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IMPACT ASSESSMENT

Initiative to improve the food supply chain (unfair trading practices)

Accompanying the document

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on unfair trading practices in business-to-business relationships in the food supply chain

{COM(2018) 173 final} - {SWD(2018) 91 final} - {SWD(2018) 93 final}

Glossary

Term or acronym	*Meaning or definition*
AUSD	Australian Dollar
B2B	Business-to-business
B2C	Business-to-consumer
CAP	Common Agricultural Policy
CF	Charter of Fundamental Rights of the European Union
CMO	Common Market Organisation
CR5	Concentration ratio of the five largest firms
ECB	European Central Bank
EP	European Parliament
EU	European Union
EUR	Euro
GBP	British Pound
GCA	Grocery Code Adjudicator (UK)
MTK	The Finnish Farmers' Association
OECD	Organisation for Economic Co-operation and Development
SCI	Supply Chain Initiative
SME	Small and medium-sized enterprises
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UTP	Unfair trading practice

1 Introduction

1.1 General

The present impact assessment report examines the case for introducing EU rules governing unfair trading practices (UTPs) in the agri-food chain including their enforcement. It addresses questions such as the nature and scope of the problem as well as the added value of EU measures over existing Member States' measures and self-regulatory initiatives.

The options discussed in sections 6 and 7 of this report would aim to complement existing rules in Member States and the existing self-regulatory initiatives (EU-wide or national) rather than replace them.

Possible measures enhancing transparency in the food supply chain, which constituted a second component of the inception impact assessment of July 2017[1], will be subject to a separate work strand. The third component of the said inception impact assessment concerning producer cooperation was covered by recent changes to basic acts decided in the framework of the so-called Omnibus regulation.[2] It is therefore not subject of this impact assessment.

UTPs can be broadly defined as practices which grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another (business-to-business).[3] The European Commission identified four key categories of UTPs that "*an effective regulatory framework should cover*":[4]

- one party should not unduly or unfairly shift its own costs or entrepreneurial risks to the other party;
- one party should not ask the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked;
- one party should not make unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions;
- there should be no unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship.

There are strong indications that UTPs occur frequently in the EU food supply chain and that they can be detrimental mainly to otherwise viable smaller operators such as agricultural producers and SME processors of food products.

Twenty EU Member States' have laws, regulations and administrative provisions specifically on UTPs. While different in shape and form, these provisions generally prohibit certain unfair

[1] http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471_en

[2] See http://www.consilium.europa.eu/en/policies/cap-simplification/omnibus-regulation-agriculture/ and Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 (Article 152 CMO)

[3] European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014.

[4] Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 5.

behaviour between businesses, often with a view to protecting the position of weaker parties. Together with self-regulation, such as the voluntary Supply Chain Initiative[5], they aim to ensure the good functioning of the food supply chain.

There are, as of yet, no EU horizontal rules on unfair trading practices between businesses.[6] EU rules on unfair commercial practices apply to business-to-consumer (B2C) situations. They do, as such, not cover business-to-business (B2B) situations although Member States may choose to extend their scope.

1.2 Political context

The discussion about UTP measures at the EU level dates back to 2009 (see Annex A for a selection of relevant documents).[7] The European Commission's "Communication on a better functioning food supply chain" of 28 October 2009[8] and its Communication "Tackling unfair trading practises in the business-to-business food supply chain" of 15 July 2014[9] are important documents in this regard.

In 2013, the Commission carried out a public consultation on the basis of questions in a "Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe".[10]

A European Commission report from January 2016 concluded that at that juncture a harmonised regulatory approach under EU law would not add value.[11] Nonetheless, it committed the Commission to re-assessing the need and added value of EU action before the end of its mandate.[12]

In June 2016, a European Parliament resolution, which garnered exceptionally strong support, invited the European Commission to submit a proposal for an EU-level framework concerning UTPs.[13]

In September 2016, the European Economic and Social Committee published a report calling upon the Commission and the Member States to take swift action to prevent UTPs by establishing an EU harmonised network of enforcement authorities, so as to create a level playing field within the single market.[14]

In November 2016, an independent high-level group of experts nominated by the European Commission presented its findings in a report entitled 'Improving Market Outcomes –

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[5] http://www.supplychaininitiative.eu/

[6] Directive 2006/114/EC covers specifically misleading and comparative advertising.

[7] European Commission Communication on a better functioning food supply chain, 28 October 2009.

[8] http://ec.europa.eu/economy_finance/publications/publication16061_en.pdf

[9] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:0472:FIN

[10] Consultation by the European Commission on the Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe.

[11] Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016.

[12] *Idem*, pp. 12-13.

[13] European Parliament resolution on unfair trading practices in the food supply chain, 7 June 2016. 600 votes in favour.

[14] COM(216) 32 final, 30 September 2016.

Enhancing the Position of Farmers in the Supply Chain' (Report of the Agricultural Markets Task Force).[15] It recommended EU legislation in the areas of unfair trading practices for agricultural products, producer cooperation and market transparency, among others.

The Council Conclusions of December 2016 invited the Commission to undertake, in a timely manner, an impact assessment with a view to proposing an EU legislative framework or other non-legislative measures to address UTPs.[16]

In the recent Omnibus context, the EP proposed an amendment which meant to commit the Commission to submit a legislative proposal on UTPs by mid-2018. The amendment was not retained due to the European Commission's institutional prerogative but the European Commission made a declaration on the topic of unfair trading practices.[17]

The Commission Work Programme for 2018 states that the Commission "*will propose measures to improve the functioning of the food supply chain to help farmers strengthen their position in the market place and help protect them from future shocks*" (new initiative).[18]

1.3 Unfair trading practices and their relevance in the agricultural sector

The integration of EU agriculture and food supply chains in global markets presents opportunities but also risks.[19] Successive reforms of the common agricultural policy (CAP) since 1992 have led to a paradigm shift from price to income support.[20] Accordingly, primary producers do no longer enjoy systematic price support via market measures. Support through the CAP rather is granted through decoupled income support (direct payments).[21] Trade barriers have been removed through more liberal trade agreements. This has resulted in EU prices of agriculture products being largely aligned with world market prices. EU farming and EU agriculture have become competitive in this new global context and have made an important contribution to the annual trade surpluses the EU has achieved in food products since 2009.[22] But the removal of price support and the insertion into global markets have exposed the EU agri-food sector to global market instabilities and their corollary, price volatility and higher income variability. 20% of farmers experience income drops of more than 30% each year.[23]

The CAP's rationale roots in the socio-economic specificities of the sector.[24] While business risk is inherent in all economic activity, agriculture is particularly fraught with uncertainty, in

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[15] Report of the Agricultural Markets Task Force, Improving Market Outcomes - Enhancing the position of farmers in the supply chain, November 2016.

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

[17] See footnote 2, p. 49 of OJ: "*The Commission confirms that it has launched an initiative on the food supply chain which is now proceeding through the various stages required by the Better Regulation guidelines. It will decide on a possible legislative proposal once this procedure has been completed, if possible in the first half of 2018.*"

[18] Commission Work Programme 2018 - An agenda for a more united, stronger and more democratic Europe.

[19] Agricultural Markets Task Force report, independent expert group, November 2016, pp. 11-12.

[20] The Common agricultural policy also covers fisheries, see Article 38 and Annex I TFEU.

[21] Agricultural Markets Task Force report, independent expert group, November 2016, pp. pp. 48-49.

[22] Annual Activity Report, 2016, DG Agriculture, p. 14.

[23] *Idem*, p. 4.

[24] Modernising & Simplifying the CAP - Economic challenges facing EU agriculture, background document, 18 December 2017.

particular due to weather which has a direct impact on the variability of the quantity and the quality supplied. Everyone needs food for survival, but demand for food is relatively inelastic: it does not change significantly if prices fall or increase. This means that farmers cannot rely on simply selling more of their output to compensate for lower prices. Over-supply therefore has a significant impact on the price levels as well as on the volatility of prices.[25] Moreover, there are long production lags due to the biological processes on which agricultural production depends. For example, it takes two years for a dairy cow to reach the stage where it produces milk. Production decisions have to be taken in advance with limited knowledge of final outcomes and against possibly changing market situations. These factors can have a significant impact on farmers' incomes, and yet they have virtually no control over them.

Agricultural producers are particularly vulnerable to UTPs[26] as they often lack bargaining power that would be equal to that of their downstream partners. Their alternatives in terms of getting their products to consumers are limited (this vulnerability is exacerbated where so called hold-up situations occur which may make alternatives virtually non-existing due to the perishability of a product[27]).

In an agricultural policy environment which is distinctly more market oriented than before and which aims at harnessing free trade opportunities, the good governance of the food supply chain has become more important for operators including farmers. Such good governance should ensure that they are able to develop their business and compete on fair terms, thereby contributing to the overall efficiency of the chain. Unfair business conduct by operators wielding significant bargaining power that is not prohibited or respective redress possibilities that lack in effectiveness are liable to undermine the economic viability of victims of UTPs as well as their trust in the overall fairness of the food supply chain.[28]

The second highest priority for citizens concerning the common agricultural policy (CAP) is strengthening the farmer's role in the food chain (45%).[29]

The EU's Common Agricultural Policy (CAP) does provide for measures which aim to strengthen farmers' position in the food supply chain.[30] These include start-up funding (rural development regulation) for producer groups and regulatory exemptions from competition law for farmers´ organisations. However, these policies have not fundamentally changed the fragmentation of agricultural producers. What is more, producer organisations, even where they do exist, can often not compensate for the lack of bargaining power of farmers in relation to their larger and more concentrated partners in the supply chain. The CAP does not currently cover

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[25] See Gregory King and Charles Davenant in one of the first laws of the history of economics in the 17th century.

[26] See for instance European Parliament resolution on unfair trading practices in the food supply chain, 7 June 2016, preamble (recital A).

[27] See Agricultural Markets Task Force report, independent expert group, November 2016, p. 29

[28] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Sexton, p. 11.

[29] Eurobarometer survey, October 2015

[30] See recital 139 of the CMO regulation (Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products): the regulation promotes the organisation of farmers in producer organisations so as to strengthen their bargaining power vis-à-vis downstream operators, thereby resulting in a fairer distribution of added value along the supply chain. See also European Court of Justice, judgment in Case C-671/15, *APVE*, paragraph 65 "*En outre, l'objectif de concentrer l'offre, afin de renforcer la position des producteurs face à une demande sans cesse plus concentrée, peut également justifier une certaine forme de coordination de la politique tarifaire des producteurs agricoles individuels au sein d'une [organisation des producteurs] ou d'une [association des organisations des producteurs]*."

UTPs.[31]

2 Problem definition

2.1 Overview of the problem definition

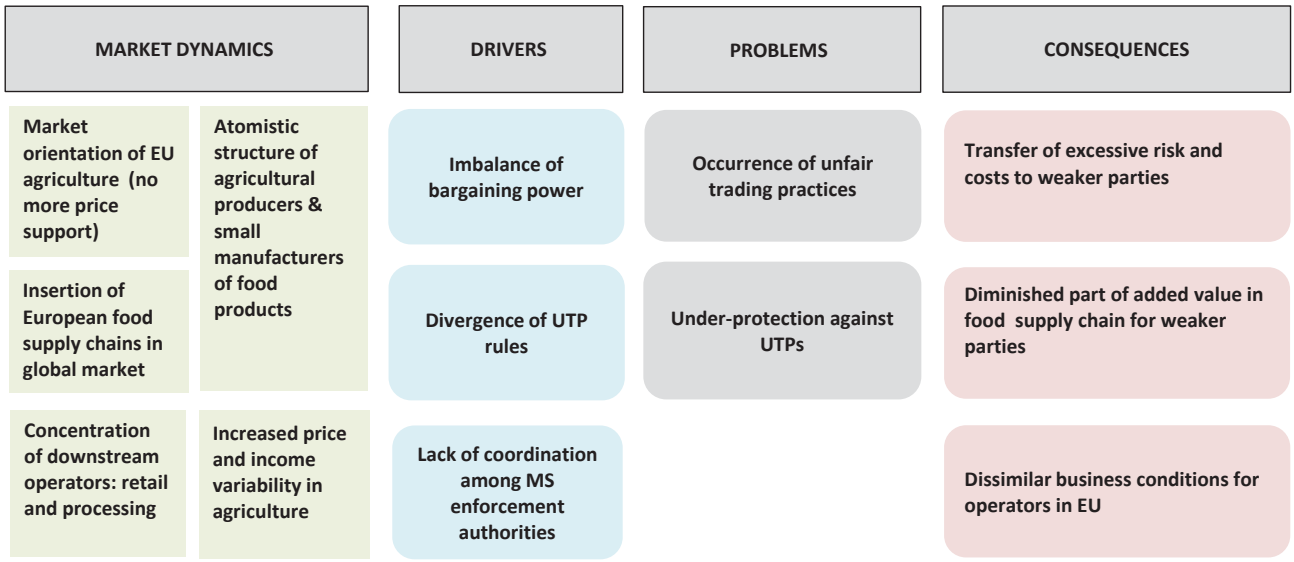

Figure 1: Schematic overview of market dynamics, drivers, problems and consequences

2.2 Introduction

Operators with significant bargaining power can impose pressure on other weaker operators in the food supply chain. [32] At times, this pressure occurs in the form of a party being subjected to unfair trading practices (UTPs). UTPs put companies' profits and margins under pressure, which can result in a misallocation of resources and even drive otherwise viable and competitive players out of business.[33] In such situations, a well-targeted regulation of certain trading practices aiming at ensuring fairness between actors in the food supply chain can help to resolve specific issues.[34]

For illustration, being faced with a retroactive unilateral reduction of the contracted quantity for perishable goods means income foregone for an operator who may not easily find alternatives. Being paid for perishable products only months after they are delivered and sold by the

[31] A recent change to the common market organisation in the Omnibus context introduces a right of producers and producer organisations to ask for a written contract from their first purchaser. (Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017, amendment 15 to Regulation (EU) No 1308/2013)

[32] European Commission, Competition in the food supply chain, Staff Working Document, 28 October 2009, p. 28 refers to "*stronger buyers, who are often perceived as gatekeeper to consumer markets*". See also EY, Cambridge econometrics ltd, Arcadia international (2014), The economic impact of modern retail on choice and innovation in the EU food sector, study for the European Commission, p. 45.

[33] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Menard, p. 75.

[34] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 1.

purchaser in a store constitutes extra financial cost for the supplier. Obliging suppliers to take back products not sold by the purchaser may constitute an undue transfer of risk to a supplier that has repercussions on his security of planning and investment. Being asked to contribute to generic in-store promotional activities of distributors without drawing a commensurate benefit unduly reduces a supplier's margin.

According to the OECD, "*there are concerns with 'fairness' and that the increased bargaining power of downstream food processors and retailers, has a potentially negative impact on the farm sector*".[35] Fairness considerations also inform the reactions to surveys undertaken in relation to the occurrence and impact of UTPs on the functioning of the food supply chain.[36]

2.3 Occurrence of unfair trading practices in the food supply chain

There is a wide-spread consensus that UTPs occur throughout the food supply chain.[37] Their frequency distinguishes the food supply chain from other supply chains in terms of the magnitude of the problem.[38] Three European Commission communications since 2009 have focused on the food supply chain including unfair trading practices.[39] Specific UTP rules in 20 Member States[40] bear witness to the significant concern about UTPs at the national level. Of the 20 Member States which have UTP rules, 12 Member States have adopted legislative instruments specifically applicable to the food supply chain. 8 Member States have adopted legislation applicable horizontally; some of these include specific provisions for the food and groceries trade.[41]

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[35] *Idem*, p. 36.

[36] See for instance OECD, 15 May 2014, Competition issues in the food chain industry, pp. 29-30. See Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Menard, p. 73: "*Indeed, all of the above presume that UTPs matter because they distort 'economic practices', therefore impacting essentially the efficiency of market arrangements and the resulting allocation of resources. But there is more to 'unfairness'. As emphasised by Fałkowski, 'unfair' is also about perception, which refers to social norms and values.*"

[37] Supply Chain Initiative, Principles of Good Practice, 29 November 2011, p. 2. Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Falkowski, p. 24. See also Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 9. See also European Commission, DG GROW, Summary of responses to the European Commission Green Paper, 2013, p. 10. Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 20: "*The analysis of evidence from both desk research and the survey results allowed the study team to conclude that UTPs seem to occur across all Member States and at all stages of the food supply chain.*"

[38] Sexton points out that if UTPs yield a competitive advantage, rivals may be tempted to follow suit to remain competitive. Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Sexton, p. 15.

[39] European Commission, Communication on a better functioning food supply chain, 28 October 2009. European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, 15 July 2014, p. 5: "*While UTPs can, in principle, be present in any sector, stakeholder feedback to the Green Paper suggests that they are particularly problematic in the food supply chain.*" Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016.

[40] See footnote 41.

[41] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 11; among the mentioned 20 Member States, 12 have adopted legislative instruments specifically applicable to the food supply chain, whereas 8 Member States have adopted legislation applicable to all sectors, although sometimes including specific provisions on practices in food and groceries trade (e.g. in France, Latvia and Portugal; in Latvia and in Portugal a specific list of prohibited UTPs has been provided for the food sector).

The open public consultation of 2017 confirms the perception that UTPs are an issue in the food supply chain: 90% of respondents agreed or partially agreed that such practices existed. Confirmation rates ranged between 80% for trade organisations to 98% for civil society respondents, 93% for organisations in the farming sector and 86% for organisations in the agri-food sector.[42] A 2016 study also concluded that UTPs occurred across all Member States and at all stages of the food supply chain and that they were perceived as serious by most stakeholders.[43] While there may be questions about some of the reported practices' meeting the UTP definition, the outcome confirms the reactions to the European Commission's Green Paper of 2013.[44]

94% of farmers and 95% of agri-food cooperatives report having been exposed to at least one UTP according to a survey by Dedicated Research in 2013.[45] Another survey conducted by Dedicated Research in 2011 had a similar result (96% of respondents {manufacturers of food products} reported to have been subject to at least one UTP).[46] The exception as regards the question about the occurrence of UTPs is retail sector organisations: in the open public consultation, only 12% of them agreed or partially agreed that UTPs existed in the food chain.[47]

UTPs manifest themselves not only in the guise of unfair contractual terms such as for example specific contract clauses but also occur "behaviourally" after contracts have been established.[48] A survey of milk producers carried out in four Member States in 2016 (Germany, France, Spain, Poland) indicated they are likely to occur before, during and after the contractual phase (respectively 25%, 87% and 4% of the cases).[49]

2.4 Under-protection against UTPs in Member States

The heterogeneity in the treatment of UTPs in Member States is significant.[50] In certain Member States, there is no or only very little specific protection against UTPs meaning that operators

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[42] 8% - "rarely". 5% "no opinion": 5%. Further details of the consultation process can be found in Annex 2.

[43] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 20: "*Differences among Member States do exist (in particular, the survey showed a higher perceived exposure to UTPs in New Member States than in former EU15 countries), but the problem is present in each Member State, and is perceived as serious by most stakeholders.*"

[44] About 76% of the respondents asserted that UTPs existed and were of concern for operators in the food chain. 182 organisations/public bodies/individuals replied to the consultation whereof 40% had no direct link to the *food* supply chain (public bodies included).

[45] Dedicated Research for COPA-Cogeca (European association of farmers and agricultural cooperatives), Impact of unfair trading practices in the European agri-food sector, June 2013, slide 25. The survey draws on a sample of 434 respondents (214 farmers, 165 agri-food cooperatives, 55 processors). See also Europe Economics, Estimated costs of Unfair Trading Practices in the EU Food Supply Chain, May 2014.

[46] Survey on behalf of CIAA (Confederation of the Food and Drink Industry) and AIM (European Brands Association).

[47] Further details of the consultation process can be found in Annex 2.

[48] European Commission, DG GROW, Summary of responses to the European Commission Green Paper, 2013, p. 10.

[49] Joint Research Center, from study in preparation.

[50] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, pp. 43-44. European Commission, Retail market monitoring report - Towards more efficient and fairer retail services in the internal market for 2020, 5 July 2010, p. 7: "*Although certain national laws on unfair contractual terms between enterprises exist, they vary widely between Member States, which can lead to barriers fragmenting the internal market, distorting competition or increasing the risk of circumvention.*"

cannot rely on UTP rules to seek redress.

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

Table 1: Member States by UTP legislation[51]

The fact that a Member State has opted to not introduce legislation does not mean that stakeholders consider the problem as non-existing.[52] The link between perceptions by operators to what extent UTPs occur and the efforts made by the Member States to tackle them by legislative measures is relatively weak.

Member States have different rules as regards UTP enforcement.[53] General (contract) law may prohibit certain practices and victims have the option to seek redress before a court of civil law. But general contract law, to the extent it covers the practice at issue, may de facto be difficult to enforce: a weaker party to a commercial transaction is often unwilling to lodge a complaint for fear of compromising an existing commercial relationship with the stronger party ("one may win the case, but lose the business").[54]

Fear of retaliation[55] is an important driver for lack of effective enforcement and the limited amount of UTP cases coming to the fore; enforcement modalities which take this fear factor into account can improve protection.[56] Fear of retaliation is consistently being pointed out as a

[51] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 11.

[52] 79% of respondents in the open public consultation from Member States without legislation or only voluntary measures regulating UTPs (Belgium, Estonia, Denmark, Luxemburg, Malta, Netherlands and Sweden) agreed that UTPs in the food chain occurs "regularly" or "very regularly". According to the open public consultation, 70 % of the respondents in the Netherlands, Denmark and Sweden stated that UTPs in the food chain occur "regularly" or "very regularly"; 63 % expressed the view that they were in favour of action taken to tackle UTPs. See also a survey on UTPs in the Netherlands in 2014. Study by Dutch Akkerbouw 2014 (139 replies), referred to in undertakings´ replies to the targeted consultation. 72% of the members had experienced UTPs during the last 10 years. Producers of potatoes and vegetables were more exposed to UTPs than producers of arable crops. 91% of the respondents would prefer to have a public authority established to facilitate the tackling of UTPs.

[53] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 20 *et seq*.

[54] *Idem*, p. 23. See also Annex B. Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 9. European Commission, 2016 Commission Staff Working Document - Evaluation of Late Payment Directive/REFIT Evaluation, Staff Working Document, p. 26.

[55] Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 6. See European Commission, 2016 report on Late Payment Directive, Staff Working Document, p. 26. See also, for example, SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, p. 19.

[56] See for instance German Bundeskartellamt, Sektoruntersuchung (sector inquiry), Nachfragemacht im Lebensmitteleinzelhandel, September 2014, p. 14. Many complaints to the authority are made requesting confidentiality.

significant concern in consultations that were carried out among stakeholders[57] and also informs the design of certain Member States' regimes.[58] The fear factor and its importance in relation to specific forms of enforcement regimes are discussed in greater detail in Annex B.[59]

Under-protection is therefore also be related to the quality of enforcement modalities. Some Member States entrust competition authorities with ensuring respect of unfair trading rules (Germany), or provide redress possibilities through administrative bodies other than competition authorities, for instance by having recourse to ombudsman-type systems (UK) or dedicated UTP authorities (France). A 2018 study shows that in as many as 18 Member States' administrative authorities other than ordinary courts have powers to enforce rules addressing selected UTPs.[60] In 17 Member States, administrative authorities can conduct own initiative investigations concerning UTPs. In 14 Member States, administrative authorities can receive confidential complaints. But in less than half of EU Member States (13) do administrative authorities have the power to do both.[61]

2.5 Harm caused by unfair trading practices

2.5.1.1 Operators

Farmers, processors, traders, wholesalers, retailers and consumers are all actors in the food supply chain. Smaller operators in the food supply chain are particularly prone to be the victims of UTPs due to their, in general, weak bargaining power in comparison to the significant bargaining power wielded by large operators at other levels of the chain. UTPs are less likely to occur when the parties to a transaction have symmetric bargaining power.[62] In the 2017 open public consultation, respondents identified farmers as being most exposed to negative effects from UTPs in the food supply chain although such effects can occur at all levels of the chain.[63]

Having said this, there is little empirical data going beyond a few case studies which makes it difficult to establish the overall harm caused by UTPs. The so-called fear factor (see Annex B),

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[57] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 50.

[58] See for example UK, Statutory review of the Groceries Code Adjudicator: 2013-2016, July 2017, paragraph 61.

[59] In the Commission's consultation it was also found that, while stakeholders wanted to be forthcoming with evidence, concerns about freedom of information requests or possible data leaks constituted a significant impediment to receiving contributions.

[60] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, pp. 22-23, Table No. 7: Enforcement, authorities and relative power.

[61] See suggestions 9 and 10 in Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, July 2014, p. 12, suggestions 9 and 10.

[62] Gorton, M. et al., (2017) Methodological framework: review of approaches applied in literature to analyse the occurrence and impact of UTPs. Presentation at the workshop "Unfair trading practices in the food supply chain", 17 July 2017. However, their occurrence is not excluded even where asymmetry is absent; see Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Falkowski, p. 24.

[63] See Annex 2. 94% of respondents to this question agreed or partially agreed that appreciable negative effects occur for farmers. 83% agreed that such negative effects occurred for processors. UTPs are less frequent for retailers (38%). See also Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 20. The data collection strategy included a survey which targeted operators at all stages of the food supply chain in all 28 Member States, as well as other stakeholders (mainly associations/NGOs). A total of 1,124 completed and valid responses were collected.

plays a significant role in this absence of empirical evidence at EU level, as does the lack of a precise definition of UTPs.

Agricultural producers, including their associations, can be direct victims of UTPs. But UTPs affect producers even if they are not directly exposed to them, by virtue of the pressure to pass on UTP-induced costs until the weakest party is reached.[64] This is congruous with a view of the food supply chain as a continuum of vertically inter-related markets.[65] The negative effect of a UTP which occurs downstream, for instance between a processor and a retailer, often cascades backward in the chain to ultimately reach farmers.[66]

A series of surveys undertaken during the last few years shows that UTPs occurring in the food supply chain are seen as detrimental by a large majority of operators, in particular smaller ones. They perceive UTPs to endanger their profitability and ability to compete fairly and to affect their capacity to invest.[67] They decrease the part of the added value generated that these operators would otherwise be able to appropriate. Qualitative research demonstrates suggests for instance that ex post unilateral changes to supply cause farmers and their organisations harm.[68]

Literature[69] also identifies negative welfare impacts, competition issues, investment and productivity effects, network effects and market failure. Concerning welfare effects, UTPs decrease the part of the added value generated that these operators would otherwise be able to appropriate with possible lower returns to suppliers and/or financial gains not necessarily passed on to the final consumer. Farmers, often already experiencing downward pressure on their

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[64] See OECD, 15 May 2014, Competition issues in the food chain industry, pp. 13 and 36. A European Commission report of 29 January 2016 recommends that Member States cover the whole chain for that reason (p. 5).

[65] See also Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Falkowski, p. 27 and Menard, p. 69. See Agricultural Markets Task Force report, independent expert group, November 2016, paragraphs 125-127. See also OECD, 15 May 2014, Competition issues in the food chain industry, p. 36: "*First, the food supply chain is a complex series of inter-related markets where competition at different stages of the supply chain matters for the overall functioning of the food sector. Concerns over competition may relate not just to selling power but also to buyer power, relating to the vertical relations between any of the stages of the food supply chain (retailer-processor or retailer/processor-farmer). Furthermore, how retailers compete may also have an effect on the overall functioning of the food supply chain.*"

[66] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, p. 24. See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 8. German Bundeskartellamt, Sektoruntersuchung (sector inquiry), Nachfragemacht im Lebensmitteleinzelhandel, September 2014 discusses the 'waterbed' effect (p. 25). See also for example farmers' reactions to changes in price relationships between retailers and manufacturers: Le secteur agricole s'invite dans le dossier Ahold Delhaize, https://www.lecho.be/actualite/archive/Le-secteur-agricole-s-invite-dans-le-dossier-Ahold-Delhaize/9809168, 15 September 2016.

[67] See Dedicated Research for CIAA and AIM, Unfair commercial practices in Europe, presentation, March 2011: 70% of the respondents consider UTPs to have a negative effect on their profitability (slide 15).

[68] In the case of fresh fruit and vegetables for example, it is not uncommon that following an order given, a producer organisation prepares a batch (with the required grading, packaging and labelling) for which the quantities are revised downwards by the buyer (a retailer or its buying subsidiary) after the batch has left the packing station (e.g. to take into account short term fluctuation of demand at retail stage, in a just-in-time logistic approach). This means that the supplier (i) has to find an alternative outlet (usually at lower price, e.g. on a wholesale market) (ii) has to usually regrade and repack the goods not at its own premises implying extra costs and (iii) lose freshness of the product. In such cases, risks (short term fluctuation of demand) and related costs are entirely passed to the supplier (in many cases a farmer or a producer organisation) and directly result in an income decrease.

[69] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, see presentation of Gorton, Lemke and Alfarsi 'Methodological framework: review of approaches applied in the literature to analyse the occurrence and impacts of UTPs' (slide 8).

incomes and a historically diminishing share of the added value accruing to them in the food supply chain[70], can ill afford being the subject of UTPs. UTPs are liable to have significant consequences in times of decreasing income support, increased price volatility and long-term trends of low commodity prices.

In the 2017 open public consultation, 94% of respondents agreed or partially agreed that such appreciably negative effects occurred in relation to farmers. 83% agreed they occur in relation to processors, 38% in relation to retail organisations, 35% in relation to retailers, 39% in relation to traders and 60% in relation to consumers. According to a 2013 survey of farmers and agricultural cooperatives, the estimated damage from UTPs amounted to EUR 10.9 billion per year.[71] The cost effect on manufacturers of food products was estimated to amount to 0.5% of the turnover of the manufacturers participating in a survey in 2011[72], which would be equivalent to EUR 4.4 billion if extrapolated to the overall food industry turnover in that year. A specific consultation of undertakings in the food chain carried out in 2017[73] showed that 60% of the respondents considering themselves suppliers (farmers and processors mainly) stated that the commercial significance of UTPs represent more than 0.5% of the annual turnover. The weighted average of the modest number of suppliers who accepted to answer despite the "fear factor" to such consultation, can indicatively be estimated at 1.5 to 1.8% of their turnover[74], roughly in the same order of magnitude of previous surveys. While these numbers are based on perceptions, they are indicative of the magnitude of the problem.

The divergence of Member States' regulatory approaches to UTPs results furthermore in dissimilar conditions of competition for operators. Under the current piecemeal approach, the extent of protection from UTPs that operators are granted depends on the Member State.[75] Divergence of rules is liable to lead to differences in the conditions of competition and the business conduct of operators, for example large manufacturers or retailers, which may be detrimental to operators subject to the rules of countries with low UTP protection.[76] For illustration, in the context of one practice discussed later (payment delays), the preamble of the Late Payment Directive[77] states that "*distortions of competition would ensue if substantially*

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[70] Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, paragraph 38. See also Annex C.

[71] Dedicated Research for COPA-Cogeca, Impact of unfair trading practices in the European agri-food sector, June 2013, slide 25.

[72] Dedicated Research for CIAA and AIM, Unfair commercial practices in Europe, presentation, March 2011, slide 12.

[73] Further details in Annex 2.

[74] See Annex 2.

[75] European Commission report, Retail market monitoring report, Towards more efficient and fairer retail services in the internal market for 2020, 5 July 2010, p. 7. See Irish Department of Jobs, Enterprise & Innovation, Regulatory Impact Analysis, 2016, Consumer Protection Act 2007, in relation to waterbed effects occurring across the border with UK: "*Finally, such regulation might also make the sourcing of goods from outside of the State more cost effective for retailers/wholesalers, thereby impacting on Irish-based suppliers with knock-on effects for their viability, competitiveness and employment creation potential.*", p. 9.

[76] See Irish Department of Jobs, Enterprise & Innovation, Regulatory Impact Analysis, 2016, Consumer Protection Act 2007, p. 6. See Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Sexton, p. 14 and Swinnen and Vandevelde, p. 41. See also AIM (European Brands Association), 21 August 2017, p. 5 regretting that "*some Member States do not have effective tools to tackle UTPs yet*". See also for example Association Française d'Etude de la Concurrence (AFEC), 2013, Green Paper reply, p. 3.

[77] Directive 2011/7/EU on combating late payment in commercial transactions.

different rules applied to domestic and trans-border operations". Late payments' having a negative impact on operators' bottom line is confirmed by EuroCommerce which states that the reduction in payment terms due to the Late Payment Directive had, in a number of countries, generated significant cash transfers.[78] The problem perception concerning the divergence of rules in Member States is however of a lesser order of magnitude than that relating to not being afforded effective protection against UTPs in Member States. And yet, competition between suppliers is an important characteristic of the EU food supply chain.[79]

Last but not least, the absence of common rules also entails uncertainty for operators who engage in trade in the EU.[80] The uncertainty concerning the identification of applicable UTP rules is likely to increase the risk and costs linked to possible cross-border disputes, which is a problem in particular for SMEs with limited resources.[81] While UTPs may involve mainly domestic suppliers and buyers they also occur in transnational supply chains.[82] The results of the open public consultation in 2017 show that 84% of respondents who believed EU action on UTPs should be taken thought it would have positive or very positive effects in allowing smoother commercial transactions between operators in different Member States. 24% of the respondents stated that they were "*often or in a significant number of cases*" in a situation where UTPs occurred in connection with cross-border trade, and 19% that this had a negative effect on their ability to seek redress.[83] In a 2011 survey among operators in the agri-food market, 46% of the respondents found that UTPs have a negative effect on access to new markets or cross border activities. More specifically, 40% said that UTPs had negative effects on their EU cross-border trade and 38% said that the risk of UTPs discouraged them from taking up activities outside their Member State of origin.[84]

2.5.1.2 Consumers

The lack of rules governing UTPs and poor application of these rules have also been identified as being liable to undermine operators' ability to invest and innovate with regard to the quality of products and services offered.[85] UTPs can therefore eventually have negative effects on

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[78] EuroCommerce, 17 November 2017, paragraph 34. These transfers have, in EuroCommerce's view – which, in EuroCommerce's view has "*largely benefitted large suppliers in the food supply chain, rather than SMEs*". Economic literature also suggests that the practice of late or delayed payments has a negative impact. See Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Falkowksi, p. 25.

[79] See Annex C, p. 14 et seq. discussing intra-EU trade.

[80] See for example Eucofel, European Fruit and Vegetables Trade Association, reply to open public consultation, November 2017, p. 2; Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, pp. 9 and 17.

[81] European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 5. Vaqué, L. G., Unfair Practices in the Food Supply Chain: A Cause for Concern in the European Union's Internal Market which Requires an Effective Harmonising Solution, European Food and Feed Law Review, 9(5), pp. 293–302.

[82] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 92.

[83] See Annex 2.

[84] Dedicated Research for COPA-Cogeca (European association of farmers and agricultural cooperatives), Impact of unfair trading practices in the European agri-food sector, June 2013, slide 25.

[85] European Commission report, Retail market monitoring report, Towards more efficient and fairer retail services in the internal market for 2020, 5 July 2010, p. 10. See also European Commission, Communication on a better functioning food supply chain, 28 October 2009, p. 5.

consumers in terms of product quality and choice.[86] However, evidence concerning the overall net impact of UTPs on consumers and innovation is inconclusive.

The relation between UTPs and innovation is two-fold. They can render innovation more difficult for small operators as they make them more vulnerable to any disruption of their contracts. For example, suppliers covering costs for additional services like upfront payments may end up increasing prices for consumers.[87] On the other hand, it is argued that upfront payments can, if not disproportionate, compensate retailers for the risks taken by making space available to new products and may act as a signalling mechanism for consumers.[88]

Several studies and surveys indicate possible consequences of UTPs in terms of lower investment capacity in new technologies and uncertainty regarding costs.[89] In a survey performed among more than 400 professionals in the agri-food sector, 64% of the respondents stated that UTPs created uncertainty regarding costs, 59% that they were leading to a reduction of investments for modernisation of production facilities and 50% that UTPs had a negative impact on investment in new technologies.[90] In a 2011 survey, some of the agri-food suppliers provided an estimate of the effects that UTPs had on investment in new technologies (on average an annual reduction of 3.4%) and employment (on average an annual reduction of 1.6%).[91] Payment delays are reported to have had a negative impact on investments undertaken at the farm level, particularly in the context of countries in transition.[92] Some national competition authorities have also "*alerted against the risks of certain commercial practices that even if in the short term may not entail an immediate anti-competitive effect, may however in the long term undermine the competitive process of the food supply chain or entail negative effects on consumer welfare by decreasing investment and innovation or reducing consumer choice.*"[93]

According to Consumers International, inordinate buying power "*fosters abusive buying practices*" which in turn may ultimately have negative effects not only for the affected

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[86] Bukeviciute L. et al., (2009), The functioning of the food supply chain and its effect on food prices in the European Union, European Economy, Occasional Paper 47, p. 20. See also German Bundeskartellamt, Sektoruntersuchung (sector inquiry), Nachfragemacht im Lebensmitteleinzelhandel, September 2014, p. 15.

[87] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Falkowski, p. 30.

[88] *Idem*, pp. 31-32. In the presentation of Russo in the Report of the Joint Research Center, reverse margin practices are understood to cover practices implying a transfer paid by the supplier to the buyer in exchange of supposed services. This comprises listing fees, slotting allowances, negotiation fees etc.

[89] Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, p. 116. See also the open public consultation in 2017: 62% of individuals and 58% of companies agreed or partially agreed that UTPs in the food supply chain have appreciable negative effects on consumers. For companies this ranged from 29% for retail to 90% for civil society organisations (48% for agriculture; 71% for agri-food sector).

[90] Dedicated Research for COPA-Cogeca (European association of farmers and agricultural cooperatives), Impact of unfair trading practices in the European agri-food sector, June 2013.

[91] See Dedicated Research for CIAA and AIM, Unfair commercial practices in Europe, presentation, March 2011.

[92] Dries L., The economic impact of unfair trading practices on upstream supplier. Presentation at the workshop "Unfair trading practices in the food supply chain" (Joint Research Center), 17 July 2017.

[93] Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, p. 117. Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 55. See also UK Competition Commission, The supply of groceries in the UK market investigation, 2008, final report, p. 12 and paragraph 38. Similar the German Bundeskartellamt, Sector inquiry concerning food retail in Germany, 2014, pp. 15, 24-25.

businesses but also for consumers.[94]

Both in the case of payments without consideration and retroactive contract changes, there is evidence that the higher the oligopolistic structure on the buyers' side and the higher the substitutability of the products at stake (commodities), the stronger the likely negative effect on consumer welfare, on the variety of products and the rate of innovation.[95]

The studies quoted above identify possible effects on individual suppliers. There are no studies identifying and quantifying effects on a whole sector or a whole market. It is not obvious that a given sector may be affected negatively overall because some operators in that sector are negatively affected by the practices of some larger operators. The evidence about the effects of concentration of suppliers and retailers is mixed. A 2014 study indicated that increased concentration of suppliers had a negative effect on innovation while a strong bargaining position of retailers (no reference to UTPs) appears to have a positive overall impact on innovation in the chain.[96] ECB studies show that higher concentration of retailers (including through buying alliances) at national level and the related increase in bargaining power can be beneficial for consumers as lower prices would be passed on (the study was not concerned with UTPs).[97] UTPs may even offer short-term benefits to consumers where they lead to lower producer prices being passed on to consumers, thereby increasing consumer welfare. However the longer term impacts, in terms of market concentration and reduced choice, and their potential negative impacts on consumers, are not known. Some theoretical studies examine under which circumstances lower purchase prices induced by UTPs are likely to be passed on to consumers.

2.6 **What are the problem drivers?**

2.6.1 Imbalance of bargaining power

A significant enabling factor for the occurrence of UTPs is that the food supply chain is characterised by considerable differences of bargaining power of its operators (although the existence of significant bargaining power does not in itself indicate the abuse of this power,

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[94] Consumers International, The relationship between supermarkets and suppliers: What are the implications for consumers?, July 2012, summary, pp. 2, 4. See also three contributions to a European Commission targeted questionnaire to consumer associations in 2017: they concur that EU UTP rules would improve investment conditions of operators.

[95] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, see presentation of Russo, Sorrentino and Menapace, The impacts of UTP on consumers: review of empirical studies, slide 25. See also Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, p. 31. The relevance of the downstream competition is also stressed in the sector inquiry of the German Bundeskartellamt, Sektoruntersuchung (sector inquiry), Nachfragemacht im Lebensmitteleinzelhandel, September 2014, p. 46.

[96] Study for DG COMP, The economic impact of choice and innovation in the EU food sector, September 2014, pp. 37 and 222.

[97] European Central Bank, Retail market structure and consumer prices in the Euro Area, December 2014. See also European Central Bank, Within- and cross-country price dispersion in the Euro Area, November 2014. "*Our results point to an overall positive and statistically significant relationship between retail market concentration at parent company level and prices for the pooled sample of countries […]. Therefore, we retrieve the well-established relation between competition and price levels: a more competitive market structure implies lower prices and enhances consumer welfare. Moreover, a higher degree of concentration at the buying group level tends to be associated with lower prices. Thus, our estimates suggest a welfare-enhancing role for buying groups, which could be explained in a countervailing-power framework, as a balancing mechanism between retailers' and producers' bargaining power, particularly in markets where the ex ante contractual strength is widely asymmetric to the benefit of the latter*."

rather it is undertakings' actual conduct that matters).[98] This, in turn, can lead to the unfair exercise of bargaining power to the detriment of weaker operators.[99] Farmers, small processors, small traders or small retailers often have little bargaining power and few alternative options for selling (or buying), while certain of their business partners, such as large food processors and increasingly concentrated retailers are in a position of using considerable power to shape a commercial relationship.[100] An indication and result of existing imbalances are, for example, farm-retail spreads over time (see Annex C) and the stickiness of upward moving retail prices when producer prices fall (price transmission).[101]

While agricultural production is generally highly fragmented and largely comprised of small units in physical terms[102], there are high concentration levels in both the food processing and food distribution sectors. This concentration has generally been increasing over the last few decades through consolidation in the food processing and retailing companies through natural growth and mergers, particularly in the case of retailers in the 1990s.[103] Having said this, the food processing sector is also characterised by a significant share of SMEs.[104] The food distribution tier is highly concentrated with the retail sector standing out. Food products are mostly distributed through supermarkets, hypermarkets and discounters, which account on average for 71% of total packaged food sales in the EU Member States.[105] In 2016, based on Euromonitor data (not covering on-line and other non-store sales[106]), the CR5 (concentration ratio of the five largest firms) in the grocery retail sector is above 60% in half of Member States (above 80% in Sweden and Finland) and below 40% only in Italy, Bulgaria and Greece. The food retailing sector is also characterised by the existence of numerous SMEs (over 99% of the enterprises representing 54% of the turn-over and 56% of total employment). More detailed data and trends concerning the food supply chain and the balance between its operators can be found in Annex C.

2.6.2 Divergence of UTP rules at the national level

UTPs have been subject to a variety of heterogeneous legislative measures in Member States

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[98] See voluntary Supply Chain Initiative, objective of the multi-stakeholder dialogue as mentioned in the introduction of Principles of Good Practice is '*find a solution to the asymmetry and possible misuses of bargaining power by actors operating in the food chain*". See also European Commission, January 2016, p. 4.

[99] A large retailer's reply to open public consultation, November 2017, p. 2. AIM (European Brands Association) refers to the "*unbalanced bargaining power at different levels of the chain, which created the fertile environment for unfair trading practices.*" AIM (European Brands Association), August 2017, p. 3. See Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, paragraph 73.

[100] See OECD, 15 May 2014, Competition issues in the food chain industry, p. 13: "*Concerns with competition in the food chain most obviously arise with respect to the levels of market concentration at food processing and retailing stages, resulting from a consolidation trend associated with mergers and acquisitions.*"

[101] See OECD, 15 May 2014, Competition issues in the food chain industry, p. 11-12. "*The concern here is that market power throughout the food supply chain may have contributed to this widening; this could arise from seller power at either or both the food processing or retailing sectors, and/or via the exercise of buyer power.*"

[102] Facts and figures on farm structures, farm structures, 2017, p. 4.

[103] Swinnen J., (2015), Changing coalitions in value chains and the political economy of agricultural and food policy, Oxford Review of Economic Policy 31(1), pp. 90-115.

[104] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium- sized enterprises (OJ L 124, 20.5.2003, p. 36).

[105] See Annex B, Table 1, p. 8.

[106] Non-store sales represent 2.8% of the EU retail sales of packaged food products in 2016 (source: Euromonitor).

over the years.[107] Annex F and Annex G provide an overview of Member States' instruments addressing UTPs including enforcement aspects and show their heterogeneity.[108] Enforcement modalities in Member States include, inter alia, judicial redress (in most Member States), actions by competition authorities under national rules on unilateral conduct (e.g. Spain, Germany), administrative redress (e.g. France), extension of competition rules (e.g. Germany) and adjudicator systems (e.g. the UK).

UTPs are not tackled equally in all Member States by means of mandatory rules, both as regards the substance of protection and enforcement. In some Member States or regions there are voluntary initiatives which are the only governance tools, in others there is no specific governance at all. In the absence of a common framework, there is no required minimum level of protection in Member States.

2.6.3 Lack of coordination among enforcement authorities

With no common framework in place, there is also very little coordination among enforcement authorities. The High Level Forum on the Better Functioning of the Food Supply Chain provides a political platform wherein to discuss ideas but cannot replace a coordination mechanism of technically competent authorities such as, for example, the European Competition Network does in the field of competition rules. Such a forum facilitates exchanges of views on the regulatory approaches but also enable the gathering and comparing of data that allows adopting a perspective which transcends national boundaries.

The voluntary Supply Chain Initiative does have a centralised governing body and encourages national platforms.[109] Although it has promoted cultural change concerning UTPs in the food supply chain and offers amicable dispute resolution options certain of its shortcomings make that it cannot effectively replace public enforcement (see sections 3.2 and 3.3).

2.7 **How will the problem evolve?**

The incentives for operators with significant bargaining power to apply UTPs are not likely to abate in view of the continued disparity of bargaining power of operators in the chain. Reductions in concentration levels downstream of primary production are not expected on current trends.[110] At current trends, the degree of concentration of business downstream of primary production, in particular in retail, processing and manufacturing, will continue to increase, subject to competition law constraints (merger control). However, also in the retail and processing sectors there are still many SMEs.

By the same token, consolidation of agricultural production into huge corporate farms (which could restore some symmetry among parties in supply chains) will remain a very limited option,

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[107] Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, pp. 43-45. See also Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016.

[108] See also Report of the Joint Research Center, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 45: a table illustrates the different degrees of stringency of Member States' regulatory frameworks including enforcement.

[109] Supply Chain Initiative, 3rd Annual report, January 2017, pp. 3 and 15.

[110] OECD, 15 May 2014, Competition issues in the food chain industry, p. 17. See also ECSIP, The competitive position of the European food and drink industry, February 2016, p. 146.

due to social, geographical, and economical constraints.[111] Reasons inherent in agriculture and the food manufacturing basis in the EU make it unlikely that a consolidation process of agricultural producers will obviate the imbalance of bargaining power. In agriculture, scale economies exist but tend to be more limited than in other economic sectors: costs decrease over a certain size range, but then they become flat.[112]

This is true notwithstanding CAP measures which aim to help farmers organise in producer organisations so as to strengthen their bargaining power vis-à-vis large operators in the food supply chain. Regulatory exemptions from competition law for farmers´ organisations are one tool provided for in the common market organisation regulation.[113] In the fruits and vegetables sector, EU support is linked to operational programmes of producer organisations and this has improved the degree of organisation.

Important considerations related to food security and safety, environmental sustainability of an activity with a strong territorial dimension and the maintenance of the rural social fabric tend to further limit the pace of structural change and increase in size of economic units in agriculture in the EU.[114]

Member States' approaches, which are not subject to any binding UTP common framework, will continue to diverge. It is unlikely that they will – short of such a framework – start to converge. So far, this has not happened. The degree of dissimilarity of conditions of competition to which they give rise is therefore likely to continue to exist.

The voluntary Supply Chain Initiative (SCI) is unlikely to develop into a comprehensive governance framework that would make public governance measures including enforcement superfluous. As of today, it exists alongside national mandatory measures of Member States. The SCI constitutes an agreement among associations of operators of the food supply chain to promote fair business practices in the food supply chain as a basis for commercial dealings.[115] It was developed within the framework of the Commission's High Level Forum on the Better Functioning of the Food Supply Chain (HLF).[116] Since its creation the SCI has played an important role in Member States in raising awareness about UTPs and fostering fairness of

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[111] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Menard, p. 84.

[112] Duffy M., Economies of Size in Production Agriculture, J Hunger Environ Nutr. 2009 July; 4(3-4), pp. 375–392.

[113] See Article 152 CMO concerning the ability of farmers to sell their production at one common price through the producer organisation. See also Judgment of the European Court of Justice of 13 November 2017, *APVE*, Case C-671/15, paragraphs 43 et seq.

[114] President Juncker stated the EU's agricultural sector was a strong part of the European way of life that should be preserved (State of the Union speech 2016).

[115] The aim of the initiative is to increase fairness in business-to-business commercial relations along the food supply chain. To this end, all market representatives involved in the Forum's working party on UTPs, including farmers' EU associations, jointly agreed on a set of principles of good practice in vertical relationships in the food supply chain in November 2011 and examples of unfair ones. Within the framework of the principles, in September 2013 a "voluntary initiative" on fair trading practices in the food supply chain was launched in order to implement and enforce the principles. Since its launch in 2013, SCI has attracted 1,160 national companies – nearly 70% of which are SMEs – to sign up to the Principles of Good Practice and SCI commitments.

[116] The High Level Forum on the Better Functioning of the Food Supply Chain comprises Member State national authorities responsible for the food sector at ministerial level and representatives of the private sector. The HLF monitors the evolution of the SCI. As regards the Supply Chain Initiative, the Belgium code of conduct of 2010 was a precursor to the Supply Chain Initiative. The so called Agro-Food Chain consultation started in 2009 in Belgium.

business conduct.[117] It provides a forum for early and non-litigious dispute resolution.[118] Recent advances such as the designation of an independent chair to act as a recipient for aggregate confidential complaints[119] show the SCI's ability to evolve.[120]

Having said this, participation in the SCI is voluntary and the SCI does not, therefore, cover all operators in the food supply chain.[121] Buying alliances of retailers do not participate. What is more, most farmer organisations do not participate in the SCI. They did not join the SCI since, in their view, it did not ensure sufficient confidentiality for complaining parties and did not provide for independent investigations and sanctions.[122] For example, MTK, the Finnish farmers' association, pulled out of the SCI's national Finnish platform because of enforcement concerns[123] and in most Member States national farmers' associations are not participating in the national platforms to the extent they exist[124], with exception of Belgium (Flanders), Germany and the Netherlands.[125]

Certain limitations of a voluntary code may be all but structural.[126] The SCI has no capability of imposing sanctions, nor are decisions published (deterrent effect[127]). One-on-one disputes are not dealt with in a manner that would ensure confidentiality of complaints[128], if only in the early

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[117] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, final report, revised version, p. 226. See also Agricultural Markets Task Force report, independent expert group, November 2016, paragraph 106.

[118] For advantages of self-regulatory dispute resolution, see SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, p. 27.

[119] Information on the procedure can be found here.

[120] See press release and Supply Chain Initiative, 3rd Annual report, January 2017, pp. 17 and 24. See also Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, pp. 10-11.

[121] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 100: "*In the view of these experts, an approach entirely based on the willingness of the stronger party not to abuse of the weaker one is not sufficient, even in presence of potential image damages for the company adopting unfair behaviour.*" The data collection for this comprehensive report included a survey which targeted operators at all stages of the food supply chain in all 28 Member States, as well as other stakeholders (mainly associations/NGOs). A total of 1,124 completed and valid responses were collected.

[122] European Commission, Report from the Commission to the European Parliament and the Council, on unfair business-to-business trading practices in the food supply chain, January 2016, p. 8.

[123] MTK left the national Supply Chain Initiative platform in October 2015 stating that the lack of sanctioning possibilities "*in combination with the so called 'fear factor' means no farmer will risk their business by putting forward a complaint.*"

[124] There are no national platforms in Greece, Croatia, Hungary, Austria and Slovakia (under discussion). Spain and France are special cases.

[125] http://www.supplychaininitiative.eu/regionalnational-supporting-initiatives

[126] See section 3.3. See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, July 2014, p. 9: "*It should be recognised that there are limits to how far a self-regulatory initiative can go in providing for a dispute resolution mechanism.*"

[127] European Commission, Report from the Commission to the European Parliament and the Council, on unfair business-to-business trading practices in the food supply chain, January 2016, pp. 7 and 8.

[128] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 226.

stages of the procedure, and there is no ability to carry out own initiative investigations.[129] The concerns about effective enforcement account for the continued low level of participation of farmers (and meat processors) in the SCI.[130] A voluntary initiative cannot have of itself an impact on the fragmentation of UTP rules in Member States.

A January 2016 survey on the application of the SCI substantiated the perceived shortcomings and a majority of the survey respondents considered that there was a need for a mixed approach to UTPs:

> *"[S]urvey respondents indicated as the most preferred approaches in tackling UTPs the combination of voluntary initiatives and public enforcement (33% of total answers) or a specific legislation at EU level (32%); on the other side, reliance on voluntary initiatives alone at national or EU level resulted to be the less preferred approach, with 4% and 9% of preferences, respectively. [...] the key aspect [...] is whether the 'soft' (voluntary, self-regulatory) approach of the SCI – basically subject to the goodwill of the stronger parties to cooperate with the weaker ones – can be enough to effectively address, by itself, the issue of UTPs in the food supply chain, also taking into account that the deterrent of potential sanctions applied by the SCI in case of unfair behaviour appears to be limited."*[131]

The study concluded that:

> *"elements from the reviewed literature, insights from interviewed stakeholders and independent experts, and the clear preference expressed by survey respondents for 'specific legislation at EU level' or for a 'combination of voluntary/self-regulatory initiatives and public enforcement', lead the study team to conclude that a mixed system, envisaging self-regulatory schemes enforced by an independent authority with wide powers (e.g. the possibility to promote investigations ex officio and to consider also confidential complaints), within a general regulatory framework provided by EU-level specific guidelines or provisions, would constitute an approach which combines effectiveness with the acceptance of stakeholders."*[132]

In the open public consultation, 75% of respondents were of the opinion that the SCI was insufficient in and of itself to address UTPs.

Digitalisation presents opportunities ('smart farming') and challenges for farmers. It increases transparency and ease of communication, i.e. farmers can more easily find out what prices others are paid or exchange experiences among themselves.

Moreover, internet platforms can present additional outlets for fresh and processed food

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[129] *Ibidem*. European Commission, Report from the Commission to the European Parliament and the Council, on unfair business-to-business trading practices in the food supply chain, January 2016, p. 9. See also European Parliament resolution on unfair trading practices in the food supply chain, 7 June 2016, point Y.

[130] See Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 50, referring to Gentile: "*In any case, whatever legislation the European Commission decides to introduce it will have to take the 'fear factor' into account more than the current Supply Chain Initiative is doing (Gentile et al., 2016).*"

[131] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, pp. 92 and 229.

[132] *Idem*, p. 21.

products.[133] Their transformative impact on the marketing of fresh produce is less evident than it has been the case in other sectors of the economy.[134] The longer-term impact of the internet in terms of fostering short supply chains and direct marketing of food products to consumers is difficult to predict. The logistics and costs of home-delivery of fresh produce are challenging.[135] It remains to be seen whether online platforms can alleviate the lack of bargaining power of weaker operators in the chain or whether greater imbalances are looming should even greater concentration of demand and oligopoly power occur through network effects in the platform business.[136]

2.8 Prior evaluations

As there is no EU legislative framework to address UTPs yet, it is not possible at this stage to present an evidence-based evaluation on how EU measures perform. However, some Member States have performed ex ante or ex-post evaluations with respect to the effectiveness and efficiency of the UTP policies. Information from these evaluations is being referred to in section 6.2.1.

3 Why should the EU act?

3.1 Legal basis for EU action

A key objective of the CAP is to ensure a fair standard of living for the agricultural community (Article 39 TFEU). Pursuit of the objective of ensuring a fair standard of living for the agricultural community should be balanced with the other objectives listed in Article 39 TFEU and, in particular, with the aim to ensure reasonable prices for consumers. For example higher prices for operators in the food supply chain may ultimately raise prices for consumers. The EU's constitutional emphasis on producer welfare which co-exists with the objective of reasonable consumer prices is unique to the agricultural sector hinting at the comprehensive responsibility of the CAP for European agriculture.

Article 43 TFEU specifies that the common market organisation shall ensure conditions for trade within the Union "*similar to those existing in a national market*". In a national market one would expect uniform UTP rules. Article 40 TFEU stipulates furthermore that the European common market organisation ought to exclude discrimination between agricultural producers (or consumers) within the Union.

The patchwork of UTPs rules or the respective absence of UTP rules in Member States is liable to impair the objective of ensuring a fair standard of living for the agricultural community. UTPs jeopardise the profitability of farmers and lead to downward pressure on their market income. Their governance falls therefore within the CAP's remit.

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[133] Amazon operates Amazon Fresh in a few cities via an online platform.

[134] In June 2016, Amazon bought the grocery chain Whole Foods for USD 13.4 billion.

[135] The total value of grocery sales in U.S. is roughly USD 800 billion per annum. The online share of U.S. grocery sales is only 1-2% currently, but expected to double by 2021 from USD 14.2 billion to USD 29.7 billion. The value of online sales of packaged food products in the EU is about 2.3% in 2017 (~1.5% in 2012) of total sales.

[136] Empfehlung der Wettbewerbskommission zum Thema "code of conduct" für Lieferanten – Abnehmerbeziehungen im Lebensmitteleinzelhandel, Österreich, 3 July 2017, p. 2

Based on the general rationale for the CAP as laid down in the Treaty, the absence of a common UTP framework[137] is a consequential gap, marking a distinct contrast to other areas with direct relevance for operators such as competition rules[138], state aid rules and marketing standards. In the said areas, the common market organisation (Regulation (EU) No 1308/2013) lays down common rules relevant to the competitive conditions of operators in the EU so as to contribute to economic and social cohesion[139], as well as to a level playing field in the single market.[140] The protection of a well-functioning internal market ensuring a level playing field for all producers across the EU is acknowledged to be a 'key asset' of the CAP.[141]

According to Article 38(2) and (3) TFEU the CAP primarily covers the agricultural products listed in Annex 1 to the TFEU. However, the European Court of Justice has explicitly confirmed that food products not listed in Annex I TFEU (Annex I products are deemed "agricultural products" under the Treaty)[142] can be covered by acts adopted under Article 43 TFEU if this contributes to the achievement of one or more of the CAP objectives and agricultural products are principally covered.[143]

Moreover, an approach which protects agricultural producers and their associations (cooperatives and producer organisations) also must take into account indirect negative effects they may suffer through UTPs occurring downstream in the food supply chain but being passed - in terms of their negative effect - through to them, i.e. normally by operators who are not agricultural producers but whose weak bargaining position in the chain makes them vulnerable to UTPs. SME operators negatively affected in their bottom line by the exercise of UTPs in the food supply chain are unlikely to be able to simply absorb such costs. They will pass them on to their trading partners such as farmers who often are their upstream suppliers and do not normally have sufficient bargaining power to resist such pressure. Protection against UTPs applying also downstream would furthermore prevent unintended consequences on farmers due to trade being diverted to their small investor-owned competitors - e.g. at the processing stage - which would not enjoy

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[137] The Common market organisation rules in this area are, so far, limited to the possibility for Member States to introduce an obligation of written contracts between producers and processors concerning agricultural products and cover the required contents of such contracts (see Article 168 of the common market organisation regulation).

[138] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, p. 43. Swinnen and Vandevelde describe this as taking a further step in the direction of a more complete common market where unfair competition would be reduced.

[139] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Menard, p. 74: "*Indeed, beside their role in guaranteeing or trying to restore 'the right conditions' for markets to run smoothly (Sexton), economic policies are also about keeping or restoring socioeconomic cohesion, which may facilitate coordination and improve performance along the supply chain.*"

[140] The European Court of Justice has held that the maintenance of effective competition is one of the objectives of the CAP, together with objectives listed in Article 39 TFEU such as ensuring a fair standard of living for the agricultural community. Judgment of the European Court of Justice of 13 November 2017, *APVE*, Case C-671/15, paragraph 48. The common market organisation may include all measures required to attain the objectives of the CAP: See for instance European Court of Justice, Judgment of 23 December 2015, Case C-333/14, *Scotch Whisky*, paragraph 14.

[141] Reflection Paper on the Future of EU Finances, 28 June 2017, p. 24. This also applies to the common fisheries policy.

[142] Food products are agricultural products listed in Annex I TFEU and processed agricultural products (PAPs) which are listed in Regulation (EU) No 510/2014. Agricultural products in the narrow legal sense are the products listed in Annex I TFEU (Annex I also covers many processed agricultural products *de première transformation*). There are several regulations based on Article 43 TFEU which cover PAPs. For example, the organic Regulation (EC) No 834/2007 inter alia covers PAPs which have food use (Article 1(2)(b)).

[143] Judgment of the European Court of Justice, C-343/07, 2 July 2009, paragraphs 50-51.

protection (e.g. less legal risk for purchasers to be confronted with UTP claims).

In light of the foregoing, 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.

3.2 Subsidiarity: Necessity of EU action

As has been shown, no common EU framework exists which would provide a minimum European standard of protection by approximating or harmonising Member States' diverging UTP measures. In the absence of a minimum standard, certain Member States have no rules on UTPs. Others do not address important aspects of effective UTP enforcement. This leads to under-protection of vulnerable operators, in particular agricultural producers, against UTPs in the EU. Moreover, in spite of its positive effects in the area of private governance of UTPs, the voluntary codes including the Supply Chain Initiative (SCI) - to the extent it applies in Member States – is not able to effectively replace public governance measures.

From this follows the need for EU legislation which would target the problem of under-protection against UTPs by providing for a common minimum standard of protection in the EU. After years of discussion, analysis and recommendations, which have improved the situation on the ground only to a certain extent, EU legislation is a means that can ensure brining about such a minimum protection throughout the EU including the enforcement and coordination aspects.

Farther reaching national UTP rules and voluntary codes like the SCI would not be replaced. An EU framework could thus lead to synergies rather than the cancelling out of the advantages of these regimes.

Short of EU measures, Member States lack coordinative mechanisms to bring about such approximation, nor do they have obvious incentives to self-align. Measures at the EU level, complementary to Member States regimes and the SCI, could consist in common UTP rules that would aim at improving the governance of the food supply chain and pursue the objective of ensuring fair living standards of the agricultural community (Article 39 TFEU). A circumspect approach could for instance take the form of partial harmonisation to introduce a minimum protection and take the positive effects of market driven contractual arrangements between parties into account. As UTPs occur along the food supply chain and have repercussions that are likely to be passed through to farmers it makes sense to address them in a comprehensive manner, that is to say to conceive of measures which apply along the chain.

3.3 Subsidiarity: Added value of EU action

The European Commission published a report in January 2016 that concluded that given the positive developments regarding UTPs in parts of the food supply chain there was no need to act at the EU level at that stage.[144] However, this assessment was based on the expectation that the observed positive developments would continue, and in its report the Commission identified a number of areas in Member States' UTP legislation that needed further improvement. Regarding the voluntary Supply Chain Initiative, the report likewise acknowledged the benefits achieved so far, but also suggested a number of measures to improve the initiative further so that no specific

[144] See footnote 11.

harmonised regulatory approach at EU level becomes necessary. In this context, the European Commission committed to re-assess the need for and added value of EU action to address UTPs in the light of subsequent developments – or a lack of further improvements – before the end of its mandate (see Table below).

As regards Member States' regimes, the report included suggestions in five key areas to enhance Member States' regulatory frameworks:

> (1) Member States' regimes should cover the whole food supply chain as well as operators from non-EU countries;
>
> (2) Member States should exchange information and best practices concerning their national legislation and experience of enforcement in a coordinated and systematic way in order to improve the common understanding which specific types of business practice should be considered UTPs;
>
> (3) Member States should review their approach to UTPs – those having chosen a general approach should ensure their laws can be applied in practice, impose manageable evidence requirements, and allocate sufficient resources to enforcement activities to ensure comprehensive and effective case-by-case assessments – those with a UTP-specific approach should consider carefully whether their measures are proportionate, and the range and nature of the practices covered by their legislation;
>
> (4) Member States' enforcement authorities should coordinate and exchange information and best practice on a regular basis in order to further improve the enforcement of measures to combat UTPs and to better address potential cross-border UTPs. Member States without any recent enforcement cases should review their national situation;
>
> (5) Member States should have sanctions that act as a real deterrent. Penalties should be high enough to outweigh any gain from imposing the UTP (although this can be difficult to quantify) and to influence behaviour at company level. But they should also be proportionate to the gravity of the conduct and its potential harm to the victim(s). A penalty may also be to 'name and shame', for example by publishing the name of the company that was found guilty.

Although some progress has been made on these recommendations, there remain significant shortcomings:

> As regards the first recommendation, although 20 Member States have introduced UTP legislation, 8 Member States have no UTP legislation. Moreover, certain Member States which have legislation do not cover the whole food supply chain (Hungary, Latvia, Lithuania, Romania and the UK).[145]
>
> As regards the second and fourth recommendation related to exchanges of information and best practices, the recommendations have been partially followed up by meaningful exchanges between Member States in the High Level Forum for a Better Functioning Food

[145] See Annex G, Cafaggi and Iamiceli, Overview on "Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, Overview Table 2.1 "Modes of regulation and prohibited unfair practices: legislative texts".

Supply Chain in 2016 and 2017, often at a political level.[146] However, the HLF is no substitute for a specialised network consisting uniquely of national authorities that would more effectively facilitate the exchange of technical information and best practices between the enforcement authorises. In the absence of a common framework for enforcement authorities to discuss UTPs, the Commission lacks a proper legal tool to facilitate such coordination between Member States.

As regards the third recommendation on policy reviews, Member States were asked in a recent stakeholder consultation to update information that was collected from them on the basis of a questionnaire sent in 2015 on the existence of UTP legislation, implementation and enforcement and to inform about impact assessments that their authorities may have carried out before deciding on national UTP rules or evaluations.[147] According to the information received, only three Member States had carried out ex ante evaluations and one Member State (UK) an ex-post evaluation thus reviewing its UTP legislation.

As regards the fifth recommendation on sanctions, , Member States that regulate UTPs include in their legislation financial penalties in the form of fines; some also add injunctions and declaratory decisions.[148] As regards fines, the variations in the different Member States are noteworthy both as regards thresholds (minimum and/or maximum) and the possible amount of possible fines.[149] As regards fining practices there is no reliable study but anecdotal evidence suggests that strong variations occur across Member States.[150] There is also no clear evidence on the effectiveness of Member States' approaches to fines and financial penalties in the food supply chain.[151] The possibility to publish outcomes of investigations may have a significant deterrent effect but only 10 Member States provide for such a possibility.[152] Consequently, the indications are that for the time being the situation in respect of important enforcement parameters continues to be heterogeneous in Member States.[153]

As regards the recommendation in the report's conclusions that Member States without UTP legislation could consider following the example of Belgium and the Netherlands that do not have a regulatory framework but have opted for national voluntary platforms, since 2016 two new national platforms were created, namely in Estonia and Poland (farmers are not part of the Polish platform). Estonia is one of the Member States without UTP legislation, Poland recently introduced UTP legislation. At present, there are still Member States that have neither introduced UTP legislation nor created a national voluntary framework (i.e. Denmark, Sweden, Luxembourg and Malta).

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[146] The Forum comprises national authorities responsible for the food sector at ministerial level and representatives of the private sector and is chaired by three Commissioners. Its mandate covers the following areas: Competitiveness and SME policy, Business-to-business trading practice, Internal Market, Trade and market access, Sustainability, Social dimension, Innovation, Food Price Monitoring Tool.

[147] See Annex 2.

[148] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, pp. 32-33.

[149] See Annex G, Cafaggi and Iamiceli, p. 30, Table n. 11: Minimum and maximum threshold for the imposition of fines (examined UTP legislation).

[150] See Annex F, Cafaggi and Iamiceli, p. 32.

[151] *Idem*, p. 33.

[152] *Ibidem* and Annex G, Table 11-bis, Publication of enforcement decisions administrative authorities, p. 35.

[153] See Annex F, Cafaggi and Iamiceli, pp. 18-36.

As regards the Supply Chain Initiative, the Commission concluded that in order to increase the initiative's credibility and effectiveness in tackling UTPs a discussion with the relevant stakeholders on how to improve the SCI under the High Level Forum for a Better Functioning Food Supply Chain should take place. The objective should be to improve awareness of the SCI, especially among SMEs, ensure the impartiality of the SCI's governance structure, allow alleged victims of UTPs to complain confidentially and grant investigatory and sanctioning powers to independent bodies.

While in the meantime the SCI has introduced an independent chair as well as confidentiality for aggregated complaint procedure,[154] it has failed to grant investigatory and sanctioning powers to independent bodies[155], which would be of significant importance for effective enforcement.[156] Moreover, it does not seem that the SCI has plans to integrate such powers into its voluntary arrangement as, in its 3rd Annual Report, it refers to civil law and courts in this respect (the disadvantages of which are discussed in section 2.4 and Annex B). Indeed, concerns about the lack of effective enforcement are the reason why EU farmer representative organisations have not joined the SCI. In November 2017, FoodDrinkEurope, a founding member of the SCI, stated in reaction to the public consultation that "*it [was] essential for an action at EU level to tackle unfair commercial relations that occur along the entire food chain.*" In conclusion, the SCI has been able to only partially followed up on the Commission's recommendations and the steps that have *not* been taken are material.

It can therefore be concluded that Member States did not follow up on most of the Commission's recommendations from January 2016. Similarly, also the SCI has only partially followed up on the recommendations. The absence of a satisfactory follow-up of the Commission's recommendations means that the situation of under-protection, which has been described in section 2, continues to exist. After having tried, through the recommendations made (including in the 2014 Communication), without full success to achieve the said outcomes so as to effectively address UTPs, it follows that at this stage a legislative proposal at the EU level implies clear added value. Such a proposal would aim to address the shortcomings established in section 2 and also alluded to in this section.

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[154] SCI, 3rd Annual report, January 2017, p. 11: as regards the SCI's dispute resolution 43 companies reported having been faced with an alleged breach of at least one of the Principles of Good Practice since 1st September 2015. 13 were not solved informally, as a result of which 3 companies lodged a total of 4 complaints. 30 were solved informally.

[155] *Idem*, p. 17.

[156] See also European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 12, suggestions 9 and 10.

Situation in 2016	Commission recommendation	Expected situation	Situation in 2018	Change compared to 2016
Not all MS regimes covered the whole food supply chain, neither operators from non-EU countries.	MS' regimes should cover the whole food supply chain as well as operators from non-EU countries.	All MS' regimes cover the whole food supply chain as well as operators from non-EU countries.	Not all MS regimes cover the whole food supply chain, neither operators from non-EU countries.	The expectation of continued improvement of MS' UTP regimes did not materialise.
MS did not exchange information and best practices in a coordinated and systematic way.	MS should exchange information and best practices in a coordinated and systematic way.	All MS exchange information and best practices in a coordinated and systematic way.	To some extent, MS exchange information and best practices happens in the High Level Forum on the Better Functioning of the Food Supply Chain.	Situation improved but realisation that means to bring about technical coordination of MS enforcement authorities is lacking.
MS had not reviewed their approach to UTPs.	MS should review their approach to UTPs.	All MS have reviewed their approach to UTPs.	Only four MS have reviewed their approach to UTPs.	The expectation of MS reviewing their approaches to UTPs did not hold.
Most MS lacked sanctions that acted as a real deterrent.	MS should have sanctions that act as a real deterrent.	All MS have sanctions that act as a real deterrent.	Not all MS have sanctions that act as a real deterrent; the situation continues to be heterogeneous.	The expectation of a convergence of effective sanctions did not hold.
Not all MS had UTP legislation in place.	MS should put UTP legislation in place or opt for a national voluntary platform.	MS have UTP legislation or an effective national voluntary platform in place.	Not all MS have UTP legislation in place, or have a national voluntary platform.	The expectation that all MS establish effective UTP regimes did not hold.
Awareness of the SCI was insufficient, the impartiality of its governance structure was not ensured, alleged victims of UTPs could not complain confidentially and no investigatory and sanctioning powers were granted to independent bodies.	The SCI should raise awareness of itself, it should ensure impartiality of its governance structure, it should enable alleged victims of UTPs to complain confidentially, and it should grant investigatory and sanctioning powers to independent bodies.	Awareness of the SCI is sufficiently high, especially among SMEs, the SCI has an impartial governance structure, alleged victims of UTPs can complain confidentially, and the SCI has granted investigatory and sanctioning powers to independent bodies.	Awareness of the SCI improved, the SCI has introduced an independent chair; victims of UTPs can complain confidentially collectively (if not individually); the SCI has failed to grant investigatory and sanctioning powers to independent bodies.	The expectation that the SCI fully follow up on the Commission's recommendations did not materialise.

Table 2: Changes regarding the governance of UTPs between 2016 and 2018

Last but not least, politically relevant events occurred since January 2016[157]:

- The European Parliament invited the European Commission in a resolution of June 2016 to submit a proposal for an EU-level framework concerning UTPs, welcoming "*the steps taken by the Commission to combat UTPs with a view to securing a more balanced market and to overcoming the current fragmented situation resulting from the different national approaches to addressing UTPs in the EU*", but – based on its own analysis and political assessment – pointing out that "*these steps are not sufficient to combat UTPs*".

- The European Economic and Social Committee published a report in September 2016 calling upon the Commission and the Member States to take swift action to prevent UTPs by establishing an EU harmonised network of enforcement authorities, so as to create a level playing field within the single market.

- The report of the Agricultural Markets Task Force of November 2016 recommended EU legislation in the areas of UTPs for agricultural products.

- The Council invited the Commission in December 2016 to undertake, in a timely manner, an impact assessment with a view to proposing an EU legislative framework or other non-legislative measures to address UTPs, underlining "*the importance of a level-playing field for all actors in the food supply chain across the EU that could be achieved by a common legislative framework on UTPs*".

In the light of the foregoing, the added value of EU action consists in being able to provide for a mandatory minimum protection standard against UTPs throughout the EU including enforcement, a standard which the voluntary initiatives and national measures have not or only to a limited extent been able to bring about. This would address the problem of under-protection against UTPs and have a deterrent effect on their occurrence. The complementary character of EU measures in relation to existing voluntary and Member States rules would respect subsidiarity and may have a reinforcing impact.

96% of the respondents to the 2017 public consultation on the modernisation of the CAP agreed with the proposition that improving farmers' position in the value chain including addressing UTPs should be an objective of the EU's Common Agricultural Policy.

[157] See references in section 1.2 above.

4 Objectives: What is to be achieved?

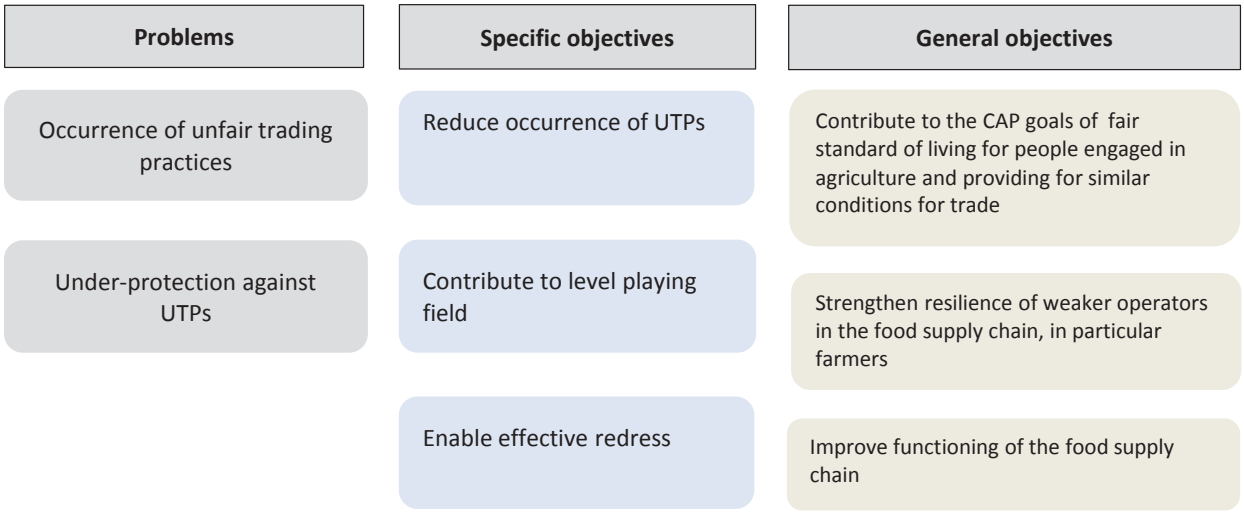

Figure 2: schematic overview of the problems and objectives

4.1 General objectives

EU UTP rules would – as do UTP rules in Member States and those of voluntary initiatives – aim at deterring and sanctioning unfair behaviour rather than remedying the structural imbalance of bargaining power between operators in the food supply chain. The latter is beyond this initiative's remit. Having said this, encouraging agricultural producers to self-organise and thus strengthen their bargaining power in relation to downstream operators is part of the CAP and the 2013 reform has introduced enhanced policy measures in that regard. One would hope that farmers make increasing use of these possibilities.

The present initiative aims to reduce the occurrence of unfair trading practices in the food supply chain by introducing a common framework ensuring a (minimum) standard of protection across the EU. This framework would apply alongside existing rules in Member States, including those of voluntary character. Prohibitions would aim to influence behaviour of operators by outlawing unfair practices and providing for effective redress possibilities in case they occur nonetheless (deterrent effect). Operators could expect a common set of minimum rules regardless of the Member State they happen to be based in or trade into. While according to a 2017 study a correlation between the stringency of national UTP regulation and its effectiveness cannot be shown[158], surveys and the results of the open public consultation suggest that operators expect EU UTP regulation to have positive effects.[159]

UTP rules would also reduce the degree of regulatory dissimilarity shaping commercial conditions and thus make a contribution to levelling the competitive playing field. By the same token, EU measures should increase legal security for operators engaging in cross-border trade. They would also contribute to reducing transaction costs, although in the absence of full harmonisation undertakings would still have to take regulatory differences into account.

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[158] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 46.
[159] See Annex 2, section 2.2.b.

Introducing minimum and effective enforcement requirements that address the fear factor would contribute to ensuring effective redress possibilities for operators against infringements of UTP rules. The absence of coordination among Member States' enforcement authorities would be addressed by introducing coordination of enforcement authorities.

4.2 Specific objectives

Achieving the specific objectives would contribute to one or several of the general objectives. All specific objectives relate to the general objective of improving the functioning of the food chain, based on the understanding that unfair trading practices are not part of but an impediment to an efficiently functioning food supply chain.

Pursuing the special objectives of reducing the occurrence of UTPs and enabling effective redress would help strengthen the resilience of weaker operators in the chain, in particular of agricultural producers. UTP rules would enable addressing one element which exacerbates price and income variability in agriculture. This would therefore contribute to maintaining a fair standard of living of farmers, a general objective of this initiative and one of the five CAP objectives listed in Article 39 TFEU (ensuring reasonable consumer prices is another of the CAP objectives). Last but not least, achieving a more level playing field would aim to contribute to ensuring similar conditions for trade for operators in the EU.

4.3 Consistency with other EU policies

It has been shown before how UTP rules would be a logical part of the overall orientation of the Union's Common Agricultural Policy which pursues producer welfare and would provide for a common set of minimum rules for operators who produce and trade agricultural products.

UTP rules are compatible with and complementary to the EU's competition rules. Competition law has a scope which is different from rules on unfair trading practices.[160] Article 102 TFEU (abuse of dominance) is concerned with exclusionary or exploitative practices by dominant companies. Article 101 TFEU targets agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. UTPs do not normally imply an infringement of competition rules but involve unequal bargaining power and prohibit undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.[161] The initiative would take into account the interests of consumers alongside those of producers as provided for in Article 39 TFEU (see section 9).

The focus on effective enforcement is shared with other policy fields. A recent Commission proposal suggests empowering the national competition authorities to improve enforcement, thereby contributing to a better application of the EU competition rules.[162] In its 2016

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[160] See also Annex B, p. 2.

[161] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 9.

[162] On 22 March 2017, the Commission has proposed minimum enforcement guarantees and standards to empower national competition authorities to reach their full potential when applying EU competition law, in particular pp. 3-4.

Communication "*Better results through better application*", the Commission also emphasises the importance of effective enforcement systems in Member States.[163]

Fairness in market activities in the business-to-business context is the specific objective of Directive 2006/114/EC, which deals with misleading practices and the requirements of comparative advertising.[164] The provisions set forth in the Directive are limited to advertising practices and do not generally address the business-to-business trading practices identified in this impact assessment report.

Regulatory divergence of a kind similar to UTPs has given rise to EU initiatives in the area of business-to-consumers protection.[165] Some Member States have extended such rules to national business-to-business situations.[166] The so-called injunctions directive ensures the defence and enforcement of collective interests of consumers in the internal market.[167] The conceptual approach under the EU's business-to-consumer rules indeed shares relevant characteristics with Member States' existing UTP rules governing business-to-business transactions, namely the focus on relatively weaker parties of a commercial transaction. In certain Member States the same enforcement authority is mandated to pursue both types of cases.[168]

The EU is committed to high standards of fundamental rights. A fair and effective system of protection against UTPs will contribute to stakeholders' ability to conduct a business (see Article 16 Charter of Fundamental Rights of the European Union {CFR}). Union legislation will respect the rights enshrined in the Charter (Articles 51, 52 CFR). Enforcement powers therefore have to be shaped in a manner compatible with the rights of defence (Article 48 CFR), e.g. by providing an effective remedy against the decision of an enforcement authority imposing penalties. In particular for the confidential treatment of complaints a balance must be struck in relation to the rights of defence.[169] Rules on professional secrecy, which is a right protected by the Charter[170], have been developed in other areas of EU legislation, namely competition law and would apply

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[163] Communication from the Commission - EU law: Better results through better application.

[164] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising.

[165] See Directive 2005/29/EC on unfair commercial practices and Directive 93/13/EEC on unfair terms in consumer contracts. Recital 8 of the Directive reads: "*It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.*" Some Member States extend EU rules on unfair business-to-consumer commercial practices to the business-to-business relationships.

[166] See Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 3 (Austria, Denmark, France, Germany, Italy and Sweden).

[167] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. See also Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

[168] See for example Italy, where the Antitrust Authority is responsible for Competition, UTPs and Consumer Protection. Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, p. 187 and http://www.agcm.it/en/general-information.html

[169] European Court of Justice, judgment in Case C-450/06, paragraphs 45-46.

[170] Orders of the President of the General Court in Case T-462/12, paragraph 44 and Case T-345/12, paragraph 32.

here as well.[171]

5 What are the available policy options?

5.1 Introduction

Any regulation of UTPs will cover legal and practical issues that can be addressed very differently and that can have different impacts on the food supply chain and the related policy objectives. This section presents and explains plausible alternatives for how these issues can be addressed in the legislation. The elaboration of the policy options helps to understand the consequences of the choices for the food supply chain and, in particular for the occurrence of UTPs, the levelling of the playing field and the possibility of seeking effective redress.

First, there is the question whether UTPs should be addressed at the EU-level at all and, if so, to what extent (section 5.2). Second, the question arises if a possible regulation of UTPs at EU level should be based on general principles or focus on specific practices (5.3). UTP rules can cover only agricultural products or all food products, that is to say also processed products (5.4). UTP rules can apply in situations of imbalance of bargaining power or they can apply to all operators. They can apply to EU operators only or also to operators from third countries (5.5). Enforcement can be ensured at the national level following a set of given standards (more or less detailed), or it can be centralised at the EU-level (5.6). In the case of enforcement at the national level, national authorities can coordinate or not (5.7). And, finally, different legal instruments can be used to put the measures in place, ranging from "soft law" to a EU Directive or Regulation (5.8).

5.2 Degree of harmonisation of substantive UTP rules

5.2.1 Baseline

Under the baseline option, common measures would not be introduced at the EU level. Member States would remain free as regards their choices about the scope of UTP rules. The majority of Member States' regimes, albeit to varying degrees, contain rules that prohibit unfair trading practices. Member States would continue to operate these regimes. Operators in Member States which have no such rules would continue to rely on contract law or, where existing, voluntary codes or platforms.

The suggestions made by the European Commission in its Report of January 2016 and in its Communication of July 2014 would remain valid. The High Level Forum on the Better Functioning of the Food Supply Chain would continue to provide a forum for stakeholders and Member States' authorities to discuss UTPs in a political framework.

5.2.2 Options discarded at an early stage: detailed harmonisation of substantive UTP rules

A complete harmonisation of UTP rules applying in Member States at the EU level would be one possible option how to pursue the policy objective of combating UTPs in the food supply chain. Member States would no longer be able to regulate UTPs differently from the common approach.

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[171] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 28.

Detailed harmonisation of UTP rules in the EU food supply chain does, at this stage, not seem warranted. While it could have the effect of de facto - by way of "occupying the legislative ground" - constituting a backstop to national UTP measures that would possibly be incompatible with the internal market, the degree of convergence of national UTP rules is not such as to invite detailed harmonisation. There is too little overall convergence of rules to justify this. What is more, detailed harmonisation would presuppose that a one-size-fits all logic can be applied but this can, at this stage, not be read out of the answers to the different surveys nor would it appear from Member States' regimes. Detailed harmonisation based on a low(est) common denominator would encounter resistance from Member States which have more stringent rules in place. Conversely, detailed harmonisation mirroring the more stringent national regimes would elicit resistance from Member States which have less stringent or no rules in place. In both cases, subsidiarity considerations would militate in favour of a less intrusive approach. The option of introducing detailed harmonisation is therefore discarded.

5.2.3 Partial harmonisation of substantive UTP rules

A partial harmonisation approach concerning substantive UTP rules could accommodate Member States' stricter UTP rules while at the same time introducing a common minimum standard of protection in the EU. The systems, including the voluntary governance approaches, would work in a complementary manner.

5.3 **Scope of UTP prohibition**

5.3.1 Baseline

Under the baseline option, no common measures would be introduced at the EU level. Member States would remain free as regards their choices about the scope. The SCI would continue as a forum for early and non-litigious dispute resolution.

5.3.2 UTPs subject to generally formulated prohibition (based on fairness)

UTP rules could operate via a generally formulated prohibition of unfair conduct in B2B relations in the food supply chain. Such a general prohibition could be paired with indicative examples of UTPs which illustrate practices that typically fall under its remit. A majority of Member States uses such a general prohibition in their national context, often paired with examples of prohibited practices.[172] The SCI's voluntary Principles of Good Practice also contain a general principle of "fair dealing" that is further specified in specific principles and examples of unfair practices.

A prohibition of UTPs defined by a general reference to fairness would provide a common standard of protection against UTPs in Member States, including in those who have no such protection as of today. Subject to its application on the ground, the approach would outlaw and deter UTPs and thus contribute to reducing the occurrence of UTPs. A common definition of UTPs, filled with life through application in Member States, could contribute significantly to levelling the playing field between operators in the different Member States. The harmonising effect of such a general prohibition could be strong thanks to a common definition at EU level that would cover UTPs in general and not only those specifically enumerated in a list.

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[172] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 15.

By addressing the issue of UTPs at the EU level, the option would be expected to raise awareness and promote fair trading practices in the food supply chain in all Member States.

5.3.3 Prohibiting specific UTPs

Under this option, EU rules would prohibit specific, relatively concretely formulated and well-defined practices as unfair. A short list of such practices would constitute a mandatory minimum protection standard against UTPs in the EU, prohibiting and deterring these practices and thus contributing to reducing their occurrence (and linking them to a common framework for redress).[173] A minimum standard would contribute to levelling the playing field between operators in different Member States.

This approach would not have the vocation of capturing all possible UTPs; it would rather address a limited set of manifestly unfair ones without – pursuant to a minimum harmonisation approach - preventing Member States to go further, for instance in their application of generally formulated national prohibitions. The rules would, due to their specificity, aim to be predictable for operators and workable for authorities entrusted with their enforcement.[174]

Certain prohibitions could override parties' possible (contractual) agreement covering a given practice.[175] This would be the case for unfair practices which are unlikely to be redeemed by, for example, circumstances that would suggest that the parties' foreseeing the practice is fair or creates efficiencies.[176] Also in business-to-consumers area certain commercial practices or clauses are regarded as unfair whatever the circumstances and cannot be set aside by contractual agreement.[177] Such an approach would aim to prevent the *de facto* imposition of unfair contract terms by a party exercising significant bargaining power.[178] The UK Competition Commission concluded in a comprehensive study of 2008 that there were circumstances where in spite of the

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[173] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 1: "*In such situations, a well-targeted regulation of certain trading practices aiming at ensuring fairness between actors in the food supply chain could help to resolve specific issues.*"

[174] Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, p. 31: "*This is a very important conclusion, since – as will be shown in full detail in section 2 of this report – currently many Member States have in place a system that relies on general principles, often included in contract law, without providing legal certainty as regards the types of UTPs addressed. The use of black and grey lists, in this respect, reduces uncertainty for both parties to a commercial relationship, provided the list follows efficiency and fairness criteria without becoming a straightjacket for the parties.*"

[175] See discussion in Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, January 2018, pp. 18-19 and 50.

[176] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 2.

[177] See Article 5(5) and Annex I of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. Denmark, Finland and Sweden have extended, at least in part, legislation implementing Directive 2005/29/EC to business-to-business relations. In Sweden, such extension has explicitly included Annex I of the Directive, listing the per se prohibited practices.

[178] See European Commission, Communication on a better functioning food supply chain, 28 October 2009, p. 29. Commission report on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions, 26 August 2016, p. 4. See also UK Competition Commission 2008, The supply of groceries in the UK market investigation, final report, paragraph 37, pointing out that an agreed up-front allocation of risk may be excessive. See also FoodDrinkEurope, 13 November 2017, p. 2 in relation to buying alliances of retailers. See OECD, 15 May 2014, Competition issues in the food chain industry, p. 25.

allocation of risk being agreed up-front the extent of risk transferred to the supplier was excessive.[179]

Alternatively, certain practices can be justified (i) if included upfront (ex ante) in an agreement between parties and (ii) if they create efficiencies by increasing the total gains from the transaction to be shared by the parties.[180] Such practices would not constitute UTPs and should not be prohibited as they create win-win situations for the parties.[181] If the same practices occurred retrospectively and without upfront agreement they would, however, lack in predictability and therefore be, in general, unjustified and inefficient.[182] Moreover, commercial agreements leaving key elements of a transaction to one party's later unilateral decision would not necessarily justify otherwise unfair practices, especially when it is possible to define such key elements or the triggering factors for their activation in the agreement. In fact, the party with significant bargaining power could impose and take advantage of this vagueness by unilaterally determining these elements after the transaction has started. In such a case, the stronger party is indeed likely to create inefficiencies by, e.g. capturing the gains of the transaction that were originally allocated to the other partner or by transferring losses.[183] Last but not least, certain contractual provisions or trading conditions agreed ex ante can still be unfair where it is generally accepted that they do not lead to efficiencies for both parties in the transaction.[184]

In some Member States, a mere provision in the contract as to the possibility of the practice is sufficient to shield it from considerations concerning unfairness.[185] In other Member States, such practices are prohibited and are not subject to parties' contractual freedom. In yet other Member States, the exclusion from UTP rules depends on a sufficient specification of the practice in the contract, so that it is predictable for parties, referring to procedural elements of reasonableness and transparency in relation to the expected sharing in the total gains.[186] For example, reasonable notice must be given in case of unilateral short term changes foreseen in a contract[187] or cost estimates are to be made available if contributions are asked which are not further specified in the initial agreement.[188]

The voluntary Supply Chain Initiative's consensus on fair unfair practices ("Principles of Good

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[179] See also UK Competition Commission 2008, The supply of groceries in the UK market investigation, final report, paragraph 37 of summary.
[180] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 2.
[181] *Idem*, p. 4.
[182] See also UK Competition Commission 2008, The supply of groceries in the UK market investigation, final report, and its Appendix 9.8.
[183] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018.
[184] *Idem*, pp. 5 and 7.
[185] See Art. 19.1 of the Bulgarian Foodstuff Act "*The contract for purchase of food for resale cannot: (…) 4. be amended unilaterally, unless this is explicitly provided for in the contract*". Similar provisions exist in the Latvian and Lithuanian legislation.
[186] See UK Competition Commission 2008, The supply of groceries in the UK market investigation, final report, paragraph 9.47 and its Appendix 9.8, Annex 1, paragraph 15.
[187] See Irish Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (S.I. No. 35 of 2016), regulation 5.
[188] *Idem*, regulation 12.

Practice") can serve as a useful point of reference for a short list of specific UTPs.[189] The respective examples referred to therein give an idea of what operators in the chain agree to be types of (fair and) manifestly unfair behaviour.[190] It is underpinned by the rationale of a fair allocation of risk, "*agreed by the parties to obtain a win-win situation*". The SCI's code states that all contracting parties in the supply chain should bear their own appropriate entrepreneurial risks.[191] Unilateral changes to contract terms shall not take place unless this possibility and its circumstances and conditions have been agreed in advance.[192]

Practices listed in the SCI code are matched by the results of the open public consultation. Of the top eight practices identified as UTPs, the majority are also listed in the SCI code of conduct[193] (and can also be subsumed under the more general concepts of the list in the Commission 2016 report[194]):

a. Unilateral changes of contracts
b. Last minute order cancellations
c. Claims for wasted or unsold products
d. Payments for perishable products later than 30 days (not in SCI[195])
e. Claims for contribution to marketing campaigns (of retailers)
f. Upfront payments to secure contracts

As already indicated above, the legal landscape is diverse across Member States concerning content and scope of UTP rules. A 2018 study shows, however, that a significant number of Member States covers the practices identified above.[196]

5.3.3.1 Unilateral and retroactive changes to contracts

A sales contract is a synallagmatic arrangement which by definition can only be changed by mutual agreement. In that sense, unilateral changes are breaches of contract and actionable under contract law.

However, redress for small parties in the food supply chain may in practice be ineffective. Moreover, operators with significant bargaining power may be able to effectively coerce suppliers into signing contracts containing terms that allow for unilateral retroactive changes

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[189] See AIM (European Brands Association), 21 August 2017, p. 2. AIM is a member of the Supply Chain Initiative.
[190] See also the UK situation where legislation rendered a code of conduct mandatory and enforceable through public authority involvement (an adjudicator with sanctioning powers was created).
[191] *Idem*, Specific Principle 6.
[192] Supply Chain Initiative, Principles of Good Practice, 29 November 2011, Specific Principle 2.
[193] See Annex 2 for more details.
[194] See section 2.2.
[195] The Supply Chain Initiative does not include late payments while the Agricultural Markets Task Force report and the open public consultation questions do.
[196] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 17 and Annex G. Table 2.3.

without further specification.[197] Unreasonably short notice periods and the absence of objectively justified reason for such changes would be parameters to take into account (see SCI on 'Termination'). For example, the UK Groceries Supply Code of Practice focuses on the transparency of the contract terms that allow such changes.[198]

The SCI considers retroactive unilateral changes in the cost or price of products or services to constitute unfair business conduct but specifies that a contract may contain legitimate circumstances and conditions under which subsequent unilateral action may be permitted.

5.3.3.2 Last-minute order cancellations concerning perishable products

Last-minute order cancellations of perishable products are a variant of the practice that consists in unilateral and retroactive changes to contracts. Such changes tend to leave suppliers of perishable products without alternative marketing opportunities and are incompatible with the principle that there should not be an excessive transfer of one's own entrepreneurial risk to one's (weaker) business partner. Last-minute order cancellations should not become a possibility due to contractual arrangements.

5.3.3.3 Claims for wasted or unsold products

Claims for wasted or unsold products from suppliers can constitute an (often retroactive) practice which stands ill against the specific principle of the SCI that "*all contracting parties in the supply chain should bear their own appropriate entrepreneurial risks*". Once purchased, the risk of not selling the product or an impairment that renders it unmarketable (and wasted) could be expected to lie with the buyer, maintaining therefore his incentives to efficiently plan and manage his business. Such claims would be unfair.

This would be different if the wastage is caused by the negligence or default of the supplier. Moreover, there can be cases where the conditions for a return of unsold products are predictably laid down in the agreement and in line with a fair mutual allocation of the financial risk. Claims on such a basis would not constitute unfair conduct.

5.3.3.4 Payments for perishable products later than 30 days

Payments delays are subject to a horizontal Directive (Late Payment Directive).[199] The Directive stipulates inter alia that businesses have to pay their invoices within 60 days, but can choose a longer payment term as long as it is expressly agreed in the contract and provided that it is not grossly unfair to the creditor. In the directive the concept of "grossly unfair" is applied to contractual terms and practices and is further specified to relate to any "*gross deviation from good commercial practice, contrary to good faith and fair dealing*" (Article 7).

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[197] European Commission, Competition in the food supply chain, Staff Working Document, 28 October 2009, p. 28. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 12.

[198] See the Groceries Supply Code of Practice as Schedule 1 of the Groceries (supply chain practices) market investigation order 2009, Article 3 – "Variation of Supply Agreements and terms of supply": "*[the agreement] sets out clearly and unambiguously any specific change of circumstances [...] that will allow for such adjustments to be made*". See also Irish Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (S.I. No. 35 of 2016), Regulation 5.

[199] Directive 2011/7/EU on combating late payment in commercial transactions.

The Directive has been transposed in Member States. When implementing the directive, a number of Member States have introduced provisions limiting payment terms for perishable foods, in certain cases, to less than 60 days (see Annex D). Currently, 24 Member States[200] stipulate shorter payments periods (than 60 days) for all sectors of the economy or, alternatively, for food products.[201] While 11 of these Member States provide for a 30 days[202] without derogation possibility, 13 Member States provide for 30 days, but allow parties to extend the 30 days by way of agreement.[203]

Fresh agricultural products (fruits and vegetables, meat, dairy products) are sold relatively quickly in grocery stores to consumers lest their perishability makes them unmarketable. Literature unanimously point to the fact that delayed payments from farmers' contractors have a negative impact on investments undertaken at the farm and farm output.[204] In light of this, payment delays for perishable products of longer than 30 days would not seem justified. In the interest of fairness and so as to create a level playing field at EU level concerning fresh agricultural products a maximum payment delay of 30 days could be rendered mandatory.[205] Allowance could be made for specific cases such as value-sharing contracts for which the value to be split between trading parties is realised only at a later stage.[206]

5.3.3.5 Claims for contributions to promotional or marketing costs of buyer

Under the heading of "entrepreneurial risk allocation" the SCI gives examples of transfers of unjustified or disproportionate risk to a contracting party. Imposing a requirement to fund a contracting party's proprietary business activities or to fund the cost of a promotion are listed as specific examples. It is explained that different operators face specific risks at each stage of the supply chain linked to the potential rewards for conducting business in that field.

Having said this, parties' ex ante agreements about the possibility of such contributions can suggest mutual efficiencies (win-win situations) and would not imply an unfair practice.[207] Such contributions would therefore be deemed lawful if exercised in accordance with the defined terms of the up-front agreement, even if they are implemented after the transaction has started. A case in point would for instance be the participation by suppliers in retail promotion covering their branded products in accordance with the expected allocation of risks and rewards.[208] The same rationale would not apply to commercial arrangements which include vague and unpredictable provisions concerning contributions and leave these provisions to be unilaterally

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[200] Only Belgium, Greece, Croatia and Luxemburg provide a payment delay of 60 days or longer, if parties agree so.

[201] 12 Member States have adopted special provisions for either agricultural or food products, some focus on perishable/fresh products: Bulgaria, Czech Republic, Spain, France, Italy, Latvia, Lithuania, Hungary, Portugal, Romania, Slovenia and Slovakia.

[202] Bulgaria, Czech Republic, Germany, Spain, France, Italy, Latvia, Lithuania, Hungary, Portugal and Romania.

[203] Denmark, Estonia, Ireland, Cyprus, Malta, Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland, Sweden and the UK.

[204] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Falkowski, p. 25.

[205] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 5.

[206] *Idem*, p. 6. Similarly, certain payment instalments may occur at year's end under statutory rules of cooperatives.

[207] *Idem*.

[208] Swedish food retailers, 17 November 2017, reply to open public consultation, p. 2: "*If there would be no cost for suppliers, the effect on the market would be less marketing of branded products and more marketing of private label products.*"

and ex post determined by one party.[209]

5.3.3.6 Requests for upfront payments to secure or retain contracts without consideration

Where parties' agreement about upfront payments implies mutual efficiencies (win-win) they would suggest the lawfulness of such contributions. Moreover, parties should have the ability to enter into business relationships and leave them as they see fit, account being taken of reasonable termination modalities. Indications in a commercial agreement to the effect that, for instance, marketable business resources are being made available or that risks for referencing new products are allocated should be taken into account.[210]

However, certain requests for payments without any consideration (sometimes referred to as "hello money") would not appear to be in line with fair cost and risk allocation as for instance referred to in the SCI code of good practices.[211]

5.3.3.7 Criteria concerning the assessment of unfairness of the practices

A categorisation of the above practices as unfair depends on the circumstances in which they occur (see also discussion in section 6.3.1 on the impact of the options). Unilateral and retroactive changes of contracts, last minute order cancellations of perishable products, claims for wasted products and payments for perishable products later than 30 days would typically be unfair whatever the circumstances. For example, even if a contractual clause specifically enabled such practices this would not redeem them. Certain conditions may however apply, for example in the case of claims for wasted products, the condition that such waste should not be the consequence of negligence attributable to the supplier.

As regards other practices such as claims for contribution to marketing campaigns or promotions and upfront payments to secure contracts, their inclusion in clear terms in a supply agreement between parties can suggest efficiencies and mutual benefits for the parties and corresponding practices and arrangements would, therefore, not be deemed unfair.

5.4 Operationally, an EU approach based on the options set out in section 5 should incorporate the said considerations and be shaped accordingly. Coverage of products

5.4.1 Baseline

The baseline scenario implies that there are no EU rules addressing UTPs. The question concerning coverage in terms of products does not arise.

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[209] Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 7.

[210] See for instance Groceries Supply Code of Practice as Schedule 1 of the Groceries (supply chain practices) market investigation order 2009, point 9, "Limited circumstances for Payments as a condition of being a Supplier".

[211] The SCI code describes demanding payments for services not rendered or goods not delivered as unfair conduct. See also Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 9: "*This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or* without consideration." (emphasis added)

5.4.2 Agricultural and processed agricultural products covered

UTP rules would focus on agricultural products and processed agricultural products traded along the food supply chain, thus covering all food products traded in the food supply chain.[212] Sales of such products in the chain would be subject to respect of the EU's UTP rules. This comprehensive scope would be consistent with the SCI's approach and UTP measures in Member States.[213]

5.4.3 Agricultural products covered

Alternatively, UTP rules could target agricultural products (Annex I TFEU) traded in the food supply chain. In retailers' shelves they account for about 60% of food products sold to consumers, a sizeable share.[214] UTP rules applying to agricultural products may in practice have positive spill-over effects where buyers source both agricultural and processed agricultural products from the same supplier.[215]

5.5 Operators covered by UTP rules

5.5.1 Baseline

Under the baseline option, no common measures would be introduced at the EU level. The question concerning the scope of UTPs rules would not arise. Member States would remain free as regards their choices about the scope of UTP rules.

5.5.2 UTP rules apply in situations characterised by weak bargaining power

UTP rules could target situations which are characterised by an imbalance of bargaining power or a relationship of economic dependency, these being generally drivers of UTPs.[216] Accordingly, UTP rules would protect operators finding themselves in such a weak position. Certain national UTP rules apply in situation of dependence of an operator on the counter-party to the transaction or in situations where an operator has market power/superior bargaining power.[217] Small agricultural producers including their associations would be covered by the protection. Due to the backward cascading effects UTPs have in the chain (see section 2.5.1.1), the protection could be extended to protect also other such operators in the chain. This would in addition prevent unintended effects such as trade diversion away from farmers due to a buyer's possible incentive to rather deal with an independent processor than a, say, farmers' processing cooperative which is protected by UTP rules.

Verification of the existence of the existence of weak bargaining power or an imbalance of bargaining power could be left to the case-by-case assessment of a competent authority.

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[212] See footnote 142.

[213] Also in this direction, for example, COOP de France, reply to open public consultation, 22 August 2017, p. 1.

[214] See Annex B.

[215] Such a buyer may not differentiate his business behaviour in accordance with the characterisation of some of the products he purchases as processed agricultural products. However, in cases where the supply relationship concerned only processed agricultural products, the UTP rules would not apply and any possible spill-over effect would therefore be unlikely.

[216] See OECD, 15 May 2014, Competition issues in the food chain industry, p. 23-24. See for instance Spain: economic dependence exists when the supplier sells at least 30% of the overall production to a single buyer.

[217] For instance in Germany, Cyprus, Latvia and Poland.

Alternatively, a proxy for such an imbalance could for example be found in the size of the undertakings thereby increasing predictability. The status as an SME including a micro-enterprise in the food supply chain could trigger the protection of the UTP rules and thus defines their scope of application.[218] In some Member States the size of potential operators is considered a proxy of bargaining power. Some Member States have limited the scope of legislation to businesses exceeding a certain size[219] or to relations in which one of the parties is a small or micro-enterprise[220]. UTP rules could for instance be formulated in such a way as to prohibit the use of the UTPs concerned for all operators in the food supply chain which trade food products with SME operators. In other words, under this option only SME operators, i.e. micro, small and medium-sized enterprises with less than 250 staff headcounts and either a turnover below EUR 50 million or a balance sheet total below EUR 43 million, would enjoy protection. Commercial relationships between large operators would not be governed by such an approach. Sales of food products by a SME supplier to a non-SME buyer would be covered.

5.5.3 UTP rules apply to all operators

Under this option, UTP rules would protect all operators in the food supply chain regardless of their size. This approach is adopted by the voluntary code agreed by the SCI. UTP rules applying to all operators also reflect the approaches certain Member States follow.[221]

5.5.4 UTP rules 'benefit' 3rd country suppliers

UTP rules can enable 3rd country suppliers to rely on them when confronted with UTPs by operators situated in the European Union.[222]

5.5.5 UTP rules 'benefit' suppliers situated in the EU

Alternatively, UTP rules would only apply insofar as commercial supply relationships are concerned which cover sellers and buyers which are situated in the EU.

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[218] See Definition of SMEs are set out in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium- sized enterprises (OJ L 124, 20.5.2003, p. 36).

[219] See Croatia: rules apply to resellers whose turnover in Croatia exceeds approx. EUR 132,500, and to processors whose turnover in Croatia exceeds approximately EUR 66,250. Polish legislation applies when the business's trade value in the past two years exceeds approximately EUR 11,900 and when the infringer's (group's) turnover exceeds approx. EUR 23,867,100. The UK Groceries (Supply Chain Practices) Market Investigation Order 2009 applies to any retailer with a turnover exceeding GBP 1 billion with respect to the retail supply of groceries in the United Kingdom, and which is designated as a Designated Retailer.

[220] This approach is partially taken by Spanish legislation when regulating formal and content requirements of supply contracts: these apply only to transactions exceeding EUR 2,500 in value and one of the proxies for unbalanced relations applies; among these proxies the size of the harmed business as an SME is also considered; similarly, Article 20 of the German Act against Restraints of Competition, abuse of relative market power is prohibited when it involves SMEs as "dependant" enterprises. Under Portuguese law (DL no. 166/2013, of horizontal application) specific provisions have been provided for the protection of small and microenterprises, and fines are foreseen in accordance with the infringing party's size.

[221] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, summary tables 1 and 2.3.

[222] See British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 11.

5.6 **Enforcement**

5.6.1 Baseline

Under the baseline option, no governance measures would be introduced at the EU level. Member States would remain free concerning the enforcement of UTP rules, if any. The redress options for victims of UTPs would depend on the regimes applicable in Member States. The suggestions made by the European Commission in its Communications in July 2014 and January 2016 would remain valid.

The Supply Chain Initiative has promoted cultural change concerning UTPs in the food supply chain. It can be expected to explore its potential to further adjust in accordance with concerns raised concerning its effectiveness. It is unlikely, however, that it will integrate enforcement modalities normally associated with public enforcement (e.g. own initiative investigations, fines, publication of results). It can, therefore, not be excluded that EU farmers' organisations will continue to abstain from participating in the Supply Chain Initiative. In any case, the Supply Chain Initiative does not constitute a suitable tool achieving a (partial) harmonisation of Member States' UTP rules concerning enforcement.

As has been shown, the fragmentation of legal rules implies certain shortcomings concerning the effectiveness of enforcement regimes in addressing the fear factor. The baseline approach would not aim to address this lack of effective redress, nor would a technical coordination mechanism (network) of enforcement authorities be appropriate in the absence of a common framework.

5.6.2 Options discarded at an early stage

Centralised enforcement would operate via an enforcement body at EU level, for instance the European Commission. A variation of this would be to foresee the parallel application by competent Member States authorities and the European Commission as is the case for EU competition law.

Centralised enforcement could make sense if there was one set of UTP rules applying throughout the EU. To the extent that differences of substantive rules in Member States remain, centralised enforcement would not seem an appropriate course of action. It is difficult to see how an EU body would enforce diverging national rules or, for that matter, assume an (EU) legal mandate to do so. The option of introducing centralised enforcement is therefore discarded.

5.6.3 Minimum enforcement requirements "plus"

Under this option, the following enforcement requirements would apply:

- Designation of a competent authority;
- Ability to carry out own initiative investigations;
- Ability to receive and treat complaints confidentially;
- Ability to receive complaints by associations of operators;
- Ability to impose fines;
- Ability to publish results of an investigation;
- Mutual assistance in transnational cases.

Certain procedural powers for authorities competent to monitor UTP rules, such as investigative

powers in relation to undertakings (information requests)[223], the ability to receive and treat complaints confidentially[224], to carry out own-initiative investigations[225] and to accept complaints by associations of operators[226] have, in several EU Member States, proven important for the perception of operators that effective enforcement exists and is apt at addressing the root causes that can lead victims of UTPs to not seek redress. The existence of a deterrent, such as the power to impose fines[227] or the publication of investigation results, may encourage behavioural change and pre-litigation solutions between the parties.[228] The ability to share information with other Member States' authorities concerning transnational cases (mutual assistance) could be a further appropriate element of effective enforcement.[229]

A recent study shows that in as many as 19 Member States administrative authorities other than ordinary courts have powers to enforce rules addressing selected UTPs.[230] In 17 Member States administrative authorities can conduct own initiative investigations concerning UTPs. In 14 Member States administrative authorities can receive confidential complaints. But in less than half of EU Member States (13) has an administrative authority the power to receive to receive confidential complaints and conduct own initiative investigations.[231]

Member States could be required to designate a competent authority for UTP enforcement which is given certain minimum enforcement powers inspired by best practices in Member States' existing regimes.[232] While courts may act upon UTP violations, their institutional lack of ability

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[223] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 101. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 13.

[224] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, suggestion 9 and Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 6. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 12.

[225] See e.g. European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 12, suggestions 9 and 10.

[226] See for instance Max Planck Institute for Intellectual Property and Competition Law, IIC (2013) 44:701–709, 23 August 2013, p. 708. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 12. Such possibilities may already exist in judicial proceedings albeit without the ability to be awarded damages, see for example the Dutch situation discussed in SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, pp. 8, 14 and 22. Collective action against recurring unfair contact, for instance in the form of unfair contract clauses, can serve to protect the identity of a particular complainant.

[227] SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, p. 36.

[228] Accordingly, the UK's Groceries Code Adjudicator has resulted in significant reductions in breaches of the Groceries Code over four years, according to yearly survey data reported in 2017, even while the number of cases acted upon was low.

[229] See European Parliament resolution on unfair trading practices in the food supply chain, 7 June 2016, paragraph 34. See also European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 12, suggestion 10.

[230] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, pp. 20-21.

[231] *Idem*, p. 24.

[232] See the suggestion in European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 11.

to take the fear factor into due account would not make them competent authorities within the said meaning.[233] Minimum requirements for effective enforcement of EU rules in Member States – apt to address the fear factor - could be laid down drawing on the above list while stopping short of a detailed harmonisation of enforcement modalities.[234]

In the open public consultation, 92% of the respondents agreed or partially agreed that there should be minimum standards applying to the enforcement of UTP rules in the EU.[235] Respondents were asked which elements they considered being an important part of an effective public enforcement of UTP rules: 94% referred to transparency of investigations and results; 93% to the possibility of imposing fines in the case of violations of the rules; 92% the possibility to file collective complaints; 89% the ability to receive and to treat confidential complaints; 89% the designation of a competent authority; 73% the ability to conduct own-initiative investigations.[236]

Confidentiality of complaints in later stages of proceedings is considered with caution though in certain Member States, due to the effect on due process and practical difficulties. Confidentiality may be difficult to ensure in all those cases in which practices are imposed on a single counter-party or a limited number thereof. Indeed, some national experts reported that in fact confidentiality might be hindered by the need to provide detailed information, whose origin may be traced back to the victim. Own-initiative investigations and the ability to instruct complaints by associative bodies collectively acting in the interest of members who became victims of UTPs can provide conduits that can ensure protecting the anonymity of an individual UTP victim.

5.6.4 Minimum enforcement requirements

Under this restricted option, the following enforcement requirements would apply:

- Designation of a competent authority;
- Ability to carry out own initiative investigations;
- Ability to receive and treat complaints confidentially.

This would be in line with the suggestions that have been made by the Commission in its communication of 2014[237] and in its report of 2016[238].

5.7 **Coordination of enforcement authorities**

5.7.1 Baseline

Under the baseline option, no governance measures would be introduced at the EU level.

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[233] *Ibidem* and Annex B, section 2.

[234] See recommendations in Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, sections 4 and 5.

[235] See Annex 2.

[236] *Ibidem*.

[237] European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 12.

[238] Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 6.

Member States would remain free as regards measures addressing UTPs. The suggestions made by the European Commission in its Communications in July 2014 and January 2016 would remain valid.

The High Level Forum on the Better Functioning of the Food Supply Chain would continue to provide a platform for discussing UTP (governance) developments including the Supply Chain Initiative (its mandate extends through to 2019). This may lead to lessons and best practices being shared. The forum's platform does, however, not amount to a network of enforcement authorities comparable in its role and coordination function to, for example, the European Competition Network.

5.7.2 Coordination

A coordination mechanism between competent authorities[239] would enable the creation of a network of authorities that could usefully accompany the EU rules, their coordinated application and facilitate an exchange of best practices as well as, importantly, collect data through Member State reporting that would, down the road, inform an evaluation (and possible adjustment) of the measures.[240] The European Commission would facilitate the network by hosting regular meetings based on annual application reports submitted to it by the Member States' competent authorities. A similar mechanism exists in the area of competition law (the European Competition Network) and contributes to coordination among national competition authorities and evidence- and application-based discussions.[241] Such a form of cooperation would be in line with the suggestions that have been made by the Commission in its Communication of 2014.[242]

5.8 **Legal instrument to be used**

Specific policies can be implemented through a variety of legislative or non-legislative instruments, ranging from self-regulation to recommendations, or full mandatory binding measures. Legislative measures can take the form of regulations or directives.

5.8.1 Recommendation

'Soft-law' could be used to encourage Member States towards an at least partial harmonisation of legal regimes, based on a common proposed understanding of what practices are considered unfair and should not be applied.

If Member States followed suit this would contribute to reducing UTPs, establishing effective redress possibilities and levelling the playing field in the EU insofar as UTPs are concerned. A recommendation could take the form of comprehensive guidance that would cover the whole 'universe' of UTPs or act as a framework recommendation trying to establish what would be a baseline of rules. Such guidelines could also address desirable enforcement mechanisms and promote exchanges of best practices.

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[239] See discussion in Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 50.

[240] AIM (European Brands Association) considers that there is "*an urgent need for coordination mechanisms*". 21 August 2017, p. 2.

[241] See this link. See also the suggestion in Association Française d'Etude de la Concurrence (AFEC), 2013, Green Paper reply, p. 27.

[242] European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014.

A recommendation would not legally require Member States to take action; its effect would depend on the degree to which Member States decided to follow the recommendation. In the open public consultation for this initiative only 4% of the respondents who believed action should be taken (which was 95% of total) preferred purely non-legislative action.[243] Recommendations could also (again) be made in relation to the voluntary Supply Chain Initiative as was done in the European Commission's January 2016 report (see discussion in section 3.3).

5.8.2 Legally binding instrument

A regulation would be legally binding and directly applicable in all Member States (Article 288 TFEU). As such, it can adopt a minimum harmonisation approach while leaving Member States room to act beyond the minimum harmonisation it lays down.

Alternatively, a directive, legally binding as to the result to be achieved, could be used to stipulate UTP framework rules. A directive leaves the choice of form and methods as regards how to achieve the results to the national authorities (Article 288 TFEU). A directive, too, could leave leeway for Member States to act beyond the minimum results stipulated in it.

6 What are the impacts of the policy options?

6.1 Introduction

This section focuses on the likely impacts of the possible policy options set out in section 5, namely the scope of UTP rules, the enforcement modalities including coordination, the coverage of products and the scope in terms of operators covered, and the type of legal instrument to be used. Options which have been discarded at an early stage are not further discussed. Most of the expected impacts are economic but possible social and environmental impacts are also referred to.

The section starts with a general discussion of the impact (harm, benefits and costs) on economic operators, consumers including innovation and Member States. The concept of UTPs covers many specific practices which have varying characteristics and impacts on economic operators. Therefore, an assessment of the balance of impacts is appropriate for the practices considered (section 6.3.1). The impact on Member States' competent authorities in terms of administrative costs is less dependent on the specific UTPs covered by the initiative and is considered separately. The benefits and costs of EU action are set out against the baseline of the continued absence of a minimum standard of protection against UTPs across the common market (both as regards substantive UTP rules and effective enforcement possibilities). Plausible option packages are identified and described in section 6.4, then compared in section 0 and eventually a preferred option – in form of an option package – is presented in section 8.

[243] See Annex 2, section 2.2.b.

6.2 Impact on operators, consumers and Member States

6.2.1 Impact on economic operators

6.2.1.1 Benefits

A precise quantified estimate of the benefits that would accrue to operators through EU legislation is not feasible (see section 2.5.1.1). For one, an EU framework approach based on a short list of prohibited UTPs would not tackle the possible damage of *all* the UTPs that are referred to in the numerous surveys and papers regarding the issue. An approach based on a generally formulated prohibition would not allow a precise quantification of the damage prevented either, not least due to the uncertainty concerning how it would be applied to specific practices. It is equally difficult to quantify the benefits of ensuring more effective enforcement through introducing minimum enforcement requirements.

Having said this, each of the UTPs described in section 5.3.3 is bound to have a negative impact on its victims' bottom line in terms of the transfer of risk and undue generation of uncertainty, in other words costs that would in competitive markets not be part of their entrepreneurial agency.

Respondents in the numerous surveys cited in this impact assessment almost all converge in their concern about UTPs' occurrence and harm and in their expectations of positive effects from public (EU) UTP rules and their effective enforcement. For instance, stakeholders in the food supply chain including retailers and processors agreed a code of good practices in 2011 aiming to use private governance measures to improve the governance of UTPs (the SCI formed around it).[244] Respondents to the surveys consider a mixture of voluntary rules and public rules including enforcement the most desirable governance approach to UTPs. The expected benefits include improvements in the allocation of risk, reduced uncertainty for operators and better revenue that operators can capture in the markets if not subject to UTPs.[245]

Survey data on the monetised costs of UTPs (potential benefits of legislation) in the food supply chain does exist, typically expressed as a share of turnover. However, these data cannot form a proper basis for the estimation of the benefits of the legislation. These data are not drawn from representative surveys and, as such, are likely to suffer from self-selection bias and to not be reliable to extend to the underlying population (even if the cost survey data may be closer to the typical damage suffered by individual firms in the specific part of the population that suffers harm from UTPs). As such, it is not possible to extrapolate from survey data to the population for benefits.[246]

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[244] Supply Chain Initiative, Principles of Good Practice, 29 November 2011. The code demonstrates "*(i) a recognition that unfair commercial practices may occur throughout the whole food supply chain and (ii) stakeholder willingness to address those practices in a consensual and effective way*".

[245] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016.

[246] Although non-representative, the survey evidence on costs is broadly consistent across sources: Dedicated Research found reported UTP median costs to suppliers of the retail sector to amount to EUR 2 million and median work days lost at 20 working days per company per year; costs incurred as a percentage of cooperatives' annual turnover were reported to amount to 1.7% (or EUR 6.1 billion, Dedicated Research in 2013); food industry figures put the cost incurred as a percentage of their turnover at 3.9% on average (median: 2%), or about EUR 7 million per company (2011); an AIM survey puts the costs at 1.25% of annual turnover of food multinationals supplying the

While it is not possible to provide a precise estimate of the benefits (avoided UTP costs), it may still be useful to form a broad idea of the possible magnitude of the costs of UTPs. To this purpose some assumptions can be made about the damage and frequency of UTPs. Taking the (representative sample) survey results used by the UK's Competition Commission for the UK market before effective enforcement was introduced one finds "*that one-third to one-half of suppliers experience practices such as payment delays, excessive payments for customer complaints, and retrospective price adjustments*".[247] Assuming similar figures across the EU and that for those companies that experience such practices related UTPs costs are between 1% and 2% of turnover, and knowing that agriculture SME turnover in the EU is about EUR 325 billion and food industry SME turnover in the EU is about EUR 470 billion a range for the magnitude of possible costs of UTPs occurring in the food supply chain can be calculated. The approach would put these costs at EUR 1 billion to EUR 3.3 billion for agricultural SMEs and EUR 1.5 billion to EUR 4.7 billion for food SMEs (or EUR 2.5 billion to EUR 8 billion in total for both agriculture and food processing SMEs). The damage imposed by the six UTPs identified as occurring most frequently, which broadly align with the SCI principles of good practice, would be a further fraction of these figures. Other indirect benefits in the form of increased trust between operators could also materialise, which are, in the main, expected to reduce transaction costs along the food supply chain.

In addition, there is evidence of harm from public investigations and court cases, indicating the existence of significant damages in some cases (to note: this data cannot be generalised to the relevant population). Most of this non-survey evidence comes from Member States where UTP rules exist and are effectively enforced. For example, the UK investigations guarantee anonymity and access to private commercial documents. This allows investigations into damaging practices and the frequency with which they occur to be established.[248] In terms of the magnitude of damages the UK Groceries Code Adjudicator found in the Tesco investigation many examples of large amounts owed to suppliers being paid late. Examples quoted range in payment delays of 'over five months' to 'over twelve months'; with the values paid late of 'over GBP 100,000' to 'nearly GBP 2 million' per supplier. Other retailers were also found to have engaged in UTPs (ex post): information received by the UK GCA indicated suppliers "*were being asked for significant financial contributions to keep their business with [...]. In some cases, this was as much as 25% of the annual turnover of the stock.*"

In France a leading supermarket chain has twice been found to be practicing banned UTPs. In the first case retroactive demands for payments resulted in the courts establishing that EUR 23.3 million had to be repaid to 28 suppliers (plus a EUR 2 million in fine). In another case, EUR 61.3 million had to be repaid to 46 suppliers (plus a EUR 2 million fine), for requests for payments without receiving a service in return from suppliers. However it is rare that such cases come before courts due to the "fear factor".

As part of the consultation, Member States were asked as to the existence of analysis related to

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retail chain (2017). The targeted consultation of undertakings for this impact assessment received 104 answers, 94 of which replied to the cost question, and reported damages of, on average, 1.8% of turnover (2017).

[247] UK Competition Commission, The supply of groceries in the UK market investigation, 2008, final report, p. 168.

[248] This evidence takes the form of document submissions by operators (contracts, invoices, bank statements, etc.) and access to correspondence between buyers and suppliers (email exchanges). For example in terms of frequency the UK GCA investigation into Tesco stated that in relation to late payments "*the frequency and scale of the issues identified go beyond what I consider to be an acceptable level of errors and resulted in business practices which were unfair*".

national UTP rules, including evaluations of existing policy.[249] Only the UK provided information concerning such evaluation. Despite the general lack of ex post evaluations, the direction for several countries has been to introduce UTP legislation where it did not yet exist and, in the case of countries where it did exist, for it to be further developed, albeit without convergence of rules across Member States.[250] This has also been the case in the UK, which has, in succession, introduced a voluntary code of conduct, then introduced specific legislation based on the code, then introduced an enforcement authority to improve the effectiveness of legislation and eventually improved the effectiveness of the enforcement authority by for example introducing sanctioning powers. The UK continues to review the legislation (recently discussing the expediency to expand the protection under the code to farmers and small producers, as well as the list of what is considered a UTP).[251] The resulting evidence indicates that the effectiveness of legislation has improved in the UK over the years. In the annual survey conducted by the UK Grocery Code Adjudicator, respondents reported fewer issues with UTPs year-on-year since the survey was first implemented four years ago[252], and in a government review the UK Grocery Code Adjudicator was deemed to be performing effectively in reducing or eliminating several types of UTPs.

> *"The majority of respondents to the Review felt that the GCA had been effective or very effective in exercising its investigation and enforcement powers. [...] The majority of respondents also described the GCA as being effective in enforcing the Code. There is evidence of a positive shift in the relationship between large retailers and direct suppliers and an end to some of the unfair trading practices that were prevalent before the Adjudicator was appointed."*[253]

As regards the divergence of Member State rules, a minimum harmonisation of rules introduced at the EU level would lessen the existing divergence of UTP rules in Member States and thereby approximate - albeit not level - relevant business conditions for operators.

6.2.1.2 Harm

Harm from UTPs, which is the reverse side of the "benefits" expected from governance measures, is discussed in section 2.5 from the point of view of victims of UTPs. The expected benefits for victims from UTPs from rules, which allow their deterrence or their redress once they occur, could be considered to constitute harm or costs for those operators which can no longer apply them. But the key consideration here is that that due to societal conventions of fairness the UTP-derived benefits should not accrue in the first place, which makes that the benefits outweigh this specific form of harm.

As regards specifically the impact on farmers becoming victims of UTPs, there is evidence that UTPs have a direct impact on farmers' costs and/or income.

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[249] Question: "*If your Member State has introduced or is considering introducing UTP rules, please share with us any assessment - ex ante or ex post (evaluation) - of the impact of the respective legislation (such as impact assessments, studies etc.).*"

[250] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p.35.

[251] UK, Groceries Code Adjudicator Review: Part 2 - Government response to the Call for Evidence on the case for extending the Groceries Code Adjudicator's remit in the UK groceries supply, February 2018.

[252] UK, Tacon marks end of first term with survey showing significant progress for groceries suppliers, June 2017.

[253] UK, Groceries Code Adjudicator: statutory review, 2013 to 2016, July 2017, p. 3.

While uncertainty is inherent in doing business, certain practices unnecessarily increase uncertainty. Ex post (e.g. changes to agreed terms) or ex ante (e.g. incomplete contracts) practices may leave weaker parties unable to determine the likelihood, impact, type, or timing of commercially relevant events. This is particularly damaging in the food supply chain, in particular for agricultural producers, as agricultural production is already subject to significant uncertainty and imponderability (Annex C). For example, the possibility of ex post price reductions, ex post requests for contributions to promotions, or last-minute cancellation of orders can contribute to the generation of uncertainty. Where liquidity is unexpectedly compromised this may lead to otherwise viable businesses being unable to maintain their activity, for example by not being able to meet their credit obligations (a concern in particular for smaller operators who typically have a lower resilience to shocks).[254]

Through price transmission and its asymmetric features in the food supply chain, UTPs are one of the elements that may result in an indirect negative impact on farmers, in particular in times of price shocks (excess supply, reduced demand).[255] The negative effects of UTPs, even if they happen downstream of farmers, are liable to be transmitted upwards to them in the form of price pressure. However such indirect effects are likely to be influenced by the structure of the chain upstream compared to the level where a UTP takes place: for instance it may be that the operator immediately located upstream to the operator subject to a UTP has bargaining power relative to that weaker party and would not pass on any effect of the UTP incurred by the smaller party downstream.[256] Operators who are exposed to UTPs perceive these practices to affect their profitability and to deprive them of added value that they would otherwise be able to appropriate.[257] More generally, asymmetric price transmission along the food supply chain means that while firms in an imperfectly competitive industry may be willing to pass on (to some extent) cost shocks through to consumers, they are less willing to reduce retail prices when costs subsequently decline.[258] Asymmetric price transmission therefore represents a sort of market failure that leads to a skewed distribution of welfare and may even induce net welfare losses. While there is no hard evidence for general and systemic squeezing of farmers' margins, in a comprehensive literature survey it was found that in about half of all cases price transmission was not symmetric.[259]

Practices that unfairly transfer entrepreneurial risks can also lead to economic inefficiencies through a misalignment of incentives. This may involve situations over which the operator to whom the risk is transferred has little or no control as they are taken by his business partner unilaterally and without sufficient predictability, or they may be included in the contract but in way that shifts risk in an excessive way (no win-win) due to the counterparty's exercise of bargaining power. A party which has control over a risk but can transfer it to a weaker

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[254] Annex F, Chief Economist of DG Competition, European Commission, Economic impact of unfair trading practices regulations in the food supply chain, 22 January 2018. See also UK Competition Commission, The supply of groceries in the UK market investigation, 2008, final report, pp. 167 and 170.

[255] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Falkowsky, p. 22-23.

[256] See OECD, 15 May 2014, Competition issues in the food chain industry, p. 13.

[257] See Dedicated Research for CIAA and AIM, Unfair commercial practices in Europe, presentation, March 2011: 70% of the respondents consider UTPs to have a negative effect on their profitability (slide 15). Also see http://www.copa-cogeca.be/Download.ashx?ID=1558129&fmt=pdf.

[258] *Idem*, p. 30. Vavra, P. and B.K. Goodwin (2005), Analysis of Price Transmission along the Food Chain, OECD Food, Agriculture and Fisheries Working Papers No 3.

[259] Meyer, J. and S. von Cramon-Taubadel (2004), Asymmetric Price Transmission: A Survey, Journal of Agricultural Economics, 55, pp. 581-611.

counterparty has reduced incentives to manage the risk effectively, while increasing total risk in the transaction and causing economic damage to its counterparty (moral hazard). For example, ex post claims for products wasted at a buyer's premise can transfer undue risk to the counterparty and make it less likely that effective countermeasures are taken by the buyer to avoid the future repetition of wastage or of erroneous planning.[260]

Agricultural producers have generally been subject to downward pressure concerning their incomes and the share of the added value in the food supply chain that accrues to them has been diminishing.[261] If agricultural producers face significant financial disadvantages from UTPs, if they feel they cannot appropriate a fair share of the value added in the chain, or if they think they are not able to recoup the return they expect from their investments, they not only face lower incomes, but their capacity to invest may also be compromised. UTP rules including enforcement could counteract these effects.

As pointed out in Annex H, potential rules on UTPs are not expected to result in a negative impact on competition; they rather tackle unfair practices that are not covered by competition law and constitute shortcomings often due to conditions of ineffective competition due to imbalances of bargaining power between parties. Unequal bargaining power and resulting imbalances in trading relationships only rarely imply an infringement of competition law. In such situations, a well-targeted regulation of certain trading practices aiming at ensuring fairness between actors in the food supply chain can help to resolve specific issues.[262]

Possible negative effects from regulation that would interfere with efficient business practices can be avoided by rules which are mindful of the arguments set out in Annex H and the research paper by the Joint Research Centre[263] (as discussed in section 6.3.1). By doing so, negative side-effects of UTP rules becoming a tool used to change balanced commercial relations would be significantly mitigated.

Last but not least, an approach that focuses on the protection of weaker operators and that would therefore not affect the competitive conditions between large parties could address proportionality concerns.[264]

6.2.1.3 Costs

The costs that would be incurred by operators depend to some extent on the form the legislation would take. The main costs would be compliance costs. Compliance costs in relation to UTP legislation are, generally, costs that relate to training and compliance in the strict sense of the term. UTP rules would not impose active duties on operators to carry out certain activities; they rather prohibit certain behaviour that is deemed unfair. There may be a risk that broadly or

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[260] See Annex F, Chief Economist of DG Competition, European Commission, Economic impact of unfair trading practices regulations in the food supply chain, 22 January 2018. See also UK Competition Commission, The supply of groceries in the UK market investigation, 2008, final report, pp. 165-166.

[261] Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, paragraph 38. See also Annex C.

[262] Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 1.

[263] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, in particular Sexton.

[264] See the concern about the skewing of margins between large operators. See EuroCommerce, 17 November 2017, paragraph 22.

vaguely defined rules would prevent efficiency-enhancing practices (win-win) that parties to a contract may agree on.[265] Care should therefore be taken in this regard when defining UTPs. Section 5.3.3 provides examples of how to define specific and predictable rules.

These costs would be expected to be mainly one-off costs to ensure standard form contracts do not include such clauses (expected to be primarily borne by parties with stronger bargaining power, as these tend to be those that present such contracts to their counterparties), and ongoing costs where contracts are based on individual negotiations (for example training costs to ensure that those negotiating and those drafting such contracts do not include prohibited clauses). These costs can be mitigated by introducing transition periods into legislation and through training and education on new rules by Members States competent authorities and the European Commission, thereby reducing uncertainty for businesses. According to a 2016 study, the aspects which were deemed by survey respondents (and especially by SCI members) to contribute most to the overall effectiveness of the initiative in tackling UTPs were the training of company staff on Principles of Good Practice and the appointment of contact person(s) for internal dispute resolution.[266]

The answers to targeted questionnaires sent to undertakings do not allow firm conclusions as to the significance of these costs. Any such cost would be incurred according to the specific UTPs that would be covered. It has to be taken into account that compliance costs in respect of the voluntary code established under the SCI have (already) been incurred by its signatories who have organised training and incurred corresponding costs.[267] A large retailer, for example, has spent EUR 200,000 on one-off training measures of staff in relation to the SCI code of conduct. Judging by the results, there seems to be a general view that compliance costs are not of great significance or a major concern for the vast majority of business stakeholders participating in the surveys. In the survey to undertakings carried out for this initiative, more than half of the buyers who answered (57%) considered these costs as insignificant or only slightly significant. By way of comparison, Australia has introduced legislation on standard form contracts applying to all business sectors (i.e. not only the food supply chain) under certain coverage conditions, where it was estimated that total costs for compliance by operators stood at AUSD 50 million (about EUR 32.7 million). In the UK case, compliance costs for the 10 retailers covered by legislation were estimated at a total of GBP 1.2 million per year (about EUR 1.36 million per year).

Possible unintended consequences might occur if operators with greater bargaining power find alternative ways to shift risk and costs to weaker parties.[268]

6.2.2 Impact on consumers including impact on innovation

A partial harmonisation of UTP rules at EU level would be expected to have limited effects on consumers. In the open public consultation, operators do in general not claim that the use of practices that are considered UTPs (e.g. by the SCI) lead to advantages for consumers through,

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[265] Annex F, Chief Economist of DG Competition, European Commission, Economic impact of unfair trading practices regulations in the food supply chain, 22 January 2018.

[266] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 226.

[267] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p. 13.

[268] However evidence that such effects occurred where national legislation was introduced is sparse; in the annual survey conducted by the UK Grocery Code Adjudicator respondents reported fewer issues with UTPs year-on-year since the survey was first implemented.

for example, lower consumer prices extracted from upstream suppliers through UTPs, although negative effects on consumer prices are sometimes argued to derive from below-cost-sales prohibitions (not covered by this impact assessment).[269] Consumer organisations encourage public UTP rules due to considerations regarding the longer-term negative effect of UTPs on consumers they expect.[270]

As regards consumer prices, there are no indications that Member States with stringent UTP regulation have witnessed stronger inflationary effects concerning consumer food prices than those with less stringent rules or no rules. The UK review of the UK adjudicator regime does not discuss this. The correlation - if any (not statistically significant) - would indicate lower food price increases in Member States which have stringent UTP rules, although many factors can contribute to this.[271] In any case, a monitoring framework (see section 9) could control for consumer price changes in relation to the specific UTPs that would be targeted. Inflationary effects on consumer prices have however been argued in case of UTP rules prohibiting below-cost sales.

The literature is not conclusive concerning the impact of unfair trading practices on operators' ability to innovate (see section 2.5.1.2) – a further important parameter of interest in terms of consumer welfare. Evidence of long-term innovation effects is scarce, the difficulty being compounded by confounding factors that are difficult to isolate. In some cases, listing fees and other types of upfront payments may be beneficial to innovation by compensating e.g. retailers for the risk they take in dedicating shelf-space to innovative products and facilitating those innovations that are seen as potentially successful by their suppliers. In other cases, such practices are increasing the cost of innovation, putting hurdles for small innovators and increasing vulnerability of suppliers to unfair termination or unilateral retroactive changes of the commercial relation. For example, listing fees applied ex post are more likely to result in a net negative impact on innovation (see Annex H). Such type of practice have as a likely effect the setting aside of capital by weaker parties to absorb possible future requests by the stronger party, with a negative impact on the overall efficiency of business decisions. Businesses may be less likely to invest in production capacity and quality, production efficiency or innovation, with possible longer-term damage to consumer welfare (resulting in reduced choice or quality of products and increased prices in the future).

6.2.3 Impact on Member States

Member States would have to adapt their national legislation to measures introduced at the EU level. In case of a Directive, Member States are expected to transpose these rules into national law, which leaves them a discretionary margin how to carry out this transposition. But even a Regulation would likely require Member States to adopt national implementing provisions, at least concerning enforcement and cooperation. In the case of a non-binding recommendation, Member States would ultimately decide whether and to which extent to follow suit.

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[269] La Libération, Intermarché avait-il le droit de vendre ses pots de Nutella avec un rabais de 70%?, 30 January 2018.

[270] Consumers International, The relationship between supermarkets and suppliers: What are the implications for consumers?, July 2012, summary, pp. 2, 4. See also three contributions to a European Commission targeted questionnaire to consumer associations in 2017.

[271] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p 12. See also Annex C, p. 11.

UTPs have been subject to a variety of heterogeneous legislative measures in Member States over the years. Annex F and Annex G provide an overview of Member States' instruments addressing UTPs, including enforcement aspects. Accordingly, the majority of EU Member States already provide for a governance framework for UTPs. Therefore, the impact of EU UTP rules on Member State legislation will depend on the scope of these existing national rules. In cases where there is no framework at all, the Member State would have to implement the new measures, including designating an enforcement authority. On the other hand, suppliers in Member States that currently do not have a UTP regime in place would benefit most from the introduction of one (see Table below). If a Member State's existing framework already goes beyond the proposed EU initiative, the Member State would have only to take limited measures in order to adapt the national framework to the EU initiative, while being able to keep more far-reaching rules in place. Looking at the diversity of Member State frameworks, most Member States would have to adapt their existing government framework to a certain degree in order to comply with the EU initiative.

Benefit	**Benefitting MS**	**Potential impact**
Introduction of a UTP regime (Annex F, Table n.1)	4 (EE, LU, MT, NL)	Large
More comprehensive UTP approach (Annex F, Table n.1)	4 (BE, DK, FI, SE)	Medium
Extension of UTP regime beyond retailers (Annex F, Table n.3)	5 (LT, CZ, HU, IE, UK)	Medium
Added enforcement of UTP rules (Annex F, Table n.6 & n.7)	8 (EE, LU, MT, NL, BE, DK, FI, SE)	Medium
Level playing field for competition	28 (all)	Small
Coordination across MS	28 (all)	Medium

Table 3: Overview of the benefits of the proposed UTP measures

Further national costs are those related to the enforcement of legally binding rules (via the application of a general prohibition or in the form of prohibited specific UTPs). For some Member States, EU rules on UTPs would not necessitate significant changes to their UTP regimes as they already apply national rules that generally prohibit UTPs and have entrusted enforcement to competent authorities. These Member States would not incur significant additional enforcement costs. For Member States that do not have UTP rules, EU measures would require adaptation, in particular with a view to enforcement.

The designation of a competent authority in Member States would be a first necessary step under a minimum requirement approach at EU level that relies on public enforcement.[272] Member States that have no competent authority should be given appropriate time to designate one. As there would be no formal requirement other than being vested with the minimum functionally defined enforcement powers, Member States could rely on existing structures and designate, for example, an existing authority (a national competition authority or a consumer protection authority).[273] Member States with experience in UTP enforcement note that significant savings of administrative costs can be achieved by concentration and utilisation of sources that already exist.[274] Minimum guarantees would not enshrine a right for one's case to be taken up and

[272] See British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, in favour of enforcement in Member States
[273] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p. 20.
[274] E.g. Czech Republic in replying to a targeted questionnaire sent by the European Commission to Member States.

pursued by a competent authority; Member States' authorities would be able to prioritise cases according to their own judgment.

In a targeted questionnaire, Member States were asked to provide estimates on the possible set-up and yearly operational costs of national bodies dealing with the implementation and enforcement of UTP related legislation, as well as on possible additional costs linked to an EU action on UTPs, including costs on reporting and coordination. Limited data has been presented as it seems difficult for Member States to provide estimates and isolate the costs for the specific activities related to implementation and enforcing of UTP measures. Most of the difficulties relate to the determination of the costs of drafting and adopting national legislation. From the information provided by Member States that currently have UTP legislation and competent authorities[275], the set-up costs vary between EUR 32,000[276] and EUR 3 million[277], the operational yearly costs vary between EUR 10,000[278] and EUR 2.9 million[279]. The differences relate to the size of the country – and therefore the national market – and the level of ambition of Member States' current UTP legislation.

Example data on actual incurred costs (i.e., not estimated) are available from the UK Grocery Code Adjudicator. Expenditure was GBP 1,785,741 in the 2015/2016 financial year, and GBP 622,024 in the 2016/2017 financial year. Most of the difference is due to a large-scale investigation into one retailer in 2015/2016. In the 2016/2017 financial year most of the costs incurred were staff costs, at 67%. The UK GCA's costs are funded by a levy on the retailers covered by the scheme. In 2016/2017, the levy was raised to GBP 2 million (from GBP 1.1 million in the previous year), to fund future investigations. Unspent money from the levy is returned to the contributing retailers at the end of each financial year.[280]

Taking the above as a reference, and assuming full funding, setting up a fully functioning enforcement authority with one active large-scale investigation per year would imply a cost of up to EUR 2.3 million per year . This figure may vary to an extent according to the size of the Member State (as some correlation between enforcement activity and the dimension of economic activity in the Member State can be expected). For Member States where there already exists specific legislation on UTPs, already covering the UTPs identified in the preferred option, and with an existing public competent authority with effective enforcement powers, additional costs from EU action are expected to be negligible (and benefits to pertain mainly to positive coordination effects with other competent authorities and the levelling of the playing field vis-à-vis competitors in other Member States). Where one or more of those elements are missing, both costs and benefits are expected to be greater (in the extreme, where no legislation – and thus enforcement – exists, full estimated costs could be incurred; and fuller benefits related to the introduction of protection from UTPs with effective enforcement, as well as coordination and level-playing field benefits, would materialise).

Focusing on the information from three Member States with well established, functioning and experienced competent authorities, the additional costs linked to EU action, including the

[275] Hungary, Latvia, Poland, Slovakia, Bulgaria, UK, Czech Republic and Spain.
[276] Latvia
[277] Spain
[278] Latvia
[279] Spain
[280] Groceries Code Adjudicator, Annual report and accounts, 2016-17.

activities related to reporting and EU coordination, would be absorbed by the current structures and, therefore, according to their estimates, not be very significant. [281] Additional costs for Member States may occur from coordination activities with competent authorities in other Member States and from reporting obligations (see section 6.3.5).

6.2.4 Social and environmental impacts

In terms of social impact, complementing the SCI with mandatory UTP rules including effective enforcement requirements may lead to an increase in trust between partners and a strengthening of the SCI, encouraging farmers' associations to sign up to the SCI's code of conduct and dispute resolution.[282] In general, predictability of business relations could be improved by governing UTPs at the EU level and enhancing enforcement modalities applicable in Member States. Increased trust between operators should have a positive economic impact.[283] An EU approach concerning UTPs would aim at a positive impact in terms of social cohesion by virtue of approximating commercially relevant conditions for operators active in the production and trade of food products in Member States.

One would not expect the positive effects of voluntary (national) platforms governing UTPs to be negatively impacted by EU UTP rules: in many Member States these voluntary initiatives have co-existed with national, publicly enforceable UTP rules. In fact, complementarity may have a positive effect on the voluntary initiatives as public enforcement possibilities could enhance the importance for both parties of voluntary dispute resolution.

Finally, UTP rules are not expected to have a significant direct impact on the environment.[284] Economic operators who are not subject UTPs may however be left with more economic margin to invest in producing in environmentally sustainable and climate-friendly ways and to prevent food waste.[285] Food waste is a common side-effect of particular types of UTPs and addressing the systemic issue within the European grocery supply chain could be an opportunity to address both the commercial losses incurred by suppliers and food waste.[286] Tackling food waste has been identified as a priority in the EU's Circular Economy package.

6.3 **Impact of the specific option components**

This section considers the effects of the various policy options taking into account the benefits and costs for stakeholders as described in section 5. The policy option relating to the "degree of harmonisation" is not discussed as only "partial harmonisation" was retained in section 5 ("detailed harmonisation" having been discarded).

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[281] UK, Spain and Czech Republic.

[282] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, pp. 9 and 13.

[283] See, for example Dakhli, M. & De Clercq, D. (2004), Human capital, social capital, and innovation: a multi-country study. Entrepreneurship & Regional Development. 16 (2). pp.107-128; B.-Y. & Kang, Y. (2014) Social capital and entrepreneurial activity: A pseudo-panel approach, Journal of Economic Behavior & Organization, 97. pp. 47-60. Bloom, N., Sadun, R. & Reenen, J. Van (2009), The organization of firms across countries (No. w15129), National Bureau of Economic Research.

[284] In the open public consultation, "programmed overproduction leading to food-waste" was mentioned by respondents as a possible UTP, ranking 11th of the trading practices listed by respondents as unfair.

[285] See SOMO, Centre for research on multi-national companies, reply to consultation, November 2017, p. 3.

[286] See EU REFRESH project.

6.3.1 Scope of UTP rules: Specific list of prohibited UTPs or general ('principles-based') prohibition

The following table summarises in a simplified form the normally expected net benefits and costs of each of the six UTPs discussed in section 5.3.3. The determinant factor for net gains is the possible efficiencies a practice may bring about when agreed "ex ante" by parties and aiming at a win-win outcome.

Potentially unfair trading practice	Option	Ex ante / ex post	Net effect of regulation
Unilateral and retroactive changes to contracts	No unilateral retroactive changes to contracts	Ex post	+
Last-minute order cancellations concerning perishable products	Last minute to be defined in provision	Ex post	+
Claims for wasted or unsold products	Risk for non-sale must be carried by buyer. Shifting it to seller is prohibited as UTP	Ex post	+
Payment periods longer than 30 days for perishable products	Supplier must be paid within 30 days from date of invoice submitted	Ex ante	+
Contributions to promotional or marketing costs of buyer	Prohibition to ask or implement such contributions under conditions to be specified	Ex ante	-[287]
		Ex post	+
Requests for upfront payments to secure or retain contracts	No payments unrelated to any consideration other than entering into business relationship	Ex ante	-[288]
		Ex post	+

Table 4: "+" = positive impact on operators, "-" = negative impact on operators

The possible negative economic impact of a short list of specific prohibited UTPs for certain operators would seem circumscribed. Concretely formulated prohibitions targeting specific

[287] See the discussion in section 5.3.3.5.
[288] See the discussion in section 5.3.3.6.

UTPs would aim to limit legal uncertainty for commercial transactions. If the code of conduct established by the SCI was taken as inspiration for such prohibited specific UTPs, the difference for SCI participants with the current situation would mainly lie in rendering the UTPs discussed in this Impact assessment enforceable; public (administrative) enforcement would complement the voluntary dispute resolution mechanism foreseen by the SCI.

Member States already providing for UTP legislation would, depending on the scope of their legislation, have to adapt their legislation to the EU initiative or introduce adjustments. Member States which have no rules would have to make these UTP prohibitions part of their national regimes.

A general prohibition would constitute a suitable way of a common protection against UTPs in the EU and thus reduce the dissimilarity of UTP rules in Member States. A general prohibition leaves flexibility to enforcement authorities and, as such, enables capturing a larger array of unfair practices; practices would not *a priori* be excluded from the EU provisions' purview because they do not match a concretely formulated and prohibited UTP.

A general prohibition has necessarily to remain vague and leave its case-by-case application to enforcement authorities. An ensuing lack of predictability of the interpretational outcomes could imply transaction costs for operators.[289] This shortcoming could be mitigated by linking the legislation and potential sanctions to a specific code of conduct that could be established and managed by all the relevant partners in the supply chain (see the Spanish UTP system).

Having said this, EU-wide rules imply aligned application by Member States. This could be ensured through a coordination mechanism and, possibly, through the possibility for the European Commission to provide guidance where appropriate. The question arises to what extent such a generally formulated EU prohibition could remain complementary to existing UTP rules in Member States and ensure complementarity and subsidiarity.[290] It is likely that a generally clause would have a harmonising impact on national UTP rules. A general prohibition could thus come to *de facto* entail a degree of harmonisation that could give rise to tension in relation to Member States' existing regimes. A short list of specific prohibited UTPs would avoid this effect.

6.3.2 Coverage of products: agricultural products or agricultural and processed agricultural products

If UTP rules applied only to agricultural products as defined in the TFEU, it would be likely that there would be some positive de facto spill-over operators trade both agricultural and processed agricultural products.[291] However, processed agricultural products would not be covered and unequal treatment of similar situations could arise. This may on the one hand negatively impact

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[289] See for instance Commission report on the implementation of Directive 2011/7/EU on combating late payment in commercial transactions, 26 August 2016, p. 26. See also SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, pp. 20-21.

[290] See for instance Max Planck Institute for Intellectual Property and Competition Law, IIC (2013) 44:701–709, 23 August 2013, p. 707.

[291] Such buyers may not differentiate his business behaviour in accordance with the characterisation of some of the products he purchases as processed agricultural products. However, in cases where the supply relationship concerned only processed agricultural products, the UTP rules would not apply and any possible spill-over effect would therefore be unlikely.

producers of non-agricultural food products as they would not be covered by UTP rules; it could, on the other hand, mean a potential disadvantage for producers of agricultural products, should some of the demand for their products shift to processed agricultural products as they would not be subject to UTP rules (e.g. less legal risk for purchasers to be confronted with UTP claims). Covering both agricultural products and processed agricultural products, that is to say food products, would avoid these negative impacts.

6.3.3 Scope in terms of operators: (i) all operators in the food supply chain protected or protection restricted to weaker operators; (ii) question of coverage of third-country suppliers

A comprehensive coverage of operators in the food supply chain would be in line with the voluntary SCI approach. But it could cause smaller operators (e.g. SMEs and farmers) compliance costs when compared to UTP rules applying only to operators having significant bargaining power. Having said this, given that smaller operators would normally not be in a position to resort to UTPs any attending compliance costs could be expected to be rather limited.

In relation to the comprehensive coverage, retailers have expressed concerns relating to the protection of large manufacturers under such an approach and the ensuing possible impact on the customary distribution of margins between retailers and these large manufacturers.[292] Retailers state they distinguish between these relationships and the ones they have with farmers and small producers of food products.[293]

Under a restricted approach as discussed in section 5.5.2, a retailer's relationship with a large manufacturer of food products would not be constrained by UTP rules. An approach which provides protection from UTPs for only smaller operators in the food supply chain would also be congruent with the problem driver "imbalance of bargaining power". A case-by-case approach ascertaining the existence of an imbalance would enable targeting. It would, however, be less predictable for operators than an approach which relates its protective effect to the size of an operator as measured by a proxy, such as for example his SME status.

Under a restricted approach, care should be had that the protection does not come to constitute a competitive disadvantage for small suppliers as their counter-parties would shift – in the interest of their ability to continue to apply UTPs - their trading activities to operators which do not enjoy such protection. The risk of such an unintended consequence may however be partially mitigated by the fact that it is be harder to use UTPs against parties which have a significant size and bargaining power; shifting trade is therefore less likely to constitute a recipe to keep the benefits from applying UTPs. At any rate, monitoring modalities could control for such effects.

As regards 3rd country suppliers and their coverage and ability to complain to competent authorities in Member States, their non-coverage could result in competitive distortions and trade diversion; buyers would have incentives to source from foreign suppliers who would not be protected by UTP rules.[294] Defining the scope of application of national UTP rules disregarding the international dimension of supply chains may lead to leave relevant practices out of reach of

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[292] EuroCommerce, 17 November 2017, paragraph 22.

[293] *Ibidem.*

[294] See Eucofel, European Fruit and Vegetables Trade Association, reply to open public consultation, November 2017, pp. 2-3. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of April 2014, p. 11.

enforcement authorities.[295] In addition, discrimination considerations also militate in favour of covering 3rd country suppliers.

6.3.4 Enforcement: minimum requirements or minimum requirements "plus"

The option of centralised enforcement was discarded at an early stage (section 5). The key difference between the remaining options, namely 'minimum requirements' and 'minimum requirements plus', is which enforcement powers are attributed to national authorities, with the latter option covering wider powers. Notably, these would include broader acceptance of complaints, the ability to extend mutual assistance in cross-border cases, and to use fines and the publication of results of cases as behavioural deterrents. A 'minimum requirements plus' approach would thus offer more tools aiming at effective enforcement. UTP legislation in several Member States already covers some of these powers. Where such additional enforcement powers exist these have in general not led to a large impact in absolute costs for the operation and set-up of competent authorities. Having said this, the cost of own-initiative investigations can account for a large share of additional total costs (see for example the UK Grocery Code Adjudicator).

6.3.5 Coordination: network of dedicated authorities or baseline (High Level Forum)

The High Level Forum option is the baseline option, which is not expected to cause significant additional costs in future. A network of dedicated enforcement authorities would be expected to offer greater technical capability with more effective evidence-based outcomes. The network approach would lead to additional coordination and travel costs for the relevant competent authorities.

The value of coordination would lie in, as mentioned before, working towards the harmonised application of EU UTP rules as well as – and importantly - building a Member States' network of enforcement authorities that could serve to gather relevant information and disseminate best practices. As such, this can help addressing the problems of a lack of effective redress and the uneven protection against UTPs in the EU. It would furthermore allow building knowledge about UTPs at the EU level that can serve the evaluation of the policy as well as its adjustment, if needed, over time. According to Member States, the costs of annual reporting would go from no additional costs, as they would be integrated in the existing operational costs, to up to EUR 20,000. Member States were asked through a targeted questionnaire to provide estimates for yearly costs of participating in an annual coordination meeting in Brussels. The median value stated, to be incurred by Member State competent authorities, is EUR 950 per year (average EUR 1,327). The financial burden for national administrations as regards these actions related to a coordination mechanism can therefore be considered to be relatively limited. In addition, the costs for the Commission of organising the coordination meeting are estimated at EUR 17,000. ITC costs, mainly related to setting up and running an online coordination platform, are estimated at EUR 50,000.

6.3.6 Legal instrument: soft law (recommendations) or legally binding instrument

The question whether soft law measures would suffice in achieving the objectives has to be considered in the context of previous Communications of the European Commission on the topic of UTPs. In 2009, the European Commission considered that action was "*needed to eliminate*

[295] See Annex F, Cafaggi and Iamiceli, Overview on Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, February 2018, p.14.

unfair contractual practices between business actors all along the food supply chain".[296] It encouraged Member States to exchange information and best practices. The Commission set up the High Level Forum on the Better Functioning of the Food Supply Chain in 2010. In 2014, a Communication made certain suggestions addressed to Member States as regards governance of UTPs. It suggested a combination of voluntary and regulatory frameworks and mentioned that particular attention should be given to confidentiality of complaints and national authorities should have the ability to conduct investigations.[297] Cooperation among enforcement authorities was again mentioned as important. The European Commission January 2016 report revisited some of these issues and made recommendations.

While developments of the voluntary initiatives, in particular the SCI and the national platforms, have occurred, the suggestions and efforts aiming at creating some kind of minimum standard among Member States and stepping up enforcement have not led to the desired results (see section 3.3 above). As has been shown, there are Member States which continue to have no rules that would cover UTPs, lack competent enforcement authorities or effective redress modalities.

In the light of the above, the use of a legally binding instrument would achieve added value.

6.4 **Option packages**

Viable policy option packages – assembled from the options set out in section 5 which have been assessed as to their impacts in section 6 - are set out in the table below. They embody different degrees of stringency of the EU approach proposed, from relatively wide regulatory coverage to a lighter and merely recommended framework. Other combinations would have been possible, but some choices have to be made in order to carry out the comparative exercise. In any case, the European Commission can decide on any different "mix and match".

The four packages have in common that they propose a partial harmonisation of UTP rules at the EU level (in Package 4 via a recommendation). Package 1 pursues a partial harmonisation by regulation and by way of a principle-based prohibition of UTPs. Alternatively, a short list of specifically prohibited UTPs can be drawn up (Packages 2, 3 and 4). The rules can apply to food products (Packages 1, 2 and 3) or to agricultural products (Package 4). The UTP rules can protect all food supply chain operators (Packages 1 and 2) or a select group that would be deemed worthy of protection (Packages 3 and 4). A recommendation would constitute a soft law option for public governance (Package 4) while a regulation (Package 1) or a directive (Packages 2 and 3) would introduce mandatory measures. Packages 1, 2 and 3 would require more elaborate enforcement powers for Member States' competent authorities than Package 4. Last but not least, Packages 1, 2 and 3 would include coordination between Member States enforcement authorities and the European Commission while Package 4 would provide for a continued high-level discussion of food supply chain issues in the High Level Forum on the Better Functioning of the Food Supply Chain.

[296] European Commission, Communication on a better functioning food supply chain, 28 October 2009, p. 7.
[297] European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, pp. 12-13.

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

Table 5: option packages

7 How do the options compare?

The option packages presented in section 6.4 combine components which have been described in section 5 as potentially effective with a view to achieving the policy objectives. The options have been assessed as to their impacts and their efficiency in section 6. In Annex E, the different options are assessed qualitatively in terms of their effectiveness and efficiency (on a range going from "more effective / "more efficient than the baseline" to "more ineffective / more inefficient than the baseline"). By doing so, a qualitative assessment of the effectiveness and efficiency of each package is carried out. The following table provides an overview of the results.

	Package 1		Package 2		Package 3		Package 4	
	General coverage & enhanced coordination and enforcement		Targeted coverage all operators & enhanced enforcement and coordination		Targeted coverage - protection of SMEs & enhanced enforcement and coordination		Targeted coverage - protection of SMEs & enforcement and coordination (recommendation)	
	Effectiveness	Efficiency	Effectiveness	Efficiency	Effectiveness	Efficiency	Effectiveness	Efficiency
Degree of harmonisation	+	+	+	+	+	+	+	+
Scope of UTP rules	+	-	+	0	+	0	+	0
Coverage of operators	++	0	++	0	++/+	+	++/+	+
Coverage of products	++	0	++	0	++	0	+	-
Enforcement	++	+	++	+	++	+	+	+
Coordination	+	0	+	0	+	0	0	0
Instrument	+	-	+	0	+	0	0	0

Table 6: Qualitative assessment of the effectiveness and efficiency of the option packages

8 Preferred option

The above option package 3 ("Protection of SMEs & enhanced coordination and enforcement") is retained as the preferred one with a view to addressing the problem defined and achieving the objectives pursued. It is more effective in achieving the specific objectives than Package 4, thanks to a broader coverage in terms of operators (in the food supply chain), of products and more extensive enforcement arrangements as well as its mandatory character. It is likely to perform equally well in terms of effectiveness as a more exhaustive approach where all UTPs would potentially be covered through a general UTP prohibition (Package 1) or an option that would cover all operators across the chain regardless of their size (Package 2). Package 1 is characterised by a risk of legal uncertainty for operators in the food supply chain due to its potential tension with Member States' general clauses. Package 2 entails a risk of not being fully proportionate in relation to the problem defined as well as the objectives pursued and is, therefore, deemed less efficient than Package 3.

Package 3 takes into account concerns that UTP rules would interfere in commercial

relationships between operators which are not characterised by an imbalance of bargaining power and where UTPs would therefore be less likely to occur in the first place. It would practically mean that commercial relationships between large operators would not be covered while sales of food products by an SME supplier to a non-SME buyer would be. As regards the scope of the rules and their proportionality, the UTP approach under Package 3 would also take into account mutually beneficial efficiency gains deriving from agreed arrangements between parties (ex ante situations referred to in Annex H[298]). The corresponding UTP definitions would be subject to the criteria described in section 5.3.3.7 ("Criteria concerning the assessment of unfairness"). The endorsement of a directive as the relevant instrument for UTP measures would be mindful of subsidiarity: a directive enables Member States to choose the means of how to integrate an EU minimum standard of protection into their national regimes.

9 Monitoring and evaluation

The Commission would monitor and evaluate the impacts of the proposed policy option on business-to-business unfair trading practices in the food supply chain. The option seeks to achieve the specific objectives described above. The approach is based on synergies with national rules and voluntary initiatives. As has been shown, the EU measures root in identified trading practices for which there is a consensus regarding their unfair nature and require a common set of minimum enforcement modalities, including coordination mechanisms among the national authorities.

The application of the EU rules and their impact should be monitored based on annual reports by Member States to the European Commission. Such reports should primarily detail the activity of enforcement authorities in terms of e.g. the number of complaints received (confidentially or not), the number of investigations launched (own initiative or upon request) and share of cases resulting in findings of an infringement. The annual reports should be discussed by the Commission and the national competent authorities in an ad hoc expert group (see section 5.7.2). The specific mandate for such a cooperation forum remains to be determined but could include making recommendations based on best practices identified in Member States.

The efficiency of a public enforcement regime is not necessarily a function of the number of its enforcement cases; nor can its effectiveness be measured by exclusively counting decisions by competent UTP authorities.[299] Therefore, annual reports should not be limited to pure implementation data but could also cover concrete practices, with a view to facilitate the adoption of best practices.

The monitoring arrangement accompanying the EU framework should in general enable the gathering of "hard data" and information on UTPs. This could cover both the EU regulated

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[298] See Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018.

[299] UK, Statutory review of the Groceries Code Adjudicator: 2013-2016, July 2017. See also Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, p. 110: "*[...] it is important to recall that the level of litigation on a specific legal rule cannot be interpreted as a univocal signal of its effectiveness, under the assumption that more effective rules always lead to more litigation. As a matter of fact, rules can generate confusion or problems of interpretation: often the more rules are vague and unclear, the more there will be litigation on their application. At the same time, effective rules can also be rules that successfully deter infringing behaviour [...]*".

UTPs, as well as, to the extent Member States show openness, other UTP rules in national provisions or voluntary guidelines. A further tool to gather information and enable an evaluation to be carried out can be anonymous surveys of undertakings active in the food chain, such as the UK grocery adjudicator or the SCI currently undertake on an annual basis. The European Commission should also directly carry out or commission economic studies aiming at measuring the impact of the different practices concerned by national rules and voluntary initiatives at micro- and macro-economic level.

The Commission will closely follow the interaction and complementary effects of the proposed policy option and the voluntary Supply Chain Initiative.

The impact of the EU's action in the form of UTP measures as set out in the proposed option in this impact assessment should be assessed 4 years after entry into force of the adopted instrument. This should take the form of a European Commission report to the legislator. A non-exhaustive list of possible monitoring indicators is shown in the table below.

Specific objectives	Source	Indicators
Reduce occurrence of UTPs	- Annual survey to undertakings - Members States annual reports	- Declared occurrences of each UTP concerned by undertakings (share of firms declaring and frequency declared, perceived costs of UTPs) - Compliance costs for firms - Potential effects of trade diversion to the detriment of protected parties
Contribute to level playing field	- Members States annual reports and annual meeting of enforcement authorities - Eurostat/national statistics / EU and national market, prices/ costs observatories	- Alignment of application of UTP rules (e.g. number of changes to national rules with a view to approximate practices) - Number of best practices recommendations adopted - Declared administrative costs for Members States - Relative production and consumer price changes
Enable effective redress	- Members States annual reports - Eurostat / national statistics / EU and national market, prices / costs price observatories	- Number of complaints received (anonymously or not) - Number of mediation meetings, if applicable Number of investigations launched (own initiative or upon request) - Share of cases resulting in findings of an infringement

Table 7: Monitoring and evaluation

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List of Annexes

Annexes - Contents

Annex 1: Procedural information

1 Lead DG, Decide Planning/Commission Work Programme references

The European Commission's Directorate-General for Agriculture and Rural Development (DG AGRI) is the lead Directorate-General in this initiative. The initiative to improve the food supply chain is included in Agenda Planning (Decide) under the reference PLAN/2017/764. In addition, in the European Commission Work Programme for 2018 the European Commission committed itself to "*propose measures to improve the functioning of the food supply chain to help farmers to strengthen their position in the marketplace and help protect them from future shocks*"[300].

2 Organisation and timing

The European Commission decided in June 2016 to perform an impact assessment on aspects of the functioning of the food supply. DG AGRI is responsible for EU policy on agriculture and rural development and deals with all aspects of the common agricultural policy (CAP), including the common organisation of the markets in agricultural products (Regulation (EU) No. 1308/2013). DG AGRI cooperated on the drafting of the IA with the Secretariat-General (SG), DG Internal Market, Industry, Entrepreneurship and SMEs (GROW), DG Trade (TRADE), DG Financial Stability, Financial Services and Capital Markets Union (DG FISMA), DG Competition (COMP), DG Environment (ENV), DG Climate Action (CLIMA), DG Maritime Affairs and Fisheries (MARE), DG Health and Food Safety (SANTE), and DG Justice and Consumers (JUST). This process included six Inter-service Steering Group meetings, which took place between 14 July 2017 and 2 March 2018 (the latter before resubmission to the Regulatory Scrutiny Board).

The following main steps were taken in the lead-up to the submission of the impact assessment to the Regulatory Scrutiny Board:

- a Joint Research Centre workshop with independent academic experts on UTPs in the food supply chain (July 2017);
- an inception impact assessment (July 2017);
- an open public consultation (August to November 2017);
- targeted questionnaires to MSs, undertakings in the food supply chain and to consumer organisations (September to December 2017);
- a series of meetings with stakeholders of all tiers of the food supply chain (year 2017).

The key results from these steps are summarised here and in Annex 2.

[300] Listed also in 2018 Commission work programme – Annex I: new initiatives, p.3, number 9.

3 External expertise and evidence base

The evidence base of the IA includes information collected through stakeholder consultation, as well as a workshop and independent expert literature reviews, and information from experiences in regulating UTPs in MSs and in third countries.

3.1 Joint Research Centre academic workshop on UTPs in the food supply chain

Experts at the "Unfair trading practices in the food supply chain" workshop acknowledged the existence of UTPs in the food supply chain, as well as the extensive regulatory and analytical work around them[301]. Such practices are in general considered to be more likely to happen in situations of imbalance of bargaining power. The food supply chain has, broadly, experienced increasing concentration and consolidation. It was however argued by one expert that under certain market conditions, increasing concentration and consolidation may result in more efficient outcomes. The negative consequences may take different forms and may affect different aspects of farm/firm decision-making processes. UTPs may distort the way prices are negotiated and set, and contribute to increased market uncertainty and increased risk that, among others, may lead to market inefficiencies, lower investment, distorted income distribution along the chain, and the exit of some operators (particularly small-scale farmers). The workshop highlighted that UTPs may happen at each stage of the food supply chain and that their effects can be transmitted along the chain towards either downstream or upstream sectors. Further, the transnational nature of supply chain systems implies that the impacts of UTPs can have cross-border effects, including with third countries.

While some practices might be perceived as being unfair they are not necessarily inefficient at the food supply chain level. There is a danger that policies to limit UTPs could eliminate practices that enhance efficiency of transactions as an unintended effect and thereby reduce the total surplus that can be shared between participants to the transaction. In some cases fairness can be a relative concept, but in any case the perception of unfairness can have a significant impact on costs (by impacting trust and increasing transaction costs or affecting socio-economic cohesion) and there are sound economic motives to take redistributive effects and the perception of redistribution on board.

The workshop also highlighted a concern that UTPs are generally imprecisely and ambiguously defined. Rules to regulate UTPs, or at least the most blatant UTPs, already exist at the level of several Member States, but the regulatory landscape in the EU is considerably fragmented. It is also challenging to establish what should be attributed to each specific practice and how to measure the effect due to a lack of information, among others because

[301] Joint Research Centre report, Unfair trading practices in the food supply chain, 2017.

companies involved in UTPs are not willing to reveal it (in the case of those exposed to UTPs due to the 'fear factor'). The probability of the so-called 'forum shopping' will also add complexity to this picture. Critiques have well substantiated the many distortions and counterproductive biases that can be introduced when considering regulations leading to a "benign neglect" for efficiency considerations, a significant risk in policy making. A lesson from these limitations could well be that a superior solution requires mixing different tools.

There was a general agreement in the workshop that regulatory authorities and other monitoring devices are needed to enforce rules concerning UTPs, preventing their harmful consequences, following-up complaints etc., and that this requires most of the time such devices to be external to the direct players of the game. The Supply Chain Initiative faces the reluctance of some key stakeholders to participate, particularly because of the lack of adequate mechanisms of enforcement of the rules agreed upon. The coordination between public and private monitoring systems would allow a more efficient enforcement of the rules.

The workshop also recognised several benefits of coordination (harmonisation) of the regulatory framework at supranational (EU) level, because of the transnational nature of many supply chains, encouraging a more complete common market, where competition takes place under the same conditions. The supranational coordination may help prevent a 'race-to-the-bottom' in UTP regulation between countries and lead to economies of scale in administration. Finally, an important benefit of coordination relates to transaction cost savings for operators along the supply chain, which would need to spend less on information costs due to differences in the regulatory framework between Member States. However, the workshop identified some costs linked with the coordination or harmonisation of the regulatory framework. Member States may need to adopt a different regulatory framework than desired, which can lead to over-regulation in certain Member States and to costs of switching from the existing system to a new one. The more restrained the harmonisation the less likely an over-regulation effect is to be significant.

The participants also noted the paucity of empirical evidence to date on the occurrence of UTPs in general and in particular within the food supply chain. The limited knowledge accumulated to date on UTPs despite the considerable public interest in the topic suggests the imperative for additional research to be conducted on the topic, even while it is recognised that measuring precisely the economic effect of such practices is complex due to many confounding factors and a lack of data, in part because of the fear factor. The lack of information could be partially solved by increasing transparency within the agro-food supply chain.

3.2 Study on UTPs at Member State level

The Commission sent a questionnaire to Member States with a threefold objective: in order to update information that was collected from Member States on the basis of a questionnaire sent in 2015 on the existence of UTP legislation, implementation and enforcement; to learn about impact assessments that Member State authorities may have carried out before deciding on national UTP rules or evaluations; and to gather evidence on the administrative costs to public administrations from the introduction of rules on UTPs. The Member States replies covering

the first aspect were used as data for the Cafaggi and Iamiceli (2018) study 'Overview on "Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain"'.

As regards the administrative cost aspect 15 Member States provided information: 8 of them (Hungary, Latvia, Poland, Slovakia, Bulgaria, United Kingdom, Czech Republic, Spain) have legislation on UTPs and a functioning competent authority, either a specific one or one integrated in the competition authority. Overall, Member States have difficulty in estimating costs – the methodologies used are diverse and unclear and sometimes result in widely different results (e.g. the cost for setting up an administrative authority varies from 32 thousand EUR (Slovakia) to 4 million EUR (Sweden), the yearly operational costs can from 10 thousand EUR (Slovakia) up to 27 million EUR (Sweden). Looking at the information from United Kingdom, Spain and Czech Republic, with well established, functioning and experienced specific competent authorities, the additional costs linked to an EU action, including those related to reporting and EU coordination, would be absorbed by the current structures and be therefore, in their opinion, negligible.

4 Regulatory Scrutiny Board

An upstream meeting with the Regulatory Scrutiny Board took place on 13 November 2017, with DG AGRI and SG present. The aim of the meeting was for DG AGRI to present the initiative and the general approach envisaged for the impact assessment and to obtain feedback as to the main issues the Regulatory Scrutiny Board expected the impact assessment to address.

DG AGRI presented the impact assessment to the Regulatory Scrutiny Board on 21 February 2018. The RSB issued a negative opinion on 23 February 2018. The Board requested further work to be done and asked for the resubmission of the impact assessment report. The Board identified several shortcomings that needed to be addressed in a revised version.

A revised version of the impact assessment report was submitted to the Regulatory Scrutiny Board on 5 March 2018 and the Board's issued a second opinion, received on 12 March 2018, of positive with reservations.

The following table provides an overview of the adjustments made to the text to meet the requirements of the Board's first opinion:

RSB	Changes: location in revised IA & comments
1.	
Report does not explain the reasons for changing the course of action following the 2016 Commission Report. The report does not explain how the initiative complements or corrects the shortcomings of actions taken so far at	Sections 3.3 and 3.2 were developed, with a discussion of the January 2016 baseline and developments since then and conclusions are presented in detail. Clarification was made that the recommendations put forward at the time were not fully implemented, which in part justifies the need

the EU level.	for EU action.
Report does not state the consensus on the occurrence of unfair trading practices in the food supply chain.	Changes to section 2.3 – the section was shortened and the consensus is now stated clearly upfront (and backed up by documentation).
2.	
Use of CAP legal bases is not sufficiently motivated	Section 3.1 (legal basis) has been further developed, including comments on the effects on farmers from UTPs occurring downstream in the chain. Clarification is given on the rationale for the restricted scope of possible options (preferred option – see choice later in document) and the reasoning is adjusted in this sense. Sections 7 and 8 (and Annex E) discuss option packages and the preferred option. The preferred approach has been changed to tackle UTPs as they occur in relationships characterised by imbalances in the chain (using SMEs as proxy for such imbalances), addressing proportionality issues.
3.	
Report does not assess the effectiveness of national legislation on UTPs in the FSC	Section 6.2.1.1 - only limited evidence is available on this issue, but the evidence that does exist is put to better use. Where systems such as the UK Groceries Code Adjudicator (practicable rules plus enforcement) exist the experience is positive and improving over time. The history of the GCA shows the evolution from voluntary code to mandatory rules that include effective enforcement powers.
It does not explain why it is more effective to act at the EU level.	Section 2.7 – the discussion on the SCI (part of baseline), its benefits and shortcomings and relation to EU need to act, has been moved from Annex B of report. Sections 3.2, 3.3 and 6.1 – a clearer and more detailed presentation is offered of the expected benefits against the baseline of under-protection against UTPs and the divergence of rules in Member States. It was clarified in various places that EU measures would not replace but rather complement existing rules (addressing subsidiarity issues and seeking

	synergies).
4.	
Options are not detailed enough	Section 6.4 - one option package has been added offering further detail. Some additions in section 5 were also included when discussing the options.
The analysis of impacts does not cover farmers' revenues, innovations in the FSC, competition in various market segments and implications for Member States.	Section 6.2.1.2 on farmers – evidence that UTPs harm farmers has been further highlighted. Surveys and the agreement around the issue in the voluntary SCI demonstrate harm to operators. Section 6.2.1.4 on innovation - evidence on impact on innovation is somewhat inconclusive. Still, negative impacts are more likely where there is low competition in markets downstream of agricultural production. Section 6.3.3 on competition –an approach that does not apply to relationships between larger operators is considered. Such an approach would address concerns that margins are skewed due the introduction of EU rules on UTPs when large operators are concerned (i.e., without the significant imbalance of bargaining power that enables UTPs in first place). See also Section 6.2.1.3 at the start, Annex E.2 and E.8. Section 6.2.3 on Member States is also developed further.
5.	
Proportionality of the preferred option, in particular with respect to the need to cover the whole supply chain, independently of the asymmetry of bargaining power is not fully tested	The complementary character of the initiative is mentioned in some passages (minimum harmonisation). It is made clear that it is not the ambition to replace voluntary schemes or national rules, but rather to introduce minimum protection and possibly re-inforce it (e.g. section 1.1). Sections 7 and 8 – the preferred option is changed from comprehensive coverage in terms of operators to protection of SME operators in the chain (see also 6.2.1.2 at the end). It is explained that the negative effects of UTPs are passed on through the food supply chain to farmers, even if UTPs occur downstream of primary production. As such, it is necessary to cover UTPs in the chain. This element is also part of previous European Commission

	documents. Section 3.2 relates EU action to (i) problem definition and objectives, (ii) complementarity, (ii) existing rules, (iii) contractual arrangements between parties. (5.3.3; 6.3.1). Coverage of operators is discussed in section 6.3.3 and informs choices made later on in text (sections 6.4, 7 and 8, and Annex E): coverage of operators and choice of legal instrument (directive instead of regulation).
6.	
Quantification of the various costs and benefits associated to the preferred option of this initiative is missing	Section 6.2.1 and Annex 3 – the section and the Annex clarify that the precise quantification of benefits is not feasible (the UK was also not able to quantify benefits in case of the UK Groceries Code Adjudicator). But some calculations are provided which enable a broad idea of the magnitude of benefits. Clearer ranges for costs estimates drawn from MS experiences are introduced.

The following table provides an overview of the adjustments made to the text to meet the requirements of the Board's second opinion:

RSB	Changes: location in revised IA & comments
1.	
The report should justify why the 2016 Commission's conclusions are no longer valid. The report should explain why the European Parliament, the Council and others have requested further actions. The revised report should present additional evidence to support the need for action at EU level.	In section 3.3 of the IA it is now better explained that, unlike expected, after 2016 there were only limited positive developments regarding UTPs, because both Member States and the Supply Chain Initiative followed up on the Commission's recommendations only to a limited extent, i.e. material improvements did not materialise. This discrepancy between expectations and the (lack of) actual development has also been illustrated in a new table.
2.	
The scope of the impact assessment is now more proportionate, covering only those parts of the food supply chain where asymmetries in bargaining power could result in unfair trading practices. The report should explain how the	The last subparagraph of section 5.5.2 has been reworded and complemented on the concrete implementation of the SME proxy. In section 8, this aspect is also clarified in the last subparagraph describing the preferred option package.

preferred option would be made operational. This includes how the proxy for SME size will be implemented to better protect weaker operators in the FSC.	
It also includes the concrete definition of unfairness criteria to be used for the six practices which the legislation will cover	A new section 5.3.3.7 has been added for this purpose. In section 8, this aspect is also clarified in the last subparagraph describing the preferred option package.
3.	
The report does not provide specific information on the effectiveness of particular national schemes. It is therefore unclear what the initiative will add. Without an analysis of the effectiveness of national schemes, the report may overestimate the benefits of the proposed measures. Enforcement may only change national practice in those Member States where no UTP regulations or voluntary schemes exist	In section 6.2.3 of the impact assessment report the benefits of UTP measures have now been detailed in a table that clearly differentiates the benefits by the practices that are already existing in Member States, thus illustrating which benefit will accrue to how many (and which) Member States. The table also includes a tentative assessment of the potential impact of the listed benefits –the largest benefit will accrue to those Member States where no UTP schemes exist, but, for instance, better coordination across Member States will provide (smaller) benefits to all. The list of benefits itself is based on the study by Cafaggi and Iamiceli that is included in Annex F.
4.	
The report should comment on costs of implementation, especially for setting up and operating the network of competent authorities	Sections 6.2.3 and 6.3.5 (and Annex 3) were developed to present further details of the expected costs of implementation to public administrations in respect to their existing legal frameworks on UTPs and to expand on the costs expected to be incurred by the same administrations in respect to participating in the network of competent authorities, as well as on costs of organising the network for the EU. The table on costs in Annex 3 was updated accordingly.
The table on benefits should be adjusted to reflect the estimates and qualitative assessment provided in the main report.	Annex 3's table on benefits was updated to reflect the figures on the magnitude of possible benefits and the qualitative benefits pertaining to increased trust between operators (discussed in section 6 of the report).

Annex 2: Stakeholder consultation

1 Stakeholder consultation process

The stakeholder consultation process was set out in a consultation strategy[302] and carried out between 17 July and 6 December 2017.

Stakeholders were invited to offer comments and evidence on problem definition, policy objectives, the need for EU action, policy options, on the likely impact of the policy options, and on implementation issues, including monitoring and enforcement. The stakeholder consultation meets the requirements in the better regulation guidelines.

2 Summary of stakeholder consultation results

2.1 Inception impact assessment

The inception impact assessment received significant attention, with 66 contributions submitted by various stakeholders[303]. 33% of these were farmers or farming organisations, 17% Member State authorities, 15% non-governmental organisations (NGOs), 11% processors and their organisations, 8% retailers and their organisations, and 17% other respondents (academia, trade unions, traders, and anonymous). It should be noted that the inception impact assessment feedback process is not structured in the sense of a questionnaire. Instead the text of the contributions was sifted for relevant information in a systematic way *ex post*.

91% of respondents agreed that UTPs exist in the food supply chain (5% did not reply, and 5% did not state a clear position). 76% of respondents stated that UTPs caused a significant problem, and 14% that they did not[304]. 5% of respondents stated that UTPs existed but an overall positive effect on the food supply chain in terms of efficiency.

71% of respondents believed there was a need for the EU to act (from 64% of 'other' to 90% of NGOs; farmers 82%, Member States 73%, processors 71%), except for retailers (100% of retailers believed the EU should not act).

Only 5% of respondents commented on the inclusion or exclusion of food products in the scope of the initiative, being broadly in favour of inclusion. 41% commented on the extent to which food supply chain operators should be included, with 82% in favour of covering the full supply chain (the outlier being the processing sector, where only 57% of respondents were in favour of covering the full supply chain).

20% of respondents mentioned the fear factor, generally considering this effect to exist and to be significant. 62% believed the possibility of making anonymous complaints should exist, 38% believed it should not). 92% believed sanctions against those practicing UTPs should exist, 8% believed they should not). 17% of respondents mentioned cooperation between Member State authorities, with most being supportive of cooperation.

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302 European Commission, Consultation Strategy – Initiative to improve the food supply chain, 2017

303 Individual contributions are listed in the inception impact assessment webpage.

304 In the remaining of the inception impact assessment subsection the percentages for 'no response' or 'unclear position' are omitted.

2.2 Open public consultation[305]

Overview of respondents

The open public consultation (OPC) results were consistent with those of the IIA. The OPC ran for three months, between 25 August and 17 November, and attracted a total of 1,432 responses(56% by individuals - 803 responses - and 44% by organisations - 628 responses). 71% of individuals stated they were involved in farming (570 responses), and 29% that they were not (233 responses). Organisations' contributions were mainly by private companies (38% of organisations' responses), business and professional associations (31%), and NGOs (20%). In terms of sector of activity, the organisation responses were from agricultural producers (53% of organisations' responses); the agro-food sector (22%); the trade sector (7%); civil society organisations (7%); the retail sector (4%); research organisations (1%); and 'other' (6%).

The 'private company' group can be further broken down by company size, (number of employees). Small and medium enterprises (SMEs) were 81% of private company responses). Large enterprises (those with more than 250 employees) were 19% of all private company contributions.

In terms of Member State of origin the highest participation came from Germany (29% of total), Austria (14%), France and Spain (7%). The lowest from Croatia, Luxembourg, and Cyprus (1 contribution each).

Respondents' views

a) Problem definition[306]

90% of respondents agreed or partially agreed that there were practices in the food supply chain that could be considered to be UTPs. These results were broadly similar for all stakeholder groups, with the exception of the retail sector (12% agreed or partially agreed UTPs existed in the food supply chain, and 88% disagreed or partially disagreed – most of these partially disagreed, at 72%).

The respondents were then asked whether a list of practices could be considered to be UTPs, with respondents agreeing or partially agreeing at between 80% (payment periods longer than 30 days for agro-food products in general) and 93% (unilateral and retroactive changes to contracts) that the practices were UTPs. When asked about how frequently UTPs occurred in the food supply chain 87% stated they occurred regularly or very regularly. All respondents agreed that they occurred regularly or very regularly except for the retail sector, which stated these never or rarely occurred (84). 88% of individuals stated UTPs occurred regularly or very regularly.

The respondents were asked to identify which 3 practices they considered to be UTPs and to have the most serious impact. Of the top 8 practices identified, six were listed as Supply Chain Initiative (SCI) Principles of Good Practice and seven as UTPs in the Agricultural Markets Task Force (AMTF) report ('payment periods longer than 30 days' appearing twice, for perishable and agro-food products in general).

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305 Where figures do not add up to 100% this is due to the omission of those stating 'no opinion'. There was dependency between some questions (only some respondents will have seen some questions, as these were only relevant depending on an answer previously given). This is relevant in particular for the retail sector, which meant for several questions the retail response rate is very low (3 or 4 responses over 25 retail organisations). Replies were not compulsory, and some respondents chose not to reply to some questions.

306 Percentages based on number of respondents answering each question.

	Frequency	SCI's Principles of Good Practice	AMTF-listed UTPs
Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices)	771	*	*
Last minute order cancellations concerning perishable products	316	*	*
Payment periods longer than 30 days for perishable products	275		*
Payment periods longer than 30 days for agro-food products in general	273		*
Imposing contributions to promotional or marketing costs	248	*	*
Unilateral termination of a commercial relationship without objectively justified reasons	227	*	
Requests for upfront payments to secure or retain contracts ("hello money")	185	*	*
Imposing claims for wasted or unsold products	182	*	*
Imposing private standards relating to food safety, hygiene, food labelling and/or marketing standards, including strict verification procedures	179		
Imposing an upfront access fee for selling a product ("listing fees")	152	*	
Programmed overproduction leading to food waste	146		
Withholding by one party of essential information to both parties	114	*	
Passing onto other parties of confidential information received from partner	98	*	
Additional payment to have products displayed favourably on shelves ("shelf-space pricing")	90		
Imposing on a contract party the purchase of an unrelated product ("tying")	78		
Inconsistent application of marketing standards leading to food waste	60		
Imposing to suppliers costs related to product shrinkage or theft	40	*	
Imposing a minimum remaining shelf life of goods at the time of purchase	11		
Other	83		

The questionnaire requested respondents to identify the actors in the food supply chain on which UTPs might have appreciable negative effects. 94% of respondents agreed or partially agreed that such appreciably negative effects occurred for farmers. 83% of respondents for processors; 66% for SMEs; 60% for consumers; 55% for third country operators producing for the EU market; 39% for traders; and 35% for retailers. Respondents were also asked whether they agreed that UTPs could have negative indirect effects on these groups, with broadly similar results.

b) Need to act

When asked whether action should be taken to address UTPs in the food supply chain 95% of respondents agreed or partially agreed. If they thought action should be taken, respondents were then asked to specify who should take such action.

- 87% believed action should be taken by the European Union (in combination with Member States, 58% ; or the EU acting alone, 29%);

- 8% that MSs should act alone; and

- 4% that action should be taken through voluntary initiatives (54% of these were retail organisations).

Of the 87% of respondents that believed that the EU should take action, 51% thought legislation was the appropriate means, 46% a mix of legislation and non-legislation, and 2% preferred non-legislative action.97% of these respondents believed EU action would result in better enforcement of rules; 95% believed EU action would provide more legal certainty for businesses; 94% that it would level the playing field in the internal market; 84% that it would benefit EU cross-border transactions; 84% believed it would reduce food waste; 80% that it would lead to a higher degree of innovation; and 75% that it would widen the choice offered to consumers. 67% preferred both a harmonised definition and a list of specific UTPs; 21% a list of specific UTPs; 11% general principles; and 1% none of these.

Finally respondents were asked for their views on whether the voluntary Supply Chain Initiative was sufficient to address UTPs. 75% disagreed or partially disagreed, and 22% agreed or partially agreed. All organisation types primarily disagreed or partially disagreed, except for retail organisations(88% agreed or partially agreed Supply Chain Initiative was sufficient. Agro-food and trade organisations had relatively high rates for 'agreed or partially agree', even if this was not overall the preferred option (43% and 40%, respectively). 81% of individuals involved in farming and 69% of other individuals disagreed or partially disagreed.

c) Enforcement

92% of respondents agreed or partially agreed that there should be minimum standards applying to the enforcement of UTP rules in the EU. Support for minimum enforcement standards ranged from 20% of retail organisations to 100% for civil society organisations (96% of agriculture organisations; 87% of agro-food organisations agreed or partially agreed).

Respondents were then asked which elements they considered to form an important part of an effective public enforcement of UTP rules. 94% stated transparency of investigations and results; 93% the possibility of fines in the case of violations to the rules; 92% the possibility to file collective complaints; 89% the ability to receive and to treat confidential complaints; 89% the designation of a competent authority; 73% the ability to conduct own initiative investigations; and 36% other aspects. The various organisation types and individual respondents mostly agreed or partially agreed with these elements, with the exception of retail (disagreed or partially disagreed with each of the elements between 72% to 80%).

2.3 Targeted questionnaire to undertakings

The targeted questionnaire to undertakings was open between 6 November and 10 December and a total of 122 responses were received. 35% of respondents were involved in agriculture, 48% in processing, 10% in retail, 4% in wholesale (remaining answers not classified). In terms of size, 70% of respondents were SMEs. 7% of the respondents classified themselves as buyers, 49% suppliers, 40% as acting as both supplier and buyer. A high share of replies is from Belgium, France, Italy, Spain and the United Kingdom (18 Member States have 3 or less replies).

54% of the enterprises acting as buyers and 89% of suppliers state that late payments occur in business transactions. 14% to 30% of those acting as buyers stated that they have imposed other UTPs in a business transaction. For enterprises acting as suppliers 44% to 82% stated that they have been subject to an UTP as defined above.

30% of the enterprises acting as suppliers have been refused a contract in writing upon request. Suppliers were asked to estimate if they have been a victim to a UTP when buyers were established in other Member State. 24% of the respondents stated that they were "often or in a significant number of cases" in such situations. 19% of suppliers stated that dealing with a foreign buyer had a negative effect on their ability to challenge UTPs.

60% of the suppliers stated that UTP costs are more than 0.5% of the annual turnover of their business operation. Under certain assumptions in terms of weight for each category of answer[307], the weighted commercial significance of costs related to UTP can be estimated at 1.8% (taking into account the 94 answers of suppliers) to 1.5% (trimming out the extreme answers – no costs, cost over 5%) of their turnover. 44% of buyers considered compliance costs as "high or moderate".

2.4 Targeted questionnaire to consumer organisations

The consultation of consumer organisations resulted in three contributions. This consultation focused on whether and how UTPs in the food supply chain would affect consumers, according to their representative organisations.

Respondents disagreed that the introduction of legislation on UTPs would raise consumer prices and agreed that it would lead to an increase of trust in the food supply chain and benefit investment. Two agreed that the conditions for those employed in the food supply chain would be improved (one no opinion). All respondents agreed that the introduction of EU rules on UTPs would benefit consumers in the long term. Two agreed and one partially disagreed there would be benefits in the short term.

One respondent agreed that the introduction of UTP rules in their own country had increased consumer choice, increased trust, improved conditions for investment for operators, improved conditions for those employed in the food supply chain, and disagreed that it raised consumer prices (the other two respondents had no opinion). Two respondents disagreed and one partially disagreed that self-regulatory initiatives are sufficient. Two respondents disagreed and one agreed that possible negative effects on consumers from UTP legislation outweigh the potential benefits (at EU level).

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[307] Reference points set: ‘over 5%’ (14 answers) = 5%; ‘2 to 5%’ (18 answers) = 3.5%; ‘0.5 to 2%’ (22 answers) = 1.25%; ‘>0.5%’ (24 answers) = 0.25%; ‘nil or insignificant’ (16 answers) = 0%.

2.5 Questionnaire to Member State public authorities

Member State authorities were consulted via a set of questionnaires that requested contributions on: actual and/or estimated administrative costs of enforcing new UTP legislation under certain conditions; an update of information previously provided (2015) on the status of UTP rules in their national jurisdictions, including enforcement aspects; and to obtain information on impact assessments and other studies that Member States had available in this area. These data were used to inform a study by external experts and directly in the present impact assessment report (see Annex 1). The questionnaire to Member States was officially open between 2 October 2017 and 3 November 2017, but late submissions were accepted for use in the study by the external experts.

2.6 Joint Research Centre academic workshop on UTPs in the food supply chain

A workshop jointly organised by the Directorate-General for Agriculture and Rural Development and the Joint Research Centre (JRC) was held in Brussels on 17-18 July 2017. The workshop brought together international experts, with a view to discuss the scientific literature on methodology, impacts and regulatory aspects of UTPs. A report compiled by several experts and edited by the JRC is publically available (further details of the outcomes of the workshop in Annex 1)[308].

2.7 Ad hoc meetings with food supply chain stakeholders

Several bilateral meetings with stakeholders were organised at their request. Meetings were held with Independent Retail Europe, FoodDrinkEurope, EuroCommerce, European Brands Association (AIM), the Danish Chamber of Commerce, the German Retail Federation, the Liaison Centre for the Meat Processing Industry in the European Union (CLITRAVI), the European Livestock and Meat Trading Union (UECBV), Edeka, REWE, Federation du Commerce et de la Distribution, the European Dairy Association, the International Dairy Federation, the United Kingdom's National Federation of Meat and Food Traders, Europatat, and Euro Fresh Foods. The bilateral meetings focused on answering stakeholder questions about the impact assessment process and content, for stakeholders to express support for or opposition to the initiative and raise issues of relevance to their sector.

2.8 Civil Society Dialogue groups

Two presentations with an exchange of views were made at Common Agricultural Policy Civil Dialogue Groups (CDGs), where several stakeholder groups are represented[309]. These took place on 6 November 2017 (Olives CDG) and 22 November 2017 (Horticulture/Fruit and Vegetables CDG).

[308] Joint Research Centre report, Unfair trading practices in the food supply chain, 2017.
[309] Common Agricultural Policy Civil Dialogue Groups.

Annex 3: Who is affected and how?

1 Practical implications of the initiative

This annex sets out the practical consequences of the options for operators in the food supply chain, public administrations, and consumers. The options were considered under the following headings (see section 5): the scope of unfair trading practices' (UTPs) rules, the enforcement modalities including coordination, and the legal instrument to be used. Some of the relevant effects would be one-off costs (adjusting to legislative changes), and others ongoing costs (additional annual training costs, additional running costs of competent authorities; see section 6).

2 Effect on food supply chain operators

A prohibition of a minimum set of clearly damaging UTPs would have a positive economic impact on operators in that it would deter such UTPs being applied in their respect. If such UTPs occurred nonetheless, the respective prohibition would provide operators with a platform on the basis of which to seek redress by way of public (administrative) enforcement. The operators concerned would be able to concentrate on competing on the merits and their economic viability could be expected to be not (or less) affected by UTPs.

The possible negative economic impact of a short list of specific prohibited UTPs for certain operators would be circumscribed. Concretely formulated prohibitions targeting specific UTPs would aim to limit legal uncertainty for commercial transactions. If the principles of good practice established by the SCI was taken as inspiration for such a 'black list', the difference for Supply Chain Initiative (SCI) participants with the current situation would mainly reside in rendering the relevant UTPs enforceable; the public enforcement would complement the voluntary dispute resolution mechanism foreseen by the SCI.

UTP rules would result in compliance costs by operators subject to them. According to a 2016 study, the aspects which were deemed by survey respondents (and especially by SCI members) to contribute most to the overall effectiveness of the initiative in tackling UTPs were the training of company staff on the principles of good practice and the appointment of contact person(s) for internal dispute resolution.[310]

The answers to targeted questionnaires sent to undertakings do not allow firm conclusions as to the significance of these costs. Any such cost would be incurred according to the specific UTPs that would be covered. It has to be taken into account that compliance costs in respect of the voluntary principles of good practice established under the SCI have already been incurred by its signatories who have organised training.[311] A leading supermarket chain replying to the consultation, for example, has spent EUR 200 thousand on one-off training measures of staff in relation to the SCI principles of good practice. Judging by the results, there seems to be a

[310] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, p. 226.

[311] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p 13.

general view that compliance costs are not of great significance or a major concern for the vast majority of business stakeholders participating in the surveys.

In relation to a comprehensive coverage of operators, retailers have expressed concerns relating to the protection of large manufacturers under such an approach and the ensuing possible impact on the customary distribution of margins between retailers and these large manufacturers. Retailers state they distinguish between these relationships and the ones they have with farmers and small producers of food products.

Under the restricted approach adopted, a retailer's relationship with a large manufacturer of food products would not be constrained by UTP rules. An approach which provides protection from UTPs for only smaller operators in the food supply chain would also be congruent with the problem driver "imbalance of bargaining power". A case-by-case approach ascertaining the existence of an imbalance would enable targeting. It would, however, be less predictable for operators than an approach which relates its protective effect to the size of an operator as measured by a proxy, such as for example his SME status.

Effects on small and medium enterprises

A coverage of operators that also created obligations for SMEs could lead these smaller operators to incur in compliance costs. Although they would not normally be in a position to resort to UTPs due to their lack of bargaining power this could exceptionally be different, for instance when they are in a position to sell "must-carry" products. Yet, smaller operators including farmers generally welcome UTP rules at the EU level (98% of micro and small enterprises that responded to the open public consultation believe that action should be taken at EU level to address UTPs, either through legislation only or through a mix of legislation with non-legislative approaches) and have also participated in agreeing the SCI´s principles of good practice which applies regardless of size or bargaining power of operators in the chain. Therefore, it is safe to assume that compliance costs are outweighed by the benefits small and medium enterprise operators would enjoy if afforded minimum protection against UTPs in the EU.

Under a restricted approach where protection is offered to SME operators only, care should be had that the protection does not come to constitute a competitive disadvantage for small suppliers as their counter-parties would shift – in the interest of their ability to continue to apply UTPs - their trading activities to operators which do not enjoy such protection. The risk of such an unintended consequence may however be partially mitigated by the fact that it is be harder to use UTPs against parties which have a significant size and bargaining power; shifting trade is therefore less likely to constitute a recipe to keep the benefits from applying UTPs. At any rate, monitoring modalities could control for such effects.

Effect on public administrations

An EU common minimum standard in the form of a short list of prohibited UTPs would apply in Member States. For some Member States this would not necessitate significant changes to their UTP regimes as they do already apply national rules that outlaw these UTPs, either via the application of a general prohibition or in the form of prohibited specific UTPs. For the majority of Member States who have UTP rules this would therefore not entail significant additional costs.

For Member States who do not have UTP rules, EU measures would require adaptation, in particular with a view to enforcement. The main cost would stem from the need to dedicate

resources to enforcement. The designation of a competent authority in Member States would be a first necessary step under a minimum requirement approach at EU level that relies on enforcement by Member States.[312] Member States which have no competent authority should be given appropriate time to designate one and enable it. As there would be no formal requirement other than being vested with the minimum functionally defined enforcement powers, Member States can rely on existing structures and designate, for example, an existing national competition authority or a consumer protection authority.[313] Member States with experience in UTP enforcement note that significant saving of administrative costs can be achieved by concentration and utilisation of sources that already exist (e.g. a competent authority for dealing with unfair trading practices as part of the national competition authority).[314]

Certain Member States' current UTP rules and enforcement arrangements may be such that the introduction of EU framework legislation would not require them to make (significant) changes. For others it would be necessary to make changes, including Member States that would have to designate a competent authority or additionally entrust an existing authority, such as a national competition authority, with an extended mandate covering the enforcement of the UTP rules.

In a targeted questionnaire Member States were asked to provide estimates on the possible set up and yearly operational costs of national bodies dealing with the implementation and enforcement of UTP related legislation and estimates on possible additional costs linked to an EU action on UTPs, including costs on reporting and coordination. Limited data has been presented that would allow an estimate of the likely aggregated costs at EU level.

It is difficult for Member States to provide estimates and isolate the costs for the specific activities related to implementation and enforcing of UTP measures. Most of the difficulties relate to the determination of the costs of drafting and adopting national legislation. From the information provided by Member States which have existing UTP legislation and competent authorities[315], the set-up costs vary between 32 thousand EUR[316] up to 3 million EUR[317], the operational yearly costs vary from 10 thousand EUR[318] up to 2.9 million EUR[319]. The differences relate to the size of the country - and therefore the national market - and the level of ambition of their current UTP legislation.

Focusing on the information from three Member States with well established, functioning and experienced competent authorities the additional costs linked to EU action, including the activities related to reporting and EU coordination, would be absorbed by the current structures

[312] See British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, in favour of enforcement in Member States.
[313] See Annex F, Cafaggi and Iamiceli, Overview on "Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain", 2018, p. 16.
[314] E.g. Czech Republic in replying to a targeted questionnaire sent by the European Commission to Member States.
[315] Hungary, Latvia, Poland, Slovakia, Bulgaria, United Kingdom, Czech Republic, and Spain.
[316] Latvia.
[317] Spain.
[318] Latvia.
[319] Spain.

and, therefore, according to their estimate, be negligible. [320]

The UK Grocery Code Adjudicator

Example data on actual costs (not estimated) are available from the UK Grocery Code Adjudicator (GCA). Expenditure was GBP 1,785,741 in the 2015/2016 financial year, and GBP 622,024 in the 2016/2017 financial year. Most of the difference is due to a large-scale investigation into one retailer in 2015/2016. In the 2016/2017 financial year most of the costs incurred were staff costs, at 67%. The UK GCA's costs are funded by a levy on the retailers covered by the scheme. In 2016/2017 the levy was raised to GBP 2 million (from GBP 1.1 million in the previous year), to fund future investigations. Unspent money from the levy is returned to the contributing retailers at the end of each financial year.[321]

Effect on consumers

The introduction of a UTP framework at EU level would have limited effects on consumers. Operators do in general not claim that the use of practices that are considered UTPs (e.g. by the SCI) lead to lower consumer prices. Neither is there evidence that Member States with stringent UTP regulation have witnessed stronger inflationary effects concerning consumer food prices than those with less stringent rules or no rules on UTP: the correlation - if any (not statistically significant) - would rather indicate lower food price increases in Member States who have stringent UTP rules, although many factors can contribute to the formation of price.[322]

On the other hand, arguments suggesting negative effects on consumers due to UTPs in the long run, in particular due to decreasing innovation, quality or choice, have been shown to not be conclusive in terms of empirical evidence (even though consumer associations and the United Kingdom's Competition Commission argue in that direction). Evidence of long-term innovation effects is scarce, the difficulty being compounded by confounding factors that are difficult to isolate.

3 Summary of costs and benefits

It was not possible to quantify with precision the overall benefits from legislation on UTPs. While there is evidence of harm and of such harm being significant and frequent (see section 6), the possibility to systematically collect and analyse a representative sample of data allowing for precise estimation of damages is not possible (notably due to the 'fear factor'). This was also an issue in the UK's Groceries Code Adjudicator impact assessment[323], where benefits were not stated. The measurement of benefits may however be improved in future through data collection by MS competent authorities coordinated at EU level (through monitoring and enforcement actions), reported in annual surveys, and fed into future policy reviews. Still, a range for the magnitude of possible benefits can be provided.

[320] United Kingdom, Spain and Czech Republic.

[321] Groceries Code Adjudicator Annual report and accounts 2016-17.

[322] See European Commission Communication, Tackling unfair trading practises in the business-to-business food supply chain, 15 July 2014, p.12, which uses this definition.

[323] Groceries Code Adjudicator impact assessment, May 2011.

I. Overview of benefits - Preferred option*		
Description	**Amount**	**Comments**
Direct benefits		
Effectively enforced protection from UTPs	Up to €2.5 billion to €8 billion*	
Indirect benefits		
Improved trust between operators and related reduced transaction costs; level-playing field for competition; public enforcement coordination effects/sharing of best practice	Not quantified	

* It was not possible to quantify the benefits from legislation on UTPs. See section 6. Estimates for direct benefits are based on assumptions (see section 6.2.1.1).

The table below provides an overview of the main implementation costs for the preferred option:

II. Overview of costs - Preferred option							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Compliance costs	Direct costs	--	--	negligible to €1.14 million*	€0 to €193 thousand** per year per non-SME operator	--	--
	Indirect costs	--	--	--	--	--	--
Enforcement costs	Direct costs	--	--	--	--	negligible to €228 thousand/€3 million*** per administration	negligible to €708 thousand/€2.9 million*** per administration per year
	Indirect costs	--	--	--	--	--	--
Other costs	Direct costs	--	--	--	--	--	--
	Indirect costs	negligible (either positive or negative)	negligible (either positive or negative)	--	--	--	€950 per administration year***

Exchange rate: EUR 1.14 / GBP 1.

* Where operators have fully implemented the voluntary SCI principles of good practice, or where national legislation is in line with the preferred option, costs are expected to be negligible; upper bound costs are drawn from UK estimates for one-off costs.

** Based on experience of large UK retailers; higher end costs would apply only where legislation does not already exist or where the voluntary SCI principles have not been implemented, otherwise expected to be smaller or negligible (baseline costs).

*** Costs for MSs that already have legislation in place are expected to be negligible or lower end; higher bound is based on estimates from a MS where no legislation exists; existing experience in the UK found recurrent enforcement costs to be about €708 thousand per year. Other costs for administrations refer to costs of attending an annual coordination meeting.

Annex 4: Analytical methods

The analysis in this impact assessment does not make use of modelling or other analytical techniques. The lack of analytical tools (such as models) in the literature on UTPs is at least in part explained by difficulties in accessing data on such practices, due to concerns of operators with disclosing commercially sensitive information (see the 'fear factor').

Annex A: Relevant EU documents concerning unfair trading practices

12 December 2016	Council Conclusions, Strengthening farmers' position in the food supply chain and tackling unfair trading practices
30 September 2016	Report of the European Economic and Social Committee of 30 September 2016 on unfair business-to-business trading practices in the food supply chain
7 June 2016	European Parliament resolution on unfair trading practices in the food supply chain
29 January 2016	Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain
2 March 2016	Opinion of the Committee on Agriculture and Rural Development on unfair trading practices in the food supply chain
1 June 2015	Commission Decision establishing the High Level Forum for a better functioning food supply chain
15 July 2014	European Commission Communication on tackling unfair trading practices
12 November 2013	Opinion of the European Economic and Social Committee on the 'Green Paper on unfair trading practices in the business to business food and non-food supply chain in Europe'
31 January 2013	European Commission Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe
19 January 2012	European Parliament Resolution on imbalances in the food supply chain
5 July 2010	European Commission report, Retail market monitoring report, Towards more efficient and fairer retail services in the internal market for 2020
28 October 2009	European Commission Communication on a better functioning food supply chain and Staff Working Document, Competition in the food supply chain

Annex B: The "fear factor" and different enforcement approaches to unfair trading practices

1 Fear factor

A 2014 report found that, based on these insights, "*any procedural rules concerning investigations must provide for rules to protect confidentiality and anonymity.*"[324] The results of the European Commission's public consultation in 2013 showed that about 67% of the respondents confirmed that fear of negative consequences in case of a complaint about UTPs is an important consideration.[325] Only about 9% of the respondents disagreed. In a 2011 study, 64% of respondents stated that the reason why they did not take further steps than discussing the issue with their buyers was that they were afraid of "commercial sanctions".[326] 11% stated that they were threatened with retaliation in case of taking action.

Existing judicial and administrative redress possibilities in some Member States lack in effectiveness in tackling the fear factor. The sentiment of a lack of protection due to the absence of an EU approach that would provide for minimum protection is confirmed in recent surveys. The open public consultation of July 2017 showed 95% of respondents to agree that action should be taken to address UTPs in the food supply chain. 87% of respondents believed the European Union should act on UTPs. A 2016 study stated:

> *"Safeguarding the parties from the exposure to the risk of retaliation, emerged as an essential component of any dispute resolution process. [...] Generally speaking [...] the comparison between the preference for legislation at EU level and at national level shows that the former is clearly preferred by the vast majority of respondents."*[327]

In the following, UTP enforcement mechanisms as they exist in Member States are further discussed as to their effectiveness.

2 Judicial redress

All Member States have provisions of law that govern contracts. Private parties can rely on the relevant rules to seek redress against certain UTPs in national courts that constitute violations of provisions of contract law (e.g. breach of contract). However, complaining about UTPs in national civil courts constitutes a risk for operators due to the fact that there is no possibility in civil law proceedings to not divulge one's identity.[328]

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[324] British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 12.

[325] See European Commission, DG GROW, Summary of responses to the European Commission Green Paper, 2013.

[326] Dedicated Research for CIAA and AIM, Unfair commercial practices in Europe, presentation, March 2011, slide, p. 15.

[327] Areté for European Commission, report, Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain, January 2016, pp. 17, 92.

[328] See for instance SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, pp. 19-20.

A further significant limitation of the effectiveness of judicial redress, in particular for SMEs, is the costs of legal proceedings.[329] In the case of administrative enforcement, the administration pays while in the case of judicial enforcement the cost risk is typically borne by the plaintiff. Who bears the cost risk does not only have important distributional consequences, but also has ramifications for the effectiveness of enforcement itself.[330]

In conclusion, judicial redress against UTPs can present significant shortcomings and tends to be ineffective where business relationships are characterised by imbalances of bargaining power between parties. This is in particular a relevant factor for SMEs, which are least likely to have at their disposal the necessary means to cover the potentially high costs of legal representation, given the complexity of such processes and the lack of knowledge on how to enforce their rights in view of available remedies.[331]

3 Administrative redress

Administrative regimes in certain Member States can and do take into account the perceived retaliation risk and the consequent bias against complaints in courts by mechanisms such as own initiative investigations or the ability to treat individual complaints confidentially or to receive complaints by producers associations.

It is not so much any in-built limitations of the administrative redress model that as such would present a challenge in terms of UTP enforcement rather than the heterogeneous enforcement landscape[332] – to the extent that Member States have publicly enforceable UTP rules - that constitutes a challenge.

Competition authorities – to the extent they are charged with the treatment of UTP complaints – can often protect the anonymity of complainants - albeit sometimes this is not possible throughout the full proceedings – for instance by having recourse to own initiative investigations.[333] However, enforcement of competition rules – and the attending procedural powers of national competition authorities - is in general not solution for victims of UTPs. If a UTP causes detriment to an economic operator, but does not have an effect on consumer welfare or on competition as a process, then competition law does normally not provide redress.[334]

A European Competition Network (ECN) Report of 2012 observes:

> *"[I]n their monitoring investigations a large number of national competition authorities (NCAs) have also identified as an issue the existence of certain practices linked to imbalances of bargaining power between market players that are deemed unfair by*

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[329] European Business Test Panel 2012, Summary report of the responses received to the commission's consultation on unfair business to business commercial practices p. 37 *et seq.*

[330] Joint Research Center report, Unfair trading practices in the food supply chain, 2017, Swinnen and Vandevelde, p. 63.

[331] European Commission, Green Paper 2013, p. 15.

[332] See Annex F, Cafaggi and Iamiceli, Overview on "Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain, January 2018 and also the summary tables (Annex G).

[333] See SEO economisch onderzoek, Oneerlijke handelspraktijken, report for the Dutch ministry of economy, 2013, p. 19.

[334] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 9.

many stakeholders. [...] However, the NCAs have found that most of these practices do not fall within the scope of competition rules at the EU level or in most of the Member States. Consequently, a few NCAs have proposed alternative solutions to tackle them, such as the application of national laws against unfair trading practices or the adoption of codes of conduct or good practices with effective enforcement mechanisms. "[335]

Competition authorities considered that in most cases these practices do not fall under the scope of EU- or national competition rules of Member States.[336] A point in case is competition cases involving an abuse of dominance: unless an undertaking has a dominant position in the relevant market ("substantial market power") its commercial practices are not open to examination under classical competition law. The (ab)use of mere "bargaining power" in a bilateral commercial relationship does not fall within the scope of Article 102 TFEU (see also Article 208 of Regulation 1308/2013). Having said this, some Member States have formally extended the scope of their national competition law by also covering a specific prohibition of UTPs and thereby expanding it into unfair dealing rules (Germany).

4 The voluntary Supply Chain Initiative

The Supply Chain Initiative (SCI) was developed within the framework of the Commission's High Level Forum on the Better Functioning of the Food Supply Chain. It includes an agreement among associations of operators of the food supply chain to promote fair business practices in the food supply chain as a basis for commercial dealings.[337] It is described in more detail in sections 2.7 and 3.3 of the impact assessment report.

[335] European Competition Network study 2012, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, paragraph 26. See also paragraph 73.

[336] *Idem*, paragraph 254 including box. See also Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, final report, 26 February 2014, p. 38.

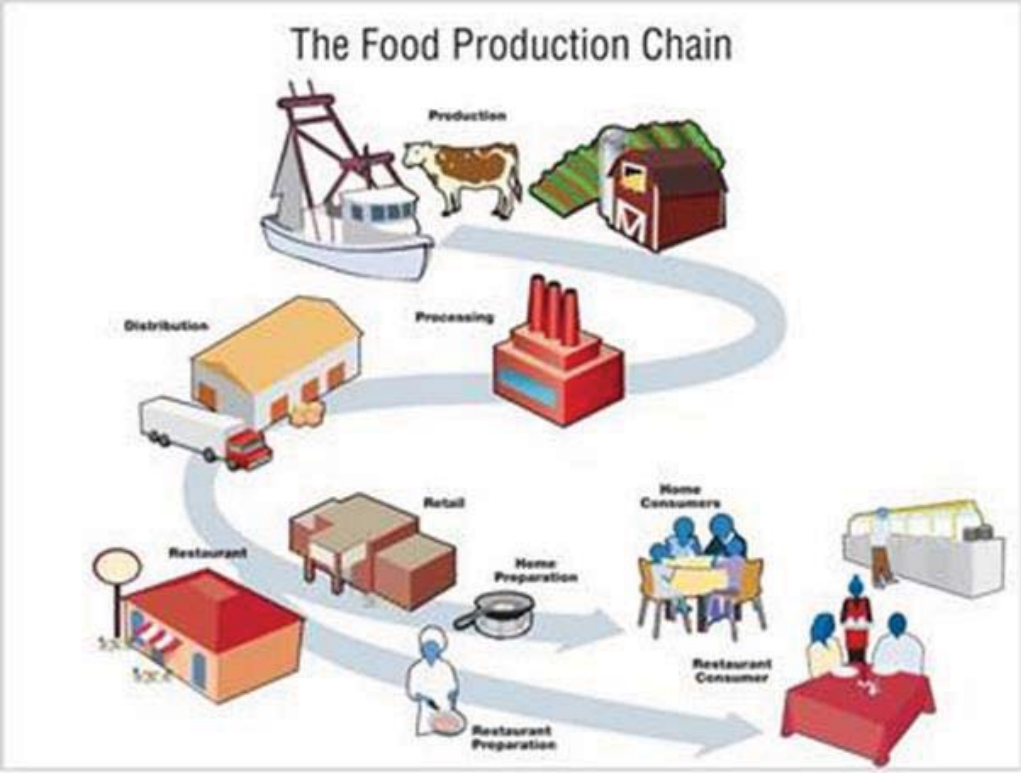
[337] The High Level Forum on the Better Functioning of the Food Supply Chain comprises Member State national authorities responsible for the food sector at ministerial level and representatives of the private sector. As regards the Supply Chain Initiative, the Belgium code of conduct of 2010 was a precursor to the Supply Chain Initiative. The so called Agro-Food Chain consultation started in 2009 in Belgium.

Annex C: UTPs, agriculture and the agri-food sector: quantitative evidence

1 The food supply chain

The food supply chain in the EU comprises all actors and activities from primary agricultural production to food processing, distribution, retailing and consumption. It ensures that food products, including beverages, are delivered to the general public for personal / household consumption via retail sales or food services (catering, etc.). It also includes recycling and disposal stages where appropriate.

Figure 1 - Organisation of the food supply chain



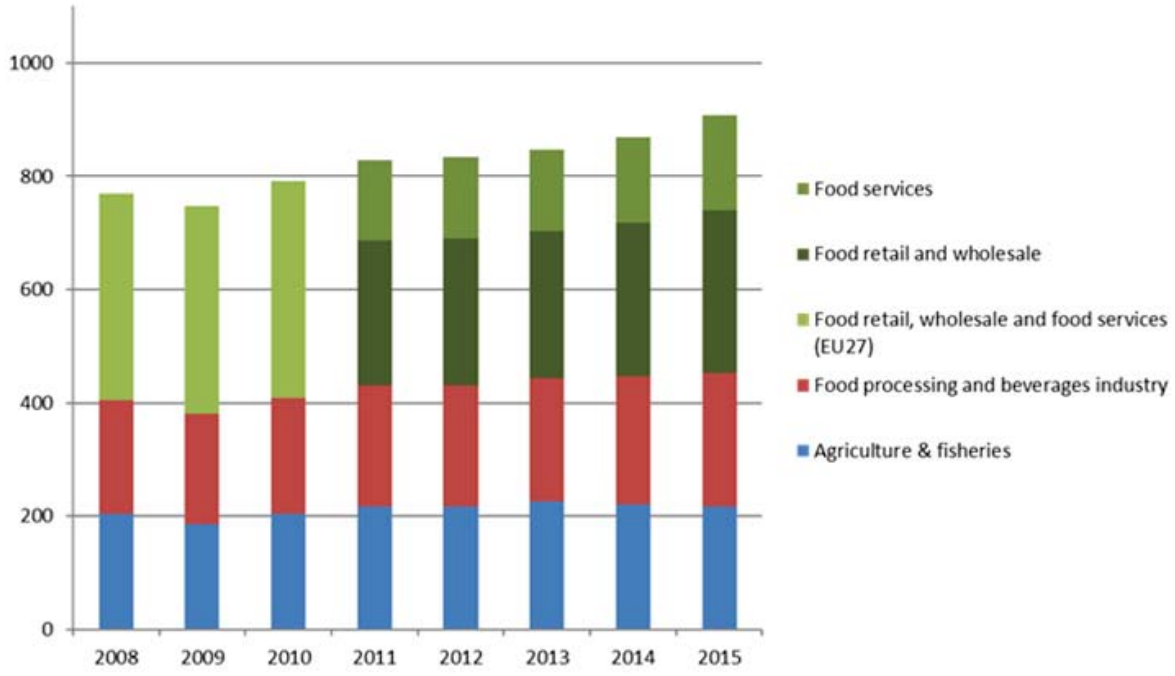
Source: CDC

The number of actors in the food chain varies greatly at each level. In the EU, around 11 million farms, providing work for roughly 22 million people (both full time and part time, for a total of around 9 million full-time equivalent) produce primary products for processing by about 300 thousand enterprises of the food and drink industry. The food processors sell their products through the 2.8 million enterprises within the food distribution (wholesale and retail

trade) and food service industry, which deliver food to the EU's 500 million consumers. Overall, the food supply chain employs around 44 million people in the EU.

The total turnover of food retail and food services amounted to close to EUR 1,600 billion in 2015[338], thus representing around 14% of total consumption in the EU. It grew annually by 2.2% on average from 2009 to 2015. This importance is also reflected at the consumer end: EU households dedicate on average 14% of their expenditure to food and beverages, ranging from less than 10% in the UK to 32% in Romania in 2015. The gross value added generated in the food supply chain has been growing by 2.4% annually since 2008, and amounts to slightly less than 7% of the total value added of the EU economy.

Figure 2 - Value added in the food supply chain (billion euro)



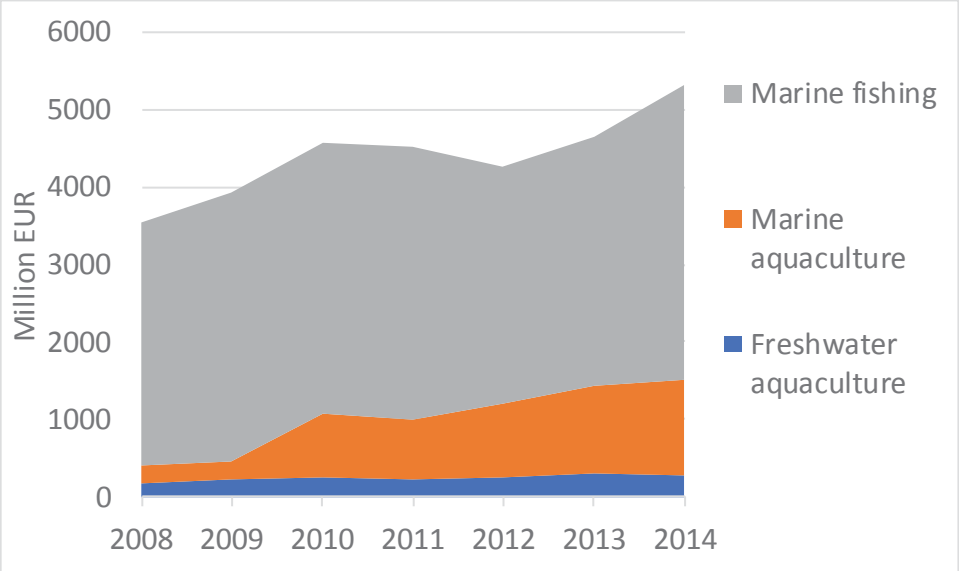
Source: DG Agriculture and Rural development from Eurostat (Economic accounts for agricultural, Structural Business statistics, Annual national accounts)

Value added in the *agricultural* sector grew at a slower pace since 2008 (+1% annually) than the other segments of the food supply chain (+2.5% annually for processing, +3.2% annually for the food retail and services sector). Following the increasing consumer demand for convenience products and services associated to food and beverages, the processing and the retail stages have added additional features to the basic agricultural product, stimulated by the changes of lifestyle, urbanisation, consumer preferences and general economic environment[339]. They have expanded their share in the total value added in the food chain, while the share of agriculture (around 25% of the total value added created in the food chain) has decreased in trend by around 0.14 percentage points per year over the period (2008-15).

[338] Sources for this paragraph are the same as the one for figure 2. Elaboration by DG AGRI from various Eurostat data sources (Economic accounts for agricultural, Structural Business statistics, Annual national accounts)
[339] EU Agricultural Markets Brief (2015), No. 4.

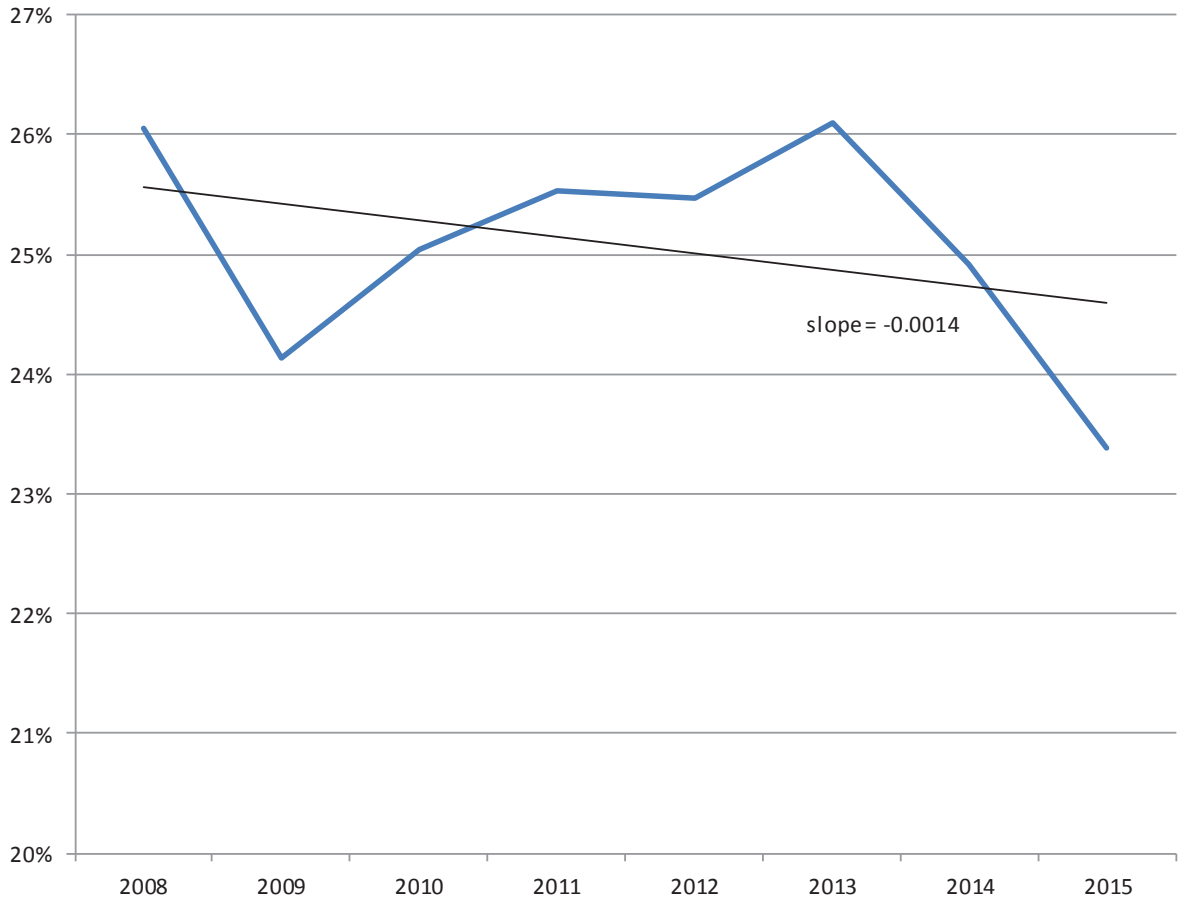
While the added value of fishery and aquaculture sector plays a marginal role within the overall food supply chain, there is an upward trend mainly due to the role of aquaculture.

Figure 3 - Value added trend of the fishing and aquaculture sector



Source: JRC-STECF (Scientific, Technical and Economic Committee for Fisheries); Structural Business statistics, Annual national accounts)

Figure 4 - Share of agriculture in value added in the food supply chain (%)



Source: DG Agriculture and Rural development from Eurostat (Economic accounts for agricultural, Structural Business statistics, Annual national accounts)

2 Economics of agriculture

From an economic perspective the agricultural sector is part of the 'bio-economy' and can be described according to its product and production characteristics, demand and supply structures, and public good characteristics[340]. Agricultural products are to a greater or lesser extent perishable (for some products storage possibilities are limited, meaning that the price in the market at the time of completing production, or shortly after, is the only available price), produced during a short period of the year (seasonality), following relatively unpredictable biological processes (rather than, for example, mechanical processes) that are also subject to natural conditions (weather). Agricultural products are also frequently homogeneous in nature (it is difficult to capture value by differentiating production, although some differentiation of products does take place, for example organic production or the use of geographical indications) and there are a high number of producers producing those products (agricultural producers are typically full price takers). Agriculture faces a decreasing return per unit of input after a certain (relatively early) point: the output per unit of input is gradually lower as

[340] Mainly from Tomas Garcia Azcarate (presentation).

inputs are increased (Law of Turgot). This has the implication that an agricultural producer is significantly (early on when compared to manufacturing) limited on the amount of income they can make from inputs and land available.

Demand for and supply of agricultural products is highly inelastic (if the quantity supplied or demanded varies by a small amount, the effect on prices is significantly larger). This makes the agricultural sector particularly exposed to demand and supply shocks (relatively to other economic sectors), as a small reduction in demand or a small increase in supply can lead to a significant reduction in prices and, eventually incomes (high income volatility). This is compounded by the fact that there are also production lags in agriculture, whereby production decisions are significantly removed from placing products on the market (production responses to market prices are necessarily relatively slow when compared to other sectors - which contributes to volatility in the face of uncertainty about future prices, for example when too much aggregate output is planned through individual production decisions).

Finally agriculture typically covers a high share of the total land cover of a territory, with a relatively complex set of public goods (and 'public bads') associated to its activities, such as areas of biodiversity and landscape value, greenhouse gas emissions (mainly from livestock) and other possibly significant externalities (such as pesticide and fertiliser run off into ground and surface waters); food safety (food security and food quality) and population health; or animal health and welfare.

3 Agriculture specifics

The EU's farm sector is one of the world's leading food producers and guarantees food security for over 500 million European citizens – at a time of growing resource- and climate-related threats in the EU and around the globe. Farmers manage over 48% of the EU's land (about 75% with forests) and, in addition to agricultural and food production, also provide a wide range of public goods, including environmental services (related to biodiversity, soils, water, air, landscape), essential carbon sinks and renewable resources for industry and the energy sector, as well as social benefits to rural areas, home to 55% of the EU's citizens.

While the EU fishery and aquaculture sector is relatively small (in 2015, about 140,000 people were employed in the sector (FTE equivalent), representing 0.1% of all jobs in the EU), the sector plays a crucial role for employment and economic activity in several regions – in some European coastal communities as many as half the local jobs are in the fishing sector. Small-scale coastal fishermen represent three quarters of the EU's sector but are responsible for a minor part of EU catches.

The Common Agricultural Policy[341] has been reformed several times over the last 25 years, switching from a price-support system to a more market-oriented policy. Domestic EU prices have generally aligned to international prices for agricultural products and the competitiveness of the EU agri-food industry has dramatically improved. The EU has been a net exporter of food and drink products since 2009[342], with the value of EU agri-food exports rising to EUR 131 billion in 2016 (compared to EUR 60 billion in 2005). The agri-food sector represented 7.5% of total EU exports in goods in 2016. With a surplus close to EUR 19

[341] The CAP includes fisheries, see Article 38 TFEU and Annex I.

[342] For fish and seafood, the EU is a net importer of these products. 24 billion EUR worth of fish and seafood were imported into the EU in 2016. The volume of intra-EU exchanges is just as big.

billion, the agri-food sector is a major contributor to the overall trade surplus of the European Union in goods (EUR 39.3 billion in 2016)[343]. Export activity is a strong contributor to the creation of jobs[344], on farms as well as in the agri-food sector.

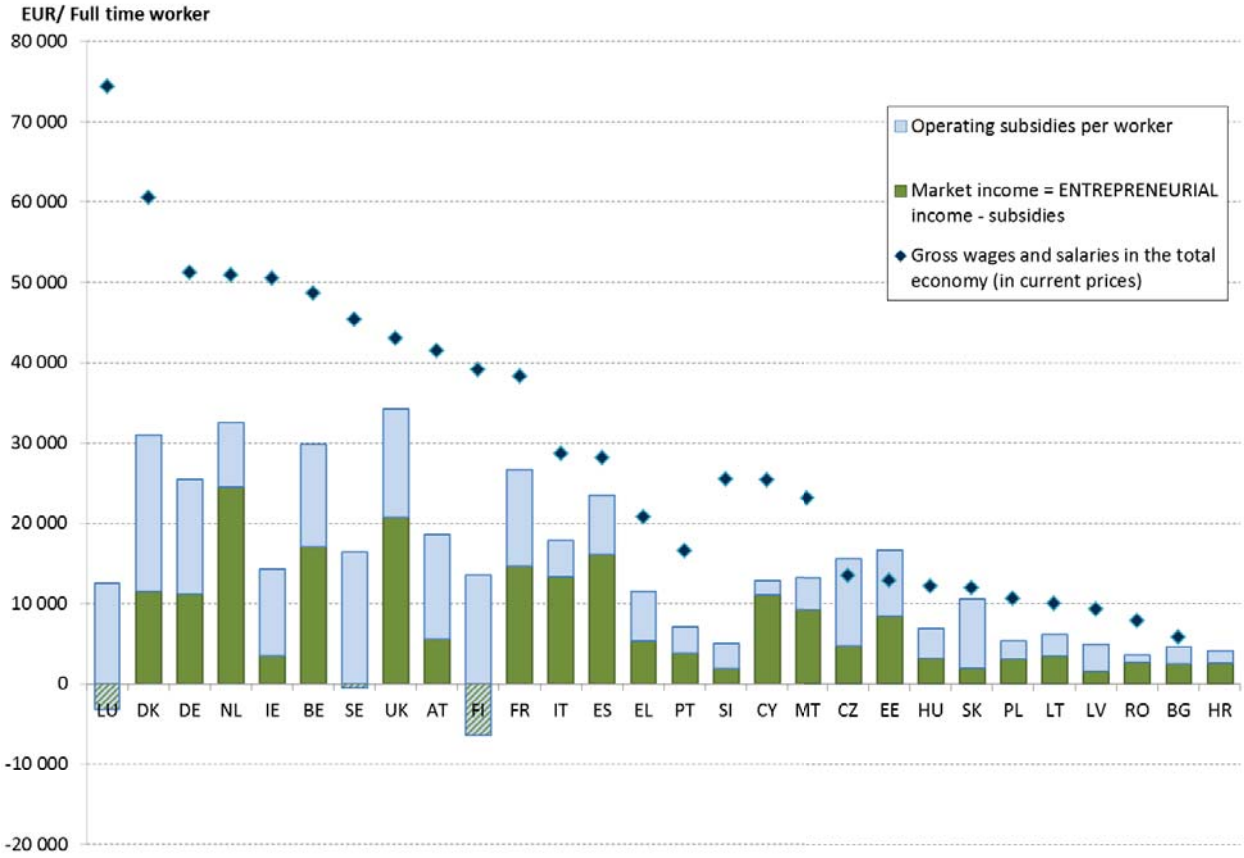
While the participation of the European agri-food sector in global markets has created important trading opportunities, it has also exposed it to greater market instability. Food production remains an uncertain activity, with agriculture dependent on weather and - in the current increasingly globalised context and more market-driven Common Agricultural Policy- subject to higher price volatility arising from global markets. In addition, while demand of agricultural products is rather inelastic because largely directed towards food, agricultural supply (production) is also inelastic (cannot typically be adjusted rapidly): there are long lags between the production decision and the actual production due to the biological processes involved (up to several years for animal production or permanent crops) and the perishability of agricultural goods does not always allow long storage periods. Farmers, fisherman and food producers in the EU operate under strict food safety, environmental and animal welfare regulations in line with consumer expectations. Consumers express their increasing interest in having access to a variety of healthy and nutritious food as well as to food with specific characteristics, such as organic produce, products with geographical indications, local specialities and innovative types of food.

Average farm income per working unit is significantly below average wages obtained in other economic sectors in the majority of Member States (see *Figure 5*). Direct payments narrow this gap and contribute to achieving one of the Treaty's CAP objectives as defined in the Treaty on the Functioning of the European Union: to ensure a fair standard of living for the agricultural community. Farm households can also gain non-agricultural on-farm and off-farm income, just as any other household (e.g. through tourism services, energy production or part-time work out of the farm in other activities). In the case of fisheries, no income contribution exists: the revenue is fully dependent on market dynamics.

[343] Monitoring EU Agri-Food Trade: Development until December 2016.

[344] A DG TRADE analysis – not specific to agriculture – suggests that 31 million jobs in the EU – 14 % of total employment – depend on exports, with 14,000 EU jobs added for every EUR 1 billion of exports.

Figure 5 - Comparison of farm income and wages



Source: DG AGRI from DG AGRI-FADN and Eurostat

Due to structural change and technological progress in the agricultural sector, agricultural production in the EU takes now place in fewer, larger and more capital-intensive farms than in the past. There is a continued trend of declining jobs in farming. More than one out of four agricultural jobs has ceased existing since 2005 (25.4%) and the number of jobs has been decreasing by 2% yearly between 2005 and 2013.[345]

And yet, the importance of agriculture, as well as the food sector, for society extends beyond primary food production. EU agriculture has been evolving in recent decades into a more consumer driven, knowledge based, innovative and high quality system of food production, delivering a very diverse set of products to global markets. Agriculture has positive ramifications for the rural economy and digitisation has the potential for further increases in productivity for the food and farm sector as it does for the economy as a whole.

At the primary production end of the supply chain, there are increasing input costs due to competition for scarcer natural resources as well as limited possibilities for primary producers to add value to the basic product[346]. Having said this, EU farmers produce a wide range of safe and high value foods, with a high level of quality in terms of food safety, nutritional

[345] Facts and figures on farm structures, 2017, p. 4.

[346] But not impossible through segmentation, e.g. quality products such as organic farming or geographical indications. Farmers may also process and sell directly their products, and thus are not limited to the role of primary producers.

value, taste, cultural and heritage value, methods of production, etc. (for example, there is an increasing amount of products with geographical indication status and a dynamic organic sector).

Around 66% in value of the food (beverages excluded) retail sales[347] correspond to agricultural products as defined in Annex I of the Treaty (fish products included), the rest being processed agricultural products (PAPs). Most of these 'agricultural products' are not strictly primary stage products and went through some (mostly basic) processing.

4 Structure of the different stages of the food chain

Agricultural production is in general highly fragmented and largely comprised of small units in physical terms, since only 7% of farms had more than 50 ha of agricultural land in 2013[348]. At the EU level the CR5 (concentration ratio; the market share of the five largest firms) at farm level (1) was 0.19% in 2010 (ranging from 0.4% in Germany to around 9% in Estonia). The dispersion due to the large share of family-owned farms poses unique challenges, particularly with respect to vertical coordination and quality control over the supply chain. As processors and distributors have become larger, more concentrated and have increased their quality requirements, farmers, without losing their legal personality, have established and maintained networks to improve their bargaining position, through a still large number of producer organisations and/or cooperatives, with different degrees of organisation. The market share of agricultural cooperatives is of about 40% at EU level[349] (with a higher share in some sectors - e.g. dairy above 50%, fruit and vegetables at 54% - than others - e.g. sugar or pig meat below 30%; and/or a higher share in some Member States - e.g., Netherlands and Denmark above 60% - than others - most Eastern Europe Member states at low or very low levels).

In other parts of the chain there are higher concentration levels, in both the food processing and food distribution sectors.[350] The degree of concentration in these sectors has generally increased over the last decades with consolidation in food processing and retailing companies through natural growth and mergers, particularly for retailers in the 1990s.[351]

The top five food processing firms are estimated to represent an overall market share in retail of a moderate 15% in a majority of Member States, but this global ratio increases for determined sectors with more specialised food industries, e.g. for dairy food products, in most Member States, the concentration in the top five dairies (private companies, cooperatives or POs) is above 40% and even close to 70% in a few countries (Figure 6). In the biscuits or the confectionery sectors, the CR5 is above 60%[352], and around 30% on average in processed meat, seafood or fruit and vegetables products (Figure 7), while in other sectors concentration may be much lower (e.g. baked goods, around 15% on average). Data at EU level suggests

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[347] Own estimate on the base of Euromonitor on five Member States (DE, FR, IT, ES, UK)

[348] Facts and figures on farm structures, 2017, p. 4.

[349] Bijman J. et al. (2012), Support for Farmers' Cooperatives, external study by LEI for the European Commission, pp 29 and following.

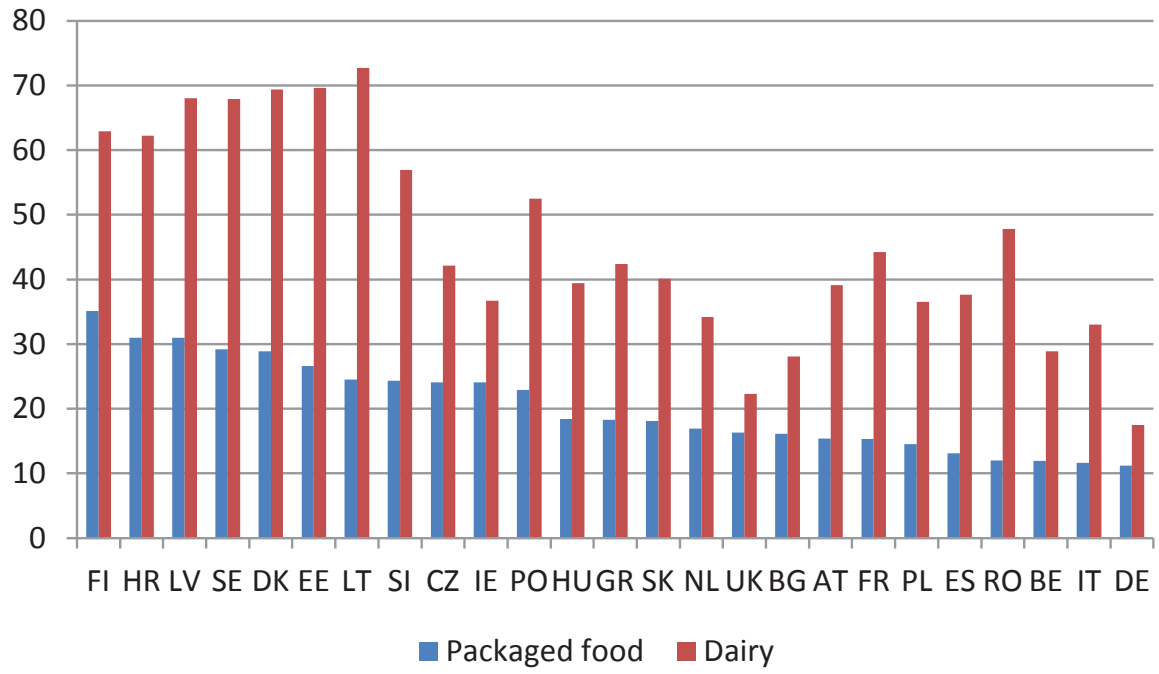
[350] No data is currently available concerning food services concentration.

[351] Swinnen J., (2015), Changing coalitions in value chains and the political economy of agricultural and food policy, Oxford Review of Economic Policy 31(1), pp. 90-115.

[352] Bukeviciute L. et al., The functioning of the food supply chain and its effect on food prices in the European Union, European Economy, Occasional Paper 47, 2009, p. 21.

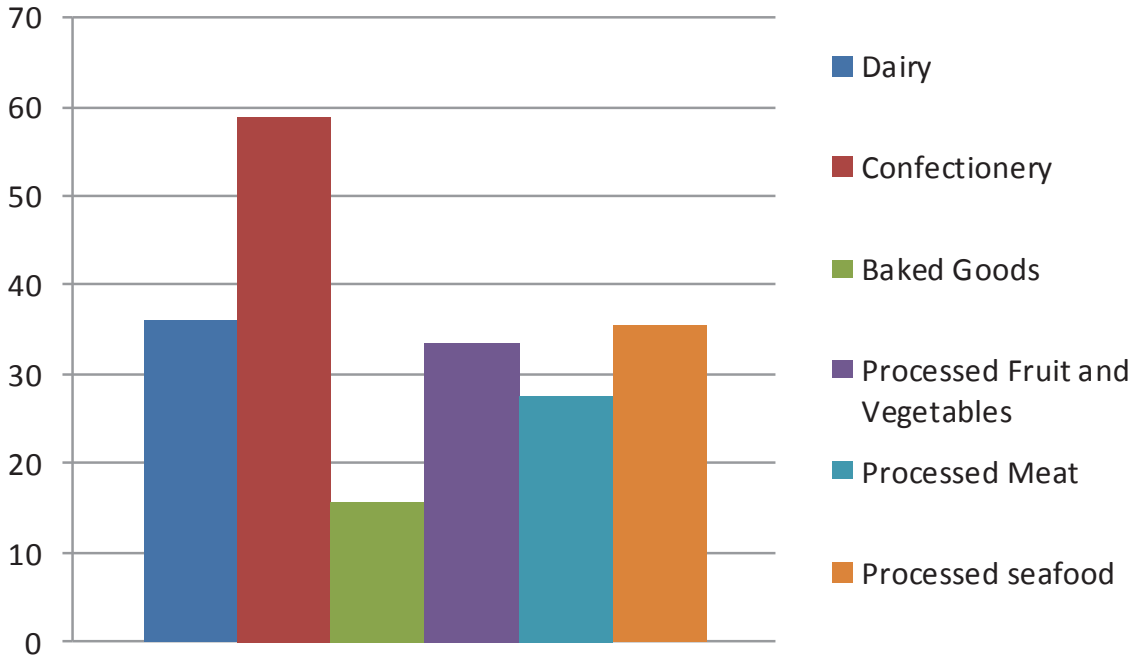
however that, beyond high concentration in certain sectors and Member States, the food processing sector still has a large share of SMEs. At EU level, SMEs represent 49% of the turnover and 63% of total employment in the food supply sector.

Figure 6 - Share in % of top five processing companies sales of packaged foods (2016)



Source: DG Agriculture and Rural development from Euromonitor

Figure 7 - EU average MS concentration ratios (CR5) per food sector



Source: DG AGRI from Euromonitor

The food distribution tier is also highly concentrated, mainly in the retail sector. Food products are distributed primarily through supermarkets, hypermarkets and discounters, which account on average for 71% of total packaged food sales in the EU Member States (Table 1).

Table 1 – Share of retail sales of packaged food sold by hypermarkets, supermarkets (>400m²) and discounters

	2012	2013	2014	2015	2016	2017
Bulgaria	42,6	45,3	47,3	48,6	49,7	50,7
Croatia	56,1	56,9	57,8	58,6	58,9	59,4
Czech Republ	75,4	75,5	75,7	75,6	75,5	75,7
Estonia	77,9	78,0	78,2	78,2	78,2	78,2
Hungary	58,7	59,6	60,3	60,7	61,3	61,7
Latvia	53,0	52,5	53,5	53,8	54,7	55,3
Lithuania	64,9	65,1	65,4	65,3	65,6	65,7
Poland	59,4	61,7	63,0	63,9	64,4	64,8
Romania	49,8	50,8	52,5	54,2	54,5	55,5
Slovakia	68,0	68,5	68,9	69,1	69,4	69,7
Slovenia	82,8	83,1	83,4	83,6	83,9	84,3
Austria	77,8	77,8	77,9	77,7	77,7	77,7
Belgium	70,0	70,0	70,1	70,3	70,5	70,5
Denmark	81,6	82,4	82,7	82,8	82,7	82,7
Finland	70,1	70,3	70,3	70,3	70,6	70,8
France	68,9	68,7	68,5	68,3	68,1	67,6
Germany	78,4	78,7	78,8	79,0	79,1	79,3
Greece	61,3	62,5	62,9	63,4	63,0	62,9
Ireland	66,2	66,2	66,2	66,4	66,5	66,4
Italy	64,3	64,5	64,7	64,8	64,8	64,8
Netherlands	80,3	80,4	80,5	80,6	80,8	80,7
Portugal	74,3	74,2	74,3	74,1	73,9	73,7
Spain	70,7	71,2	72,0	72,2	72,6	72,9
Sweden	81,0	80,9	80,7	80,3	80,1	80,0
United Kingdo	70,4	70,1	69,9	69,6	69,4	69,2
EU-28*	70,5	70,7	70,9	70,9	71,0	71,0
*Malta, Cyprus, Luxemburg not taken into account						

Source: Euromonitor

At EU level, the top five retailers represent (CR5) 20% of the market share on average. This high level of concentration has been a feature of the sector for several years. In 2007 the top five retailers held market shares (CR5) of more than 50% in most Member States[353], with, in general, higher concentration ratios in the older Member States[354]. More recent data shows that this process is continuing, with further mergers, acquisitions and joint-ventures[355]. In 2016, based on Euromonitor data (not covering on-line and other non-store sales[356]), the CR5 in the grocery retail sector was above 60% in the half of Member States (above 80% in Sweden and Finland) and below 40% only in Italy, Bulgaria and Greece. Depending on the

[353] *Ibidem*.

[354] Dobson, P. (2016), Grocery retailing concentration and competition in the European Union, presentation to the workshop Competition in the food retail sector, 2 May 2016, European Parliament.

[355] EY, Cambridge econometrics ltd, Arcadia international (2014), The economic impact of modern retail on choice and innovation in the EU food sector, study for the European Commission, pp. 45-64.

[356] Non-store sales represent 2.8% of the EU retail sales of packaged food products in 2016 (Euromonitor).

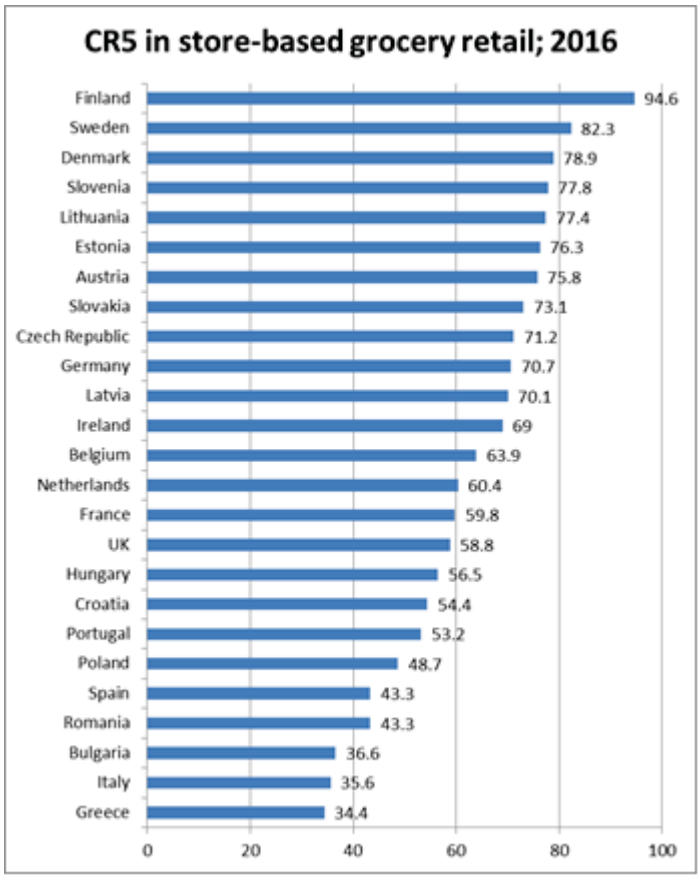
Members State and product concentration ratios can be higher on the processing side than on the retail side. Other sources (e.g. Planet Retail) show some slight differences but an overall common trend and similar magnitudes. Data at EU level also suggests that the food wholesale and retail industry is characterised by the existence of a very high number of SMEs involved in food trade (over 99% of the enterprises representing 54% of their turn-over 56% of the total employment)

Increasing concentration is also seen through the development of international buying groups (IBG), organised by several retailers to improve their purchasing power.[357] The five major buying groups in the EU have a size larger than any of the single retailers in the EU[358] and 6 out of 10 large retailers in the EU are members of and IBG. IBGs usually operate cross-border. 2 of the 3 main IBGs are established in Switzerland. However, the impact of IBGs on the food supply chain may not be as a significant as the impact of each single retailer, as it is estimated that only 5% of the total volume purchased by individual retailers is purchased through IBGs. IBGs focus on uniform and widespread consumer preferences products such as pasta, processed tomatoes and sauces, canned vegetables, rice, sugar, olive oil, etc.

[357] EY et al. (2014), p.52.

[358] ten Kate G. and van der Wal S. (2017), International supermarket buying groups in Europe, SOMO paper March 2017.

Figure 8 - Retail concentration ratio (CR5)



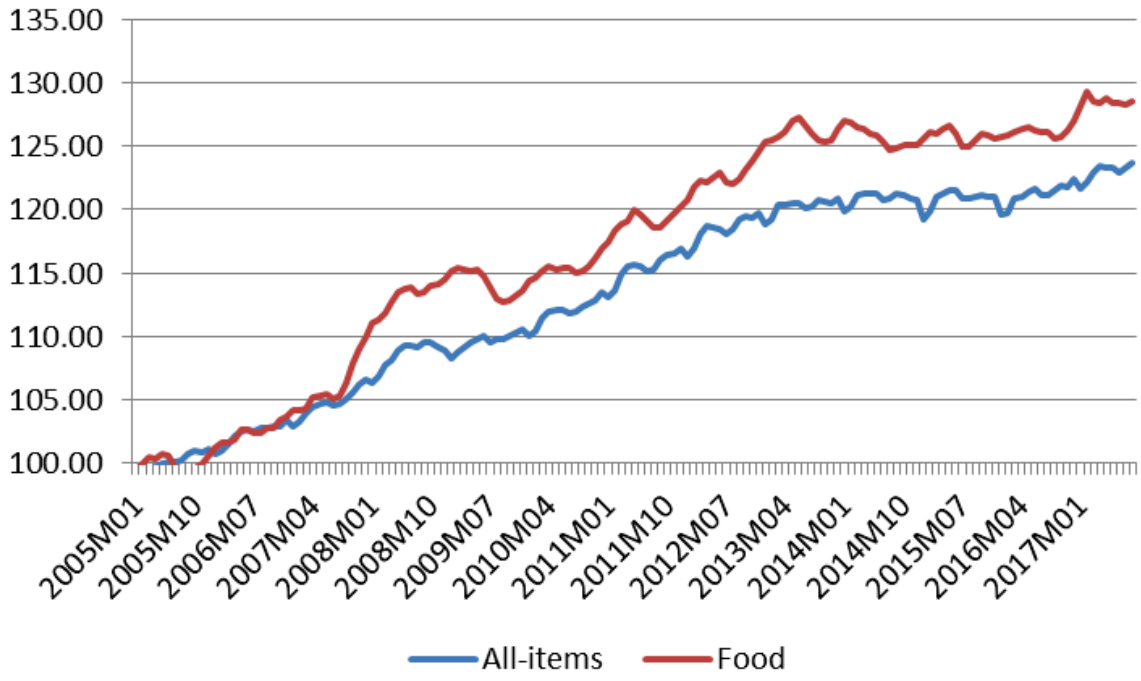
Source DG GROW from Euromonitor

5 Price transmission

In terms of price evolution along the food supply chain, food prices grew faster than prices for other goods since 2007, in particular following food price spikes.[359] Several factors contributed to this: the increasing global demand for food, the slowdown in productivity growth in agriculture, as well as the increasing input cost (such as fertilisers, plant protection products, etc.) and their link with price trends in other commodities (e.g. energy). Despite lower agricultural commodity prices since 2015, food prices trends do not seem to have yet followed a downwards correction compared to the general inflation rate.

[359] EU Agricultural Markets Brief (2014) No.3.

Figure 9 - Inflation rate and food price index (index 100 = 2005)

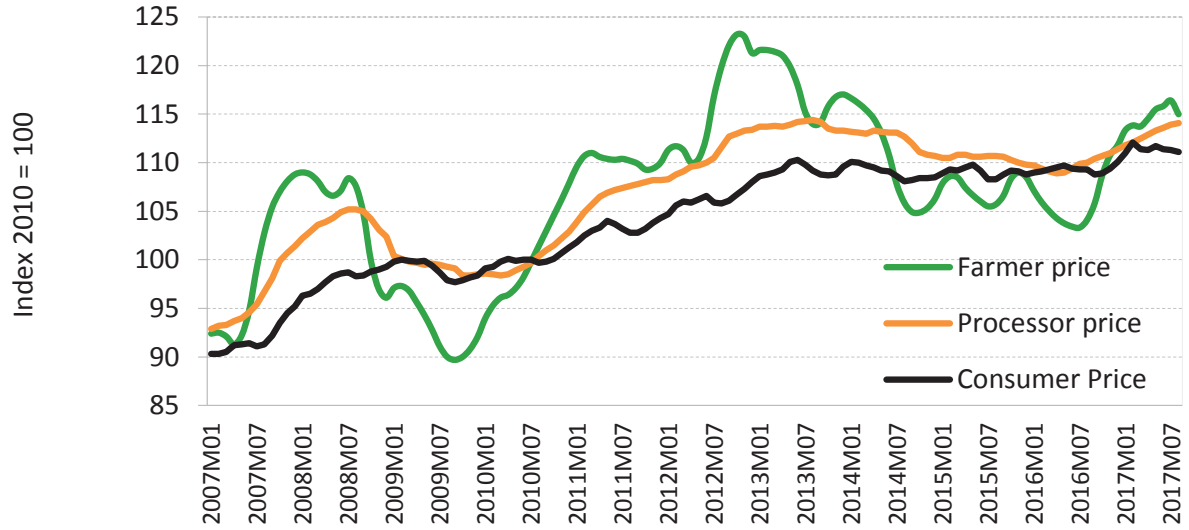


Source Eurostat

Prices in the food supply chain are also characterised by strong volatility (price variation through time at every step of the food chain). Volatility is stronger for primary products[360], while there tends to be a smoothening effect downstream in the food chain, essentially caused by the fact that (volatile-priced) raw material represents only a limited share of the cost of the final food product.[361] Consumer prices for food products tend to rise or decrease less than the raw material concerned (e.g. higher volatility of wheat prices than bread prices).

[360] EU Agricultural Markets Brief (2015) No.5, Price Developments and links to food security – price level and volatility.
[361] Bukeviciute L. (2009), p.16.

Figure 10 - Food supply chain index for EU-28 (2007-2017)



Source: Eurostat, Food price monitoring tool and DG Agriculture and Rural Development based on data provided by the Member States

In addition there is a debate about asymmetric price transmission in the food supply chain, in particular for downward price corrections: a decrease in the price of agricultural products is transmitted more slowly to the subsequent stages of the food supply chain than an increase in the price of raw materials (stickiness of prices). This may be caused by differentiated market powers, but alternative explanations are also provided (i.e. adjustment costs, menu costs, government intervention)[362] and these effects can vary significantly across product type, level of the supply chain, seasonality and Member States.[363] Such asymmetry was found to be more pronounced in food chains of the newer Member States when compared to the Euro area in 2009[364] and in specific sectors and countries.[365]

6 Rules on UTPs and price evolution[366]

One concern about regulating UTPs that is often referred to is that they could result in increased prices for consumers, in particular if they result in legislating practices which may result in efficiency gains at the chain level. Other views are that they could lead to efficiency gains and lower consumer prices if such regulation results in the building of trust and decreased transaction costs.

Swinnen and Vandevelde (2017)[367] group Member States based on how they have undertaken action to

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[362] Vavra P and Goodwin B. K. (2005) *Analysis of Price Transmission Along the Food Chain*, OECD Food, Agriculture and Fisheries Working Papers No3.

[363] Dries L. (2017), *The economic impact of unfair trading practices on upstream supplier*, presentation at the workshop 'Unfair trading practices in the food supply chain', 17 July 2017.

[364] Bukeviciute L., (2009), p.18.

[365] EU Agricultural Markets Brief, No. 5 (2015), Vavra et al. (2005).

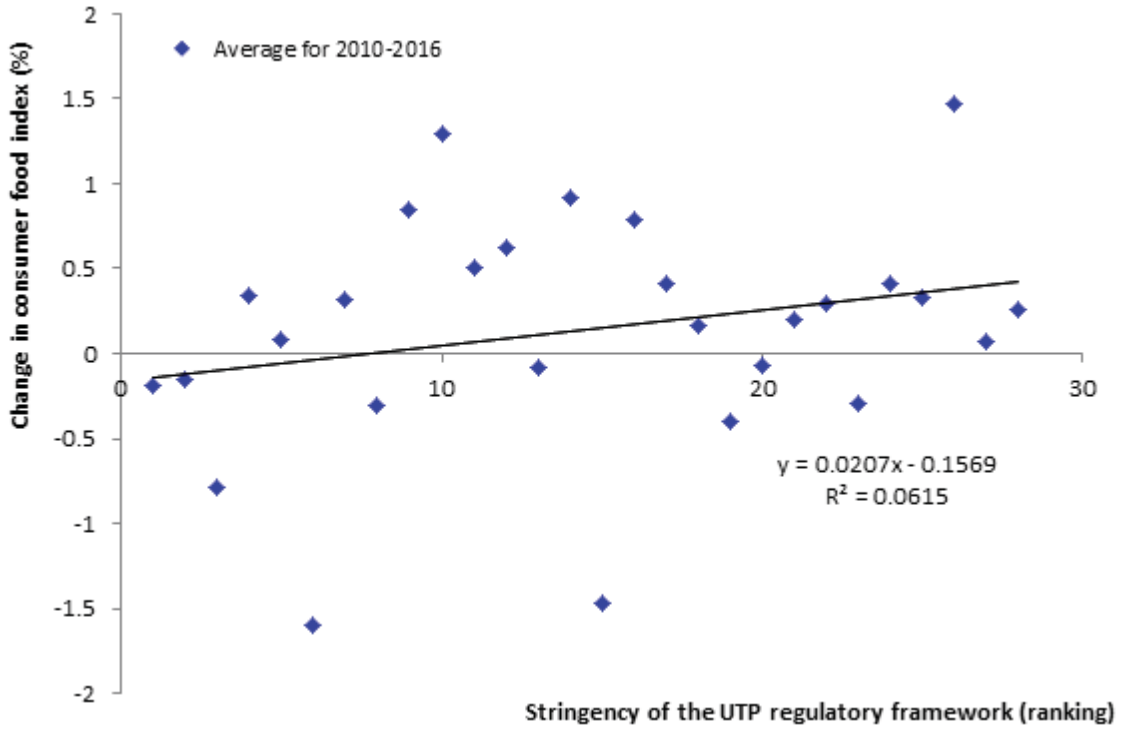
[366] This chapter has been elaborated on the basis of a longer note authored by Pavel Ciaian and Federica Di Marcantonio, from JRC Seville.

[367] Swinnen, J. and S. Vandevelde (2017), Regulating UTPs: diversity versus harmonisation of Member State rules, in Fałkowski, J., C. Ménard, R.J. Sexton, J. Swinnen and S. Vandevelde (Authors), F. Di Marcantonio and P. Ciaian

combat UTPs by considering two criteria (i) the type of legislation used (legal treatment of UTPs) and (ii) the coverage of UTPs in their legislation. Then using these two criteria, they develop a ranking of MS on the base of the stringency of their UTP regulatory framework. A preliminary work by the JRC compared this ranking of Member States with the evolution of (deflated) consumer price for food for 2010-2016 (see .

Figure *11*).

Figure 11 - Relation between Consumer food price index and stringency of UTP rules

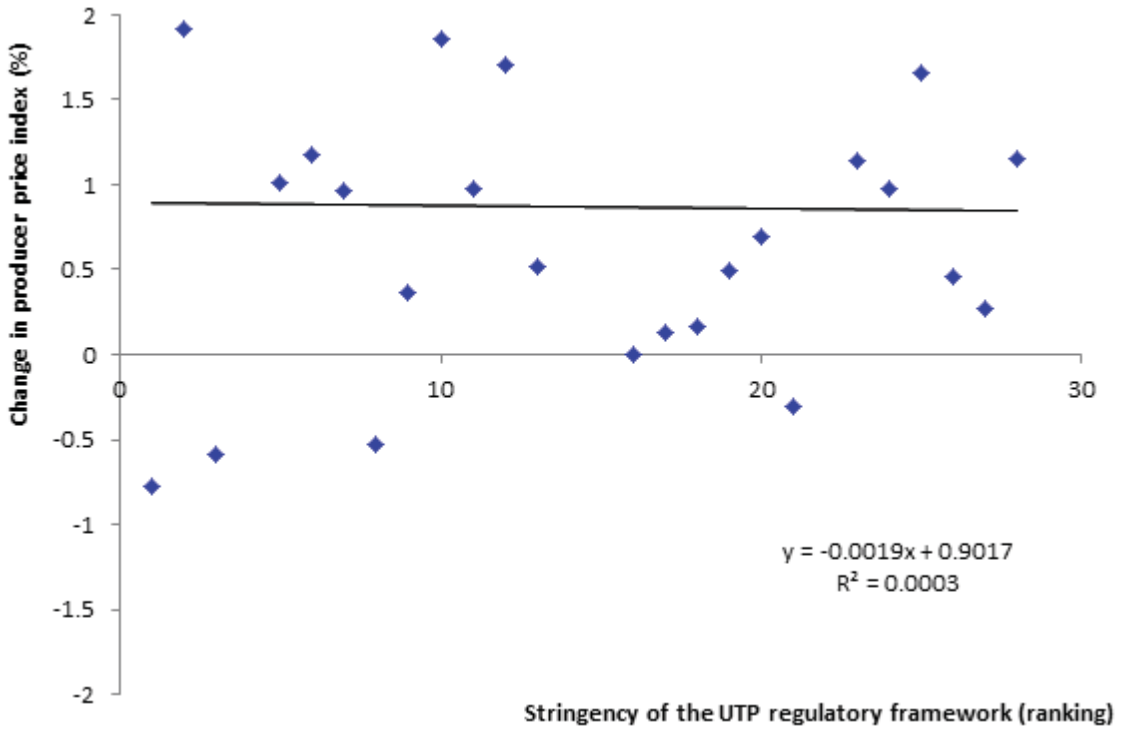


Source: JRC

The comparison shows that the correlation between the stringency of UTP rules (1) and consumer food prices is weak (Member States with the more stringent rules on the left in figure 10). Many factors other than rules on UTPs are at play in the determination of the evolution of food consumer prices. If anything, the poor correlation shows that Member States with more stringent rules seem to enjoyed lower food price increases than Member States with less stringent UTP rules. There are similar results for longer periods (2005-2016; see figure 11).

(Editors) (2017), Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects, European Commission, Joint Research Centre.

Figure 12 - Relation between Producer food price index and stringency of UTP rules



Source: JRC

7 Intra-EU Trade

Intra-EU trade in the food chain can be looked at both from data on firm data (exports and imports declared by firms per sector of activity in the economy), allowing a split per size of firms (Eurostat - International Trade in Goods - Trade by NACE Rev. 2 activity and enterprise size class), or from customs data (Eurostat Comext), tracing the origin of goods.

Most of the total value of intra-EU trade in goods is by large companies, with exports at about 3,073 billion in 2015[368]. A breakdown by enterprise size shows that SMEs represent approximately 39% of total intra-EU-trade.[369] For firms in agriculture, forestry and fishing most EU trade in value is by SMEs (81%), while the value is 0.5% of the total intra-EU trade. The large share of SMEs in agriculture is likely due to the relatively small size of farms when compared to other economic actors (large companies having more than 250 employees). For food product manufacturers most EU trade in

[368] Source: Eurostat - International trade in goods - Trade by NACE Rev. 2 activity and enterprise size class - 01/12/2017 update.

[369] Because of lack of data on intra-EU exports by company size for agriculture, forestry and fishing, the calculations exclude Estonia, Ireland, France, Italy, Cyprus, Latvia, Luxembourg, Malta, Austria, and Finland. Comparisons are made like-for-like for the remaining Member States. The Member States used in the calculations represent 76.7% of total intra-EU trade. Where data were reported but company size listed as 'unknown' these data were assigned to companies with 250 employees or more to provide a conservative estimate in relation to the significance of SMEs.

value is by large companies, but SMEs have a significant share in value traded intra-EU (43%). Intra-EU food product trade represents approximately 4.5% of total intra-EU trade.

In terms of the number of enterprises involved in intra-EU trade, the majority of these are SMEs, as is to be expected (approximately 88% of firms involved in intra-EU trade are SMEs, 59% are micro enterprises, i.e. have fewer than 10 employees). The share of SMEs is slightly higher for agri-food: approximately 94% of agriculture, forestry and fishing firms involved in intra-EU trade are SMEs (but the vast majority of these are micro enterprises, at 71%) and approximately 91% of food product manufacturers involved in intra-EU trade are SMEs (32% are micro enterprises).

By products (Eurostat Comext), for a selection of products aiming at representing the food sector, the total value of intra-EU trade represented around EUR 250 billion, which is equivalent to around 25% of the total turn-over of the food manufacturing industries (and above 15% of the turnover of food wholesale and retail trade turnover). In order to check whether less processed products would be less traded than processed ones, the share of intra-EU trade in quantity over the total production in the EU for several products was considered. Such a share is at a minimum around 20% for cereals (unprocessed) or apples and pears, and around 30% for most commodities like pigmeat, sheep meat, poultry, wine and even higher for tomatoes (fresh) or beef meat (40%) or olive oil (over 50%).

Table 2 - Value of intra trade / number of firms involved in intra-EU trade per size of enterprise

VALUE	All economic activities		Agriculture, forestry and fishing		Manufacture of food products	
	Value (thousand euro)	% of total	Value (thousand euro)	% of total	Value (thousand euro)	% of total
Total	2,357,584,071		12,707,198		105,548,153	
From 10 to 49 employees	216,827,542	9.2%	3,564,990	28.1%	8,374,110	7.9%
From 50 to 249 employees	394,800,531	16.7%	3,313,138	26.1%	34,910,161	33.1%
250 employees or more	1,445,345,221	61.3%	2,403,862	18.9%	60,483,655	57.3%
SMEs	912,238,850	38.7%	10,303,336	81.1%	45,064,499	42.7%

NUMBER OF ENTERPRISES						
	All economic activities		Agriculture, forestry and fishing		Manufacture of food products	
	Number of enterprises	% of total	Number of enterprises	% of total	Number of enterprises	% of total
Total	949,631		30,660		18,435	
Fewer than 10 employees	563,833	59.4%	21,654	70.6%	5,941	32.2%
From 10 to 49 employees	202,002	21.3%	5,584	18.2%	6,580	35.7%

From 50 to 249 employees	69,110	7.3%	1,489	4.9%	4,191	22.7%
250 employees or more	114,686	12.1%	1,933	6.3%	1,723	9.3%
SMEs	834,945	87.9%	28,727	93.7%	16,712	90.7%

Notes

** Where data were reported but company size listed as 'unknown' these data were assigned to companies with 250 employees or more.

Table 3 Value of intra EU-28 trade in €

PRODUCT/PERIOD	Jan.-Dec. 2012	Jan.-Dec. 2013	Jan.-Dec. 2014	Jan.-Dec. 2015	average 2012-15
01 Live animals	8 035 032 611	8 574 692 738	8 287 481 756	8 208 733 416	8 415 399 996
02 Meat and edible meat offal	34 751 794 952	35 010 425 513	35 257 075 435	35 286 150 349	35 334 499 761
03 Fish and crustaceans, molluscs and other aquatic invertebrates	13 991 110 482	15 021 990 879	16 262 271 457	17 609 588 241	15 721 240 265
04 Dairy produce; birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included	30 154 507 411	33 498 488 464	34 481 985 788	31 948 431 522	31 674 244 075
07 Edible vegetables and certain roots and tubers	16 261 215 099	17 910 805 202	17 157 930 501	18 889 263 192	20 020 570 549
08 Edible vegetables and certain roots and tubers	19 134 162 514	20 610 409 885	20 980 947 628	24 287 118 844	25 239 812 697
10 Cereals	14 391 229 193	14 055 605 383	12 891 025 649	13 154 430 816	12 638 984 177
11 Products of the milling industry; malt; starches; inulin; wheat gluten	3 675 586 812	3 854 359 829	3 867 731 105	3 897 716 357	3 970 085 540
12 Products of the milling industry; malt; starches; inulin; wheat gluten	9 719 964 520	9 435 030 193	8 530 418 394	8 789 223 011	9 355 969 287
15 Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes	16 257 283 119	16 488 253 545	15 414 235 214	15 831 026 509	16 916 470 217
1601 Sausages and similar products, of meat, meat offal or blood; food preparations based on these products	2 099 080 353	2 306 832 799	2 329 081 121	2 409 118 913	2 582 628 501
1602 Other prepared or preserved meat, meat offal	5 124 615 383	5 245 676 709	5 372 690 872	5 668 458 559	5 591 478 380

or blood					
1604 Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs	2 621 406 685	2 711 080 752	2 823 571 128	2 959 234 833	2 778 823 350
1605 Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved	856 201 307	869 182 902	952 022 023	1 129 258 120	951 666 088
17 Sugars and sugar confectionery	9 268 823 595	8 931 773 172	8 435 873 007	8 106 652 155	8 611 246 113
19 Preparations of cereals, flour, starch or milk; pastry cooks' products	18 475 109 746	19 687 440 889	20 506 053 275	22 207 306 291	23 543 300 860
20 Preparations of vegetables, fruit, nuts or other parts of plants	16 340 884 695	16 972 512 716	17 258 372 601	18 086 224 958	19 125 947 273
21 Miscellaneous edible preparations	15 430 098 371	16 027 479 674	17 069 555 161	18 153 092 868	18 985 180 078
TOTAL FOOD	219 119 388 374	228 609 786 711	227 840 457 507	234 922 947 760	227 623 145 088
TOTAL FOOD fish included 3 FISH and ex 16 Prepared fish products	236 894 240 467	247 710 168 376	248 283 253 804	256 980 890 559	247 467 138 302

Source: Comext

Table 4 Share of intra EU trade in total turnover of food industry / food and retail services

	2012	2013	2014	2015	average
Turnover or gross premiums written EU 28 - Manufacture of food products (mio €)	916 154.0	938 547.2	944 594.2	956 083.2	938 845
Turnover or gross premiums written EU 28 – Retail and food services (mio €)	1 516 554.8	1 517 537.9	1 574 759.4	1 621 658.9	1 557 628
Share of food intra EU trade	23.9%	24.4%	24.1%	24.6%	**24.2%**

on food industries turnover (fish excluded)					
Share of food intra EU trade on food industries turnover (fish included)	25.9%	26.4%	26.3%	26.9%	**26.4%**
Share of food intra EU trade on retail and food services turnover	14.4%	15.1%	14.5%	14.5%	**14.6%**

Source: Eurostat

Table 5 Share of Intra EU trade over total production (in %)

	1000 t	2012	2013	2014	2015	2016	average
Cereals (including seeds)	Production	281693	307606	330975	314409	296835	
	Intra EU trade CN10	54847	54110	57408	60922	61406	
		19.5%	17.6%	17.3%	19.4%	20.7%	**18.9%**
Tomatoes	Production* (for fresh use)	6548	6904	6795	7260	7848	
	Intra EU trade CN 0702	2529	2674	2721	2821	2719.663	
		38.6%	38.7%	40.0%	38.9%	34.7%	**38.2%**
Apples & pears	Volume* (source: estimate from WAPA)	11983	13256	14936	14659	13952	
	Intra EU trade CN 0808	2992	2870	2942	3581	3142	
		25.0%	21.7%	19.7%	24.4%	22.5%	**22.7%**
Wine	Volume	140314	170411	163413	165310	161505	
	Intra EU trade CN 2204	48 541	46 668	50 307	49 504	47 745	
		34.6%	27.4%	30.8%	29.9%	29.6%	**30.5%**
Olive oil	Volume	1463	2483	1434	2324	1743	
	Intra EU trade CN1509	918	863	1126	919	991	
		62.8%	34.8%	78.6%	39.6%	56.9%	**54.5%**
Cattle	Volume	7868	7529	7695	7846	8099	
	Intra EU trade CN0102-0201-0202	3033	2972	3037	3135	3215	
		38.6%	39.5%	39.5%	40.0%	39.7%	**39.4%**
Pig	Volume	22769	22595	22782	23490	23761	
	Intra EU trade CN0103-0203	6851	7009	7107	7327	6938	
		30.1%	31.0%	31.2%	31.2%	29.2%	**30.5%**
Sheep and goats	Volume	928	901	900	924	931	
	Intra EU trade CN0104-0204	283	287	285	284	292	
		30.6%	31.9%	31.6%	30.7%	31.4%	**31.2%**
Poultry	Volume	12 715	12802.96	13280.64	13799.32	14484.97	
	Intra EU trade CN0105-0207	4 569	4 649	4 940	5 102	5 180	
		35.9%	36.3%	37.2%	37.0%	35.8%	**36.4%**

Fish (catches + aquaculture)	Volume	6182	6122	6251	6081		
	Intra EU trade CN 03 – 1604 - 1605	4468	4646	4872	5184		
		72,3%	75,9%	78,0%	85,2%		**77,8%**

8 Share of cooperative products in retail sales

Companies' share of retail sales of all packaged dairy products may be estimated from of Euromonitor data (aggregation of butter and margarine, drinking milk products, cheese, yoghurt and sour milk drinks, and other dairy products). The percentage of cooperative groups is calculated in relation to the sales of identified companies (top 25 to 50 companies depending on the Member State) and extrapolated to the total.

Table 6 - Share of cooperative dairy products in retail sales (%)

France	2012	2013	2014	2015	2016	2017	Average
Identified cooperative groups	8,3	8,4	8,5	8,85	9,2	9,4	8,8
Identified private groups	47,8	47,6	47,4	47,6	48,9	49,4	48,1
Unidentified	43,9	44,0	44,1	43,6	41,9	41,2	43,1
Share cooperatives	14,8	15,0	15,2	15,7	15,8	16,0	15,4
Germany							
Identified cooperative groups	10,8	11,2	10,9	10,6	10,6	10,6	10,8
Identified private groups	34,1	33,2	33,1	32,9	32,5	32,8	33,1
Unidentified	55,1	55,6	56,0	56,5	56,9	56,6	56,1
Share cooperatives	24,1	25,2	24,8	24,4	24,6	24,4	24,6
Italy							
Identified cooperative groups	15,9	17,0	17,2	17,3	17,0	17,0	16,9
Identified private groups	37,8	38,4	38,4	38,3	37,8	37,4	38,0
Unidentified	46,3	44,6	44,4	44,4	45,2	45,6	45,1
Share cooperatives	29,6	30,7	30,9	31,1	31,0	31,3	30,8
Spain							
Identified cooperative groups	6,9	6,5	6,5	6,6	6,5	6,3	6,6
Identified private groups	44,5	43,3	42,4	41,8	42,4	42,4	42,8
Unidentified	48,6	50,2	51,1	51,6	51,1	51,3	50,7
Share cooperatives	13,4	13,1	13,3	13,6	13,3	12,9	13,3

Source: DG AGRI from Euromonitor

9 Share of agricultural products (in the meaning of the Treaty) in retail sales

On the basis of the Euromonitor database of retail sales of packaged food products and fresh food products, one can calculate the share of products under Annex I in the Treaty within the tool food sales at the retail stage. As the classification of products in Euromonitor database on packaged food are not coinciding with the legal classification, some assumption should be made. Annex I products are assumed to be covered by the following items in Euromonitor classification in the following calculations: butter, cheese, drinking milk products, yoghurt and sour milk products except fruited and flavoured yoghurts, condensed milk, cream, fresh cheese, oils, processed fruit and vegetables, processed meat, processed seafood, rice, honey, jams and preserves, fruit snacks. Other packaged foods such as baby food, baked goods, breakfast cereals, flavoured and fruited yoghurts and other dairy-base desserts, frozen desserts, ice cream, meat substitutes, ready meals, noodles and pasta, sauces, savoury snacks, chocolate nuts and yeast spreads, snack bars and sweet biscuits are taken into account for products that are non-Annex I of the Treaty products. Concerning fresh foods (unpackaged), all goods covered by Euromonitor (eggs, fish and seafood, fruits, meat, nuts, pulses, starchy roots, sugar and sweeteners, vegetables) are clearly Annex I of the Treaty products and are considered as such. By

assumption too, beverages sales as well as goods covered by the database 'hot drinks' (including, coffee, tea etc.) in Euromonitor were not considered.

The share of "agricultural" products (in the meaning of being listed in Annex I of the Treaty) within packaged food sold at retail stage (*Table 7*) is, under these assumptions, estimated to be around 40% at EU level, lower in some MS like Ireland, Austria, Croatia or the UK (32 to 35%), and higher in other up to 45% in Sweden or 47% in Hungary.

Table 7 - Share of 'agricultural' products in total retail sales of packaged food (%)

	2012	2013	2014	2015	2016	2017	2012-2017 (average)
Austria	33,1	33,1	33,1	32,9	32,6	32,4	32,9
Belgium	40,7	40,9	40,9	40,9	40,7	40,5	40,8
Bulgaria	43,7	43,3	43,0	42,9	43,0	43,1	43,2
Croatia	36,3	36,0	35,5	34,4	33,8	33,5	34,9
Czech Republic	42,8	43,5	43,8	43,4	43,1	43,6	43,4
Denmark	43,8	43,8	43,2	42,4	42,3	42,1	42,9
Estonia	39,6	40,1	40,6	40,5	40,5	40,6	40,3
Finland	40,5	40,9	41,0	40,4	40,0	40,4	40,5
Greece	40,7	40,7	40,7	40,5	40,1	39,4	40,4
Hungary	46,9	46,9	47,5	47,3	47,1	47,0	47,1
Ireland	32,6	32,4	32,4	32,5	32,7	32,9	32,6
Latvia	45,2	45,1	45,0	44,7	44,7	44,7	44,9
Lithuania	42,4	42,4	42,8	42,6	42,4	42,4	42,5
Netherlands	37,3	37,0	37,2	37,2	37,3	37,2	37,2
Poland	36,4	36,7	36,9	37,3	37,7	38,6	37,3
Portugal	44,1	44,3	44,3	43,8	43,6	43,4	43,9
Romania	38,4	39,7	40,0	40,3	40,7	41,1	40,0
Slovakia	41,8	42,0	42,5	42,7	43,3	43,5	42,6
Slovenia	43,3	43,1	42,9	42,9	43,1	43,3	43,1
Sweden	45,2	45,3	45,3	45,0	44,8	44,6	45,0
France	42,7	42,7	42,8	42,8	42,7	42,6	42,7
Germany	39,7	40,0	39,9	39,6	39,1	39,2	39,6
Italy	41,5	41,6	41,6	41,5	41,0	40,4	41,3
Spain	44,3	44,8	44,8	44,8	44,8	44,7	44,7
United Kingdom	34,4	34,3	34,3	33,8	33,8	33,8	34,1
Total 5 MS	40,0	40,2	40,1	39,8	39,7	39,6	39,9
Total EU28	**40,0**	**40,2**	**40,1**	**39,8**	**39,8**	**39,8**	**40,0**

Source DG AGRI from Euromonitor

When adding to the picture the retail sales of fresh / unpackaged goods, the calculation can only be made for the 5 largest Member States (as the information on fresh products is not available in the other MS). The share of 'agricultural' products in the total food retail sales (under the assumptions described above) are of around 66.5% (less in the UK, France and Germany between 64 and 65%) while closer to 70% in Italy and even more in Spain (see).

Table 8 Share of 'agricultural' products in total retail sales of packaged food (%)

	2012	2013	2014	2015	2016	2017	2012-2017
France	65,0	65,0	64,9	64,7	64,5	64,3	64,7
Germany	65,2	65,2	65,3	64,8	64,7	64,7	65,0
Italy	69,6	70,0	70,2	70,0	68,8	68,6	69,5
Spain	72,0	72,4	72,2	71,8	71,6	71,4	71,9
United Kingdom	63,3	63,5	64,0	64,2	64,5	65,0	64,1
5MS	66,5	66,7	66,8	66,5	66,2	66,2	66,5

Source DG AGRI from Euromonitor

Annex D: Table on transposition of Late Payment Directive in Member States in terms of payment terms[370]

COUNTRY	TRANSPOSITION OF DIRECTIVE 2011/7/EU INTO NATIONAL LEGISLATION (MAXIMUM DELAY FOR PAYMENT)			COMMENTS
	Public Authorities	Business to business (B2B)	B2B for fresh/perishable products	
BELGIUM	30 days with an exception of 60 days for public health authorities (Law of 22 November 2013)			This law is only applicable between enterprises and public authorities as a general framework for commercial transactions.
BULGARIA	30 days with a possible extension to 60 days if: - it is objectively justified in light of the particular nature or feature of the goods/services; and - it is not grossly unfair to the creditor and contrary to good faith.	60 days with possibility of extension based on same arguments as for public authorities Where the date or period for payment is not fixed in the contract, the creditor is entitled to interest for late payment, with no obligation to send a reminder to the debtor, upon expiry of 14 calendar days following the date of receipt by the debtor of	30 days for food retail industry Bulgarian Food act, State Gazette No 90 of 15 October 1999.	http://www.lexology.com/library/detail.aspx?g=8532815f-db3d-460c-a9a9-6d53d5838106

[370] Some of the information provided in this table has been taken from the Interim Report for an ongoing Study of DG Grow' Business to business transactions: a comparative analysis of legal measures vs. soft law instruments for improving payment behaviour.

		the invoice or an equivalent request for payment (or after receipt of the goods).		
CZECH REPUBLIC	60 days	30 days unless parties agree otherwise	30 days for food retail contracts Act 395/2009, Article 3 a) on Significant Market Power in Selling of Agricultural and Food Products	Any payment period exceeding 60 days in B2B transactions may be agreed upon only if it is not grossly unfair to the creditor within the meaning of the provisions of the EU Directive 2011/7.
DENMARK	30 days with a possibility for extension if expressly agreed	30 days with a possibility for extension if expressly agreed		
GERMANY	30 days	30 days. Where nothing is fixed in the contract, the payment is due immediately upon receipt of the invoice		For B2B, the law implies that a higher payment term, whilst possible to negotiate, is likely to be considered unreasonable in case of a dispute.
ESTONIA	30 days or 60 in specific circumstances	60 days; longer if expressly agreed and not unfair; 30 days if the payment date starts after receiving the goods or services or after their verification		https://www.bnt.eu/en/news-at-bnt-2/215-news/988-combating-late-payments-and-improving-payment-discipline
IRELAND	30 days with possibility to extend it to 60 days if expressly agreed by the parties	30 days with possibility to extend it to 60 days if expressly agreed by the parties		Statutory Instruments: S.I. No. 580/2012 - European Communities (Late Payment in Commercial Transactions) Regulations 2012
GREECE	60 days	60 days unless otherwise		http://www.ey.com/Publication/vwLUAssets/Platis_A

		expressly agreed and not unfair		nastassiadis_-_Late_Payments_Directive_and_transposition_in_Greek_Law/$FILE/Platis-Anastassiadis-Article-Late-Payments-20131116.pdf
SPAIN	30 days	60 days	30 days for fresh and perishable goods Ley 7/1996 Official State Journal 17.1.1996	The provision of 30 days limit for payments for fresh food and perishable products already existed in Law 7/1996 on retail trade. http://www.comercio.mineco.gob.es/es-ES/comercio-interior/Legislacion/Pdf/mindley7_1996commin_eng.pdf
FRANCE	30 days	60 days or 45 days end of month maximum	Article L443-1 of the Commercial Code: - 30 days after the end of the 10-day period from delivery for purchases of perishable food products and frozen or deep-frozen meat, deep-frozen fish, convenience foods and preserves made from perishable food products, with the exception of purchases of seasonal products made in the context of the "cultivation contracts" referred to in Articles L.326-1 to L.326-3 of the Rural Code; - 20 days after the day of delivery for purchases of live cattle intended for	

			consumption and fresh meat by-products; - 30 days after the end of the month of delivery for purchases of alcoholic drinks subject to the consumer tax specified by Article 403 of the General Tax Code….	
CROATIA	30 days with possibility of extension to 60 days in specific circumstances	60 days; a longer period may be agreed if expressly agreed, not unfair and no longer than 360 days		http://www.lexology.com/library/detail.aspx?g=02a21e88-e5c2-4ac3-ad73-c827004388cd
ITALY	30 days with exception to 60 days for transparency reasons or public health authorities.	- As a general rule, contractual payment terms must be limited to 60 calendar days, but the parties may expressly agree (in writing) on payment terms longer that 60 calendar days, provided, however, that such extension is not grossly unfair to the creditor; - If the payment term is not fixed in the contract: 30 calendar days is the rule.	30 days for fresh and perishable goods, Article 62 (3) Law Decree of 24.1.2012	
CYPRUS	30 days; 60 for health services	30 days if no date specified under contract; 60 days if agreed in the contract; can be extended		http://www.lexology.com/library/detail.aspx?g=8468d334-8025-404d-9cae-9d237d67734c

		if parties agree and not grossly unfair		
LATVIA	30 (?)	60 (?)	20 days for the supply of fresh veg and fruit, if supplied to the same retailer for 3 months and more. Article 8 (2) of the Unfair Trading Practices Act.	No clear data found
LITHUANIA	30 days or longer if agreed by the national law	60 days or longer if agreed under the national law	Maximum periods shorter than 60 days apply to diverse groups of agricultural products, depending on the payment schedule agreed Order of the Government of 6 April 2000, Official Gazette 2000, No 30-835 as last amended by Act published in Official Gazette 2013No 70-3527.	https://www.bnt.eu/en/news-at-bnt-2/215-news/899-transposition-of-directive-2011-7-eu-into-lithuanian-law
LUXEMBOURG	**30 days** payment deadline unless stipulated otherwise by contract. A longer payment period, with a maximum of 60 days, must be duly justified by the specific nature of the contract or by specific elements in the contract.	60 days or longer by explicitly defining longer payment periods in their agreement. Nevertheless, the extension of this deadline must not be grossly unfair to the creditor.		

HUNGARY	30 days	30 days if not specified in the contract; 60 days maximum if agreed by the parties	30 days for food retail contracts Act XCV of 2009 on the prohibition of unfair distributor contract vis a vis suppliers regarding agricultural an food industry products Act of 1 January 2010	In a B2B contract, a provision stipulating a payment period longer than 60 days is to be deemed as a unilateral and unreasonable derogation to the detriment of the business entity and being in violation of the principles of proceeding in good faith and fairness. Such a contractual provision may be challenged in court by the creditors.
MALTA	30 days or, in specific circumstance fixed in the contract 60 days	30 days, if not fixed in the contract with a maximum of 60 days if provided for in the contract		http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8578
THE NETHERLANDS	30 days unless clearly specified and duly justified; however, the maximum is fixed at 60 days	30 days, if there is nothing specified in the contract. Maximum of 60 days unless parties otherwise agree and it is not considered grossly unfair for the creditor NL Civil Code, Article 6:119, particular paragraph 5.		
AUSTRIA	30 days	60 days Where nothing is fixed in the contract, the payment is due without any undue delay		According to a COM Report on transposition into national legislation of Late Payments Directive, AT ranks among the MS with the shortest average number of days for payment for public contracts (7 days).
POLAND	30 days or 60 for medical entities	30 days, if nothing is stipulated in the contract; Maximum 60 days if		http://www.lexology.com/library/detail.aspx?g=393441db-781f-4d9e-b249-7e120d2a3d37

		provided for in the contract and not grossly unfair to the other party.		
PORTUGAL	30 days with the possibility to extend it to a maximum of 60 days under specific circumstances or for public health authorities	60 days maximum and parties may agree on longer deadlines for payments unless grossly unfair to the creditor	30 days for food retail contracts. Decree Law 118/2010 as amended by Decree Law 2/2013	
ROMANIA	30 days; 60 days for public health authorities	60 days with the possibility of extension if not grossly unfair to the creditor and if stipulated in the contract.	7 days for fresh food and perishable products	For fresh food and perishable products, the new deadline for payment was established by a law of 2016, which modifies the previous law on trade of agricultural and agri-food products: For fresh food and products: 7 days (by the new law of 2016!): http://www.dreptonline.ro/legislatie/legea_150_2016_modificare_legea_321_2009_comercializarea_produselor_alimentare.php
SLOVENIA	30 days	60 days maximum if stipulated in the contract with an extension up to 120 days if expressly agreed and not grossly unfair to the creditor.	45 days for perishable food. Article 61 b of the Agriculture Act	
SLOVAKIA		60 days with possibility of extension if not grossly unfair for the creditor.	30 days following the date of delivery of the duly issued invoice, but not more than 45 days after delivery of the food as provided for in *Act No. 362/2012 Coll. on Inappropriate Conditions in*	

			Business Relations which Subject is Food;	
FINLAND	30 days unless expressly mentioned in the contract	30 days unless expressly mentioned in the contract		
SWEDEN	30 days	30 days following the invoice's issuing date. This can be prolonged, if parties explicitly give their consent.		
UNITED KINGDOM	30 days	60 days if agreed in the contract or longer if agreed and not grossly unfair to the creditor; 30 days, if nothing mentioned in the contract.		https://www.gov.uk/government/consultations/consultation-on-implementing-directive-2011-7-eu-on-combating-late-payment-in-commercial-transactions

Annex E: Comparison of policy options

The aim of this Annex is to explain in greater detail the comparison of the different option packages presented and compared in sections 6.4 and 7 of the impact assessment report. The different components included in the option packages are assessed individually in respect of their effectiveness and efficiency.

Due to the lack of robust empirical and quantitative data (Annex 3 of the impact assessment report) the assessment is carried out in a qualitative manner. Individual option components are assessed and ranked on the basis of expert judgement based on the evidence referred to throughout sections 2 to 6 of the impact assessment report. The degree to which each component considered allows addressing the specific objectives of the initiative (effectiveness) and at which efficiency - as compared to the baseline situation - is assessed on a simple five-stages grid going from a double minus "- -" (more ineffective / more inefficient than the baseline) via a zero "0" (same as baseline) to a "double plus" + + (more effective / more efficient than the baseline). Two scores separated by the sign / mean that the option ranks in between the two scores concerned.

1 Degree of harmonisation of substantive UTP rules

The impact of the introduction of an EU partial harmonisation approach is assessed in terms of its effectiveness in relation to the specific objectives described in section 4. Harmonisation at EU level, even if not taking the form of a detailed harmonisation (an option discarded in section 5.2.2.), is effective in contributing to enhancing the level of protection against UTPs in the EU and to a level playing field.

As evoked in the impact assessment report, the compliance costs (usually one-off) and the cost of administration should remain limited even in those few countries which do not yet have UTP rules (savings due to the use of existing structures whose powers could be extended). Savings through a decrease of product mismanagement or transaction costs may exist to a certain extent (see section 6.2.1.1 of the impact assessment report).

			Option **Partial harmonisation of substantive UTP rules**
Effectiveness	Specific objectives	Reduce UTPs	+/0
		Contribute to level playing field	+
		Enable effective redress	+
Efficiency	Costs		0/-
	Savings		+/0

Overall, the partial harmonisation of substantive UTP rules can be judged to be more effective (+) than the baseline with at least a similar degree of costs / savings as under the baseline, thus being more efficient than the baseline (+).

2 Scope of UTP definition

Introducing a short list of prohibited unfair trading practices (**Option 1**) would serve to reduce the occurrence of these UTPs, in particular if paired with effective enforcement. Such measures would be expected to reduce the occurrence of the UTPs concerned and contribute to a level playing field.

Prohibiting specific UTPs would fall short of tackling all UTPs occurring in the food supply chain. Member States would retain discretion to go further than the EU approach subject to general EU law. Some will do so (or will have done so) while others may not. Beyond the common basis, there would therefore continue to be divergence of rules and dissimilar commercial conditions for operators although to a lesser degree when compared to the baseline. Therefore, a general prohibition at EU level based on principles of fairness (**Option 2**) could probably be more effective in terms of reducing UTPs and the divergence of rules by addressing a wider number of trade practices and contributing to a level playing field.

The relative openness of a general UTP prohibition at the EU level – for instance based on fairness - and the possible spill-over effects it would have on national UTP rules suggest that it may be less efficient as it would raise questions concerning its complementarity with Member States measures. Legal certainty considerations may have an impact on commercial transaction costs under this option.

			Option 1 Specific prohibition	Option 2 General prohibition
Effectiveness	Specific objectives	Reduce UTPs	+	++
		Contribute to level playing field	+	0
		Enable effective redress	n.a.	n.a.
Efficiency	Costs		0	-
	Savings		0	0/-

Overall, both options can be considered as more effective than the baseline, the first one both for reducing UTPs and ensuring a level playing field, the second one for covering a wider range of potential UTPs. However, because of the legal questions raised in relation to existing national regimes and also political considerations of feasibility, the option of a general prohibition seems less efficient than the option of a specific prohibition of certain UTPs when compared to the baseline.

As mentioned in sections 5.3.3, 6.1 of the impact assessment report and in Annex H of the impact assessment report (contribution of DG COMP's chief economist), certain trade practices considered as unfair when applied unilaterally and/or retroactively can create efficiencies when agreed ex ante by the parties. Therefore, a differentiated treatment of these practices (namely upfront payments and contributions to promotion and marketing costs) depending on their ex ante or ex post character would further improve the efficiency of **Option 1**.

3 Coverage of products

Coverage of all food products including agricultural and processed agricultural products (**Option 1**) would seem suited to address the problem of the occurrence of UTPs in the food supply chain. The distinction between agricultural products (which include many processed products like oils, preserved goods, dairy and meat products etc.) and processed agricultural products in the TFEU has legal import but both types of products are traded along the same food supply chain delivering products downstream to the final consumer.

A comprehensive product coverage would therefore better address the existing problem of under-protection against UTPs in certain Member States in respect of the specific UTPs targeted by the initiative. It would be more effective in achieving the specific objectives related to reducing the occurrence of UTPs and to contributing to a level playing field.

While an approach of only covering agricultural products (**Option 2)** would mean a step towards better governance of the EU food supply chain and partly achieve the objectives, it would only cover a sub-set of the products traded in the food supply chain. What is more, as described in section 6.2.2, limiting the coverage to agricultural products could have unintended consequences such as trade diversion.

			Option 1 All food products	Option 2 Agricultural products
Effectiveness	Specific objectives	Reduce UTPs	++	+
		Contribute to level playing field	++	+
		Enable effective redress	n.a.	n.a.
Efficiency	Costs		0	-
	Savings		n.a.	n.a.

Overall, in terms of both effectiveness and efficiency, **Option 1** covering all food products performs better than the option limited to agricultural products.

4 Operators covered

In terms of effectiveness, the reduction of UTP occurrences should be roughly the same for Option 1 (all operators) and Option 2 (SMEs) as in both cases weaker operators, which are the operators more likely to be victims of UTPs, are covered across the chain. Having said this, Option 1 would, by definition, be more comprehensive than a targeted applicability that specifically protects weaker parties (such as SME operators). As regards the contribution to a level playing field, operators throughout the EU would all be covered by the same arrangements; as regards enabling effective redress, the two options should not have different impacts either.

As regards efficiency, universal applicability of UTP rules presents a higher probability that suppliers which are not in a situation of stark bargaining power imbalance could use UTP rules

to improve their commercial conditions. This could result in possible efficiency losses in the food chain, and therefore higher overall costs / lower gains for actors in chain including consumers.[371] Protection targeting weaker operators would avoid these risks and therefore score better both in terms of less costs and more gains, although it may carry a risk of inadvertent trade diversion due to the risk of a party's protection deterring its partners from trading with it.[372]

As regards the coverage of 3rd country suppliers, the public interest character of UTP rules – as opposed to a mere inter-party contractual arrangement issue – justifies covering foreign suppliers too and thus addressing the risk of trade diversion as well dissimilar treatment of foreign operators.[373]

			Option 1 All operators	Option 2 Protection of SMEs across the chain
Effectiveness	Special objectives	Reduce UTPs	++	++
		Contribute to level playing field	++	+
		Enable effective redress	n.a.	n.a.
Efficiency	Costs		-	0
	Savings		+	++

Overall, in terms of effectiveness, **Option 1** covering all operators performs slightly better (++) than the Option limiting the coverage to transactions characterised by an imbalance of power or to operators involved in agriculture (between ++ and +), but a selected approach would ensure a higher degree of efficiency.

5 Enforcement

Option 1, below called "minimum enforcement requirements plus", consists of best practices in terms of enforcement powers encountered in Member States. It would usefully accompany the UTP rules introduced at the EU level. It scores highly as regards effectiveness in relation to the achievement of the objectives, in particular effective redress. The actual costs of introducing the

[371] Annex H, European Commission, DG COMP Chief Economist note, Economic impact of unfair trading practices regulations in the food supply chain, January 2018, p. 3.

[372] See Irish Department of Jobs, Enterprise & Innovation, Regulatory Impact Analysis, 2016, Consumer Protection Act 2007, in relation to waterbed effects occurring across the border with UK: "*Finally, such regulation might also make the sourcing of goods from outside of the State more cost effective for retailers/wholesalers, thereby impacting on Irish-based suppliers with knock-on effects for their viability, competitiveness and employment creation potential.*", p. 9.

[373] See the Report from the European Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain, 29 January 2016, p. 2. See also British Institute of International and Comparative Law, Fair Relations in the Food Supply Chain - Establishing Effective European Enforcement Structures, paper of 2014, p. 11.

requirements depend on the Member State concerned.

The restricted list of enforcement requirements (**Option 2**) also has the vocation to improve effective redress in Member States. Its scope is, however, restricted to a few basic enforcement modalities (competent authority, confidential complaints and own-initiative investigations). It scores lower, therefore, on effectiveness.

Both options would operate on the basis of a decentralised enforcement by Member State authorities. This entails increased costs for national administrations, albeit of the relatively moderate amounts (especially where economies of scope can be realised due to existing structures). In addition, by allowing tackling the fear factor, these options would both generate significant benefits for stakeholders and the food chain.

			Option 1 Minimum requirements +	Option 2 Minimum requirements -
Effectiveness	Specific objectives	Reduce UTPs	+	+
		Contribute to level playing field	+	+
		Enable effective redress	++	+
Efficiency	Costs		-	-/0
	Savings		++	+

Overall, in terms of effectiveness, a more complete enforcement regime would enable to achieve larger effectiveness of enforcement; in terms of efficiency, both options are comparable as costs and benefits increase with a more extended version.

6 Coordination of enforcement

The options are either to introduce a coordination mechanism bringing together Member States' enforcement authorities or not. Coordination among enforcement authorities would be a measure accompanying the introduction of common UTP rules and minimum enforcement requirements.[374] It would indirectly be conducive to the goals pursued by the initiative, that is to say the reduction and deterrence of UTPs and the levelling of the playing field for operators in Member States. Coordination would have the main vocation of aligning the application of the EU rules. It would also serve as a platform to gather data on UTPs and their enforcement that could provide valuable input for a policy review and possible adjustments (see section 9 of the impact assessment report) as well as to exchange best practices.

In terms of coherence, in several Member States which have national rules on UTPs, national competition authorities or consumer protection authorities have been entrusted with the enforcement of UTP rules in the business-to-business field (see Annex G of the impact assessment report).

[374] *Idem*, p. 5.

			Option 1 Network of dedicated authorities
Effectiveness	Specific objectives	Reduce UTPs	+
		Contribute to level playing field	+
		Enable effective redress	n.a.
Efficiency	Costs		-
	Savings		+

Overall, this Option allows some degree of effectiveness with balanced costs and benefits.

7 Legal instrument

Options 1 and 2 would be to adopt mandatory regulatory measures in the form of respectively a regulation or a directive. **Option 3** would be to recommend measures to Member States. In terms of effectiveness, a mandatory legal tool (regulation or directive) obviously gives higher assurance that the rules will be applied than a mere recommendation. A regulation may be slightly more effective in ensuring a level playing field as it does not depend on Member States' transposition to the same degree as a directive. As mentioned in the impact assessment report, mutual synergies can be found between regulatory and voluntary approaches and one could reinforce the value and effectiveness of the other. In terms of efficiency, costs would likely be lower under a recommendation approach but "savings" could remain elusive if the Commission's recommendations are not being followed. A directive would imply lower costs in terms of adapting national rules than a regulation as a regulation would not enable Member States to adapt the rules in accordance with their national specificities.

			Option 1 Regulation	Option 2 Directive	Option 3 Recommendations
Effectiveness	Specific objectives	Reduce UTPs	+	+	+/0
		Contribute to level playing field	++	+	+/0
		Enable effective redress	+	+	+/0
Efficiency	Costs		-	0	+
	Savings		0	+	+/0

8 Comparison of option packages

Four option packages are presented in section 6.4 of the impact assessment report. The four packages all presuppose a partial harmonisation of UTP rules at the EU level. Against this common backdrop, the differentiated packages are drawn up working off the options discussed

in sections 5 and 6 of the impact assessment report.

A principle-based UTP prohibition in **Package 1** is contrasted with a definition of a list of a limited number of manifest UTPs to be proscribed in the three other packages. The **Packages 2, 3 and 4** would introduce a short list of specific UTP rules meant to protect weaker operators (SMEs). Under **Packages 1 and 2** the measures apply to all operators (and products) in the food supply chain. **Packages 2 and 3** would cover trade in food products. In **Package 4** the scope is limited to agricultural products. The instruments are a regulation (**Package 1**), a directive (**Packages 2 and 3**) and a recommendation (**Package 4**).

	Package 1		**Package 2**		**Package 3**		**Package 4**	
	"General coverage & enhanced enforcement and coordination"		"Targeted coverage - all operators & enhanced enforcement and coordination"		"Targeted coverage - protection of SMEs & enhanced enforcement and coordination“		"Targeted coverage - protection of SMEs & enforcement and coordination (recommendation)"	
	Effective-ness	Efficiency	Effective-ness	Efficiency	Effective-ness	Efficiency	Effective-ness	Efficiency
Degree of harmonisation	+	+	+	+	+	+	+	+
Scope of UTP rules	+	-	+	0	+	0	+	0
Coverage of operators	++	0	++	0	++/+	+	++/+	+
Coverage of products	++	0	++	0	++	0	+	-
Enforcement	++	+	++	+	++	+	+	+
Coordination	+	0	+	0	+	0	0	0
Legal instrument	+	-	+	0	+	0	0	0

By drawing on the previous sections, a comparison of the option packages in terms of effectiveness and efficiency (compared to the baseline of each subcomponent) can be carried out.

Package 1 may bring the highest effectiveness, but there is a trade-off with the higher costs it entails for administrations by foreseeing a wide scope of prohibited trading practices and for stakeholders by possibly entailing an issue regarding the uncertain and divergent interpretations of a general prohibition laid down at the EU level. **Package 4** is characterised by the opposite trade-off: a relatively low effectiveness, particularly with regard to enforcement, but also lower costs of implementation. **Packages 2 to 3** show intermediate results with a rather high degree of effectiveness for **Package 2** thanks to a wider coverage of operators. From the point of view of

efficiency, **Packages 3 and 4** are better targeted to those operators / transactions likely to involve UTPs as they would be characterised by differences in bargaining power.

Based on the above (table), **Package 3** would appear as the preferred one ("Protection of SMEs & enhanced coordination and enforcement"). It is more effective in achieving the specific objectives of the initiative than **Package 4**, thanks to a broader coverage in terms of products and more extensive enforcement modalities as well to it legally binding delivery (directive). It is likely to perform slightly less well in terms of effectiveness compared to a wider approach that would cover UTPs by way of a general prohibition (**Package 1**) or for all operators in the chain (**Package 2**). However, in terms of efficiency, **Package 1** would entail a higher risk of uncertainty and costs for operators in the food chain and **Package 2** a higher risk of not being proportionate to the objectives and therefore result in inefficiencies.

It has to be noted that the above comparison and assessment are qualitative. There is no complete body of empirical studies one could draw on. The operation of an EU facilitated coordination mechanism among Member States, anchored in EU rules, could favour the development of such a body of empirical knowledge concerning UTPs and facilitate later improvements of the rules.

Subsidiarity

In terms of subsidiarity, the discarded option of detailed harmonisation (see section 5.2.2 of the impact assessment report) would imply that Member States' rules are changed, without them being able to address specificities relating to national business customs. At this stage, considerations of subsidiarity would militate against detailed harmonisation.

Similarly, **Package 1**'s general approach in terms of UTP rules prohibited might eventually have a quite high harmonising impact on Member States. This aspect was taken into account in the assessment of its efficiency. **Package 1** is likely to raise more questions in relation to subsidiarity than the other three Packages presented.

Proportionality

The scope of **Packages 3 to 4** which is limited to operators who are more likely to be affected by UTPs due to situations of imbalance of bargaining power is more proportionate in relation to the problem identified than the broader **Packages 1 and 2**. As discussed in particular in sections 5.3 and 6.2 of the impact assessment report, addressing the different practices at issue individually allows taking possible countervailing efficiencies into consideration, which, as has been explained, may exists in situations where parties agree or "authorise" practices upfront and thus create win-win situations. Costs for the whole food chain could increase if such cases were not taken into due account.

Annex F: Study - Overview on “Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain”

(for DG Agri and European Commission - Joint Research Center Ares(2017)5377697)

by Fabrizio Cafaggi and Paola Iamiceli

February 2018

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Fabrizio Cafaggi and Paola Iamiceli

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I) Introduction

The reaction to unfair trade practices (UTPs) in agri-food chains has become a key feature of agricultural policies at State, regional and global level. It is part of a more general phenomenon concerning the governance of global chains[376]. The increased level of global trade in agriculture has called for new approaches tackling unfair practices beyond states' boundaries. Increasingly bargaining power is unevenly distributed along global chains. There has been a growing concentration at the retailer and processors levels while producers remain relatively small and fragmented[377].The distribution of value along agri-food supply chains has changed over the last years[378]. Low prices at production level make farmers more vulnerable to UTPs[379]. Costs generated by regulation have been shifted. Regulatory burdens imposed by countries of the product's final destination are often borne by suppliers and farmers. In such an environment the likelihood of UTPs in global chain increases and the lack of adequate institutional responses does not permit addressing the significant market failures related to UTPs.

UTPs hinder trade in agricultural commodities, negatively affect competition, burden producers with additional risks and costs that may undermine the objectives of the European common agricultural policies (CAP). UTPs can condition access to the chain and determine exit from the chain reducing farmers' market opportunities to grow or even to survive[380].

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

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[375] A Report for DGAGRI based on contract n. Ares(2017)5377697 with the JRC of Seville.
The Report and its Annex are based on data and information gathered through a consultation launched by DG AGRI in October 2017 with the cooperation of experts and respondents from the 28 MSs as a follow-up of a previous consultation launched in 2015. For Greece only the answers provided in the 2015 survey have been available; neither survey was successful for Malta.

[376] See Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, FINAL REPORT 26 February 2014, Prepared for the European Commission, DG Internal Market (DG MARKT/2012/049/E), available at http://ec.europa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf.

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

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

[379] See EU Commission Report Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final, p. "While UTPs are not the cause of the recent price declines, the low prices have made farmers more vulnerable to potential unfair behaviour by their trading partners."

[380] See J. Lee, G. Gereffi and J. Beauvais, Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries, (2012) 109(31) Proceedings of the National Academy of Science 12326-12331. OECD Competition issues in the food chain industry; Havinga and Verbruggen (eds.), Elgar, 2017.

food supply chain[381]. Meanwhile MSs have adopted different measures often combining legislation and forms of steered private regulation.

Legislation exists at MSs level but regulatory approaches diverge both in terms of instruments and practices[382]. So far, 24 MSs have legislated on UTPs and 12 specifically in food chains[383]. Legislative approaches differ between principle and detailed rules. In some MSs legislation is principle-based with general clauses prohibiting unfair practices, and leaving the enforcers the task to determine specific prohibited practices. In other MSs, legislation is very detailed, deploying black lists to exemplify prohibited practices[384]. Many legislations combine general clauses with lists of practices. In the latter case enforcers have less discretion but the risk of under-deterrence is higher when new unfair practices emerge. Principle-based legislation on the contrary leaves more discretion to enforcers but it can address new forms of UTPs as they arise. Differences concern also the instruments. A few countries have simply extended consumer protection legislation to farmers and producers. The majority has opted for a different route, enacting specific BtoB legislation motivated by the different types of practices and the need for specific supply chain remedies. The private regulation regime introduced with the Principles of good practice also reflects a combination of general principles and a list of unfair practices paired with good practices[385].

There is no full consensus over the definition of UTPs and how different trade practices are qualified unfair (see below for in-depth analysis). Nor there is agreement over the instruments in addition to competition law, whose effectiveness was questioned by a ECN study in 2012[386]. Not only MSs diverge on the relative weight of competition law versus contract or extra-contractual liability to contrast UTPs but, even for violations addressed with the same instrument (contract, unfair compaetition) , sanctions and remedies may differ (see below for in-depth analysis). As it will be shown, both the amount of penalties and the scope of injunctions vary within administrative enforcement. These differences and the ensuing fragmentation has stimulated the debate over the desirability of EU intervention in order to have a minimum common playing field to tackle UTPs in the agri-food sector.

The European Commission had first promoted a self-regulatory regime consistent with the inter-professional approach that characterizes European agriculture. A set of principles were developed

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

[382] See Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, February 2014; Johan Swinnen and Senne Vandevelde, *Regulating UTPs: diversity versus harmonisation of Member State rules*, in *Unfair trading practices in the food supply chain. A literature review on methodologies, impacts and regulatory aspect* (2017), p. 41 ff. JRC technical report, Editors: Federica Di Marcantonio and Pavel Ciaian, available at http://www.centromarca.pt/folder/conteudo/1772_7_JRC_report_utps_final.pdf (hereinafter A literature review).

[383] Among MSs having some type of UTP legislation we here include also 4 MSs (Belgium, Denmark, Finland, Sweden) whose legislation is merely focused on some pre-contractual practices, mainly tailored around the concept of misleading and aggressive practices inherited from consumer law and based on Directive 2005/29/EC. A part of the in-depth analysis below will only focus on the remaining 20 MS legislation. Grounds for this decision are explained below (see § III).

[384] See EU Commission Report, Tackling unfair trading practices in the business-to-business food supply chain, COM 2016 (472) final, p. 5-6.

[385] See Vertical relationships in food supply chain. Principles of good practice (2011), available at http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain (hereinafter Principles of good practice)

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

by various players of agri-food chain in 2011 which was followed by an initiative for implementation and enforcement in 2013. The food supply chain initiative (FSCI or SCI) arose out of a proposal by the Commission's High Level Forum for a Better Functioning Food Supply Chain[387]. It represents a form of 'governed self-regulation' with the European Commission playing a relevant role as a facilitator. One of the problems in FSCI is the absence of farmers' associations, which decided to pull out right after its creation. The FSCI monitors and enforces the principles of the code of practice[388]. The results of this approach are unclear; whether self-regulation delivers the expected results with a significant reduction of number and intensity of unfair practices is debated[389]. It appears that it can properly work as a complement of legislation both in terms of regulatory and enforcement practice.

In 2016 the Commission wrote a Report on unfair trade practices in the food supply chain[390]. The Report focused on the MSs regulatory frameworks and the impact of the FSCI [391]. It concluded that, "given the positive developments in parts of the food chain and since different approaches could address UTPs effectively, the Commission does not see the added value of a specific harmonised regulatory approach at EU level at this stage. However, the Commission recognises that, since in many Member States legislation was introduced only very recently, results must be closely monitored, and reassessed, if necessary."[392].

Soon thereafter the European Parliament issued a resolution encouraging the Commission to act[393]. The European Parliament underlined the fragmentation and divergences across MSs.[394] There was subsequently a report by the Agricultural market task force (AMTF) with recommendations on various issues including unfair trade practices[395]. Very recently (2017), the Commission has published an inception impact assessment for consultation defining different regulatory options[396]. The two main variables in the Inception assessment concern the nature of the instruments and its coverage. As to the instrument, the alternative is: non-binding instruments like guidelines or recommendations (option 2) or framework legislation (option 3 and 4). As to the coverage, the

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[387] See Food supply chain Initiative (FSCI).

[388] See Principles of Good Practice, 2011.

[389] See [389] Report of the Agricultural Markets Task Force (Brussels, November 2016).

[390] See Commission REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on unfair business-to-business trading practices in the food supply chain, January 2016.

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

[392] For an analysis concerning the existence of national legislation addressing UTPs in supply chains, see below, § III.

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

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

[395] See the Report of the Agricultural Markets Task Force (Brussels, November 2016).

[396] See Inception Impact Assessment, INITIATIVE TO IMPROVE THE FOOD SUPPLY CHAIN, 25 July, 2017.

alternative is between (1) an instrument to protect weaker parties or (2) an instrument regulating the relationships within the whole food chain. The results of the consultation suggest that the opportunity for a legislative intervention should be reconsidered.

II) A supply chain approach to UTPs regulation

Unfair trade practices in supply chains are quite common, even more in agrifood. In the field of agriculture, the definition provided by the EU Commission in the 2014 Communication represents a useful starting point. "UTPs can broadly be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another."[397] UTPs may result in civil, administrative, and at times criminal infringements. As we shall see often the three dimensions co-exist and the three enforcement regimes are in place in relation to the same UTP.

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

The Supply chain approach characterizes also private regulation. The Food supply chain initiative defines principles and rules to be applied all along the chain. The regulatory perspective combines general principles related to risk allocation along the chain with specific rules prohibiting contractual clauses that distribute risks (and costs) unfairly [398]. The principle of proportionality indirectly emerges from the description of the unfair practice, where a disproportionate risk is imposed on producers[399].

Who are the infringers in supply chains?[400] UTPs within a supply chain may be decided by the chain leader and applied all along the chain. Depending on the decision-making power held by each party within the chain, the participants to the chain may either be co-infringers or mere 'agents' of the chain leader's illegal behaviour. These different positions may have an effect on the liability, on the sanctioning, and on civil remedies. When infringers are located in different MSs or some in MSs and some outside EU, the definition of applicable laws to the same infringement committed by multiples infringers can become highly complex.

Taking a supply chain approach to legal regulation has relevant implications. UTPs have both efficiency and distributional effects concerning costs and risks. They redistribute value along the chain, frequently penalizing producers and the upstream part of the chain while benefitting large buyers in the downstream part. Unfair distribution of both risks and costs often occurs through contractual provisions reproduced along the chain that may qualify as UTPs. Contract clauses may permit unilateral changes raising costs and increasing requirements that producers have to meet

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

[398] According to the code of practice general principle "RESPONSIBILITY FOR RISK: All contracting parties in the supply chain should bear their own appropriate entrepreneurial risks." From the general principle the good practice is distilled "Different operators face specific risks at each stage of the supply chain – linked to the potential rewards for conducting business in that field. All operators take responsibility for their own risks and do not unduly attempt to transfer their risks to other parties" . See Code of practice, cit fn. 11

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

[400] See F. Cafaggi and P. Iamiceli, Unfair trade practices and contracting along global supply chains: the agri-food industry, (2018) on file with the authors.

without a corresponding increase of prices. These contractual clauses may be voided and their effects removed. While it is claimed that UTPs occur throughout the chain, the most relevant ones happen in the upper part of the chain. Different policy options might be taken to correct unfair distribution. A first option regulates UTPs along the chain regardless of the potentially injured party's economic function; a second option would instead focus on UTPs specifically against producers. Some recent legislations at MS level applies to the entire chain[401]. Others only apply to the relation between retailers and their direct suppliers.

Conceptually different approaches might be used: the most radical provides a legal definition of supply chain and applies to all the relationships within the chain[402]. The less radical approach focuses on bilateral relationships between producers and buyers, but considers the effects of the UTP along the chain[403]. An intermediate approach focuses on bilateral relationships but considers the harmful consequences for the entire chain. The intermediate approach seems to be the most popular in the recent legislations. Within the bilateral approach there are differences between legislations that only apply to producers of agricultural commodities and legislations (like Ireland) that only apply to a specific contractual relationship between retailers or wholesalers and suppliers (see, more extensively, below, § III.1).

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

The supply chain approach has been prominent in some MSs within EU[404]. For example, Spain in 2013 has subscribed to a supply chain approach regulating UTPs along the chain[405]. Moving from this perspective, Spanish legislation takes in due consideration situations in which an SME is in a relationship with a buyer characterized by economic dependence or at least one of the two conditions occur (nature of SME or economic dependence); according to the Spanish legislation economic dependence exists when the supplier sells at least 30% of the overall production to a single buyer[406]. The European Commission encourages MSs that are going to introduce new legislation to adopt a supply chain approach[407].

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[401] See for example Spain, Italy. Some legislations instead focus and exclude cooperatives. See below, § III.1.

[402] See F. Cafaggi, Regulation through contracts: Supply-chain contracting and sustainability standards, European Review of Contract Law, 2016, p. 218 seq.

[403] These two approaches are captured by option 3 and 4 of the Inception Impact assessment above cit.

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

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

[406] See Article 2(3), Law 12/2013, cit.: "The scope of Title II, Chapter I of this law [*on legal form and minimum content of agri-food contracts*] is limited to the commercial relations of operators engaging in commercial transactions the value of

The supply chain approach to UTP is not necessarily associated with trans-border infringements. It can apply to both domestic and trans-border chains. Legal aspects concerning transborder infringements require decisions concerning applicable laws and criteria to identify the competent enforcer(s). A supply chain approach in transborder infringements should definitely distinguish between EU infringements and those that affect enterprises and farmers operating beyond the EU territory. Even if there is not dedicated research comparing UTPs within and outside EU it is likely that both the nature and the enforcement may vary depending on whether they are addressed to EU or non EU producers.

III) The current legal framework at national level:

(1) national legislation addressing UTPs in supply chains

Although most MSs have adopted some legislation in the area of unfair trade practices in "business to business" (hereinafter, BtoB) relations, the legal landscape is rather diversified across the EU.

Among those which have introduced new rules:

- some have opted for legislation;
- some have opted for a pure self-regulatory option (e.g. Belgium, Estonia, the Netherlands);
- many have chosen a hybrid approach that combines legislation and self-regulation.

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

This contribution is focused on legislation, whereas private regulation, including the EU platform established with the Supply Chain Initiative (SCI), will not be specifically addressed though occasionally referred to.

Within the context of legislative instruments, the present analysis **will not consider legislation exclusively based on competition law** and tailored upon article 102, TFEU, even when the concept of dominant position and the relevant market thresholds have been stretched beyond the EU definition (as it is the case for Finland, e.g.). As acknowledged in previous reports and studies, a legislative approach exclusively based on competition law may fail to capture most relevant UTPs

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which exceeds € 2 500, provided that said operators find themselves in any of the following situations of imbalance: operators find themselves in any of the following situations of imbalance: a) One of the operators is an SME and the other is not. b) In the case of the marketing of unprocessed agricultural products, perishable goods and food inputs, one of the operators has primary agricultural, livestock, fishery or forestry producer status, or is a group having such status, and the other does not. c) One of the operators is economically dependent on the other operator, meaning that the total sum for which the former invoiced the latter accounts for at least 30% of the former's turnover during the previous year".

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

in national and global supply chains[408]. By contrast, the present analysis will consider legislation that, though introduced within a competition law framework, does not require a specific UTPs impact on market competition: this may be the case when national competition law expands beyond the boundaries of article 102, TFEU, sometimes through the concepts of abuse of bargaining superior power or abuse of economic dependence (so, e.g., in Germany).

Other "border-line" approaches are taken by those MSs that have only addressed **a very limited menu of unfair practices** in the area of pre-contractual information, advertising and unsolicited offers, mostly as a spill-over effect of consumer law in the field of unfair commercial practices, though not necessarily through explicit extension of BtoC legislation to the BtoB domain. This is the case for Belgium, Denmark, Finland and Sweden. Among these, Denmark, Finland and Sweden have extended, at least in part, legislation implementing the consumer directive on UTPs 2005/29/EC to BtoB relationships. In Sweden, such extension has explicitly included Annex I of the Directive, listing the *per se* prohibited practices. In Belgium, articles VI.104-109 of the *Code de droit économique* (book VI, title 4, chapter 2) specifically addresses unfair market practices towards persons different from consumers and provides for a general prohibition of business acts infringing honest market practices and harming other businesses; however, the type of practices addressed remains within the limited range above described with regard to pre-contractual information, advertising and unsolicited offers. A fifth MS, namely Austria, has taken a similar approach by extending to BtoB relations the consumer unfair practice legislation, including the list of *per se* unfair practices[409]. It departs from the approach taken in Denmark, Finland and Sweden for two reasons: (*i*) because it makes unfair practices occurred in BtoB relations subject to civil remedies (namely injunctions and damages) only to the extent that they materially distort competition; (*ii*) because Austrian legislation also addresses UTPs in another piece of legislation (so called Local Supply Act), examined below.

Due to its limited scope, MSs legislation exclusively focused on pre-contractual information, advertising and unsolicited offers will not be examined within the variety of legislative instruments specifically addressing unfair trade practices in BtoB relations[410]. Nor will advertising legislation (including implementation of Directive 2006/116/EC) be specifically considered in the present analysis. Indeed, as shown below, policy debate on BtoB UTPs in global supply chains focuses on practices different from those addressed by this type of legislation.

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

Within the boundaries just defined, the performed analysis leads to observe that:

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[408] Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, February 2014. See also ECN, *Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector*, May 2012, p. 11.

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

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

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

Table n. 1: MSs by UTPs legislation

NO LEGISLATION ON UTPS	LIMITED SCOPE LEGISLATION (mainly consumer-type UTP approach)	SPECIFIC LEGISLATION ON UTPS
Estonia **Luxembourg** **Malta** **(The) Netherlands**	Belgium Denmark Finland Sweden	Austria Bulgaria Croatia Cyprus Czech Republic France Germany Greece Hungary Ireland Italy Latvia Lithuania Poland Portugal Romania Slovakia Slovenia Spain United Kingdom

For the reasons above explained, the analysis below will focus on the legislation in the 20 MSs mentioned in the third indent. A list of the examined legislation is provided in the Annex.

Different approaches may be distinguished. In some cases, e.g. Cyprus and Germany, UTPs have been addressed by **stretching the scope of competition law** beyond the boundaries of article 102, TFEU, and applying the concept of abuse to economic dependence or superior bargaining power. This approach has been taken by other MSs, such as Bulgaria, where a more focused and sector-specific legislation has also been adopted, namely in the food sector. In other cases, now representing the vast majority of MSs having legislative instruments on UTPs, dedicated legislation has been adopted **outside of the scope of national competition law**. This legislation more and more tends to focus on contractual relations between suppliers and processors or retailers, covering the several stages of such relations: from pre-contractual, to contract negotiation and drafting, execution and termination, therefore going well beyond the scope of legislation tailored upon the consumer protection approach taken in some other MSs (so in Belgium, Denmark, Finland, Sweden; see above, in this §).[411]

[411] In these countries, the application of consumer legislation to BtoB relationship may not allow to consider some of the practices concerning contractual activities. See directive 2005/29 that applies without prejudice to contract law (art. 3(2)).

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

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

CROSS-SECTOR LEGISLATION ON UTPS	SPECIFIC LEGISLATION ON UTPS IN THE AGRI-FOOD SECTOR
Austria **Cyprus** **France** **Germany** **Greece** **Latvia** **Lithuania** **Portugal**	Bulgaria Croatia Czech Republic Hungary Ireland Italy Poland Romania Slovakia Slovenia Spain United Kingdom[412]

Other variables concern the **addressed segment of supply chains**. In 5 MSs (Czech Republic, Hungary, Ireland, Lithuania, United Kingdom), examined legislation is only applicable *towards retailers*; this is mostly the case for MSs adopting specific legislation in the food sector, though in some case (Lithuania) retailers' practices are addressed regardless the economic sector.

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

	CROSS-SECTOR LEGISLATION ON UTPS	SPECIFIC LEGISLATION ON UTPS IN THE AGRI-FOOD SECTOR
LEGISLATION APPLICABLE ALONG THE WHOLE CHAIN	Austria Cyprus France Germany Greece Latvia Portugal	Bulgaria Croatia Italy Poland Romania Slovakia Slovenia Spain
LEGISLATION APPLICABLE TOWARDS RETAILERS ONLY	Lithuania	Czech Republic Hungary Ireland United Kingdom

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

In all the other cases legislation is applicable at all stages along the chain. It is remarkable that, even within this set of legislative instruments, variations emerge depending on supply chain structure. E.g., the Croatian Act on the prohibition of unfair trading practices in the BtoB food supply chain provides for both general and specific lists of prohibited UTPs based on the type of relation (between the supplier and the buyer or processor, and between the supplier and the re-seller). Comparatively, the French Commercial Code includes both general scope provisions (e.g. art. 442-6) and specific provisions on distribution contractual relations (e.g. art. 441-7).

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

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

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

The approach under (*i*), restricting the scope of application of UTP legislation to *"large enterprises"* only, is, e.g., taken in:

- *Croatia*, whose legislation applies to resellers whose turnover in Croatia exceeds approximately 132.500 eur, and to processors whose turnover in Croatia exceeds approximately 66.250 eur;
- *Lithuania*, whose legislation applies to retailers having significant market power, defined as retailers with at least 20 stores and a surface of at least 400 sqm in Lithuania and with an aggregate income in the last financial year that is not less than 116 million eur;
- *Poland*, whose legislation applies when the business' trade value in the past two years or within the UTP practices exceeds approximately 11.900 eur and when infringer's (group's) turnover exceeds approximately 23.867.100 eur;
- the *United Kingdom*, whose "Groceries (Supply Chain Practices) Market Investigation Order 2009" applies to any retailer with a turnover exceeding £1 billion with respect to the retail supply of groceries in the United Kingdom, and which is designated in writing as a Designated Retailer.

The approach under (*ii*), taking into account the position of SMEs as potentially injured party, is taken (again) in *Lithuanian legislation*, that does not apply to relations between retailers having significant market power and *suppliers whose aggregate income during the last financial year exceeds EUR 40 million*: larger suppliers, as potential victims, are then excluded from the scope of application of the law. A comparable approach is only partially taken in *Spanish legislation* on the functioning of the food supply chain, when regulating formal and content requirements of supply contracts: indeed, these apply only to transactions whose value exceed (or will presumably exceed) 2.500 eur and one of the proxies for unbalanced relations occur; among these proxies the size of the harmed business as a SME is also considered. Rather similarly, in article 20, *German Act against Restraints of Competition*, abuse of relative market power is prohibited only when it involves SMEs as "dependent" enterprises. In the *Portuguese DL no. 166/2013*, whose scope of application is

general, specific provisions have been provided for the protection of small and microenterprises; moreover, fines are adapted to infringers' size.

As the German and the Lithuanian examples show, the reference to the size of involved enterprises may be combined with a reference to a situation of superior bargaining power of the potential injurer or the one of economic dependence of the potential injured. Other pieces of legislation specifically focus on **abuse of superior bargaining power or abuse of economic dependence**, so indirectly excluding from their scope of application more paritarian or balanced relations. This is the case for one of the pieces of legislation in Bulgaria, for Croatia, Cyprus, Czech Republic, Greece, Poland, Slovenia.

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

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

III. The current legal framework at national level: *(2) modes and extent of prohibition of UTPs*

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

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

- prohibition of unequal treatment of entrepreneurs unless objectively justified (Austria);
- prohibition of every act/omission by an undertaking with a stronger bargaining position when in conflict with fair business practice damaging or impairing the interest of a weaker party (Bulgaria);
- prohibition of abuse/exploitation of superior/significant bargaining power (Croatia, Czech Republic, Italy, Slovenia);
- prohibition of abuse of relative market power, consisting in unfair treatment or objectively unjustified discrimination in case of economic dependence of SMEs (Germany);
- prohibition of abuse of economic dependence (Cyprus, Greece);
- liability for imposing significant unbalance between parties' rights and obligations (France, Italy);
- prohibition of imposing unfair contractual advantage contrary to the principles of morality and threatening the essential interest of the other party (Poland);
- prohibition of unfair conduct (Hungary, Italy) or conducts in contrast with fair practice (Latvia), of actions contrary to fair business practices (Lithuania), of unfair contractual conditions and unfair trade practices (Slovak Republic);
- duty to conduct trading relationships in good faith and in a fair, open and transparent manner and to respect the terms and conditions of the agreed contracts (Ireland);
- duty to comply with principles of transparency, fairness, proportionality, reciprocity in contractual obligations (Italy);
- duty to comply with the Principles of Good Practice in Vertical relationships in the Food Supply Chain, developed by the European Commission in the B2B Platform of the High Level Forum for a Better Functioning Food Supply Chain (Italy);
- duty to comply with principles of balance and fair reciprocity between parties, freedom to enter into agreements, goodwill, mutual interest, equitable sharing of risks and responsibilities, cooperation, transparency and respect for free market competition (Spain);
- duty to comply with the principle of fair dealing (United Kingdom).

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

Only in a few cases (Portugal, Romania) prohibitions are listed with regard to specific conducts without relying on general clauses and general principles. Also rare is the use of general clauses not coupled with **list of prohibited conducts** (e.g. in the German Act against Restraints of Competition). Indeed, in the large majority of systems, general principles and general clauses are always complemented by either examples or more structured lists of prohibited practices falling under the umbrella of the general prohibition. In some cases, it is specified that the list is not

complete and any other conduct infringing the general prohibition must be sanctioned (e.g. Italy) or that the list provides only examples of prohibited conducts (e.g. Poland); in other cases, it is more doubtful *whether unlisted conducts may be sanctioned* under the general prohibition, especially when the general prohibition is very open and the list of prohibited conducts rather detailed (this is the case for Hungary, e.g.). This extension may be particularly critical in systems in which enforcement is mainly criminal (Ireland, Romania) and the principle of legality may reduce extensive interpretation of law identifying crimes.

The use of list does not totally eliminate the need for discretionary powers when interpreting and apply the rules. Indeed, even when prohibited conducts are listed, the use of **open terms** (such as proportional, reasonable, justified, significant unbalance, etc.) is very common, though diversified across countries (see tables 2.1 and 2.2 in the Annex).

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

ONLY GENERAL CLAUSES AND GENERAL PRINCIPLES	ONLY LISTS OF PROHIBITED PRACTICES	GENERAL PRINCIPLES, GENERAL CLAUSES, EXAMPLES OR LISTS OF PROHIBITED PRACTICES
Germany	Portugal Romania	Austria Bulgaria Croatia Cyprus Czech Republic France Greece Hungary Ireland Italy Latvia Lithuania Poland Slovakia Slovenia Spain United Kingdom

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

The table below addresses the following practices:

1) Payment periods longer than 30 days
2) Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices)
3) Contributions to promotional or marketing costs
4) Claims for wasted or unsold products
5) Last-minute order cancellations concerning perishable products, or unfair contract termination in general
6) Requests for upfront payments to secure or retain contracts

It is mainly based upon the list of practices proposed in the Report of the Agricultural Markets Task Force[413], partially complemented by the shorter list of UTPs identified by the EC Report in 2016 as "core types of UTPs broadly covered by all regulatory frameworks"[414]. It also draws on the SCI code and the annexed list of practices therein included, whose development has contributed to the definition of relevant practices.

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

Table n. 5: UTPs covered by specific national legislation on UTPs

SELECTED PRACTICES	MSS, WHOSE UTP LEGISLATION COVERS THE SELECTED PRACTICES
PAYMENT PERIODS LONGER THAN 30 DAYS	Bulgaria, Croatia, Czech Republic, France, Hungary, Ireland, Italy, Latvia, Poland, Romania, Slovakia, Slovenia, Spain, UK *In other MSs provisions on late payment are addressed in the legislation implementing the Late Payment Directive*
UNILATERAL AND RETROACTIVE CHANGES TO CONTRACTS (CONCERNING VOLUMES, QUALITY STANDARDS, PRICES)	Bulgaria, Croatia, Hungary, Ireland, Italy, Latvia, Lithuania, Portugal, Spain, UK
CONTRIBUTIONS TO PROMOTIONAL OR MARKETING COSTS	Bulgaria, Czech Republic, France, Hungary, Ireland, Italy, Latvia, Lithuania, Portugal, Romania, Slovenia, Spain, UK

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

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

CLAIMS FOR WASTED OR UNSOLD PRODUCTS	Bulgaria, Croatia, Czech Republic, Hungary, Ireland, Latvia, Lithuania, Portugal, Slovenia, Spain, UK
LAST-MINUTE ORDER CANCELLATIONS CONCERNING PERISHABLE PRODUCTS, OR UNFAIR CONTRACT TERMINATION IN GENERAL	Bulgaria, Czech Republic, Croatia, Cyprus, France, Greece, Ireland, Italy, Poland, Romania, UK
REQUESTS FOR UPFRONT PAYMENTS TO SECURE OR RETAIN CONTRACTS	Croatia, Czech Republic, France, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Spain, United Kingdom

Particularly in this case, figures must be considered as showing general trends rather than conclusive evidence. Indeed, some of the listed practices (e.g. payment periods longer than 30 days) may be prohibited in other pieces of legislation than those here examined (e.g. legislation implementing the Late Payment Directive), or some of the specific conducts here considered (e.g. imposition of contribution to promotional marketing costs) may be ignored as such by the lists at stake though being addressed through more general prohibitions (e.g. concerning imposition of costs not related with provided services) or through the use of general clauses (e.g. abuse of superior bargaining power), as seen above. Under this perspective some more detailed information is provided in table n. 2.3 in the Annex.

Moving from this clarification and within these limitations, one could observe that even a relatively commonly addressed practice (e.g. unfair contract termination) is not specifically referred to in almost half of MSs specifically regulating UTPs in BtoB relations and other mentioned UTPs (e.g. unilateral and retroactive changes to contracts, contributions to promotional and marketing costs and requests for upfront payments to secure or retain contracts) are addressed in less than two thirds of these MSs. No specific prohibition is common to all legal systems, even though, once again, the presence of general prohibitions based on fairness may permit coverage of these UTPs.

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

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

- *mere exemption*, as shown in the following example: "The contract for purchase of food for resale cannot: (…) 4. be amended unilaterally, **unless this is explicitly provided for in the contract**" (art. 19.1, Bulgarian Foodstuff Act; similar provisions are adopted in Latvian and Lithuanian legislation, although both include examples of the second type here below);
- *exemption subject to compliance with contract regulation*, as shown in the following example: "This Regulation prohibits a retailer or wholesaler from varying, terminating or renewing a contract with a supplier **unless the contract expressly provides for such variation**, **termination or renewal** or agreed circumstances when such variation, termination or renewal can occur. Thus, unilateral retrospective variations are not permitted. In addition, the agreed contract must specify the period of written notice that must be given prior to any such variation, termination or renewal. The period of such notice will be reasonable and have regards to all the circumstances of the contract, including:
    - the duration of the contract;

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

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

Table 2.2. in the Annex shows more examples of both types of exemption.

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.

IV) The Enforcement Triangle and its current weaknesses

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

The enforcement mechanisms comprise adjudication by courts directed at compensation for damages, restitution of unduly paid sums, invalidity of clauses in contracts. Some MSs include also a criminal facet and consider UTPs as a civil, administrative, and criminal infringements. Increasingly judicial enforcement has been complemented by administrative enforcement with sanctioning powers, including fines and, to a limited extent, injunctions. Administrative enforcers include competition authorities, ministries of agriculture, agencies[415]. Often multiple administrative bodies in charge with enforcement powers are in place. Competition authorities are responsible both for unfair practices that constitute anticompetitive infringements and for non-competition aspects of UTPs when, for example, the infringer that engages in unfair practices is not in a dominant position. In addition, some MSs have identified other administrative authorities complementing the former that either focus on the protection of SMEs in agriculture or deliver recommendations and opinions using cooperative rather than hierarchical enforcement. The introduction of administrative enforcement is mostly linked to the adoption of dedicated legislation on UTPs in supply chains. Indeed, in all MSs adopting such legislation, some type of administrative enforcement has been provided. Whereas in several cases existing authorities have been empowered (mainly Competition or Consumer and Competition Authorities), in other cases newly dedicated administrative authorities have been established.

Table n. 6: MSs and main enforcing authorities

MS	MAIN ENFORCING AUTHORITY AS REGARDS UTP LEGISLATION
AUSTRIA	Court *(administrative authorities, e.g. Federal Competition Authority, have standing to start judicial proceedings)*
BULGARIA	Commission of Protection of Competition (CPC)
CROATIA	Competition Authority
CYPRUS	Commission for the Protection of Competition
CZECH REPUBLIC	Office for the Protection of Competition
FRANCE	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF, within the Min. Econ.)
GERMANY	Competition Authority (*although injunctions are imposed by courts; CA may file a request*)
GREECE	Court
HUNGARY	National Food Chain Safety Office
IRELAND	Competition and Consumer Protection Commission
ITALY	Competition Authority

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

LATVIA	Competition Council
LITHUANIA	Competition Council
POLAND	Office of Competition and Consumer Protection
PORTUGAL	ASAE (Autoridade Administrativa Nacional Especializada)
ROMANIA	Consumer Protection Authority and Ministry of Finance (*depending on UTP*)
SLOVAKIA	Ministry of Agriculture And Rural Development
SLOVENIA	Slovenian Competition Protection Agency
SPAIN	Administration of Aut. Comm. or General State Administration (*depending on territorial dimension of UTPs*:)
UNITED KINGDOM	Grocery Code Adjudicator
MS HAVING LIMITED SCOPE LEGISLATION (MAINLY FOCUSED ON CONSUMER-TYPE MISLEADING AND AGGRESSIVE PRACTICES)	
BELGIUM	Commercial Court
DENMARK	Court
FINLAND	Market Court
SWEDEN	Market Court

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

Administrative bodies may (1) either only have investigative powers and refer to courts for enforcement or (2) hold both investigative and sanctioning powers. When they can only investigate, they may bring actions before the court without prejudice of individual rights to effective judicial protection by the UTPs injured[416]. In the latter case, these powers have to be exercised by separate units or legal entities in order to comply with due process and good administration requirements.

Complementarity of enforcement mechanisms include also private regimes that can either be voluntary or mandatory, characterized by the extensive use of market and reputational sanctions The pillar of private bodies applying codes of conduct represents the third side of the triangle. This is supported at EU level by the Food Supply chain initiative (FSCI)[417]. Enforcement of codes of practices may follow a different path. Compliance with codes of practice can be ensured by private bodies like the FSCI platforms, by public enforcers, including administrative bodies (UK grocery

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

[417] See www.supplychaininitiative.eu

adjudicator) and courts, and by hybrid bodies composed by members of public administration and representatives of the various interests involved like the Code oversight committee in Spain.

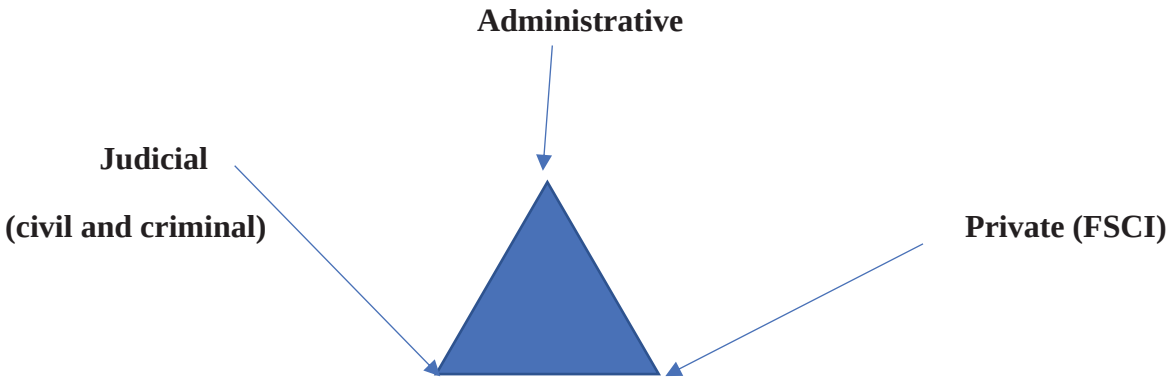
What is the relative weight of each enforcement mechanisms? Why and how do they complement each other? No legislation imposes alternative routes. Injured parties can access the three enforcement mechanisms. The enforcement triangle, including judicial, administrative and private resolution mechanisms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

The relative weight of each enforcement mechanism has changed over time. Administrative enforcement has gained more relevance over adjudication. The rise of administrative enforcement can partly be explained by the (lack) of producers' incentives and more generally of 'victims' to use the judicial system. In long term relationships characterized by economic dependence between the parties, litigation is generally the end and farmers might not afford such a risk. Administrative enforcement with *ex officio* power shields farmers away from the danger of retaliation and better preserve the continuation of the business relationship with large buyers.

. The complementarity concerns both procedures and sanctions/remedies.

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

The enforcement triangle



The three pillars constitute the enforcement triangle that should address the enforcement gap in UTPs. Their coordination at MSs level is currently very limited; lack of coordination together with some design fallacies undermine the effectiveness of decentralized enforcement calling for a better integrated approach both at MS and EU level. An integrated approach requires coordination between enforcement mechanisms to ensure that each performs its functions without duplications and overlaps. But the most important feature is coordination among MSs both among administrative

enforcers and between them and courts, criminal and civil. It is necessary to define a sequence, to regulate the legal force of administrative decisions in judicial proceedings, the possibility to use evidence, and the solution of potential conflicts between final decisions in each enforcement mechanism.

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

In case of trans-border infringements one of the open questions is the extent of national enforcers' power to investigate and sanctions infringements that start from a foreign MS and have effects on their own or start from their own MS and have effects in other MSs

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

Judicial enforcement against UTPs becomes problematic when there are multiple infringers and multiple injured located in different MSs[418]. Whether a single law could be applicable to the same infringement or different laws should be applied depending on where the infringers are located is an open question. Even more problematic is the case when injured are partly located in EU MSs and partly outside of EU. Access to enforcement systems by non-EU producers follow different patterns in judicial and administrative enforcement. Some new legislation as that of UK has broadened the scope of enforcement beyond EU borders making it accessible also for non EU producers.

IV) A. Administrative enforcement

As shown in the table above (table n. 6), the most recent MSs legislation has introduced forms of administrative enforcement in addition to judicial enforcement and to private dispute resolution mechanisms. It is an attempt to address the enforcement gap related to the very limited use of courts and the low effectiveness of private dispute resolution mechanisms. It is partly driven by the so

[418] With special regard to applicable law, see S. Clavel in Renda - Cafaggi, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, February 2014, p. 84 seq.

called ‘fear factor’ that prevents farmers from using courts fearing commercial retaliation with termination of the commercial relationship and forced exit from the chain.

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

Table n. 7: Enforcement, authorities and relative power

TYPE OF ENFORCEMENT	MS	MAIN ENFORCING AUTHORITY	INJUNCTIVE POWER	POWER TO IMPOSE FINES
ENFORCEMENT VIA COURTS	AUSTRIA	Court	Court (*Competition Authority, among other interested parties, may seek injunction*)	
	GREECE	Court	N/A	N/A
ENFORCEMENT VIA COMPETITION AUTHORITIES	BULGARIA	Commission of Protection of Competition (CPC)	Commission of Protection of Competition (CPC)	Commission of Protection of Competition (CPC)
	CROATIA	Competition Authority	N/A (*CA may assess and accept voluntary commitments*)	Competition Authority
	CZECH REPUBLIC	Office for the Protection of Competition	Office for the Protection of Competition (*CA may assess and accept voluntary commitments*)	Office for the Protection of Competition
	ITALY	Competition Authority	Competition Authority	Competition Authority
	LATVIA	Competition Council		Competition Council
	LITHUANIA	Competition Council	Competition Council	Competition Council
	POLAND	Office of Competition and Consumer Protection	Office of Competition and Consumer Protection (*may assess and accept voluntary commitments*)	Office of Competition and Consumer Protection
	SLOVENIA	Slovenian Competition Protection Agency		Slovenian Competition Protection Agency
ENFORCEMENT VIA CONSUMER PROTECTION AUTHORITY	ROMANIA	Consumer Protection Authority		Consumer Protection Authority
ENFORCEMENT VIA DEDICATED ENFORCING AUTHORITIES	HUNGARY	National Food Chain Safety Office	National Food Chain Safety Office (*at least for prohibition to use unfair terms*)	National Food Chain Safety Office
	PORTUGAL	ASAE (Autoridade Administrativa Nacional Especializada)		ASAE (Autoridade Administrativa Nacional Especializada)
	UNITED KINGDOM	Grocery Code Adjudicator	Grocery Code Adjudicator (*may issue recommendations*)	Grocery Code Adjudicator
ENFORCEMENT VIA STATE OR LOCAL ADMINISTRATION	SLOVAKIA	Ministry of Agriculture and Rural Development		Ministry of Agriculture And Rural Development
	SPAIN	Administration of Autonomous Communities or General State Administration		Administration of Autonomous Communities or General State Administration
COMBINED ENFORCEMENT BETWEEN	CYPRUS	Commission for The Protection of Competition	Court	Commission for the Protection of Competition

TYPE OF ENFORCEMENT	MS	MAIN ENFORCING AUTHORITY	INJUNCTIVE POWER	POWER TO IMPOSE FINES
COURTS AND COMPETITION AUTHORITIES	FRANCE	DGCCRF (Min. Econ)	Court (art. 442-6, code de comm.) (*Min. Ec. and CA, among other interested parties, may seek injunction*)	Competition Authority (art. 470-2, code de comm.)
	GERMANY	Competition Authority	Court (*CA may seek injunction*)	Competition Authority
	IRELAND	Competition and Consumer Protection Commission		Court

A.1. Investigative powers

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

Limited resources and the necessity to identify priorities in tackling UTPs require strategic decision making on the administrative enforcer. The investigation strategy is generally determined by the enforcer which defines priorities and scope of investigations. In some legislation priorities are statutorily defined, in others they are determined on a case by case. Only a few countries like the UK have defined in the legislation criteria and priority setting to be followed, including the impact of the practice and the effects of its removal. Administrative enforcers publish an annual report where they specify their strategic priorities for the future and the past achievements[419].

Enforcers use primarily inspections but can also promote self-reporting by retailers in order to reduce asymmetry of information and save costs. Especially those enforcers which engage into a continuous dialogue with the infringers rely more on self-reporting and surveys than on individual inspections. Collaborative models first address the potential infringer and ask them to investigate and report[420]. If the investigation is inadequate or the reported infringement does not stop, the enforcer can switch to inspections and other more intrusive monitoring instruments moving from a cooperative to a command and control enforcement approach.

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

[419] See for example in France DGCCRF that established each year a program for investigation (source: questionnaire based DG AGRI consultation of MS experts, October-November 2017).

[420] See the statutory review of the Grocery code adjudicator published in 2016 "GCA approach to investigations: 42. The Adjudicator has chosen to take a collaborative approach and describes a three-stage process that is designed to address and resolve issues quickly whilst retaining the option to move to an investigation if necessary. This process consists of:
• Alerting large retailers when Code-related issues are raised with the Adjudicator by suppliers; • Requesting that the large retailer Code Compliance Officers (CCOs) internally look into the issues; and • Report back to the Adjudicator, identifying any business changes made to address the issue raised (if necessary).".

Most often enforcers can act *ex officio* or on the basis of parties' complaints[421]. More specifically, in almost all MSs UTPs legislation empowers administrative authorities to act *ex officio*[422]. In most MSs (see the table below) complaints can be anonymous in order to protect the complainants from retaliation. Although confidentiality shall be balanced with the effectiveness of investigation and the right of defence of potential infringers[423]. Many administrative enforcers allow anonymous complaints but preserve the discretionary power to start investigations.

Table n. 8: Confidentiality of complaints lodged with administrative authorities and ex officio investigative powers in UTP examined legislation

MS	CONFIDENTIAL COMPLAINTS	EX OFFICIO INVESTIGATIVE POWERS
AUSTRIA	X	*No, but law provides standing of administrative authority and business organisations*
BULGARIA	X	X
CROATIA	N/A	X
CYPRUS	N/A	X
CZECH R.	X	X
FRANCE	X	X
GERMANY	X	X
GREECE	N/A	N/A
HUNGARY	X	X
IRELAND	X	X
ITALY	X	X
LATVIA	X	X
LITHUANIA	X	X
POLAND	X	X
PORTUGAL	NO	X
ROMANIA	NO	N/A
SLOVAKIA	NO	X
SLOVENIA	X	X
SPAIN	X	X
UNITED KINGDOM	X	X

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

[422] The Austrian case would represent the only exception as shown by the data collected within the DG AGRI survey (2017). However, in this case, the Local Supply Act, sec. 14, vests associations representing business collective interests with the power to start proceedings before the Court for a cease and desist order.

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

The possibility to lodge a complaint does not necessarily imply the status of party within the administrative proceeding concerning the potential infringement. When no specific provisions exist national administrative laws determine who can lodge a complaint and who can be a party to the proceeding. Among the parties which can lodge complaints before administrative authorities some MSs include also producers' organizations and farmers' associations, as shown in the table below. Moreover, in some MSs the producers' organizations lodging the complaints can also participate in the proceedings (e.g. Hungary, Italy)[424]. Their role may be extremely useful to present the views of those harmed by the practices which generally do not have the right to participate. Examples include those presented in the table below.

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

MSs	POWER OF TRADE OR PROFESSIONAL ASSOCIATIONS TO LODGE COMPLAINTS FOR THE ENFORCEMENT OF UTP LEGISLATION BEFORE ADMINISTRATIVE AUTHORITIES (EXAMPLES)
CYPRUS	power to lodge complaints with the Competition Commission
CZECH R.	power to lodge complaints with the Competition Commission
GERMANY	power to lodge complaints with the Federal Cartel Office
HUNGARY	power to be party to administrative proceedings for enforcement of UTP legislation, representing collective interests
ITALY	power to seek injunctions before the CA in representation of collective interests; power to lodge complaints and to intervene in investigation procedures

In some models, the enforcer engages suppliers and meet regularly with them or their representatives to learn about UTPs[425].

A.2. Enforcement *stricto sensu*

Administrative enforcement includes a number of approaches from soft to hard. As we suggested in relation to investigation, also enforcement *stricto sensu* can include both a collaborative and hierarchical approach. The former tries to establish a cooperative relationship between enforcers and infringers before and after the infringement when the consequences have to be removed. The latter does not engage the infringer before and, within the due process guarantees, proceeds with sanctions and injunctions after the infringement has materialized. The collaborative approach addresses both causes and consequences of the infringement. The hierarchical approach focuses on the consequences but does not address the causes.

[424] See for example section 5 of the Hungarian Act (2009): "(1) The professional organisation representing the interest of suppliers may assume the position of a client (*melius* party) in any administrative proceeding initiated for the violation of this Act." (unofficial translation); Article 8, Italian Competition Authority Regulations on investigation procedures in the field of UTPs in agrifood contractual relationships: "Partecipazione all'istruttoria. 1. I soggetti portatori di interessi pubblici o privati, nonché i portatori di interessi diffusi costituiti in associazioni o comitati cui può derivare un pregiudizio dalle infrazioni oggetto dell'istruttoria hanno facoltà di intervenire nel procedimento in corso (...)".

[425] This is the case for the Grocery adjudicator in the UK where promotion of dialogue between suppliers and retailers is one of the main tasks.

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

MSs practices show that collaborative approaches may deliver better than conventional sanctioning regimes. Often the different tools are combined and scaled. In some cases, the enforcer can first issue recommendations and advices and, if they are not followed, can exercise sanctioning powers. In other cases, the enforcer can only sanction. However even in the latter case, informally cooperative enforcement takes place at the stage of investigation. On the infringer side, there is also an alternative between commitments and sanctioning, an alternative which is normally limited to not serious infringements. The infringer is given the possibility to propose commitments and the enforcer has discretionary power to (1) accept the proposal without declaring the infringement or (2) reject the proposal and move to the sanctioning stage once the infringement has been ascertained.

We distinguish between enforcement stricto sensu and forms of public dispute resolutions mechanisms that include negotiations. Within enforcement we encompass conventional command and control and forms of cooperative enforcement where there is joint problem solving between enforcer and infringer but the latter preserves the power to accept or reject proposals made by the infringer. We do not include conciliation procedures promoted by administrative bodies.

Administrative enforcement may vary according to practices and to the seriousness of the infringement. Some MSs distinguish between major and minor infringement and adapt the sanctioning policy accordingly[426]. Other MSs do not expressly make the distinction in legislation but adopt it in practice by scaling the type and the amount of sanctions (in case of fines) according to the gravity of the violation (see table below n. 11).

Some MSs distinguish the seriousness of infringements by 'ranking' practices and the sanctioning system reflects the differences. Infringement of certain practices entail harder sanctioning than infringement of other unfair practices (see below § A.3.3 and table n. 11).

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

The administrative enforcer follows an administrative procedure where they perform both investigation and adjudication. The two phases are procedurally distinguished in order to guarantee due process rights. It must be avoided that the same entity investigates and decides over its own investigation. This separation can be (1) structural, when two different bodies are in charge of investigation and adjudication or (2) functional, where within the same entity two separate units are

[426] See Spain Ley, as examined below, § IV.A.3.

in charge. Procedural guarantees include right to be informed, to be heard, right of defence, right to appeal. The procedure ends with an administrative decision that can be appealed before a court.

A.3. The correlation between practices and sanctions

Sometimes, legislations provide different types of enforcement depending on the type of practices. E.g. in France, restrictive practices addressed by art. 442-6, code de comm., are subject to judicial injunctions and *ammendes civile*, whereas other practices, e.g. in the area of payment delays or negotiation of distribution contracts (art. 441-7, 441-8, code de comm.), are subject to administrative fines by administrative authorities.

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

Table n. 10: Examples of correlation between practices and fines

COUNTRIES	PRACTICES/FINES
CROATIA	Depending on the gravity and the significance of the infringement the UTPs Act recognises fines for most serious infringements, serious infringements, for minor and other infringements. Most serious infringements: - up to 662.556,81 eur equivalent (legal persons) - 331.278,41 eur equivalent (physical persons) Lower caps for serious and minor infringements
FRANCE	Administrative fines (infringements of art. L441-7,8, retail contracts) *Ammende civile* (infringements of art. L 442-6, restrictive practices)
ITALY	Different fines depending on UTP (contracts v. practices v. payment delay/practices) Infringements concerning the use of written form for agrifood contracts and the contents requirements of such contracts: 1.000 – 40.000 UTPs during execution and in case of unfair termination: 2.000 - 50.000 eur Violation of payment terms: 500 – 500.000 eur
SPAIN	Distinction between minor and serious offenses is based on type of UTPs. 3000 eur (minor offenses) 1.000.000 eur (very serious offenses) 100.000 eur (serious offenses) Examples of minor food procurement contracting infringements: failure to draw up a written food procurement contract as specified in the specific legislation; introducing changes in the terms of the contract that were explicitly agreed by the parties; f) requiring additional payments over the price agreed in the contract, except in the cases provided for in this law. Example of serious infringements: failure to comply with payment periods in commercial transactions involving food or food products. Repeat infringements. Two or more minor offences within two years as from the date of issue of the final administrative decision of the first one: a serious offence. Two or more serious offences within two years as from the date of issue of the final administrative decision of the first one: a very serious offence.

A.3. Commitments, Recommendations, and sanctions

Following a consolidated trend in administrative enforcement, some new legislations provide the infringer with the possibility to voluntarily cease the infringement and make whole of the infringement's consequences. The possibility to undertake commitments is generally associated to the (low) gravity of the violation and it is an alternative to sanctions. In some MSs the infringers can submit a proposal to be accepted or rejected by the enforcer (Croatia, Hungary). When the infringement is serious, commitments may not be allowed and the enforcer issues both a fine and an injunction. In other MSs the enforcer issues recommendations which are not legally binding. Following the recommendation the infringer submits an action plan whose implementation is monitored by the enforcer[427]. If the action plan is not complied with the enforcer can move to conventional enforcement practice and order a sanction.

3.1) Commitments

Commitments represent a cooperative approach to enforcement. They can result in an undertaking to cease and desist from the violation and to remove the consequences of the infringement. Commitments may be offered by the infringer and evaluated by the enforcer that can accept or reject them if they seem inadequate[428]. Commitments can be part of an agreement between the authority and the infringer that is legally binding and judicially enforceable. However, the incentives to comply are related to the possibility of scaling up to sanctions by the administrative authority. Indeed, commitments are often backed by conditional fines or *astreintes* (for example provided by Polish legislation).

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

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

[428] See for example the Croatian legislation "Within the investigation the CCA decides whether the proposed measures are sufficient for the elimination of the UTPs, **taking into account the gravity, scope and the duration of the infringement. If** the CCA finds the proposed commitments acceptable and sufficient for the elimination of the UTPs, it **issues an interim decision on the basis of which these commitments become binding for the party** that must provide evidence on the fulfilment of these measures within a prescribed deadline. Where the party submits this evidence, the CCA decides to terminate the proceeding without establishing the infringement of the rules concerned and without imposing any sanctions." A similar provision is in the Hungarian Act. Section 8.1 states: "(1) If, prior to the adoption of a resolution by the agricultural administrative authority on the merits of the case, the trader affected undertakes in writing to align its conduct to the provisions of this Act in a set manner, and public interest can be served this way, the agricultural administrative authority may adopt an order that renders the performance of the undertaking obligatory, simultaneously terminating the proceeding, ordering the trader to pay the procedural costs, without including the establishment of infringement or non-infringement in the order."

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

3.2) Recommendations

In this model (UK) the enforcer makes (**not** legally binding) recommendations at the end of the investigation. Compliance with recommendations is driven by persuasion rather than by legal authority. The Grocery Code Adjudicator (GCA) after investigation can decide to issue a report and make recommendations or use its sanctioning power[429]. It generally follows a scaling strategy and issues recommendations asking the infringer to report on the progress.

A similar model is used in France, where a Commission for unfair trade practices (*Commission pour pratiques deloyales*) issues non-legally binding opinions (*avis*), that are generally followed by the courts. The difference with commitments is that the recommendations are usually issued by the 'enforcer' whereas commitments are usually submitted by the infringer and accepted or rejected by the Administrative body. Not only Recommendations concern the substantive part e.g. what constitutes a UTP but can also deal with the remedial side. The French Commission for unfair trade practices has for example explicitly stated that it is possible to combine injunctive relief and invalidity[430]. The *Cour de Cassation* in France makes references to the opinion of the Commission when deciding about remedies related to UTPs.

3.3) Sanctions

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

3.3.1 Within fines, variations in legislations are remarkable. Most MSs have determined both a minimum and a maximum. Some only a maximum. At times the maximum can be alternatively the lower sum between a threshold and the amount of revenues[431].

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[429] See, for example, the case of TESCO which was found in breach of the Code
" £ Tesco had breached paragraph 5 of the Code by:
• failing to rectify data input errors, or pay money owed to suppliers as a result of those errors, within a reasonable time; • failing to reimburse suppliers within a reasonable time for duplicate invoices containing deductions for promotional activities; • using money owed to suppliers as leverage in negotiations on future agreements or promotions; • seeking deferral of payments to suppliers, or otherwise delaying payment, in order to maintain margin targets; and • making unilateral deductions from money owed to suppliers, including in respect of: o historic underpayments made by suppliers as a result of invoicing errors or omissions, which were identified by forensic audits instructed by Tesco – the GCA found that it was unreasonable to make unilateral deductions for historic claims; o unilaterally imposing charges for alleged supplier failures to fulfil orders or achieve service level targets, and then unreasonably delaying both in resolving supplier challenges to those charges and in repaying the money; o charging promotional fixed costs (gate fees), even though the promotion did not take place – the GCA found that any failure to promptly refund such charges was unreasonable.
It was also unfair and unreasonable not to fully engage in attempting to resolve supplier concerns before making unilateral deductions from payments owed to them."

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

[431] See for example section 6 of the Hungarian Act on the prohibition of unfair distributor conduct vis-à-vis suppliers regarding agricultural and food industry products. Section 6.2 states "(2) The minimum amount of the product path supervisory fine is one hundred thousand Hungarian forints, while its maximum amounts to five hundred million

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

Hungarian forints; however, it may not exceed ten percent of the net revenue attained by the trader in the business year preceding the issue of the resolution that establishes the violation".

Table n. 11: Minimum and maximum threshold for the imposition of fines (examined UTP legislation)

MS	PECUNIARY SANCTIONS	MINIMUM/MAXIMUM/NO THRESHOLDS	MIN P.S.	MAX P.S.	% TURNOVER
AUSTRIA	*Infringements of §§1-4, Local Supply Act are addressed only resorting to civil remedies (injunctions, damages)*				
BULGARIA	X	Minimum/maximum thresholds	5000 eur	25.000 eur (in case turnover is 0)	Up to 10% (t.o. of the product concerned)
CROATIA	X	Only maximum threshold		Most serious infringements: up to 662556,81 eur (legal persons) 331278,41 eur (physical persons) Lower caps for serious and minor infringements	
CYPRUS	X	Only maximum threshold			Up to 10%
CZECH REPUBLIC	X	Only maximum thresholds		39.141.000 eur	Up to 10%
FRANCE	X Administrative fines (infringements of art. L441-7,8) Ammende civile (infringements of art. L 442-6)	Only maximum thresholds		Admin. fines: 75.000 eur (individuals) 375.000 (entities) Civil sanctions (ammèndes civiles): 5 million eur	
GERMANY	X	Only maximum thresholds		1mln eur	Up to 10%
GREECE	N/A	Only maximum thresholds		50.000 eur	N/A
HUNGARY	X	Minimum/maximum thresholds	318 eur	1.591.000 eur	Up to 10%
IRELAND	X (criminal)	Minimum/maximum thresholds	3000 eur	100.000 eur	
ITALY	X	Minimum/maximum thresholds	2000 eur (500 for payment delay)	50.000 eur (500.000 for payment delay)	
LATVIA	X	Minimum/maximum	70 eur		Up to 0,2%

MS	PECUNIARY SANCTIONS	MINIMUM/MAXIMUM/NO THRESHOLDS	MIN P.S.	MAX P.S.	% TURNOVER
		thresholds			of net t.o.
LITHUANIA	X	Only maximum threshold		120.000 eur	
POLAND	X (to the entity and to managers)				Up to 3%
PORTUGAL	X	Minimum/maximum thresholds	- € 250 for natural person - € 500 for micro enterprises -€ 750 for small enterprises -€ 1000 for medium enterprises - € 2.500 for large enterprises	- € 20.000 for natural person - € 50.000 for micro enterprises -€ 150.000 for small enterprises -€ 450.000 for medium enterprises - € 2,5 mln for large enterprises	
ROMANIA	X (criminal sanctions imposed by Consumer Protection Authority)	Minimum/maximum thresholds	10.756,15 eur	21.512,31 eur	
SLOVAKIA	X	Minimum/maximum thresholds	1000 eur	300.000 eur	
SLOVENIA	X	Minimum/maximum thresholds	6.000 eur	18.000 eur	
SPAIN	X	Minimum/maximum threshold	3000 eur (minor offenses)	1.000.000 eur (very serious offenses) 100.000 eur (serious offenses)	
UNITED KINGDOM	X	Only maximum threshold			1% of t.o. in UK

As the table suggests the variations within fining rules are remarkable. Not only there is a difference between MSs that only define maximum and those that also define a minimum but also the amount varies from 18.000 (Slovenia) to 2.500.000.00 euro (Portugal). When the maximum is high variations occur within the national system and often the sanctioning criteria are not very detailed. These variations both within and between MS depend on the gravity of the infringements and on the characteristics of the infringer. Different approaches concern the link between sanctioning and the status of the infringer. In most MSs no direct and specific relevance seems to be attributed to the victim's status (e.g. it does not matter, when establishing the amount, if the victim is a medium, small or a micro enterprise). In some MSs for the same UTP the amount of a fine can be higher for

a large than a medium or a small enterprise[432]. Clearly the status is relevant when the legislation only applies to protect micro enterprises or it excludes cooperatives The amount of the fine can vary according to the number and size of the producers affected when the consequences of the UTP on the market are taken into account[433].

In some MSs fines are related to the infringer's turnover, normally as a reference for the maximum amount of fines (BG, CY, CZ, DE, HU, LV, PL, UK). In other MSs, fines are related to the benefits accrued for engaging into the UTPs (e.g. in Italy[434]). Some MSs (Croatia, France, Portugal) distinguish between natural and legal persons and define the maximum amount accordingly (higher for legal than for natural persons)[435]. More rarely, it is explicitly linked to the magnitude of consequences and the impact on the fairness along the chain or the market. References are made to the effects of the practice on the market in relation to fairness and competitiveness which allow to capture the economic impact of the UTPs. In some cases, sanctioning is correlated to the gravity of the infringement based on the distinction between minor and major or serious offences[436]. In some countries, the amount is not only determined by reference to the seriousness of the infringement but also to the conduct of the infringer after the infringement and its availability to voluntary stop the

[432] See the Portuguese DL no. 166/2013.

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

[434] See Italy "art. 62. 6. **Salvo che il fatto costituisca reato,** il contraente, ad eccezione del consumatore finale, che contravviene agli obblighi di cui al comma 2 e' punito con la sanzione amministrativa pecuniaria da euro 2.000,00 a euro 50.000,00. La misura della sanzione e' determinata facendo riferimento al beneficio ricevuto dal soggetto che non ha rispettato i divieti di cui al comma 2 (7)."

[435] See Croatian Legislation "The cap amount of the fine for a most serious infringement may amount to up to HRK 5 million for a legal person and HRK 2.5 million for a natural person, where a legal or a natural person is a buyer and/or processor or re-seller within the meaning of the UTPs Act and sells the product under the price which is lower than any other purchase price in the product purchase chain, as referred to in Article 12 item 14 of the UTPs Act."

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

unlawful conduct and remove the consequences[437]. The nature of the sanctions and the amount in case of fines vary depending on whether the infringer is a repeat infringer (e.g. Greece, Spain).

There is not a reliable study concerning fining practices but the anecdotal evidence suggests that strong variations occur across MSs. These variations are also correlated with different interpretations of the principle of proportionality that informs the exercise of sanctioning power by administrative authorities. These principles and its different applications across MSs also relate to the relation between penalties and corrective remedies when provided[438].

Sanctions' effectiveness may be complemented by publication of the administrative decision[439]. When legislation explicitly provides so, a balance between the punitive/deterrent function of publication and procedural guarantees for the sanctioned party is ensured, e.g. by giving evidence on judicial review and revocation[440].

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

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[437] See under the Polish law: "In fixing the amount of the fines imposed in accordance with paragraph 1, paragraph 1, the President of the Office **shall take into account attenuating or aggravating circumstances** in the case.

2. Examples of mitigating circumstances referred to in paragraph 2, are in particular:

1) voluntary removal of effects of the infringement;

2) failure by the supplier or buyer, on its own initiative, the practice of using the contractual advantage unfairly before proceedings are instituted or immediately after its initiation;

3) on its own initiative to take action to stop the infringement or remedy the effects thereof;

4) working together, the President of the Office in the course of proceedings, in particular to contribute to a rapid and smooth conduct of proceedings.

3. Aggravating circumstances referred to in paragraph 2 shall be the intentional nature of the infringement and a previous similar infringement."

[438] See. e.g., Draft Groceries Code Adjudicator Bill, Schedule 3: Order conferring power to impose financial penalties

79. The Government considers that financial penalties may not be necessary in order to secure a high level of compliance with the Groceries Code by large retailers.

80.The Secretary of State would need to authorise financial penalties by order under clause 10, approved by each House of Parliament (see clause 24).

81.Under paragraph 1 of Schedule 3, the Secretary of State could only make an order if, following consultation under paragraph 6, he or she thought the Adjudicator's other powers (including recommendations and requirements to publish) were inadequate. The order would need to specify the maximum penalty that could be imposed or how to calculate the maximum: for example, by reference to the retailer's groceries turnover or the value of relevant supply arrangements. The order could also require the Adjudicator to publish guidance about the criteria the Adjudicator intends to adopt in deciding the amount of a financial penalty. By delaying and leaving open the question of whether financial penalties are needed, clause 10 and Schedule 3 allow the Secretary of State to take into account the history of enforcement of the Groceries Code by the Adjudicator, together with the views of those affected.

[439] See § A.6 below and the table therein provided.

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

A.4. Administrative injunctions

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

Injunctions may be prohibitory and or affirmative, with orders to modify the current practices. Unfair practices are about transferring costs and risks along the chain. While unlawful cost transfer may be tackled by monetary transfers, unfair distribution of risks may require more structural intervention in the organization of the supply chain. This is the case for perishable goods where the issue related to disposal includes significant organizational changes both in the suppliers' side and in the retailers' side. This is an issue that touches on the broader question related to waste disposal[441]. Cost and risk transfers can both be addressed by injunction but with different content. Prohibition of clauses transferring costs have to be combined with astreintes and restitution if the injunction is not complied with. Risk transfer may force organizational changes in the chain. The injunction not only should prohibit the transfer but also force organizational changes that can prevent such transfer in the future.

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

[441] See European Parliament Resolution 2017.

A.5. The boundaries between administrative and criminal sanctions and the principle of ne bis in idem

For the most part, the MSs legislation has introduced administrative sanctions and conferred enforcement power to existing or, in some cases, new authorities. This leaves open the issue of the possible criminal nature of the administrative sanctions and the ensuing question about *ne bis in idem*, e.g. whether criminal sanctions can be combined with administrative sanctions. A prominent exception is Ireland, where the UTPs are considered criminal offences and the sanctions are criminal. In the Irish case the Competition and Consumer Authority can issue a decision with findings concerning the UTP but it has to refer the case to the criminal court that can order the criminal sanction[442]. The qualification of UTP as a criminal offence is featured in other MSs (e.g. Romania and Austria).

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

A.6. Reputational sanctions via administrative enforcement

It is generally believed that reputational sanctions associated with market consequences like black list are generally the domain of private regulation and enforcement by private actors. However administrative enforcers are considering the possibility of using reputational sanction in addition to the more conventional array. In particular, the reputational sanction may consist in the publication of the administrative decision.

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

A similar effect is attained through the publication of decisions by enforcing authorities, as addressed in the table below.

Table n. 11-bis: Publication of enforcement decisions administrative authorities

Summary information (examples, not necessary exhaustive)

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

A.7. The practices of administrative enforcement in MSs

The practice of administrative enforcement depends upon national administrative substantive and procedural laws which significantly differ[443]. As it was shown in the previous tables, significant variations across MSs within administrative enforcement not only concern the 'if' (e.g. the number of investigations) but also the outcome of the enforcement action (type and intensity of sanctions). These divergences are partly determined by the legislative frameworks and partly related to the approach taken by individual enforcers. Divergences in practices may occur even when legislation is similar.

The European Commission reported a significant variation across MS about the practices evaluated through the number of investigations. It stated: "The actual number of investigations into alleged unfair trading practices differs significantly across Member States. Around a third of Member States with public enforcement had no cases in the last few years (AT, BG, FI, HR, LV, RO, SI); another third just investigated a few cases (CY, DE, IE, LT, UK); and the remaining third dealt with dozens or even more (CZ, ES, FR, HU, IT, PT, SK). To some extent, this could be attributed to the different salience of the problem in the different Member States."[444]

More recent data suggest that no relevant changes have occurred since the EC Report was written (see table below). Indeed, most of the MSs where the case rate is still low, if ever available, have

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

adopted legislation very recently (e.g. Ireland, Croatia) or are still relying on limited scope existing legislation (e.g. Austria, Finland) and some of them are considering the adoption of new more focused legislation (e.g. Finland).

Table n. 12: Enforcement practices during 2015-2016

MS	NUMBER OF COMPLAINTS (2015 -2016)	NUMBER OF COMPLAINTS RESULTING IN FURTHER ACTION AFTER COMPLAINTS	INVESTIGATION CONDUCTED BY ENFORCEMENT BODIES (2015-2016)	RESULTS OF INVESTIGATION / PROCEEDINGS
AUSTRIA	6	6	6	Fines
BULGARIA	8	8	8	- 5 pending investigations - 2 infringement decisions (fines applied)
CROATIA	N/A	N/A	N/A	N/A
CYPRUS	0	0	0	N/A
CZECH RUPUBLIC	22	18	31	- 2 closed proceedings (no infringement found) - 2 closed proceedings (commitment accepted) - 0 fines
FRANCE	595 (2015), 494 (2016)		2015: 36 national, 25 regional; 2016: 32 national, 20 regional; 2016	8 civil proceedings in 2015, 6 in 2016; 158 criminal sanctions applied in 2015; 134 criminal sanctions applied in 2016;
GERMANY	10	Few cases	1	Annulled by the Higher Regional Court of Düsseldorf
GREECE	N/A	N/A	N/A	N/A
HUNGARY	41	41	152	-29 fined undertakings - 11 investigations ended (commitments accepted) - 67 ended (no infringement found)
IRELAND	0	0	0	N/A
LATVIA	2	2	2	Pending
LITHUANIA	0	0	1	Injunction and fine
POLAND	0	0	0	N/A
PORTUGAL	80 (2015), 46 (2016)	26 (2015) 20 (2016)	2 (2015) 2 (2016)	42 impositions of sanctions - 33 without any sanctions
ROMANIA	0	0	0	N/A
SLOVAKIA	9	9	39	-12 (infringement found; 4 fines applied) - 18 (no infringement found) - 9 pending
SLOVENIA	N/A	N/A	0	N/A
SPAIN	98	98	1784	- 43 sanctions proceedings based on confidential complaints - by December 2016, 347 sanctions proceedings based on ex officio investigations 95 fines applied
SWEDEN	0	0	0	N/A
UK	- 0 request for arbitration	0	1	Pending

A.8. Conciliation and mediation by public bodies

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

This is a grey area for at least two important reasons. (1) Institutionally, there are many instances where bodies in charge may have a hybrid identity and the enforcement body be composed by both public and private actors. (2) Functionally, because the evolution of administrative enforcement into forms of cooperative enforcement between enforcers and infringers makes the boundaries between enforcement and ADR blurrier. However, as the Bulgarian example shows that there is room for public bodies engaging into mediation and conciliation. The Bulgarian legislation has opted for a relatively formal approach where the Reconciliation Commission sitting at the Ministry of Agriculture can conclude its proceedings with a written binding agreement between the two or more litigants[445]. In other cases, in which the Code is enforced through legislation (as is the case in the UK), retailers are under a duty to negotiate in order to solve the dispute "amicably". If this attempt fails, an arbitration procedure is started[446].

A.9. Monitoring Compliance by administrative bodies

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

Pre-infringement monitoring compliance.

Enforcers can ask potential infringers to adopt a compliance governance that enables them to detect and remove UTPs. The compliance can either refer exclusively to the large buyer (chain leader) or can include the various segments of the chain.[447].

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

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

[447] See CGA Compliance tips: "Compliance tips.
Retailers should take the following steps to ensure they comply with the Code, and mitigate the financial and reputational risks of non-compliance: 1. Start at the top – all compliance efforts stand or fall based on whether they are supported (and, crucially, seen to be supported) by senior management. Regular and unequivocal reminders from senior management about both the terms of the Code, and the business's commitment to compliance, are essential.

Post- infringement monitoring compliance. Using scorecards

Enforcers have to monitor compliance after the infringement. Post-infringement monitoring encompasses not only monitoring compliance with commitments, recommendations, and sanctions but also the infringer's efforts to remove the primary causes of the infringement. Not only enforcers have to ensure that sanctions are complied with and that the infringement is terminated but they also have to make sure that the causes of the infringement, like the transactional model along the chain, are removed and transactional practices are modified. Monitoring the behaviour of the infringers over time is relevant to verify compliance with the specific order (e.g. injunction) and to evaluate improvements over time fairer distribution of risks along the chain. The majority of enforcers do not have a stable monitoring system of the infringers' conduct. The Grocery Code adjudicator (GCA) in the UK adopts the continuous improvement approach and monitors the conduct of the infringers over time[448].

Especially important when collaborative modes are adopted is the continuous improvement approach. Often changes requested by the enforcer after the infringement call for a re-adaptation of the chain. The sanctions and the remedies focus on the practices but the causes of the practice may lie in the organizational structure of the chain. To monitor the changes preventing UTPs in the future requires specific instruments like scorecards. Scorecards with indicators measure improvements over time when the removal of infringement's causes requires structural changes hard to implement instantly. Scorecards look at the behaviour and its impact on the entire chain. Monitoring compliance should look at improvements made by the chain leader in organizing

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

[448] See Grocery Code Adjudicator Annual Report and Accounts 2016/2017.

exchanges along the chain by involving first, second, and third tier suppliers together with multiple intermediaries.

For example, UTPs related to the payment system along the chain requires time. The payment system in long term relationship may require deep reorganization. For example, often payments include some degree of input financing, some contribution to new technologies, premiums for sustainability achievements. These may be factored into the price or may be paid separately, they may be paid before or after performance. In the former case they provide resources and represent and investment. In the latter case they simply reward the performance and its quality. Modes and time of payment have deep influence on the investment strategies of farmers with repercussions along the entire chain.

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

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

IV.B) Judicial Enforcement

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

Judicial enforcement may include criminal and civil UTPs. It may concern one or multiple infringers and one or multiple affected producers. When multiple infringers cooperate in deciding and operationalizing the UTP, joint and several liability can be applied[449]. Many specific legislations define UTPs as civil or administrative infringement. Some MSs (notably Ireland and, partly, Romania and Austria) however emphasize the criminal aspects of UTPs and design them as criminal offences. In other legal systems, the possibility to issue criminal sanctions in addition to administrative sanctions and civil remedies reflects the different facets of UTPs. For example, Italy regulates UTPs and makes criminal offences alternative to administrative infringements. The nature of the infringement results into an enforcement mechanism. If the infringement can be characterized at the same time as administrative, criminal, and civil then multiple enforcers can act. The multiplicity of enforcement systems reflects the relevance of complementarity among various pillars of the enforcement triangle.

The new legislations mainly refer to UTPs' administrative enforcement. Those UTPs that are not specifically included in that legislation can still be tackled via general judicial enforcement when they represent a breach of contract or an act of unfair competition. That is to say, the new MSs legislation has not replaced the general clauses that were used before to address UTPs[450]. Hence, judicial enforcement applies to the new legislation for aspects concerning restitution and

[449] See e.g. § 13, Austrian Unfair Competition Act.

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

compensation not covered by administrative enforcement, and as a general form of enforcement for the UTPs not included in the new legislation.

In fact, judicial enforcement plays an important role in MSs that have not adopted a dedicated legislation on UTPs, mostly representing the only means of protection for UTP's injured parties. In these cases, courts apply general contract or tort law and, when relevant, competition law. The lack of a dedicated enforcing authority and the costs and length of judicial proceedings may represent one of the drawbacks of not adopting dedicated legislation on UTPs. This conclusion may also apply to those MSs that have only adopted a limited set of provisions mainly dealing with pre-contractual misleading and aggressive commercial practices relying only on judicial enforcement. Indeed, this is the case in *Belgium, Denmark, Finland, Sweden*, whose legislative approach, mainly drawn on consumer law, has been described above (see § III). In these four MSs, the prohibition of unfair commercial practices is enforced by courts. In some cases, specialized courts (such as Commercial or Market Courts) have jurisdiction (so in Belgium, Finland and Sweden). Otherwise general courts are competent. Courts have the power to impose injunctions (often reinforced through conditional penalties – *astreintes*) and fines. In some legislation the right to damages and restitution is specifically recognized (Denmark).

Access to judicial enforcement is primarily granted to those injured by UTPs. They can act individually or jointly when the same UTPs has affected multiple producers or even multiple enterprises along the chain. Producers' organizations may play different roles. (1) They may be granted an autonomous right to access court. In some MSs the law defines specifically the associations and public bodies entitled to bring a civil action before the Court[451]. Lacking specific legislation general provisions of civil procedure apply to regulate standing and the possibility for producers organizations to seek remedies. In this case they protect the collective interests of producers or more broadly of parties along the chain. (2) Alternatively, they may be granted a right to represent producers in the proceedings, filing a claim in their own interest. (3) Finally there are MSs which do not allow producers associations to be a party in the judicial proceeding. When they are not granted a right to be a party to the proceeding they may be enabled to intervene in the proceeding. Third party intervention does not warrant a right to seek an independent remedy but simply a right to take part in the judicial proceedings and to present evidence on the existence of the practice and its harmful consequences.

Table n. 13: Empowerment of enterprises' associations in judicial enforcement of UTP legislation (examples)

MSs	POWER OF ENTERPRISES' ASSOCIATIONS IN THE ENFORCEMENT OF UTP LEGISLATION BEFORE COURTS (EXAMPLES)

[451] See for example France L. 470-7 of code de commerce states: « Les organisations professionnelles peuvent introduire l'action devant la juridiction civile ou commerciale pour les faits portant un préjudice direct ou indirect à l'intérêt collectif de la profession ou du secteur qu'elles représentent, ou à la loyauté de concurrence". See for example the Austrian unfair competition Act "General provisions Claim for an injunction: "§ 14. (1) In the cases referred to in Sections 1, 1a, 2, 2a, 3, 9c and 10, an injunction for cessation may be sought by any trader who offers goods or services of the same or related species or in the commercial market (competitor) or by associations promoting the economic interests of businesses, provided these associations represent interests that are affected by the action. In the cases referred to in Sections 1, 1a, 2, 2a and 9c, an injunction may also be claimed by the Federal Chamber for Workers and Employees, the Austrian Economic Chamber, the Conference of Chairs of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation or the Federal Competition Authority. In cases of aggressive or misleading commercial practices under § 1 para. Point 2, paragraph 1 2 to 4, Section 1a or Section 2, an injunction may also be claimed by the Association for Consumer".

AUSTRIA	power to file suits for cease and desist orders before Court
FRANCE	power to start civil proceedings before the Court

Judicial enforcement is also open to administrative authorities and branches of executives[452]. In some MSs like France the Ministry of Economy is granted the possibility to seek remedy that would not be available to the injured parties. This the case for *amende civile* and for '*repetition de l'indu*'[453]. Other MSs like Austria grant several bodies the possibility to seek judicial remedies[454].

Judicial enforcement includes primarily compensation and restitution. To a limited extent, especially when unfair competition is applicable, judicial injunctions can also be issued. Judicial injunctions are granted in those systems that have extended the consumer regulation implementing dir. 2005/29[455]. Other MSs explicitly grant the judge the power to issue an injunction and other corrective measures (e.g. Cyprus, France, Germany)[456]. In some limited cases judicial remedies include also civil penalties (*amendes civiles*)[457]. Moreover, in France the code de commerce imposes a renegotiation clause whose absence can be punished with an administrative penalty[458].

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[452] See France Code de Commerce art. 442/6 " III. - L'action est introduite devant la juridiction civile ou commerciale compétente par toute personne justifiant d'un intérêt, par le ministère public, par le ministre chargé de l'économie ou par le président de l'Autorité de la concurrence lorsque ce dernier constate, à l'occasion des affaires qui relèvent de sa compétence, une pratique mentionnée au présent article."
See Austrian Unfair competition Act, art. 14, cited above (fn n. 72).

[453] See France art. 442-6 code de commerce.

[454] See § 14, Austrian Unfair Competition Act.

[455] See, e.g., § 14, Austrian Unfair Competition Act.

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

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

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

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

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

Le fait de ne pas prévoir de clause de renégociation conforme aux deux premiers alinéas du présent article, de ne pas respecter le délai fixé au troisième alinéa, de ne pas établir le compte rendu prévu au même troisième alinéa ou de porter atteinte, au cours de la renégociation, aux secrets de fabrication ou au secret des affaires est passible d'une amende administrative dont le montant ne peut excéder 75 000 € pour une personne physique et 375 000 € pour une personne morale. L'amende est prononcée dans les conditions prévues à l'article L. 470-2. Le

Publication of the judgment is allowed in some MSs. The party who suffered harm and or producers' associations can ask to publish the judgment at the expenses of the infringer[459].

Table n. 13-bis: Publication of enforcement decisions by courts
Summary information (examples, not necessary exhaustive)

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

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

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

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maximum de l'amende encourue est doublé en cas de réitération du manquement dans un délai de deux ans à compter de la date à laquelle la première décision de sanction est devenue définitive".

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

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

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

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

A significant difficulty explaining the low level of judicial enforcement is proving the amount of damages at least for some UTPs. While clearly UTPs shift costs along the chain it might not be easy to determine the amount of unlawful cost shifting for practices. Easier is the case to determine compensation for late payment, retroactive conditions, unilateral modifications of contracts, unlawful termination of the business relationship.

The difficulties increase even further if the consequences of UTPs have to be evaluated not at the level of the specific bilateral relationship but at the chain level (multiple injured parties) where the interdependent effects of UTPs may have very wide reach and the distribution of costs may include several stages of the chain.

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

Complementarity poses challenges to the modes of coordination between various enforcement systems all in place. National legislations do not effectively address the issue of coordination among enforcement mechanisms and between different judicial disputes. An interesting exception is the Irish system where it is expressly stated that findings of an infringement by a retailer constitute res judicata and can be used by different parties in subsequent litigation[460]. Here the relationship is

[460] CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 S.I. NO. 35 OF 2016: "The Act also provides anyone who is aggrieved by the failure of a retailer or wholesaler to comply with any regulations or with any compliance notice issued under the relevant Section of the Act, shall have the right of action for

between criminal findings and a right of action for civil remedies. If the criminal offence has been ascertained the civil action can be based on those findings. Hence when the large retailer engages into criminally relevant behaviour all those affected can bring civil actions asking for damages. In the Irish legal system the civil action seems a 'follow on' of the criminal prosecution[461]. Coordination between judicial and administrative enforcement is needed both (1) when the UTP constitutes a criminal offence to regulate *ne bis in idem* consequences, and (2) when a civil remedy may be sought to complement ad administrative sanction to ensure consistency between the administrative decision and the judgement.

IV C) Dispute resolution mechanisms

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

The Food Supply Chain Initiative (FSCI) is a joint initiative developed by 8 EU-level associations representing the food and drink industry (FoodDrinkEurope), the branded goods manufacturers (AIM), the retail sector (the European Retail Round Table [ERRT], EuroCommerce, EuroCoop and Independent Retail Europe), the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) and agricultural traders (CELCAA). The SCI is managed by a Governance Group.

"The SCI, a voluntary framework for implementing the principles of good practice was launched in September 2013. Individual companies may join the SCI once they comply with the principles of good practice. Under the SCI, disputes between operators can be addressed through mediation or arbitration."[462]

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

"The SCI focuses on organisational requirements at company level to prevent UTPs, including staff training and participation in dispute resolution mechanisms. Breaches of these organisational requirements can lead to the concerned company being excluded from the SCI. However, the SCI

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relief against that retailer or wholesaler in the Circuit Court (any such relief, including exemplary damages, not being in excess of the limits of the jurisdiction of the Circuit Court in an action founded on tort). "

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

[462] See Commission Report p. 8

does not provide for any other type of sanction. Members of the SCI must ensure that the weaker parties using the dispute resolution mechanisms are not subject to commercial retaliation."[463]

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

The regulatory approach is based on the identification of the unfair practices and the recommendation of best practices[464]. When, as it is the case in Italy, the code is incorporated in legislation, this becomes the regulatory approach in administrative enforcement. FSCI distinguishes between minor and major breaches. The former do not result in any public statement while the latter do.

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

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

V. Rethinking the policy options for UTPs in agrifood supply chains: an agenda for future research

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

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

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[463] See Commission Report p. 8

[464] See Vertical relationships in the Food Supply Chain: Principles of Good Practice, and more specifically Recommendation for Good Practice in applying the SCI principles of fair dealing, information, confidentiality, and justifiable request, enacted at the end of 2017.

A sub question about the scope of application is related to extraterritoriality, e.g. the desirability to extend legal protection to non-EU agricultural producers. Should EU and MSs legislation prevent UTPs against non-EU producers? Should access to enforcement mechanisms be granted to all over the world producers selling products in the EU market? A global supply chain approach that features EU as a global regulatory player should certainly move towards such an approach. EU law should control the global chains from every perspective including risk and power allocation, and potential abuses. This policy change can however increase the costs of enforcement and translate into a less effective enforcement for EU producers. Hence, there are costs for adopting extraterritorial scope. Possible solutions to the cost of enforcing practices extraterritorially might differentiate the relevance of enforcement mechanism and make extraterritorial enforcement available only for significant and widely spread infringements that include both EU and non EU producers. This option would leave out of the EU scope minor and individual infringements towards non EU producers.

Variations about legal protection on the one hand, represent a positive ground for experimentation; on the other hand, make it more difficult to tackle cross border violations. Fragmentation makes enforcement difficult especially in transborder infringements that occur in EU and within global chains. A decentralized enforcement mechanism does not provide effective solutions for UTPs occurring in global markets where agricultural commodities come from countries different from those of food processing and consumption.

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

The most urgent issues concern whether a EU legislative intervention and impact is useful to reduce and mitigate UTPs and, in the affirmative case, what should its determinant features be. A EU intervention is useful to warrant a common ground in terms of principles related to forbidden UTPs and enforcement mechanisms with identification of priorities over modes of infringement and sanctioning policies. It is a useful opportunity to defining coordination mechanisms among enforcers especially relevant in transborder multi party infringements.

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

Current variations in MSs legislation concern the combination and interaction between principles like the duty to act in good faith and engage in fair dealing and specific forbidden practices. These distinctions result in different allocation of power between rule makers and enforcers. Some legislations are more principle- based and the identification of practices is mainly left to the enforcers. Other legislations are more specific and the general principles have interpretative rather than creative functions. In the latter case enforcers enjoy less discretion. But differences across MSs occur also between specific rules as the late payment example shows (MSs have different thresholds of days to define what constitutes a late payment). Whereas different MSs legislative techniques may reflect alternative policy options, some limits to legal differentiation should be drawn within

the boundaries of subsidiarity and proportionality. In other words, differentiation of legal instruments across MSs should not undermine consistency of policy goals and results at EU level.

Within the array of different legislative techniques, the choice between mandatory and default rules becomes very relevant. Moving away from a crude alternative between mandatory rules and freedom of contract for a wider set of options, is necessary; in some areas, including default rules that parties can deviate from by using, for example, a 'comply or explain' technique would certainly increase the effectiveness of legislation. A good illustration of a combined use between mandatory and default is provided by the FSCI regulatory approach. Within FSCI prohibitory mandatory rules define unfair practices, default rules recommend good practices. A more complex architecture could include default rules also in relation to UTPs prohibition. In this case the prohibited practices may be differentiated between those regulated by mandatory and those regulated by default rules. Default rules may permit parties' negotiations over contractual terms as long as certain procedures detailed in the contract are met, as exemplified in the above analysis (see § III.2). Default rules may allow parties to reallocate the risks and costs as long as redistribution is made transparently and within the parameter of proportionality. Default rules permit taking into account chains' specificities concerning the commodities, the level of industry concentration, the role of large distribution. The use of alternative contractual clauses to the legislative default should be carefully monitored to ensure that no abuses take place and that the default clearly represent the majoritarian best option. One possibility is the creation of a EU observatory of agri-food trade practices that collect information about contractual clauses deployed along the chains. This approach can be based on self-reporting by large retailers and buyers and it should at least distinguish between horticulture, crop, aquaculture, livestock.

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

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

There is clearly an enforcement gap to tackling UTPs. The gap stems from ineffective coordination within MSs and between MSs. Such enforcement gap increases even more in relation to trans-border infringements. As to the enforcement framework, decentralized enforcement both administrative and judicial should be complemented by stronger coordination mechanisms among MSs. The new EU legislation should provide coordination instruments among administrative enforcers similar to those deployed in competition law under Regulation 2003/1 or those just introduced in consumer law by EU Regulation 2017/2394. A EU legal intervention could define one or more options for coordination in case of cross border infringements involving several MSs. Coordination should encompass investigations, sharing information and evidence, sanctioning practices, and remedies, especially when multiple infringers and multiple injured parties are located in various MSs.

Sanctioning practices sensibly differ across administrative enforcers. This makes inconsistency across MSs likely to occur. Same infringements in two or more MSs may be subject to different sanctions or within the same 'sanction family' (financial penalties) significantly different amounts can be determined. Some legislations introduce differences between UTPs with major and minor infringements. Others do not prioritize the seriousness of infringements according to the specific

practice. The principles of effectiveness, proportionality, and dissuasiveness should be applied consistently by enforcers across countries. Even if the sanctioning power is left to national enforcers, coordination may help avoiding inconsistencies and ensuring a uniform deterrent effect.

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

The other relevant macro-question is whether the current complementarity between public and private regimes delivers the best results. In case of a negative answer what are the changes that can make complementarity work better? The two dimensions concern substantive and remedial rules.

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

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

What are the possible effects of UTPs EU legislation on the MSs current legal framework? A EU legislative intervention would not replace current MSs' legislation. It would either fill in the gaps or complement it. The use of general civil law and competition law should be considered inadequate to

meet implementation requirements of a EU legislative instrument. These MSs will be obliged to approve new rules both on the substantive and the remedial side. The impact on MSs with an existing UTPs legislation would differ. Possibly the most significant impact would be more effective coordination of the enforcement bodies and increasing the influence of CJEU judgments if preliminary references about UTPs were submitted. It would be the beginning of the process of soft harmonization with both an impact on intra EU trade of agricultural products and an impact on trade between third countries and EU, affecting both the structure of global supply chains and the exercise of unequal bargaining power.

Annex G: Study annexes - Overview on "Specific regulations on Unfair Trading Practices in Member State in the Business-to-Business Retail Supply Chain" [465]

Annex (extended tables)

(within a cooperation with DG Agri and European Commission - Joint Research Center Ares(2017)5377697)

by Fabrizio Cafaggi and Paola Iamiceli

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[465] The Report and its Annex are based on data and information gathered through a consultation launched by DG AGRI in October 2017 with the cooperation of experts and respondents from the 28 MSs as a follow-up of a previous consultation launched in 2015. For Greece only the answers provided in the 2015 survey have been available; neither survey was successful for Malta.

LIST OF TABLES

List of national legislations

Countries	*Legisl. ref.*
Austria	Act on the Improvement of Local Supply and Market Conditions (Local Supply Act, Bundesgesetz vom 29. Juni 1977 zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen, StF: BGBl. Nr. 392/1977 (NR: GP XIV IA 4/A und 12/A AB 565 S. 61. BR: AB 1689 S. 366 Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG StF: BGBl. Nr. 448/1984 (WV)
Belgium	Code de droit économique, Livre VI, TITRE 4, CHAPITRE 2. [Pratiques du marché déloyales à l'égard de personnes autres que les consommateurs], Art. VI.104-109; Inséré par L 2013-12-21/23, art. 3, 009, En vigueur: 31-05-2014
Bulgaria	Bulgarian Law on Protection of Competition (LPC), Art. 37a Art. 37a. (new - SG 56 of 2015) (1) Foodstuffs Act Article 19.
Croatia	Act on the prohibition of unfair trading practices in the business-to-business food supply chain, Official Gazette 117/17, enters into force on 7 December 2017
Cyprus	Protection of Competition Laws of 2008 and 2014, section 6(2)
Czech R.	Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof
Denmark	Consolidated Marketing Practices Act, Consolidated Act no. 58 of 20 January 2012 as amended by section 33 of Act no. 1231 of 18 December 2012, section 5 of Act no. 1387 of 23 December 2012 and section 1 of Act no. 378 of 17 April 2013
Estonia	
Finland	Unfair Business Practices Act (1061/78 amendments up to 461/2002 included)

Countries	*Legisl. ref.*
France	Article L. 442-6 (I, II) du code de commerce: unfair practices and unfair terms. Art. L 441-6: precontractual information duties Art. L. 441-7: framework distribution contracts Art. L. 441-8: duration contracts and price renegotiation in food market Art. L. 441-9: subcontracting Art. L 442-9: excessively low price sales imposed by buyer (in general and in the food sector) Art.L. 443-1: payment terms and practices
Germany	Sec. 20 of the Act against Restraints of Competition (ARC)
Greece	Act No. 146/1914 on "Unfair Competition", art. 18a
Hungary	Act XCV of 2009 on the prohibition of unfair distributor conduct vis-à-vis suppliers regarding agricultural and food industry products
Ireland	CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 (S.I. NO. 35 OF 2016)
Italy	D.L. 24-1-2012 n. 1 Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività. Pubblicato nella Gazz. Uff. 24 gennaio 2012, n. 19, S.O. Art. 62. Disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari In vigore dal 19 dicembre 2012 D.M. 19 ottobre 2012, n. 199 Regolamento di attuazione dell'articolo 62 del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, convertito, con modificazioni, dalla legge 24 marzo 2012, n. 27.
Latvia	Unfair Retail Trade Practices Prohibition Law
Lithuania	REPUBLIC OF LITHUANIA LAW ON THE PROHIBITION OF UNFAIR PRACTICES OF RETAILERS 22 December 2009 – No XI-626 Vilnius (As last amended by 17 December 2015 – No XII-2204)
Luxembourg	
Malta	
Netherlands	

Countries	*Legisl. ref.*
Poland	OJ 2017 Item 67 ACT of 15 December 2016 to prevent the fraudulent use of contractual advantage in trade in agricultural products and groceries
Portugal	Decree-Law (DL) No. 166/2013, of 27.12, changed by Decree-Law (DL) No. 221/2015, of 8.10 (in order to provide certain clarifications), on "individual restrictive commercial practices", which has revoked previous legislation on the same area (DL 370/93, of 29.10, with the amendments introduced by DL 140/98, of 16.05)
Romania	Law 321/2009 on food marketing. Law no. 321/2009
Slovakia	Act No. 326/2012 on unreasonable conditions in trade relations subject of which are foodstuffs entered into force on January 1, 2013
Slovenia	Act on Changes and Amendments to the Agriculture Act OJ - 26/14 on 14 April 2014.
Spain	Law 12/2013, of 2 August, measures to improve the functioning of the food supply chain.
Sweden	The Marketing Act (2008:486), implementation of Directive 2005/29/EC; annex I (list of unfair practices practices) made applicable to BtoB as well.

Countries	*Legisl. ref.*
United Kingdom	THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009 On 9 May 2006, the Office of Fair Trading, in the exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the UK. On 30 April 2008 the CC published a report on the investigation and it contained the decision that there were adverse effects on competition. On 26 February 2009 the CC gave notice of its intention to make this order in accordance with paragraph 2 of Schedule 10 to the Act as applied by section 165 of the Act. Following consultation, the CC made modifications to the order and issued a further notice of its intention to make this order in accordance with paragraph 5 of Schedule 10 to the Act. The CC, in accordance with section 138 of the Act and in exercise of the powers conferred by sections 161 and 164 and Schedule 8, and for the purpose of remedying, mitigating or preventing the adverse effects on competition concerned and for the purpose of remedying, mitigating or preventing detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effects on competition, makes the following Order.

1. Legislative instruments

Does legislation exist in EU MSs addressing unfair trade practices in business-to-business relations?
If existing, is its scope of application limited to the food sector?
Is it limited to specific type of potential infringers, e.g. large companies only and/or retailers only?

Countries	*No legislative instrument available*	*Legislative instrument on UTPs in BtoB relations (not specific for food chain)*	*Legislative instrument on UTPs in food sector*	*Limited scope by size (large businesses only)*	*Limited scope by position in the chain (retailers only)*	
						Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria		X (Local Supply Act: non-discrimination; prohibition of transfer of unjustified risk)				*The list of unfair practices has been amended. For example the unjustified transfer of risk is now regulated in § 1 (2) Local Supply Act (Nahversorgergesetz) to include special equipment, obligations to take back goods or assumptions of liability).*
Belgium		X				
Bulgaria		X	X			
Croatia			X	X (re-seller: >132.511 eur turnover in Croatia) (buyer, processor: > 66.255 eur t.o. in C.)		
Cyprus		X				
Czech Republic			X		X	
Denmark	X	-	-	-	-	
Estonia	X	-	-	-	-	

Countries	*No legislative instrument available*	*Legislative instrument on UTPs in BtoB relations (not specific for food chain)*	*Legislative instrument on UTPs in food sector*	*Limited scope by size (large businesses only)*	*Limited scope by position in the chain (retailers only)*	
Finland	X	-	-	-	-	New legislation scheduled for 2019
France		X				
Germany		X	-	-	-	
Greece		X				Update: 2015
Hungary			X		X	Plan for legislative reform
Ireland			X		X	Applies in favour of suppliers also if located out of Ireland
Italy			X			
Latvia		X	Specific list of UTP for food sector			
Lithuania		X		- applies to retailers having significant market power, defined as retailers with at least 20 stores and a surface of at least 400 sqm in Lithuania and with an aggregate income in the last financial year that is not less than 116 mill eur; - does not apply to relations between retailers having significant market power and suppliers whose aggregate income during the last financial year exceeds EUR 40 million	X	Update: 2015
Luxembourg	X					Update: 2015
Malta	X					No answer available within DG Agri survey
(The) Netherlands	X					
Poland			X	No but legislation applies when trade value in past two yrs or within UTP	Out of scope of legislation: trade internal to cooperatives and	Scope limited to the extent that UTP's effects occur in Poland

Countries	*No legislative instrument available*	*Legislative instrument on UTPs in BtoB relations (not specific for food chain)*	*Legislative instrument on UTPs in food sector*	*Limited scope by size (large businesses only)*	*Limited scope by position in the chain (retailers only)*	
				practices exceeds 11933,55 eur and when infringer's (group's) turnover exceeds 23.867.107,62 eur	agricultural producer groups or associations	
Portugal		X	Law (DL) No. 221/2015, of 8.10, whose scope is transversal, also carries specific provisions for the agri-food sector.	No, but fines are defined also in respect of infringer's size. Moreover, decree-Law (DL) No. 166/2013, of 27.12, changed by Decree-Law (DL) No. 221/2015, of 8.10, whose scope is transversal, also carries specific provisions for the agri-food sector, specifically when the supplier is a micro or a small enterprise, producer organization or cooperative.		Impact assessment of legislation just finalised at the end of 2017. This decree-law only applies to companies established in national territory and to contracts concerning goods and services originating outside Portugal (reform)
Romania			X			Not applied due to infringement procedure at EU level (C 2148/2016)
Slovakia			X			
Slovenia			X			Reform of the Agriculture Act approved by the Government in December 2017, submitted to the Parliament (decision in January 2018)
Spain			X	No, but legal requirements concerning the use of written form in contracts and their minimum	Relations within cooperatives are excluded	

Countries	*No legislative instrument available*	*Legislative instrument on UTPs in BtoB relations (not specific for food chain)*	*Legislative instrument on UTPs in food sector*	*Limited scope by size (large businesses only)*	*Limited scope by position in the chain (retailers only)*	
				contents apply to transactions whose value exceed (or will presumably exceed) 2500 eur and one of the proxies for unbalance relations occur (i.e., relation with a SME, or a primary producer, or an enterprise in economic dependence		
Sweden		X				
United Kingdom			X[466]	X	X	

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

2.1 Modes of regulation and prohibited unfair practices: legislative texts

What are the relevant legislative provisions defining UTPs? How do they look like?

Countries	*Text/summary*	*Legisl. ref.*
		Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria	Non-discrimination; prohibition of transfer of unjustified risk. The Local Supply Act prohibits the unequal treatment of entrepreneurs by other entrepreneurs, unless such behaviour is objectively justified. According to Austrian case law, this non-discrimination obligation conferred upon entrepreneurs does not require a dominant market position in order to be applied. Contributions to promotional or marketing costs as an UTP.	Act on the Improvement of Local Supply and Market Conditions (Local Supply Act, Bundesgesetz vom 29. Juni 1977 zur Verbesserung der Nahversorgung und der Wettbewerbsbedingungen, StF: BGBl. Nr. 392/1977 (NR: GP XIV IA 4/A und 12/A AB 565 S. 61. BR: AB 1689 S. 366
Belgium	*Est interdit, tout acte contraire aux pratiques honnêtes du marché par lequel une entreprise porte atteinte ou peut porter atteinte aux intérêts professionnels d'une ou de plusieurs autres entreprises* Plus: specific provisions on infringements of precontractual information duties, misleading or aggressive advertisement, unsolicited offers, pyramidal sales.	Code de droit économique, Livre VI, TITRE 4, CHAPITRE 2. [Pratiques du marché déloyales à l'égard de personnes autres que les consommateurs], Art. VI.104-109; Inséré par L 2013-12-21/23, art. 3, 009, En vigueur: 31-05-2014
Bulgaria	Bulgarian Law on Protection of Competition (LPC), Art. 37a Art. 37a. (new - SG 56 of 2015) (1) *Every act or omission of an undertaking with a* ***stronger bargaining position*** *shall be prohibited, where it is in conflict with the fair business practice and is damaging or can impair the interests of the weaker part in negotiations or of consumers. Unfair shall be acts or omission which do not have objective economic grounds, such as unjustified refusal to be delivered or purchased goods or services, imposition of unreasonably heavy or discriminatory*	Bulgarian Law on Protection of Competition (LPC), Art. 37a Art. 37a. (new - SG 56 of 2015) (1)

Countries	*Text/summary*	*Legisl. ref.*
	conditions or ungrounded termination of business relations. *(2) The existence of a stronger bargaining position shall be determined in view of characteristics of the structure of the relevant market and particular legal relationship between the involved undertakings, taking into consideration the level of dependence between them, the nature of their business and the difference in the scale thereof, the probability of finding of an alternative trade partner, including the existence of alternative supply sources, distribution channels and/or customers.* Foodstuffs Act Article 19. (1) *The **contract** for purchase of food for resale **cannot**:* *1. contain a prohibition or a restriction on a party to the contract to offer or purchase goods and services of or from third persons;* *2. contain a prohibition or a restriction on a party to the contract to offer the same or better terms of trade to third persons;* *3. envisage sanctions in the case of provision of the same or better terms of trade to third persons;* *4. be amended unilaterally, unless this is explicitly provided for in the contract;* *5. envisage remunerations for services which have not been actually provided;* *6. envisage the shifting of unjustified or disproportionate trade risk onto one of the parties;* *7. envisage a payment time limit longer than 30 days from the date of receiving the invoice for delivery or another invitation for payment. When the invoice or invitation is received prior to receiving the goods, the time limit shall begin elapsing from the day following the day of receiving the goods, regardless of the fact that the invoice or invitation for payment dates prior to that;* *8. contain a prohibition or a restriction on a party to the contract to assign receivables to third parties.* *(2) All arrangement in violation of Paragraph 1 shall be null and void.*	Foodstuffs Act Article 19.
Croatia	Abuse the superior bargaining power. The UTPs in the **production, processing and/or sales of agri or food products** that are imposed on the suppliers by the abuse of the superior bargaining power are as follows: the provisions under written agreements between the buyers and/or processors or re-sellers and their suppliers that do not comply with the provisions of the UTPs Act, or obligations imposed on the suppliers that are not provided under the written agreement between the buyers and/or processors or re-sellers and their suppliers; payments that are not clearly identified and specified on the receipt or the goods receipt note; general terms of business of the buyer and/or processor or re-seller that are not in compliance with the provisions of the UTPs Act; possible unilateral oral termination by the buyer and/or processor or re-seller of the contract with the supplier or without justifiable reasons for termination, or possible cancellation of the contract with the supplier without a reasonable notice period, or possible unilateral or retroactive changes to contract terms by the buyer and/or processor or re-seller; disproportionately high contractual sanctions relating to the value and significance of the subject of obligation, and other unfair trading practices laid down under this Act. In the **relationship between the supplier and the buyer and/or processor** the UTPs Act lists nine more unfair trading	Act on the prohibition of unfair trading practices in the business-to-business food supply chain, Official Gazette 117/17, enters into force on 7 December 2017

Countries	*Text/summary*	*Legisl. ref.*
	practices, such as: any non-transparent reduction in the quantity and/or value of the standard quality products, issuing of a blank debenture for the raw materials and manufacturing components, conditioning of the conclusion of the contract and the business co-operation by barter arrangements for the goods and services, unwillingness to take delivery of the agreed quantities of agri or food products in line with the agreed purchase dynamics, imposing charges for the conclusion of the contract with the supplier that are not proportionate to the administrative fees that should be borne by the supplier etc. In the **relationship between the supplier and the re-seller** the UTPs Act lists twenty four other unfair trading practices involving the payment of different fees, such as listing fees, slotting fees involving abuse of services linked to use of shelf space – unless they are linked to real services where the supplier explicitly requests from re-seller to place its product on a distinctive shelf in the outlet of the re-seller, fees for the return of delivered but unsold goods or fees for managing unsold merchandise and goods – unless these goods are delivered to the re-seller for the first time or where the supplier explicitly asked for the goods to be sold although the re-seller warned him in advance that due to the small turnover the expiry date of the goods concerned may elapse, fees for delivery of the products outside the agreed place of delivery, fees for refurbishing and conversion of the re-seller's outlets or warehouse space etc.	
Cyprus	Any **abuse** by one or more undertakings, of a relationship of **economic dependence** where an undertaking stands compared to that or those undertakings, which is either a client, supplier, producer, representative, distributor or commercial collaborator, shall be prohibited, even as far as a specific kind of products or services is concerned, and it does not have an equal alternative solution. This abuse of a relationship of economic dependence may, in particular, be constituted of the imposition of unfair trading conditions, the application of discretionary treatment, or of sudden and inexcusable interruption of long-term trade relationships.	Protection of Competition Laws of 2008 and 2014, section 6(2)
Czech Republic	Article 3a - Particulars of a Contract The contract between the buyer with significant market power and the supplier must be made in writing and, in addition to the substantial parts, it must also include: a) The method of payment of the purchase price and the time for its payment, etc. (omissis) Article 4 - Prohibition of Abuse of Significant Market Power: (1) Abuse of significant market power is prohibited. (2) Abuse of significant market power includes, primarily: a) Negotiating and implementing contractual terms which create a significant imbalance in the rights and obligations of the Parties; b) Negotiating or obtaining any payment or other performance for which no service or other consideration was provided, or is disproportionate to the value of the actual consideration; c) Implementing or obtaining any payment or discount, the amount of which, or the purpose and scope of the provided consideration for this payment or discount, was not agreed in writing prior to the delivery of the food or provision of services, to which the payment or discount relates; d) Negotiating and implementing any pricing conditions due to which the tax document for the payment of the purchase price for the delivery of food does not contain the final purchase price after all agreed discounts on the purchase price, with the exception of pre-negotiated volume discounts; e) Negotiating and making payments or other considerations for the receipt of food for sale; f) Negotiating and implementing the maturity of the purchase price for food longer than the time specified in § 3a, item aj;	Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and Abuse Thereof

Countries	*Text/summary*	*Legisl. ref.*
	g) Negotiating and exercising the right to return purchased food with the exception of a substantial breach of contract; h) Seeking compensation for sanctions imposed by the control authority from the supplier without the existence of its fault; i) Discrimination against the supplier consisting of arranging and implementing different contractual terms for the purchase or sale of services related to the purchase or sale of food with comparable performance, without justifiable cause; j) Conducting an audit or another form of control of the supplier by the buyer or a natural person or legal entity authorised by the buyer at the cost of the supplier, including demands for food analyses at the cost of the supplier; or k) The customer's failure to respect the results of official inspections of food conducted by the state surveillance authority	
Denmark	Legislation implementing 2005/29/EC Directive on unfair commercial practices in BtoC relationships, extended to BtoB relationships Includes general rules and principles on unfair marketing practices, misleading advertising, comparative advertising, unsolicited offers and the like. No annex of prohibited practices included.	Consolidated Marketing Practices Act, Consolidated Act no. 58 of 20 January 2012 as amended by section 33 of Act no. 1231 of 18 December 2012, section 5 of Act no. 1387 of 23 December 2012 and section 1 of Act no. 378 of 17 April 2013
Estonia	*No specific UTP legislation*	
Finland	*National expert refers that no legislation exists. The text below is not uptodated (implementation of Directive 2005/29/EC is not included)* Section 1 Good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business. The commercial purpose of marketing and the party on whose behalf the marketing is done shall clearly appear from the marketing. (461/2002) Section 2 A false or misleading expression concerning one’s own business or the business of another may not be used in business if the said expression is likely to affect the demand for or supply of a product or harm the business of another. An expression that refers to irrelevant circumstances or that is presented or formulated in an unsuitable manner may not be used in business if the said expression is likely to harm the business of another.	Unfair Business Practices Act (1061/78 amendments up to 461/2002 included)
France	L.442-6 I. - Engage la **responsabilité de son auteur et l'oblige à réparer le préjudice** causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers: 1° D'obtenir ou de tenter d'obtenir d'un partenaire commercial un avantage quelconque ne correspondant à aucun service commercial effectivement rendu ou manifestement disproportionné au regard de la valeur du service rendu. Un tel avantage peut notamment consister en la participation, non justifiée par un intérêt commun et sans contrepartie proportionnée, au financement d'une opération d'animation ou de promotion commerciale, d'une acquisition ou d'un investissement, en particulier dans le cadre de la rénovation de magasins, du rapprochement d'enseignes ou de centrales de référencement ou d'achat ou de la rémunération	Article L. 442-6 (I, II) du **code de commerce**: unfair practices and unfair terms. Art. L 441-6: precontractual information duties

Countries	*Text/summary*	*Legisl. ref.*
	de services rendus par une centrale internationale regroupant des distributeurs. Un tel avantage peut également consister en une globalisation artificielle des chiffres d'affaires, en une demande d'alignement sur les conditions commerciales obtenues par d'autres clients ou en une demande supplémentaire, en cours d'exécution du contrat, visant à maintenir ou accroître abusivement ses marges ou sa rentabilité; 2° De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties; 3° D'obtenir ou de tenter d'obtenir un avantage, condition préalable à la passation de commandes, sans l'assortir d'un engagement écrit sur un volume d'achat proportionné et, le cas échéant, d'un service demandé par le fournisseur et ayant fait l'objet d'un accord écrit; 4° D'obtenir ou de tenter d'obtenir, sous la menace d'une rupture brutale totale ou partielle des relations commerciales, des conditions manifestement abusives concernant les prix, les délais de paiement, les modalités de vente ou les services ne relevant pas des obligations d'achat et de vente; 5° 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. Lorsque la relation commerciale porte sur la fourniture de produits sous marque de distributeur, la durée minimale de préavis est double de celle qui serait applicable si le produit n'était pas fourni sous marque de distributeur. A défaut de tels accords, des arrêtés du ministre chargé de l'économie peuvent, pour chaque catégorie de produits, fixer, en tenant compte des usages du commerce, un délai minimum de préavis et encadrer les conditions de rupture des relations commerciales, notamment en fonction de leur durée. Les dispositions qui précèdent ne font pas obstacle à la faculté de résiliation sans préavis, en cas d'inexécution par l'autre partie de ses obligations ou en cas de force majeure. Lorsque la rupture de la relation commerciale résulte d'une mise en concurrence par enchères à distance, la durée minimale de préavis est double de celle résultant de l'application des dispositions du présent alinéa dans les cas où la durée du préavis initial est de moins de six mois, et d'au moins un an dans les autres cas; 6° De participer directement ou indirectement à la violation de l'interdiction de revente hors réseau faite au distributeur lié par un accord de distribution sélective ou exclusive exempté au titre des règles applicables du droit de la concurrence; 7° D'imposer une clause de révision du prix, en application du cinquième alinéa du I de l'article L. 441-7 ou de l'avant-dernier alinéa de l'article L. 441-7-1, ou une clause de renégociation du prix, en application de l'article L. 441-8, par référence à un ou plusieurs indices publics sans rapport direct avec les produits ou les prestations de services qui sont l'objet de la convention; 8° De procéder au refus ou retour de marchandises ou de déduire d'office du montant de la facture établie par le fournisseur les pénalités ou rabais correspondant au non-respect d'une date de livraison ou à la non-conformité des marchandises, lorsque la dette n'est pas certaine, liquide et exigible, sans même que le fournisseur n'ait été en mesure de contrôler la réalité du grief correspondant; 9° De ne pas communiquer ses conditions générales de vente, dans les conditions prévues à l'article L. 441-6, à tout acheteur de produits ou tout demandeur de prestations de services qui en fait la demande pour l'exercice d'une activité professionnelle; 10° De refuser de mentionner sur l'étiquetage d'un produit vendu sous marque de distributeur le nom et l'adresse du fabricant si celui-ci en a fait la demande conformément à l'article L. 112-6 du code de la consommation; 11° D'annoncer des prix hors des lieux de vente, pour un fruit ou légume frais, sans respecter les règles définies aux II et III de l'article L. 441-2 du présent code; 12° De passer, de régler ou de facturer une commande de produits ou de prestations de services à un prix différent du prix	Art. L. 441-7: framework distribution contracts Art. L. 441-8: duration contracts and price renegotiation in food market Art. L. 441-9: subcontracting Art. L 442-9: excessively low price sales imposed by buyer (in general and in the food sector) Art.L. 443-1: payment terms and practices

Countries	*Text/summary*	*Legisl. ref.*
	convenu résultant de l'application du barème des prix unitaires mentionné dans les conditions générales de vente, lorsque celles-ci ont été acceptées sans négociation par l'acheteur, ou du prix convenu à l'issue de la négociation commerciale faisant l'objet de la convention prévue à l'article L. 441-7, modifiée le cas échéant par avenant, ou de la renégociation prévue à l'article L. 441-8. 13° De soumettre ou de tenter de soumettre un partenaire commercial à des pénalités pour retard de livraison en cas de force majeure. II. - Sont **nuls les clauses ou contrats** prévoyant pour un producteur, un commerçant, un industriel ou une personne immatriculée au répertoire des métiers, la possibilité: a) De bénéficier rétroactivement de remises, de ristournes ou d'accords de coopération commerciale; b) D'obtenir le paiement d'un droit d'accès au référencement préalablement à la passation de toute commande; c) D'interdire au cocontractant la cession à des tiers des créances qu'il détient sur lui; d) De bénéficier automatiquement des conditions plus favorables consenties aux entreprises concurrentes par le cocontractant; e) D'obtenir d'un revendeur exploitant une surface de vente au détail inférieure à 300 mètres carrés qu'il approvisionne mais qui n'est pas lié à lui, directement ou indirectement, par un contrat de licence de marque ou de savoir-faire, un droit de préférence sur la cession ou le transfert de son activité ou une obligation de non-concurrence postcontractuelle, ou de subordonner l'approvisionnement de ce revendeur à une clause d'exclusivité ou de quasi-exclusivité d'achat de ses produits ou services d'une durée supérieure à deux ans. L'annulation des clauses relatives au règlement entraîne l'application du délai indiqué au huitième alinéa du I de l'article L. 441-6, sauf si la juridiction saisie peut constater un accord sur des conditions différentes qui soient équitables. (…)	
Germany	Sec. 20 of the Act against Restraints of Competition (ARC) § 20 **Prohibited Conduct of Undertakings with Relative or Superior Market Power** (1) § 19(1) in conjunction with paragraph 2 no. 1 [*An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification*] shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (**relative market power**). A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers. (2) § 19(1) in conjunction with paragraph 2 no. 5 [*An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request*] shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them.	Sec. 20 of the Act against Restraints of Competition (ARC)
Greece	Article 18a specifies that abuse of economic dependence may include “the imposition of arbitrary terms in transactions, the implementation of discrimination or the unjustified termination of an existing commercial relationship between the undertakings involved, taking into account, inter alia, their previous commercial relations and commercial usage”. Accordingly, the Greek law covers some UTPs, and namely the abuse of economic dependence, unfair contract termination,	Act No. 146/1914 on “Unfair Competition”, art. 18a

Countries	*Text/summary*	*Legisl. ref.*
	liability disclaimers, unilateral modification clauses and terms unreasonably imposing or shifting risks.	
Hungary	Act XCV of 2009, Section 3 (1) Unfair distributor conduct is prohibited. (2) The following are regarded as unfair distributor conduct: a) the establishment of such conditions for the supplier as a result of which risk is shared in a way that provides unilateral benefits to the trader; b) the application of a contractual provision, not including obligations related to defective performance, stipulating the following with regard to the products delivered by the supplier to the trader: ba) the supplier's repurchase or retake obligation, or bb) repurchase or retake at a price reduced to an inappropriate extent in consideration of product characteristics or further usability by the supplier; c) the trader on its own or with the involvement of a third party collaborator transfers the costs serving the trader's business interests, in particular those related to business establishment, operation and functioning, to the supplier in part or in whole; d) the trader on its own or with the involvement of a third party collaborator charges the supplier a fee for becoming one of the trader's suppliers or for including or keeping its product in the trader's stock; e) the trader on its own or with the involvement of a third party collaborator charges the supplier a fee by any legal title ea) for service not actually provided; eb) for any activity performed by the trader that is unrelated to sale to the end customer and constitutes no added service for the supplier, in particular for the placement of the product at a specified location in the trader's shop if it does not constitute an added service for the supplier; ec) requiring the use of or providing services not requested by the supplier and not serving its interests; ed) fees for services requested by the supplier and actually provided by the trader are also regarded as such if they are disproportionate; f) the requirement of a supplier contribution to a discount provided by the trader to the end customer for a period longer than the discount term, even if it is a partial contribution, or a supplier's contribution in excess of the discount rate provided to the end customer; g) if the costs resulting from sanctions imposed on the trader by authorities for any breach of law falling within the scope of the trader's operation are shifted onto the supplier; h) if the consideration for the product is paid to the supplier later than thirty days following takeover except for the case of defective performance; i) if a discount is required for the case that payment is effected within the set deadline; j) if the trader disclaims the applicability of late-payment interest, default penalty and other accessory contractual obligations ensuring performance; k) with the exception of products made under the trader's brand name, if an exclusive sale obligation is imposed on the trader without a proportionate consideration or if the application of the most advantageous conditions is required visà-vis the trader concerned relative to other traders; l) if a non-written contractual provision is applied between the trader and the supplier and it is not put into writing in spite of the supplier's relevant request within three business days thereof; m) if the trader places or changes an order with the supplier regarding the product without leaving a reasonable deadline;	Act XCV of 2009 on the prohibition of unfair distributor conduct vis-à-vis suppliers regarding agricultural and food industry products

Countries	*Text/summary*	*Legisl. ref.*
	n) if the trader unilaterally amends the contract for an objectively unjustifiable reason that is not attributable to a circumstance regarded as external to the trader's operation; o) if the trader fails to publish the Business Rules mentioned in paragraph (5), deviates from the published Business Rules or applies a condition not contained therein; p) if the trader restricts the supplier's lawful trademark use. (3) Any contractual stipulation containing unfair distributor conduct or aiming to avoid a prohibition laid down in this Act shall be regarded as null and void. If the publication of the Business Rules mentioned in paragraph (5) is omitted, it shall not in itself result in the nullity of the provisions set forth therein.	
Ireland	(2) Scope of the Regulations 5. Both parties should conduct their trading relationships in good faith and in a fair, open and transparent manner and to respect the terms and conditions of the agreed contracts. Regulation 4: Grocery goods contracts. This Regulation requires retailer or wholesalers to have agreed written contracts with their suppliers, which include all the terms and conditions of the agreed contract. Regulation 5: Variation, etc. of grocery goods contracts. This Regulation prohibits a retailer or wholesaler from varying, terminating or renewing a contract with a supplier unless the contract expressly provides for such variation, termination or renewal or agreed circumstances when such variation, termination or renewal can occur. Specifications follow (omissis) Regulation 6: Goods or services from a third party. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to obtain goods or services from a third party from whom the retailer or wholesaler receives payment for this arrangement. Specifications follow (omissis) Regulation 9: Payment from a supplier. This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier as a condition of stocking, displaying or listing the supplier's grocery goods unless the payment is based on an objective and reasonable estimate of the cost of stocking, displaying or listing those grocery goods, including different considerations when dealing with an individual store or a multiple of stores in the retailer or wholesaler's chain of stores. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of stocking, displaying or listing the supplier's grocery goods and the basis for that estimate. Specifications follow (omissis) Regulation 10: Payment terms and conditions. This Regulation provides that the retailer or wholesaler shall pay the supplier within 30 days of the receipt of the supplier's invoice or within 30 days of the date of delivery of the goods (whichever is the later) unless the parties make express provision for a different timeframe for payments in their grocery goods contract. Specifications follow (omissis) This Regulation is subject to the provisions of the European Communities (Late Payment in Commercial Transactions)	CONSUMER PROTECTION ACT 2007 (GROCERY GOODS UNDERTAKINGS) REGULATIONS 2016 (S.I. NO. 35 OF 2016)

Countries	*Text/summary*	*Legisl. ref.*
	Regulations 2012 (S.I. No. 580 of 2012) which should be carefully examined by all parties. In this context, any agreed payment to a retailer or wholesaler by a supplier will also be subject to the provisions of S.I. No. 580 of 2012. Regulation 11: Promotions. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment in respect of the promotion of the supplier's grocery goods in the retailer's or wholesaler's premises. This prohibition does not apply where the agreed contract between the two parties makes express provision for such payments. The Regulations further provide that prior to a promotion the retailer or wholesaler must give written notice (provided for in the contract) to the supplier specifying certain features of the promotions as follows. Specifications follow (omissis) Regulation 12: Payment for marketing costs This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for marketing costs. This prohibition does not apply where the agreed contract between the two parties: - makes express provision for such payments; - the payment is based on an objective and reasonable estimates of the marketing costs; and - any payment sought is in accordance with the agreed contract. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of marketing costs and the basis for that estimate. Specifications follow (omissis) Regulation 13: Payment for retention, increased allocation or better positioning of shelf space. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment for the retention, increased allocation or better positioning of shelf space for the supplier's grocery goods. This prohibition does not apply where the agreed contract between the two parties: - makes express provision for such payments; and - any payment sought is in accordance with the agreed contract. Specifications follow (omissis) Regulation 14: Payment for advertising or display of grocery goods. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment for the advertising or display of grocery goods of the supplier in the retailer's or wholesaler's premises. Regulation 15: Payment for wastage. This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for wastage. This prohibition does not apply where: - the agreed contract between the two parties makes express provision for such payments; - the agreed contract makes express provision for an agreed average wastage cost; - the grocery goods contract makes express provision for the circumstances, where wastage arises from the negligence or fault of the supplier, in which the supplier will be required to make a payment to cover wastage at the retailer's or wholesaler's premises;	

Countries	*Text/summary*	*Legisl. ref.*
	- any payment sought is in accordance with the agreed contract; - the payment is based on an objective and reasonable estimates of the costs of the wastage to the retailer or wholesaler. These conditions are not cumulative. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the wastage and the basis for that estimate. Specifications follow (omissis) Regulation 16: Payment for shrinkage This Regulation provides that a retailer shall not seek payment from a supplier for shrinkage. This prohibition does not apply where: - the agreed contract between the two parties makes express provision for such payments; - any payment sought is in accordance with the agreed contract; and - the payment is based on an objective and reasonable estimate of the costs of the shrinkage to the retailer. If any such payment is requested by the retailer, then the retailer is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the shrinkage and the basis for that estimate. Specifications follow (omissis)	
Italy	1. I contratti che hanno ad oggetto la cessione dei prodotti agricoli e alimentari, ad eccezione di quelli conclusi con il consumatore finale, sono stipulati obbligatoriamente in forma scritta e indicano la durata, le quantità e le caratteristiche del prodotto venduto, il prezzo, le modalità di consegna e di pagamento. I contratti devono essere informati a principi di trasparenza, correttezza, proporzionalità e reciproca corrispettività delle prestazioni, con riferimento ai beni forniti. 2. Nelle relazioni commerciali tra operatori economici, ivi compresi i contratti che hanno ad oggetto la cessione dei beni di cui al comma 1, è vietato: a) imporre direttamente o indirettamente condizioni di acquisto, di vendita o altre condizioni contrattuali ingiustificatamente gravose, nonché condizioni extracontrattuali e retroattive; b) applicare condizioni oggettivamente diverse per prestazioni equivalenti; c) subordinare la conclusione, l'esecuzione dei contratti e la continuità e regolarità delle medesime relazioni commerciali alla esecuzione di prestazioni da parte dei contraenti che, per loro natura e secondo gli usi commerciali, non abbiano alcuna connessione con l'oggetto degli uni e delle altre; d) conseguire indebite prestazioni unilaterali, non giustificate dalla natura o dal contenuto delle relazioni commerciali; e) adottare ogni ulteriore condotta commerciale sleale che risulti tale anche tenendo conto del complesso delle relazioni commerciali che caratterizzano le condizioni di approvvigionamento. 3. Per i contratti di cui al comma 1, il pagamento del corrispettivo deve essere effettuato per le merci deteriorabili entro il termine legale di trenta giorni e per tutte le altre merci entro il termine di sessanta giorni. In entrambi i casi il termine decorre dall'ultimo giorno del mese di ricevimento della fattura. Gli interessi decorrono automaticamente dal giorno successivo alla scadenza del termine. In questi casi il saggio degli interessi è maggiorato di ulteriori due punti percentuali ed è inderogabile. (…) Art. 4 Pratiche commerciali sleali 1. Ai fini dell'applicazione dell'articolo 62, comma 2, lettera e), del decreto-legge 24 gennaio 2012, n. 1, convertito, con modificazioni, dalla legge 24 marzo 2012, n. 27, nell'ambito delle cessioni di prodotti agricoli e alimentari, rientrano nella	D.L. 24-1-2012 n. 1 Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività. Pubblicato nella Gazz. Uff. 24 gennaio 2012, n. 19, S.O. Art. 62. Disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari In vigore dal 19 dicembre 2012 D.M. 19 ottobre 2012, n. 199 Regolamento di attuazione dell'articolo 62

Countries	*Text/summary*	*Legisl. ref.*
	definizione di "condotta commerciale sleale" anche il mancato rispetto dei **principi di buone prassi e le pratiche sleali** identificate dalla Commissione europea e dai rappresentanti della filiera agro-alimentare a livello comunitario nell'ambito del Forum di Alto livello per un migliore funzionamento della filiera alimentare (**High level Forum for a better functioning of the food supply chain**), approvate in data 29 novembre 2011, di cui in allegato al presente decreto. 2. Le disposizioni di cui all'articolo 62, comma 2, del decreto-legge 24 gennaio 2012, n. 1, convertito, con modificazioni, dalla legge 24 marzo 2012, n. 27, vietano qualsiasi comportamento del contraente che, **abusando della propria maggior forza commerciale**, imponga condizioni contrattuali ingiustificatamente gravose, ivi comprese quelle che: a) prevedano a carico di una parte l'inclusione di servizi e/o prestazioni accessorie rispetto all'oggetto principale della fornitura, anche qualora queste siano fornite da soggetti terzi, senza alcuna connessione oggettiva, diretta e logica con la cessione del prodotto oggetto del contratto; b) escludano l'applicazione di interessi di mora a danno del creditore o escludano il risarcimento delle spese di recupero dei crediti; c) determinino, in contrasto con il **principio della buona fede e della correttezza**, prezzi palesemente al di sotto dei costi di produzione medi dei prodotti oggetto delle relazioni commerciali e delle cessioni da parte degli imprenditori agricoli. 3. Configura, altresì, una pratica commerciale sleale la previsione nel contratto di una clausola che obbligatoriamente imponga al venditore, successivamente alla consegna dei prodotti, un termine minimo prima di poter emettere la fattura, fatto salvo il caso di consegna dei prodotti in più quote nello stesso mese, nel qual caso la fattura potrà essere emessa solo successivamente all'ultima consegna del mese.	del decreto-legge 24 gennaio 2012, n. 1, recante disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività, convertito, con modificazioni, dalla legge 24 marzo 2012, n. 27.
Latvia	Section 5. Prohibited Activities A retailer is prohibited to perform activities, which are in contradiction with fair practice of economic activity and by which operational risk of a retailer is imposed on suppliers, additional duties are imposed or the possibility of free operation in the market is restricted. Section 6. Prohibited Activities in Retail Trade of Food Products (1) It is prohibited to bring forward the following requirements to a supplier in retail trade of food products: 1) to pay directly or indirectly or otherwise reimburse for entering into a contract; 2) to pay directly or indirectly for the goods being present at a retail selling point, including for placing of goods in store shelves, except the case when the retailer and the supplier have entered into a written agreement that it will be paid for additional arrangement of the goods in special places; 3) to compensate the profit not obtained by the retailer from selling the goods supplied by the supplier; 4) to compensate the costs of the retailer related to arranging new stores or restoring the old stores, including to perform unfair and unjustified payment for the delivery of goods to a retail selling point to be newly opened; 5) to purchase goods, services or property from the third person indicated by the retailer, except the case when it has an objective justification and entered into a separate written agreement regarding purchase of such goods or services; 6) to ensure the lowest price by restricting the freedom of the supplier to agree on a lower price with another retailer; 7) to change the specifications of goods, including assortment if the supplier has not been notified thereof within the time period specified in the contract, which may be not less than 10 days; 8) to take back the unsold food products, except goods of poor quality and new goods unknown to consumers, the initiator of the supply or increase in the amount of which is the supplier; 9) to pay directly or indirectly to a retailer for sales promotion measures or to otherwise reimburse all costs of such measures or	Unfair Retail Trade Practices Prohibition Law

Countries	*Text/summary*	*Legisl. ref.*
	part of them, except the case when the retailer has entered into a written agreement with the supplier regarding sales promotion measures; 10) to compensate the costs related to examining complaints of consumers, except the case when justified complaints of consumers arise from circumstances, for which the supplier is responsible; 11) to determine unfair and unjustified sanctions for the violation of contractual provisions; 12) to perform unfair, unjustified payments (discounts) or payments (discounts) not provided for in the contract, except the case when the retailer has agreed with the supplier regarding bulk discount (discount applied depending on the amount of the goods ordered) or campaign discount (discount applied for a limited and indicated period of time for promoting the sale of goods); 13) to compensate the costs of a retailer, which are related to the costs of logistics services of the retailer, except the case when the retailer has entered into a written agreement with the supplier regarding distribution of goods; 14) to compensate the costs of a retailer, which are related to its administration costs. (2) A campaign discount shall not be applied to goods not sold during sales promotion of goods, except the case when the retailer has entered into a written agreement with the supplier regarding application of campaign discount to goods not sold during sales promotion of goods. (3) A retailer is not entitled: 1) not to accept food products from a supplier, which are valid for use for at least two thirds of the expiration date, if such term exceeds 30 days; 2) to change the order of food products two days before the delivery of goods or later.	
Lithuania	Article 3. Prohibition of unfair practices 1. Retailers shall be prohibited from carrying out any actions contrary to fair business practices whereby the operational risk of the retailers is transferred to suppliers or they are imposed additional obligations or which limit the possibilities of suppliers to freely operate in the market and which are expressed as requirements for the supplier: 1) to pay directly or indirectly or remunerate in any other way for consent to start trading in the supplier's goods ("entry" fees); 2) to compensate for the lost or smaller-than-expected income of the retailer from the sale of goods received from the supplier; 3) to compensate for the operational costs of the retailer related to equipping new stores or renovating the old ones; 4) to acquire goods, services or assets from third parties specified by the retailer; 5) to tie the prices of goods supplied to the retailer as well as the supply conditions to the supplier's prices of goods and supply conditions applied to third parties; 6) to change the basic supply procedures or goods specifications without notifying the supplier thereof within the time limit specified in the agreement, which may not be shorter than ten days; 7) to accept unsold food products, except for non-perishable packaged food products if they are safe, high-quality and at least 1/3 of time before their expiration date remains or they have no expiration date and there is a prior agreement in relation to their return; 8) to pay directly or indirectly a part of the costs of sales promotion carried out by the retailer or together with it or to compensate for such costs in any other way, except for the cases where there is a written agreement between the retailer and the supplier regarding the amount of costs to be paid and sales promotion activities to be applied; 9) to compensate for the expenses incurred while investigating consumer complaints, except for the cases where a justified consumer complaint was due to the circumstances which are the responsibility of the supplier. In this case, the amount of expenses which the retailer requests the supplier to compensate for must be substantiated by the actual expenses of the retailer;	REPUBLIC OF LITHUANIA LAW ON THE PROHIBITION OF UNFAIR PRACTICES OF RETAILERS 22 December 2009 – No XI-626 Vilnius (As last amended by 17 December 2015 – No XII-2204)

Countries	*Text/summary*	*Legisl. ref.*
	10) to pay directly or indirectly or to compensate for the arrangement of goods, except for the cases where there is a written agreement between the retailer and the supplier regarding payment for the arrangement of goods. 2. Where a supplier establishes in the agreement a commercial rebate expressed as a fixed amount of money which is not tied to the sale, quality, logistics (distribution and delivery of goods), sales promotion and/or other conditions of purchase and sale of the goods and where a retailer requests to accept the unsold food products (acceptance of which is not prohibited under point 7 of this paragraph), for which the commercial rebate on such products expressed as a fixed amount of money has already been received, the retailer shall be prohibited from refusing to return to the supplier the share of the commercial rebate, expressed as a fixed amount of money, in proportion to the returned food products. 3. In the course of investigation of infringements of this Law (hereinafter: 'investigation of an infringement'), the duty to prove that the agreement referred to in points 7, 8 and 10 of paragraph 1 of this Article has been concluded and meets the set requirements shall fall on the retailer which has concluded such an agreement.	
Luxembourg	*No specific UTP legislation*	
Malta	*No specific UTP legislation*	
(The) Netherlands	*No specific UTP legislation*	
Poland	Article 6. it is prohibited to use unfair contractual advantage vis-à-vis the supplier and purchaser of the supplier towards the purchaser. Article 7 1. The contractual advantage within the meaning of this Act, is the purchaser against the supplier in which there is not enough for the supplier and the actual possibility of disposing of other agricultural products or foodstuffs to buyers and there is a significant gender imbalance in economic power in favour of the buyer or supplier towards the buyer, the buyer there is insufficient and the actual scope for acquisition of agri/food products from other suppliers and there is a significant gender imbalance in economic power in favour of the supplier. 2. Using the contractual advantage is unfair if it is contrary to the principles of morality and threatens the essential interest of the other part or violates such an interest. 3. Unfair use of contractual advantage consists of particular in: 1) unjustified termination or the threat of termination of the contract. 2) award only one side of the right to dissolve, withdraw from or terminate the contract; 3) make the conclusion or continuation of the contract subject to the acceptance or performance by either party of other services not materially or causally linked to the object of the contract; 4) unjustified lengthening payment periods for agricultural and food products supplied.	OJ 2017 Item 67 ACT of 15 December 2016 to prevent the fraudulent use of contractual advantage in trade in agricultural products and groceries
Portugal	Decree-Law (DL) No. 166/2013, of 27.12, changed by Decree-Law (DL) No. 221/2015, of 8.10 prohibits: (i) Discriminating prices or selling conditions, but insofar they are not compatible with competition rules (Article 3); (ii) Prices and selling conditions which are not included in the general buyer/seller contractual agreement (Article 4); (iii) Sales below cost (Article 5); (iv) Refusal of selling or of supplying services (Article 6); and (v) Abusive commercial practices such as: imposing to a counter-party the impossibility of selling to any other company at a lower price; imposing disproportionate payments or other terms; retroactive changes in contracts and imposition of conditions by unilateral decision (Article 7). This Decree-Law, whose scope is transversal, also carries specific provisions for the agri-food sector, specifically when the	Decree-Law (DL) No. 166/2013, of 27.12, changed by Decree-Law (DL) No. 221/2015, of 8.10 (in order to provide certain clarifications), on “individual restrictive commercial practices”, which has revoked

Countries	*Text/summary*	*Legisl. ref.*
	supplier is a micro or a small enterprise, prohibiting the following terms that unreasonably shift commercial risk onto the small supplier (Article 7 (3)) : (i) The returning or rejection of products without objective reasons; (ii) The imposition of direct payments or discounts on the purchase price: a. In case the expected volume of sales is not reached; b. For introduction or reintroduction of products; c. As a compensation for costs related to consumer complaints (unless the complaint was due to the supplier's negligence); d. To cover any wastage of supplier products, unless the buyer demonstrates that such is due to negligence, tort or breach of contract by the supplier; e. For costs related to transport and warehousing subsequent to the delivery of the products; f. As a contribution for opening new establishments or refurbishment of the existing ones; g. As a condition to start a business relationship.	previous legislation on the same area (DL 370/93, of 29.10, with the amendments introduced by DL 140/98, of 16.05)
Romania	Article 6 It is prohibited any retailer to ask providers to other merchants not to sell the same products at a cost of acquisition less than or equal to that of purchased products. Article 7 (1) Except where the delisting is due to fault of the supplier contract, delisting the merchant supplier of a product must be made by written notification prior two months before the date of delisting. (2) unilateral delisting retailer undertakes to refund the entire amount of money received by it from the supplier to assume the contractual obligation of listing. (3) The trader may refuse receipt of the goods given that this does not meet legal marketing, stated in the contract or order, or delays, notifying in writing the reason for refusal reception supplier product within 24 hours, in otherwise the goods are considered accepted. (4) If the parties agree by contract that quantitative and qualitative reception to be made after the time of delivery, the receiving document will be submitted in writing provider within 48 hours of the availability of the commodity trader. Chapter III - Obligations of pay between retailer and supplier of food Article 8 Between retailer and supplier payment is made on the date agreed by the parties in agreement, as follows: a) fresh food merchant payment term of the provider contracted and delivered products may not be longer than 12 days; b) frozen food merchant payment term of the PARTY contracted and delivered products may not be longer than 20 days; c) Food products other than the letter prevented. a) and b) the period for payment of the merchant provider contracted and delivered products may not be longer than 35 days. Article 9 In case of failure or improper performance of contractual obligations by either party, they may provide in the contract payment of penalties by the defaulting party, equal parts, their amount being negotiated at contract completion date. Article 10 If payment is not made on time, the debtor is in default without any further formality and at that time paid a penalty equal to twice the daily interest of the National Bank of Romania, calculated the amount due.	Law 321/2009 on food marketing. Law no. 321/2009
Slovakia	Slovak legal system has determined inadequate conditions. The amendment to the Trade Law No. 9/2013, effective as from	Act No. 326/2012 on

Countries	*Text/summary*	*Legisl. ref.*
	February 1, 2013, has introduced the concept of "unfair contractual condition" and "unfair trade practice" in the Trade Law (§ 369d). "Unfair contractual condition" is defined as contractual arrangement related to maturity of financial commitment, delay interest rate or flat-rate reimbursement of the costs related to enforcement of account receivable which is in serious disproportion to the rights and obligations resulting from commitment relation for creditor without existing equitable reason. Such contractual arrangement is invalid. "Unfair trade practice" is defined as trade practice introduced between the parties related to maturity of financial commitment, delay interest rate or flat-rate reimbursement of the costs related to enforcement of account receivable which is in serious disproportion to the rights and obligations resulting from commitment relation for creditor without existing right-minded (equitable) reason. Unfair trade practice is forbidden. With regard to relations between suppliers and purchasers subject of which are foodstuffs and where is accurate definition of foodstuffs, the Act No. 326/2012 on unreasonable conditions in trade relations subject of which are foodstuffs entered into force on January 1, 2013. The act has been covering only the sphere of trade relations with foodstuffs and has been determining 44 unreasonable conditions for which any contractual party, benefiting from agreed unreasonable condition, may be fined. The Ministry of Agriculture and Rural Development of the SR is the inspection body. Upon the act, unreasonable condition is understood as financial/non-financial fulfilment without adequate counter-value/counter-fulfilment. The Slovak Act on UTPs covers the trading practices related to food only and it lays down 44 UTPs. Nevertheless, there are other UTPs being applied in the supply chain which are not covered by the Act, e.g. enforcement of services free of charge, enforcement of unfair promotion fees, enforcement of practices according to which the ownership of goods remains with the supplier until the goods are sold to third parties by the retailer (the retailer does not take legal responsibility for the goods), enforcement of exchange of goods or their withdrawal from sale before the best-before date, enforcement of sale of supplier`s goods under the retailer`s trademark, payment not made within the contractual or statutory period of payment etc.	unreasonable conditions in trade relations subject of which are foodstuffs entered into force on January 1, 2013 (quoted source: response to Green Paper consultation from S.R. Ministry of Agriculture)
Slovenia	Illegal practices are those practices by which one party with their significant market power, exploits the other party. Significant market power is evident from the volume or value of sales, contrary to good business practice. Illegal practices are: - Failure to comply with the legislative payment deadlines, - The imposition of conditions in particular: additional payments or discounts, promotions or other services, unfair terms of delivery, offset by non-competitive conditions, additional payments for achieving or failure to achieve certain levels of sales, unconditional return of unsold goods. The payment period for quickly perishable food should not be longer than 45 days from the reception of the goods Different agreement on the length of the payment period for quickly perishable food is null and void. Illegal practices are: the imposition of conditions in particular: additional payments for achieving or failure to achieve certain levels of sales, unconditional return of unsold goods; additional payments or discounts, promotions; unfair terms of delivery, offset by non-competitive conditions.	Act on Changes and Amendments to the Agriculture Act OJ - 26/14 on 14 April 2014.
Spain	Article 4. Guiding Principles. The commercial relations subject to this Act shall be governed by the principles of balance and fair reciprocity between parties, freedom to enter into agreements, goodwill, mutual interest, equitable sharing of risks and responsibilities, cooperation, transparency and respect for free market competition.	Law 12/2013, of 2 August, measures to improve the functioning of the food supply chain.

Countries	*Text/summary*	*Legisl. ref.*
	Article 9. Contract conditions. 1. Food procurement contracts regulated in this Chapter shall contain at least the following information: (omissis) c) Price of the contract, with express indication of all payments, including applicable discounts, determined in fixed or variable amounts. In this latter case, variable amounts shall be determined based solely on objective, verifiable and non-manipulable factors and explicitly laid down in the contract. These may include, inter alia, the evolution of the market situation, volume delivered and the quality or composition of the product. d) Payment conditions. (omissis) h) Duration of the contract and conditions of renewal and modification. i) Causes, formalisation and effects of contract termination. Unfair business practices Article 12. Unilateral changes and unforeseen commercial payments. 1. Modification of established contractual terms, unless by mutual agreement of the parties, is prohibited. Food procurement contracts must contain appropriate clauses laying down the procedure for possible modification and, where appropriate, for the determination of retroactive application. 2. Additional payments over the agreed price are prohibited, unless they are to cover the reasonable risk of referencing a new product or the partial financing of the marketing of a product reflected in the unitary retail price and have been agreed and explicitly included in the contract concluded in writing, together with a description of what said payments are for. 3. The contract must stipulate the refund mechanism for the return of payments where services or promotion or similar activities were not carried out by the deadline and under the agreed terms and conditions. Code of Good Business Practices in Food Procurement Contracting Article 15. Purpose, scope and development. 1. The Ministry of Agriculture, Food and Environmental Affairs, organisations and associations above the Autonomous Community level and representatives of production operators, industry and distribution, shall come to an agreement on a Code of Good Business Practices in Food Procurement Contracting. The Ministry of Economy and Competitiveness and the Autonomous Communities shall also participate in the said agreement in order to promote the uniform application of the code throughout national territory. 2. The Code shall establish the principles on which to base commercial relations between the different operators involved in the chain with a view to facilitating the development of contractual relations, observance of best practices in the building of these relations and their adaptation to the rules and principles contained in Article 4 of this law. The Code shall also list those business practices that promote fair, balanced and loyal relationships between food supply chain operators. 3. Adherence to the Code of good business practices is voluntary for operators in the different areas of the food supply chain referred to in paragraph 1 of this Article. 4. Once committing to the Code, operators must adapt their commercial relations to its principles and rules and the use of the systems defined to settle disputes that may arise in such relationships, following the procedures established therein.	
Sweden	General clause and open terms in definition of unfair, misleading and aggressive practices complemented by list of per se prohibited practices (annex I of the Directive) Section 5 Marketing shall be consistent with good marketing practice. Section 6 Marketing that contravenes good marketing practice under Section 5 is to be regarded as unfair if it appreciably affects or probably affects the recipient's ability to make a well-founded transaction decision.	The Marketing Act (2008:486), implementation of Directive 2005/29/EC; annex I (list of unfair practices practices) made applicable to BtoB as

Countries	*Text/summary*	*Legisl. ref.*
	Aggressive marketing Section 7 A trader may not use aggressive marketing. Marketing is to be regarded as aggressive if it involves harassment, coercion, physical violence, threats or other aggressive ways of bringing pressure to bear. Aggressive marketing is to be regarded as unfair if it appreciably affects or probably affects the recipient's ability to make a well-founded transaction decision. Aggressive marketing as specified in points 24–31 of Annex I to Directive 2005/29/EC are always to be regarded as unfair. Misleading marketing Section 8 Marketing that is misleading under any of the provisions of Sections 9, 10 or 12-17 is to be regarded as unfair if it affects or probably affects the recipient's ability to make a well-founded transaction decision.	well.
United Kingdom	PART 2—FAIR DEALING 2. Principle of fair dealing. A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues. PART 3—VARIATION. 3. Variation of Supply Agreements and terms of supply. (1) Subject to paragraph 3(2), a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement. (2) A Retailer may make an adjustment to terms of supply which has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously: (a) any specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made; and (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply. (3) If a Retailer has the right to vary a Supply Agreement unilaterally, it must give Reasonable Notice of any such variation to the Supplier. 4. Changes to supply chain procedures. A Retailer must not directly or indirectly Require a Supplier to change significantly any aspect of its supply chain procedures during the period of a Supply Agreement unless that Retailer either: (a) gives Reasonable Notice of such change to that Supplier in writing; or (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice. PART 4—PRICES AND PAYMENTS 5. No delay in Payments A Retailer must pay a Supplier for Groceries delivered to that Retailer's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice. 6. No obligation to contribute to marketing costs Unless provided for in the relevant Supply Agreement between the Retailer and the Supplier, a Retailer must not, directly or indirectly, Require a Supplier to make any Payment towards that Retailer's costs of:	THE GROCERIES (SUPPLY CHAIN PRACTICES) MARKET INVESTIGATION ORDER 2009 On 9 May 2006, the Office of Fair Trading, in the exercise of its powers under section 131 of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC), for investigation and report, the supply of groceries by retailers in the UK. On 30 April 2008 the CC published a report on the investigation and it contained the decision that there were adverse effects on competition. On 26 February 2009 the CC gave notice of its intention to make this order in accordance with paragraph 2 of Schedule

Countries	*Text/summary*	*Legisl. ref.*
	(a) buyer visits to new or prospective Suppliers; (b) artwork or packaging design; 14 (c) consumer or market research; (d) the opening or refurbishing of a store; or (e) hospitality for that Retailer's staff. 7. No Payments for shrinkage A Supply Agreement must not include provisions under which a Supplier makes Payments to a Retailer as compensation for Shrinkage. 8. Payments for Wastage A Retailer must not directly or indirectly Require a Supplier to make any Payment to cover any Wastage of that Supplier's Groceries incurred at that Retailer's stores unless: (a) such Wastage is due to the negligence or default of that Supplier, and the relevant Supply Agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the Supplier; or (b) the basis of such Payment is set out in the Supply Agreement. 9. Limited circumstances for Payments as a condition of being a Supplier A Retailer must not directly or indirectly Require a Supplier to make any Payment as a condition of stocking or listing that Supplier's Grocery products unless such Payment: (a) is made in relation to a Promotion; or (b) is made in respect of Grocery products which have not been stocked, displayed or listed by that Retailer during the preceding 365 days in 25 per cent or more of its stores, and reflects a reasonable estimate by that Retailer of the risk run by that Retailer in stocking, displaying or listing such new Grocery products. 10. Compensation for forecasting errors (1) A Retailer must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error in relation to Grocery products and attributable to that Retailer unless: (a) that Retailer has prepared those forecasts in good faith and with due care, and following consultation with the Supplier; or (b) the Supply Agreement includes an express and unambiguous provision that full compensation is not appropriate. (2) A Retailer must ensure that the basis on which it prepares any forecast has been communicated to the Supplier. 15 11. No tying of third party goods and services for Payment (1) A Retailer must not directly or indirectly Require a Supplier to obtain any goods,	10 to the Act as applied by section 165 of the Act. Following consultation, the CC made modifications to the order and issued a further notice of its intention to make this order in accordance with paragraph 5 of Schedule 10 to the Act. The CC, in accordance with section 138 of the Act and in exercise of the powers conferred by sections 161 and 164 and Schedule 8, and for the purpose of remedying, mitigating or preventing the adverse effects on competition concerned and for the purpose of remedying, mitigating or preventing detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effects on competition, makes the following Order.

Countries	*Text/summary*	*Legisl. ref.*
	services or property from any third party where that Retailer obtains any Payment for this arrangement from any third party, unless the Supplier's alternative source for those goods, services or property: (a) fails to meet the reasonable objective quality standards laid down for that Supplier by that Retailer for the supply of such goods, services or property; or (b) charges more than any other third party recommended by that Retailer for the supply of such goods, services or property of an equivalent quality and quantity. PART 5—PROMOTIONS 12. No Payments for better positioning of goods unless in relation to Promotions A Retailer must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store unless such Payment is made in relation to a Promotion. 13. Promotions (1) A Retailer must not, directly or indirectly, Require a Supplier predominantly to fund the costs of a Promotion. (2) Where a Retailer directly or indirectly Requires any Payment from a Supplier in support of a Promotion of one of that Supplier's Grocery products, a Retailer must only hold that Promotion after Reasonable Notice has been given to that Supplier in writing. For the avoidance of doubt, a Retailer must not require or request a Supplier to participate in a Promotion where this would entail a retrospective variation to the Supply Agreement. 14. Due care to be taken when ordering for Promotions (1) A Retailer must take all due care to ensure that when ordering Groceries from a Supplier at a promotional wholesale price, not to over-order, and if that Retailer fails to take such steps it must compensate that Supplier for any Groceries overordered and which it subsequently sells at a higher non-promotional retail price. (2) Any compensation paid in relation to paragraph 14(1) above will be the difference between the promotional wholesale price paid by the Retailer and the Supplier's non-promotional wholesale price. (3) A Retailer must ensure that the basis on which the quantity of any order for a Promotion is calculated is transparent. 15. No unjustified payment for consumer complaints (1) Subject to paragraph 15(3) below, where any consumer complaint can be resolved in store by a Retailer refunding the retail price or replacing the relevant Grocery product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:	

Countries	*Text/summary*	*Legisl. ref.*
	(a) the Payment does not exceed the retail price of the Grocery product charged by that Retailer; and (b) that Retailer is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of that Supplier. (2) Subject to paragraph 15(3) below, where any consumer complaint cannot be resolved in store by a Retailer refunding the retail price or replacing the relevant Grocery product, that Retailer must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless: (a) the Payment is reasonably related to that Retailer's costs arising from that complaint; (b) that Retailer has verified that the consumer complaint is justifiable and attributable to negligence or default on the part of that Supplier; (c) a full report about the complaint (including the basis of the attribution) has been made by that Retailer to that Supplier; and (d) the Retailer has provided the Supplier with adequate evidence of the fact that the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of the Supplier. (3) A Retailer may agree with a Supplier an average figure for Payments for resolving customer complaints as an alternative to accounting for complaints in accordance with paragraphs 15(1) and 15(2) above. This average figure must not exceed the expected costs to the Retailer of resolving such complaints. 16. Duties in relation to De-listing (1) A Retailer may only De-list a Supplier for genuine commercial reasons. For the avoidance of doubt, the exercise by the Supplier of its rights under any Supply Agreement (including this Code) or the failure by a Retailer to fulfil its obligations under the Code or this Order will not be a genuine commercial reason to De-list a Supplier. (2) Prior to De-listing a Supplier, a Retailer must: (a) provide Reasonable Notice to the Supplier of the Retailer's decision to De-list, including written reasons for the Retailer's decision. In addition to the elements identified in paragraph 1(1) of this Code, for the purposes of this paragraph 'Reasonable Notice' will include providing the Supplier with sufficient time to have the decision to De-list reviewed using the measures set out in paragraphs 16(2)(b) and 16(2)(c) below; (b) inform the Supplier of its right to have the decision reviewed by a Senior Buyer, as described in paragraph 17 of this Code; and (c) allow the Supplier to attend an interview with the Retailer's Code Compliance Officer to discuss the decision to De-list the Supplier.	

2.2 Modes of regulation and prohibited unfair practices: general clauses, list of prohibited practices, contractual exemptions

Does existing legislation prohibit UTP using general clauses such as general prohibition of practices breaching accepted standards of fairness or professional diligence?
Does legislation provide lists of "per se" prohibited practices?
Does legislation use open terms when defining or listing UTPs?
Does legislation admit that contracts may exempt practices from being held unfair, merely or subject to certain conditions?

Countries	***General clause only***	***General clause + examples of prohibited practices***	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	***Open terms v. strict standards***	***Contractual exemption of TPs otherwise held unfair***
					Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria		X		Mainly open terms	
Belgium	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*				
Bulgaria		X	X	Mainly open terms; some stricter standards (eg payment term clauses. Prohibition of specific contract clauses.	Foodstuffs Act Article 19. (1) *The **contract** for purchase of food for resale **cannot**:* *(…)* *4. be amended unilaterally, unless this is explicitly provided for in the contract; (…)*
Croatia		X	X	Mainly open terms	
Cyprus		X		Open terms	
Czech Republic		X		Mainly open terms	
Denmark	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*				
Estonia	*No specific UTP legislation*				
Finland	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*				
France		X	X	List of prohibited conducts through open terms	

Countries	*General clause only*	*General clause + examples of prohibited practices*	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
Germany	X			Open terms	
Greece		X			
Hungary		X (Unfair distributor conduct is prohibited)	X Not obvious whether the list is exclusive or other conducts may be deemed unfair (so falling under the general prohibition).	List of practices is relatively detailed with more limited use of open terms	
Ireland		X (2) Scope of the Regulations 5. Both parties should conduct their trading relationships in good faith and in a fair, open and transparent manner and to respect the terms and conditions of the agreed contracts.	X	Rather detailed prohibitions. Open terms are used though to a more limited extent.	(2) Scope of the Regulations 6. Any term of a grocery goods contract which directly or indirectly contravenes, waives or restricts a provision of the Regulations is not binding or enforceable. Regulation 5: Variation, etc. of grocery goods contracts. This Regulation prohibits a retailer or wholesaler from varying, terminating or renewing a contract with a supplier unless the contract expressly provides for such variation, termination or renewal or agreed circumstances when such variation, termination or renewal can occur. Thus, unilateral retrospective variations are not permitted. In addition, the agreed contract must specify the period of written notice that must be given prior to any such variation, termination or renewal. The period of such notice will be reasonable and have regards to all the circumstances of the contract, including: □ the duration of the contract; □ the frequency with which orders are placed by the retailer or wholesaler for the grocery goods concerned; □ the characteristics of the grocery goods concerned including the durability, seasonality and external factors affecting their production; and □ the value of any order relative to the annual turnover of the supplier in question.

Countries	*General clause only*	*General clause + examples of prohibited practices*	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
					The term "variation" includes variation in the frequency, timing or volume of the supply or delivery of the grocery goods. All such variations, etc. should be recorded in writing in the contract in accordance with Regulation 4. Regulation 10: Payment terms and conditions. This Regulation provides that the retailer or wholesaler shall pay the supplier within 30 days of the receipt of the supplier's invoice or within 30 days of the date of delivery of the goods (whichever is the later) unless the parties make express provision for a different timeframe for payments in their grocery goods contract. Regulation 11: Promotions. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment in respect of the promotion of the supplier's grocery goods in the retailer's or wholesaler's premises. This prohibition does not apply where the agreed contract between the two parties makes express provision for such payments. The Regulations further provide that prior to a promotion the retailer or wholesaler must give written notice (provided for in the contract) to the supplier specifying certain features of the promotions as follows. Specifications follow (omissis) Regulation 12: Payment for marketing costs This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for marketing costs. This prohibition does not apply where the agreed contract between the two parties: - makes express provision for such payments; - the payment is based on an objective and reasonable

Countries	***General clause only***	***General clause + examples of prohibited practices***	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	***Open terms v. strict standards***	***Contractual exemption of TPs otherwise held unfair***
					estimates of the marketing costs; and - any payment sought is in accordance with the agreed contract. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of marketing costs and the basis for that estimate. Specifications follow (omissis) Regulation 13: Payment for retention, increased allocation or better positioning of shelf space. This Regulation prohibits a retailer or wholesaler from compelling (either directly or indirectly) a supplier to make any payment for the retention, increased allocation or better positioning of shelf space for the supplier's grocery goods. This prohibition does not apply where the agreed contract between the two parties: - makes express provision for such payments; and - any payment sought is in accordance with the agreed contract. Specifications follow (omissis) Regulation 15: Payment for wastage. This Regulation provides that a retailer or wholesaler shall not seek payment from a supplier for wastage. This prohibition does not apply where: - the agreed contract between the two parties makes express provision for such payments; - the agreed contract makes express provision for an agreed average wastage cost; - the grocery goods contract makes express provision for the circumstances, where wastage arises from the negligence or fault of the supplier, in which the supplier will be required to make a payment to cover wastage at

Countries	*General clause only*	*General clause + examples of prohibited practices*	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
					the retailer's or wholesaler's premises; - any payment sought is in accordance with the agreed contract; - the payment is based on an objective and reasonable estimates of the costs of the wastage to the retailer or wholesaler. These conditions are not cumulative. If any such payment is requested by the retailer or wholesaler, then the retailer or wholesaler is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the wastage and the basis for that estimate. Specifications follow (omissis) Regulation 16: Payment for shrinkage This Regulation provides that a retailer shall not seek payment from a supplier for shrinkage. This prohibition does not apply where: - the agreed contract between the two parties makes express provision for such payments; - any payment sought is in accordance with the agreed contract; and - the payment is based on an objective and reasonable estimate of the costs of the shrinkage to the retailer. If any such payment is requested by the retailer, then the retailer is obliged, if requested by the supplier, to provide the supplier with an estimate of the cost of the shrinkage and the basis for that estimate. Specifications follow (omissis)
Italy		X	X	Use of open terms within list of detailed prohibited conducts. Reference to general principles,	

Countries	***General clause only***	***General clause + examples of prohibited practices***	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	***Open terms v. strict standards***	***Contractual exemption of TPs otherwise held unfair***
				including those developed by the High Level Forum	
Latvia		X	X	Both open terms and detailed prohibitions	Section 6. Prohibited Activities in Retail Trade of Food Products (1) It is prohibited to bring forward the following requirements to a supplier in retail trade of food products: (…) 2) to pay directly or indirectly for the goods being present at a retail selling point, including for placing of goods in store shelves, except the case when the retailer and the supplier have entered into a written agreement that it will be paid for additional arrangement of the goods in special places; (…) 5) to purchase goods, services or property from the third person indicated by the retailer, except the case when it has an objective justification and entered into a separate written agreement regarding purchase of such goods or services; (…) 7) to change the specifications of goods, including assortment if the supplier has not been notified thereof within the time period specified in the contract, which may be not less than 10 days; (…) 9) to pay directly or indirectly to a retailer for sales promotion measures or to otherwise reimburse all costs of such measures or part of them, except the case when the retailer has entered into a written agreement with the supplier regarding sales promotion measures; (…) (2) A campaign discount shall not be applied to goods not sold during sales promotion of goods, except the case when the retailer has entered into a written agreement with the supplier regarding application of campaign discount to goods not sold during sales promotion of

Countries	*General clause only*	*General clause + examples of prohibited practices*	*List of "per se" prohibited practices* (unfair as such; no need for further inquiry under a more general definition of UTP)	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
					goods.
Lithuania		X	X	Both open terms and detailed prohibitions	Article 3. Prohibition of unfair practices 1. Retailers shall be prohibited from carrying out any actions contrary to fair business practices whereby the operational risk of the retailers is transferred to suppliers or they are imposed additional obligations or which limit the possibilities of suppliers to freely operate in the market and which are expressed as requirements for the supplier: (…)7) to accept unsold food products, except for non-perishable packaged food products if they are safe, high-quality and at least 1/3 of time before their expiration date remains or they have no expiration date and there is a prior agreement in relation to their return; 8) to pay directly or indirectly a part of the costs of sales promotion carried out by the retailer or together with it or to compensate for such costs in any other way, except for the cases where there is a written agreement between the retailer and the supplier regarding the amount of costs to be paid and sales promotion activities to be applied; (…) 10) to pay directly or indirectly or to compensate for the arrangement of goods, except for the cases where there is a written agreement between the retailer and the supplier regarding payment for the arrangement of goods.
Luxembourg	*No specific UTP legislation*				
Malta	*No specific UTP legislation*				
(The) Netherlands	*No specific UTP legislation*				
Poland		X		Mainly general clauses and	

Countries	*General clause only*	*General clause + examples of prohibited practices*	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
				open terms. Few examples and cases of UTPs are also listed.	
Portugal			X	Mainly list of prohibited practices, though open terms are used in defining these.	
Romania			X	Mainly list of prohibited practices, though open terms are used in defining these.	
Slovakia		X	X	Legislative text not available (source of information: response to Green Paper consultation from S.R. Ministry of Agriculture). Cross sector legislation: main use of general clauses and open terms. Long list of prohibited practices in the food legislation (not available).	
Slovenia		X	X	General clause (part. exploitation of significant market power) and list of more detailed (per se?) prohibited practices. Legislative text not available.	
Spain		X	X	General clauses, open terms are largely used. Detailed practices are listed though described through	Article 12. Unilateral changes and unforeseen commercial payments. 1. Modification of established contractual terms, unless by mutual agreement of the parties, is prohibited. Food

Countries	*General clause only*	*General clause + examples of prohibited practices*	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	*Open terms v. strict standards*	*Contractual exemption of TPs otherwise held unfair*
				open terms too. Same approach while referring to private regulation.	procurement contracts must contain appropriate clauses laying down the procedure for possible modification and, where appropriate, for the determination of retroactive application. 2. Additional payments over the agreed price are prohibited, unless they are to cover the reasonable risk of referencing a new product or the partial financing of the marketing of a product reflected in the unitary retail price and have been agreed and explicitly included in the contract concluded in writing, together with a description of what said payments are for.
Sweden	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*				
United Kingdom		X	X	Both open terms and detailed description of prohibited conducts are used.	Contractual regulation of trade practices are allowed so to avoid unfairness (eg on contract changes, imposition of costs, etc. – see the text). E.g.: 3. Variation of Supply Agreements and terms of supply (1) Subject to paragraph 3(2), a Retailer must not vary any Supply Agreement retrospectively, and must not request or require that a Supplier consent to retrospective variations of any Supply Agreement. (2) A Retailer may make an adjustment to terms of supply which has retroactive effect where the relevant Supply Agreement sets out clearly and unambiguously: (a) any specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made; and (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply. (3) If a Retailer has the right to vary a Supply Agreement unilaterally, it must give Reasonable Notice of any such variation to the Supplier.

Countries	***General clause only***	***General clause + examples of prohibited practices***	***List of "per se" prohibited practices*** *(unfair as such; no need for further inquiry under a more general definition of UTP)*	***Open terms v. strict standards***	***Contractual exemption of TPs otherwise held unfair***
					8. Payments for Wastage A Retailer must not directly or indirectly Require a Supplier to make any Payment to cover any Wastage of that Supplier's Groceries incurred at that Retailer's stores unless: (a) such Wastage is due to the negligence or default of that Supplier, and the relevant Supply Agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the Supplier; or (b) the basis of such Payment is set out in the Supply Agreement.

2.3. Modes of regulation and prohibited unfair practices: commonly used general clauses and specific UTPs (6 UTPs list) in examined UTP legislation

Which general clauses are more commonly used?
Are there specific types of UTPs which are recurrently prohibited in UTP legislation?

Countries	***Abuse of economic dependence*** *(as prohibited practice, notwithstanding the nature of ED as possible limitation for law's scope of appl.)*	***Abuse of superior bargaining power*** *(as prohibited practice, notwithstanding the nature of BP as possible limitation for law's scope of appl.)*	***Prohibition of significance unbalance in rights and obligations /excessive benefits***	***Payment periods longer than 30 days***	***Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices)***	***Contributions to promotional or marketing costs***	***Claims for wasted or unsold products***	***Last-minute order cancellations concerning perishable products, or unfair contract termination in general***	***Requests for upfront payments to secure or retain contracts***
									Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria									
Belgium	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*								
Bulgaria		X		X	X	X (*requiring remuneration for not provided service*)	X (*unduly shifting the risk on the supplier*)	X	
Croatia		X		X	X		X	X	X
Cyprus	X							X	
Czech Republic		X	X	X		X (*requiring remuneration for not provided*	X	X	X

Countries	***Abuse of economic dependence*** *(as prohibited practice, notwithstanding the nature of ED as possible limitation for law's scope of appl.)*	***Abuse of superior bargaining power*** *(as prohibited practice, notwithstanding the nature of BP as possible limitation for law's scope of appl.)*	***Prohibition of significance unbalance in rights and obligations /excessive benefits***	***Payment periods longer than 30 days***	***Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices)***	***Contributions to promotional or marketing costs***	***Claims for wasted or unsold products***	***Last-minute order cancellations concerning perishable products, or unfair contract termination in general***	***Requests for upfront payments to secure or retain contracts***
						service)			
Denmark	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*								
Estonia	*No specific UTP legislation*								
Finland	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*								
France	X		X	X		X		X	X
Germany	X	X							
Greece	X							X	
Hungary				X	X	X	X		X
Ireland				X	X	X	X	X	X
Italy	X	X	X	X	X	X (*incorporates High Level Forum Pr. and definition of pratices*)		X (*incorporates High Level Forum Pr. and definition of pratices*)	X
Latvia			X	X	X	X	X		X
Lithuania		X		*X (food specific late payment legislation)*	X	X	X		X
Luxembourg	*No specific UTP legislation*								
Malta	*No specific UTP legislation*								
(The) Netherlands	*No specific UTP legislation*								
Poland			X (unfair	X				X	X

Countries	***Abuse of economic dependence*** *(as prohibited practice, notwithstanding the nature of ED as possible limitation for law's scope of appl.)*	***Abuse of superior bargaining power*** *(as prohibited practice, notwithstanding the nature of BP as possible limitation for law's scope of appl.)*	***Prohibition of significance unbalance in rights and obligations /excessive benefits***	***Payment periods longer than 30 days***	***Unilateral and retroactive changes to contracts (concerning volumes, quality standards, prices)***	***Contributions to promotional or marketing costs***	***Claims for wasted or unsold products***	***Last-minute order cancellations concerning perishable products, or unfair contract termination in general***	***Requests for upfront payments to secure or retain contracts***
			contractual advantage)						
Portugal	As part of competition law (impact on market required)			*X (food specific late payment legislation)*	X	X	X		X
Romania				X		X		X	
Slovakia	N/A	N/A	N/A	X	X	N/A	N/A	X	X
Slovenia		X		X (45 days)		X	X		
Spain				X	X	X	X		X
Sweden	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*								
United Kingdom				X	X	X	X	X	X

3. Enforcement

A part from judicial enforcement and any forms of ADR, do MSs identify administrative authorities for the enforcement of legislation on UTP in business-to-business relation?
Can these authorities act ex officio?
Can they receive confidential complaints?
Does legislation on UTPs enable enforcers (courts or administrative authorities) to impose injunctions to infringers?
Does legislation on UTPs enable enforcers (courts or administrative authorities) to impose fines to infringers?

Countries	***Main administrative enforcement authority*** *(addressing UTP under lenses different from competition law ones)*	***Additional administrative enforcement authorities*** *(different competence/powers from the one on the left side)*	***Confidential complaints***	***Ex officio investigative powers***	***Injunctive powers***	***Pecuniary sanctions***
						Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria	FEDERAL COMPETITION AUTHORITY (may seek injunctions from the Court) *Local Supply Act and Unfair Competition Act*		*Partially* *Specified in unfair competition law, not in Local Supply Act*	*Replaced by standing of administrative authority and business organizations.* Deemed not necessary by the reporter since many administrative bodies and associations representing interests affected by infringements of Local Supply Act may file complaints	X Court (upon request of CA too) *Local Supply Act (Cartel Court) and Unfair Competition Act*	

Countries	***Main administrative enforcement authority*** *(addressing UTP under lenses different from competition law ones)*	***Additional administrative enforcement authorities*** *(different competence/powers from the one on the left side)*	***Confidential complaints***	***Ex officio investigative powers***	***Injunctive powers***	***Pecuniary sanctions***
Belgium	*Only limited scope UTP legislation (mainly based on BtoC type UTPs)*					
Bulgaria	COMMISSION OF PROTECTION OF COMPETITION (CPC)	Not as enforcers: Consultative Council (food); Reconciliation Commission (food)	X	X	X	X
Croatia	COMPETITION AUTHORITY		N/A	X	Assessment of voluntary commitments by infringers	X
Cyprus	COMMISSION FOR THE PROTECTION OF COMPETITION	-	N/A	X	X (courts only)	X
Czech Republic	OFFICE FOR THE PROTECTION OF COMPETITION	-	X	X	X (and commitments)	X
Denmark	*Only limited scope UTP legislation (mainly based on BtoC type UTPs)*					
Estonia	*No specific UTP legislation*					
Finland	*Only limited scope UTP legislation (mainly based on BtoC type UTPs)*					
France	DGCCRF (MIN. ECON.)	CEPC (non binding opinions)	X	X	X (imposed by court, upon request of injured parties, Public Prosecutor, Minister Econ.) (infringements of art. L 442-6)	X Administrative fines (imposed by the Competition Authority for infringements of art. L441-7,8) Ammende civile (imposed by court for infringements of art. L 442-6)
Germany	COMPETITION AUTHORITY	–	X	X	X (imposed by court also on the basis of CA's request)	X (imposed by Competition Authority)

Countries	***Main administrative enforcement authority*** *(addressing UTP under lenses different from competition law ones)*	***Additional administrative enforcement authorities*** *(different competence/powers from the one on the left side)*	***Confidential complaints***	***Ex officio investigative powers***	***Injunctive powers***	***Pecuniary sanctions***
Greece	N/A	N/A	N/A	N/A	N/A	N/A
Hungary	NATIONAL FOOD CHAIN SAFETY OFFICE	-	X	X	Prohibition to use unfair terms. Warnings first (only for Smes)	X
Ireland	COMPETITION AND CONSUMER PROTECTION COMMISSION	-	X	X		X (criminal. Imposed only by courts)
Italy	COMPETITION AUTHORITY		X	X	X	X
Latvia	COMPETITION COUNCIL	-	X	X		X
Lithuania	COMPETITION COUNCIL		X (art. 5.2)	X	X (+astreinte)	X
Luxembourg	*No specific UTP legislation*					
Malta	*No specific UTP legislation*					
(The) Netherlands	*No specific UTP legislation*					
Poland	OFFICE OF COMPETITION AND CONSUMER PROTECTION	National Center for Agricultural support (only monitoring over written form of agrifood contracts)	X (compet. auth.)	X (compet. auth.)	(commitments) Astreintes for failure to comply with comp. auth.'s enforcing decisions	X (to the entity and to managers)
Portugal	ASAE (AUTORIDADE ADMINISTRATIVA NACIONAL ESPECIALIZADA)		*No*	X		X
Romania	MINISTRY OF FINANCE (depending on UTP – more on competition law side)	or CONSUMER PROTECTION AUTHORITY (depending on UTP – more on unfair trade side)	*No*	N/A		X (criminal sanctions imposed by adm auth)
Slovakia	MINISTRY OF AGRICULTURE AND RURAL DEVELOPMENT		*No*	X		X
Slovenia	SLOVENIAN COMPETITION PROTECTION AGENCY	Ombudsman (general monitoring and reporting to CPA –	X	X		X

Countries	***Main administrative enforcement authority*** *(addressing UTP under lenses different from competition law ones)*	***Additional administrative enforcement authorities*** *(different competence/powers from the one on the left side)*	***Confidential complaints***	***Ex officio investigative powers***	***Injunctive powers***	***Pecuniary sanctions***
		signalling of UTPs – and to Government – annual report)				
Spain	Depending on territorial dimension of UTPs: ADMINISTRATION OF AUT. COMM. OR GENERAL STATE ADMINISTRATION (D.G. of Food Industry, Ministry of Agriculture/Council of Ministries, depending on the gravity of infringement)	SPANISH AGENCY FOR FOOD INFORMATION AND CONTROL (within the Ministry of Agriculture): monitor over compliance, not strictly an enforcement authority; manages control system; receives and reports complaints to enforcing authorities.	X	X		X
Sweden	*Only limited scope UTP legislation (mainly based on BtoC type UTPs)*					
United Kingdom	GROCERY CODE ADJUDICATOR	(forthcoming) Small Business Commissioner (for Smes only; will receive complaints and provide advice and information)	X	X[467]	Recommendations	X

[467] See Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions, 2016, p. 5 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/511676/GCA_Statutory_Guidance_updated_March_2016.pdf)
"The Adjudicator may carry out an investigation if the Adjudicator has reasonable grounds to suspect that a large retailer has broken the Code or has failed to follow a recommendation made following a previous investigation by the Adjudicator on action it should take to comply with the Code. The reasonable grounds for suspicion might be based on evidence supplied by direct or indirect suppliers, third parties such as trade associations, other retailers, whistle-blowers or information which is in the public domain."

3.1. Publication of UTP enforcement decisions by courts and administrative authorities

Are decisions by courts and administrative authorities enforcing UTP legislation made public?

Summary information (examples, not necessary exhaustive)

MS	PUBLICATION OF COURT'S DECISIONS ON UTP ENFORCEMENT	PUBLICATION OF ADMINISTRATIVE AUTHORITY'S DECISIONS ON UTP ENFORCEMENT	HIGHLIGHT IN ADMINISTRATIVE AUTHORITY ANNUAL REPORT OR WEBPAGE
AUSTRIA	X		
BULGARIA		X	
CROATIA			X (*de facto – no legislative reference available*)
CYPRUS		X	
CZECH R.			X (*de facto – no legislative reference available*)
FRANCE	X	X	
GERMANY	X *(for injunctions)*		
GREECE	N/A	N/A	N/A
HUNGARY	X		
IRELAND	N/A	N/A	N/A
ITALY		X	
LATVIA	N/A	N/A	N/A
LITHUANIA			X
POLAND			X
PORTUGAL	N/A	N/A	N/A
ROMANIA	N/A	N/A	N/A
SLOVAKIA	N/A	N/A	N/A

SLOVENIA	N/A	N/A	N/A
SPAIN		X	
UNITED KINGDOM		X	

4. Fines

Does legislation on UTP in business-to-business relations provide fines and their escalation within minimum and maximum thresholds?
How are these thresholds defined?

Countries	*Pecuniary sanctions*	*Minimum/maximum/no thresholds*	*Min p.s.*	*Max p.s.*	*% turnover*	*Practices/fines*
						Greece: DG Agri survey, update: 2015 *Malta: no answer available within DG Agri survey*
Austria	X (District Administrative Authority) (Local Supply Act)	Only maximum threshold		any party who in the course of business for competitive purposes knowingly applies aggressive or misleading business practices in a public announcement or in a media, shall be sentenced by the court to a fine of up to 180 per diem rates, according to the Act against Unfair Competition.		
Belgium	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*					
Bulgaria	X	Minimum/maximum thresholds	5000 eur	25.000 eur (in case turnover is 0)	Up to 10% (t.o. of the product concerned)	This fine for abuse of stronger bargaining position.
Croatia	X	Only maximum threshold		Most serious infringements:		(website presentation) When

Countries	*Pecuniary sanctions*	*Minimum/maximum/no thresholds*	*Min p.s.*	*Max p.s.*	*% turnover*	*Practices/fines*
				up to 662556,81 eur (legal persons) 331278,41 eur (physical persons) Lower caps for serious and minor infringements		imposing the fines the CCA takes into account all mitigating and aggravating circumstances, such as the gravity, scope and duration of the infringement and the consequences this infringement had on the suppliers. The CCA uses fines to eliminate, restore and promote fair trading practices that protect the participants in the food supply chain. Fines serve as punishment for infringers but at the same time they ensure a credible deterrence against the use of UTPs. Depending on the gravity and the significance of the infringement the UTPs Act recognises fines for most serious infringements, serious infringements, for minor and other

Countries	*Pecuniary sanctions*	*Minimum/maximum/no thresholds*	*Min p.s.*	*Max p.s.*	*% turnover*	*Practices/fines*
						infringements.
Cyprus	X	Only maximum threshold			Up to 10%	
Czech Republic	X	Only maximum thresholds		39.141.000 eur	Up to 10%	
Denmark	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*					
Estonia	*No specific UTP legislation*					
Finland	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*					
France	X Administrative fines (infringements of art. L441-7,8) Ammende civile (infringements of art. L 442-6)	Only maximum thresholds		Admin fines 75.000 eur (ind.) 375.000 (entity) Civil sanctions (ammende civile): 5 millions eur		X Administrative fines (infringements of art. L441-7,8) Ammende civile (infringements of art. L 442-6)
Germany	X	Only maximum thresholds		1mln eur	Up to 10%	
Greece	N/A	Only maximum thresholds	N/A	50.000 eur	N/A	Act No. 146/1914, Art. 18a provides that in case of abuse of economic dependence, damages can be claimed and a fine up to 50.000 Euros may also be imposed. The fine can be doubled in case of recurrence. (par. 2 & 3 of Art. 18a).
Hungary	X	Minimum/maximum thresholds	318 eur	1.591.000 eur	Up to 10%	
Ireland	X (criminal, imposed only by courts)	Minimum/maximum thresholds	3000 eur	100.000 eur		
Italy	X	Minimum/maximum	2000 eur	50.000 eur		Different fines

Countries	*Pecuniary sanctions*	*Minimum/maximum/no thresholds*	*Min p.s.*	*Max p.s.*	*% turnover*	*Practices/fines*
		thresholds	(500 for payment delay)	(500.000 for payment delay)		depending on UTP (contracts v. practices v. payment delay/practices)
Latvia	X	Minimum/maximum thresholds	70 eur		Up to 0,2% of net t.o.	
Lithuania	X	Only maximum threshold		120.000 eur		
Luxembourg	*No specific UTP legislation*					
Malta	*No specific UTP legislation*					
(The) Netherlands	*No specific UTP legislation*					
Poland	X (to the entity and to managers)				Up to 3%	
Portugal	X	Minimum/maximum thresholds	- € 250 for natural person - € 500 for micro enterprises -€ 750 for small enterprises -€ 1000 for medium enterprises - € 2.500 for large enterprises	- € 20.000 for natural person - € 50.000 for micro enterprises -€ 150.000 for small enterprises -€ 450.000 for medium enterprises - € 2,5 mln for large enterprises		
Romania	X (criminal sanctions imposed by adm auth – Consumer Protection Authority)	Minimum/maximum thresholds	10.756,15 eur	21.512,31 eur (32.330 eur for competition law type infringements)		
Slovakia	X	Minimum/maximum thresholds	1000 eur	300.000 eur		
Slovenia	X	Minimum/maximum thresholds	6.000 eur	18.000 eur		
Spain	X	Minimum/maximum threshold	3000 eur (minor offenses)	1.000.000 eur (very serious offenses) 100.000 eur		Distinction between minor and serious offenses is based on

Countries	*Pecuniary sanctions*	*Minimum/maximum/no thresholds*	*Min p.s.*	*Max p.s.*	*% turnover*	*Practices/fines*
				(serious offenses)		type of UTPs. Article 25. Scale of penalties. Penalties shall be scaled mainly on the basis of the degree of intentionality or the nature of the damage caused.
Sweden	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*					
United Kingdom	X	Only maximum threshold			1% of t.o. in UK	

5. Enforcement practices

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Greece: DG Agri survey, update: 2015 Malta: no answer available within DG Agri survey										
Austria	6	6	6	Fines	6	- Pago International GmbH -Pfeiffer HandelsgmbH und die Zielpunkt GmbH - Spar Österreich-Gruppe - Vöslauer Mineralwasser AG - Spar Österreich-Gruppe II - RAUCH Fruchtsäfte GmbH & Co OG	- in cartel or abuse of dominant position - delusive information of a merger registration or wrong answer at the information requested	- Max 10 % of total turnover for abuse of dominant position -max 1% of total turnover	N/A	N/A
Belgium	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*									

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Bulgaria	8	8	8	- 5 pending investigations - 2 infringement decisions	2	- Siemens Bulgaria - Kaufland Bulgaria	- Abuse of dominant position - Abuse of economic dependence	- Min: BGN 35.000 Max: BGN 157.981 (7% of the generated turnoverof the specific goods at issue)	0	N/A
Croatia	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Cyprus	0	0	0	N/A	0	N/A	N/A	N/A	0	N/A
Czech Rupublic	22	18	31	- 2 closed proceedings because the infringement of the law was not proven - 2 closed proceedings because the Office agreed to accept the supposed commitments that are able to remove detrimental/harmful effect/state in the relevant market	0	N/A	N/A	N/A	0	N/A
Denmark	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*									

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Estonia	*No specific UTP legislation*									
Finland	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*									
France	595 (2015), 494 (2016)		2015: 36 national, 25 regional; 2016: 32 national, 20 regional; 2016	8 civil proceedings started in 2015, 6 started in 2016;	158 criminal sanctions in 2015; 134 in 2016;	N/A see https://www.economie.gouv.fr/cepc/etudes-jurisprudence (names unpublished)	main practices sanctioned: significant unbalance and procédures	Civil sanctions: 2 580 000 (2015); € 150 000 € (2016) Profit restitution: 3 78 259 791 € (2015); 76 871 390 € (2016) Criminal sanctions: 239 900 € (2015); 470 731 € (2016) Settlments: 955 450 € (2015); 411 363 € (2016)	Not in the food sector (but complaints about international purchase centers	N/A

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Germany	10	Few cases	1	Annulled by the Higher Regional Court of Düsseldorf	Pending	Edeka	-abusive takevover justification -inducing suppliers to grant benefits without an objective justification	N/A	0	N/A
Greece	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Hungary	41	41	152	-29 fined undertakings - 11 investigations ended with the commitment of the traders - 67 ended without finding any infringement	20	- AUCHAN Magyarország Kft. - ALDI Magyarország Bt. - SPAR Magyarország Kft. - Lidi Magyarország Kereskedelmi Bt. - dm-Drogerie Markt Kft. - Palóc Nagykereskedelmi Kft. - Hunnia Frucht Kft. - Nagy István e. v. - Elektro_Asz Kft. - Agócsker 2002 Kft. - OBI Hungary Retail Kft. - Mecsek Faszért Zrt. - City Food Euro Kft. - Budapest Bortársaság - Metro Kereskedelmi Kft. - TESCO Global Zrt. - CBA DL Projekt Kft.	- Payment delay (more than 30 days) - Sale at less than purchaser price - Price discimination - Not transferring the discount given by the supplier according to the discount period - Fee for not real service - Fee for not proportional services - Listing fee linked not real turnover - Provisions of services not serving the counterparties' benefits - Not publishing	- Min: HUF 100.00 - Max: HUF 80 millions	0	N/A

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
							business policy			
Ireland	0	0	0	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Italy	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Latvia	2	2	2	Pending	Pending	N/A	N/A	N/A	0	N/A
Lithuania	N/A	N/A	1	Injunction and fine	1	N/A	N/A	N/A	N/A	N/A
Luxemb	*No specific UTP legislation*									

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
ourg										
Malta	*No specific UTP legislation*									
(The) Netherlands	*No specific UTP legislation*									
Poland	0	0	0	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Portugal	80 (2015), 46 (2016)	26 (2015) , 20 (2016)	2 (2015) , 2 (2016)	42 impositions of sanctions - 33 without any sanctions	-17 entities have been fined	Caisdis – Sociedade de Distribuição S.A. Aldi Portugal -Supermercados, Lda.Algueiradis - Sociedade de Distribuição, S.A.António Manuel dos Santos AlmeidaArmazém MulticashAuchan Portugal Hipermercados, S.A.BCM-Bricolage, S.A.Central Deborla - Comércio de Utilidades, S.A.Continente Hipermercados, S.A.CÓPRAVE - Sociedade Avícola, Lda.Dia Portugal - Supermercados, Sociedade Unipessoal, Lda.Dietimport, S.A.Eternas Novidades, Unipessoal, Lda.Ideias de Pé - Sapatarias, Lda.Ikea Portugal - Móveis e Decoração, Lda.José Júlio Leite Mesquita & Cª, Lda.Lidl & CompanhiaMakro - Cash & Carry PortugalMedia Markt - SetúbalMedia Markt Alfragide - Produtos Informáticos e Electrónicos, Lda.Media Markt Gaia - produtos Informáticos e Electrónicos, Lda.Média Markt Nascente - Produtos Informáticos e Eletrónicos, Lda.Media Markt Sintra - Produtos Informática e Electrodomésticos, Lda.Modelo Continente Hipermercados, S.A.Moviflor - Comércio de Mobiliário, S.A.Naddem ImtiazNova Figueiradis - Sociedade de Distribuição, S.A.Pingo Doce - Distribuição Alimentar, S.A.Rádio Popular - Electrodomésicos, S.A.Zhu Xing - Importação & Exportação, Lda.Worten - Equipamentos para o lar, S.A.Rádio Popular - Electrodomésicos,	13 cases of sales below cost 4 cases of pricing tables references	- Min: € 250 - Max: € 500.000		

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
Romania	0	0	0	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Slovakia	9	9	39	-12 confirmed the infringement of law - 18 did not confirmed the infringement of law - 9 are Pending	4	-Tesco Stores SR s.r.o -Retail Value Stores a.s -Terno Group K.s. -Kaufland Slovenka Republica v.o.s	-non compliance with the payment terms - requests for additional monetary payments	-Min € 1.000 - Max € 244.000 € -Average € 58.261	N/A	N/A
Slovenia	N/A	N/A	0	N/A	N/A	N/A	N/A			
Spain	98	98	1784	- 43 sanctions proceedings were opened on the basis of confidential complaints - by December 2016 347 sanctions proceedings on the basis of ex oficio investigations	95	N/A	- 62 % for the infringiment of payment deadlines - 23% for not having formalised compulsory contracts - 7% for not providing the required information -4% for not including the mandatory clauses in the contracts - 4% for other causes: recidivism and unilateral modifications	- Min € 250 - Max € 10000 -Average 8673€	N/A	N/A
Sweden	*Only limited scope UTP legislation (mainly based on BtoC type UTPs*									

Countries	*Number of complaints (2015 - 2016)*	*Number of actions after the compliance submissions*	*Investigation conducted by enforcement bodies*	*Results of investigation*	*Number of fines or sanctions as consequence of UTPs*	*Fined / sanctioned entities (names)*	*Specific fined/sanctioned practices*	*Minimun, average and maximum level of fines (absolute terms or % of turnover)*	*UTPs cases in cross-border transactions*	*Impact of the cross-border UTPs*
UK	0	0	1	Pending	Pending	Tesco Plc (still under investigation)	Delayed in payments	N/A	N/A	N/A

Annex H: Economic impact of unfair trading practices regulations in the food supply chain (DG Competition)

An Annex prepared for the Impact Assessment on the Initiative to improve the food supply chain

Chief Economist – DG COMPETITION

22 January 2018

1. INTRODUCTION

The food sector in many Member States displays some imbalances of bargaining power between firms at different levels of the supply chain. Such imbalances could be the source of potential problems whereby a trading partner considers that it has been treated unfairly by its counterpart with stronger bargaining power, be it either the supplier or the buyer. Competition policy can help to mitigate (some of) these problems only in few cases. Indeed competition law only deals with situations where a particular seller/buyer possesses a "dominant position" in that it has some power over buyers/suppliers in general, and not only over one or few particular firm(s), and where there are likely anti-competitive effects. Therefore, unequal bargaining power and resulting imbalances in trading relationships rarely imply an infringement of competition law.[468] Such issues may be, where appropriate, addressed by other policy tools, such as contract and unfair commercial practices law.[469] General contract law may not be enforceable in a number of situations. In such situations, a well-targeted regulation of certain trading practices aiming at ensuring fairness between actors in the food supply chain could help to resolve specific issues.

As explained in the Impact Assessment, a strong enabling factor of Unfair Trading Practices (UTPs) in the food supply chain is that it is characterized by large differences in trading partners' bargaining power. These imbalances, which do not constitute in themselves an abuse of power, may lead to situations where bargaining power is exercised through *unfair* mechanisms. Farmers and SME operators, who generally possess a low level of bargaining power, are thus particularly prone to be affected by UTPs.

It is not obvious to determine what is "fair" or unfair" in bilateral commercial negotiations. In fact, many practices mentioned in the debate about UTPs relate to the determination of the price of the transaction and determining a "fair price" in that regard is a daunting task. Regulating it is even more challenging if one wants to maintain the room for operators to innovate in a market-oriented economy.

[468] ECN Activities in the Food Sector, Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, para 26, available at http://ec.europa.eu/competition/ecn/food_report_en.pdf.
[469] *Idem*, para 73.

This Annex presents a brief summary of the economic impact of regulating UTPs in the food supply chain, and introduces an approach that in general distinguishes practices agreed between parties ex-ante (i.e. before the commercial agreement is concluded, or before sales are realised) and those which occur ex-post (after the commercial agreement has been concluded or sales have materialised). Importantly, the distinction between ex-ante and ex-post is not linked to the existence of a formal, written contract. The criterion to distinguish between ex-ante and ex-post is rather whether the parties to the commercial transaction have reached a common understanding of the transaction, irrespective of its form (e.g. a written contract, an exchange of emails, an oral agreement, etc.), and have started the transaction, for example, by making deliveries and sending orders.

This Annex was prepared by the Chief Economist of the Directorate-General for Competition. It builds on the report compiling the principal issues raised by academic specialists in Agricultural Economics speaking at the workshop on "Unfair trading practices in the food supply chain" held in Brussels in July 2017, jointly organised by the Directorate-General for Agriculture and Rural Development and the Joint Research Centre.[470]

The Annex also builds on the report of the Agricultural Markets Task Force (AMTF),[471] and explains why some of the practices considered in the report as UTPs are instead potentially beneficial for farmers because they increase the total gains to be shared between trading partners. Hence, banning such practices could have a negative impact on farmers' business. On the other hand, several of the other practices listed by the AMTF could indeed often be detrimental to farmers and other participants in the food supply chain with little bargaining power. The main objective of the Annex is to suggest a framework that helps distinguishing between the two sets of practices.

This Annex also identifies potential unintended negative consequences of regulating practices in the food supply chain, which were not considered in the AMTF's report as it focussed on the position of farmers in the chain, notably regulating the trading relationships between large (mostly brand) manufacturers and their large customers (e.g. modern retailers). This includes reducing the pressure exerted in a competitive environment on the margins of these large manufacturers and increasing prices for the final consumer.

2. RISKS OF REGULATING UNFAIR TRADING PRACTICES

As mentioned by Swinnen and Vandervelde, it is important to "*clearly define UTPs and provide an exhaustive list of what can be considered as such.*"[472] The main risk in having a broad or vague definition of UTPs, according to Richard Sexton, is that it could prevent efficiency-enhancing

[470] See the JRC Technical Report, 2017, *Unfair trading practices in the food supply chain*, available at https://publications.europa.eu/en/publication-detail/-/publication/924dbb04-db00-11e7-a506-01aa75ed71a1/

[471] Agricultural Markets Task Force, 2016, *Improving Market Outcomes, Enhancing the position of Farmers in the Supply Chain*.

[472] Johan Swinnen and Senne Vandevelde, 2017, "Regulating UTPs: diversity versus harmonisation of Member State rules," in *Unfair trading practices in the food supply chain*, JRC Technical Report.

behaviours and commercial practices from taking place. Efficient commercial transactions create value by increasing the total gains from the transaction to be shared by the various trading partners. This risk holds regardless of the size of the operators or their position within the supply chain.

Indeed, as Sexton mentions,[473] commercial transactions between various businesses along the supply chain typically aim both at (i) maximizing the total gains from the transaction (i.e. the size of the pie), and (ii) splitting these total gains between parties (i.e. sharing the pie). Therefore, identifying efficiency-enhancing commercial practices as UTPs and prohibiting them could very well harm all parties involved, including farmers, by reducing the size of the pie (the total gains from the transaction) to be shared between the trading partners in the first place. As Sexton puts it: "*Proscribing behaviours that are efficiency enhancing will reduce the surplus to a transaction and likely harm both parties to it, making it imperative that regulatory bodies do not incorrectly identify such behaviours as UTPs.*"

In this respect, it is important to consider what would happen if practices that can render a commercial transaction more efficient from the trading partners' point of view are prevented by UTP regulations. In such case, one should recall that UTPs are defined as practices that "*grossly deviate from good commercial conduct and are contrary to good faith and fair dealing and which are typically imposed in a situation of imbalance by a stronger party on a weaker one.*"[474] This means that the aim of regulation of UTPs should be to prevent trading partners with strong bargaining power to engage into some clearly identified "unfair" practices, but not to prevent these trading partners from exercising their bargaining power in a "fair" manner when negotiating, e.g. obtain low purchase prices. Then, if UTP regulations mistakenly ban practices that could render a commercial transaction more efficient from the trading partners' point of view, an imbalance of bargaining power would still exist and would still be exercised by the stronger party, albeit in a situation which can very likely make the outcome worse for all players involved.

Moreover, there can be unintended negative consequences of regulating practices in the food supply chain. This concerns notably regulating the trading relationships between (mostly brand) manufacturers holding a significant share of the market of the sales of food products in a particular product category in a given Member State (hereafter designated in a simplified way as "large manufacturers") and their "large customers" (e.g. modern retailers holding a significant share of the food retail sales in a given Member State). Regulating commercial transactions between such large players could reduce the pressure that large customers can exert on large manufacturers to reduce their margins and imply significant market disturbance because of their broad impact on the market and, ultimately, on consumer prices.[475] Besides, it is not obvious that farmers or other parties higher

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[473] Richard J. Sexton, 2017, "Unfair trade practices in the food supply chain: defining the problem and the policy issues," in *Unfair trading practices in the food supply chain*, JRC Technical Report.

[474] European Commission, 2013, *Green Paper on unfair trading practices in the Business-to-Business Food and Non-food Supply Chain in Europe*.

[475] Any regulation of contractual practices in a supply chain can impact final consumers, possibly through adverse impact on consumer prices. For instance, the French *Loi Galland* was enforced in 1997 and was meant to protect small firms from large competitors by defining the relevant cost threshold to implement below-cost regulations, but resulted in creating a situation which *de facto* allowed for industry-wide price floors; see, P. Biscourp et al., 2013,

up in the supply chain would benefit from a regulation of UTPs that would give large processors or manufacturers greater margins. A large manufacturer that would leverage a regulation of UTPs to pressurize the retailers to increase prices at which retailers buy from the manufacturer has no obligation or incentives and is unlikely to share with its own suppliers the extra benefits it would obtain from such regulation.

3. A UNIFIED APPROACH

3.1 EX-ANTE AGREEMENTS SHOULD GENERALLY BE ALLOWED

Sexton explains that even in the case where maximizing the total gains resulting from a transaction conflicts with each party's incentives to capture a larger share of these gains, there exist ex-ante contractual pricing mechanisms (e.g. slotting allowances or various forms of upfront payments, contribution to promotions) which can "*enable the trading partner with a bargaining-power advantage to extract surplus to a transaction without imposing UTPs that diminish the surplus associated with the transaction.*"[476] These mechanisms thus provide such trading partner with incentives not to engage in UTPs that would decrease the total gains to the transaction. In addition, Sexton points out that the long-run viability of trading partners (hence, ensuring them a fair share of the gains from a transaction) is also usually in the interest of firms with strong bargaining power. As regard suppliers of agricultural products Sexton notably points out that their buyers try to distinguish themselves from their competitors through specific product characteristics: as a result switching suppliers can be costly and it is in the interest of the buyers to maintain the long-term viability of existing suppliers. In other words, contractual provisions or trading conditions to which the parties would agree ex-ante in general lead to efficiencies.

Also, there exist some mechanisms to share the extra value generated by the transaction between parties. Hence, even trading partners with low levels of bargaining power often benefit from the practices which generate value for the industry (i.e. which increases the size of the pie).

The party with weaker bargaining power may still like to obtain more from the transaction but that would only be possible through acquiring a different economic position (e.g. a much larger scale that reduces costs or producing a different unique product) or through an arbitrary external intervention to set the prices at a different level (such as price regulation as is done in non-market-oriented economies).

Contractual provisions or trading conditions to which the parties would agree ex-ante typically lead to efficiencies and should not be banned under UTP regulations, because normally they would make

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"The Effects of Retail Regulations on Prices: Evidence from the *Loi Galland*," *The Economic Journal*, 123, pp. 1279-1312.

[476] See footnote 473 above.

all parties involved better off.[477] For instance, a supplier's contribution to promotions can help to adapt supply to consumers' demand. By contrast, if suppliers' contributions to promotions were to be banned as a general rule, the gains from adapting supply to demand could be lost, resulting in losses for all parties involved. In particular, losses could be large for the suppliers that do not participate in promotions because consumers could redirect their purchases towards other products, for instance because these products would be promoted instead. As an example, if suppliers of fresh fruits and vegetables cannot contribute to promotions, retailers would have to bear the entire contribution to such promotions and could face more difficulties to adapt the overall supply of fresh fruits and vegetables to demand than if the contribution to promotions was shared between trading partners. They could also deflect the promotions to other categories of products, such as processed food products, thus leading to a negative impact on sales of fresh fruits and vegetables.

Ultimately operators adapt to regulations to be able to secure sales and earnings. If suppliers cannot contribute to promotions, they will still be able to reduce their prices for any given period (as part of setting their so-called "list price" outside promotions) and try therefore to out-compete other suppliers by such reductions. Retailers will still be able to advertise "decreasing prices" versus "stable or increasing prices" and suppliers will continue to obtain the same or similar benefit from their transactions. Similarly, if a supplier is prohibited to make upfront payments and maintains its wholesale price, it may be replaced by another supplier that offers to reduce the price of its products or to provide additional services (e.g. in terms of delivery, packaging, merchandising, etc.) to secure access to the outlets of the buyer.

This being said, there are certain well-defined exceptions to this general rule regarding the presumed lawfulness of ex-ante agreed conditions.[478] Certain contractual provisions or trading conditions agreed ex-ante could still be regarded as unlawful or unfair where it is generally accepted that they do not lead to efficiencies for both parties in the transaction. This could be the case, in particular, for contractual provisions or trading conditions on payment periods of more than 30 days for perishable products. Payments for perishable goods that exceed 30 days seem to have, indeed, a negative impact on investment and output at the farm level.[479]

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[477] In this respect, the 2011 SCI's "Principles of Good Practice" mention as an example of fair practice a "*transfer of risk which is negotiated and agreed by the parties to obtain a win-win situation*," i.e. an increase of the size of the pie.

[478] Some ex-ante conditions may raise issues under competition law; for example when a dominant company offering exclusivity contracts to trading partners which play a pivotal role in the viability of the dominant company's competitors.

[479] Falkowski explained that actions involving "*processors trying to rebuild their reputation and trustworthiness by paying on time and providing their suppliers with various assistance programmes*" have been shown to have "*a very profound and quite rapid positive effect on both investment decisions and output at the farm level*," while pointing out the need for further research in order to understand better the mechanisms at play in such scenario. One potential explanation could be that small farmers face some frictions in their access to capital markets. See Jan Falkowski, 2017, "The economic aspects of unfair trading practices: measurement and indicators," in *Unfair trading practices in the food supply chain*, JRC Technical Report.

3.2. EX-POST UNILATERAL CHANGES SHOULD GENERALLY BE PREVENTED IN SITUATION OF STRONG ASYMMETRY IN BARGAINING POWER

In contrast to what we discussed above, and because contractual provisions or trading conditions cannot ultimately cover all possible aspects of a trade relation, a trading partner with a strong bargaining power might sometimes be able to unilaterally and retrospectively change a commercial agreement or a transaction in its favour or impose additional conditions which reduce or eliminate the efficiencies for the party which has no or weaker bargaining power.[480]

Such ex-post modifications to the existing trade relationship could allow the trading partner with a strong bargaining power to capture the gains of the transaction that were originally allocated to the other partner or transfer the losses that the trading partner with a strong bargaining power should have kept, and, therefore, could qualify as UTPs.[481] For instance, a last-minute order cancellation for perishable goods prevents the supplier of these goods from finding an alternative and creates an unexpected cost as well as additional uncertainty for future transactions. The buyer in addition has a reduced incentive for appropriate market analysis and planning for future transaction. This overall can reduce investments and reduce overall gains for future transactions. In addition when the trading partner with weak bargaining power anticipates future unilateral and retrospective changes before reaching the agreement, this can diminish its incentives to innovate or force it to distort its orders or sales to some levels that are inefficient for the parties in the supply chain, and ultimately harm both parties.

Claims for wasted or unsold products could generally be considered as ex-post practices, given that they arise due to a modification of the initial terms of the transaction after the outcome of the transaction has been realised (i.e. after that parties realised there were wasted or unsold products due to, e.g. improper management of the goods or lack of demand). Claims for wasted or unsold products can remove incentives to manage properly the flow and storage of products if the claims have to be paid, for instance, by the supplier for waste created at the premises of the buyer. In principle the costs of wasted goods should be borne by the party that creates such waste. Hence, claims for wasted or unsold products can have effects similar to those discussed above for last-minute order cancellations.

3.3. THE FRONTIER BETWEEN EX-ANTE AND EX-POST

There may be questions about the frontier between "ex-post" and "ex-ante" in the case, for instance, of regular negotiations or arrangements between two trading partners to continue or renew their

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[480] Note however, that ex-post, unilateral UTPs should generally already be covered by contract law. Dedicated regulation of such UTPs should be promoted only when it is clearly established that contract law is not sufficient to protect all trading partners, when, e.g. small players may not be fully aware of the law, or when it may be too costly for them to start a legal action.

[481] Similarly, the UK Competition Commission's 2008 Final report on their "Groceries market investigation" generally draws a distinction between e.g. an override agreed in advance, or imposed retrospectively (see Appendix 9.8).

agreements or trading conditions.[482] In such case, ex-post unilateral changes could be interpreted as part of the ex-ante negotiation tactics with respect to the future agreements, or e.g. as part of standard adjustments to demand.[483]

Unilateral changes occurring after the parties have reached an agreement or have started the transaction which should be interpreted as part of ex-ante business practices would relate to, e.g. changes in the previous contracts in regard of supplies which are about to be ordered (or will be ordered in the future), but not for supplies that were already agreed or ordered (which would be the case, for instance, for last-minute order cancellations in particular of perishable products) that could still qualify as a UTP. This is the case, for instance, when a large customer uses "delisting" as part of its recurring negotiations with a large manufacturer, such practice would typically be categorized as an ex-ante practice, as this corresponds to the case where the retailer simply stops ordering products from the manufacturer and thus affects future orders. Hence, this should generally be allowed.[484] More generally, particular caution is advised when identifying trading practices in such situations, in particular when there are no strong asymmetries in the trading partners' relative bargaining power.

There may also be questions about the frontier between "ex-post" and "ex-ante" in the case that a commercial arrangement includes vague provisions or clauses for key elements of the transaction or artificially sets that a condition will be determined ex-post. If it is possible to determine ex-ante such key elements (e.g. percentage contributions to promotions or specific contributions to marketing costs), inserting a clause in a contract about the later determination of such elements only artificially makes the practice of determining such conditions an "ex-ante" practice. It is more appropriate to consider this an ex-post practice when such clause exists, and when it is possible to determine such key elements ex-ante. In fact the trading partner with stronger bargaining power could take advantage of this situation and could force the other party to agree that a contract remains vague or does not clearly determine certain elements upfront so that the stronger party can unilaterally set these elements once sales have been realized. Indeed in such a case, the stronger party is likely creating the same inefficiencies as discussed above for ex-post practices (which are not envisaged at all in the pre-transaction arrangements).

3.4 APPLICATION TO SPECIFIC UTPs

The above-mentioned distinction between provisions or conditions agreed ex-ante and which typically lead to efficiencies for both parties and practices that occur ex-post and reduce or eliminate the efficiencies for the weaker party can be applied to the specific unfair trading practices mentioned in the impact assessment.

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[482] This is usually the case for instance between a manufacturer of branded goods and a retailer: both usually agree some general terms of trade at the beginning of a twelve-month period while orders and specific promotions are decided at multiple points in time during the twelve-month period.

[483] As an example, variations in quantities ordered can be part of standard adjustments to demand, and can be also part of the discussion between the trading partners for future orders.

[484] This paragraph does not concern last-minute order cancellations of perishable products discussed above given that by definition a cancellation requires that a specific order has been placed in the first place.

First, the following practices would generally belong to the set of ex-ante contractual provisions or trading conditions for which there typically exist some efficiencies to be gained and shared by all trading parties:

- "Contributions to promotional or marketing costs of buyer"

- "Requests for upfront payments to secure or retain contracts".

One should keep in mind that, absent these practices, the imbalances of bargaining power would remain and simply be applied to trading arrangements which are typically less efficient for all parties involved, generally leaving trading partners with no or weak bargaining power in a worse situation than when the practices are agreed upon ex-ante.

However, as discussed in section 3.3, in specific cases where the two above-mentioned ex-ante practices clearly relate to unilateral and retroactive changes or determinations of some elements that could be instead determined ex-ante, they could exceptionally qualify as ex-post and be regulated.

In addition, certain contractual provisions or trading conditions agreed ex-ante could still be regulated where it is generally the case that they do not lead to efficiencies for both parties in the transaction. This is the case for "Payment periods longer than 30 days for perishable products".

Note, however, that a regulation of these UTPs should take into account all the specificities of the various transactions in the food supply chain in the different Member States in order not to penalize both farmers and other trading partners by limiting the scope of their business arrangements. For instance, enforcing a strict payment period of 30 days could sometimes prove difficult under value-sharing contracts for which the value to be split between trading partners is realized only at a later stage (e.g. for some cereals and other arable crops).

Second, practices which typically belong to the set of ex-post practices which could generally be harmful to some trading partners when imposed in situation of imbalances of bargaining power are:

- "Unilateral and retroactive changes to contracts"

- "Last-minute order cancellations concerning perishable products"

- "Claims for wasted or unsold products".

These practices could be addressed by a regulation on UTPs as there is only a very limited risk that such regulation would eliminate potential efficiencies. These practices would typically be used by trading partners with strong bargaining power in order to capture the surplus which should be owned by other trading partners while bearing almost no risk.

4. CONCLUSION

As detailed above, UTP regulations should be very carefully tailored in order not to prevent trading partners from engaging in efficiency-enhancing agreements or trading conditions. Moreover, one should recall that UTP regulations will not ultimately prevent the existence and exercise of strong bargaining power through fair practices such as, for example, lower purchasing prices.

This Annex advocates for a clear identification of a "black-list" of well-defined UTPs based on an ex-ante vs. ex-post criterion. Regulation focused on addressing "ex-post" UTPs would limit the risk of preventing efficiency-enhancing behaviour and trading practices from taking place. In contrast, other approaches such as a "rule-of-reason" as advocated by Sexton could prove more complex and challenging to implement in practice. Such rule-of-reason type of approach may lead to over-enforcement of the regulation and risks affecting efficiencies linked to commercial transactions in the supply chain.[485]

As presented in the Annex, distinguishing between practices which involve ex-ante commercial agreements or trading practices between parties and those which instead relate to ex-post unilateral decisions could provide some guidance to help defining a very precise "black-list" of UTPs.

Prof. Tommaso Valletti

Chief Economist, DG COMPETITION

[485] Sexton mentioned that a "rule-of-reason" regulatory approach may be the most appropriate to deal with UTPs. In particular, he proposed "*specific criteria for adjudicating a rule-of-reason standard. The first criterion would be whether the alleged action had a clear efficiency motivation. Second, investigatory bodies should examine if simpler means than the alleged UTP were available to the accused party to extract economic surplus. A third criterion is to ask if the business relationship in question is likely to be long term, with it being unlikely that a business would disrupt a long-term relationship by engaging in UTP*." See footnote 473 above.