

The New Directive on Unfair Trading Practices (UTPs) in Agri-Food Supply Chains¹

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Abstract

Power concentration in food global chains often leads to abuse by shifting risks and costs to weaker contractual partners, not necessarily the most efficient actors to control risks and manage costs related to production and distribution processes. Inappropriate exercise of market and contractual power may bring about inefficient allocation of tasks together with undesirable distributional consequences. Unfair trade practices (UTPs) can refer to individual firms or, more often, concern the entire chain. We contend that UTPs in supply chains present specific features; as a consequence, they require specific rules and remedies. We distinguish between isolated UTPs, whose effects mostly remain within the bilateral contractual relation, and systemic UTPs, whose effects directly or indirectly spread along the chain. The latter create much more severe consequences, both distributional and exclusionary. By examining the recently adopted EU Directive on UTPs in agri-food chains and its complementarities in respect to private regulation, the Authors develop a conceptual framework that might be useful to complement existing and forthcoming regulation at EU and national level with rules reflecting the supply chain dimension of UTPs. More particularly, Authors suggest that both distributional and exclusionary systemic effects should be considered in a) the definition of the practice, (b) the type of prohibition and the extent to which agreed terms may allow the use of some of the practices, (c) the nature and scope of liability of the infringer(s), (d) the use of presumptions concerning the practices' effects, (e) the choice and content of sanctions and remedies. They believe that these distinctions fit all within the discretionary space allowed to MSs when implementing the directive and suggest that a more significant legal regulation of supply chain dynamics will make the implementation more effective and consistent with its regulatory goals.

Keywords

Supply chain governance – Institutional complementarity – Systemic unfair trading practices – EU harmonization – Enforcement

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1. Unfair trading practices in global value chains: a policy perspective

Power concentration in global chains often leads to abuse by shifting risks and costs to weaker contractual partners, not necessarily the most efficient actors to control risks and manage costs related to production and distribution processes. Inappropriate exercise of market and contractual power may bring about inefficient allocation of tasks together with undesirable distributional consequences². Empirical evidence shows that, for example, gains from the growth of international trade in agriculture have not been distributed evenly³. Symmetrically, losses from the financial crisis and from other agricultural crises have not been allocated fairly among chain's participants⁴.

The distribution of gains and losses is not only a question of fairness; it also involves the development opportunities for growth of many enterprises located in the southern part of the world. Unfair trade practices, resulting in transferring risks and costs onto farmers and small enterprises not only have distributional effects, but they are also inefficient

As the value of the final product is not fairly distributed along the chain due to the power unbalance, the different degree of concentration of each market's segment may affect value distribution. Higher concentration downstream may decrease the fraction of value allocated upstream.

Unfair trade practices (hereinafter, UTPs) can refer to individual firms or, more often, concern the entire chain. The chain leader can introduce the practice or induce first-tier suppliers to adopt the practice with second- and third-tier suppliers in order to achieve the objectives set for the chain. It is only by looking at the governance of the chain and the allocation of the decision-making power that origins and effects of UTPs can be identified and eliminated.

The occurrence of the UTP within a supply chain may require a different approach concerning the definition of both the scope and the effects of the practice. Not only UTPs may occur at different tiers of the supply chain but they also present distinctive features and determine different effects depending on the type of chain, its structure, the allocation of bargaining power. The level of interdependence between parties within the chain allows for the expansion of direct and indirect effects stemming out of UTPs in respect of the chain participants. A supply chain approach is the only one permitting to address the causes of power abuse. We suggest that using the supply chain as unit of analysis for examining the consequences of UTPs requires a change of perspective of the legal framework which can be fruitfully adapted when addressing UTPs and particularly so when implementing the new Directive, just adopted by the EU on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter, Directive)⁵.

² We differentiate between market and contractual power. The abuse of market power is addressed by competition law instrument; the abuse of contractual power by a variety of legal instruments including contract, tort and unfair competition. With special regard to UTPs in the retail chains, see A. Renda, F. Cafaggi, J. Pelkmans, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, cit., p. 43 seq.

³ See O. De Schutter, 'Contract Farming and Inclusive Business Models in the Food Chains,' Interim Report of the Special Rapporteur on the Right to Food to the 66th Session of the General Assembly, UN Doc A/66/262, 4 August 2011.

⁴ See O. De Schutter, 'Contract Farming,' cit.

⁵ See Directive (EU) 633/2019 of the European Parliament and of the Council, 17 April 2019 (hereinafter Directive).

Not only we believe that a supply chain approach reflects the real power dynamics within chain and permits more effective contrast to power abuse but we also suggest that supply chains differ and that differences should be internalized in the institutional and legal design addressing UTPs.

From a policy perspective, this observation may lead to either defining the scope of application of regulatory instruments having regard to the type of chain and the allocation of power emerging therein or adjusting the regulatory effects (e.g. the definition of prohibited practices, the extent of monitoring powers, the sanctions, etc.) according to the specific features of the chain.

In other words, a policy maker may either (*first approach*) decide that a regulatory instrument applies only to certain types of chain (e.g. captive chains, where power is asymmetrically distributed) or (*second approach*) establish that it applies to any type of chain but, depending on their nature (e.g. captive or relational chains), define prohibited practices in relation to the specific features of the chain. Hence, legislation may apply to all the chains but the degree of power asymmetry and the abuse may affect the definition of unfair trade practices and the sanctions and remedies against it.

We recommend the second approach: application to all supply chains with differentiation of practices and remedies depending on distribution of power, the control and influence exercised by the chain leader over the regulation of relationships within the chain.

There are at least two sets of instruments to address abuses within supply chains: governance and regulatory responses. Governance responses focus on the causes of UTPs; they include the aggregation of suppliers to increase their bargaining power in addition to the creation of scale and scope economies, the creation of internal dispute mechanisms, the use of third-party facilitators. Regulatory responses address mainly the effects of abuse and prohibit practices or impose restitution on those who benefited from engaging in the unfair practice. The former focus more on the causes, the latter on the consequences of power abuse. In this article we concentrate on regulatory responses to the abuse or misuse of bargaining power.

As we shall see, the new EU directive addresses UTPs in the supply chain but does not fully articulate the specificities of UTPs within chains. Like in previous EU policy documents and in some national legislation, supply chain mainly represents the context in which bilateral relations are established⁶. Although the Directive shows clear awareness about the chain dimension of UTPs when considering the need and the objectives of a legislative intervention, e.g. in the light of possible ‘passing on’ effects of UTPs along the chain, it does not specify what legal implications may derive from this dimension when rules need to be defined, interpreted and applied⁷.

⁶ See for Spain, Law 12/2013, of 2 August, measures to improve the functioning of the food supply chain, part. art. 2(1) on scope of application (“This law applies to commercial relations among all operators along the food supply chain from production to the distribution of food or food products.”) and art. 5(a) providing a definition of ‘food supply chain’ (“The set of activities carried out by the various operators involved in the production, processing and distribution of food or food products, excluding transportation, hotel and restaurant activities”). In the EU context, see already European Commission, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, COM(2013) 37 final, 31.1.2013, p. 3 (“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.”).

⁷ See recitals n. 7 and 9 of the Directive, distinguishing between direct and indirect effects of UTPs, the latter consisting in “cascading of consequences” harming primary producers (“(7) In particular, such unfair trading practices are likely to have a negative impact on the living standards of the agricultural community. This 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 in a manner that negatively effects the primary producers in the agricultural and food supply chain. (9) The number and size of operators vary across the different stages of the agricultural and food supply chain. (...) Unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain. Enterprises larger than SMEs but with an annual turnover not exceeding EUR 350 000 000 should also be protected against unfair trading practices to avoid the costs of such practices being passed on to agricultural producers. The cascading effect on agricultural producers appears to be particularly significant for enterprises with an annual turnover of up to EUR 350 000 000. The protection of intermediary suppliers of agricultural and food products, including processed products, can also serve to avoid the diversion of trade away from agricultural producers and their associations which produce processed products to non-protected suppliers.”).

A legal instrument should deploy supply chain as unit of analysis and address both inefficient and undesirable distributional effects. We strongly recommend MSs to adopt the supply chain approach when implementing the Directive.

2. The EU context

The EU context reflects the general observations related to agrifood global supply chains with some important caveats related to the supply chain approach. A European agrifood supply chain should potentially include three separate stages: production, processing and distribution. EU agrifood chains may feature the active participation of professional organizations intervening in one or more facets of the regulatory framework including contracting and trade practices. From a regulatory perspective, EU instruments could address UTPs looking at their impact along chains crossing national borders. To be qualified as a EU chain the enterprises involved in the chain should be located in at least two if not more jurisdictions⁸.

With the Common agricultural policy reform (CAP) of 2013 producers and inter-branch organizations have been conferred stronger power to intervene in matters concerning price transmissions and distribution of risks⁹. Producers and trader associations often determine framework conditions within which contractual relationships occur. Certifiers and other service providers help monitoring the compliance with regulatory requirements, facilitate knowledge transfers and joint problem solving. The role of intermediaries along supply chains is changing the contractual content and practices, redefining the boundaries between compliance, performance monitoring techniques, and breach and the remedies for violations¹⁰. Hence, a supply chain includes not only individual companies but also organizations carrying relevant coordinating activities.

Whereas there are some common features concerning the general structure and the allocation of power and value, clearly significant differences exist between horticulture, livestock, aquaculture, cereals, dairy. Empirical research shows that different degrees of market concentration exist in various EU MS¹¹. Differences exist at the production level where concentration differs between EU 15 and EU 13¹². They also exist at the processing level. In fact, the food industry is also heterogeneous. It is characterized by the coexistence of a large number of SMEs and some large producers¹³. Retail is less dispersed. In the last decades EU retailers have strongly concentrated to the detriment of small shops. The process of concentration is likely to increase further but also to develop

⁸ We do not include short chains where the producers are directly linked to consumers. The EU Directive on UTPs in agri-food supply chains does not define a EU supply chain but it defines its scope of application having regard to contractual relations in which either the supplier or the buyer, or both, are established in the EU.

⁹ See on the role of producer organizations Van Herck, K. (2014). *Assessing Efficiencies Generated by Agricultural Producer Organisations*, European Commission, 2014. Retrieved from <http://ec.europa.eu/competition/publications>

¹⁰ See F. Cafaggi and P. Iamiceli, 'Supply chains, contractual governance and certification regimes', *European Journal of Law and Economics*, 2014, 37, 131-173.

¹¹ See for example in relation to dairy Cavicchioli, Pretolani e Cucchiarelli, *Should we cry over the spit milk? Market power and structural change along dairy supply chains in EU countries*, 2016 available at https://www.cigionline.org/sites/default/files/cigi_paper_30.pdf

¹² See Sorrentino and Russo, cit. p. 217: "the structural characteristics of agriculture in EU15 are decisively different than those observed in EU-13. The average physical farm size and the average standard output per year in the former are, respectively, three and seven times higher than in the latter. Moreover, although the total number of cooperatives has recently decreased reaching less than 22 thousand units, a significant growth trend showed by the leading cooperatives indicates that the presence and the total turnover (€347 billion) of EU cooperatives are relevant in European food supply chain (Cogeca, 2015)".

¹³ See Sorrentino and Russo, cit. p. 220 "The top 5 subsectors (meat sector, various food products category, drinks, dairy products and bakery products) represent four fifth of the total turnover. On the one hand, food and drink industry appears fragmented, since 99.1% of total companies are SMEs (with less than 250 employees), including 78.8% of micro-companies (with less than 10 employees). On the other hand, some major EU-companies, which represent only 1% of the total processors, account for around 49.5% of total turnover, 52.2% of value and 35.5% of employment."

with online food marketing where room for SMEs may reopen on the basis of a different retail model from that of the XX century.

The increasing phenomenon of private labels in food retail is reshaping the structure of the chain by eliminating the intermediate level of large food processors and shortening the chain with retailers directly engaging farmers and first stage transformers¹⁴.

In this context chains with different forms have arisen. Chains led by large enterprises, ever more retailers (e.g. Tesco, Carrefour, Metro, Aldi) but to a significant extent also food producers (e.g. Nestlè, Danone, Unilever), chains led by online platforms which link producers and consumers and act as logistics operators. Many chains encompass enterprises located in more than one MS. Clearly geographical indications and other territorial regulatory instruments contribute to maintain local productions, but it is only one part of the agrifood industry, defined by high quality products and strong traceability requirements.

The increasing power imbalance among enterprises located along the chain has led to the increase of unfair trade practices in the agrifood industries redistributing costs and benefits among the various chain participants. Growing concern over the consequences of these practices has led to legislative reforms and policy initiatives both at MS and EU level¹⁵.

The regulation of UTPs in agrifood at EU and MS level presents a significant degree of variation that may hinder the development of a EU efficient agricultural policy and have a negative impact on agricultural sustainable growth¹⁶. After a soft law combined with private regulation approach the European Commission, upon a European Parliament Recommendation, has decided to propose a hard law instrument to complement the existing ones. The European Commission has proposed a EU directive on unfair trade practices in agri-food supply chains¹⁷. The proposal has become law with some significant changes concerning the scope of application, the number and definition of unfair practices, the means for enforcement. It is a minimum harmonization directive.

The Directive covers both agricultural and processed food products¹⁸. The primary regulatory aim is not the reduction of power imbalance, which is left to other regulatory instruments within the Common agricultural policy (CAP)¹⁹. Rather, the Directive aims at reducing the occurrence of UTPs

¹⁴ See Sorrentino and Russo, cit., p. 221 “The penetration of private labels by retail chains is an increasingly significant feature of the food sector: on average, private labels account for 23% of total retail food sales in Europe and 15% in North America (EC, 2014a). Although initially private labels were exclusively introduced as a lower-price alternative to a national brand, recently retailers have put on their shelf higher quality products (the so-called “premium private labels”). On the one hand, private labels might positively affect the market, increasing consumer choice and competition for suppliers of branded products. On the other hand, competition concerns increase when private labels are used to strengthen the retailer’s bargaining power through stricter terms and conditions for suppliers (OECD, 2013).”

¹⁵ See, in particular, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, cit., and European Commission Report from the Commission on unfair business-to-business trading practices in the food supply chain, January 2016, COM/2016/032 final, where some types of UTPs were identified. “*Four key categories of UTPs, which may occur at every link of the food chain, have been identified by EC (2016). The first category includes practices that allow one trading partner to transfer its own costs and/or risks to another. The second category refers to practices occurring when one party asks the other one for advantages without giving a service (e.g. upfront payments as entry fees to negotiate). The third category contains unilateral and/or retroactive changes to agreed terms, for example in form of discounts on agreed price. Last unfair practices consider the threat to terminate a contractual relationship in order to obtain further concessions*”.

¹⁶ See the various contributions in Unfair trading practices in the food supply chain A literature review on methodologies, impacts and regulatory aspects 2017 EUR 28791 Authors (in alphabetical order): Jan Falkowski, Claude Ménard, Richard J. Sexton, Johan Swinnen and Senne Vandevelde Editors: Federica Di Marcantonio and Pavel Ciaian (hereinafter A literature review).

¹⁷ See 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, Brussels, 12.4.2018 COM(2018) 173 final 2018/0082(COD).

¹⁸ The scope of application has been enlarged in this respect after the intervention of the European Parliament, being originally limited to food products.

¹⁹ Sorrentino and Russo, cit., p. 227: “Balancing power across actors is a key concern in modern agricultural policy. The 2013 Reforms includes new rules related to POs and IBOs in order to strength the bargaining power of farmers. The welfare implications of PO establishment could be twofold: i) the cost reduction through economies of scale and differentiation allows POs to gain efficiencies; ii) joint selling can strength the bargaining power of farmers, making

in the food supply chain by introducing a minimum common standard of protection across the EU. It focuses on enforcement. Lack of a common standard among MS undermines the achievement of policy objectives like the enhancement of producers' welfare²⁰. The legal basis of the Directive is art. 43 of the Treaty (TFUE)²¹. This choice results in a focus on farmers' protection within supply chains²². The Directive however offers legal protection to enterprises located along the chain beyond the production stage. It applies to agricultural and food chains (art. 1). The definition of supplier includes sales of agricultural and food. Hence it refers to transactions and more broadly relationships concerning processing and packaging.

The rationale for intervention is based on the inadequacy and heterogeneity of legislative responses at MS level²³. The main goal of the Directive is the definition of a common standard to prevent the undesirable consequences of power, imbalance namely the occurrence of UTPs. Clearly deterring UTPs implies action on the chain's governance which in turn has effects on the mechanisms through which risks are allocated and value is distributed. Hence, UTPs regulation has secondary relevant effects on power (re-distribution) and the allocation of value and opportunities along the chain. It is important to maintain the distinction between objectives and effects of regulatory interventions like that on UTPs.

3. Regulatory power in agrifood supply chains: systemic and isolated UTPs.

We contend that UTPs in supply chains present different features; as a consequence, they require specific rules and remedies. Hence, we recommend a supply chain approach to the legal regulation of UTPs. In this vein we offer an interpretation of the Directive and make recommendations to MSs in order to adopt a supply chain approach when implementing the Directive.

To show the desirability of a supply chain approach we introduce three distinctions related to unfair trade practices: one distinguishes between systemic and isolated practices. The other two ones concern the effects of unfair practices: distributional and exclusionary, direct and indirect.

We claim that practices may have different features and impact depending on whether they involve the entire or at least part of the chain or are addressed to an individual supplier without relevant effects along the chain. Furthermore, the effects of practices can be stable if nor permanent or temporary and subject to frequent changes.

potentially more beneficial their negotiations with downstream actors. Therefore, the participation in the PO can grant members to increase their income”.

²⁰ See the accompanying text to the original proposal, p. 5: “A minimum standard of protection against UTPs in Member States does not yet exist, despite the Commission’s recommendations in its communications. Certain Member States have no specific rules at all that would protect against UTPs. Others do not address important aspects of effective UTP enforcement. This leads to under-protection of vulnerable operators, in particular agricultural producers. Moreover, in spite of its positive effects in the area of private governance of UTPs, the voluntary codes including the SCI – to the extent it applies in Member States – are not able to effectively replace public governance measures.

²¹ See the accompanying text to the original proposal, p. 5: “A key objective of the CAP is to ensure a fair standard of living for the agricultural community (Article 39 TFEU). The EU’s constitutional emphasis on producer welfare is unique to the agricultural sector hinting at the comprehensive responsibility of the CAP for European agriculture. The Treaty lists four other objectives for the CAP, i.e. increasing agricultural productivity, stabilising markets, assuring availability of supplies and ensuring reasonable prices for consumers... In light of this, Article 43 TFEU, which entrusts the Union legislator with the legal powers to establish a common organisation of agricultural markets in the EU, can in principle serve as the legal basis for measures covering UTPs occurring in the food supply chain in relation to the trade of food products which originate with agricultural producers.”

²² See the accompanying text to the original proposal, p. 13 and recital n. 9 in the final text of the directive, as cited above.

²³ See the accompanying text to the original proposal, p. 4: “The patchwork of UTPs rules in Member States or the absence thereof is liable to impair the objective of ensuring a fair standard of living for the agricultural community. UTPs jeopardise the profitability of agricultural producers and lead to downward pressure on their market income. Their governance falls therefore within the CAP’s principled remit.”. On legal fragmentation at national level, see also A. Renda, F. Cafaggi, J. Pelkmans, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices, cit.; F. Cafaggi – P. Iamiceli, Unfair Trading Practices, JRC Report 2018, cit.

Accordingly, we propose to distinguish between isolated and systemic UTPs. The focus of this article is on the latter, to explore whether they take different features, whether they need different monitoring and enforcement instruments.

Isolated UTPs are those imposed upon a firm without having any significant negative impact on other firms, either directly or indirectly. They tend to be temporary and subject to frequent changes.

By contrast, systemic UTPs occur in supply chains when the chain leaders impose unfair decisions of trade either within or without contracts on a large number of enterprises participating in the agricultural and industrial activities along the same chain²⁴. Systemic UTPs expand their impact beyond the bilateral relation, either because the same unfair practice by the same enterprise is adopted towards a large number of suppliers within the same chain (*systemic UTPs with direct effects*), or, as is more often the case, because the direct victim of the practice is induced to pass its negative consequences on the upstream supplier (*systemic UTPs with indirect effects*).

Depending on their effects, we may consider, for example, among systemic practices (1) unilateral decisions to give unsold products back without payment, (2) retroactive unilateral reductions of the volume of goods and services purchases, (3) reduction of prices due to a rebate or discount policy made at retail level after the contracts were concluded: the effects of these unilateral decisions may fall upon a large number of suppliers along the chain all the way to the farmer. Unlike the conventional model of bargaining power in bilateral transactions, here the exercise of power impacts on a large number of transactions, of which the power wielder is not necessarily party to. Moreover, systemic effects tend to be stable over time.

Like isolated UTPs, also *systemic UTPs may have exclusionary or distributional effects*. However, being systemic, both types of effects span over the chain, either horizontally or (as is often the case) vertically or both. So, e.g., exclusionary effects are not limited to contract termination but result in the expulsion from the chain of a supplier and possibly its sub-chain; distributional effects are not limited to rent appropriation in a bilateral relation but redistribute risks and opportunities, gains and losses along the chain without forcing exit. The intensity of distributional and exclusionary effects strongly depends upon the chain's form. Exclusionary effects tend to be associated more with hierarchical and captive chains where the power is strongly asymmetric. Distributional effects occur in all chains, but their intensity varies according to the type of chain.

We further distinguish between direct and indirect effects of UTPs onto the supply chain and explore the differences in both sanctioning and remedial policies necessary to address supply chain effects. Examples of direct effects are the increase of risks and costs or the decrease of opportunities and gains suffered by the enterprise because of the UTP. Indirect effects are those transferred by the suppliers who bore the direct effects onto other suppliers along the chain.

Some examples may illustrate these differences. Although there may be no negotiation between parties, one private regulator (the chain leader) imposes the rules (contractual terms and conditions) on the parties in the chain or modifies them after the supply agreement has been concluded. Such imposition or modifications can have *direct systemic effects* in at least two types of situations:

- if the buyer adopts the same type of unfair practice in multiple relations with first-tier suppliers;
- if the UTP relates to a contractual instrument (e.g. a supplier code) whose adoption is mandatory along the chain so that, e.g., a change in the code by the chain leader results in automatic changes of rules along the whole chain. In this case, every time the code is modified automatically all the contracts that incorporate the code are modified without any specific expression of consent.

By contrast, a systemic UTP may generate *indirect effects* if it causes its victim to shift some of costs borne or to replicate the same practice *vis à vis* an upstream supplier. For example, if the first tier supplier, upon change of the supplier code by the chain leader, has to impose a consequent change in contract terms deployed with second tier suppliers. In these cases, the direct effect of the practice is

²⁴ Clearly the UTPs can concern multiple chains when they come from large retailers and refer to all the producers of a specific commodity.

on the immediate supplier which then modifies the terms and/or passes the costs of that practice onto the upstream suppliers. The costs of these practices may be unevenly distributed along the chain between the traders and the producers often falling on the farmers as the weakest link of the chain. Though considering both direct and indirect effects stemming out of systemic UTPs, this Article will focus on systemic UTPs generating indirect effects.

4. Regulating UTPs in the EU: exploiting institutional complementarity

In the light of the outlined conceptual framework, we examine the content of the Directive to show the implications of a supply chain approach and invite Member States to take into account the systemic nature of UTPs. The Directive on UTPs changes the previous institutional landscape moving from a combination of soft law (EU Communication 2016²⁵) and private regulation (Supply chain initiative²⁶) to a combination of hard and soft law complemented by private regulation. The new framework is inspired by a double institutional complementarity: vertical complementarity between jurisdictional levels and horizontal complementarity between public and private regulatory tools.

Well before proposals for EU legislation were discussed in the field of business-to-business unfair practices, the role of private regulation had been acknowledged and promoted at EU level. Not only private regulation may fill in an informative gap, providing inputs about concrete risks for opportunism in business-to-business relationships. It may also contribute to raise awareness and promote compliance among those to whom rules are targeted²⁷. The contribution by the High Level Forum for a Better Functioning Food Supply Chain has pursued both objectives. The results achieved are only partially satisfactory but the reasons may be found more in the practices of enforcement than in the definition of UTPs²⁸.

The Directive neither repeals the EU Communication nor directly affects the Supply Chain Initiative (SCI). It represents the floor of a minimum harmonization that leaves open the space for a reform of private regulation and for a strategy of implementation of the Directive at MS level that can expand the scope and integrate the approach (art. 9.1). The Directive regulates unfair practices without prejudice for competition, unfair competition, and contract law instruments both at national and EU level (art. 9.2). It leaves open the space for existing and additional private regulation both at EU and MS level.

Complementarity between the two regulatory instruments (the Directive on the one hand and the SCI on the other) concerns both the scope of application and the definition of unfair practices.

Unlike the SCI, which applies regardless business size, the scope of the Directive is limited to practices occurring between businesses having a different positioning in terms of revenues as established in article 1, Directive, in respect to parties' turnover²⁹. Asymmetry of turnover is conceived as a proxy for asymmetry of power. When UTPs are carried by a business having the same

²⁵ See European Commission Communication, Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final, pp. 5-6.

²⁶ See B2B Platform of the High Level Forum for a Better Functioning Food Supply Chain, *Vertical Relationships in Food Supply Chain: Principles of Good Practice*, 29.11.2011, available at <http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain> (hereinafter *Principles of Good Practice*).

²⁷ F. Cafaggi, "Private Regulation and European Private Law" in A. S. Hartkamp, M. W. Hesselink, E. Hondius, C. Mak, E. Du Perron (eds.), *Towards a European Civil Code*, Den Haag: Kluwer Law International, 2011, pp. 91-126; R. Brownsword, R.A.J. van Gestel and H.-W. Micklitz (eds), *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law* (Cheltenham: Edward Elgar, 2017), with special regard to the chapters by A. Beckers and D. Leczykiewicz. With specific referenced to UTPs in the retail chains, see A. Renda, F. Cafaggi, J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, cit., p. 41 and 88 seq.

²⁸ See Report from the European Commission, COM(2016) 32 final, cit., p. 8 seq., part. p. 10.

²⁹ See art. 1, Directive, classifying buyers and suppliers into 6 categories defined by turnover. The Directive applies to sales between a supplier and a buyer where the former belongs to a "turnover category" which is lower than the buyer's.

turnover as the one suffering the UTP, they are not within the scope of the Directive. They remain within the scope if the UTP originated from a larger company and it spread along the chain. When the business imposing the UTP on a business of the same size is a pure agent of a larger company, the Directive should apply.

This definition of the scope of application can generate a high degree of fragmentation. The new Directive cannot apply to the entire chain but only to relationships between certain types of enterprises depending on their relative turnover. As a result, the effects of the same unfair practices will be regulated by different regimes depending on the relative size of contractual parties leading to undesirable complexity for the enforcers. In some instances the Directive will apply; in others it will not apply even if there is asymmetry of power but not (sufficient) asymmetry of turnover. Moreover, since revenues must be compared relationally (in respect of the several parties concerned) and may change overtime, complexity increases.

With reference to the second aspect (modes of definition of UTPs), similarities and divergence co-exist between the directive and the SCI. Like for the SCI, the legislative technique chosen by the Commission is that of a list of a limited number of UTPs. Along the legislative process, however, the number of practices has significantly increased in the final version³⁰. The choice of general clauses, clearly endorsed in the SCI, was initially dismissed in order to achieve partial yet effective harmonization. It has been partially reconsidered during the legislative process³¹.

The expected outcome of the Directive implementation is a higher harmonization for the listed practices and for enforcement. The Directive may be implemented so to protect not only the immediate suppliers but also those upstream in the chain that are only remotely linked to those which engaged in the UTPs³².

As to the practices, there is not an effort to distinguish between fair and unfair practices. Unlike the SCI, where examples of both are provided, the Directive focuses on prohibition of unfair practices. For certain practices the directive ‘promotes’ the contractualization *ex ante* as an instrument to formalize and make it easier the control by the parties and by third enforcer, thereby increasing the observability and the verifiability of the violations³³. Hence, there are practices prohibited by mandatory rules and practices prohibited by default rules. The latter give parties the possibility to engage in those practices insofar as the procedural requirements of clarity, transparency and specificity are complied with.

Indeed, art. 3 distinguishes between practices unfair *per se* (3.1) and practices that should be qualified unfair if not explicitly agreed upon in the supply contract (3.2). For the latter the default rule prohibits the practice but parties may overcome this prohibition if they expressly agree upon. The directive

³⁰ It went from 6 in the proposal to 14 (8 prohibited *per se* and 6 prohibited when an agreement is missing) in the final text (art. 3).

³¹ In the finally approved text a reference to open-ended terms has been only added in article 1, when defining the regulatory objectives but not in articles 2 and 3 when defining the concept of unfair trading practice. See art. 1: “*With a view to combating 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, this Directive establishes a minimum list of prohibited unfair trading practices*” (emphasis added to highlight latest addition).

³² See recital 9, Directive, cited above.

³³ This approach is known at national level. Indeed, pursuant to some MSs’ legislation, certain UTPs are exempted if the business conduct is expressly regulated through contract clauses that parties have agreed upon. In some cases, conducts are exempted as such (e.g. if unilateral power of contract modification is agreed upon by the parties); in other cases, national legislation requires that specific procedures are in place in order to ensure a fair adjustment of parties’ interests, e.g. businesses shall timely inform of their conduct or provide reasons or compensation. Whereas the former type of exemption may create room for abuse when drafting contract clauses, the latter type limits this risk by adopting contractual procedures or specifying requirements for contractual exemption. See F. Cafaggi – P. Iamiceli, Unfair Trading Practices, JRC Report 2018, cit., p. 16.

refers to the supply agreement or a subsequent agreement³⁴. Unilateral changes made by the chain leader cannot ‘legitimize’ the practice unless expressly agreed upon by the parties to the contract. Hence, *a unilateral change of a supplier code or an instruction from the chain leader to the suppliers cannot be considered an agreed upon practice*. More broadly, it should be underlined that the use of default rules in supply chain may create high coordination costs if parties whose performances are interdependent express different preferences over the change of default rules. For example, when the buyer requires the suppliers to pay for advertising or marketing, if suppliers have different views and some agree and some do not agree, the distribution of costs for a collective good (advertising and marketing) may be distributed inefficiently giving rise to free riding.

Contractualizing unfair trade practices does not make them lawful. The rules of the Directive are mandatory, and parties cannot derogate (art. 3.4). Contract terms that allow for UTPs included in the black list or that admit grey list practices without complying with the requirements imposed by the Directive may not be enforced. So, the new rules will limit contractual freedoms and, when UTPs have effects beyond the contract parties, will enable the use of extracontractual liability and/or unfair competition. Contractualization of trade practices has also its shortcomings, since privity of contracts reduces the possibility to capture cascade effects on the supply chain originated by UTPs downstream. In the Directive, grey list UTPs shall be regulated at the time of conclusion of the supply agreement. At this time, but only if requested by the supplier, the buyer should also provide an estimate of payments and costs to the latter, as possibly related to the practice concerned. Within the amendment process occurred along the trilogue with the European Parliament and the Council, the EU legislator has made clear that terms may be not only renegotiated upon agreement between the parties (and not unilaterally changed) but also stipulated after the conclusion of the supply agreement, yet before the occurrence of the UTP³⁵.

5. How to define UTPs in food supply chains? A view onto EU regulatory instruments

5.1. Unfair trading practices in the Directive on business-to-business relationships in agricultural and food supply chain: distributional and exclusionary effects

According to the framework above described, minimum harmonization is the main objective pursued by the Directive. The Directive is strongly committed to subsidiarity and proportionality to ensure the least possible interference with national power to autonomously define UTPs along the lines of existing or future legislation³⁶.

Though enlarged if compared with the original proposal, the directive only provides a minimum list of prohibited practices, giving MSs the possibility to broaden the scope of intervention when implementing³⁷. Not only MSs could decide to increase the number or broaden the scope of each practice but they can also regulate the supply chain effects of practices that originate from the chain

³⁴ See Directive art. 3.2 “Member States shall ensure that at least all the following trading practices are prohibited, unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer. (...)”.

³⁵ See, in this respect the amendment proposal presented by the European Parliament, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE623.672>

³⁶ See, by contrast, amendment proposal by the European Parliament in favour of the adoption of a general definition of UTP as follows: “unfair trading practice” means any practice that: - grossly deviates from good commercial conduct, is contrary to good faith and fair dealing and is unilaterally imposed by one trading partner on another; - imposes or attempts to impose an unjustified and disproportionate transfer of a buyer’s economic risk to the supplier; or - imposes or attempts to impose a significant imbalance of rights and obligations on the supplier in the commercial relationship before, during or after the contract”. In the final text of the Directive such definition is presented to qualify the objective pursued by the directive, whose effect is limited to the establishment of a minimum list of prohibited practices and of minimum rules on enforcement.

³⁷The original proposal listed only seven practices, whereas a subsequent proposal by the European Parliament included around fifty practices within the list.

leader formally or informally. They can also intervene to ensure more sophisticated coordination mechanisms when default rules concerning UTPs are in place.

As mentioned above, art. 3 distinguishes between practices prohibited as such (unfair *per se*) and practices that may be allowed if the contract (usually a supply agreement) regulates them in clear and unambiguous terms.

Within the first group, nine types of practices are considered; among these, we will focus on the following ones: (i) payment delay, (ii) abrupt order cancellation of perishable food product, (iii) unilateral changes of contract terms concerning (iii.1) frequency, timing or volume of the supply or delivery, (iii.2) quality standards, (iii.3) prices of the food products,³⁸.

Within the second group, practices allowed if agreed upon in the contract concern the return of unsold and the imposition to suppliers of certain fees (for stocking, displaying, listing, marketing, advertising, promotional activities or for fitting-out premises for supplier's products).

Focusing on the main UTPs addressed by the Directive, we analyze first the effects determined on immediate counterparty (*direct effects*). The effects along the supply chain (direct and indirect) will be analyzed separately below (see par. 6).

In general terms, UTPs generate two types of consequences: *distributional effects*, implying transfer of profits or shift of risks and costs to the detriment of small businesses; *exclusionary effects*, hindering access to or causing exit from supply chains³⁹.

Most of the *per se* prohibited practices (*black list*) and all the practices considered unfair by the directive if not agreed upon in the contract (*grey list*) determine unfair shifting of costs and risks, therefore causing distributional consequences, e.g. distributive unfairness.

Exclusionary effects may also occur. They are specifically considered within the list of *per se* unfair practices when a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products (art. 3.1(b)). It should be added that, even in this case, exclusionary effects are only potential, since in theory the seller might bear the loss and continue to supply the same buyer. Indeed, the Directive merely focuses on order cancellation without addressing the unfair termination of contractual relationships more widely intended, which is a much deeper concern for small farmers and other chain's operators.

Exclusionary effects may also derive from UTPs primarily generating distributional effects, when the latter are so severe to preclude further access to the chain. One example is unilateral and retroactive change of quality standards implying new investments that the supplier may not afford for costs or capacity limitations. The following table shows the main effects that can be associated with some of the UTPs addressed by the Directive. It focuses on direct effects, i.e. the immediate effects on the business partner.

³⁸ Compared with the full list of UTPs prohibited by the Directive, the following are not specifically considered here: request for payments that are not related to the sale; (iv) requests for payment concerning the deterioration or loss of agricultural and food products - that is not caused by the negligence or fault of the supplier - occurring on the buyer's premises or when ownership has passed to the buyer; refusal to confirm in writing the terms of a supply agreement; unlawful use or disclosure of supplier's trade secret; commercial retaliation against a supplier exercising contractual or legal rights, including filing a complaint or cooperating with enforcement authorities during an investigation; request for compensation for the cost of examining customer complaints related to the sale of the supplier's products although there is no negligence or fault on the part of the supplier.

³⁹ See above, par. 3*. F. Cafaggi – P. Iamiceli, Unfair Trading Practices in the Business-to-Business Retail Supply Chain. An overview on EU Member States legislation and enforcement mechanisms, JRC Technical Report, Publications Office of the European Union, Luxembourg, 2018, p. 4. On the exclusionary effects of UTPs, see J. Falkowski, The economic aspects of unfair trading practices: measurement and indicators, in F. Di Marcantonio - P. Ciaian (eds.), Unfair Trading Practices in the Food Supply Chain: A Literature Review on Methodologies, Impacts and Regulatory Aspects, JRC technical report, 2017, p. 20 seq.; R.J. Sexton and T. Xia, Increasing concentration in the agricultural supply chain, cit., p. 235.

Table n. 1: Direct effects of UTP

Legenda:
D: distributional effect
E: exclusionary effect

	<i>Economic effects of UTP</i>	<i>Distributional (D) / exclusionary (E) effects</i>
<i>Per se UTPs</i>		
Payment delay	Economic losses and shift of costs	D (transfer of costs)
Abrupt order cancelation	shift of risk related to resale or use in the food processing	D, potentially E (if implying termination of contractual relationship)
Contract term modification		
<i>frequency, timing or volume of the supply or delivery</i>	change in expected revenues and economic losses	D
<i>quality standards</i>	possible change in production process, possible change of costs	D, potentially E
<i>prices of the food products</i>	change in expected revenue	D
Unreasonable shift of risks (cost concerning deterioration or loss unrelated with supplier's fault)	shift of risk	D
<i>Trading practices subject to transparency requirements in supply agreements</i>		
Return of unsold	shift of risk	D
Stocking, displaying, listing costs	shift of costs	D
Promotional fees	shift of costs	D
Marketing fees	shift of costs	D

5.2. Unfair trading practices in private regulation and the Principles of Good Practice adopted by the B2B Platform of the High Level Forum for a Better Functioning Food Supply Chain

Not only does the Directive not eliminate private regulatory arrangements but it is intended to interplay with private regulation at EU and MS level. Within the Principles of Good Practice above mentioned, the High Level Forum has elaborated general and specific principles together with two sets of illustrations for each practice: one describes what is unfair, whereas the other defines what is fair.

If examined with a view to the adoption of a legislative instrument at EU level and to the existing legislation at national level, both types of private regulatory instruments (principles and examples) may play a complementary role to legislation.

Indeed, general and specific principles may inspire the adoption of new legislative instruments and guide legal interpretation of existing rules; being almost absent from the wording of the directive but present in several national statutory provisions, general principles provided by private regulation at EU level may play an important role⁴⁰. At the same time, examples of fair and unfair practices may

⁴⁰ So, e.g., whenever the law makes explicit reference to private regulation (this is the case for the Italian art. 62, l. 1/2012, making reference to the SCI) or when courts consider private regulation as a reference for the use of general clauses, e.g. the duty of fair dealing or good faith, or open-ended terms such as trade usages (this is the case of France, under L. 442-6 of Commercial Code, or Croatia; see A. Renda, F. Cafaggi, J. Pelkmans, Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, cit., p. 94).

It should be clarified that

fill in the many gaps left by the lists of prohibited practices provided by national legislation and, prospectively, by the minimum list included in the directive; moreover, both at EU and national levels, legislation is normally focused on prohibition of UTPs rather than on the promotion of fair practices.

One example of this form of complementarity relates to the case of termination of a commercial relationship. This is considered by the Principles of Good Practice as an example of unfair practice, whereas, as seen above, the directive specifically focuses on the case in which a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products. Quite interestingly (and beyond what also national legislation provides when addressing the more general case for termination), the Principles of Good Practices describe the example of fair practice looking at cases in which “the unilateral termination of the agreement respects the agreement and *due process* and is in accordance with applicable law”. Reference to due process represents an important addition, as some national courts have acknowledged⁴¹. Procedural rules concerning changes of contractual instruments and relationships should be informed by procedural and substantive due process and those affected by changes should have the possibility to interact with the chain leader.

Complementarity also relates to the nature of UTP effects considered, whether distributive or exclusionary. For example, building on the comparative analysis above on termination, it is clear that European private regulation looks at exclusionary effects more explicitly than the EU directive, where the immediate focus is on distributive effects generated by abrupt order cancellation and only indirectly exclusionary effects may be linked to the banned practice.

In other cases, the SCI allows to address practices not covered by EU legislation, which may be distributive and/or exclusionary. So, e.g., with regard to contractual penalties that are applied in a non-transparent manner and are disproportionate to damages suffered or to penalties imposed without any justification in the agreement or the applicable law. Indeed, these penalties may consist in monetary fines (therefore determining distributive costs) or the termination of the contractual relationship, so leading to exclusionary effects.

Just like the equivalent UTPs foreseen in the EU directive, many other practices addressed by the SCI are relevant for the distributive effects determined by the practices; so, e.g., for non-contractual retroactive unilateral changes in the cost or price of products or services or for the imposition of listing fees that are disproportionate to the risk incurred in stocking a new product.

We recommend that MSs make explicit reference to the principles so to integrate national legislation. Even more importantly, we strongly recommend coordination at the enforcement level especially when both the public and the private enforcer are engaged in proceedings concerning the same violation. This is particularly necessary when, as it is the case for Italian law, the principles have already been incorporated by reference in legislation. We also recommend a stronger emphasis on the supply chain consequences of violation in the interpretation of the principles by the private enforcers.

So far, we have considered the (distributive or exclusionary) effects generated by UTP in the single relationship between seller and purchaser. In the next section we enter a wider analysis bringing the supply chain dimension into the picture.

6. Regulating UTPs: a supply chain approach

The EU directive expressly looks at relations characterised by significant imbalances in bargaining power between suppliers and buyers but uses the turnover difference as a proxy for power imbalance.

⁴¹ For an example in another sector, see a widely discussed judgment of the Italian Corte di Cassazione, 18.9.2009, no. 20106, deciding that a court shall assess the fairness of a contractual withdrawal by a car manufacturer in a distribution agreement taking into account the principle of proportionality from the perspective of procedural fairness.

However, it would be inappropriate to conclude on these grounds that only certain types of supply chains (e.g. captive ones) are covered by the Directive.

We contend that the directive encompasses various types of supply chains where relationships may be established between firms with different turnover. Given the minimum harmonization nature, MSs can modify the rule set in art. 2 and reduce the level of fragmentation that would result from that model. We suggest that a practice may be unfair depending on the structure of the chain. Hence, considering the form of the chain is relevant to define the existence and the seriousness of a practice. For national implementation of the Directive we recommend taking the different forms of supply chains into account when defining the existence of a UTP and the modes of sanctioning its occurrence. Particularly, taking the supply chain dimension into consideration implies going beyond UTPs' effects on the immediate business partner and looking at the systemic effects. As indicated above, by systemic effects we mean those *effects that are caused by UTPs along the chain, mainly through "pass on" conducts (e.g. payment delay or imposition of unreasonable fees due to equivalent practices suffered by the buyer in its downstream contractual relations)*⁴².

We may see some applications in the illustrations below, where we propose some tentative criteria to examine whether UTPs generate isolated or systemic effects. Indeed, not all UTPs produce systemic effects. Moreover, some of them may in principle cause systemic effects but these may be either unlikely to occur or hardly verifiable in practice. When no systemic effects can be proven, the identification of the UTP should be limited to the immediate victim of the practice.

Systemic effects of UTPs along the supply chain may be relevant for several aspects. In this article we focus on some of them, namely:

1. the territorial scope of application of regulatory instruments;
2. the ascertainment of the existence of UTPs and of their effects;
3. the allocation of liability (i.e. the identification of business to whom UTPs may be referred);
4. the modes of enforcement of regulatory instruments and the use of remedies against UTPs.

After briefly examining the first issue (sec. 6.1), we will focus on the relevance of systemic effects for the definition of UTPs, first in general terms (par. 6.2) and then with reference to different types of supply chains (par. 6.2.1). We will devote a separate analysis to issues concerning liability and enforcement (par. 7).

6.1. Systemic effects and territorial scope of application

Identifying systemic effects may impact on the scope of application of regulatory instruments. As we explain below, not all UTPs have systemic effects but those that generate them are likely to disrupt the functioning of the market and affect a larger number of farmers than isolated practices. For this reason, at least in principle, legislation may be aimed at policing specifically this type of UTPs.

Systemic effects may also influence the scope of application with regard to trans-border supply chains. In some cases, UTPs, originated in the EU, may have systemic effects outside EU while generating minor or no effects within the EU. This shall not be an obstacle to the application of a EU instrument. With regard to the new Directive, the extra-territorial effects of UTPs may be captured as far as the practice occurs within a direct bilateral relation in which at least one of the parties is based in the EU⁴³. Along the same lines, goes the adaptation of private international law legislation and the need to ensure that UTPs, originated in MS *x* but with systemic effects in other MSs (e.g. MS *y*), may be subject to rules enabling effective protection⁴⁴. Preventing the risk of forum shopping is even more

⁴² (see par.*),

⁴³ Indeed, the Directive applies to sales in which either party to a sale contract or both parties are established in the European Union.

⁴⁴ Along these lines, see art. 3(4), Directive, qualifying the prohibitions of UTPs included in the black and grey lists as overriding mandatory provisions which are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the supply agreement between the parties.

relevant if within the EU different enforcement rules apply depending on national applicable law, so allowing for different level of deterrence⁴⁵.

Broadening the scope of application of regulatory instruments beyond national boundaries helps capturing systemic effects; it is not sufficient, however. As seen above, in most cases systemic effects concern enterprises different from those having a direct contractual relation with the business engaging in UTPs. Anchoring the scope of application of regulatory instruments to a specific sale contract may leave these victims without effective protection. This gap of protection may be filled by expanding the scope of application including UTPs occurring in relation to multiple and linked transactions along the chain rather than to a specific sale contract between the UTP originator and the UTP victim. This expansion can significantly influence enforcement, since redress might be sought by upstream businesses that have no contractual ties with UTPs originators. Overcoming the limitations brought by the privity of contract principles, in order to take UTPs' systemic effects into account, would be particularly important at national level. Indeed, whereas the Directive only tackles enforcement measures due to either modify the tortfeasor's conduct or sanction him, it will be for MSs to define the forms of redress for the victims⁴⁶.

6.2. Systemic effects and the ascertainment of UTPs beyond the bilateral dimension of the supply contract

Systemic effects may be relevant for the establishment of a UTP. Indeed, UTPs with systemic effects but very limited impact on the immediate counterparty shall be considered as UTPs. For example, change in quality standards imposed by the chain leader on first tier-supplier may have very limited consequences upon the latter but very severe ones on the entire chain upstream. The distribution of systemic effects may depend on the ability and power to transfer risks and costs. The ability to transfer the negative consequences along the chain may reduce the impact on the immediate contractual partner and increase that on the remote participants. This is also relevant from an enforcement perspective, since the lack of harm on the first-tier supplier could generate an enforcement gap were chain interests not internalized in procedural rules. Since the Directive is aimed at providing a "minimum list" of unfair practices, we examine whether and how listed practices can capture this supply chain dimension⁴⁷.

Using a different technique, the cited Principles of Good Practices adopted by the High Level Forum are more open to explicitly acknowledging such dimension. E.g., the very first principle provides that "[c]ontracting parties should always take into account consumer interests and the *overall sustainability of the supply chain in their B2B relations*. Contracting parties should ensure maximum efficiency and optimisation of resources in the distribution of goods *throughout the supply chain*". In the light of institutional complementarity and without departing from the "minimum list" approach, national legislation could either incorporate or refer to the general principles provided by the B2B Platform as guiding principles for legal interpretation of adopted implementing measures.

6.2.1. UTPs, systemic effects and supply chain models

The analysis above suggests that looking at systemic effects of UTPs is important for detecting practices with low impact on immediate suppliers and high impact along the supply chain.

However, not all UTPs generate systemic effects and not all do so in all types of supply chains (modular, relational, captive).

In order to take these diversities into consideration we again look at some of the UTPs addressed by the EU Directive among already examined in par. 5. The objective is to evaluate:

- whether some UTPs tend to generate systemic effects more than others;

⁴⁵ On the modes of enforcement and specific remedies introduced by the new directive, see par. 7 below.

⁴⁶ See sec. 7* below.

⁴⁷ See section 6.2.1.* below.

- whether this occurs in different ways or at different conditions depending on the type of supply chain;
- whether the occurrence of systemic effects along certain types of chains increases the magnitude of distributional or exclusionary effects observed in par. 5 for isolated UTPs.

As concluded above, the ultimate goal is *not* to suggest that UTP legislation should be limited to address UTPs generating systemic effects only or doing so in specific type of chains (e.g. the captive ones). Rather it is to *differentiate* UTPs with systemic and UTPs with only isolated effects.

Indeed, as we see here below, *ex ante* distinguishing between isolated and systemic practices in the various supply chain models requires extensive analysis and more in-depth evidence than might be available. Moreover, from a policy perspective, if only UTPs with systemic effect were considered, deterrence would not be optimal, with special regard to isolated practices that may be equally disruptive for the functioning of the market.

Hence, we propose to prohibit UTPs with both systemic and isolated effects but associate different consequences. Given the stronger impact of UTPs with systemic effects we suggest that both remedies and sanctions take duly into account the existence and the magnitude of systemic effects produced by the UTP. For the same reason, we suggest that the type of chain, whether captive, modular or relational, should be taken into account when ascertaining and then policing UTPs.

Within this perspective, institutional complementarities between legislation and private regulation may be sought in order to define UTPs and to achieve the optimal level of deterrence. Indeed, this is a case in which, even when legislation fails to distinguish between isolated and systemic UTPs, private regulation can provide a useful contribution, e.g. by enriching the array of examples of fair and unfair practices taking systemic effects into account in the light of the general principles of “chain sustainability” and “chain fairness”, adopted by the High Level Forum in the Principles of Good Practices, as examined above (see par. 6.2).

For the purpose of the present analysis, we group the here examined Directive’s practices as follows:

- (a) payment delays;
- (b) abrupt order cancelation;
- (c) unilateral changes of contract terms.

We observe differences in systemic effects, depending on the type of chain, whether modular, relational or captive. As specified above, within systemic effects, we focus on indirect ones, therefore those generated by passing-on the consequences of suffered UTPs on upstream suppliers.

(a) Payment delays

Payment delays will likely induce systemic effects since liquidity constraints, when existing, may equally impact on any transaction along the chain; therefore, payment delays downstream may reasonably at least contribute to payment delays upstream. It is true that also listing fees or the like may squeeze the margin for first-tier supplier and somehow impact on price negotiation upstream but it is hard to verify to what extent these specific elements influence price fluctuations along the chain⁴⁸.

⁴⁸ See J. Fałkowski, *The economic aspects of unfair trading practices: measurement and indicators*, cit., p. 26 (“we are still far from understanding what drives the observed patterns of price adjustments and why (Bakucs et al., 2014). This also clearly indicates the second key point which explains the lack of systematic evidence on the impacts of UTPs, namely the problem of attribution. As there are many confounding factors, it is very challenging to pinpoint the extent to which a given phenomenon (for example, farm exits) is due to UTPs or rather due to some other things happening (for example, specific state regulations or idiosyncratic risks faced by an individual or by a group of farm households)”). Studies on price fluctuations, e.g. those resulting from economic crisis, show certain asymmetries in the adjustments of value distribution along the chain, so that price volatility is much higher at farm’s than at processor’s level (J. Fałkowski, *The economic aspects of unfair trading practices: measurement and indicators*, cit., p. 24, citing OECD’s and FAO’s analysis). Other studies observe the positive relation between asymmetric price transmission and fragmented farm structure (A. Sorrentino et al., *Food value chain in the EU*, cit., 225 seq.), which may play as a proxy for reduced bargaining power. Based on these considerations, one could assume that such asymmetry is influenced by asymmetrical power allocation. More evidence would be needed to support this hypothesis, however (J. Fałkowski, *The economic aspects of unfair trading practices*, cit., p. 24).

Only indirectly, economic literature on price transmission and value distribution along the chain is relevant under this respect; indeed, this literature is more concerned with transmission of fluctuations at farm's level upon price determination at processor's and consumer's level⁴⁹. From this perspective, superior bargaining power may be observed as a factor modifying the speed and the modes of price transmission downstream more than imposing a new wave of fluctuations upstream, based e.g. on reduction of supplier's profit through imposition of listing fees or alike.

Looking at different types of chains, one could presume that *the higher the UTP immediate impact on supplier's margins, the more limited the supplier's exit options, the higher the systemic impact on the chain*. This means that systemic effects would be more relevant in captive chains than in modular and relational ones⁵⁰.

(b) Abrupt order cancelation and unfair termination of contractual relationships

Abrupt order cancelation, as a practice addressed by EU legislation, must be distinguished from unfair termination of medium-long term contractual relationships, a UTP not covered by the directive but addressed by the Principles of Good Practices above examined.

With regard to abrupt order cancelation of perishable food products, the risk of transmission of systemic effects on upstream suppliers is more limited as far as the specific order is concerned, being rather unlikely that a "chain" of sub-orders cancelation may be triggered as an immediate reaction in respect of perishable products whose value is proximate to 0.

By far higher probability of systemic effects exists if one considers the more severe case of unfair termination of contractual relations, with special regard to long-term ones⁵¹; indeed, **unfair termination of long-term relations** would cause relevant effects upon sub-suppliers in cases in which the latter have made specific investments in chain processes and(or) their income largely depends on the relation with first-tier supplier, whose relation with the chain leader has been unfairly terminated. This type of systemic effects would then be particularly relevant for both relational and captive chains.

In both cases, private regulation could contribute to define how chain leader can take chain's interest into consideration when terminating a bilateral relationship with systemic effects. Moreover, as proposed by the Principles of Good Practices, unilateral termination should respect the rules of *due process*; from a supply chain perspective, this could imply, e.g., that chain participants different from first-tier supplier could be consulted or that justifications for termination could be provided taking their interest into account.

(c) Unilateral contract modification

The third type of practices should be addressed distinguishing between cases in which unilateral contract term modification concerns: (1) frequency, timing or volume of the supply or delivery, (2) quality standards, or (3) prices of the food products⁵².

⁴⁹ See A. Sorrentino et al., Food value chain in the EU, cit., p. 222 seq.; J. Fałkowski, The economic aspects of unfair trading practices: measurement and indicators, cit., p. 22 seq. See also High Level Forum for a Better Functioning Food Supply Chain, The State of Food Prices and Food Price Monitoring in Europe, accompanying the Forum's 2014 Report, part. p. 3 seq., where it is clarified that the competitive structure of food production (varying degrees of horizontal concentration and vertical integration) is only one of the main determinants of food prices.

⁵⁰ Indeed, following the Gereffi et al.'s theoretical framework (see footnote n....* above), captive chains are those in which exit options are very limited or inexistent due to high complexity of transactions and lack of skills on the side of suppliers.

⁵¹ Within long-term relations, we here include also the sequence of short-term contracts determining the legitimate expectation (reliance) of contract continuity.

⁵² See art. 3 c) Directive "the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services insofar as these are explicitly referred to in paragraph 2 (...)"

(c.1) *Frequency, timing or volume of supply*

In the first set of modifications, systemic effects are very likely if changes are substantial (in quantitative terms or due to repeat changes) and the first-tier supplier has limited alternative options to either source or sell the agreed products; in this respect, systemic effects may be more limited in modular chains, in which switching costs are lower⁵³. Also relational chains may be more prone to generate adaptive measures based on cooperation between the victim (first-tier supplier) and his/her sub-suppliers. These adaptive measures may be included within systemic effects, although they are based on cooperation rather on the unilateral shift of costs/risks on upstream suppliers.

(c.2) *Quality standards.* Contract term modifications concerning quality standards usually generate systemic effects along the chain. These effects are stable. E.g., one could look at a substantial decrease of fat percentage in milk-based products, which implies a change in sourcing strategies and skimming processes along the chain. This impact could be even boosted by the use of ‘supplier codes’ or ‘general terms and conditions’ incorporating quality standards imposed along the chain⁵⁴: a change in the supplier code is likely to produce a systemic impact on the chain by far stronger (and faster) than in cases in which the changes imply a renegotiation process within each bilateral relation. Once the changes become contractually binding, costly adaptations may be needed through changes of sourcing strategies and processing methods; this is the core of systemic effects caused by this UTP. Similarly, to the case under (c.1), modification of quality standards will generate systemic effects in relational and in captive chains more than in modular ones. Indeed, in the latter ones, due to high codifiability of knowledge, high competence of suppliers and absence of specific investments, chain interdependence is rather low and chain “modules” may be replaced at low switching costs⁵⁵. By contrast, for different reasons, unilateral changes of quality standards may determine severe systemic effects in relational and captive chains: in the former, due to high interdependence along the chain; in the latter, because of the technological dependence of low competence suppliers on their buyers⁵⁶. In relational chains, systemic effects will mainly imply the loss of specific investments and the need to make new investments to adapt to new quality standards; once again, these measures may be based on cooperative adaptation. In captive chains, even more than in relational chains, the need for these adaptations may cause the exit of chain participants, so that distributive effects are coupled with exclusionary ones.

(c.3) *Prices of food products.* Whereas the first two types of contract modifications will most likely generate systemic effects, at least in relational and captive chains, the third type of modification (concerning prices of food products) may or may not generate systemic effects depending on the ability of the victim supplier to stay on the market despite the margin reduction suffered. As observed above with regard to practices due to increase victim’s costs (and so reduce his/her margins, see under (a)), systemic effects, if occurring, could be particularly troublesome for captive chains and may have therein not only distributional but also potential exclusionary effects.

⁵³ See A. Carbone, *Food supply chains: coordination governance and other shaping forces*, cit., p. 13.

⁵⁴ See. Cafaggi, F., ‘The regulatory provisions of transnational commercial contracts. New architectures’, 36 *Fordham Journal of international law* 1557 (2013); Cafaggi F., P. Iamiceli, ‘Supply chains, contractual governance and certification regimes’, cit.

⁵⁵ See G. Gereffi, J. Humphrey, and T. Sturgeon, ‘The Governance of Global Value Chains’, cit.; E. Pomarici, *Food Value Chains: Governance models*, cit.; A. Carbone, *Food supply chains: coordination governance and other shaping forces*, cit.

⁵⁶ Gereffi et al., ‘The Governance of Global Value Chains’, cit.; on chain interdependence see also K. Sorsa, F. Cafaggi, P. Iamiceli, C. Ferrari, *Transnational Private Regulation, System Level Innovations and Supply Chain Governance in the Coffee Sector*, Turku University of Applied Sciences, Research Report 224, 2015, available at <http://julkaisut.turkuamk.fi/isbn9789522165855.pdf>. An exception to chain interdependence could be represented by quality standards which are applicable only to an isolated segment of the chain process without any impact on subsequent segments, e.g. certain standards on packaging.

Once again, private regulation could specify when and how unilateral modification of supply agreements may be fairly endorsed. The current version of Principles of Good Practices adopts a bilateral approach rather than a supply chain approach; the latter could be usefully included having special regard to contractual modifications occurring in captive chains and, if quality standards or quantitative parameters of delivery are substantially changed, in relational chains. E.g., compensatory measures should be taken into consideration not only for the other party in a specific bilateral relation directly affected by the contract modification but also in favour of other chain participants if affected⁵⁷. Moreover, due process and suppliers' consultation could contribute to prevent systemic effects and unfairness.

The table below summarises the main results of this analysis.

Table no. 2

Systemic effects of UTPs

	<i>Isolated/systemic effects</i>	<i>Modular (M), relational (R), captive (C) supply chains</i>
Payment delay	Potentially systemic	Systemic effects more likely in C than in M or R
Abrupt order cancelation	Most likely, isolated (as order cancelation) Potentially systemic if implying termination of contractual relationship	High concern for R and C
Contract term modification		
<i>frequency, timing or volume of the supply or delivery</i>	Isolated occasionally Systemic (when changes are permanent)	In all chains but M may more easily allow for cover sales or sourcing
<i>quality standards</i>	Systemic (unless change regards an isolated stage of production process)	Not particularly problematic (or likely) in M. Quite problematic and with severe consequences in C and in R, also for possible exclusionary effects
<i>prices of the food products</i>	Potentially systemic	More likely and more troublesome in C, also for possible exclusionary effects

The above analysis may help both policy makers and enforcement authorities in the difficult task of establishing the existence of UTPs and enforcing legal prohibitions.

Firstly, UTPs generating systemic effects must be prohibited regardless the consequences determined upon the direct target or counterparty, since other businesses may be severely affected along the chain. The asymmetry between direct and indirect systemic effects may also create a gap in the enforcement, since the direct counterparty may have limited interest in filing a complaint, whereas upstream suppliers may lack procedural rights to bring an action. The possibility that systemic effects may vary depending on the form of the chain does not affect the existence of the practice; rather it might influence the choice of remedies and their content.

Secondly, whereas some isolated UTPs, being other safeguards present, might be allowed if agreed upon in the contract, UTPs generating systemic effects should always belong to the so called “black list”. By definition systemic effects may not be agreed upon in bilateral contracts. Hence, the rule of prohibition applies and individual parties cannot agree on regulating systemic effects.

Only if collective agreements along the chain were introduced in the implementation of article 3.2, the possibility for agreement on systemic effects may be considered. Indeed, if including this type of

⁵⁷ See the following example in the Principles of Good Practice: “The agreement contains precise circumstances and detailed rules under which the parties can jointly modify the terms of the agreement, in a timely and informed way, including the process for setting the necessary compensation for any costs resulting for either party.”

UTPs, “grey lists” should provide for wider agreements (e.g. supply chain agreements) regulating these practices. Some examples emerge at national level where interprofessional and interbranch agreements are deployed⁵⁸.

Thirdly, as we argue below, legislation should provide for more severe enforcement measures in case of UTPs with systemic effects. When the latter commonly occur (as, e.g., in case of unilateral modification of quality standards established by means of supplier codes), these may be presumed unless the business engaging in the practice provides a counter-evidence.

7. Enforcement of UTPs in supply chains

Enforcement is the core of the Directive. The institutional framework within which the Directive will operate features an enforcement triangle composed by ADR, administrative and judicial enforcement. The triangle is not an isosceles. Increasingly ADR and administrative enforcement are covering areas that were either unregulated or insufficiently covered by judicial enforcement. As to the enforcement, the MSs and EU preference for administrative enforcement is clear and based on the expectation that it will lead to more effective measures. Leaving without prejudice the current power of national judiciaries, the effort to harmonize made by the Directive focuses on administrative enforcement with additional power to investigate and sanction both domestic and cross-border UTPs. The national enforcement authority is competent for the practices regulated by art. 3 of the Directive. Administrative Authorities may carry on own investigations stimulated by affected parties, stakeholders, or initiate ex officio proceedings.

In the Directive only the cooperation between public enforcers is regulated whereas no indications are offered concerning integrated governance of EU cross-border UTPs (art. 8, Directive). No coordination between administrative sanctions and judicial remedies is provided: an important task for national legislators, implementing the Directive. This is of paramount importance when cross-border UTPs are in place. Depending on MSs’ choices, coordination may occur between administrative enforcers and judiciaries at EU level. We recommend that coordination between national judiciaries and administrative authorities be regulated in the process of implementation. We further suggest that the European Commission can promote the coordination between administrative and judicial enforcers without interfering into their independence. The coordination can range from pure reporting on different enforcement practices to guidelines concerning coordination and the application of the principles of effectiveness, proportionality and dissuasiveness. Art. 10 of the Directive, on annual reporting and Commission’s implementing acts may provide a partial basis. More could be done within and after the evaluation process under art. 12 of the Directive. We recommend introducing mechanisms of coordination with judicial enforcement so that findings by the administrative authority can be used in judicial proceedings. The two models of competition law (Dir. 2014/104/EU) or consumer law, including the model proposed in the ‘new deal’ package, can be usefully adapted to ensure that victims of UTPs can use evidence produced by the administrative proceedings when asking for compensation and/or restitution⁵⁹.

⁵⁸ See, e.g., art. L 442-6, French commercial code on restrictive practices, including in the list the following UTP: “De rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte de la durée de la relation commerciale et respectant la durée minimale de préavis déterminée, en référence aux usages du commerce, *par des accords interprofessionnels*”. English unofficial translation: “To break off abruptly, even partially, a commercial relationship, without written notice having regard to the duration of the business relationship and respecting the minimum period of notice determined, by reference to usage of trade, through *trade agreements*” (emphasis added).

⁵⁹ Under the term New Deal are included proposals concerning the reform of directive 93/13, 2005/29, 2009/22. See ...***. In relation to the changes concerning the directive 2009/22 the proposal makes significant improvements as to the coordination between administrative and judicial enforcement mechanisms by allowing the victim of the violation the possibility to use the administrative decision in judicial proceedings related to damages and or restitution. A similar

MS can also expand the scope of the Directive when implementing, given the minimum harmonization⁶⁰. It would not constitute an infringement of EU law if MSs broaden the scope of legislative intervention beyond the rules provided by the Directive insofar as this broadening is compatible with rules on the functioning of the internal market (see art. 9 of the Directive). They can broaden the scope by eliminating references to the size-difference of the harmed firms, including also enterprises having similar size to that of the infringer. Furthermore, they can regulate the consequences of UTPs for multiple enterprises by identifying preventive and restitutionary remedies that refer to the entire chain and not only to individual enterprises or groups of enterprises within the chain. Nothing prevents MSs, when implementing the directive, to confer broader powers to the administrative Authority and allow them to investigate and sanction also the practices not listed in the Directive but considered unlawful under national law. Hence, substantive partial harmonization can be combined with partial (minimum) harmonization of enforcement.

The Directive does not address civil remedies and the coordination between sanctions and remedies. Enforcing UTPs at supply chain level implies a radical change of perspective in relation to both the scope and content of remedies. Clearly, there are questions concerning the coordination at national level between different enforcers. Detection and repressions of UTPs depends on the engagement of a variety of players. Coordination is important not only at the preliminary stage level, when evidence of UTPs first arises, but also when violations are detected and multiple enforcers act possibly in different countries. When the UTPs involve a global chain with farmers and producers located in some countries, including non EU, and traders and retailers located in other countries, many enforcers including both administrative and judicial are in place. Their effective coordination both when investigating and when sanctioning is a precondition for deterrence.

Not only is prohibition of UTPs very important but the main goal of a remedial system should be the correction of the inefficiencies and the unfair distributional effects. It is unlikely that parties engaged in long term relationships will seek compensation. Much more effective than damages are corrective and restitutionary measures. Farmers and suppliers may seek forms of reorganization of the chain that reallocates more fairly risks concerning exogenous factors that may determine contractual changes.

We propose to have a pyramidal scheme for remedies and sanctions⁶¹. Cooperative enforcement must complement hierarchical enforcement. The cooperation between producers' associations, NGOs and large buyers is a necessary component of an enforcement strategy along agrifood supply chains.

We believe that the developments of complementary enforcement strategies that allow at first the possibility to engage in corrective behaviour and only as a last resort the conventional sanctions can mitigate the effects of the practice. Like in other pieces of EU legislation, corrective measures should have a distinct role complementary to the one of injunctions due to require the buyer to bring the prohibited trading practice to an end (art. 6.1 of the Directive). Corrective measures should be considered both in the domain of sanctions as alternative to them or as factors that can mitigate the amount of pecuniary sanctions. They should certainly be regulated within the commitment regime. Secondly, corrective measures should be aimed at reducing harm to other participants in the chain.

More specifically, on the remedial side concerning systemic violations, we propose to address the issue specifically in the legislation. As we saw, cooperative behaviour by the infringer is an important component of sanctioning that should be introduced in the implementation of the directive at national level.

mechanism that permits the use of administrative decisions or judgments whichever comes first in the other track would be extremely useful to effectively contrast UTPs in agrifood supply chains.

⁶⁰ See art. 9, Directive.

⁶¹ See Ayres and Braithwaite, *Responsive Regulation*, OUP, 1992, p. 00**

7.1. UTPs and systemic effects: the enforcement challenge

Among the many features that MS can develop in their implementation we would like to focus on the supply chain implications for enforcement. A supply chain approach that considers the systemic effects of practices requires the governance of the chain to be capable of effectively administering remedies potentially reaching out thousands of addressees. This is an issue for the enforcer but also for the responsible party(ies) which have to modify their behaviour.

The enforcement of practices with systemic effects has implications over the scope of remedies and their content. When the existence of systemic effects is proven, the remedy should affect the entire chain. It should address the causes and the consequences of the practice. This may imply the need for higher levels of cooperation among enforcement authorities and enforcement procedures, since most supply chains expand cross-border.

We recommend differentiating enforcement strategies concerning practices with systemic or isolated effects. The distinction affects both the scope of each remedy and the content. The effects of injunction will change depending on whether the practice is with or without systemic effects. Changes will concern the subjective scope but also the content of the injunction. Whether or not systemic effects are in place will influence the beneficiaries of injunctive relief and the change of rules resulting from the injunction. For example, injunctions may change contractual terms. Whether the UTP has systemic effects will influence the content of the injunction and those who are affected. Equally relevant is considering whether a supplier code change is required or simply a change of terms in a limited number of contracts along the chain will be sufficient to contrast the UTP. When systemic effects are in place, the injunction should change the supplier code and all the contracts within the chain. When only isolated effects occur, the injunction should target only the relevant contracts without changing the general terms and conditions.

UTPs may depend upon procedural or substantive violations.

If the unfairness depends on the procedural dimension, e.g. the unilateral nature of the change, then the chain leader has to involve the participants into the chain and ensure that the changes are agreed upon by the addressees in the supply chain.

If the unfairness is substantive, the content of the rule rather than the procedure has to be modified. For example, unilateral changes made by the chain leader when engaging in a UTP have to be eliminated and combined with restitutionary remedies concerning the redistribution of the costs of those changes. The chain leader will be asked by the enforcer to make changes in the supplier code and/or the general terms and conditions to be then 'transmitted' to all the chain's participants. The changes that eliminate the UTP must be subsequently incorporated in bilateral linked contracts along the chain. Uniform mechanisms of restitution along the chain have to be devised so that the unfair costs of the unilateral change paid by chain participants will be returned. These changes should be monitored by ad hoc committees operating under the supervision of the enforcer. Reporting about the effectiveness of the remedy should be required. The introduction of collective or representative actions at national level should be carefully considered given that in UTPs with systemic effects procedural economy would suggest claims aggregation. A different yet related issue concerns the restitutionary measures ordered by administrative authorities and the due process rights of the UTPs victims.

The existence of systemic effects produces radical modification of the remedial structure, moving from decentralized to centralized mechanisms. Whereas this approach may contribute to ensure that the entire chain is involved, due process issues may arise. Parties who have not participated in the dispute resolution may be subject to remedies they have not sought and may even disagree with. We propose an opt out mechanism whereby those participants who disagree can opt out of the remedy

and negotiate their own remedy with the immediate contractual partners instead of benefitting from the remedy associated with the removal of systemic effects.

A key issue when enforcing unfair practices and implementing the distinction between systemic and isolated effects is the allocation of the burden of proof. The claimant in civil litigation or the authority when deploying administrative enforcement has to prove the existence of systemic effects along the chain. Once the systemic effects have been *prima facie* shown, the burden of proof is on the chain leader who has to show that effects were limited and isolated. If no systemic effects can be proved, the practice should be dealt as one producing only isolated effects. As seen above, stronger presumptions could be established in respect of captive chains, where suppliers and sub-suppliers are economically dependent upon the chain leader and have limited exit options.

7.2. Systemic effects and the allocation of liability: who is liable for UTPs spreading their effects along chain?

The distinction between systemic and isolated effects of UTPs poses challenging questions concerning the scope and the function of administrative sanctions and judicial remedies. How should the infringer be determined when UTPs are adopted in global chains? Which liability regime should be adopted? Who should be sanctioned? More specifically who are the potentially sanctioned enterprises and what are the functions of these sanctions? All these questions are left to the process of implementation. We strongly recommend to integrate in national legislation specific rules concerning liability in supply chains.

Indeed, when considering the systemic effects of UTPs along the supply chain the scope and the allocation of liability is of paramount importance. The term liability is used both in relation to administrative infringements leading to sanctions and civil infringements related to remedies. From this perspective, one could ask whether liability passes together with systemic effects with the consequence that not only the chain leader but also the key suppliers may be sued for unfair practices when passing-on the effects of the “originating” UTP on the upstream supplier; in this case, joint liability between chain leader and first-tier suppliers could be considered. Of course, this may not be *the* general rule, nor automatism may be established along these lines. The form of the supply chain and the ‘relative’ independence of key suppliers may play a role in defining the *if* and *how* of liability regimes. In many cases, systemic effects are the result of *defensive* measures taken by intermediary chain participants who have no other options than, e.g., delaying payments or canceling orders, if they have suffered from the same practice by the chain leader. In captive supply chains, this may be the rule due to the lack of exit options for captive suppliers⁶². Merely defensive practices should not be addressed as unfair.

Somehow, the Directive indirectly prevents the described paradox by limiting its scope of application in respect of the size-difference between the potentially unfair trader and its counterparty under art. 1, Directive. Indeed, in the EU legislator’s view, smaller businesses could never be held liable towards larger ones⁶³. However, as suggested, a supply chain approach should apply to all the segments, since

⁶² G. Gereffi, J. Humphrey, and T. Sturgeon, ‘The Governance of Global Value Chains’ (2005) 1 Review of International Political Economy 78, part. p.*; J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards, cit.; E. Pomarici, Food Value Chains: Governance models, cit.; A. Carbone, Food supply chains: coordination governance and other shaping forces, cit.

⁶³ This is not necessarily the case under national legislation concerning UTPs. Some national legislation does limit the scope of application of dedicated instruments on UTPs in retail chains to business having a higher size than a legally established threshold (so in Croatia, Lithuania, Poland, the United Kingdom) and these or other MSs further limit protection of potentially injured parties to those qualifying as SMEs (so for Lithuania again, Germany and to certain extent Spain). See, for a more detailed analysis in the food sector legislation, F. Cafaggi – P. Iamiceli, JRC Report, 2018, cit., p. 11, and for a wider examination in the retail chain legislation, A. Renda, F. Cafaggi, J. Pelkmans, Study on the

most of the time the practice originates from the chain leader and intermediate suppliers only operate as vehicles or agents. It should then be questioned whether the size or the type of chain should control for determining the cases in which chain participants may be held (jointly) liable for “passed-on” unfair practices. If the type of chain were one of the relevant factors, then consideration should also be paid for the power allocation within the chain and, even more, for the switching costs and exit options influencing the objective capacity of the “passing-on” trader to mitigate the effects of suffered UTP without passing them on the upstream supplier. E.g., “passing on” could be used as a defense in captive chains, at least in terms of presumption, but not in relational and modular chains where the independence of intermediate actors is larger. Hence, joint liability should be more likely applied in relational and modular chains than in captive chains but one cannot exclude that even in highly hierarchical chains some degree of several liability could be used. If not on the *if* question, the power relationships will affect the distribution of liability allocating on the chain leader a larger amount in captive than in relational and modular chains.

7.3. Sanctions and remedies for supply chain’s UTPs: how to address systemic effects through enforcement measures?

Not only we contend that UTPs in supply chains systemic effects have different features from isolated ones in relation to joint and several liability but also that different chains’ features may require different remedies or methods to calculate sanctions.

Currently, the degree of divergence among MSs about sanctioning practices is very high⁶⁴. Administrative enforcement has been introduced in many MSs in addition to judicial enforcement but the powers of the administrative authorities and even more the practices of enforcement dramatically vary⁶⁵. The EU Directive defines both the scope and the instruments of national enforcement authorities. It includes investigation and sanctioning powers. Enforcement authorities have the power to stop existing practices and to prohibit future ones. They also have the power to administer fines and other penalties. Sanctions, both pecuniary and non-pecuniary, have to be effective, proportionate and dissuasive. The determination of penalties should be based, pursuant to article 6 of the Directive, on the nature, duration, recurrence and gravity of the violation. However, in the Directive there is no distinction between different types of violations and specifically those with an impact on the supply chain.

We propose to distinguish between isolated and systemic violations for the purpose of sanctioning and have different criteria to quantify sanctions. Within systemic violations a role should be played by the effects of the practices: whether exclusionary or purely distributional. Distributional effects shift costs and risks; exclusionary effects produce the exit of the enterprise from the chain. UTPs that result or may result in forced exit from the chain are clearly more serious than those that redistribute risks and losses.

At the outset we strongly recommend national legislators to include a rule that characterize administrative sanctions as effective, proportionate and dissuasive, as requested by the Directive (art. 6.1). As it will be shown these three features display interesting features when applied to multiple infringers and concern multiple parties harmed by the same UTP:

The systemic violations with an impact on part or the entire chain influence the nature and the gravity of violations. UTPs with systemic effects on the chain have often structural effects on the relationships when, for example, they concern risk allocation of external contingencies like prices of

Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain, cit., p. 74 and table referred.

⁶⁴ See F. Cafaggi – P. Iamiceli, JRC Report, 2018, cit.

⁶⁵ See F. Cafaggi – P. Iamiceli, JRC Report, 2018, cit. See also F. Di Marcantonio, P. Ciaian, Unfair trading practices in the food supply chain, cit.

commodities or costs of transportation. Since they involve a greater number of injured parties their gravity is usually higher and accordingly requires stronger sanctions. This conclusion should be factored in the application of effectiveness, proportionality and dissuasiveness. Proportionality changes depending on whether the sanctioned entity is only the chain leader or also key suppliers along the chain.

Gravity should also be influenced by the level of gains and losses along the chain. When the gains from UTPs are very high they should be the most relevant dimension to calculate a dissuasive sanction. We propose using a wide notion of gains that include not only pecuniary gains but also immaterial resources like knowledge and capabilities acquire through the unfair practice. Hence, the amount of the sanction should depend upon the failure to transfer know how to the suppliers (e.g. when imposing standard changes without enabling suppliers' upgrade through knowledge transfer) or the forced transfer without remuneration from the suppliers to the chain leader.

We propose to evaluate and quantify the sanctions depending also on the type of the chain. This evaluation can be incorporated into the analysis of the nature of violation whether systemic or isolated. Within the notion of the nature of violations the differences among chains, whether there are multiple or one leader and how the power is allocated, should have some weight. We suggested that joint and several liability are more likely to occur in relational and modular. As a result, the allocation of sanctions should reflect liability and the criterion of proportionality and dissuasiveness be applied accordingly.

We want to highlight the difference between remedies and sanctions within a bilateral relationship and remedies and sanctions when UTPs produce effects along the chain. Clearly the three principles of effectiveness, proportionality and dissuasiveness have different scope when the magnitude of the UTP incorporates systemic effects and the consequences for the whole chain. We shall examine first the magnitude of the sanction related to systemic effects on the chain and then the effects of the remedy, in particular when injunctions include not only prohibitory but also restitutionary effects.

Clearly, when the consequences on the chain are considered, the magnitude of harm is greater than if the focus remains on the individual supplier. Consequences of systemic violations tend to be greater than isolated infringements. Hence, the sanctions should reflect the magnitude.

We can consider two classical examples of chain. The first is vertical chain: here, the UTP concerns the immediate supplier but its effects span over the second and third tier supplier. Pecuniary fines when considered within the scope of the chain need to be higher if correlated to the magnitude of harm. Effectiveness and dissuasiveness require higher pecuniary sanctions. Proportionality will be commensurate to the effects on the chain rather than to the individual victim of the practice. The second example concerns multiple suppliers of the same commodity. Clearly, even when only a few suppliers are considered by the administrative authority in the preliminary stage of the investigation, if many more are likely to be affected by the practice, the level of the sanction has to be commensurate to the broader effects produced by the practice on the chain.

Enforcement is not only about sanctions. It is about cooperation between the enforcer and the infringer. This is usually called *cooperative enforcement*. It is of paramount relevance in relation to systemic effects where changes in the conduct of multiple actors are required. A second proposal we would like to make when implementing the Directive concerns the commitments by those who have engaged in UTPs. Systemic effects and the supply chain dimension also affect these means of enforcement. Indeed, injunctions and commitments should be expanded providing for the adoption of concrete measures concerning the whole chain, including restitutionary and redistributive measures as well as contract renegotiation, if appropriate.

The distinction between isolated and systemic effects plays an important role in relation to enforcement strategies and it should be introduced when implementing national legislation in order to ensure that the principles of effectiveness, proportionality and dissuasiveness will be differently

applied depending on whether the effects are systemic or isolated and, on the forms, and nature of the supply chain.

8. Concluding remarks

In this article we have recommended the adoption of a supply chain approach when implementing directive ***/2019 concerning unfair trade practices in agri-food supply chains. The minimum harmonization nature of the directive will allow MSs to introduce further distinctions within the defined framework. We have proposed the distinction between isolated and systemic effects, distributional and exclusionary effects. We have suggested that both distributional and exclusionary systemic effects should be considered in a) the definition of the practice, (b) the type of prohibition and the extent to which agreed terms may allow the use of some of the practices, (c) the nature and scope of liability of the infringer(s), (d) the use of presumptions concerning the practices' effects, (e) the choice and content of sanctions and remedies. We believe that these distinctions fit all within the discretionary space allowed to MSs when implementing the directive and suggest that a more significant legal regulation of supply chain dynamics will make the implementation more effective and consistent with its regulatory goals.