et al. (Forthcoming). Distribution of Value and Power in Food Value Chains. Oxfam-commissioned research undertaken by BASIC.

To find a solution to the unfairness of this system, large retailers should share with farmers just a minimal quantity of the total value captured from consumers: no more than 5% and often less than 1%, as Oxfam's data reveals[252]. Moreover, this would not lead to the increment of the final product price presented to consumers. Therefore, it would not

[249] Ibid.
[250] T. Gore et al., op. cit., p. 17.
[251] Ibid.
[252] Id., p. 19.

affect that so attractive factor on which large retailers lay all their sales and marketing strategies, price.

For this reason, Oxfam decided to assess, through a scorecard, how retailers contribute to the development of unfair dynamics along the food supply chain, such as UTPs and unequal distribution of value, and finally also to the exploitation of those "invisible" agricultural workers. The Supermarkets Scorecard represents an evaluation scheme for buyers in the agri-food supply chain, which holds them responsible for addressing those unfair behaviours that have a negative impact on the agricultural community.

Given the constant growth in the profits of large retailers and the decrease in those of the downstream actors of the food supply chain, the first ones should respond to their unjustified actions that increase this already enormous gap. As highlighted, these industrial giants capture almost all the value generated through the food supply chain. It is therefore unacceptable that they do not redistribute it among other chain's actors. In a long-term perspective, if the agricultural sector becomes unattractive because of its low profits, there will be a lack of labour in the fields and consequently of agri-food products on supermarkets' shelves. This would thus directly affect the food distribution and retailing sector.

Up to now, the issue of the progressive abandonment of agriculture has been addressed in terms of food security, but from an economic point of view, it also means a potential loss for large retailers. It could indeed lead to the closure and failure of many supermarkets, due to difficulties in finding both suppliers to deal with and supplies. Consequently, a policy aimed at restoring fairness in the distribution of value along the agri-food supply chain could also be beneficial for retailers, in a perspective of long-term market resilience. Concerning the key findings of the Supermarkets Scorecard, it has been acknowledged that buyers should start implementing fair trading practices and engaging also in advocacy with governments to support the agricultural community[253]; for the future, it would be a win-win situation.

In addition to tackling in advance the food security issue, supermarkets would benefit from a radical change in their commercial practices for other reasons too. Indeed, Oxfam listed some of the risks of inaction for large retailers. For example, the possible "damage to brand perception from current and future customers, heightened by the potential of new technologies to expose bad supply chain practice"[254].

Therefore, technological development is not only increasing the power of large retailers, but it could also further undermine their reputation in the event of a discovery of their misbehaviour towards their business partners. Another detected risk is the potential intervention of new legislation introducing stricter obligations on supermarkets. For instance, this could happen when that previously-cited intergovernmental working group established by the Human Rights Council of United Nations reaches an agreement on due diligence. Alternatively, if after recognising the potentiality of mandatory rules on the subject, the EU Commission decides to intervene at EU level. Indeed, the best choice for supermarkets would be to start adapting to expected regulatory trends ahead, with a gradual approach, in order to contain the future costs of rules adaptation. While concerning the opportunities of a positive transformation of the food retailing sector, Oxfam pointed out essentially the potential "increasing interest from investors and companies in contributing

[253] Oxfam America, *US Supermarket Supply Chains. Ending the human suffering behind our food*, 2018, p. 19.
[254] T. Gore et al., op. cit., p. 25.

to the fulfilment of the UN Sustainable Development Goals", and the "rising expectations from customers on provenance and sustainability"[255].

Indeed, as stressed for the forthcoming regulatory trends, supermarkets should also predict and adapt to new future trends in consumption, and among these, there is an increasing demand for "sustainable" food products[256]. Consumers demand for more sustainability not only in relation to the environmental impact of food production, but also, from a social point of view, concerning the living and working conditions of those who produce food.

It might be also due to these conclusions that powerful economic actors are starting to cooperate with NGOs in the implementation of sustainability along global value chains[257]. Indeed, from 2018 the Oxfam Scorecard has registered a steadily increasing positive trend in the enhancement of those identified four main critical aspects, also because of the developing sustainable approach of the evaluated supermarkets towards their B2B relationships.

These downstream actors of the chain have probably understood the importance of ensuring fairness in their transactions with suppliers, in order to build stable and lasting relationships. This could indeed avoid that tragic result of a progressive abandonment of the agricultural sector and of shortage of products to sell for buyers, and to consume for people. There has been an increasing evolution in the concept of stability, which has historically characterised farmers' negotiations with their powerful buyers. The first chapter highlighted how farmers often agree on explicitly unfair contractual conditions, in order to ensure in advance the purchasing of their agri-food products. *Ergo*, their choice is driven by the necessity of economic certainty and stability in the commercial relationships. Indeed, by agreeing to unfair clauses, they guarantee that their products end up on the market and not being unsold[258].

Differently, buyers have always exploited their strongest bargaining power to freely decide with whom to bargain, and under which conditions. With the comeback of the food security issue, this large retailers' boundless freedom of choice could end. Therefore, pursuing sustainable and fair relationships along the food supply chain could be beneficial for both contractual parties[259], guaranteeing future stability to every actor and transaction involved.

### 3.3.2 An efficient "supply chain approach": the involvement of consumers

From the consumers' point of view, thanks to the Oxfam's Scorecard they can identify which retailers and food distributors sell agri-food products that contain "human suffering". In fact, the adopted methodology assesses whether food arrives on our table through fair commercial transactions or not. The first results of the Oxfam's Scorecard have revealed that none of the supermarkets under investigation ensured basic human rights to the workers of the agri-food supply chain. With the publication of this discovery and thanks to consumers' reaction, supermarkets were encouraged to improve some of

[255] Ibid.

[256] See The European Consumer Organisation, *One bite at a time: consumers and the transition to sustainable food. Analysis of a survey of European consumers on attitudes towards sustainable food*, Brussels, 2020.

[257] See F. Cafaggi, *Regulation through contracts: Supply-chain contracting and sustainability standards*, cit., pp. 236-237.

[258] M. Imbrenda, *Le relazioni contrattuali nel mercato agroalimentare*, Napoli, Edizioni Scientifiche Italiane, 2016, p. 21.

[259] F. Cafaggi, *Regulation through contracts: Supply-chain contracting and sustainability standards*, cit., pp. 236-237.

those identified critical aspects[260], in order to appear more virtuous in front of public opinion.

The Oxfam's Scorecard also demonstrates that TPR does not need to be enforceable in order to be effective. On the contrary, what makes a TPR effective are often social, economic or political factors. Sometimes, more than public enforcement itself. Concerning UTPs' phenomenon, on one hand public enforcement is certainly essential; in order to tackle that discussed fear factor issue, which arises from the intrinsic characteristics of the agri-food chain and from the imbalance of bargaining power among its players. Actually, in the Directive, the EU legislator successfully addressed it. On the other hand, the most influential economic and social factor is consumers' demand, which could determine the effectiveness of the intervention on UTPs.

If consumers were willing to buy agri-food products that are the result of fair and equitable negotiations along the chain, then its commercial protagonists would more easily adapt to private regulations and standards, potentially without the need for public enforcement. In this case, a powerful economic factor intervenes, which consists in the necessity of supermarkets to respond to consumers' needs in order to remain in the market and be profitable. Therefore, in the future both private and public interventions should focus on policies that raise consumer awareness and increase the transparency of the food supply chain. The aim is to shed light on large retailers and supermarkets' oppressive dynamics, so that consumers decide to consume only "fair" agri-food products, driven by their ethical and moral sense.

These campaigns are aimed at raising awareness among the final actors of the supply chain, the only ones capable of influencing large retailers with their buying choices. When consumers asked for better standards of food safety, supermarkets adapted and consequently they provided for safer agri-food products in their stores. Actually, consumers' demands shape retailers' business decisions more than mandatory regulations. If consumers start asking for more transparency on the price paid to each actor in the supply chain and on the fairness of the B2B relationships, large retailers will surely answer to this call. The EU legislator can of course intervene in multiple ways to address the disparity of power in the chain that crushes agricultural communities; by encouraging form of aggregation, or by providing for stricter rules for agri-food buyers concerning negotiations and agreements, together with effective deterrents against their violation. As argued in the first and second chapters, this public intervention is needed to effectively tackle some aspects of UTPs, such as the fear factor, and to generally increase the bargaining power of farmers.

Nevertheless, to eradicate the structural inefficiencies that characterise the food supply chain, consumers' active role is essential too. That is why public policies must go hand in hand with TPR such as the Oxfam's Supermarket Scorecard, whose scope is to make consumers aware of the real value of food products, and on the consequences that their purchasing choices have on the whole chain. In this peculiar case, the awareness is mainly raised on the impact that their purchasing decisions have on the weakest actors of the food supply chain, agricultural workers.

Given the little interest of the EU Institution in raising this type of consciousness among consumers, private actors such as NGOs must fill this gap. When public regulations concerning the agri-food supply chain are not fostered through social campaigns and initiatives aimed at educating consumers, they are surely less effective. Indeed, they do not adopt that highly requested "supply chain approach", since not considering a fundamental

[260] Oxfam America, op. cit., p. 19.

part of the chain, consumers. Until now, it has been argued that the Directive (EU) 2019/633 on UTPs has other two main shortcomings in relation to the implementation of this fundamental approach. The first one refers to the absence of a targeted protection of farmers, the main victims of UTPs. While the second one is related to the lack of consideration of another substantial part of the agri-food chain, farm input suppliers. Finally, the last and third shortcoming is that the Directive completely disregards consumers, the only ones capable of giving effectiveness both to public and private action against UTPs.

### 3.4 The "NoCap" ethical certification scheme

As mentioned before, private regulators are assessing compliance with both private and public regulations not only through scorecards, but also through certification schemes and labels. This is the case of the "NoCap" ethical certification scheme, which has been developed by the international "No Cap" association, founded in Italy by Yvan Sagnet[261], in 2011.

This association evaluates agri-food companies and products through a multifunctional method, which assesses six main aspects, giving to each of them a score from one to five. Precisely, this evaluation aspects are the following: ethics in business relationships, decarbonisation, virtuous and fair supply chain, zero waste and circular economy, added value on products, and finally, ethical animals' treatment[262].

The similarity with the Oxfam's Scorecard is evident. Indeed, both private regulations identify *ex ante* some principal feature in which to control the performance of the regulated, and both use scores to evaluate them. In particular, the "No Cap" association together with CETRI-TIRES[263] has developed the evaluation criteria, and only a positive assessment of each of them can result in the final recognition of the "NoCap" label. Therefore, agri-food enterprises shall prove their compliance with all the criteria, which is verified by a "No Cap" team of experts, together with the Agrifood Quality Department (DQA) certification body, accredited by the Italian Ministry of Agriculture, Food and Forestry Policies and by "Accredia"[264].

Moreover, controlled businesses do not pay for these assessment operations, but consumers actually pay them, through a minimum percentage levy on the final product's price[265]. Certainly, this is a fundamental aspect for guaranteeing the effectiveness of the

[261] Ivan Sygnet was the spokesperson during a 2011 strike against gangmasters in Italy, which led to the introduction in Italy of the crime of gangmastering and to the first trial in Europe on slavery, ended with the conviction of twelve agricultural gangmasters. He now works as a trade unionist for FLAI-CGIL (Federation of Agro-Industrial Workers of the Italian General Confederation of Labour).

[262] No Cap. *I sei criteri di valutazione*. Available at: https://www.nocap.it/certificazioneetica/bollino-etico/. Accessed 30 October 2020.

[263] "The "European Circle for the Third Industrial Revolution" (CETRI-TIRES) is an association founded in 2010, made up of EU citizens and experts in various fields, such as economic, technical and social sciences, who share the vision of a new distributed, interactive and democratic energy model". CETRI-TIRES. *Chi siamo*. Available at: http://cetri-tires.org/press/chi-siamo/. Accessed 30 October 2020.

[264] "Accredia was appointed by the Italian government to attest the competence, independence and impartiality of Conformity Assessment Bodies (CABs) which verify the conformity to the standards of goods and services. All European countries have an accreditation body, which operates in line with the requirements of Regulation EC 765/2008 and with the international standard ISO/IEC 17011". Accredia. *About us*. Available at: https://www.accredia.it/en/about-us/. Accessed 30 October 2020.

[265] No Cap. *I sei criteri di valutazione*. Cit.

certification scheme. Many private certifications, in fact, require companies to pay directly the inspection body, which can lead to a potential lack of confidence about the effectiveness of the certification method and to a possible loss of the value of the product on the market. The "No Cap" international association also decided not to be financed by the agri-food industry, in order to be fully independent and impartial in its assessment and monitoring activities.

Therefore, consumers support its functioning directly through the purchase of "NoCap" food products. The previous TPR's analysis highlighted that some of the main features of this form of regulation are often determined by who are the regulators. In this case, the regulator is an association firstly founded by an "invisible" agricultural worker, therefore, it is almost obvious the consequent decision to remain disconnected from the strong powers of the supply chain.

The "NoCap" label is able to combine a certification with a scorecard, since containing an indication about the achieved score in each of the evaluated aspects by the agri-food enterprise. Therefore, it does not simply display whether a given product has been produced in compliance with ethical, social and environmental sustainability standards, but also what is the percentage of that compliance. As a result, the food company is capable of acknowledging where to improve, and consequently it can decide to implement some best practices, in order to require a review of the score received for a certain indicator.

This mechanism allows constant monitoring of the behaviour of the actors involved in the supply chain, while encouraging the improvement in the dynamics that govern it. This private certification scheme is clearly following the same philosophy of the Oxfam's Supermarket Scorecard. Indeed, also this form of private intervention assumes that public regulation and its enforcement mechanisms, alone, cannot determine an effective change in the logic of power affecting the agri-food supply chain[266]. Both Oxfam and "No Cap" association believe that this revolution must come from public opinion *in primis*, the only one capable of influencing both public policies and of obtaining remarkable results.

However, rather than revealing the negative outcomes of agri-food companies on the six identified themes, the private "No Cap" certification scheme highlights the positive scores of the assessed businesses. Therefore, unlike the Oxfam's Scorecard, this private regulation aims at giving prominence to those virtuous chain's actors who committed to a fairer and more transparent food supply chain, while also promoting their products in the market. The scope is also to encourage the transaction towards a more sustainable agri-food system; indeed, the "No Cap" label ensures that a certain food product has been produced respecting social, environmental and ethical aspects. As stressed during the analysis of the Scorecard, consumers' awareness concerning these sustainability elements is increasing, and private initiatives such as this one are further boosting it.

The intent is of course to extend this assessment model and the related label further across national borders, in order to achieve an effective form of transnational private regulation. Actually, this private regulatory initiative is already producing cross-borders effects, which are typical of transnational regulatory interventions, since "NoCap" agri-food products are sold also outside the Italian border. Indeed, even if the project started in Italy, involving mainly Italian agri-food companies, today food products with the "NoCap" label are also available in supermarkets and stores based in other EU States, such as Great

[266] No Cap. *Certificazione etica: premessa*. Available at: https://www.nocap.it/certificazioneetica/premessa/. Accessed 30 October 2020.

Britain and Germany[267]. Italy is in fact one of the leading European countries in the agri-food sector; therefore, it has an important economic role in the current globalised food supply chain, and it exports its food products throughout all Europe.

Currently, the NoCap certification scheme involves almost twenty agri-food enterprises and hundreds of those before-mentioned "invisible" agricultural workers, who are principally non-EU migrants. If they were before working in conditions of extreme precariousness, illegality, danger, poverty and without the recognition of their basic human rights, today, they can actually benefit from proper housing, regular contracts, safety equipment, transports, etc[268]. Therefore, the results of this certification scheme are quite satisfactory, at least concerning the living conditions of those vulnerable actors of the chain, who have been completely forgotten by the EU legislator in the Directive on UTPs.

The "NoCap" certification scheme represents another example of how private regulators are able to intervene with a more comprehensive "supply chain approach" than the EU legislator did, with the Directive (EU) 2019/633 on UTPs. In fact, through the label, consumers are aware that the food products they buy comes from a fair chain, where each actor has been paid the right price. In this case, even if the emphasis is mainly on the exploitation in the fields of the so-called "invisible" workers, ensuring their protection also means safeguarding farmers' rights. Or, better yet, it means securing that fair standard of living for the agricultural community. The "NoCap" label guarantees the fairness of all the relationships occurring along the supply chain, which also means the absence of UTPs. Indeed, large retailers selling "NoCap" agri-food products are obliged to pay their suppliers an equitable price and to act fairly in their B2B agreements.

Consequently, large retailers also renounce to capture that excessive portion of value along the chain, and a fair distribution is guaranteed. In particular, supermarkets must conclude a binding agreement to enter the "NoCap" network and sell its food products, where they commit to respect some established ethical, social and economic parameters[269]. Even if this can entail a (minimal) reduction in supermarkets' profits, at the same time it allows them to maintain those customers who are more attentive to the ethical and social sustainability of agri-food products. Once again, this would be a win-win situation.

### 3.5 Final remarks

Private regulatory initiatives such as the Oxfam's Supermarkets Scorecard and the "NoCap" ethical label allow consumers to make a conscious and responsible choice of consumption: to buy good, clean and fair agri-food products. As the Slow Food's Manifesto stresses, food shall be not only good for consumers, but also for those who grow it[270].

Only by reducing the information asymmetry affecting the whole food supply chain, also due to the many intermediaries placed between producers and consumers, the latter will acknowledge the real and actual value of what they eat. As long as the only parameter

[267] See the "No Cap" points of sales' map. Available at: https://www.google.com/maps/d/u/0/embed?mid=1wfHcKs1uUJScsRi1AIsI4Qm-1uPG7Twz&ll=41.89015761896085%2C12.492375709450453&z=11. Accessed 31 October 2020.

[268] No Cap. *La prima filiera etica italiana contro il caporalato*. 2019. Available at: https://www.nocap.it/certificazioneetica/. Accessed 31 October 2020.

[269] No Cap. *Attestazione di Rete*. Available at: https://www.nocap.it/certificazioneetica/attestazione-di-rete/. Accessed 31 October 2020.

[270] Slow Food, *Good, Clean and Fair: the Slow Food Manifesto for Quality*, 2015.

of choice for consumers will be the (lowest) price, there will not be a paradigm shift of this currently unsustainable agri-food system, not only for agricultural producers, but also for our future food security. In the majority of cases, price is the only available information that consumers can find on the food products they buy. Or, at least, the easiest information they can have access to. Consequently, price represents the main data driving their choices. A synergistic work between public and private actors can in this case make a huge difference, through forms of both TPR and public intervention.

As highlighted in the JRC Report, the role of the SCI as a private initiative at EU level should have been rethought with the entry into force of the Directive (EU) 2019/633 on UTPs, as full part of this new public legislation. The Directive introduced a fundamental public enforcement mechanism in order to address UTPs' issue, filling the main gap of the SCI. However, this Initiative had to remain active, to enhance and fill, in turn, the gaps of the public regulation. By improving the SCI, with a greater participation of the weakest actors of the chain and, perhaps, also with a consumer panel, to get an overall supply chain approach, the Initiative could have played a strategic complementary role in relation to the Directive. Indeed, it could have represented an effective form of private transnational regulation, supported by EU institutions, therefore endowed with a certain authority and persuasive capacity.

On the contrary, private initiatives coming from NGOs such as Oxfam meet inevitably a more limited public, most of the time already aware of the paucity of transparency, sustainability and fairness in the food supply chain. The other part of consumers lacking this awareness, since not able to have access to certain information about the chain, could be reached thanks to a targeted initiative supported by the European Union. EU Institutions have an availability of resources that NGOs or other private associations do not generally have at their disposal, as well as a more extensive network of contacts.

The SCI could also have been the proper place to collect all these private regulatory initiatives, in order to implement them at EU level. Given its absence, national legislators are today required to work synergistically with private regulators to guarantee an effective transposition of the Directive on UTPs. In fact, only these types of TPRs could ensure the monitoring of the behaviour of big buyers, the inclusion of subjects and unfair trading practices left outside the Scope of the Directive, the necessary engagement of consumers, and thus effectively tackling UTPs occurring along the supply chain.

Today, agriculture is no longer considered just a primary production activity, but it actually includes a whole other set of services from which citizens can benefit[271]. In particular, they are increasingly demanding for agri-food products that satisfy them not only in terms of taste, but also in more social and cultural ones. They are more and more attentive to the context from which the product they buy comes, and consequently the act of buying becomes a conscious choice to support a fair and equitable agri-food system.

Consumers are the main protagonists in the process of revolution towards fairer commercial practices and behaviour, greater transparency, and human rights' respect concerning the most vulnerable players in the chain. This process is defined as "re-socialisation" of the food supply chain, and it involves a relationship between peers, which currently does not exist among chain's actors[272]. The imbalance of bargaining power, the unequal distribution of value and their negative effects can be tackled only through a new civil economy that goes beyond the boundaries of profit[273].

[271] See M. Imbrenda, op. cit., p. 121 ff.
[272] Ibid.
[273] Ibid.

Certainly, the last analysis highlighted even more the complexity of the UTPs' issue. In fact, today that "horizontal" complementarity has the important task of filling many gaps of the Directive (EU) 633/2019 on UTPs, among which there is the inadequate civil society's awareness on the topic. Unfair trading practices along the B2B agri-food supply chain are the result of unhealthy dynamics, which require an intervention that goes not only beyond that anachronistic rigid division between public and private sphere, but also beyond the consumers/businesses dichotomy. In order to effectively tackle this problem, various actions must be taken, involving all the actors of the food supply chain, therefore consumers too. The issues affecting the agri-food chain must be dealt with a supply chain approach, which is easy to acknowledge, but apparently more difficult to put into practice. Especially, if public intervention does not recognise and value private transnational regulation as a complementary and fundamental part of its action on unfair trading practices.

# CONCLUSIONS

Through this work, the issue of Unfair Trading Practices in the B2B relationships along the EU food supply chain has been examined starting from the analysis of its structural characteristics. The phenomenon of UTPs can indeed be understood only in light of the dynamics that govern the food supply chain, therefore, by acknowledging each actors' role and the intrinsic problems that affect the chain. The root of the problem can be located in the fragmentation that has historically characterised the EU agricultural sector, compared to other economic sectors, and in the progressive process of globalisation of the agri-food market. This last one, indeed, has led to a consolidation and concentration of powerful players at both the beginning and the end of the food supply chain.

*In primis*, there are farm input suppliers, whose role is regrettably not taken into account, neither in the public nor in the private interventions that were examined. These subjects are progressively imposing themselves on farmers through seed patents and ongoing mergers, with disastrous consequences not only for the agricultural community, but also for citizens, since we are witnessing a rapid process of loss of biodiversity in the fields. In addition to undermining the agricultural activity and its fundamental task of preserving biodiversity, farm input suppliers are also increasingly capturing value along the supply chain, again at the expense of farmers.

*In secundis*, globalisation has also caused the acquisition of a dominant position by the food distribution industry in the agri-food market. Large retailers are the nearest actors to consumers in the food supply chain; therefore, they are in the best position to impose their control over that part of the chain that goes from fields to their shelves. More precisely, their strategic position in the market and their progressive gathering in group purchasing organisations ensure them a powerful bargaining power *vis-á-vis* their suppliers. Consequently, they are also capable of capturing most of the value along the food supply chain, through unfair commercial practices embedded in their B2B agreements.

Starting from these preliminary remarks, the paper addressed a specific analysis of UTPs and their consequences, stressing the lack of investigations on the topic, since considered a "new" phenomenon. This clarification has been made in various acts at EU level, perhaps, also in order to justify the absence over the years of an effective hard law intervention to stem this problem. Probably, the European legislator initially hid behind this conclusion, to justify the fostering of soft law interventions, rather than more invasive ones.

However, the examined "potential" effects of UTPs, both on businesses and consumers, have highlighted the need also for hard law. In fact, UTPs proved to affect mainly the agricultural community, putting at risk the stability of the whole sector, thus re-proposing a food security issue. If agriculture becomes an unprofitable sector, its attractiveness decreases, and in a not so far future it will be difficult to find people willing to work in the fields. Since access to food is a primary need, this result must be absolutely avoided. Without farmers, indeed, there is no food, and without food, there is no life.

For this reason, during the years public policies have always been supporting the agricultural sector and its community, through the so-called "agricultural exceptionalism" approach. Farmers' and, consequently, food security support justifies the "exceptional" public intervention on private autonomy and freedom of contracts. Indeed, some other potential remedies have been analysed in order to limit the occurrence of UTPs, such as the restoration of a short food supply chain and product differentiation. Nonetheless, the ones capable of tackling more deeply this issue are the public ones.

Firstly, the regulatory intervention on competition has been analysed, which targets the UTPs' issue at this source, adjusting farmers and small producers' status of powerlessness in front of their powerful buyers. The introduced exemptions concerning the agricultural sector encourage forms of aggregation between producers (POs, APOs, etc.), mainly, in order to increase their bargaining power. However, there are other aspects that need to be addressed, to which this form of intervention alone cannot provide an adequate response.

The second necessary public intervention is indeed on the content of the B2B agreements. Therefore, its aim is to tackle the consequences of UTPs, rather than their causes. In this case, as mentioned before, the "agricultural exceptionalism" approach justifies the public interference in a matter that is generally left undisturbed by public policies, which are private contracts. Here, the theme of "agricultural exceptionalism" is intertwined with that of contractual justice, and allows the pursuit of a distributive justice, rather than only a commutative one, by the EU legislator.

In fact, the need to guarantee a fair distribution of value and resources along the food supply chain and to eradicate UTPs' phenomenon, is strictly connected with the need to support the agricultural community. The positive outcome is not only beneficial for the single contractual parties of the B2B relationships, but also for the entire community, in terms of ensuring access to food to everyone. For this particular reason, Article 39 TFEU includes among the objectives of the CAP to ensure a fair standard of living for the agricultural community.

Therefore, the first chapter already highlighted the need for a public intervention against UTPs on several fronts, which immediately demonstrates the complexity of this phenomenon. Moreover, the subsequent chapters also acknowledged the necessity of a differentiated approach, not only from a public perspective, but also from a private one, further complicating the overall picture. Starting from these conclusions, the second chapter analysed the EU legal framework on UTPs and the path that led to the public intervention of the EU legislator on B2B agreements along the food supply chain: the Directive (EU) 2019/633 on UTPs.

Immediately, the EU legislator's resistance to intervene with a binding regulation on UTPs is detectable. Indeed, the first EU acts to be examined on the topic are purely of soft law, essentially promoting private regulatory initiatives, such as the Principles of Good Practice and the Supply Chain Initiative. In particular, the Principles represent an extremely useful code of conduct for agri-food businesses in their relationships. Because of this, throughout the analysis the importance of including them in a public intervention has always been stressed.

Concerning the SCI, it was a potentially successful private initiative on UTPs at EU level, therefore with a transnational trait, which included the Principles and required its members to respect them. Moreover, it also provided for alternative dispute resolution mechanisms. As stated, the potentiality of this private approach is considerable; however, it had also many shortcomings that led to its inefficiency and to its end. Among these, there is the lack of farmers' participation in the initiative, a partiality defect linked to its governance system, and finally, the most relevant one, the lack of an adequate enforcement system capable of steaming the so-called "fear factor".

Over the years, various solutions to these problems have of course been identified, and if implemented, they could have strengthened the role of the SCI and determined its final success in the fight against UTPs. Obviously, always in a complementary perspective compared to other public interventions. Nevertheless, after many requests for a more incisive action on UTPs, coming from both EU Institutions and agri-food actors, the EU

Commission decided to present a Proposal for a Directive completely unrelated to the previous soft law interventions at EU level. Indeed, not only it does not contain a reference to the Principles of Good Practices, but also to the SCI. Unfortunately, the final text of the Directive will have the same shortcomings.

Before reaching this disappointing conclusion, also some other Directive's deficiencies have been analysed. In particular, the ones concerning its Scope and its lists of prohibited unfair trading practices. In both cases, the worst shortcoming is the lack of an effective supply chain approach and of farmers' protection *in primis*, which undermines the entire legal basis of the Directive, Article 43(2) TFEU.

Perhaps, the only merit of this legislative act is the introduction of a decentralised enforcement system capable of effectively tackling the so-called "fear factor", therefore overcoming the SCI's fault. It is surely unsatisfactory that the EU legislator, once finally reached the goal of intervening on the B2B agreements in the food supply chain, has missed the opportunity to introduce a regulation at EU level capable of ensuring effectively distributive contractual justice. Given that the right conditions were in place to achieve this result, it can be that those industrial giants controlling the food supply chain have once again managed to impose their demands. In today's highly globalised reality, those who hold the economic and regulatory power are no longer national States or the European Union, but the big private actors that operate transnationally, imposing themselves on the market, often because they are not sufficiently controlled.

This lack of supervision is related to the limited capacity of public institutions in controlling phenomena and subjects that produce cross-borders effects. From this follows the need of a public approach towards UTPs reinforced by a private transnational regulatory action, in a complementary perspective defined as "horizontal".

The Directive (EU) 2019/633 on UTPs has indeed a complementary role, both in relation to MSs public regulation on UTPs and to private regulatory interventions. Nevertheless, more boldly, the Directive should have recalled both the Principles and the SCI, avoiding its termination, therefore strengthening them at EU level. Indeed, this choice would have solved two of the main shortcomings of the Directive: the lack of inclusiveness of its Scope and the limitation of its UTPs' list.

Since this did not happen, the third chapter analysed the potential role that other transnational private regulations could have in filling these gaps. Indeed, the intrinsic characteristics of this type of regulation perfectly suit UTPs' issue, which, since affecting a transnational food supply chain, also produces cross-borders effects. Moreover, the typically hybrid nature of TPR makes it possible to combine both a public and private approach towards UTPs, which is essential in the fight against them.

Consequently, two private regulatory models have been examined, developed with the aim of monitoring companies' behaviour in the agri-food supply chain: the Oxfam's Supermarket Scorecard and the "NoCap" ethical certification scheme. Both proved to be effective private initiatives, above all, because capable of filling those protection gaps left by the EU legislator. In particular, what has been highlighted was their fundamental role in increasing consumer awareness on the issues affecting the food supply chain. This last one represents indeed another aspect completely forgotten by the EU legislator. The involvement of the civil society in the fight against UTPs is fundamental in order to achieve an effective result, given that consumers are the most important factor influencing B2B dynamics along the food supply chain.

In conclusion, the Directive (EU) 2019/633 on UTPs represents a feeble attempt to intervene at public level on the topic, praiseworthy in the intent, while disappointing in the outcome. It is now up to MSs to implement this legislation using a complementary

approach, by integrating the private initiatives already developed at EU level and the TPRs examined, since capable of engaging consumers and accompanying them in a transition towards a more sustainable global agri-food system, from an ethical and social point of view. Indeed, only through such a "supply chain approach" it will be possible to eradicate not only unfair trading practices, but also the imbalance of bargaining power and unfair distribution of value along the chain, therefore, ensuring an effective fair standard of living for the agricultural community. Finally, this approach can also prevent that so feared food security issue.

# BIBLIOGRAPHY


Agra CEAS Consulting, Areté srl, European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, IFAU, *Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain. Final report - Revised version*, Luxembourg, Publications Office of the European Union, 2016

Agricultural Markets Task Force, *Improving market outcomes. Enhancing the position of farmers in the supply chain*, Report, Brussels, 2016

ALBANESE A., *Contractual Justice and Market Efficiency in the Supply Relationships within the Agro-Food Chain*, Rivista della Regolazione dei mercati, 2016, 2

ALLEWELDT F., BAEZA-BREINBAUER D., BAUER M., BRIGHT C., DERINGER H., KARA S., MCCORQUODALE R., SALINIER C., SMIT L., TEJERO TOBED H., TORRES-CORTES F., *Study on due diligence requirements through the supply chain. Final report*, European Commission Directorate-General for Justice and Consumers, Brussels, 2020

AND International, European Commission's Directorate-General for Agriculture and Rural Development, ECORYS*, Study on economic value of EU quality schemes, geographical indications (GIs) and traditional specialities guaranteed (TSGs). Final report*, 2020

BALAZS B., BLACKETT M., BOS E., EYDEN-WOOD T., KNEAFSEY M., SCHMUTZ U., SUTTON G., TRENCHARD L., VENN L., *Short Food Supply Chains and Local Food Systems in the EU. A State of Play of their Socio-Economic Characteristics*, eds. S. Gomez y Paloma, F. Santini, European Commission, Joint Research Centre, 2013

BENEDETTO G., FURES R., IDDA L., *Il marketing territoriale per il settore agroalimentare*, inside Marketing Agroalimentare. Specificità e temi di analisi, ed. G. Antonelli, Franco Angeli, Milano, 2004

BONANNO A., DRABIK D., MALAGUTI L., MATERIA V. C., MEYER M., VENUS T. J., WESSELER J., *Overview of the Agricultural Inputs Sector in the EU. Study*, Directorate-General for Internal Policies, Policy Department B: Structural and Cohesion Policies, 2015

BRAGDON S. H., HAYES C., *Reconceiving public-private partnerships to eradicate hunger: recognizing small-scale farmers and agricultural biological diversity as the foundation of global food security*, Georgetown Journal of International Law, 2018, 49, 4

CAFAGGI F., IAMICELI P., *Unfair Trading Practices in food supply chains. Regulatory responses and institutional alternatives in the light of the new EU Directive*, 2019

CAFAGGI F., *New Foundations of Transnational Private Regulation*, Journal of Law and Society, 2011, 38, 1

CAFAGGI F., *Regulation through contracts: Supply-chain contracting and sustainability standards*, European Review of Contract Law, 2016, 12, 3

CAFAGGI F., RENDA A., SCHMIDT R., *Transnational Private Regulation,* International Regulatory Co-operation: Case Studies, Transnational Private Regulation and Water Management, OECD publishing, 2013, 3

CAFAGGI F., SCOTT C., SENDEN L., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, Journal of Law and Society, 2011, 38, 1

CEPS, Council of Europe, Directorate-General for the Internal Market and Services (European Commission), Financial Services and Capital Markets Union (European Commission), European University Institute, University of Valencia, Université de Versailles, *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain. Final Report*, 2014

CICONTE F., LIBERTI S., *Il grande carrello. Chi decide cosa mangiamo*, Bari, Laterza, 2019

CORRIAS P., *Giustizia contrattuale e poteri confermativi del giudice*, Rivista di Diritto Civile, 2019, 2

D'AMICO G., *Giustizia contrattuale e contratti asimmetrici*, Europa e Diritto Privato, 2019, 1

DE CASTRO P., *La Direttiva UE contro le pratiche commerciali sleali nel settore agroalimentare. Cosa cambia per le imprese e i consumatori italiani*, 2019

European Commission Directorate-General for Competition, ECORYS, Wageningen Economic Research, *Study on Producer Organisations and their activities in the olive oil, beef and veal and arable crops sectors*, 2018

European Commission's Directorate-General for Communication, *The European Union Explained: Agriculture. A partnership between Europe and farmers*, Luxembourg, 2017

European Commission's Directorate-General for Agriculture and Rural Development, Unit Farm Economics, *The Food Supply Chain*, 2017

European Commission's Directorate-General for Agriculture and Rural Development, *The 2003 CAP reform. Information sheets*, 2005

European Commission's Directorate-General for Agriculture and Rural Development, *CAP specific objectives…explained. Brief No 3: Farmer position in value chains*, 2018

Eurostat, *Agriculture, forestry and fishery statistics*, Luxembourg, 2019

FALKOWSKI J., MENARD C., SEXTON R. J., SWINNEN J., VANDEVELDE S., *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and*

*regulatory aspects*, eds. F. Di Marcantonio, P. Ciaian, European Commission, Joint Research Centre, 2017

FAO, IFAD, WFP, *Achieving Zero Hunger: the critical role of investments in social protection and agriculture*, Roma, FAO, 2015

FRASCARELLI A., *Differenziazione, tutela della qualità e concentrazione dell'offerta: come riprendersi il valore*, Agriregionieuropa, 2008, 4, 15

GALIZZI G., VENTURINI L., *L'innovazione nel sistema agro-alimentare, Rivista Internazionale di Scienze Sociali*, 1995, 3

GORE T., WILLOUGHBY R., *Ripe for change. Ending the human suffering in supermarket supply chains. Report*, Oxfam International, 2018

IAMICELI P., *Unfair Practices in business-to-consumer and business-to-business contracts: a private enforcement perspective*, Revista da Faculdade de Direito da UFMG, Special Edition for the 2nd Conference Brazil-Italy, 2017

IMBRENDA M., *Le relazioni contrattuali nel mercato agroalimentare*, Napoli, Edizioni Scientifiche Italiane, 2016

Italian Competition Authority, *AS1703 - Recepimento della direttiva UE 2019/633 in material di pratiche commerciali sleali nei rapporti tra imprese nella filiera agricola e alimentare*, 2020, 42

JANNARELLI A., *Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, Rivista di Diritto Agrario, 2018, 4

JANNARELLI A., *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche commerciali sleali business to business*, Rivista di Diritto Agrario, 2019, 1

JANNARELLI A., *Profili del sistema agro-alimentare e agro-industriale. I rapporti contrattuali nella filiera agro-alimentare*, Bari, Cacucci Editore, 2018

JANNARELLI A., *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, Bari, Cacucci Editore, 2016

KEIRSBLICK B., PURNHAGEN K. P., SCHEBESTA H. S, VERDONK T., *Unfair Trading Practices in the Food Supply Chain: Regulating Right?*, European Journal of Risk Regulation, Cambridge University Press, 2018, 9

LIBERTI S., *I signori del cibo. Viaggio nell'industria alimentare che sta distruggendo il pianeta*, Rome, Minimum Fax, 2016

LUCIFERO N., *Le pratiche commerciali sleali nel sistema delle relazioni contrattuali tra imprese nella filiera agroalimentare*, Milano, Wolters Kluwer, 2017

MASINI S., *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, «Rivista di Diritto Agroalimentare», 2019, 2

MASINI S., SCAFFIDI C., *Sementi e Diritti. Grammatiche di libertà*, Bra, Slow Food Editore, 2008

MESSA M., SOTTILE F., *Slow Food's Position Paper on Seeds*, 2015

Oxfam America, *US Supermarket Supply Chains. Ending the human suffering behind our food*, 2018

Oxfam International, *Ripe for change: methodology note*, 2018

RUSSO L., *La Direttiva UE 2019/633 sulle pratiche commerciali sleali nella filiera agroalimentare: una prima lettura*, Rivista di Diritto Civile, 2019, 6

SCOTT C., *Beyond Taxonomies of Private Authority in Transnational Regulation*, German Law, 2012, 12, 13

Slow food, *Good, Clean and Fair: the Slow Food Manifesto for Quality*, 2015

SORBI U., *Aspetti della dinamica della distribuzione dei prodotti agricoli alimentari*, Giornale degli Economisti e Annali di Economia, 1964, 11/12

Supply Chain Initiative, *Vertical relationships in the Food Supply Chain: Principles of Good Practice*, 2011

The European Consumer Organisation, *One bite at a time: consumers and the transition to sustainable food. Analysis of a survey of European consumers on attitudes towards sustainable food*, Brussels, 2020

The Supply Chain Initiative, *5th Annual Report*, 2018

Traidcraft Exchange, IFOAM-EU, Oxfam, SOMO, FTAO, *The Unfair Trading Practices Directive: a transposition and implementation guide*, 2019

United Nation General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015

## WEB

(Accessed last time: 15 November 2020)

Accredia. *About us*. Available at: https://www.accredia.it/en/about-us/

CETRI-TIRES. *Chi siamo*. Available at: http://cetri-tires.org/press/chi-siamo/

CICONTE F., LIBERTI S. *I discount mettono all'asta l'agricoltura italiana*. Available at: https://www.internazionale.it/reportage/stefano-liberti/2018/07/25/passata-pomodoro-eurospin

CICONTE F., LIBERTI S. *Supermercati, il grande inganno del sottocosto*. Available at: https://www.internazionale.it/reportage/fabio-ciconte/2017/02/27/supermercati-inganno-sotto-costo

European Commission. *Civil dialogue groups explained*. Available at: https://ec.europa.eu/info/food-farming-fisheries/key-policies/committees-and-advisory-councils/civil-dialogue-groups/cdg-explained_en#:~:text=is%20regularly%20updated.-,Overview,rural%20development%2C%20and%20its%20implementation

European Commission. *Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions*. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282

European Commission. *Producer and interbranch organisations. European Union's policy on producer and interbranch organisations*. Available at: https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/agri-food-supply-chain/producer-and-interbranch-organisations_en

European Commission. *Regulatory Scrutiny Board*. Available at: https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en#annual-reports

European Parliament. *Interinstitutional negotiations*. Available at: https://www.europarl.europa.eu/ordinary-legislative-procedure/en/interinstitutional-negotiations

No Cap. *Attestazione di Rete*. Available at: https://www.nocap.it/certificazioneetica/attestazione-di-rete/

No Cap. *Certificazione etica: premessa*. Available at: https://www.nocap.it/certificazioneetica/premessa/

No Cap. *I sei criteri di valutazione*. Available at: https://www.nocap.it/certificazioneetica/bollino-etico/

No Cap. *La prima filiera etica italiana contro il caporalato*. Available at: https://www.nocap.it/certificazioneetica/

No Cap. *Points of sales' map*. Available at: https://www.google.com/maps/d/u/0/embed?mid=1wfHcKs1uUJScsRi1AIsI4Qm-1uPG7Twz&ll=41.89015761896085%2C12.492375709450453&z=11

Oxfam International. *End the suffering behind your food*. Available at: https://www.oxfam.org/en/take-action/campaigns/end-suffering-behind-your-food

Oxfam International. *Our history*. Available at: https://www.oxfam.org/en/our-history

Slow Food Foundation for Biodiversity. *Short Food Chain*. Available at: https://www.fondazioneslowfood.com/en/what-we-do/earth-markets/producers-and-co-producers/short-food-chain/

The Food and Nutrition Technical Assistance (FANTA). *Household Food Insecurity Access Scale (HFIAS) for Measurement of Food Access: Indicator Guide*. Available at: https://www.fantaproject.org/monitoring-and-evaluation/household-food-insecurity-access-scale-hfias

The Supply Chain Initiative. *Individual Disputes*. Available at: https://www.supplychaininitiative.eu/dispute/bilateral-disputes

The Supply Chain Initiative. *PRESS RELEASE: European Supply Chain Initiative winds down activities – Principles of Good Practice remain in place*. Available at: https://www.supplychaininitiative.eu/news/press-release-european-supply-chain-initiative-winds-down-activities-%E2%80%93-principles-good-practice

The Supply Chain Initiative. *Questions and answers on The Supply Chain Initiative*. Available at: https://www.supplychaininitiative.eu/faq

United Nations Human Rights Council. *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*. Available at: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

# The Student Paper Series of the Trento LawTech Research Group is published since 2010

http://lawtechnew.jus.unitn.it/main-menu/paper-series/student-paper-series-of-the-trento-lawtech-research-group/2/

## Freely downloadable papers already published:

**STUDENT PAPER N. 60**

**PFAS e inquinamento delle falde acquifere venete: la tutela civilistica fra danno ambientale e azioni risarcitorie collettive**

VERONICA RAISA (2020), PFAS e inquinamento delle falde acquifere venete: la tutela civilistica fra danno ambientale e azioni risarcitorie collettive, Trento Law and Technology Research Group. Student Paper Series; 60. Trento: Università degli Studi di Trento. ISBN: 978 88 8443 927 7

---

**STUDENT PAPER N. 59**

**Il turismo alla prova del covid-19: una ricerca interdisciplinare: da quali dati partire e quali risposte dare alla più grande crisi che il comparto turistico abbia mai affrontato**

UMBERTO IZZO (a cura di), Autori: ANDREATTA, GIULIA; ANDREOLI, ELISA; ARDU, SIMONE; BORTOLOTTO, FABIO; BRUZZO, PIERLUIGI; CALZOLARI, GIULIA; CAMPOS SANTOS, DIEGO; CARLINO, PIETRO; CAVALLERA, LORENZO; CEPPAROTTI, GIACOMO; CIABRELLI, ANTONIA; DALLE PALLE, GIORGIA; DAPRÀ, VALENTINA; DE SANTIS, DIEGO; FAVARO, SILVIA; FAVERO, ELEONORA; FERRARI, LAURA; GATTI, VERONICA; GAZZI, CHRISTIAN; GISMONDO, MARIANNA; GIUDICEANDREA, ANNA; GUIDA, GIOVANNI; INCARNATO, ANDREA; MARANER, ROBERTA; MICHELI, MARTA; ELENA MORARASU, LAURA; CHIARA NARDELLI, MARIA; PALLOTTA, EMANUELE; PANICHI, NICCOLÒ; PELLIZZARI, LAURA; PLAKSII, ANDRII; RANIERO, SAMANTHA; REGNO SIMONCINI, EMANUELE; RUSSO, SARA; SCHIAVONE, SARA; SERAFINO, ANTONIO; SILENZI, LUCA; TIRONZELLI, ELENA; PEGGY TSAFACK, CYNTHIA; VIGLIOTTI, AYLA; ZINETTI, GIULIA, Il turismo alla prova del Covid-19: una ricerca interdisciplinare: da quali dati partire e quali risposte dare alla più grande crisi che il comparto turistico abbia mai affrontato, Trento Law and Technology Research Group, Student Paper Series; 59. Trento: Università degli Studi di Trento. 978-88-8443-903-1

---

**STUDENT PAPER N. 58**

**La responsabilità dell'internet service provider alla luce della nuova direttiva sul diritto d'autore nel mercato unico digitale**

LAURA CAMARELLA (2020), La responsabilità dell'Internet Service Provider alla luce della nuova direttiva sul diritto d'autore nel mercato unico digitale, Student Paper Series; 58. Trento: Università degli Studi di Trento. 978-88-8443-893-5

---

**STUDENT PAPER N. 57**

**Rischio idrogeologico e responsabilità civile**
CATERINA ROBERTI (2020), Rischio idrogeologico e responsabilità civile, Trento Law and Technology Research Group. Student Paper Series; 57. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-891-1

---

**STUDENT PAPER N. 56**
**Assistente vocale e dati sanitari. Le sfide dell'intelligenza artificiale alla luce del Regolamento (UE) n. 2016/679**

LIVIA PETRUCCI (2020), Assistente vocale e dati sanitari. Le sfide dell'intelligenza artificiale alla luce del regolamento (UE) N. 2016/679, Trento Law and Technology Research Group. Student Paper Series; 56. Trento: Università degli Studi di Trento. ISBN: 978 88 8443 888 1

---

**STUDENT PAPER N. 55**

**The Legal Dimension of Energy Security in EU Law**

ANDREAS SCHMIEDHOFER (2020), The legal dimensions of energy security in EU law, Trento Law and Technology Research Group. Student Paper Series; 55. Trento: Università degli Studi di Trento. ISBN: 978 88 8443 888 1

---

**STUDENT PAPER N. 54**

**Macchine intelligenti che creano ed inventano. Profili e rilievi critici del nuovo rapporto tra intelligenza artificiale e diritti di proprietà intellettuale.**

LAURA TREVISANELLO (2020), Trento Law and Technology Research Group. Student Paper Series; 54. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-887-4

---

**STUDENT PAPER N. 53**

**La protezione delle indicazioni geografiche: il sistema europeo e il sistema cinese a confronto**

MARTA COGO (2019), Trento Law and Technology Research Group. Student Paper Series; 53. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-856-0

---

**STUDENT PAPER N. 52**

**Responsabilità civile e prevenzione dell'abuso interpersonale, fra molestie sessuali e bullismo**

FRANCESCA PERETTI (2019), Trento Law and Technology Research Group. Student Paper Series; 52. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-856-0

---

**STUDENT PAPER N. 51**

**Blockchain, Smart Contract e diritto d'autore nel campo della musica**

FRANCESCO FAGLIA (2019), Trento Law and Technology Research Group. Student Paper Series; 51. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-855-3

---

**STUDENT PAPER N. 50**

**Regole per l'innovazione: responsabilità civile e assicurazione di fronte all'auto a guida (progressivamente) autonoma**

FILIPPO ZEMIGNANI (2019), Trento Law and Technology Research Group. Student Paper Series; 50. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-850-8

---

**STUDENT PAPER N. 49**

**Unravelling the nexus between food systems and climate change: a legal analysis. A Plea for smart agriculture, a "new" organic agriculture and a wiser use of biotechnologies in the name of human rights protection**

ALESSANDRA TELCH (2019), Trento Law and Technology Research Group. Student Paper Series; 49. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-842-3

---

**STUDENT PAPER N. 48**

**Wireless community networks e responsabilità extracontrattuale**

CHIARA VIDORNI (2019), Trento Law and Technology Research Group. Student Paper Series; 48. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-841-6

---

**STUDENT PAPER N. 47**

**Proprietà intellettuale e scienza aperta: il caso studio del Montreal Neurological Institute**

GIOVANNA CASSIN (2019), Trento Law and Technology Research Group. Student Paper Series; 47. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-835-5

---

**STUDENT PAPER N. 46**

**Il "ciclista previdente" che si scontrò due volte: con un'auto e col principio indennitario applicato all'assicurazione infortuni,**

CHRISTOPH SIMON THUN HOHENSTEIN WELSPERG (2019), Trento Law and Technology Research Group. Student Paper Series; 46. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-834 8

---

**STUDENT PAPER N. 45**

**«Errare humanum est». L'errore nel diritto tra intenzionalità, razionalità ed emozioni**

LEILA BENSALAH (2018), Trento Law and Technology Research Group. Student Paper Series; 45. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-829-4

---

**STUDENT PAPER N. 44**

**La gestione del rischio fitosanitario nel diritto agroalimentare europeo ed italiano: il caso Xylella**

Marina De Nobili (2018), Trento Law and Technology Research Group. Student Paper Series; 44. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-828-7

---

**STUDENT PAPER N. 43**

**Mercato agroalimentare e disintermediazione: la dimensione giuridica della filiera corta**

Orlandi Riccardo (2018), Trento Law and Technology Research Group. Student Paper Series; 43. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-827-0

---

**STUDENT PAPER N. 42**

**Causa, meritevolezza degli interessi ed equilibrio contrattuale**

PULEJO, CARLO ALBERTO (2018), Trento Law and Technology Research Group. Student Paper Series; 42. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-810-2

---

**STUDENT PAPER N. 41**

**Graffiti, street art e diritto d'autore: un'analisi comparata**

GIORDANI, LORENZA (2018), Trento Law and Technology Research Group. Student Paper Series; 41. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-809-6

---

**STUDENT PAPER N. 40**

**Volo da diporto o sportivo e responsabilità civile per l'esercizio di attività pericolose**

MAESTRINI, MATTIA (2018), Trento Law and Technology Research Group. Student Paper Series; 40. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-784-6

---

**STUDENT PAPER N. 39**

**"Attorno al cibo". Profili giuridici e sfide tecnologiche dello Smart Packaging in campo alimentare**

BORDETTO, MATTEO (2018), Trento Law and Technology Research Group. Student Paper Series; 39. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-795-2

---

**STUDENT PAPER N. 38**

**Kitesurf e responsabilità civile**

RUGGIERO, MARIA (2018), Trento Law and Technology Research Group. Student Paper Series; 38. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-793-8

---

**STUDENT PAPER N. 37**

**Giudicare e rispondere. La responsabilità civile per l'esercizio della giurisdizione in Italia, Israele e Spagna**

MENEGHETTI HISKENS, SARA (2017), Giudicare e rispondere. La responsabilità civile per l'esercizio della giurisdizione in Italia, Israele e Spagna, Trento Law and Technology Research Group. Student Paper Series; 37. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-778-5

---

**STUDENT PAPER N. 36**

**Il diritto in immersione: regole di sicurezza e responsabilità civile nella subacquea**

CAPUZZO, MARTINA (2017), Il diritto in immersione: regole di sicurezza e responsabilità civile nella subacquea, Trento Law and Technology Research Group. Student Paper Series; 36. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-775-4

---

**STUDENT PAPER N. 35**

**La privacy by design: un'analisi comparata nell'era digitale**

BINCOLETTO, GIORGIA (2017), La privacy by design: un'analisi comparata nell'era digitale, Trento Law and Technology Research Group. Student Paper Series; 35. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-733-4

---

**STUDENT PAPER N. 34**

**La dimensione giuridica del Terroir**

BERTINATO, MATTEO (2017), La dimensione giuridica del Terroir, Trento Law and Technology Research Group. Student Paper Series; 34. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-728-0

**STUDENT PAPER N. 33**

**La gravità del fatto nella commisurazione del danno non patrimoniale: un'indagine (anche) nella giurisprudenza di merito**

MARISELLI, DAVIDE (2017), La gravità del fatto nella commisurazione del danno non patrimoniale: un'indagine (anche) nella giurisprudenza di merito, Trento Law and Technology Research Group. Student Paper Series; 33. Trento: Università degli Studi di Trento. ISBN: 978-88-8443-727-3

---

**STUDENT PAPER N. 32**

**«Edible insects». L'Entomofagia nel quadro delle nuove regole europee sui novel foods**

TASINI, FEDERICO (2016), «Edible insects». L'Entomofagia nel quadro delle nuove regole europee sui novel foods = «Edible Insects»: Entomophagy in light of the new European Legislation on novel Foods, Trento Law and Technology Research Group. Student Paper Series; 32. Trento: Università degli Studi di Trento. ISBN 978-88-8443-709-9

---

**STUDENT PAPER N. 31**

**L'insegnamento dello sci: responsabilità civile e assicurazione per danni ad allievi o a terzi**

TAUFER FRANCESCO (2016), L'insegnamento dello sci: responsabilità civile e assicurazione per danni ad allievi o a terzi, Trento Law and Technology Research Group. Student Paper Series; 31. Trento: Università degli Studi di Trento. ISBN 978-88-8443-697-9

---

**STUDENT PAPER N. 30**

**Incrocio tra Contratti e Proprietà Intellettuale nella Innovazione Scientifica e tecnologica: il Modello del Consortium Agreement europeo**

MAGGIOLO ANNA (2016), Incrocio tra Contratti e Proprietà Intellettuale nella Innovazione Scientifica e tecnologica: il Modello del Consortium Agreement europeo, Trento Law and Technology Research Group. Student Paper Series; 30. Trento: Università degli Studi di Trento. ISBN 978-88-8443-696-2

---

**STUDENT PAPER N. 29**

**La neutralità della rete**

BIASIN, ELISABETTA (2016) La neutralità della rete, Trento Law and Technology Research Group. Student Paper Series; 29. Trento: Università degli Studi di Trento. ISBN 978-88-8443-693-1

---

**STUDENT PAPER N. 28**

**Negotiation Bases and Application Perspectives of TTIP with Reference to Food Law**

ACERBI, GIOVANNI (2016) Negotiation Bases and Application Perspectives of TTIP with Reference to Food Law. The Trento Law and Technology Research Group. Student Paper Series; 28. Trento: Università degli Studi di Trento. ISBN 978-88-8443-563-7

---

**STUDENT PAPER N. 27**

**Privacy and Health Data: A Comparative analysis**

FOGLIA, CAROLINA (2016) Privacy and Health Data: A Comparative analysis. The Trento Law and Technology Research Group. Student Paper Series; 27. Trento: Università degli Studi di Trento. ISBN 978-88-8443-546-0

---

**STUDENT PAPER N. 26**

**Big Data: Privacy and Intellectual Property in a Comparative Perspective**

SARTORE, FEDERICO (2016) Big Data: Privacy and Intellectual Property in a Comparative Perspective. The Trento Law and Technology Research Group. Student Paper Series; 26. Trento: Università degli Studi di Trento. ISBN 978-88-8443-534-7

---

**STUDENT PAPER N. 25**

**Leggere (nel)la giurisprudenza: 53 sentenze inedite in tema di responsabilità civile nelle analisi di 53 annotatori in formazione = Reading (in) the caselaw: 53 unpublished judgemnts dealing with civil liability law analyzed with annotations and comments by 53 students during their civil law course**

REMO ANDREOLLI, DALILA MACCIONI, ALBERTO MANTOVANI, CHIARA MARCHETTO, MARIASOLE MASCHIO, GIULIA MASSIMO, ALICE MATTEOTTI, MICHELE MAZZETTI, PIERA MIGNEMI, CHIARA MILANESE, GIACOMO MINGARDO, ANNA LAURA MOGETTA, AMEDEO MONTI, SARA MORANDI, BENEDETTA MUNARI, EDOARDO NADALINI, SERENA NANNI, VANIA ODORIZZI, ANTONIA PALOMBELLA, EMANUELE PASTORINO, JULIA PAU, TOMMASO PEDRAZZANI, PATRIZIA PEDRETTI, VERA PERRICONE, BEATRICE PEVARELLO, LARA PIASERE, MARTA PILOTTO, MARCO POLI, ANNA POLITO, CARLO ALBERTO PULEJO, SILVIA RICCAMBONI, ROBERTA RICCHIUTI, LORENZO RICCO, ELEONORA RIGHI, FRANCESCA RIGO, CHIARA ROMANO, ANTONIO ROSSI, ELEONORA ROTOLA, ALESSANDRO RUFFINI, DENISE SACCO, GIULIA SAKEZI, CHIARA SALATI, MATTEO SANTOMAURO, SILVIA SARTORI, ANGELA SETTE, BIANCA STELZER, GIORGIA TRENTINI, SILVIA TROVATO, GIULIA URBANIS, MARIA CRISTINA URBANO, NICOL VECCARO, VERONICA VILLOTTI, GIULIA VISENTINI, LETIZIA ZAVATTI, ELENA ZUCCHI (2016) Leggere (nel)la giurisprudenza: 53 sentenze inedite in tema di responsabilità civile nelle analisi di 53 annotatori in formazione = Reading (in) the caselaw: 53 unpublished judgemnts dealing with civil liability law analyzed with annotations and comments by 53 students during their civil law course. The Trento Law and Technology Research Group. Student Paper Series; 25. Trento: Università degli Studi di Trento. ISBN 978-88-8443-626-9

---

**STUDENT PAPER N. 24**

**La digitalizzazione del prodotto difettoso: stampa 3D e responsabilità civile= The Digital Defective Product: 3D Product and Civil Liability**

CAERAN, MIRCO (2016) La digitalizzazione del prodotto difettoso: stampa 3D e responsabilità civile = The Digital Defective Product: 3D Product and Civil Liability. The Trento Law and Technology Research Group. Student Paper Series; 24. Trento: Università degli Studi di Trento. ISBN 978-88-8443-663-4

---

**STUDENT PAPER N. 23**

**La gestione della proprietà intellettuale nelle università australiane = Intellectual Property Management in Australian Universities**

CHIARUTTINI, MARIA OTTAVIA (2015) La gestione della proprietà intellettuale nelle università australiane = Intellectual Property Management in Australian Universities. The Trento Law and Technology Research Group. Student Paper Series; 23. Trento: Università degli Studi di Trento. ISBN 978-88-8443-626-9

---

**STUDENT PAPER N. 22**

**Trasferimento tecnologico e realtà locale: vecchie problematiche e nuove prospettive per una collaborazione tra università, industria e territorio = Technology Transfer and Regional Context: Old Problems and New Perspectives for a Sustainable Co-operation among Universitiy, Entrepreneurship and Local Economy**

CALGARO, GIOVANNI (2013) Trasferimento tecnologico e realtà locale: vecchie problematiche e nuove prospettive per una collaborazione tra università, industria e territorio. The Trento Law and Technology Research Group. Student Paper Series; 22. Trento: Università degli Studi di Trento. ISBN 978-88-8443-525-5

---

**STUDENT PAPER N. 21**

**La responsabilità dell'Internet Service Provider per violazione del diritto d'autore: un'analisi comparata = Internet Service Provider liability and copyright infringement: a comparative analysis.**

IMPERADORI, ROSSELLA (2014) *La responsabilità dell'Internet Service Provider per violazione del diritto d'autore: un'analisi comparata.* Trento Law and Technology Research Group. Student Paper; 21. Trento: Università degli Studi di Trento. ISBN 978-88-8443-572-9

---

**STUDENT PAPER N. 20**

**Open innovation e patent: un'analisi comparata = Open innovation and patent: a comparative analysis**

PONTI, STEFANIA (2014) *Open innovation e patent: un'analisi comparata.* The Trento Law and Technology Research Group. Student Paper Series; 20. Trento: Università degli Studi di Trento. ISBN 978-88-8443-573-6

---

**STUDENT PAPER N. 19**

**La responsabilità civile nell'attività sciistica**

CAPPA, MARISA (2014) La responsabilità civile nell'attività sciistica = Ski accidents and civil liability. Trento Law and Technology Research Group. Student Paper Series, 19. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N. 18**

**Biodiversità agricola e tutela degli agricoltori dall'Hold-Up brevettuale: il caso degli OGM**

TEBANO, GIANLUIGI (2014) Biodiversità agricola e tutela degli agricoltori dall'Hold-Up brevettuale: il caso degli OGM = Agricultural Biodiversity and the Protection of Farmers from patent Hold-Up: the case of GMOs. Trento Law and Technology Research Group. Student Paper Series; 18. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N. 17**

**Produrre e nutrirsi "bio": analisi comparata del diritto degli alimenti biologici**

MAFFEI, STEPHANIE (2013) Produrre e nutrirsi "bio" : analisi comparata del diritto degli alimenti biologici = Producing and Eating "Bio": A Comparative Analisys of the Law of Organic Food. Trento Law and Technology Research Group. Student Paper Series; 17. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N. 16**

**La tutela delle indicazioni geografiche nel settore vitivinicolo: un'analisi comparata = The Protection of Geographical Indications in the Wine Sector: A Comparative Analisys**

SIMONI, CHIARA (2013) La tutela delle indicazioni geografiche nel settore vitivinicolo: un'analisi comparata. The Trento Law and Technology Research Group. Student Papers Series; 16. Trento: Università degli Studi di Trento. Facoltà di Giurisprudenza.

---

**STUDENT PAPER N. 15**

**Regole di sicurezza e responsabilità civile nelle attività di mountain biking e downhill montano**

SALVADORI, IVAN (2013) Regole di sicurezza e responsabilità civile nelle attività di mountain biking e downhill montano. Trento Law and Technology Research Group. Student Paper; 15. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N. 14**

**Plagio, proprietà intellettuale e musica: un'analisi interdisciplinare**

VIZZIELLO, VIVIANA (2013) Plagio, proprietà intellettuale e musica: un'analisi interdisciplinare. Trento Law and Technology Research Group. Student Paper; 14. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N.13**

**The Intellectual Property and Open Source Approaches to Biological Material**

CARVALHO, ALEXANDRA (2013) The Intellectual Property and Open Source Approaches to Biological Material. Trento Law and Technology Research Group. Student Paper Series; 13. Trento: Università degli Studi di Trento.

---

**STUDENT PAPER N.12**

**Per un'archeologia del diritto alimentare: 54 anni di repertori giurisprudenziali sulla sicurezza e qualità del cibo (1876-1930)**

TRESTINI, SILVIA (2012) Per un'archeologia del diritto alimentare: 54 anni di repertori giurisprudenziali sulla sicurezza e qualità del cibo (1876-1930) = For an Archeology of Food Law: 54 Years of Case Law Collections Concerning the Safety and Quality of Food (1876-1930). The Trento Law and Technology Research Group. Student Papers Series, 12.

---

**STUDENT PAPER N.11**

**Dalle Alpi ai Pirenei: analisi comparata della responsabilità civile per attività turistico-ricreative legate alla montagna nel diritto italiano e spagnolo**

PICCIN, CHIARA (2012) Dalle Alpi ai Pirenei: analisi comparata della responsabilità civile per attività turistico-ricreative legate alla montagna nel diritto italiano e spagnolo = From the Alps to the Pyrenees: Comparative Analysis of Civil Liability for Mountain Sport Activities in Italian and Spanish Law. The Trento Law and Technology Research Group. Student Papers Series, 11.

---

**STUDENT PAPER N.10**

**Copynorms: Norme Sociali e Diritto d'Autore**

PERRI, THOMAS (2012) Copynorms: Norme Sociali e Diritto d'Autore = Copynorms: Social Norms and Copyright. Trento Law and Technology Research Group. Students Paper Series, 10

---

**STUDENT PAPER N. 9**

**L'export vitivinicolo negli Stati Uniti: regole di settore e prassi contrattuali con particolare riferimento al caso del Prosecco**

ALESSANDRA ZUCCATO (2012), L'export vitivinicolo negli Stati Uniti: regole di settore e prassi contrattuali con particolare riferimento al caso del Prosecco = Exporting Wines to the United States: Rules and Contractual Practices with Specific Reference to the Case of Prosecco. Trento: Università degli Studi di Trento (Trento Law and Technology Research Group. Students Paper Series 9)

---

**STUDENT PAPER N.8**

**Equo compenso e diritto d'autore: un'analisi comparata = Fair Compensation and Author's Rights: a Comparative Analysis.**

RUGGERO, BROGI (2011) Equo compenso e diritto d'autore: un'analisi comparata = Fair Compensation and Author's Rights: a Comparative Analysis. Trento: Università degli Studi di Trento (TrentoLawand Technology Research Group. Student Papers Series, 8)

---

**STUDENT PAPER N.7**

**Evoluzione tecnologica e mutamento del concetto di plagio nella musica**

TREVISAN, ANDREA (2012) Evoluzione tecnologica e mutamento del concetto di plagio nella musica = Technological evolution and change of the notion of plagiarism in music Trento: Università degli Studi di Trento (Trento Law and Technology Research Group. Students Paper Series 7)

---

**STUDENT PAPER N.6**

**Il trasferimento tecnologico università-imprese: profili giuridici ed economici**

SIRAGNA, SARA (2011) Il trasferimento tecnologico università-imprese: profili giuridici ed economici = University-Enterprises Technological Transfer: Legal and Economic issues Trento: Università degli Studi di Trento (Trento Law and Technology Research Group. Students Paper Series 6)

---

**STUDENT PAPER N.5**

**Conciliare la responsabilità medica: il modello "generalista" italiano a confronto col modello "specializzato" francese**

GUERRINI, SUSANNA (2011) Conciliare la responsabilità medica: il modello "generalista" italiano a confronto col modello "specializzato" francese = Mediation & Medical Liability: The Italian "General Approach" Compared to the Specialized Model Applied in France. Trento: Università degli Studi di Trento (Trento Law and Technology Research Group. Students Paper Series 5)

---

**STUDENT PAPER N.4**

**"Gun Control" e Responsabilità Civile: una comparazione fra Stati Uniti e Italia**

PODETTI, MASSIMILIANO (2011) "Gun Control" e Responsabilità Civile: una comparazione fra Stati Uniti e Italia = Gun Control and Tort Liability: A Comparison between the U.S. and Italy Trento: Università degli Studi di Trento. (Trento Law and Technology Research Group. Students Paper Series 4)

---

**STUDENT PAPER N.3**

**Smart Foods e Integratori Alimentari: Profili di Regolamentazione e Responsabilità in una comparazione tra Europa e Stati Uniti**

TOGNI, ENRICO (2011) Smart Foods e Integratori Alimentari: Profili di Regolamentazione e Responsabilità in una comparazione tra Europa e Stati Uniti = Smart Foods and Dietary Supplements: Regulatory and Civil Liability Issues in a Comparison between Europe and United States Trento: Università degli Studi di Trento - (Trento Law and Technology Research Group. Students Paper Series; 3)

---

**STUDENT PAPER N.2**

**Il ruolo della responsabilità civile nella famiglia: una comparazione tra Italia e Francia**

SARTOR, MARTA (2010) Il ruolo della responsabilità civile nella famiglia: una comparazione tra Italia e Francia = The Role of Tort Law within the Family: A Comparison between Italy and France Trento: Università degli Studi di Trento - (Trento Law and Technology Research Group. Students Paper Series; 2)

---

**STUDENT PAPER N.1**

**Tecnologie belliche e danno al proprio combattente: il ruolo della responsabilità civile in una comparazione fra il caso statunitense dell'Agent Orange e il caso italiano dell'uranio impoverito**

RIZZETTO, FEDERICO (2010) Tecnologie belliche e danno al proprio combattente: il ruolo della responsabilità civile in una comparazione fra il caso statunitense dell'Agent Orange e il caso italiano dell'uranio impoverito = War Technologies and Home Soldiers Injuries: The Role of Tort Law in a Comparison between the American "Agent Orange" and the Italian "Depleted Uranium" Litigations Trento: Università degli Studi di Trento - (Trento Law and Technology Research Group. Students Paper Series; 1)