

# AGRI-FOOD MARKET REGULATION AND CONTRACTUAL RELATIONSHIPS

IN THE LIGHT OF DIRECTIVE (EU) 2019/633



Edited by  
**Anna Maria Mancaleoni**  
**Raffaele Torino**

Consumatori  
e Mercato

**16**



Università degli Studi Roma Tre  
Dipartimento di Giurisprudenza

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Anna Maria Mancaloni

*Introduction: Directive (EU) 2019/633 as a piece  
in the puzzle of the agri-food market regulation*

SUMMARY: 1. Premise – 2. Directive 2019/633 and its broader context – 3. The transposition of Directive 2019/633 into the domestic legal systems: a summary report – 4. Critical remarks.

1. *Premise*

This volume was conceived in the wake of the adoption of Directive (EU) 2019/633 *of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain*. The Directive obliged Member States to introduce into domestic law its implementing measures by the deadline of 1 November 2021.

Directive 2019/633 draws the attention of private law scholars, such as the editors of this Volume, both for its repercussions in domestic law and due to its relevance to the hotly debated gradual construction of a European contract law. In fact, it is noticeable that the Directive is one of the few EU instruments for the protection of the weaker party to a contract who is not a consumer: as such, the Directive is directly comparable, as regards the tools of protection and their impacts in the Member States, with the interventions and protection strategies envisaged for consumers by the more numerous contractual directives specifically concerning them. Therefore, Directive 633 can be considered an obligatory point of reference in the attempt to build the regulatory framework for B2B contracts within the European Union and accordingly in the Member States.

However, by focusing on private law, the perspective outlined above immediately reveals itself as limited and partial if one wants to correctly grasp the legal framework concerning the contracts of the agri-food chain in abstract, as well as the practical implications of the discipline provided

by Directive 2019/633. Indeed, in the context of the agri-food chain, the issue of the effectiveness of the protection provided by the rules of private law is more crucial than ever, due in particular to the limits that civil protection encounters in this area. In fact, it is an established fact, as emerges from the contributions in this Volume, that abuses within the food-chain occur despite the legal protections provided by domestic legal systems, but available civil remedies and private enforcement procedures are not sufficient to tackle the problem. In particular, the high market concentration on the demand side and the consequent unfolding of the «fear factor» stifle the protection afforded by the rules of private law.

Furthermore, the agri-food chain is a complex and multifaceted phenomenon and of public interest, not just of private law. In any case – even if one wanted to merely consider the profile of the protection of the weaker party according to the rules of private law – the very understanding of the protections provided by private law cannot be separated from the consideration of the broader framework within which Directive 2019/633 is placed. This certainly requires putting the Directive into the broader framework of the Common Agricultural Policy (CAP), including the regulation on competition.

Therefore, in the light of the above, it was almost obligatory for the editors of this Volume to widen the scope of the research, by extending the view from the private law of contractual relations to the discipline of the agri-food market and asking for support from experts in the field of agri-food law and of other relevant areas of the law (without any pretension of exhausting all the aspects of this broad and complex matter).

From the foregoing follows the articulation of the volume into two parts: the first is dedicated to the contextualisation of the new EU discipline within the broader regulation of the agri-food market; the second is focused on the implementation of Directive 2019/633 in selected domestic legal systems. That said, in the next pages, a summary illustration of the topics dealt with and of the results that can be drawn from the contributions to this Volume will be provided.

## 2. Directive EU 2019/633 and its broader context

The initial contributions of the first part of this Volume are devoted to the critical illustration of the legal framework in which Directive 2019/633 is placed, with the Directive only one part of the integrated framework that the European Union has been building under the umbrella of the CAP since the origins of the European Economic Community. This process has been conducted with a view to achieving the more or less specific goals identified in the different historical moments that have marked the evolution of the Common Agricultural Policy.

It is well-known that agriculture has an ‘exceptional’ position amongst the EU policies, to such an extent that, starting from the earliest times of the Treaty of European Economic Community, it has been subjected to derogations from the ordinary rules on competition, which are the cornerstone of the single market. Indeed, «Article 42 TFEU exceptionally allows farmers to enter into horizontal agreements *precisely in order to mitigate imbalances in economic and contractual power and ensure that the agricultural party has effective powers to shape the content, including the economic content, of contracts*» (Luigi Russo; emphasis added).

Furthermore, in recent years there has been «an expansion of the objects considered and of the area covered by the European legislative reforms on a plurality of topics all related in some ways to the CAP and all mentioning the CAP among their legal basis: from the General Food Law of 2002, to the Hygiene Package of 2004, to the Quality Package of 2012, to the new rules on transparency and risk assessment in the food chain and on official controls on food, feed, animal health and welfare, plant health and plant protection, up to the reform of the CAP and of the single CMO of December 2021» up to and including Directive 2019/633 (as illustrated by Ferdinando Albisinni).

Indeed, the legal basis of Directive 2019/633 is Art. 43(2) TFEU, and not, as normally occurs for directives on contracts with consumers, Art. 114 TFEU («measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market»).

The Directive, in fact, is well placed in direct relationship with the objectives of the CAP, as established in Art. 39 TFEU, para. 1, in particular as it aims «to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture». Although indirectly, the Directive also relates to the objective

«to increase agricultural productivity ... by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, *in particular labour*». In fact, since «labour» means regular work, and therefore fair remuneration of suppliers, the Directive should also help to combat the proliferation of undeclared work (as outlined by Irene Canfora).

Moreover the EU Court of Justice «has explicitly and authoritatively recognized the CAP as the founding basis of a complex system, which unifies reasons of competition and reasons of food safety in a multifunctional discipline, overcomes the distinction between subjects, locates in a single regulatory framework all subjects of the production chain and consumers, and aims to ensure the stability of the market and the transparency of production and marketing conditions» (as remarked by Ferdinando Albisinni).

The rationale justifying the adoption of the Directive is the so-called «double risk», as set out in recital 6 of the preamble, according to which «[w]hile business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes and its exposure to weather conditions. That uncertainty is compounded by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal. *In an agricultural policy environment that is distinctly more market-oriented than in the past, protection against unfair trading practices has become more important for operators active in the agricultural and food supply chain*». As underlined by several of the contributors, the main reason for the adoption of the new Directive lies in the vey need to protect suppliers as a result of the fading of the support measures previously granted by the EU, while the market has also become more competitive.

Directive 2019/633 is dealt with in more detail in the contribution of Luigi Russo. After an illustration of the general framework in which the Directive is placed and of the history of the Directive, the Author focuses on its most relevant aspects, such as the scope, the notion of unfair practice, the types of practices it covers and their respective regulation as well as the minimum harmonisation approach. Finally, some conclusions on the impact of the Directive are made.

The subsequent contributions deal with some specific aspects of the agri-food market regulation, more or less interlinked with Directive 2019/633.

Irena Canfora concentrates on the profile, as crucial as difficult to regulate, of the «fair price» of agri-food products, which is immediately related

to one of the aims of the CAP and of the same Directive 633: the aim «to ensure a fair standard of living for the agricultural community, in particular by increasing the individual income of people engaged in agriculture». In this respect importantly the Court of Justice has clarified that the principle of freedom of price applies in conditions of effective competition, while in situations of imbalance Member States may intervene with provisions which possibly affect the functioning of the internal market, provided that the measures in question are appropriate for achieving the objective and do not go beyond what is necessary to achieve it.

Nevertheless, the EU interventions on prices – both those assigning a primary negotiating role to producer associations and the rules laid down in Art. 168 of Regulation 2013/1308 – have remained incomplete. Even if the more recent Regulation EU 2021/2117 dealt with the formation of the price and the indicators to a more significant extent, the solution is still partial, as the faculty to determine these indicators is left to the Member States and, in accordance with the principle of contractual freedom, it is at the discretion of the parties to establish whether to fix the price on the basis of the indicators and possibly choose the reference indicators. In the final analysis, prices of products charged to suppliers, differently from prices applied to consumers, are not in fact determined upstream, but downstream, by the large distribution chains. In the final part, Irene Canfora's contribution dwells upon the possible indirect impact of Directive 2019/633 on «fairness» of prices.

Raffaele Torino focuses on a central aspect of Directive 633, such as the definition of «bargaining power». In determining its scope, the Directive favours an automatic mechanism, linked to the relationship between the turnover of the parties, identified by brackets (so called «staggered mechanism»), but this choice, dictated by reasons of compromise, is debatable and may also lead to paradoxical consequences. Evidence of this is the fact that the Member States themselves have not often shared the approach of the Directive, as emerges from the contributions in the second part of this Volume.

Lorenzo Bairati analyses the role of private and hybrid non-state actors, including standard-setting bodies, in the production of agri-food law (which «is increasingly being shaped by private and hybrid non-state actors, thus making private law sources a fundamental component in this sector. Indeed, the vast number of food governance sources, which includes standards, codes of conduct, criteria, guidelines, policies and rulebooks, has reached such a level that it cannot be overlooked when studying com-



parative and global food law...»). Concerns about growing inequality of bargaining power in the agri-food market would require also a response to this phenomenon, as «the rise of contractual governance is not politically neutral, in the sense that it clearly favors some operators at the expense of others» and «especially transnational corporations and intermediary actors are most likely to benefit from the expansion of governance by contract»; but the regulation of the agri-food chain «cannot be entirely delegated to large businesses and market forces», as it pursues also public goals.

The collective contribution by Enrico Bonadio, Nicola Lucchi and Magadali Contardi deals with the protection offered to geographical indications (GIs) in the European Union. The agri-food quality policy is also one of the instruments of the CAP which should help also increase farmers' incomes by protecting local producers from those who appropriate and exploit their names in the marketplace (as outlined also by Luigi Costato and Irene Canfora). Concerns raised in this context are mostly related to the fact that in the EU – the «Old World» – the protection is notoriously stronger than in the «New World», as shown by the growing number of disputes arisen at the international level as illustrated by Enrico Bonadio, Nicola Lucchi and Magadali Contardi.

Roberta Peleggi deals with «contract farming», «as a particular form of supply chain governance adopted by firms to secure access to agricultural products, raw materials and supplies within certain specifications as to the quality, quantity, origin and timing», which can take different forms, based on the product characteristics, the number of parties involved, the targets and resources available to the firms, the farmers' skills and which presents many benefits, as well as disadvantages and risks, as it very often results in an unbalanced relationship between the parties involved in the contract. Only a minority of countries, both European and non-European, have enacted regulations, also with a view to affording stronger protection to the weaker party, while at the supranational level the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, «which offers a comprehensive soft guidance to all possible actors involved in these operations whilst at the same time supporting domestic legislators willing to undertake legal reform, can represent a veritable step forward for a more responsible contract farming».

The contribution of Luigi Costato addresses the impact of Covid 19 on the agri-food chain: while the flow of supplies of foods produced directly by EU farmers or of agricultural raw materials to be processed in industry did not undergo significant alterations during the pandemic,

worse problems have been encountered in developing countries, where the number of people suffering from hunger has swelled significantly. Therefore, after a historical excursus aimed at highlighting the diversity of contexts in past eras as opposed to the present age of more homogenous globalisation and consequent delocalisation of production processes, along with the insufficiency of the international agreements and institutions of global governance, the Author makes some observations on the limited impact of Directive 2019/633 in the perspective of better functioning of the supply chain and of rebalancing of the positions of the parties.

### *3. The transposition of Directive 2019/633 into the domestic legal systems: a summary report*

The ‘rapporteurs’ of the Member States participating in this Volume were asked to present the legal framework governing contractual relationships in the agri-food chain in their own national law, encompassing the specific regulation before and after the implementation of Directive 2019/633, as well as the general regulation provided by private law and competition law, and the related enforcement procedures, to the extent applicable to the agri-food chain relationships.

As to the impact of Directive 2019/633, which is the main focus of this Volume, the contributions provide significant feedback in particular with regard to the extent to which Member States have availed themselves of the possibility to maintain – considering that many Member States already had enacted a specific regulation – or introduce a standard of protection higher than the Directive, in conformity with the minimum harmonisation clause set out in Art. 9 of the Directive.

All the contributions highlight the non-correspondence between the approach taken by the Directive and the choices made by national legislatures. The Member States dealt with in this Volume introduced or maintained a standard of protection higher than the Directive in relation to one or more of the core aspects of the discipline, such as scope, general clause and/or list of clauses, adherence to the Directive as far as the inclusion of a given practice in the grey list or in the blacklist and inclusion in the national regulation of practices other than those provided in the Directive. Furthermore, while the Directive does not impose the obligation to conclude the contract in written form, this obligation is provided in the

legislation of some Member States.

As to the scope, the approach taken by Directive 633 can be easily questioned for more than one reason. First of all, the Directive is applicable only in favour of the supplier and provided that the turnover of the parties falls under the thresholds laid down in the Directive.

Therefore, regrettably the buyer is not protected under the Directive. Even if it is true that in the real practice the stronger party is normally the buyer, the opposite could also be true and thus such discrimination seems unjustified.

More importantly, as highlighted in the contributions of Luigi Russo and Raffaele Torino, the «staggered mechanism» laid down in the Directive operates automatically, with the consequence that if the turnover of one of the parties deviates from the threshold figures to a minimal extent, the protection cannot be invoked. This also leads to the paradoxical result that the Directive applies even if the supplier has a turnover of 9.999.000,00 euros and the buyer has a turnover of 10.000.001,00 euros, even if «[i]n these instances, it is evident that the turnover cannot be used as a trustworthy indicator (the EU legislators use – Whereas 14 – the term “*suitable approximation*”) of a different negotiating power»; on the contrary, «the Directive does not apply if the supplier’s turnover is 150 million euros plus 1,00 euro and the buyer’s turnover is euros 349.999.999,00. Contrary to the apparent intent of the EU legislators, in this instance a difference of 200 million euros would not be considered to indicate a considerable disparity in negotiation power» (Raffaele Torino). Furthermore, practices conducted between micro-enterprises are never prohibited, as they would not fall within the thresholds of the Directive (as outlined by Luigi Russo).

In the light of this criticism, it is to be welcomed that the Member States dealt with in this Volume have sometimes opted for also protecting the buyer against the seller and that they have sometimes renounced defining the scope of the discipline on the basis of the «staggered mechanism», by following a different approach. At the same time, it cannot be ignored that the adoption of criteria different to the Directive may cause the difficulties which the staggered mechanism has the advantage of preventing. Indeed, as the experience of some Member States shows, and as it emerges also from some of the contributions, outside the scope of abuse of a dominant position and the related criteria, the issue of the demarcation of a disparity of power justifying protection in contract law is not easy to resolve.

With regard to the definition of «unfair practice», Directive 2019/633 does not provide a general clause, but it only identifies as unfair the prac-

tices listed in the black and grey list, provided that the turnover thresholds are met. Conversely some Member States opted for the provision of a general clause in addition to a catalogue of unfair practices. Some Member States considered as «black» some practices which would be grey under the Directive. Some Member States extend the protection to some practices which are not contemplated in the Directive.

Provided below is a summary overview of the basic information of the law in the Member States studied following the implementation of Directive 2019/633, with a view, in particular, to give some indications on the possible ‘deviations’ from the common minimum standard required by the Directive.

In Belgium, the contracts of the agri-food chains had not received any specific regulation before the transposition of Directive 2019/633. Under the implementing legislation only the supplier is protected, like in the Directive, while no reference to the turnover thresholds of the parties involved in the practice is made (provided that the turnover of the supplier does not exceed 350 million euros and exception made for recognised producer organisations, which can benefit from protection even beyond that threshold); neither is any requirement of significant imbalance between the parties set out. Furthermore, the notion of «food product» includes also feed.

There is not any general clause establishing when a given practice is unfair, but only a list of black and grey practices corresponding to the catalogue in the Directive (and even if domestic law, unlike the Directive, does not make any distinction depending on the perishable or non-perishable nature of the products). However, it should also be noted that more general provisions of domestic law, especially those introduced in 2019 on the abuse of economic dependency, unfair terms and unfair market practices in B2B relations, based on general clauses, are applicable, regardless of the relative size of undertakings.

In France, the implementation of Directive 2019/633 has gone almost unnoticed, due to experience already gained in the regulation of the agri-food relationships. Indeed, the subject matter of the disparity of power within the agrifood chain has received great attention in recent years, including in the political debate and in the media, and several reforms have been implemented.

The practices listed in the Directive were already illegal under the French regulation on commercial practices, as recently amended, which considers such practices as «pratiques restrictives de concurrence», which

are forbidden per se, regardless of their effects on the market. Furthermore, the scope of the domestic regulation goes beyond the Directive: the protection is afforded to all businesses, without any reference to the turnover ratio; the implementation of the Directive only led to the introduction of three new practices. It can be further noted that French law provides that the negotiations between the supplier and the buyer do not extend to the part of the supplier's price that covers the cost of the raw agricultural materials and of the processed products mentioned in the law, and that the contract has to include a price revision clause based on the variation in the price of the raw agricultural materials used in the finished food product.

The German legal framework prior the implementation of the Directive was also to a considerable extent capable of giving the weaker party of the agri-food chain adequate protection, at least in abstract terms, by means of the general provisions on unfair commercial practices, antitrust law and unfair terms. That said, the Directive can be credited with introducing a public enforcement mechanism capable of overcoming the «fear factor», which would prevent the weaker party from taking any legal initiative against the stronger counterparty. As to the scope, the same turnover ratio of the Directive is adopted as a general rule (but the upper limit is wider than the Directive with regard to some sectors and for a transitional period which can be further extended) and only the supplier is protected, in accordance with the Directive. The option to provide a general clause was rejected, because it could have interfered with antitrust law (being a sort of «shadow BGB») and because the presence of a list of detailed practices would better ensure clarity. However, some grey practices of the Directive are contemplated as black in the domestic legislation. Antitrust law remains a valid tool of protection also after the implementation of Directive 633, especially because the abuse of dominant position, in the form of «relative» abuse, can cover practices which are not contemplated under the legislation implementing the Directive.

In Hungary, Directive 2019/633 was transposed by amending a pre-existing regulation on unfair distribution practices vis-à-vis suppliers of agri-food products. Like the Directive, the resulting regulation protects only suppliers against buyers, but, unlike the Directive, it does not determine its scope by reference to the turnover of the parties. Only the practices which are listed in the law can be regarded as unfair; furthermore, all the listed practices are black and none are grey. If the practices listed in the domestic legislation seem to correspond to the same practices provided by the Directive, it is not easy to tell exactly whether the domestic legislation

complies with the Directive, as the former defines the practices in a more sophisticated way and in great detail. It is also interesting to note that the Hungarian competent enforcement authority has been involved in many infringement procedures. Unfortunately, the reasons that a given practice is considered unlawful are not made public, with the consequence that no useful indication can be found as to the approach taken by the authority in interpreting the practices (in particular in relation with the Directive) and in order to identify the best practices and avoid future infringements.

The Italian legislation implementing Directive 2019/633 goes beyond the scope of the Directive: it also protects buyers against suppliers and it does not refer to the turnover ratio of the parties. It does not contemplate a general definition of unfair practice; it does not require the finding of a situation of abuse; in other words, differently from the regulation previously in force, the domestic legislation is independent «of the verification of the actual occurrence of a specific economic dependence of one contractor with respect to the other which is, on the other hand, an operational prerequisite in Directive 633 of 2019» (as highlighted by Antonio Jannarelli; and taking into consideration the remarks made by Raffaele Torino with regard to those practices which the national legislation defines in terms of «imposition» by the buyer, which conversely would require «a concrete and careful analysis (...) to determine which of the two parties has the real and effective power to impose itself on the other»). The implementing legislation only lays down a black and a grey list and adds some more practices to those provided in the Directive, including also double-discount electronic tenders and auctions and sales below cost. In particular, the fact that double-discount auctions are banned is to be positively assessed, because this method for concluding contracts is highly detrimental to all the supply chain relationships, leading to the ‘mortification’ of prices on the entire market; furthermore, below-cost sales very often follow the implementation of such auctions (as remarked by Antonio Jannarelli).

It must also be noted that some of those additional practices are defined in broad terms, so that the enforcement authority enjoys a wide discretion in the assessment of their unfairness. Furthermore, collective entities are entitled to bring proceedings in order to obtain an injunction as well as damages.

In Poland both suppliers and buyers are protected. In line with the approach of the legislation on contractual relationships in the agri-food chain already in force prior to Directive 2019/633, and unlike the Directive, a general clause is provided, according to which a given practice

is to be qualified as «unfair use of contractual advantage» if it is contrary to principles of morality and threatens to infringe or infringes upon significant interests of the other party. To facilitate the assessment on the existence of such practice, some rebuttable presumptions are established, based on the turnover ratio of the parties, and provided that the contractual advantage may be found even regardless of the turnover. Also, a list of clauses, both black and grey, is set out.

Some relevant cases can be found in which the competent administrative enforcement authority has intervened in relation to practices in the agri-food market. On the contrary, civil remedies afforded to weaker parties do not appear adequate (particularly with regard to the nullity of the entire contract as a consequence of the unfairness of the single clause and to the regulation on prescription; also, the lack of provisions concerning the relation between administrative proceedings and civil proceedings and the lack of standing of associations representing the interests of the operators involved are regrettable).

In Spain as well the regulation of agri-food relationships preceded the adoption of Directive 2019/633. The protection framework of weaker parties, as resulting from the amendments introduced in the previous legislation to implement the Directive, is broader in its scope than the Directive: no reference is made to the turnover ratio of the parties and the protection is afforded both to suppliers and buyers, including small undertakings. Practices to be considered unfair are only those listed; the implementation of the Directive led to the introduction into domestic law of the unfair practices set forth in Art. 3 of the Directive, according to the same characterisation, as black or grey, provided by the Directive; such practices are additional to the practices already prohibited under national law. It can be noted that – similarly to other legal systems (such as, e.g., France and Italy) – some domestic provisions are concerned with avoiding «destruction of value in the food chain» («destrucción de valor en la cadena»: Art. 12 *ter* of *Ley* 12/2013): the price paid by each operator to the previous operator along the chain cannot be lower than the cost of production effectively incurred by the latter and, in order to protect primary producers, the prices applied to final consumers cannot be lower than the real price of purchase of the product. All the means of proof admitted by law can be used to determine the cost of production and the elements to be taken into consideration in the assessment are laid down in the same law.

Last but not least, the United Kingdom: Michael Cardwell highlights how before Brexit the main concerns raised were mostly related to the



possible adverse effect that disparity of power within the chain could have on consumers and on competition rather than on any professional weaker parties, including intermediaries, operating within the chain. The only initiatives taken – such as the Groceries Supply Code of Practice and the later establishment of the Groceries Code Adjudicator – have limited scope and impact. Following Brexit, bespoke national legislation to address imbalances within the agri-food supply chain was introduced: Section 29 of the Agricultural Act 2020 authorises the Secretary of State for Environment, Food and Rural Affairs to introduce regulations which impose obligations on business purchasers of agricultural products when contracting to purchase agricultural products from qualifying sellers and which provide for the enforcement of these obligations, «for the purpose of promoting fair contractual dealing by business purchasers of agricultural products from qualifying sellers». In addition, a non-exhaustive list is provided of the kinds of obligation which regulations made by the Secretary of State might impose. The examples under the Agriculture Act 2020 bear considerable similarity to the prohibited unfair trading practices as set out in Art. 3 of Directive 2019/633: in particular both the lists are non-exhaustive and under both measures further action is required for full implementation, but the non-exhaustive list of prohibited practices of the Directive is generally more comprehensive. While no regulations under Section 29 of Agriculture Act 2020 have been enacted yet, some specific-sector commitments have been undertaken by the Government in April and May 2023 in this respect.

#### *4. Critical remarks*

The following considerations summarise the assessments emerging from the contributions collected in this Volume in relation to the effectiveness and impact of Directive 2019/633.

First of all, it should be noted that the ‘judgment’ on Directive 2019/633 depends on the attitude of the observer and the reference standard for the evaluation.

On the one hand, the Directive is an overall modest protection instrument. The content is limited, as also arises from the comparison with the regulations already in force in numerous Member States before its adoption, as well as from the finding, although based on a sample of a minority



of Member States, that most national legislators have made use of the minimum harmonisation clause, by introducing or maintaining provisions more far-reaching than the Directive.

As to the scope of application, it is true that – thanks to the amendments proposed by the Parliament, which played a positive role in strengthening the position of weaker parties (as highlighted by Luigi Russo and Ferdinando Albisinni) – the Directive applies even if only the supplier or only the buyer is established in the Union. Nevertheless, the delimitation of the field of application seems to remain unsatisfactory, as it is anchored to rigid and automatic criteria, which do not allow an assessment on the existence of a situation of weakness needing protection outside the established numerical parameters (the turnover thresholds). Moreover, only the supplier is protected with respect to the buyer and not vice versa.

Furthermore, the Directive limits itself to laying out some typical cases of unfair commercial practices and there is no case in which practices that are not found in the list can be considered unfair. Moreover the practices of the grey list becomes legitimate if they are provided for in contractual clauses formulated in a clear and intelligible way (and therefore the stronger party can easily impose on the other such clauses without any consequence).

The Directive also has a relative impact in terms of the level of harmonisation pursued, because it is a minimum harmonisation measure.

What also emerges from the contributions is an awareness of the inherent limits of protection based on contractual formalism and transparency, such as that envisaged by the Directive, for the purpose of rebalancing the position of the parties in a market which is characterised precisely by the asymmetry of negotiating power due to downstream concentration. Indeed, with the words of Irene Canfora, «[i]nterventions based on strengthening contractual transparency cannot be considered adequate for reducing the abuse of contractual power, since it is precisely the disparity of power that conditions the exchange value». More effective, in relation to this objective, is the protection offered by antitrust law: «[t]he structural imbalance is, in large part, due to the mergers of economic operators at the top end of the food supply chain and the purchasing power that results from this. If this purchasing power cannot be “de-concentrated” then it is important to monitor mergers *ex-ante*» (Catherine Del Cont); and «the non-application, on an exceptional basis, of part of the antitrust rules (...) is the most incisive, allowing the weaker party in the market to increase its economic power», while the fight against unfair commercial practices «is a

sort of ‘palliative treatment’, since it does not affect the economic content of the contract nor does it seek to reduce existing imbalances, but it merely ensures that the rules governing the contract and its performance are in line with the principles of fairness and good faith» (Luigi Russo).

Looking at the impact of Directive 2019/633 in a positive light, it can be first considered that, in general terms, the very existence of common European rules should activate a mechanism of interaction and dialogue between legal systems, through the different «legal formants», capable of causing further changes and possible advances, as is inherent in any European law intervention and as the experience gained in the field of consumer protection shows. Indeed, the fact that Member States often go beyond the Directive (in particular by regarding as unfair those practices which do not fall under the Directive) should trigger a virtuous cycle whereby in the long-term European law will tend to expand the range of practices deemed incorrect.

Looking at the single commercial practices, it can also be remarked that, with regards to late payments, which are one of the most recurring unfair practices in the agri-food market, Directive 2019/633 goes beyond EU Directive no. 2011/7 on combating late payment in commercial transactions, as it introduces mandatory time limits and thus abandons the residual approach set out in the latter Directive (Luigi Russo).

Furthermore, the fact that Directive 2019/633 does not deal with the price of agri-food products, does not mean that it does not intervene on the contractual balance, taking into consideration that such price is only one of the factors that contribute to determining the profitability of the operation and the presence of the unfair practices targeted by the same Directive. This undoubtedly affects such profitability, adding costs and risks additional to those inherent in agricultural activities (as remarked by Antonio Jannarelli). In this respect it can be also noticed that, despite the lack of provisions on the ‘fair price’ of the product in the Directive, some national legal systems (France, Italy, Spain, for example, even if with partial results), going beyond the obligations deriving from the implementation of the Directive and Art. 168 of Regulation 2013/1308, contemplate the ‘fair’ price as a relevant element for the purpose of qualifying a given practice as unfair (for example in the context of the below-cost sales) and set forth reference indicators (even without concealing the limited impact of these provisions).

In general terms it can be argued that the main merits of the directive pertain to the mechanism of enforcement, and first of all to the fact that

the Directive has imposed the setting-up of a public law enforcement system, which was not present in all legal systems (as shown in the contribution on the German experience). In fact, if it is true that many Member States could compensate for the lack of specific regulation concerning relationships in the agri-food chain through the general provisions applicable in B2B relations, the effectiveness of private remedies would be precluded by the fear factor (as inferred also, indirectly, from the paucity of case law). It is from that same perspective that the Directive protects the anonymity of the complainant. Additionally, the fact that the enforcement authorities are vested with significant investigative and sanctioning powers, as well as the provision of «effective, proportionate, and dissuasive» sanctions, which may lead national legislators to possibly increase the severity of the sanctions already provided, can be considered merits to be credited to the Directive.

Also the mechanism of institutional cooperation laid down in Directive 2019/633 – i.e., the cooperation between the State authorities and the monitoring role of the Commission – can help to strengthen protection in national contexts and at the European level, possibly leading to further action.

The fact remains that the assessment on the unfairness of the practices is carried out only at national level: the Member States are still considered as better positioned to evaluate the occurrence of situations complementing the criteria of unfairness of the practices in the market that would be complex to identify and to regulate in a uniform way at the EU level. It remains also to be seen what can happen when the unfair commercial practice is conducted by an operator outside the European Union.

Finally, beyond the insight provided by the contributions with specific regard to the regulation of the agri-food chain relationships, their added value has to be underlined also in terms of the knowledge that they provide on the evolving legal framework concerning the protection instruments of weaker parties in contract law, and their interplay with competition law, and accordingly on the coherence of the entire system (particularly in the light of the call for more coherence in European private law expressed in the past by both the EU Parliament and the EU Commission and the relevant proposals set forth by the European legal doctrine).

In particular the contributions on Belgium and France epitomise the extent of the complexity that the overall regulation can reach due to the overlap between different «layers» of protection (sectoral, B2B, general: see Bert Keirsbilck and Elisa Paredis, describing the present Belgian framework

as a «millefoglie»; and Chaterine Del Cont, depicting the «plethora» of laws governing the matter): in both cases it seems that such complexity is not balanced by an effective improvement in terms of protection and better functioning of the agri-food chain.

With regard to the regulation of agri-food contracts, the contributions also provide useful insights on the debate concerning those more specific profiles on which Directive 633 says nothing, such as, in particular, the fate of the contract in case of nullity of the clause constituting an unfair practice and the relationship between the enforcement proceedings and the possible civil proceedings, in addition to the issue of the criteria relevant in order to determine whether a situation of imbalance/abuse/advantage exists for the discipline to be applicable in those legal systems which do not simply refer to the criterion of turnover.



PART I

THE SUPRANATIONAL FRAMEWORK



Ferdinando Albisinni

*Unfair trading practices in the agri-food chain:  
the EU framework and the transnational dimension*

SUMMARY: 1. CAP, markets, European framework – 2. The Commission's proposal – 3. The parliamentary path – 4. The new paradigms – 5. The transnational dimension.

*1. CAP, markets, European framework*

In 1957 the Treaty of Rome establishing the European Economic Community – stipulated by founding Members which had experienced fierce conflicts during the war and were still facing a difficult economic and social situation – insisted on the creation of a common market: «to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe», calling «for concerted action in order to guarantee steady expansion, balanced trade and fair competition»<sup>1</sup>.

The promotion of full competition was one of the founding principles of EEC<sup>2</sup>, strongly innovative in comparison to the traditional national approaches, shaping a general framework, which expressly prohibited and declared void, inter alia, all agreements among undertakings or associations of undertakings and all decisions or public aids «which distorts or threatens to distort competition»<sup>3</sup>.

This principle, applicable to all economic activities of any kind, knew only a relevant and significant exception: the Treaty assigned to agriculture a special regulation, exclusive and different from all other economic activities.

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<sup>1</sup> See the premises of TEEC.

<sup>2</sup> See R. TORINO-C. DI MAIO (eds), *Diritto e politiche dell'Unione Europea*, Cedam, Padova, 2020.

<sup>3</sup> See Artt. 85-94 TEEC.



Production and trade of agricultural products were not, in general terms, subject to general EEC rules on competition, but were located in a single regulatory area, taking into account the special objectives assigned to CAP<sup>4</sup>.

The specialty of regulation was expressly based on the specialty of the objectives, thus identified by art. 39 TEEC:

«The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices»<sup>5</sup>.

A common element is shared by the objectives of art. 39 TCEE: it is the active search for security, specifically food security, which includes and relates fair earning for producers and adequate access to food for consumers.

The search for security was a founding element even of other European Treaties of that period<sup>6</sup>: the Coal and Steel Treaty<sup>7</sup>, and the Euratom Treaty<sup>8</sup>, both aimed to assure «availability of supplies» through active policies to meet essential needs of European citizens, like carbon, steel, energy.

In Coal and Steel Treaty and in Euratom Treaty, reference to security

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<sup>4</sup> Art. 42 TEEC states: «The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39».

<sup>5</sup> On the *specialty* of objectives assigned to agriculture, and on the traditional status of *price-takers* of farmers, see A. GERMANÒ, *Manuale di diritto agrario*, Giappichelli, Torino, 9<sup>a</sup> ed., 2022.

<sup>6</sup> On the development of European integration, see R. TORINO, *Percorsi dell'Unione europea*, in R. TORINO-C. DI MAIO, cit., p.1.

<sup>7</sup> Treaty establishing the European Coal and Steel Community, of 1951.

<sup>8</sup> Treaty establishing the European Atomic Energy Community, of 1957.

implied an active approach, within and outside the new Communities thereby created, with the introduction of provisions on behaviours and duties of public and private actors, and the adoption of public policies, called to guarantee essential goods<sup>9</sup>. The result was a model of action, which may be traced to that of «heavy modernity»<sup>10</sup>, a model «where reality was shaped as an architectural work ... a time of drawing tables and drafts»<sup>11</sup>.

In the same perspective, agriculture was recognised by the TEEC as a special area of economic activity, subject to a special regime within the CAP - Common Agricultural Policy, i.e. within a Policy distinguished by a specific governance in consideration of the objectives pursued.

There was something, not expressly declared, but clearly appearing from the whole set of provisions regarding agriculture,

Art. 38 TEEC made reference not to agricultural activity but to agricultural products as «products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products», specifying that the list of such products is that of Annex II to the Treaty. This list was mainly a list of food products<sup>12</sup>, which e.g. did not include wood, as judicially confirmed still in 1999, when the Court of Justice, accepting the appeal of the Commission and the European Parliament, concluded that, since wood is not an agricultural product, support for forestry activities could not be included in the agricultural policy, but had to be traced back to the environmental one<sup>13</sup>.

This European model marked a relevant difference in comparison to previous Italian experience, which assigned central relevance to the activity performed, including any kind of care of the life cycle of vegetable and animal organisms, even if not addressed to the food chain, moving toward a systemic inclusion within the national model of «agricultural law» of all rules in any way related to the use of natural and land resources<sup>14</sup>.

<sup>9</sup> On content and models of *security* in those treaties, in comparative perspective, see F. ALBISINNI, *Soggetti e oggetti della sicurezza, non solo alimentare, in Europa, prima e dopo Lisbona*, in *Riv. dir. agr.*, 2010, I, p. 607.

<sup>10</sup> Z. BAUMAN, *Liquid Modernity*, Cambridge, Polity, 2000.

<sup>11</sup> Z. BAUMAN, *cit.*

<sup>12</sup> See the list in Annex II of TEEC, now Annex I of TFEU.

<sup>13</sup> Court of Justice, 25 February 1999, joined Cases C-164/97 and C-165/97, *European Parliament v/ Council of the European Union*.

<sup>14</sup> As underlined already in the '70s, with reference to the original text of Art. 2135 of the civil code, by A. CARROZZA, *L'autonomia del Diritto agrario*, in N. IRTI (ed), *Manuale di diritto agrario italiano*, Utet, Milano, 1978, p. 37, p. 52. See also the reform introduced by

During the first decades of CAP, starting with the regulations of the '60s<sup>15</sup>, the European Community assured to farmers a minimum level of prices<sup>16</sup>, with refunds on exports to third countries and intervention on the domestic market, aimed at stabilising markets, «In order to enable the common organisation of agricultural markets to attain its objectives»<sup>17</sup>, and therefore to guarantee adequate income to farmers and access to food at reasonable prices to consumers.

Through those policies, the European CAP of the first decades largely attained its objectives, as recognised even recently by the European Commission: «The Common Agricultural Policy (CAP) is one of the oldest policies of the European Union (EU). It successfully fulfilled its original objectives of securing supply of good quality, safe and affordable food products while supporting European farmers. ... The European agricultural policy turned the EU into the agri-food superpower that it is now: the EU if the first agri-food exporter globally, has an unparalleled reputation for its culinary heritage and food products, and for the savoir-faire of its producers»<sup>18</sup>.

In a sort of paradoxically counterreaction, at the cross road of the century, the attention to food production and food security, as declared objectives assigned to CAP by TCEE, has been shadowed by the growing attention to environment and rural resources assumed as a whole<sup>19</sup>,

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Decr. Leg.vo 18 May 2001, No 228, which modified Art. 2135 c.c., specifying that the care even of a single phase of the biological cycle of any organism, vegetable or animal, is sufficient to recognize agricultural character to the activity, even if performed without land. On this relevant reform, see L. COSTATO (ed), *Commentario a I tre «Decreti orientamento» della pesca e acquacoltura, forestale e agricolo*, in *Le nuove leggi civ. comm.*, 2001, p. 668.

<sup>15</sup> See Regulation No 25 of the Council, of 4 April 1962, on the financing of the common agricultural policy; formally repealed and substituted only in 2005 by Council Regulation (EC) No 1290/2005, of 21 June 2005, on the financing of the common agricultural policy.

<sup>16</sup> On the mechanisms, which guaranteed prices of agricultural products to European producers in the first decades of CAP and until the end of the XX century, see L. COSTATO, *Compendio di diritto agrario italiano e comunitario*, Padova, Cedam, 1989; ID., *Corso di diritto agrario*, Giuffrè, Milano, 2001, A. GERMANÒ-E. ROOK BASILE, *Diritto agrario*, Giappichelli, Torino, 2006, p. 87.

<sup>17</sup> Art. 1 of Reg. No 25 of 1962.

<sup>18</sup> European Commission, *The future of food and farming - Communication on the Common Agricultural Policy post-2020*, Brussels, 29 November 2017.

<sup>19</sup> Starting with Council Regulation (EEC) No 2088/85 of 23 July 1985, introducing the integrated Mediterranean programmes, considering in a unified perspective agriculture, fisheries and related activities, including the agri-food industries, energy, crafts and industry, including building and public works, services, including tourism; and later with Council Regulation (EC) No 1257/1999 of 17 May 1999, on support for rural

moving toward the reforms of CAP of 2003<sup>20</sup>, which introduced a general definition of «agricultural activity» (until then unknown to EU legislation), giving up the system of economic incentives related to the quantities produced and cancelling the guarantees of prices for agricultural (mainly food) products<sup>21</sup>.

Even in those years and even after all the relevant reforms of CAP adopted in the XX century, the objectives assigned to CAP in the 1957 TEEC remained nevertheless unchanged, and are still the same in TFEU introduced in 2007<sup>22</sup>.

After the Lisbon Treaty, it was argued by some commentators that some of the objectives, assigned to the CAP in 1957 by the Treaty of Rome and reaffirmed in 2007, were to be considered «obsolete» and that the failure to adapt these objectives in the text approved with the Lisbon Treaty would only depend on the tight deadline within which it was necessary to close the agreement<sup>23</sup>. There was talk of a «chameleon CAP» to point out the evolving nature of agricultural policy<sup>24</sup>.

The experience of recent years has instead confirmed the lasting effective relevance of the objectives originally assigned to the CAP, reaffirmed in the present Art. 39 TFEU, and most recently enhanced by the Directive on UTP in the agri-food chain, here in comment.

The essential relationship between objects of regulation, sources, and institutions, has always been (and it is, even to-day) an identity dimension of European agri-food law<sup>25</sup>, in a constant dialogue between legislation and jurisprudence.

This perspective found large confirmation in recent years, with an expansion of the objects considered and of the area covered by the

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development from the European Agricultural Guidance and Guarantee Fund (EAGGF).

<sup>20</sup> Council Regulation (EC) No 1782/2003, of 29 September 2003, establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers; see the definition of *agricultural activity* introduced at Art. 2.c).

<sup>21</sup> See *infra*. In the same perspectives are shaped the most recent reforms of CAP adopted in December 2021; see note 31.

<sup>22</sup> Compare art. 39 TEEC and art. 39 TFEU.

<sup>23</sup> See D. BIANCHI, *La PAC "camaleontica" alla luce del Trattato di Lisbona*, in *Riv. dir. agr.*, 2009, I, p. 592.

<sup>24</sup> See D. BIANCHI, *cit.*

<sup>25</sup> See G. GALLONI, *Agricoltura (Diritto dell'). Quali prospettive per gli anni '80*, in A. Carrozza (ed), *Diritto Agrario*, Giuffrè ed., 1983, p. 1; L. COSTATO, *Politica agricola comunitaria (gli sviluppi dal 2° Piano Mansholt ad oggi)*, *cit.*, p. 583.

European legislative reforms on a plurality of topics all related in some ways to the CAP and all mentioning the CAP among their legal basis: from the General Food Law of 2002<sup>26</sup>, to the Hygiene Package of 2004<sup>27</sup>, to the Quality Package of 2012<sup>28</sup>, to the new rules on transparency and risk assessment in the food chain<sup>29</sup> and on official controls on food, feed, animal health and welfare, plant health and plant protection<sup>30</sup>, up to the reform of the CAP and of the single CMO of December 2021<sup>31</sup>.

<sup>26</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

<sup>27</sup> This name usually identifies a group of four regulations, all approved in the same day, establishing general European rules to guarantee safety of food products: Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs; Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin; Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption; Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

<sup>28</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs.

<sup>29</sup> Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain.

<sup>30</sup> Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products.

<sup>31</sup> Reference is made to the three Regulations of Parliament and Council, published jointly on O.J.E.U. of 6 December 2021: Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013; Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013; Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union.

It is a path, within which regulation of production and trade of agricultural and food products has been structured as a unitary and systemic framework of rules, of public and private law, on the entire agri-food chain; a legal framework which, starting from agriculture, regulates both food and non-food agricultural products and moves to internal and external markets, in a dimension increasingly transnational.

The conclusion is that we are facing a laboratory of European law, which includes rules on agriculture and on food, in a single complex legal framework, even if food security for some time appeared to someone as a sort of memory of the past, more than an enduring challenge.

The 2019 Directive on UTP in the agricultural and food product market<sup>32</sup> finds its place within this integrated framework, which stays at the cross-road between public, private, and competition rules<sup>33</sup>.

Phil Hogan, European Commissioner for Agriculture in office when the directive has been approved, underlined how this directive «represents only part of the package of proposals on the agri-food chain that the Juncker Commission is involved in»<sup>34</sup>, recalling the Omnibus Regulation of 2017<sup>35</sup>

<sup>32</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair commercial practices in business-to-business relationships in the agricultural and food supply chain, whose transposition deadline was set at 1 May 2021 pursuant to of the art. 13. Italy has implemented the directive with Law 22 April 2021 n. 54, Delegation to the Government for the transposition of European directives and the implementation of other European Union acts - European Delegation Law 2019-2020, whose Art. 7 establishes principles and criteria to be followed; and then with the Legislative Decree 8 November 2021, No 198.

<sup>33</sup> As underlined in comparative perspective, with reference to previous French and Italian experiences and to general EU competition rules, by A. M. MANCALEONI, *Le pratiche commerciali nella filiera agroalimentare e la tutela della parte debole: riflessioni alla luce dell'esperienza francese*, in *Cibo e diritto. Una prospettiva comparata*, L. Scaffardi-V. Zeno Zencovich (eds), *Osserv. dir. civ. e comm.*, 2019, p. 313.

<sup>34</sup> P. HOGAN, *Introduzione*, in P. DE CASTRO (ed), *La Direttiva Ue contro le pratiche commerciali sleali, cosa cambia per le imprese e per i consumatori italiani*, Roma, 2019, p. 11.

<sup>35</sup> Regulation (EU) 2017/2393, of the European Parliament and of the Council, 13 December 2017, known as the *Omnibus Regulation* due to the large areas involved, introduced relevant innovation in Regulation (EU) No 1308/2013 on the common organisation of the markets in agricultural products, with reference to producers associations and regulatory contracts, recognizing the specialty of this market. On the growing relevance of the collective organisations and agreements, with peculiar reference to UTP, see S. MASINI, in *Riv. dir. alim.* [www.rivistadirittoalimentare.it](http://www.rivistadirittoalimentare.it), No 4-2021. More generally, on the process assigning regulatory competence to such collective agreements and decisions, starting with the milk quotas reform of 2012 and then with CMO regulation of 2013, see the contributions published in *I contratti del mercato agroalimentare*, F. Albinin-M. Giuffrida-R. Saija-A. Tommasini (eds), 2013, Napoli, ESI; and the analysis of L. Russo, *Mercato agroalimentare*



and the new Regulation on transparency in risk analysis approved in 2019<sup>36</sup>.

Together with those two regulations, it may be mentioned another innovative regulation adopted in that period: Regulation (EU) 2017/625 on official controls, which goes far beyond the perimeter of food products, assigning attention to the entire life cycle<sup>37</sup>.

All those regulations mention Art. 43 TFEU on CAP among their legal basis, but place together to this reference the mention of Art. 114 TFEU on the internal market and of Art. 168 TFEU on health protection, thereby adopting the same «plural» model characterized by multiple legal basis followed in 2002 by Regulation (EC) No 178/2002 on general food law<sup>38</sup>.

Directive (EU) 2019/633, on the other hand, assumes CAP as its exclusive legal basis, for a legislative act aimed «at pursuing the objectives of the common agricultural and fisheries policy»; objectives considered suitable for supporting even to-day (more than 60 years after the Rome Treaty) a penetrating intervention on the market, assuming that CAP by its nature invests and regulates commercial and exchange relations, and not only production.

This is not new: it is a well-known choice, practiced from the first

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*e concorrenza*; I. CANFORA, *La cessione dei prodotti tramite le organizzazioni dei produttori*; L. PAOLONI, *Le regole interprofessionali per il funzionamento della filiera*, in *Trattato di diritto alimentare italiano e dell'Unione Europea*, P. BORGHI-I. CANFORA-A. DI LAURO-L. RUSSO (eds), Giuffrè ed., 2021, p. 12, p. 147 ss., p. 155.

<sup>36</sup> Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the Union risk analysis in the food supply chain; discussed in the AIDA-IFLA Congress of 11-12 October 2019, Portici; the papers discussed in the Congress have been published in *Riv. dir. alim.* www.rivistadirittoalimentare.it, No 3-2019 and No 4-2019. On the relation between transparency and UTP rules resulting from the joint application of Reg. (EU) 2019/1381 and of Dir. (EU) 2019/633, see R. SAIJA, *I principi generali delle buone pratiche commerciali: la trasparenza dopo la direttiva 2019/633*, in *Riv. dir. alim.* www.rivistadirittoalimentare.it, No 1-2022, p. 5.

<sup>37</sup> Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities carried out to ensure the application of food and feed law, health and safety rules animal welfare, plant health and plant protection products. More indications on this regulation in F. ALBISINNI, *Regulation (EU) 2017/625: Official Controls, Life, Responsibilities, and Globalization*, in *European Food and Feed Law Review*, 2019, pp. 118-131.

<sup>38</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. For an analytic examination of the provisions introduced by this regulation, see IDAIC (ed), *Commentario al regolamento (CE) n.178/2002 del 28 gennaio 2002*, in *Le nuove leggi civ. comm.*, 2003, p. 260.

years of CAP, and expressly affirmed more than twenty-five years ago with Regulation (EC) No 820/97 on traceability and origin labelling of beef, adopted in response to the BSE crisis<sup>39</sup> and declaring CAP as its single legal basis, therefore following the legislative procedure of Art. 43 TCE, which at that time entrusted the legislative power to Council by qualified majority after consultation with the European Parliament, without co-decision<sup>40</sup>.

This choice was solemnly confirmed by the Court of Justice in a decision of 2000<sup>41</sup>, called to solve the conflict that arose between the Commission and Parliament on the one hand, and the Council of Ministers on the other.

Regulation (EC) No 820/97 was at the time submitted to the review of the Court of Justice, on appeal by the European Commission and the Parliament, which did not criticize the merit of the provisions but the choice of the legal basis, assuming that the provisions on traceability and labelling of large areas, since intended to protect the consumer and the right to health, should have been adopted on the basis of Art. 152 (pursuant to Art. 129) and not of Art. 43 TEC, and therefore required the co-decision procedure and not a simple decision of the Council such as the one provided at that time by Art. 43 TEC.

When the Court decision was adopted, the conflict between the institutions of the Community was in the process of being politically resolved<sup>42</sup>, and the question was no longer relevant in operational terms, but rather on a systemic level, of identifying the founding principles of the regulatory areas in examination.

With the ruling of April 4, 2000, the Court rejected the distinction between production and market, and between rules aimed at producers

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<sup>39</sup> It is the well-known Council Regulation (EC) No 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products; this regulation was adopted assuming CAP as its single legal basis,

<sup>40</sup> Art. 43 TCE: «The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting ... by a qualified majority ..., make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make».

<sup>41</sup> Court of Justice, 4 April 2000, C-269/97, *Commission of the European Communities supported by European Parliament v/ Council of the European Union*.

<sup>42</sup> Regulation (EC) No 820/97 has been repealed by Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000, having substantially the same content of the first regulation, but adopted by indicating a multiple legal basis and following the co-decision procedure, thus overcoming the previous conflict between European institutions.



and rules aimed at consumers, supported by the Advocate General, and declared legitimate the use of the CAP as the legal basis for interventions aimed to regulate the market even in the stages following agricultural production, and addressed to all operators in the supply chain (including non-farmers), such as those introduced by Regulation (EC) No 820/97, with this exemplary motivation:

«47. ... it is clear from settled case-law that Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and marketing of agricultural products listed in Annex II to the Treaty which contributes to the attainment of one or more of the objectives of the common agricultural policy set out in Article 39 of the Treaty. ...

51. The content of the contested regulation, which is not in dispute between the parties, consists of laying down the rules necessary, on the one hand, for the identification and registration of bovine animals and, on the other hand, for the labelling of beef.

52. The contested regulation thus concerns the production and marketing of agricultural products listed in Annex II to the Treaty.

53. As regards the aim of the contested regulation, it must be observed that, according to the first recital, it is intended to re-establish stability in the beef and beef products market, destabilised by the BSE crisis, by improving the transparency of the conditions for the production and marketing of the products concerned, particularly as regards traceability.

54. It is not disputed that the systems for the identification and registration of bovine animals and labelling of meat prescribed by the contested regulation will make an essential contribution to the pursuit of that objective. ...

59. It must therefore be held that, in regulating the conditions for the production and marketing of beef and beef products with a view to improving the transparency of those conditions, the contested regulation is essentially intended to attain the objectives of Article 39 of the Treaty, in particular the stabilisation of the market.

60. It was, therefore, rightly adopted on the basis of Article 43 of the Treaty»<sup>43</sup>.

The ruling of the Court has explicitly and authoritatively recognized the CAP as the founding basis of a complex system, which unifies reasons of competition and reasons of food safety in a multifunctional discipline,

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<sup>43</sup> See points 47, 52, 53, 54, 59, 60 of the decision.

overcomes the distinction between subjects, locates in a single regulatory framework all subjects of the production chain and consumers, and aims to ensure the stability of the market and the transparency of production and marketing conditions.

The framework thus identified by the Court of Justice in 2000, and confirmed below by further decisions<sup>44</sup>, is the same adopted two decades later by Directive (EU) 2019/633, which assuming the CAP as its exclusive legal basis, invests and regulates the market, introduces innovative paradigms, for the object, the subjects, the territorial scope of application, and starting from the declared goal to contribute to ensuring a fair standard of living for agricultural producers<sup>45</sup>, underlines:

«While business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its reliance on biological processes and its exposure to weather conditions. That uncertainty is compounded by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal. In an agricultural policy environment that is distinctly more market-oriented than in the past, protection against unfair trading practices has become more important for operators active in the agricultural and food supply chain»<sup>46</sup>.

The specialty of production conditions in agriculture, due to the inherent risks coming from biological processes and meteorological factors,

<sup>44</sup> See Court of Justice, 2 July 2009, C-343/07, *Bavaria NV, Bavaria Italia Srl v Bayerischer Brauerbund eV*, expressly mentioned at point 2 of the Explanatory Memorandum of the European Commission to the Proposal of the Directive, COM(2018), 173 final. The Court – deciding with reference to a product, beer, not mentioned in Annex I TFEU, but protected under Regulation (EC) No 2081/92 on PDO and PGI adopted having CAP as legal basis – stated: «as regards the argument that Articles 32 EC and 37 EC do not constitute the appropriate legal basis for the adoption of Regulation No 2081/92, on the ground that beer is not one of the 'agricultural products' mentioned in Annex I to the Treaty, it must be borne in mind that the Court has already held that legislation which contributes to the achievement of one or more of the objectives mentioned in Article 33 EC must be adopted on the basis of Article 37 EC, even though, in addition to applying essentially to products falling within Annex I to the Treaty, it also covers incidentally other products not included in that annex (see, to that effect, Case C-11/88 *Commission v Council*, paragraph 15, and Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 134)» (p. 50 of decision), thereby confirming an expansive interpretation and application of European legislation adopted within CAP.

<sup>45</sup> See whereas (7) of the Directive.

<sup>46</sup> Whereas (6) of the Directive.

and the related specialty of the legal regulation of this area<sup>47</sup>, are expressly recognised as the proper legal basis for the introduction of a special regulation of commercial practices in the agricultural and food products market.

But there is even another element, expressly declared, the present «agricultural policy context that is decidedly more market-oriented than in the past», which plays a central role in the decision to adopt the new Directive.

As mentioned, basic strategies of CAP knew a dramatic change after the Marrakesh Treaty and the establishment of WTO agreement<sup>48</sup>.

At the turn of the century, solicited by international trade agreements, persuaded by growing concerns on environmental protection and food safety, and comforted by the widespread (even if erroneous) perception of the definitiveness of the achieved European self-sufficiency (and, in some cases, even surplus) in the production of products agricultural – as well as strongly solicited by some economic analyzes, which wanted to reduce the community expenditure for agriculture, and which in the name of the search for the lowest consumer price pushed to procure food on the world market, regardless of the possible outcomes on present activity in the European countryside – the Brussels regulators moved to abolish production aid and guarantees for prices of agricultural/food products.

This led in September 2003 to the adoption of seven regulations, covering almost all of the production sectors. The most significant changes to the previous disciplinary framework were introduced by the already mentioned Regulation (EC) No 1782/2003, which provided for the adoption of the decoupled single payment scheme from 2005<sup>49</sup>. Starting from this reform, a single annual amount is paid to the farmer, based on the hectares, regardless of effective production, abandoning the previous aid system coupled to the quantities produced, and abandoning the measures aimed to guarantee a sufficient level of prices of agricultural products.

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<sup>47</sup> On the special regime applied to production and trade of agricultural products, compared with general competition rules, ex Art. 42 TEEC and Art. 42 TFEU, see A. JANNARELLI, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, 2<sup>a</sup> ed., Cacucci ed., 2018; ID., *Profili del sistema agro-alimentare e agro-industriale. I rapporti contrattuali nella filiera agro-alimentare*, Cacucci ed., Bari, 2018; A. GERMANÒ, *Manuale di diritto agrario*, cit.; L. COSTATO-L. RUSSO, *Corso di diritto agrario italiano e dell'Unione Europea*, 5<sup>a</sup> ed., Giuffrè, Milano, 2019.

<sup>48</sup> See L. COSTATO, *From food security to food sovereignty*, in Atti dell'Accademia dei Georgofili, *Produzione e mercato innanzi alle sfide del tempo presente*, Firenze, 2021, p. 130.

<sup>49</sup> See *supra* note 20.

The result is an agricultural policy expressly market-oriented, with all the critical difficulties for agricultural producers mentioned in the premises of the Directive (EU) 2019/633, and with the resulting need to introduce some new tools aimed to promote agricultural food production and to assure a renewed support for income of farmers, taking into account their position of price takers, made weaker than in the past by the CAP measures adopted in the last years after the Marrakesh Treaty.

## *2. The Commission's proposal*

The proposal of the directive was submitted by the European Commission in 2018<sup>50</sup>, as a result of a dating process, which has seen during the years the participation of all the European institutions.

The Commission already in 2009, then in 2014 and in 2016<sup>51</sup>, released some communications on the food supply chain<sup>52</sup>, concerning also unfair trading practices.

The European Parliament, having taken notice of these communications, with a resolution of June 2016 promoted by the Agriculture Commission<sup>53</sup>, called the Commission to submit one or more proposals, for an EU-level framework laying down general principles and taking proper account of national circumstances and best practices to tackle UTPs in the entire food supply chain in order to ensure a level playing-field across Member States.

In the following months, the European Economic and Social Committee, with a report of 19 October 2016, underlined the need for an action by the Union and the Member States in the area of unfair commercial practices in the food supply chain<sup>54</sup>.

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<sup>50</sup> Proposal for a Directive of the European Parliament and of the Council, on unfair trading practices in business-to-business relationships in the food supply chain, Brussels, 12.4.2018, COM(2018) 173 final, 2018/0082 (COD).

<sup>51</sup> Report of the Commission, *Unfair business-to-business trading practices in the food supply chain*, Brussels, 29.1.2016, COM(2016) 32 final.

<sup>52</sup> On this point see references in whereas (1) of Directive (EU) 2019/633.

<sup>53</sup> Resolution of the European Parliament, *Unfair trading practices in the food supply chain*, 7 June 2016, 2015/2065(INI).

<sup>54</sup> Opinion of the European Economic and Social Committee on the "Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain" (COM(2016) 32 final), OJ C, C/34, 02.02.2017, p. 130.

Lastly, the Council, with the conclusions approved on 12 December 2016, concerning “Strengthening farmers’ position in the food supply chain and tackling unfair trading practices”<sup>55</sup>, starting from the declared acknowledgment that «the sustainability of the food supply chain to be of strategic importance for the European Union and its proper functioning essential for the benefit of European consumers and farmers», urged the Commission and the Member States to take initiatives aimed at strengthening the position of farmers in the food supply chain.

Based on this broad institutional consensus, in April 2018 the Commission presented the Proposal for a Directive<sup>56</sup>, moving from this premise:

«Farmers, processors, traders, wholesalers, retailers and consumers are all actors in the food supply chain. Smaller operators in the food supply chain are more prone to face unfair trading practices (UTPs) due to their, in general, weak bargaining power in comparison to the large operators in the chain. Agricultural producers are particularly vulnerable to UTPs as they often lack bargaining power that would match that of their downstream partners that buy their products»<sup>57</sup>.

The Proposal identified the CAP as its legal basis, underlining:

«A key objective of the CAP is to ensure a fair standard of living for the agricultural community (article 39 TFEU). The EU’s constitutional emphasis on producer welfare is unique to the agricultural sector hinting at the comprehensive responsibility of the CAP for European agriculture»<sup>58</sup>;

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<sup>55</sup> Council of European Union, Brussels, 12 December 2016, 15508/16, AGRI 676, AGRILEG 197, recalling in the premises the previous reports of the Commission and of the Committee, President Juncker’s 2016 State of the Union Speech as well as the report of the Agricultural Markets Task Force presented to the Council on 15 November 2016, concluded: «1. *RECALLING* the attention the issue of strengthening farmers’ position in the food supply chain has regularly gained in the work of the Council. 2. *CONSIDERING* the sustainability of the food supply chain to be of strategic importance for the European Union and its proper functioning essential for the benefit of European consumers and farmers. 3. *EMPHASIZING* that, in order to achieve a well-functioning food supply chain as well as economic growth and employment, it is paramount that relations among all actors of the chain are balanced, that added value is fairly distributed among them and that consumers can make their choices on an informed basis. *HIGHLIGHTING* the importance of facilitating access to local products. ...».

<sup>56</sup> See *supra* note 50.

<sup>57</sup> *Doc. cit.*, p.1.

<sup>58</sup> *Doc. cit.*, p. 4.

thus assigning a value of constitutional rank to the protection of the agricultural producer, in line with the strategic importance recognized to the food supply chain by the resolution of the Council of December 2016.

Despite the declared reference to the general Common Agriculture Policy, the Commission's proposal concerned only the food supply chain and only food products (as confirmed by the title), and applied only to small and medium-sized enterprises<sup>59</sup> and not to the entire agri-food production and trade chain.

With reference to the geographical area of application, the proposal limited its scope of operations to purchasers «established in the Union»<sup>60</sup> as such subject to the sovereignty of the Member States, while extending to any supplier selling food products «regardless of its place of establishment»<sup>61</sup>; thus binding buyers established in the Union to respect the rules against unfair practices also in favor of suppliers located outside the Union, but (paradoxically) not protecting suppliers established in the Union from buyers located outside the Union.

Even with these limitations, the Commission's proposal was characterized by innovative rules on market and contractual agreements<sup>62</sup>, where it prohibited certain commercial practices excluding the possibility of contrary agreements between the parties<sup>63</sup>; allowed Member States to introduce laws against unfair trade practices beyond the provisions of the directive, provided they are compatible with the internal market<sup>64</sup>; assured the designation of national law enforcement authorities having relevant powers and cooperative mechanisms among them and guaranteeing confidentiality to complainants<sup>65</sup>.

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<sup>59</sup> As defined by Commission Recommendation, of 6 May 2003, concerning the definition of micro, small and medium-sized enterprises, mentioned by Art. 2.c) of the Proposal.

<sup>60</sup> See definition of «purchaser» in art. 2.a) of the Proposal.

<sup>61</sup> See definition of «supplier» in art. 2.b) of the Proposal.

<sup>62</sup> See A. M. MANCALEONI, *Le pratiche commerciali nella filiera agroalimentare e la tutela della parte debole: riflessioni alla luce dell'esperienza francese*, cit.

<sup>63</sup> Thereby introducing relevant innovation in comparison to Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions; see Art. 3 of this Directive.

<sup>64</sup> See Art. 8 of the Proposal.

<sup>65</sup> See Artt. 4, 5, 6, 7, of the Proposal.

### 3. *The parliamentary path*

The proposed directive changed its title and object during the parliamentary process: it no longer affects only the food supply chain, but the entire agricultural and food supply chain<sup>66</sup>, and does not apply only to food products but to all agricultural products, as well as food, thereby expanding the same area of application considered by the Parliament and the Council with the above mentioned 2016 resolutions<sup>67</sup>.

The examination of the proposal in Parliament, having overcome some objections by Sweden and Romania on assumed infringement of the principle of subsidiarity, was assigned to the Agriculture Commission, and not to the Commission on the internal market, consistently with the legal basis identified in the CAP and shared by the Parliament.

The Agriculture Commission introduced some amendments<sup>68</sup>, and acquired the opinions of the other Commissions, pronouncing itself in favour of the project by a large majority<sup>69</sup>.

Parliament approved its final position on 12 May 2019<sup>70</sup>, later shared by the Council, thus determining the final text of the directive.

From the perspective of regulatory innovation, it must be underlined the role played by the European Parliament in the elaboration of the text and in the definition of the object, as well as in the general scope of the directive.

The Commission proposal applied – as already mentioned – only to the food supply chain.

The text amended by Parliament and definitively approved considers the full agricultural and food supply chain, and insists on the need to

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<sup>66</sup> As specified by the new title of the Directive, “*on unfair trading practices in business-to-business relationships in the agricultural and food supply chain*”, and expressly ruled in Art. 1 of the Directive.

<sup>67</sup> See *supra* note 53.

<sup>68</sup> See the final Report 10.10.2018, on the 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)0173 – C8-0139/2018 – 2018/0082(COD)) - Committee on Agriculture and Rural Development - Rapporteur: Paolo De Castro. [https://www.europarl.europa.eu/doceo/document/A-8-2018-0309\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2018-0309_EN.html).

<sup>69</sup> 38 votes in favour, 4 against, and 3 abstentions; see last doc.

<sup>70</sup> Final Position of European Parliament, adopted at first reading on 12 March 2019 with a view to the adoption of Directive (EU) 2019/... of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (EP-PE\_TC1-COD(2018)0082).



guarantee a fair standard of living for the agricultural population, taking into account the peculiarities of the forms of collective organization of the offer, already considered by the Regulation Omnibus<sup>71</sup>.

Amendments and changes to the original proposal of the Commission are numerous. They include not only the extension to all agricultural products referred to in Annex I of the TFEU as well as to food products obtained by processing from these products<sup>72</sup>, but also the provision – and it is a decidedly innovative element – absent in the original Commission proposal, and inserted by Parliament, which provides for the application of the directive «to sales where either the supplier or the buyer, or both, are established in the Union»<sup>73</sup>, and the consequent change in the definition of «buyer», which includes any natural or legal person «irrespective of that person's place of establishment» who purchases agricultural and food products<sup>74</sup>.

Supply chain agreements and value sharing clauses are also enhanced.

The protection against unfair trade practices is extended not only to small and medium-sized enterprises (as envisaged by the Commission proposal), but also to suppliers with an annual turnover of up to 350,000,000 euros<sup>75</sup>, therefore with much higher turnovers; further original paradigms are identified.

More generally, the Directive goes beyond the market, and is proposed as a tool of institutional innovation.

As observed by an authoritative scholar of administrative and constitutional law in reference to Regulation (EC) No 178/2002, with

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<sup>71</sup> With this expression – as it is well known – it is usually named Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material. In particular this regulation, introduced special rules to support market agreements among recognized associations or interbranch organisations of agricultural producers (see Artt. 149, 152, 159, 161, 164, 168 of Reg. (EU) No 1308/2013).

<sup>72</sup> See definitions at Art.2.d) of the Proposal and at Art. 2.1.) of the final text approved.

<sup>73</sup> Art. 1 of the final text approved.

<sup>74</sup> Art. 2.1. of the final text approved.

<sup>75</sup> See Art. 1.2. of the final text approved.



considerations that may be entirely confirmed with reference to the Directive on UTP in the agri-food chain, this legislation «operates on different levels: that of the sources of law, ... [where] it bears general principles ... dictates direct provisions, for which they are not necessary national implementing acts; ... that of the structure that must be put in place in each State; ... That of the collaboration to be ensured between national organizations and community organizations»<sup>76</sup>.

We are facing a legislative act, Directive (EU) 2019/633, which introduces operational principles and rules, drawing a complex interaction between European and national sources and institutions, and placing itself within a path which characterizes agriculture and food law: the move towards a unifying and systematic perspective, of codification of the discipline of agriculture and agricultural and food markets.

The European reforms of the CAP of this century, before and after the Lisbon Treaty, most recently with the regulations of December 2021<sup>77</sup>, marked the progressive affirmation of European Codes, which are not uniform homologation texts, but rather common codes, in which needs and subjects, national, regional and local, occupy a prominent place alongside disciplinary choices expressed centrally<sup>78</sup>.

It is a model of codification and codes, where the sources of law are plural and different among them, and an essential role remains assigned to interpretation, to *ius dicere*, in its judicial, administrative and doctrinal expressions<sup>79</sup>, with reference to regulatory acts, general and specific, to decisions of the Court of Justice and of national judges, to the operative and administrative decisions of the European Commission.

Within this process, the Directive on unfair commercial practices appears as an exemplary model of building European law, and expresses a systemic structure, which ranges from institutional profiles to those

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<sup>76</sup> S. CASSESE, *Introduzione*, in *Per un'Autorità nazionale della sicurezza alimentare*, Milano, 2002.

<sup>77</sup> See *supra* note 31.

<sup>78</sup> For further indications on those trends in EU agricultural law, see F. ALBISINNI, *I codici europei dell'agricoltura, dopo Lisbona*, in *Dalla riforma del 2003 alla PAC dopo Lisbona. I riflessi sul diritto agrario alimentare e ambientale*, L. Costato-P. Borghi- L. Russo- S. Manservigi (eds), Napoli, Jovene ed., 2011.

<sup>79</sup> Along the lines anticipated, in historical and comparative perspective by G. GORLA, in well known researches, among which reference may be made here to: *L'interpretazione del diritto*, Giuffrè, Milano, 1941, reprinted 2003; *Raccolta di saggi sull'interpretazione e sul valore del precedente giudiziale in Italia*, in *Quaderni del Foro Italiano*, 1966; *Diritto comparato e diritto comune europeo*, Giuffrè, Milano, 1981.

of merit, overcoming the traditional boundary between private law and public law, and conforming the structure and content of contracts between companies, recognized as an essential moment in the articulation of the market<sup>80</sup>.

#### 4. *The new paradigms*

The CAP, with Directive (EU) 2019/633, by going into the market and intervening directly on the content and form of contracts<sup>81</sup> introduces new paradigms in the regulatory design, assigning importance to innovation, not only technological, but also organizational, which has characterized in recent decades the market for agricultural and food products<sup>82</sup>; and thus provides, to mention only some of the provisions contained in the final text approved in parliament as a result of the dialogue between the European institutions:

- the non-necessity of ascertaining a specific dominant position, or a concrete abuse; so that the case-by-case verification of the assumptions of the abuse is not left to the Supervisory Authority, but is defined by law as such, with relevant results in terms of effectiveness of the new framework, especially – with regard to Italy – when compared with the weakening of the innovative content of Art. 62 of the D.L. 1-2012<sup>83</sup> as a result of

<sup>80</sup> On the peculiar contractual regulation in agri-food markets resulting in the Italian legal order from Directive (UE) 2019/633, see M. GIUFFRIDA, *Neoformalismo contrattuale tra tutela del contraente debole e mercato*, and G. D'AMICO, *La giustizia contrattuale nelle filiere agroalimentari*, in *Riv. dir. alim.* [www.rivistadirittoalimentare.it](http://www.rivistadirittoalimentare.it), No 4-2021.

<sup>81</sup> As underline M. GIUFFRIDA, *cit.*, and G. D'AMICO, *cit.*, with reference also to the previous Italian legislation introduced by Art. 62 of D.L. No 1/2012.

<sup>82</sup> Including within *innovation* – following the model of J. A. SCHUMPETER, *Teorie der wirtschaftlichen Entwicklung*, Berlin, 1946; ID., *Capitalism, Socialism and Democracy*, London, 1954 – not only the introduction of new products, new product qualities or new production methods, but also the opening of a new market, access to new sources of supply, or a different organization of industry such as acquisition of a monopoly position or the breaking of a monopoly position; phenomena all widely present in the evolution of the agri-food and agro-industrial system of recent decades. On the effects of the joint action, within agri-food law, of legal and scientific innovation and of globalization, see *Innovation in Agri-Food Law between Technology and Comparison*, AIDA-IFLA (ed), Cedam – Wolters Kluwer, 2019, p. 73.

<sup>83</sup> On the innovative rules introduced by this provision, and on the application and interpretation by Mipaaf and by AGCM, see the critical analysis of R. TORINO, *La*

the circulars of the Mipaaf and the AGCM, which had reintroduced the requirement, absent in Art. 62, of the «significant imbalance in the respective positions of commercial strength»<sup>84</sup>;

- the aforementioned extension of the scope, by the European Parliament, to all agricultural products, and the tracing of the definition of “food products” not to Regulation (EC) No. 178/2002 (as the Ministerial Decree Mipaaf 19 October 2012, No 199 had done in Italy, expanding the application area of Art. 62 of D.L. 1-2012 well beyond agricultural producers<sup>85</sup>), but to Annex I of the TFEU and to the products not listed in this annex, but processed for food use starting from the products listed in that annex, thus enhancing the agricultural component<sup>86</sup>;

- the establishment of payment terms that cannot be derogated through the agreements between the parties (unlike the provisions of the general Directive No. 2011/7/EU on late payment)<sup>87</sup>;

- the identification of certain trade practices in any case qualified as unfair, and therefore illegal, which affect both the content and the form of the contract (from the refusal to use the written form, to the clauses that require the seller to pay sums not related to the sale, to the terms of payment), and subsequent behaviours (such as the cancellation of the order with too short notice, the unilateral modification of the conditions

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*nuova disciplina dei contratti e delle relazioni commerciali di cessione dei prodotti agricoli e alimentari*, in *Contratto e impresa*, 2013, n. 6, p. 1425,

<sup>84</sup> See D.M. Mipaaf 19 October 2012, No 199, «Regolamento di attuazione dell'articolo 62 del decreto-legge 24 gennaio 2012, n. 1»; e the Resolution of the Italian AGCM 6 February 2013, No 24220, «Regolamento sulle procedure istruttorie in materia di disciplina delle relazioni commerciali concernenti la cessione di prodotti agricoli e alimentari». The Resolution of AGCM, defining the area of exercise of its competences, limited it «to the economic relations between the operators of the supply chain characterized by a significant imbalance in their respective positions of commercial strength», thus neglecting one of the qualifying innovations introduced by Art. 62 of the D.L. No 1-2012, where this had typified as illegal in itself certain behaviors in the context of the sale of agricultural and agri-food (or food) products, excluding the need for the additional conditions required by general antitrust legislation, thereby producing a substantial weakening of the D.L. No 1-2012, which has found very few applications.

<sup>85</sup> As recognised by T.A.R. Lazio, Sez. II ter, 17 July 2013, No 7195, *Chefaro Pharma Italia s.r.l. c/ Mipaaf*; in *Riv. dir. alim.* [www.rivistadirittoalimentare.it](http://www.rivistadirittoalimentare.it), No 3-2013, p. 33, which expressly and effectively censored the Decree of Mipaaf, on the basis of systemic and literal arguments.

<sup>86</sup> See Art. 2.1.) of the Directive.

<sup>87</sup> Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions; implemented in Italy with D.Lgs. 9 November 2012, No 192.

of the agreement, the request of the buyer to charge the seller for the deterioration or loss of the products after delivery, the unlawful disclosure of trade secrets, the threat of retaliation in the event of a complaint to the authorities, the request for compensation from the supplier for the cost incurred by the buyer to examine customer complaints)<sup>88</sup>;

- the introduction of a specific series of practices prohibited, unless expressly provided for in writing in the contract, which to a large extent involve practices «parallel» to the sale considered by itself (such as the claim to return unsold products, payment costs for stocking, advertising, marketing, or positioning in the sales spaces, the claim to charge the seller for discounts on products sold in promotion)<sup>89</sup>;

- the power granted to Member States to «maintain or introduce stricter rules aimed at combating unfair trading practices stringent than those laid down by this Directive, provided that such national rules are compatible with the rules on the functioning of the internal market»<sup>90</sup>; power that the Italian legislator used in the implementation of the directive, among other things by providing, already in the delegation law, «the application of the discipline to all sales of agricultural and agri-food products, regardless of company turnover<sup>91</sup>», and by including prohibited trade practices other than those provided for by the directive<sup>92</sup>;

- the provision of «effective, proportionate, and dissuasive» sanctions<sup>93</sup>, far higher than those provided for in Italy by Art. 62 of the D.L. No 1-2012, even after the increase introduced in 2015<sup>94</sup>, so that the implementing decree in Italy provided for administrative pecuniary sanctions up to a percentage of the annual turnover of the responsible company<sup>95</sup>;

- the designation by the Member States of national law enforcement authorities<sup>96</sup>, the identification of their powers, including investigative as well

<sup>88</sup> See Art. 3.1. of the Directive.

<sup>89</sup> See Art. 3.2. of the Directive.

<sup>90</sup> Art. 9 of the Directive.

<sup>91</sup> See Art. 7 co. 1, lett. a) of Law 22 April 2021, No 53; and Art. 1 co. 2 of Decr. Leg. vo 8 November 2021, No 198.

<sup>92</sup> See the analysis of G. D'AMICO, *cit.*, e di L. Russo, *cit.*

<sup>93</sup> Art. 6 of the Directive.

<sup>94</sup> The original amount of sanctions determined by Art. 1 of Italian D.L. No 1-2012, had been increased by Art. 2, comma 3, lett. a), D.L. 5 May 2015, No 51, L. 2 July 2015, No 91.

<sup>95</sup> See Art. 10 del Decr. Leg. vo 8 November 2021, No 198.

<sup>96</sup> Art. 4 of the Directive.

as sanctioning powers<sup>97</sup>, the collaboration between said Authorities<sup>98</sup>, the regulation of complaints and procedures with guarantee of confidentiality<sup>99</sup>, the explicit reference to possible alternative national dispute resolution procedures<sup>100</sup>, the provision of annual reports from the national Authorities<sup>101</sup>, and of a general assessment by the European Commission<sup>102</sup>, as well as the adoption of Commission implementing acts<sup>103</sup>, that intervene on the procedural aspects; with great attention to institutional profiles;

- the enhancement of the peculiarity of the productive structures and aggregation of the offer in agriculture<sup>104</sup>, both in general as regards the validity and effectiveness recognized to «a value sharing clause within the meaning of Article 172a of Regulation (EU) No 1308/2013»<sup>105</sup>, both with specific reference «to [multi-year] supply agreements between suppliers of grapes or must for wine production and their direct buyers»<sup>106</sup> which fall within the scope of regulatory contracts stipulated by recognized OPs and OIs, thus enhancing the forms of collective organization of supply operating in agriculture<sup>107</sup>.

The broad institutional design, as well as of merit, that characterizes the directive is clear:

- the general principles are accompanied by direct provisions;  
- the institutional rules that intervene in the internal organization of individual Member States are accompanied by specific provisions on the cooperation of the national authorities thus identified, among themselves and with the European Commission.

In this framework, which consolidates and strengthens evolutionary

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<sup>97</sup> Art. 6 of the Directive.

<sup>98</sup> Art. 8 of the Directive.

<sup>99</sup> Art. 5 of the Directive.

<sup>100</sup> Art. 7 of the Directive.

<sup>101</sup> Art. 10.2 of the Directive.

<sup>102</sup> Artt. 11-12 of the Directive.

<sup>103</sup> Art. 10 of the Directive.

<sup>104</sup> See. I. CANFORA, *La cessione dei prodotti tramite le organizzazioni dei produttori*, cit.; L. PAOLONI, *Le regole interprofessionali per il funzionamento della filiera*, cit.

<sup>105</sup> Art. 3.1.i) of the Directive.

<sup>106</sup> Art. 3.1.i) of the Directive.

<sup>107</sup> See the analysis, which, starting from the reinterpretation of the experiences and reflections of the first half of the twentieth century, reconstructs the emergence of new models of regulation in the most recent interventions, of S. MASINI, *Sufficienza regolativa della legge e ruolo delle organizzazioni professionali: soluzioni per il migliore funzionamento della filiera agroalimentare*, cit.

lines already known and practiced, a new and transnational dimension emerges, peculiar of Directive (EU) 2019/633, which marks a highly innovative step, when compared to the previous models of legislative intervention, and offers relevant elements for the construction of a positive law of globalization in the area of European agriculture and food law.

### 5. *The transnational dimension*

As already mentioned, Directive (EU) 2019/633, due to the amendments introduced by the European Parliament, has expanded its application perimeter far beyond the borders of the European Union, to all sales where either the supplier or the buyer, or both, are established in the Union<sup>108</sup>, seeking original answers to the challenges of globalization<sup>109</sup>.

It is not the first time that European legislation rules on topics and areas related to the global dimension of agri-food markets, but the prevailing approach until now has been that of cooperation through international agreements<sup>110</sup>, as most recently confirmed by the regulation on accession to the Geneva Act for the protection of PDO and PGI<sup>111</sup>.

Leaving aside the international conventions, reference to a cross-border dimension of regulation had hitherto been understood as operating mainly

<sup>108</sup> Art.1.2. of the Directive.

<sup>109</sup> Challenges of globalization, accentuated by the serious crises of recent years, as points out L. COSTATO, *Globalizzazione, Covid-19, e sopravvivenza*, in *Riv. dir. alim.*, No 1-2021, p. 7; underlines the importance of the asymmetries accentuated by globalization, and the consequent outcomes on UTP in the agri-food chain, the critical comparative analysis of M. FERRARI, *Pratiche commerciali sleali e globalizzazione*, in *Riv. dir. alim.*, No 1-2022.

<sup>110</sup> In Regulation (EC) No 178/2002, see references to international agreements in whereas (8), (22), (23), (25), (39), and in Artt. 5.3., e 13. See also the principles judicially declared by the Court of Justice in a number of decisions, among which, 9 October 2001, C-377/98 (on the patentability of biotechnological inventions), as to the limits placed on the direct operation of international agreements within the European system; and recently, 12 November 2019, C-363/18 (on the indication on the label of food products of the origin from the Palestinian territories occupied by Israel), in a perspective that enhances international humanitarian law and concludes that art. 3 of Regulation (EU) No 1169/2011 «must be read» in such way «that the provision of information to consumers must enable them to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations».

<sup>111</sup> Regulation (EU) 2019/1753 of the European Parliament and of the Council of 23 October 2019 on the action of the Union following its accession to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications.

inside European Union, through cooperation between national authorities of individual Member States.

This model, which overcomes national borders, but remains already within the EU borders, includes:

- the rapid alert system envisaged by Regulation (EC) No 178/2002<sup>112</sup>;
- the cooperation between the national authorities responsible for the implementation of the legislation that protects consumers<sup>113</sup>;
- the ex officio protection introduced by the Quality Package to overcome the national dimension of public supervision on GIs and to commit all Member States to protect ex officio PDOs and PGIs marketed in their territory, even if produced in other Member States<sup>114</sup>.

In all these cases, we are in the presence of European provisions, largely introduced with regulations, directly applicable and applied in the territory of the Union, within a single market and a common system, as such subject to shared rules coming from shared sources.

The key that unifies these provisions is therefore not globalization, but simply completion of the internal market.

A different approach, with a projection beyond the borders of the Union, can be found in the 2004 Hygiene Package, with the provisions introduced by Articles 12 and 15 of Regulation (EC) No 854/2004<sup>115</sup>, which assigned to the Commission the task of compiling and updating lists of meat processing or fishing establishments operating in countries outside the Union; in the absence of such prior registration in the lists, or in the event of cancellation from the same, the related products cannot be imported into the Union<sup>116</sup>. In this case, regulation from European sources

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<sup>112</sup> See Art. 50 of Reg. (EC) No 178/2002.

<sup>113</sup> See 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; and now Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

<sup>114</sup> See Art. 13.3. of Reg. (EU) No 1151/2012.

<sup>115</sup> Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption; repealed by Regulation (EU) 2017/625.

<sup>116</sup> Even recently, there have been significant cases of cancellation from the list of authorized establishments. See e.g., with reference to meat, Commission Implementing Regulation (EU) 2018/700 of 8 May 2018 amending the lists of third country establishments from which imports of specified products of animal origin are permitted, regarding certain establishments from Brazil, which canceled from that list some factories located in Brazil;



got an effectiveness, that goes far beyond the borders of the European Union and is aimed to operate as well in other jurisdictions, as a requirement of legitimacy for meat and fish processing plants located outside the European borders, admitted to export to Europe only after an administrative act (inclusion in the list) adopted by a European institution, the Commission, and intended to produce effects in the legal sphere of a subject operating outside its territory, with a model similar to that introduced in USA with the FSMA<sup>117</sup>.

A similar approach has been followed over the years by entrusting the Commission with the maintenance of a list, where to insert (or from which to exclude) third countries and certification bodies for organic products obtained in third countries<sup>118</sup>.

With the Hygiene Package of 2004 and with the regulation of BIO products of 2007 and 2018, European food rules are therefore getting an effectively trans-national dimension, being addressed to operate well beyond EU boundaries.

A further significant step in this direction was recently marked by Regulation (EU) 2017/625 on official controls on food, feed, animals and plants<sup>119</sup>.

This regulation, as regards its territorial perimeter of application, has introduced, alongside more articulated forms of collaboration between the Member States<sup>120</sup>, new measures extended to include Commission controls

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and, with reference to fish, Commission Implementing Regulation (EU) 2018/981 of 11 July 2018 amending the list of Brazilian establishments from which imports into the Union of fishery products intended for human consumption are permitted.

<sup>117</sup> On US rules applicable to import of food products, see F. BRUNO, *L'accreditamento degli importatori di prodotti alimentari in USA*, in *Riv. dir. alim.* www.rivistadirittoalimentare.it, No 1-2014, p. 17.

<sup>118</sup> See Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91; whose provisions have been confirmed by the presently in force Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007. See also the list of the certification bodies operating outside EU borders, list managed by the European Commission, Commission Implementing Regulation (EU) 2021/2325 of 16 December 2021 establishing, pursuant to Regulation (EU) 2018/848 of the European Parliament and of the Council, the list of third countries and the list of control authorities and control bodies that have been recognized under Article 33(2) and (3) of Council Regulation (EC) No 834/2007 for the purpose of importing organic products into the Union.

<sup>119</sup> See *supra* note 37.

<sup>120</sup> See Artt. 102-108.



in third countries<sup>121</sup> as well as in the Member States<sup>122</sup>, joint training activities<sup>123</sup>, unified IT systems for the processing of information<sup>124</sup>, constant monitoring of food operators through a unified register on «compliance records»<sup>125</sup>. All the information collected, from EU and non-EU institutions, is placed within the new System for the processing of information for official controls (IMSOC)<sup>126</sup>. The System is set up and managed by the Commission, and it is the basis for the introduction of the rating mechanism, by virtue of which is determined «a classification of operators based on the evaluation of their correspondence to the rating criteria»<sup>127</sup>.

The creation of a unified system for the collection and processing of information, fed with information also from countries outside the European Union, the provision of a rating under which all operators are classified on a unified and systemic basis, constitute a regulatory innovation of great importance, which recognizes the need to build new forms of reputation based on original tools, no longer looking to the traditional model of direct knowledge and evaluation characteristic of closed markets (whether local proximity markets, or wider but still homogeneous national markets), but placing knowledge, and with this reputation, on a level not defined *ex ante* but homogeneous with the current global dimension of the markets.

Even with these significant innovations, however, the EU measures introduced in recent years, and operating in a cross-border dimension, are all measures pertinent to products, their characteristics, their control, essentially aimed at protecting health and food safety, whereas the measures relating to the contents of the contractual discipline had maintained up to now an operational limit within EU borders.

In this scenario, Directive (EU) 2019/633 has introduced radical innovations, which affect the object, the application area, and the operational tools.

The directive:

- regulates contracts and contractual relationships, borrowing some models from the regulations relating to contracts with consumers, but

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<sup>121</sup> See Artt. 120-129.

<sup>122</sup> See Art. 118.

<sup>123</sup> See Art. 130.

<sup>124</sup> See Artt. 131-136.

<sup>125</sup> See Art. 44.2.c).

<sup>126</sup> See Artt. 131-136 of Reg. (EU) 2017/625.

<sup>127</sup> See whereas (39), Art. 3.1. No 31, and Art. 131 of Reg. (EU) 2017/625.

investing business contracts whose form and contents are predetermined by law, without the need to identify a dominant position or a abuse; so that the supplier of agricultural and agri-food products is identified *ex se* as the recipient of a special discipline, due to the recognized specialty of its position in the production chain and in the market;

- applies to all contracts for agri-food products and related services, even if the buyer or the supplier is not established in the Union<sup>128</sup>, going well beyond the spatial dimension of the directives concerning contracts with consumers<sup>129</sup>;

- overcomes the traditional international private dimension as regards the law applicable to contracts<sup>130</sup>, establishing a hard core of provisions on form and content, as well as on subsequent conduct during execution, which prevail in any case both on the will of the parties and on any hypothetical different provisions.

In Italy, up to now the general rules on private international law leave the parties wide choice to decide on the applicable law and therefore on individual negotiated clauses, recognising supremacy of a mandatory provisions in force in a country only «if at the time of the choice all other data in fact refer to a single country».

In a quite different perspective, Directive (EU) 2019/633, in Art. 3.4., expressly provides: «Member States shall ensure that the prohibitions laid down in paragraphs 1 and 2 constitute overriding mandatory provisions which are applicable to any situation falling within the scope of those prohibitions, irrespective of the law that would otherwise be applicable, to the supply agreement between the parties», with a provision confirmed in Italy by the implementing legislative decree.

For years we have witnessed a globalization linked to «the emergence of liberalism» as an «essential feature of the Marrakech Agreements» of

<sup>128</sup> See Art. 1.2. co. 4 of the Directive.

<sup>129</sup> See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests; Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

<sup>130</sup> See Italian L. 18 December 1984, No 975, of the ratification and execution of the International Convention on the law applicable to contractual relations adopted in Roma on 19 June 1980. The validity and effectiveness of this Law has been expressly confirmed by Art. 57 of Italian L. 31 May 1995, No 218, on the reform of the Italian system of private international law.

1994<sup>131</sup>, characterized by confidence in the market's ability to regulate itself.

As observed with great effectiveness by Natalino Irti already at the beginning of the century, as a result of the globalization of markets «the territory, the territories with what each of them has of individual and peculiar, have been replaced by space, or better by “a” space without internal borders”, not a larger territory, but an artificial “space” for production and trade»<sup>132</sup>.

Today, such critical issues and the challenges of trade globalisation to fundamental security rights, including food security (but also access to other fundamental resources, among which energy), appear with clear evidence as a result of the economic crises of recent years, and as effects of the Covid-19 Pandemic and of the war Russia-Ukraine<sup>133</sup>.

A first tentative answer with reference to food production and availability – to ensure a fair standard of living for the agricultural community, as declared in 1957 by Art. 39 TCEE and confirmed in 2007 by Art. 39 TFEU – is now sought by Directive (EU) 2019/633 on UTD in agri-food chain, with the rediscovery of politics, governance, choices of priorities, hierarchies of interests, as well as values.

Along this path, European law, moving from the CAP, becomes the «national law of others»<sup>134</sup>: the reaffirmed specialty of agriculture, identified as a prerequisite of the new discipline, translates into original measures and in mandatory rules, in terms of substance and structure of contractual agreements, which are intended to operate in a transnational dimension and cannot be overcome by private contracts, proposing a possible model for regulatory innovations even in other sectors of the European legal system.

It does not seem accidental that this happens in one area, the discipline of agriculture, which in the very name of the CAP, enhances the component of «Politics», therefore of assumption of responsibility.

It remains to be seen how adequate to face these challenges will be the national legislators.

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<sup>131</sup> As underlined by L. COSTATO, *Globalizzazione, Covid-19, e sopravvivenza*, cit.

<sup>132</sup> N. IRTI, *Norma e luoghi. Problemi di geo-diritto*, Laterza, Bari-Roma, 2001.

<sup>133</sup> For a first analysis of the effects of these recent crises on the CAP, see Accademia dei Georgofili (ed), *La PAC innanzi alle sfide del tempo presente*, 6 May 2002, with contributions of L. COSTATO, P. PULINA, L. RUSSO, A. BANTERLE, F. ALBISINNI, G. MARTINO, P. DE CASTRO, at [www.georgofili.it](http://www.georgofili.it)

<sup>134</sup> Borrowing the expression introduced with reference to commercial law by F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005.

It cannot fail to be noted that the Italian decree of implementation in Italy of Directive (EU) 2019/633<sup>135</sup> expressly declared that rules adopted on the basis of Directive prevail on any contrary rule «whatever is the law applicable to the contract»<sup>136</sup>, but did not introduce any specific tool in reference to contracts entered with parties located outside the territory of the Union, referring only to the law enforcement authorities of the Member States<sup>137</sup>.

Comparative analyses on the implementation of Directive (EU) 2019/633 in different EU Member States, having different legal orders, traditions and systems, as those proposed in this book, may contribute to offer some possible answers to this and others crucial questions, still open.

In this perspective, the peculiar structure of agri-food law, characterized by a multiplicity of sources, institutions, rules, and models, confirms the central role of the comparative method as a valuable tool for all those seeking to «ask the appropriate questions»<sup>138</sup>, searching for consistent answers to critical questions.

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<sup>135</sup> Decr. Leg.vo 8 November 2021, No 198.

<sup>136</sup> Art. 1, co. 4, of Decr. Leg.vo, No 198/2021.

<sup>137</sup> See Art. 9, co. 1, of Decr. Leg.vo 8 November 2021, No 198.

<sup>138</sup> As observed by V. ZENO ZENCOVICH, in the conclusion of *Comparative Legal Systems. A short and illustrated introduction*, Roma-Tre Press, Roma, 2019, p. 105: «In this much more complex, but real, context the role of comparative law is not to provide correct answers but, much more engagingly, to ask the appropriate questions».



Luigi Russo

*Directive (EU) 2019/633 on unfair trading practices  
in the agri-food chain*

SUMMARY: 1. The fight against unfair trading practices in the agri-food chain in EU law – 2. Directive (EU) 2019/633: the origins – 3. General features of Directive 633/2019: minimum harmonization approach, legal basis and objective and subjective scope – 4. Unfair trading practices: lack of a definition – 5. Unfair trading practices always prohibited – 6. Trading practices which are potentially unfair – 7. The other provisions of the Directive – 8. The Commission's Report on the implementation of the Directive – 9. Conclusions.

*1. The fight against unfair trading practices in the agri-food chain under EU law*

At a time when the CAP started to become progressively less effective, leaving farmers increasingly exposed to the dynamics of an increasingly global and less assisted market, the issue of their adequate economic and contractual protection started to become more and more evident.

Bargaining within the agricultural market takes place between parties with different bargaining power, to the detriment of the agricultural product supply sector, so that in most cases agricultural producers are forced to accept the economic content of the contract. They also are faced with practices – not necessarily reflected in contractual clauses – carried out through the opportunistic or *unfair* behaviour of the counterparty against which there is no other alternative than concluding the contract as it is or giving up<sup>1</sup>.

It is no coincidence that the agricultural sector is the subject of particular

<sup>1</sup> On this topic see N. LUCIFERO, *Le pratiche commerciali sleali nel sistema delle relazioni contrattuali tra imprese nella filiera agroalimentare*, Wolters Kluwer, 2017, *passim*. See also S. MASINI, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, in *Dir. agroalim.*, 2019, p. 261 ff.; L. COSTANTINO, *La tutela del contraente debole nelle relazioni lungo la filiera agro-alimentare nelle più recenti esperienze giuridiche europee e statunitensi*, in *Riv. dir. agr.*, 2013, I, p. 166 ff.

attention with regard to the applicability of antitrust law. Indeed Article 42 TFEU exceptionally allows farmers to enter into horizontal agreements precisely in order to mitigate imbalances in economic and contractual power and ensure that the agricultural party has effective powers to shape the content, including the economic content, of contracts<sup>2</sup>. Alongside this fundamental guideline, the EU legislator has begun to introduce rules aimed at protecting weaker contracting parties in the market for agricultural products (and not only), in order to prevent the adoption of contractual clauses or unfair commercial practices to the detriment of the party placing agricultural products on the market. In other words, the stronger contracting party must be precluded from introducing clauses or imposing unfair practices to the detriment of the other party, who is forced to suffer unfair behaviour both before and after the conclusion of the contract.

There is no doubt that the first form of action – the non-application, on an exceptional basis, of part of the antitrust rules – is the most incisive, allowing the weaker party in the market to increase its economic power (think of the rules on agricultural producers' and interbranch organizations, as well as the various aid and support measures for agricultural producers provided for by EU law) and, consequently, also its bargaining power<sup>3</sup>. The second type of action – the fight against unfair commercial practices – is a sort of 'palliative treatment', since it does not affect the economic content of the contract nor does it seek to reduce existing imbalances, but it merely ensures that the rules governing the contract and its performance are in line with the principles of fairness and good faith.

EU Directive 2019/633 is the first general measure aimed to contrast unfair commercial practices. It innovates the approach to the issue compared to the measures previously implemented by the European Union: in fact, following the chronological order, measures of a completely heterogeneous nature are to be ascribed to the action against possible unfair practices in contracts for the sale of agricultural or agri-food products,

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<sup>2</sup> On this point see in particular A. JANNARELLI, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza*, Bari, 2016, p. 117 ff.; C. DEL CONT, L. BODIGUEL and A. JANNARELLI, *EU Competition Framework: Specific Rules for the Food Chain in the New CAP*, in <http://www.europarl.europa.eu/studies>.

<sup>3</sup> To date, the legislation on this point must be considered still inadequate, in the light of the lack of clarity that still exists - despite the adoption of EU Reg. no. 2017/2393 of 13 December 2017 - regarding many aspects concerning the actions entrusted to POs: see A. JANNARELLI, *Dal caso "indivia" al regolamento omnibus n. 2393 del 2017: le istituzioni europee à la guerre tra la PAC e la concorrenza?*, in *Dir. Agroalim.*, 2018, p. 109 ff.

such as, in particular, the directive on late payment in commercial transactions, adopted in 2000<sup>4</sup>. Clearly the latter is not a directive specific to the agricultural or foodstuffs sector alone, since the scope of the legislation is extremely broad, covering the entire field of commercial transactions between businesses, with a few exceptions<sup>5</sup>. In any event, the harmonization brought about by that directive is minimal, since it does not impose mandatory time limits for payment, but it only intervenes on a subsidiary basis, where the parties to the contract (or, more generally, to the transaction) did not provide anything in this regard. Even the interest rate in case of late payment may to a large extent be left to the discretion of the parties, who may in fact fix interest rates lower than those laid down in the directive, provided that they are not derisory and are not such as to entail a substantial circumvention of the rules.

Subsequently, after an initial intervention limited to the dairy sector, contained in EU regulation no. 261/12, the EU legislator has – with EU regulation no. 1308/2013 – extended to all the sectors of the CMO the discipline relating to the possible introduction, at the discretion of each individual Member State, of the obligation of written form for contracts for the delivery of agricultural products<sup>6</sup>. Even this provision, although specific to the agricultural sector unlike the directive on late payments, appears to have little impact, since it is aimed exclusively at ensuring greater transparency of contractual conditions and does not therefore affect,

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<sup>4</sup> Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, subsequently repealed: that directive concerned any payment made as remuneration for commercial transactions. It concerned any payment made by way of consideration in a commercial transaction, which, on the basis of the definition of «commercial transaction» given in Article 2(1) of the directive, was to be understood as meaning any contract, however named, concluded between undertakings or between undertakings and the public authorities which lead to the delivery of goods or the provision of services for remuneration.

<sup>5</sup> The Directive provided that Member States could exclude its application in only three cases, relating to debts subject to insolvency proceedings instituted against the debtor, to contracts concluded prior to 8 August 2002 and in case of claims for interest of less than €5.

<sup>6</sup> See Article 168, Reg. 1308/2013, which sets out the discipline of the so-called «contractual relations» (see the heading), also applicable to all the sectors covered by the CMO, with the sole apparent exception of milk and dairy products and sugar: apparent because it is already subject to similar discipline in other articles of the same regulation (Articles 148 and 125 respectively). On this topic, see A. JANNARELLI, *La disciplina dell'atto e dell'attività: i contratti tra imprese e tra imprese e consumatori*, in *Trattato di diritto privato europeo*, Lipari (ed), III, *L'attività e il contratto*, Padua, 2003, p. 48 ff.



except for a minimal extent<sup>7</sup>, the economic content of the contract: on the contrary, the provision itself specifies that the content of the contract is «freely» negotiated between the parties.

In essence, the provision under consideration achieves a sort of optional harmonisation with very limited content, establishing only that the written form, if and insofar established autonomously by each Member State, must also concern the main contractual clauses, in order to increase the level of certainty, in favour of the weaker party, as regards contractual agreements, and that the contract, to be drawn up in writing, must necessarily be concluded before the delivery or deliveries of the product; as regards the actual content of the contractual relationship, it is left to the parties to decide, with the sole exception – again left to the discretion of each Member State – of the possible introduction of a mandatory minimum duration for the purchaser<sup>8</sup>. It is also significant to note that, even before Regulation 1308/2013, a number of European States<sup>9</sup> had already approved regulatory acts of similar content<sup>10</sup>.

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<sup>7</sup> Indeed, once Member States have made it compulsory for contracts for the sale of one of the products covered by the CMO to a processor or distributor to be in writing (or for a written offer to be made by the first purchasers), they are obliged to provide that the formal requirements must also cover the clauses referred to in paragraphs 4 and 6 of that Article; this is without prejudice to the possibility for Member States to set a minimum duration of at least six months.

<sup>8</sup> In the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15 July 2014, COM (2014) 472, *Tackling unfair trading practices in the business-to-business food supply chain*, it is noted that following a survey conducted at European level among suppliers in the food supply chain, 96% of respondents stated that they had suffered at least one form of unfair commercial practice. Nevertheless, the Communication does not reveal any intention, at least for the time being, to promote a proposal for a regulatory intervention at European level aimed at combating the phenomenon of abuse of bargaining power between companies, while noting the extreme diversity with which some Member States have addressed the issue, noting that «where [national] rules exist, they differ in terms of level, nature and legal form of the protection granted against unfair commercial practices».

<sup>9</sup> And not only: also in the United States, for example, the first timid steps in this regard are being taken: see E. SIRSI, *I contratti del mercato agro-alimentare: l'esperienza USA*, in *Riv. dir. alim.*, no. 1/2013, p. 40 ff.

<sup>10</sup> Think of Italy, with Article 62, Decree-Law No. 1 of 2012; Spain, with the Food Chain Law No. 12/2013 (*Ley 12/2013* of 2 August 2013, *de medidas para mejorar el funcionamiento de la cadena alimentaria*, on which see A. SANCHEZ HERNANDEZ, *Los contratos alimentarios en la Ley de la cadena alimentaria. (Referencia a la normativa y doctrina italiana "dei contratti di cessione dei prodotti agricoli e agroalimentari"*, in *Actualidad Civil*, 3/2015, pp. 4-35); as to France, see the Law of Modernisation of Agriculture and Fisheries of 27 July 2010 (*Loi 2010-874* adopted the 27 July 2010 *de modernisation de l'agriculture et de la pêche*, on which see. C. DEL CONT, *Filières agroalimentaires et contrat*:

Moreover, the rules in question say nothing about the consequences (e.g. civil or administrative) of any failure to comply with the written contractual obligation established by the Member State or of any failure to include in the contractual text the minimum information required by the regulation or, again, in case of breach of the mandatory minimum duration by the purchaser<sup>11</sup>.

## 2. Directive (EU) 2019/633: the origins

After repeatedly arguing that there was no need for EU regulatory intervention in this area<sup>12</sup>, the Commission was forced to revise its thinking, following calls to the contrary from the European Parliament.

In fact, in its conclusions to the Report to the European Parliament and the Council of 29 January 2016<sup>13</sup>, the Commission did not see any added value in an harmonizing intervention by the EU on the issue of combating

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*l'expérience française de contractualisation des relations commerciales agricoles*, in *Riv. dir. alimentare*, no. 4/2012, p. 1 ff.).

<sup>11</sup> It is, in some ways, surprising that the provision does not deal with sanctioning profiles, since the Commission itself has pointed out on several occasions, addressing the issue of unfair commercial practices in the agro-food supply chain, that the regulatory fragmentation of the matter, left, in substance, to the decisions of individual Member States, including sanctioning profiles, which differ from one State to another as regards the «nature and legal form of the protection granted at national level against unfair commercial practices», implies a fragmentation of the single market: see, e.g., the *Green Paper on unfair commercial practices in the business-to-business food and non-food supply chain in Europe*, 31-1-2013, COM (2013) 37.

<sup>12</sup> An initiative taken on the input of the High Level Forum for a better functioning of the agri-food supply chain has been, since 2013, the *Supply Chain Initiative* (SCI), operating on an exclusively voluntary basis: in addition to having a limited impact on the territory of the Union, it has not produced, in reality, great and appreciable results, due, in essence, to the lack of an adequate system of sanctions. Moreover, the organizations representing agricultural producers have not joined the scheme, partly because of the alleged lack of confidentiality – in the scheme in question – for the person denouncing an unfair practice to his detriment.

<sup>13</sup> The Report referred to in the text has been classified as COM (2016) 32 final, on unfair business-to-business trading practices in the food supply chain. Earlier, and of similar tenor, see Commission Communications COM (2009) 591 final, *A better functioning food supply chain in Europe*, and COM (2014) 472 final, *Tackling unfair trading practices in the business-to-business food supply chain*.

unfair commercial<sup>14</sup> practices in contracts of the food supply chain. In the report, the Commission also noted that the phenomenon of unfair practices in the sector was widespread, since at that time as many as 20 Member States had already adopted rules to combat them or planned to do so in the near future. Moreover, precisely because State interventions were intended to respond to needs for which there was no EU regulation, the rules adopted at domestic level were inevitably, although intended to tackle the same phenomenon, heterogeneous in content and thus harboured fragmentation and distortions of the internal market, especially whenever commercial transactions concerning agricultural products or foodstuffs took place at transnational level<sup>15</sup>.

Already in June 2016, on the contrary, the European Parliament, responding to the above-mentioned Communication, invited the Commission to present a legislative proposal on unfair commercial practices in the agri-food sector<sup>16</sup>, and the EU Council<sup>17</sup> and the European Economic and Social Committee<sup>18</sup> came to similar conclusions.

The Commission thus presented a proposal for a directive in April 2018<sup>19</sup>, which received much attention also from the media, and led to the unusual quick adoption of Directive 2019/633 of 17 April 2019, shortly before the end of the parliamentary term (followed by the European elections in May 2019)<sup>20</sup>.

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<sup>14</sup> For a critical stance, against the Commission's position, see. L. GONZALEZ VAQUÉ, *Unfair practices in the food supply chain*, in *EFFL*, 2014, 293 ff. Against a direct intervention of EU law in the sector, see instead R.M. HILTY, F. HENNING-BODEWIG, R. PADSZUN, *Comments of the Max Planck Institute for Intellectual Property and Competition Law, Munich, of 29 April 2013 on the Green Paper of the European Commission on unfair trading practices in the business-to-business food and non-food supply chain in Europe dated 31 January 2013, com (2013) 37 final*.

<sup>15</sup> For a meritorious study of national regulations aimed at countering the phenomenon of unfair trading practices also, but not only, in the food sector, F. CAFAGGI and P. IAMICELI, *Unfair trading practices in the business-to-business retail supply chain, An overview on EU Member States legislation and enforcement mechanisms*, EC Commission JRC Technical Reports, Publication Office of the European Union, Luxembourg, 2018.

<sup>16</sup> Thus European Parliament Resolution 2015/2065(INI) of 7 June 2016 *on unfair trading practices in the food supply chain*.

<sup>17</sup> See Council Conclusions of 12 December 2016 *on strengthening the position of farmers in the food supply chain and combating unfair trading practices*.

<sup>18</sup> See COM (2016) 32 final of 30 September 2016.

<sup>19</sup> Of 12 April 2018, (COM) 173, on unfair business-to-business commercial practices in the food supply chain.

<sup>20</sup> On EU Directive No 2019/633 see A. JANNARELLI, *La tutela dei produttori agricoli*

It is therefore not surprising that the effectiveness of the action envisaged by the directive has been significantly enhanced following the intervention of the European Parliament, since the text of the original Commission proposal was not particularly relevant and incisive in combating unfair commercial practices against weaker players in the agri-food sector, so much so that the Economic and Social Committee<sup>21</sup> «regretted» it.

### 3. *General features of Directive 633/2019: minimum harmonization approach, legal basis and objective and subjective scope*

The proposed harmonization appears, first of all, to be of a minimal nature, leaving the Member States free to implement the discipline by strengthening – or maintaining, if already existing – the protection for the party affected by the unfair conduct<sup>22</sup>. In particular, Member States are given the possibility of maintaining or introducing stricter rules than those provided for by the Directive, as well as of regulating cases which do not fall within the scope of the Directive (see Article 9(2))<sup>23</sup>.

The minimum harmonization approach can indeed be understood in the light of the above mentioned Commission's scepticism, and of the fact that the directive is essentially the first organic intervention on the topic<sup>24</sup>,

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*nelle filiere agroalimentari alla luce della direttiva sulle pratiche commerciali sleali business to business*, in *Riv. dir. agr.*, 2019, I, p. 5 ff.; A. GENOVESE, *Le pratiche commerciali sleali nella filiera agroalimentare*, in *Trattato di diritto alimentare*, in P. Borghi, I. Canfora, A. Di Lauro and L. Russo (eds), Milan, 2021, p. 190 ff.; M. IMBRENDA, *Filiera agroalimentare e pratiche commerciali sleali*, in *Europa e dir. priv.*, 2019, no. 4, p. 1133 ff.; let us also refer to L. RUSSO, *La nuova direttiva UE sulle pratiche commerciali sleali nella filiera agroalimentare: una prima lettura*, in *Riv. dir. civ.*, 2019, I, p. 1418 ff.; on the Commission's proposal, see H. SCHEBESTA, K.P. PURNHAGEN, B. KEIRSILK, T. VERDONK, *Unfair trading practices in the food chain: regulating right?*, Wageningen Working Paper Law and Governance, 2018/03.

<sup>21</sup> See EESC Opinion on the proposal for a directive of 19 September 2018, COM (2018) 173 final, in OJEU C 440, 6-12-2018.

<sup>22</sup> See Art. 9, according to which «with a view to ensuring a higher level of protection, Member States may maintain or introduce stricter rules aimed at combating unfair trading practices than those laid down by this Directive».

<sup>23</sup> Provided that the internal rules are compatible with those relating to the functioning of the internal market: see Article 9(1) and (2).

<sup>24</sup> In fact, it has already been pointed out that EU law does not lack interventions on specific aspects, such as the rules on interest for late payments in commercial transactions, or the possibility of formalizing in writing the contracts of first sale of

as such susceptible to checks and additions over time.

It is worth noting that Article 43(2) TFEU is indicated as the legal basis, since the declared aim of the directive is primarily to achieve one of the objectives of the CAP as set out in Article 39 TFEU, namely the need to ensure a fair standard of living for the agricultural community<sup>25</sup>.

Moreover, it has been pointed out that subjecting farmers to the unfair practices of their contractual partners has a wide range of negative consequences, not only for the farmers concerned, who see their margins reduced and find themselves exposed to factors that are difficult to foresee in ordinary commercial relations, but more generally for the entire sector, in view of the spread of the phenomenon, with a consequent reduction in investment and innovation in general<sup>26</sup>. Recital (7) of Directive 633/2019 also points out that the agricultural sector, as a sector upstream in the food chain, runs the risk of being victim of unfair practices that are carried out in contractual relations relating to subsequent links in the chain, since the operators who suffer them will in turn try to pass on the negative effects to their suppliers<sup>27</sup>.

On closer inspection, the directive provides protection not only to ‘genuine’ agricultural producers, but also to food producers and simple traders in agricultural products and foodstuffs, so much so that the commercial transactions covered by the discipline are both those relating to agricultural products listed in Annex I to the TFEU and those relating to foodstuffs not listed in the Annex, but processed for use as food using products listed in the Annex<sup>28</sup>.

Indeed, the protection offered by the directive applies both to agricultural undertakings, i.e. those engaged in the production of products defined as such and included in the list in Annex I to the TFEU; and to undertakings producing foodstuffs, i.e. not only products for food use listed in Annex I to the TFEU, but also «products not listed in that

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agricultural products subject to EU regulation no. 1308/2013.

<sup>25</sup> See the Explanatory Memorandum accompanying the proposal, which notes that «unfair commercial practices jeopardize the profitability of agricultural producers and generate downward pressure on their market income. Regulating them is therefore a core competence of the CAP». This assumption is then repeated several times in the opening recitals: see recitals (1) and (7).

<sup>26</sup> Thus already the Green Paper, cit.

<sup>27</sup> In particular, recital 7 highlights the possible ‘cascading’ effects, with negative consequences on primary producers operating in the agricultural and food chain.

<sup>28</sup> This is reflected in the definition of «agricultural and food products» in Article 2(1), under the heading «Definitions».

Annex but processed for use as food using products listed in that Annex»<sup>29</sup>; and, finally, undertakings which simply market agricultural products or foodstuffs<sup>30</sup>.

In order to justify the reference to Article 43 TFEU as the legal basis of the Directive, in its proposal the Commission<sup>31</sup> referred to the now long-standing case law of the Court of Justice, according to which a legislative act may be adopted under the «agricultural» umbrella even if it concerns, in an ancillary manner, products not included in Annex I to the TFEU, if this can contribute to the achievement of one or more objectives of the CAP and if the legislative act at issue essentially concerns agricultural products<sup>32</sup>. The extension of the ambit of application of the directive to the supply of 'Annex I' agricultural products, without further distinction as to their use, certainly strengthens the case for the use of Article 43, even if it is probably excessive to consider that the entire body of the directive can be said to be aimed essentially at protecting the incomes of farmers alone.

In addition, the Directive is intended to apply to contracts which allow the transfer of ownership of foodstuffs: consider Article 1(1), which refers to the prohibition of contracts «between purchasers and suppliers»;

<sup>29</sup> Thus Article 2(d) of the directive, entitled *Definitions*.

<sup>30</sup> Thus, the final text of the directive significantly broadens the scope of those potentially covered by its rules compared to the original Commission proposal, which only covered products for food use and not agricultural products in general listed in Annex I. Under the proposal, it follows that those engaged in the production of agricultural products which, although included in Annex I to the TFEU, are not intended for food use, would be left without the protection offered by the future directive, whereas non-farmers would also benefit from the rules in question. As a result of the amendments made by the European Parliament, the title of the directive has also been changed: it now refers to unfair practices in «business-to-business relationships in the agricultural and food supply chain», whereas the proposal referred only to «businesses in the food supply chain».

<sup>31</sup> The reference to Article 43 TFEU is considered as not entirely satisfactory by A. JANNARELLI, *La direttiva sulle pratiche sleali commerciali business to business nella filiera alimentare: considerazioni introduttive*, in *Dir. lav. e delle rel. ind.*, 2019; ID., *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche sleali commerciali business to business*, cit., p. 44 ff.; H. SCHEBESTA, K.P. PURNHAGEN, B. KEIRSBILK and T. VERDONK, *Unfair trading practices in the food chain: regulating right?*, cit.

<sup>32</sup> In this sense, see Court of Justice of the European Union, Case C-343/07, para. 50: «the Court has already held that legislation which contributes to the achievement of one or more of the objectives mentioned in Article 33 EC must be adopted on the basis of Article 37 EC, even though, in addition to applying essentially to products falling within Annex I to the Treaty, it also covers incidentally other products not included in that annex (see, to that effect, Case C11/88, *Commission v Council*, paragraph 15, and Case C180/96 *United Kingdom v Commission* [1998] ECR I2265, paragraph 134)».

references to such positions are, moreover, repeatedly contained in the articles of the directive, and specific definitions are offered to identify both the «purchaser» and the «supplier»<sup>33</sup>. Thus the Directive cannot be taken into account in all those vertical integration contracts – particularly widespread in the livestock sector – in which there is no such transfer: since they are essentially obligations to do something placed on the integrated company, which operates on products that are and remain the property of the integrating company.

Moreover, in addition to these objective conditions, the Directive contains further equally important subjective conditions: the protection is afforded only to those relationships involving producers and traders in agricultural products and foodstuffs, on the one hand, and purchasing undertakings<sup>34</sup>, on the other, which do not exceed (as regards the supplying undertakings) and do exceed (as regards the purchasing undertakings) certain turnover thresholds<sup>35</sup>.

The solution adopted is thus characterized by a certain rigidity, resulting from the need to ascertain annual turnovers, which could lead to practical difficulties and to eccentric results: as has already been correctly observed, «the same practices implemented by a purchaser could be either unfair or not unfair, depending on the economic weight of the other party»<sup>36</sup>. The fact is that under the directive, and unlike the proposal, supplier companies that fall under the definition of large companies will also be able to benefit from the relevant discipline, if their counterparty has a turnover in excess of EUR 350 million. On the other hand, supply relationships where both the supplier and the purchaser can be considered micro-enterprises cannot enjoy the same protection.

In particular, for the Directive to be applicable, the maximum turnover

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<sup>33</sup> Within these relationships, certain services may also be sanctioned as UCPs, provided that they are included among the prohibited conduct referred to in Article 3 of the directive: see Article 1(2)(5).

<sup>34</sup> The rules do not apply to sales to consumers, being reserved for business-to-business relations only.

<sup>35</sup> Here too, the final version of the directive differs significantly from the content of the original proposal: the latter, in fact, established the applicability of the future directive exclusively to (only) food suppliers that qualified as small or medium-sized enterprises and that, however, sold these products to an enterprise that was neither small nor medium-sized, according to the parameters set out in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

<sup>36</sup> Thus A. JANNARELLI, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce della direttiva sulle pratiche sleali commerciali business to business*, cit., p. 48.



threshold of the transferring undertaking (agricultural or foodstuff) must be lower than the turnover of the acquiring undertaking. In substance, the application of the discipline is subject to the presence of a situation characterized by a disparity in the size of the contracting undertakings, such as to entail – with a sort of absolute presumption – asymmetries of bargaining power between them such as to justify the regulatory intervention in question.

The Parliament's intervention broadened the scope of the «purchasing» companies relevant for the application of the directive, by including also the public authorities<sup>37</sup>, establishing that in case of supply relationships with them the turnover thresholds established in Article 1, para. 1, do not apply, provided that the turnover of the supplying company does not exceed 350 million euros.

Having outlined the boundaries of application of the Directive, it is now possible to analyze its content.

#### 4. *Unfair trading practices: lack of a definition*

In this regard, it should be noted that the text of the directive in question does not contain – unlike Directive 2005/29/EC on unfair business-to-consumer commercial practices<sup>38</sup> – a general definition of unfair trading practice: there is therefore no definition or general concept of unfair commercial practice, characterized by the presence of specific elements or indices denoting its unfair nature, but only<sup>39</sup> an exhaustive list of typical cases.

This, moreover, can be justified by the difficulty in laying down a general definition which would probably remain excessively indeterminate

<sup>37</sup> These means «national, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law»: Article 2(3) of the Directive.

<sup>38</sup> On which see in particular M. BERTANI, *Pratiche commerciali scorrette e consumatore medio*, Milan, 2016; G. DE CRISTOFARO (ed.), *Le “pratiche commerciali sleali” tra imprese e consumatori. La direttiva 2005/29/CE e il diritto italiano*, Torino, 2007; ID., *Le pratiche commerciali scorrette e il codice del consumo*, Torino, 2008; E. Minervini and L. Rossi Carleo (eds), *Le pratiche commerciali sleali*, Milano, 2007.

<sup>39</sup> A list of prohibited practices is also contained in Directive 2005/29/EC, and in particular in Annex I thereof, but the Annex is not the only instrument for the identification of UCPs.



as regards its boundaries. Moreover, the scope of UCPs in the agri-foodstuffs sector differs profoundly from that already outlined in relations between professionals and consumers in Directive 2005/29. Suffice it to say that in the latter directive the prohibited practices are aimed, in principle<sup>40</sup>, at affecting the mechanism by which the consumer makes a purchase decision, so that the consumer would not have taken a commercial decision or would have done it under different conditions in the absence of the unfair practice carried out by the professional counterparty<sup>41</sup>.

In relations between companies operating in the agri-food chain, on the other hand, the concept of unfairness of the commercial practice changes significantly, since the company that is subjected to such practices is in almost all cases perfectly aware of the abuse that before, during or after the conclusion of the contract is forced to suffer to its own detriment, but is not able to oppose it adequately, because it does not have the possibility or because, in any case, it does not want to prejudice a commercial relationship that could prove fundamental for its survival on the market.

This is certainly not the place to compare the two sets of rules (those protecting consumers and those protecting agri-food businesses), but only to highlight at least the major differences between them, without considering that the harmonizing nature of the two directives is quite different: while Directive 2005/29 achieved complete harmonization of the field, as recognized also by the case law of the Court of Justice<sup>42</sup>, the harmonization in the Directive 2019/633 is declaredly minimal.

On the other hand, the new Directive does not contain certain clarifications of no little importance which can be found in the directive on consumer contracts. We refer, in particular, to the absence of any indication as to the relationship between the finding of the presence of an unfair commercial practice and the fate of the relevant contract from the civil law point of view: in particular, Directive 633/2019 lacks a clause similar to that contained in Article 3(2) of Directive 2005/29, according to which the provisions contained therein are without prejudice to «contract law and, in particular, to the rules on the validity, formation or effect of a

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<sup>40</sup> This is so even though, strictly speaking, Article 3 of Directive 2005/29 provides that the directive applies to unfair business-to-consumer commercial practices carried out before, during or after a commercial transaction.

<sup>41</sup> See, in this respect, recital 7, according to which «This Directive addresses commercial practices directly related to influencing consumers' transactional decisions ... ».

<sup>42</sup> See EU Court of Justice, judgment of 16 April 2015 in Case C-388/13, *Nemzeti Fogyasztóvédelmi Hatóság*, para 32, which recalls other previous well-established case law on the point.

contract».

Lastly, unlike the UCPs with consumers, which, as they are structured in the Directive, can exist irrespective of the trader's intentionality or fault – so much so that Directive 2005/29 takes care to point out that the relevant sanctions can be imposed «even without proof ... of intention or negligence on the part of a trader»<sup>43</sup> –, the definition of UCPs within the agri-food chain is such as to always imply an intentional behaviour of the undertaking in a 'dominant' position (with the sole exception of non-payment or late payment within to the due date, which could be due to simple negligence), so that the ascertainment of the existence of one of the prohibited practices implies (in any case or subject to certain conditions, as will be seen below) the application of sanctions, being implicit in the case the voluntariness of the action in which the UCPs is substantiated.

### *5. Unfair trading practices always prohibited*

The Directive identifies – in Article 3 – fifteen types of unfair conduct, nine of which, listed in paragraph 1, are considered always prohibited, and the remaining six, listed in paragraph 2, prohibited only under certain conditions<sup>44</sup>.

In particular, the different types of terms which are always prohibited are listed below, followed by some separate considerations as to their content and effectiveness. That said, the conducts which are always prohibited, as referred to in Article 3(1), para. 1, of the Directive, are:

- (a) non-payment or delayed payment of the supply beyond the legal deadlines: on this point the rule is much more articulated than in the original proposal, distinguishing not only between perishable or non-perishable agri-food products<sup>45</sup>, but also between continuous supply contracts (for which the delivery of the products takes place «on a regular basis») or spot contracts. Four distinct cases are thus identified,

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<sup>43</sup> Thus Article 11(2) of Directive 2005/29/EC. For a case of imposition of sanctions on the trader for UCPs against an individual consumer and irrespective of proof of fault of the author, see the already cited CJ 16 April 2015, in case C-388/13.

<sup>44</sup> In contrast, the original Commission proposal listed a total of eight types of unfair conduct, four of which were considered to be always prohibited and the remaining four prohibited only under certain conditions.

<sup>45</sup> An agricultural product or foodstuff is perishable, as defined in Article 2(5), if it is likely to become unfit for sale within 30 days after harvest, production or processing.

depending on whether the relationship is continuous or not and on whether the product is perishable or not. In principle, and simplifying, legal and mandatory time limits for the payment of the price are identified, set at 30 or 60 days, depending on the perishable or non-perishable nature of the product, with a different determination of the respective *dies a quo*, depending on the continuous or non-continuous nature of the relationship. Pursuant to Article 3(2), the delay in payment is without prejudice to the creditor's rights acquired under the directive on late payment in commercial transactions (Directive 2011/7/EU) and to the possibility for the parties to agree on a value sharing clause pursuant to Article 172a of EU Regulation 1308/2013.

- (b) the cancellation of orders for perishable agricultural products or foodstuffs at such short notice that it can be «reasonably» assumed that the supplier will not be able to sell or otherwise use the products; the provision – innovative in this respect compared to the proposal – specifies that notice of less than 30 days is «short», although «in duly justified cases and for specific sectors» Member States are allowed to legitimize shorter notice periods.
- (c) unilateral (and no longer necessarily retroactive, as provided for in the proposal) modifications by the purchaser of certain contractual provisions (frequency, method, place, timing, volume of supply or delivery, quality standards, terms of payment, price of the product);
- (d) the request for payments not related to the sale of the products;
- (e) the claim for payment for deterioration and/or loss of the products which has occurred on the buyer's premises or after the purchaser has become the owner of the products, without the supplier being negligent or at fault in respect of the deterioration or loss;
- (f) the refusal from the buyer to confirm in writing the terms of a supply agreement despite the fact that the supplier had requested written confirmation<sup>46</sup>;
- (g) the unlawful acquisition, use or disclosure by the buyer of the supplier's trade secrets;
- (h) the threat or use by the buyer of commercial retaliation against the supplier for exercising its contractual or legal rights, including the filing of a complaint or cooperating with enforcement authorities;
- (i) the buyer's request of compensation from the supplier for the costs

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<sup>46</sup> Similarly to what has already been established with regard to the possible written form of first sale contracts for agricultural products included in the single CMO, relations between the member and the PO to which the former belongs are excluded from the prohibition, if the statutes of the organization offer adequate protection to the transferor.

incurred in examining customer complaints relating to the sale of the supplier's products, in the absence of negligence or fault on the part of the supplier.

In principle, not necessarily contractual clauses are sanctioned, but more generally the conduct of the stronger party, normally put in place after the conclusion of the contract and irrespective of the existence of any express agreements<sup>47</sup>; such conduct, or clauses, are generally accepted by the weaker contracting party precisely because of its position of weakness and its limited or non-existent bargaining power.

If we wish to examine the prohibited conduct separately, it may thus be noted, as regards the failure to comply with the time limit for payment, that the scope of the directive in question seems to be that, significantly, of introducing mandatory time limits, thus abandoning the residual approach set out in EU Directive no. 2011/7. In this way, the supply of agricultural products or foodstuffs is configured as a special relationship with respect to all other commercial transactions, due to the mandatory time limits for payment. As already pointed out at the beginning of this work, the directive on payment periods in commercial transactions does indeed identify a time limit for payment of the service, which, however, is applicable in lack of any other agreements of the parties, which, as a rule, remain valid with the sole threshold of the «gross unfairness» referred to in Article 7 of the directive. Exceptions to the applicability of the prohibition are, however, provided for in the last subparagraph of para. 1 of Art. 3, Directive 2019/633.

The final text of the directive has the merit of introducing a presumption of illegality for notice of less than 30 days (while allowing derogations in certain circumstances), since the text of the Commission's proposal was devoid of indications, so that, except in the most striking cases of no notice or very short notice, it could have been very difficult to classify the cancellation of an order as an unfair practice within the meaning of para. 1(b).

The modification of the contractual conditions constitutes a prohibited practice when it is imposed unilaterally by the purchaser: it is not clear whether the provision is intended to prohibit conduct of the purchaser

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<sup>47</sup> As regards non-compliance with payment terms, this may be relevant both in terms of an unfair contractual term, if the agreement provides for longer terms for the payment of the supply, which, in the light of the Directive, are intended to be replaced by the shorter terms provided for in Article 3(1)(a) by operation of law, and in terms of unfair conduct, if and in so far as the buyer, despite the existence of agreements complying with the Directive, fails to make timely payment of the amount due.

subsequent to the formation of the contract or whether the prohibition concerns the very contractual provision of possible unilateral modifications for the purchasing party.

With regard to the refusal of the purchaser to conclude a written contract although requested by the supplier, the provision follows what has already been set out in para. 1a of Articles 148 and 168, EU Regulation no. 1308/2013, according to which, if the Member State of origin has not made use of the option to introduce an obligation of written form, it is the transferor who may request the purchaser to adopt such a contractual form, provided that the latter is not a micro, small or medium-sized enterprise: the provision contained in the directive is thus more stringent, given that the provisions of regulation 1308/2013 allows the application of the rule only in cases where the purchaser is a large enterprise.

The other prohibitions are newly drafted cases, introduced in the final version of the Directive, which were not covered or, as to hypothesis e), formulated differently in the original proposal. Among them, it is worth noting the inclusion within the list of prohibited practices of retaliatory conduct (or even the mere threat thereof) by the buyer against the supplier, due to the fact that the latter has done no more than exercise rights conferred on him by contract or by law.

## *6. Trading practices which are potentially unfair*

Para. 2 of Art. 3 of the Directive contains a list of clauses which are to be considered prohibited only if not «previously agreed in clear and unambiguous terms in the supply agreement» or in another subsequent agreement, such as: the return to the supplier of unsold goods without payment and/or disposal; the imposition on the supplier of a payment «as a condition for stocking, displaying or listing» its products or of making them available on the market; the request to the supplier to bear, even in part, the costs of any discounts given by the purchaser as part of a promotion, unless the buyer, prior to a promotion, specifies to the supplier the period of the promotion and the expected quantity of the goods to be ordered at the discounted price; the request to the supplier to pay the costs of advertising carried out by the purchaser; the request that the supplier pay the costs of marketing carried out by the purchaser relating to the products purchased from the supplier; and the request that the supplier pay the costs of the personnel for fitting-out premises used for the sale of the supplier's products.

The presence of the above condition («unless they have been previously agreed in clear and unambiguous terms in the supply agreement») for the applicability of the prohibitions makes such prohibitions merely residual. It will, in fact, be sufficient to take care to include clear and detailed contractual provisions at the time of the conclusion of the contract or in a subsequent agreement in order to avoid the application of para. 2. The presence of clear and unambiguous terms does not seem to be an effective deterrent to the inclusion of such terms in the contract, since the disparity of bargaining power is likely to make suppliers willing to accept terms such as those at issue.

This consideration, which is of an eminently practical nature, avoids going into the details of individual cases.

### *7. The other provisions of the Directive*

In order to ensure the effectiveness of the prohibitions laid down in Article 3, Article 3(4) requires the Member States to implement the prohibitions laid down therein by means of mandatory provisions and of necessary application, so as to prevent their otherwise easy circumvention: indeed, according to the express provisions of Article 1(2), the directive shall apply «to sales where either the supplier or the buyer, or both, are established in the Union». This means that it applies even where only the supplier or only the buyer is established in the territory of the Union.

Under Article 4, each Member State must designate an enforcement authority, i.e. a body responsible for monitoring and verifying compliance with the above prohibitions, and inform the Commission of that designation. The Directive provides that this authority shall act<sup>48</sup> either on its own initiative or following a complaint from any person claiming to have been harmed by an unfair practice; producer organizations or other associations of suppliers or associations of such organizations may also lodge a complaint. Appropriately, it is expressly provided that the complainant may, if he so requests, remain anonymous in order to avoid possible commercial retaliation by the complained<sup>49</sup>.

Art. 6 governs the consequences of an unfair practice: the Enforcement Authority may impose on the purchaser: i) the cessation of the prohibited practice, unless in so doing there is a risk of disclosing the identity of the

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<sup>48</sup> Thus Article 6(1)(a) of the Directive.

<sup>49</sup> See Article 5(3) of the Directive.

complainant when the latter expressed the wish to remain anonymous; ii) fines and other equally effective penalties, which<sup>50</sup> are effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement. Finally, as a further form of sanction, the Authority may order the publication of the injunctions and sanctions referred to in (i) and (ii) above. Member States must also give the enforcement authority the power to carry out unannounced on-site inspections and to require the parties to provide any information necessary for the investigation. The exercise of the enforcement authority's powers must, however, respect the parties' rights of defence.

Article 7 provides that Member States may promote voluntary recourse to dispute settlement systems, without prejudice to the possibility for interested parties to lodge complaints before the Enforcement Authority.

As mentioned at the beginning of this work, the legal systems of many Member States already provided rules designed to combat unfair commercial practices in the agri-food sector; however, given the lack of a harmonized framework to date, national measures are characterized by their heterogeneity, both as to the conduct to be qualified as relevant unfair practices and as to the applicable penalties. Therefore, in the light of the adoption of the Directive and its implementation into the Member States, in order to permit the widest homogeneity of application also on the practical-operative level Article 8 provides for the necessary coordination between the national enforcement authorities and for an exchange of information procedure.

Furthermore, as mentioned above, the harmonization pursued by the Directive is minimal, so that the Member States remain free to introduce more stringent national provisions, with the sole limitation of the compatibility of such rules with the functioning of the internal market. It will probably be the *ex-post* verification of the implementation of the directive and the results obtained, as provided for in Article 12, that will induce the Commission to raise the standard of protection in the fight against unfair commercial practices in the agri-food sector by the adoption of new regulatory measures.

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<sup>50</sup> It should be noted that the Commission proposal only envisaged the possibility of financial penalties.



## 8. *The Commission's Report on the implementation of the Directive*

The Directive had to be transposed by 1 May 2021, and the internal implementing provisions had to become applicable by 1 November 2021 at the latest (the application to be extended also to supply agreements in place at the date of publication of the implementing legislation, the content of which has to be brought in line with the Directive within 12 months of the publication of the internal implementing rules)<sup>51</sup>.

The Commission prepared a first record of the state of play regarding the transposition of the Directive by the Member States into national law (although without providing an assessment of transposition measures) in its Report of 27 October 2021<sup>52</sup>, updated to the 31st July 2021. By that date, only 15 out of 27 Member States<sup>53</sup> had transposed the Directive, of which eight by introducing new specific legislation, while the other eight by amending existing legislation, or by integrating implementing measures into more far-reaching legislative measures. Only France and Slovakia have provided for the application of the legislation irrespective of the size of the companies concerned (subsequently joined by Italy, which transposed the Directive with the 2019/20 European Delegation Act<sup>54</sup> and the subsequent Legislative Decree No. 198/2021 of 8 November 2021).

It is interesting to note that the 15 Member States that had transposed the Directive by the 31<sup>st</sup> of July 2021 designated an administrative, rather than a judicial, enforcement authority, and the most designated an independent administrative authority and established financial penalties for breaches of the prohibitions laid down in the Directive.

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<sup>51</sup> Thus Article 1(4) of the Directive.

<sup>52</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the state of transposition and implementation of EU Directive 2019/633, COM (2021) 652, 27 October 2021.

<sup>53</sup> Bulgaria, Denmark, Greece, Finland, Ireland, Latvia, Netherlands, Hungary, Croatia, Luxembourg, Germany, Lithuania, Malta, Sweden, Slovakia.

<sup>54</sup> Law No. 53 of 22 April 2021, Delegation to the Government for the transposition of European directives and the implementation of certain EU acts - European Delegation Law 2019-2020. See A. IANNARELLI, *The implementation of Directive no. 633 of 2019 in the Italian experience*, in *This Volume*.



## 9. *Conclusions*

It is hard to understand the enthusiasm shown by the agricultural sector and the attention that the proposal and subsequent adoption of the Directive have constantly received, including from the media. Fortunately, Parliament's intervention during the procedure for the adoption of the act has significantly broadened the subjective and objective scope of the new rules and included many types of unfair practices that the Commission proposal did not cover at all.

In fact, the Directive cannot be considered as a general instrument for combating unfair commercial practices in the agri-food chain, but rather as an instrument for combating only certain practices, and in particular well-identified cases. Moreover, for six of these practices, the prohibition is not absolute, deriving from the fact that they are not clearly and unequivocally provided in the contract. The practices listed, moreover, cannot be said to be always prohibited even when falling within the 'black list' of Article 3(1), since for the prohibition being applicable it is necessary that the undertakings involved in the commercial relationship at issue fall within the turnout thresholds laid down in the Directive: in particular, practices adopted if the contracting undertakings are both micro-enterprises are never prohibited. Nor can the directive be considered as a specific safeguard for the agricultural sector, since, as we have seen, its provisions also benefit food businesses, whether they are producing or merely marketing.

This admittedly minimalist approach is not surprising, given that the Commission was essentially forced by the Parliament and the Council to adopt a proposal that was not in its wheelhouse and that, in any case, this is the first regulatory intervention: as such, it is susceptible to subsequent amendments, also on the basis of the *ex post* evaluation that will be made four years after its application. The amendments made by Parliament have, in any case, undoubtedly made this minimal form of intervention to protect the weaker party more effective.

There is no doubt, therefore, that despite the harmonization brought about by the Directive, Member States remain the main actors in the fight against unfair practices in the sector. Moreover, the creation of enforcement authorities, imposed by the directive, even for those States that do not yet have them, could lead to the development of fruitful cooperation between them, thus filling a significant gap in the current situation, in which each authority – where it exists – acts as a monad for the application of its own national law, with no exchange of information with authorities in other

Member States on their respective practices and the concrete cases at issue.

The fact remains that, beyond the more or less incisive ways in which one intends to tackle the issue of unfair practices in the agri-food supply chain, regulatory action aimed at combating unfair practices is limited in scope to individual contractual relationships or, at most, to groups of contractual relationships, and is aimed at removing or preventing the application of contractual clauses or practices that strongly and unjustifiably penalize the weaker party, without, however, being able to affect the real source of the problem, i.e. the disparity of bargaining power that in practice characterizes bargaining in the agri-food market.



Irene Canfora

*The «fair price» in agri-food chain*

SUMMARY: 1. Introduction – 2. Farmers fair price and regulation of market relationship in the CAP reform 2014-20 – 3. The role of Producer Organizations in agricultural sector – 4. Contractual schemes for the sale of agricultural products and price formation – 5. Regulatory action to ban unfair commercial practices – 6. Intervention on prices and market balance in the implementation of Member States.

1. *Introduction*

The topic of the fair remuneration of farmers shall be considered the basis of the special regulation of agriculture in the Treaty, founded on the general goals laid down in Art. 39 of the Treaty of Rome (and currently, without any change, in the Treaty on the functioning of the EU). Indeed, Art. 39 TFUE mentions the «fair standard of living of the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture» as one of the five objectives of the Common Agricultural Policy (CAP), related to the first one, «increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour».

Legal tools to join the CAP objectives changed among the years, starting with a price policy, that supported farmers through the withdrawal of unsold products at an administrative price system defined by the EU Commission, gradually replaced by the decoupling payments<sup>1</sup>. Direct payments system has been remarkably weakened, mainly in the latest years, in the perspective to address agriculture to the market, face to the international obligation in the framework of WTO.

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<sup>1</sup> J. MacMahon, M. Cardwell (eds), *Research Handbook on EU Agricultural Law*, EE Cheltenham, 2015.

At the same time, as consequence of the MacSharry agricultural policy reform the EU introduced, in the '90, a very relevant set of rules aimed at enhancing quality products, with the goal to promote the competitiveness of agricultural products and at the same time support farmers income, considering the higher prices of PDO and PGI as well as organic products on the market. Until today, the Regulation 1151/2012, on quality systems pointed out the role of these special trademarks as a tool to increase the earnings of farmers<sup>2</sup>.

From this point of view, European rules on quality products of geographical origin, in accordance with CAP objectives declared in Art. 39 TFUE, achieves a synthesis between the interest of agricultural producers (to the profitability of products with quality added value, linked to the origin of a specific territory) and the growing consumers expectation on quality agricultural products.

The relevance of profitability of the use of denomination of origin for farmers and first processors, located in the territorial area interested by the sign, is clearly highlighted by Regulation 1151/12 by specifying the goals to achieve with the establishment of PDO and PGI signs, based on the *ratio* of the legislation on quality schemes.

Indeed, the quality scheme based on PDO and PGI represents a way to achieve the goals through a competitive tool reserved to the producers and directly managed by themselves, as expressly stated by Art. 4, laying down that the use of signs guarantees a fair return for the quality of their products (besides the protection of names as intellectual property right within the EU, and the clear information to consumers).

In the last years, as far as the financial measures by direct payments decrease and the EU opens to the external market, the question of the balance of value and of the need to ensure profitable price for the supply of agricultural raw materials, become the *leitmotif* of the structural interventions for market governance since the CAP regulation of December 2013, until the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain and finally with the amendments to CMO regulation laid down by Regulation 2021/2117.

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<sup>2</sup> I. CANFORA, *La politica della qualità dei prodotti agroalimentari dell'UE*, in P. Borghi-I. Canfora-A. Di Lauro-L. Russo (eds), *Trattato diritto alimentare e dell'Unione Europea*, Giuffrè, Milano, 2021 p. 425 ff.

## *2. Farmers fair price and regulation of market relationship in the CAP reform 2014-20*

In order to understand the tools aimed at ensure a fair price for agricultural producers, it is necessary to start from the analysis of the legal framework about the supply chain relationships.

For this purpose, it will be useful to summarize the stages leading to the CAP reform 2014-20, considering that it produced a substantial break with the past «legal instrumentarium» as regards to the structure of supply chain relations at the European level.

A significant effect on agricultural productions prices, especially commodities, may be determined by various causes: the liberalization of markets, the ability of processors and distributors to acquire raw materials on foreign markets at lower prices than the European ones, the elimination of domestic quota measures, the reshaping of support measures in terms of the distribution of funding between the first and second pillars of the CAP (in the relationship between direct payments and rural development measures). Moreover, this scenario mainly affected the farmers resilience, particularly in relation to small enterprises.

The European Union dealt with the price crisis by an experimental regulatory model, in dairy sector. Indeed, in this sector, the cancellation of milk quotas – a protectionist mechanism that ensured guaranteed outlets for production and consequently an adequate remuneration of the sale price of milk at the barn – strongly affected the situation of producers supplying raw milk to buyers.

The pilot experience of Regulation 261/2012 (called «milk package») laid down special rules defining a new discipline for agrifood chain relationships and gave rise to an innovative experience for CAP regulation, since it identified a set of regulatory tools. In particular, Regulation no. 261/2012 included regulatory tools later taken up in the text of the CMO of December 2013: by defining the role of producer organizations in managing contractual relations, the functions of interbranch organizations, the transparency in price monitoring, later transformed into systems for calculating average European prices, futures market measures, and finally by reporting risks of unfair trade practices affecting agricultural producers.

The relevance of the Milk sector regulation lies in the fact that this set of rules was the basis of the CAP 2014-20. Indeed, it was extended to other sectors by the Common Market Organization (CMO) Regulation no. 1308/13, and later consolidated as a model of market regulation by

the mid-term reform, laid down in 2017, by Regulation no. 2393/2017.

In order to grasp the perspective of development of the regulatory system, it is useful to go back over the economic context, from which the Commission is moving to propose the new market regulation framework, as summarized by the recitals to the act.

Indeed, the reform is intended to the price stabilization in the face of falling prices «to the lower safety net level» (recital 2 Reg. 261/2012).

A first piece of evidence, consisting of the low concentration of supply (size and fragmentation of farms in relation to buyers of raw materials) is identified as the cause of the «imbalance in bargaining power in the supply chain (...) that can lead to unfair commercial practices», particularly in relation to the time of the price determination: «farmers may not know at the moment of delivery what price they will receive for their milk because frequently the price is fixed much later by dairies on the basis of the added value obtained, which is often beyond the farmer's control» (recital 5 to Reg. 261/2012).

Moreover, goes on the preamble to Regulation 261/12: «There is thus a problem of price transmission along the chain, in particular as regards farm-gate prices, the level of which generally does not evolve in line with rising production costs. (...) value added in the dairy chain has become increasingly concentrated in the downstream sectors, especially dairies and retailers, with a final consumer price that is not reflected in the price paid to milk producers» (recital 6).

It can be seen, therefore, how the issue of price formation of agricultural products, related to the persistence of farms in the European territory, is a crucial topic in the legal thought about the new regulation of agri-food markets<sup>3</sup>.

Acknowledged that the dispersion of value affects the food chain in milk sector (extended to the whole Common Market organization by Reg. 1308/13) shall be identified legal instruments aimed at strengthening producers association to concentrate supply and obtain more competitive prices, as well as establishing interbranch relations between business operators and transparent contractual relations. Actually, the update of regulatory framework of contractual relationships in terms of formal transparency, it is not in itself a guarantee to reduce the abuse of buyer power, since it is the imbalance of bargaining power between enterprises

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<sup>3</sup> See L. Russo, *La sostenibilità economica delle imprese agricole tra dinamiche di mercato e rapporti contrattuali di filiera*, in *La sostenibilità in agricoltura e la riforma della PAC*, S. Masini-V. Rubino (eds), Bari, 2021, p. 91 ff.

which affects the value of the exchange<sup>4</sup>.

Indeed, the significant imbalance in bargaining power between farmers and buyers is answered in the instruments listed above, mainly by the (voluntary) establishment of groups of farmers in the form of producer organizations (PO). Indeed POs are theoretically more incisive in negotiations; however they may not, always be found to be adequate or sufficient, in any context, to determine the proper functioning of the agrifood supply chain.

Therefore, firstly in milk sector emerged the need for a European-based regulation of the functions assigned to the players involved in the supply chain, as well as the framework of contractual relations and supply contracts.

The reason that guided this path was both the need to ensure the functioning of the agricultural supply, as well to guarantee a uniform framework of supply chain relations in the interest of farmers, with the final goal to obtain a fair return from the supply of agricultural products.

All these aspects are grounded on the fundamental objectives enshrined in the Treaty, related to the need to preserve agricultural activities in the whole territory of the European Union; moreover they reappear in the farm to fork strategy outlined by the Commission in 2020 based on the establishment of «sustainable food systems».

As discussed over, such interventions are decisive in ensuring an adequate income for agricultural producers, in the light of the objectives of the CAP, defined by Art. 39 TFEU and unchanged in their enunciation since the wording of the 1957 Treaty of Rome, insofar as they aim – in the context updated to the post-2020 reform – to ensure a fair standard of living for the agricultural population, linked to increase in agricultural productivity.

It is, moreover, a perspective that increasingly tends to highlight the competitiveness of agricultural enterprises as economic players active in market dynamics, precisely because they are linked to the regulation of the supply chain, as outlined in the Common Market Organization.

After all, the objective laid down by Art. 39, «to ensure a fair standard of living for agricultural producers», can be broadly interpreted, referring

<sup>4</sup> About the opportunities and limits of the new trend, inaugurated by EU law on negotiations carried out by producer groups consult A. JANNARELLI, *L'associazionismo dei produttori agricoli e il tabù dei prezzi agricoli nella disciplina europea della concorrenza. Considerazioni critiche sul reg. n. 261 del 2012 in materia di latte e prodotti lattiero caseari*, in *Riv. Dir. Agr.*, in particular p. 191 ff. See also: I. CANFORA, *Raggiungere un equilibrio nella filiera agroalimentare. Strumenti di governo del mercato e regole contrattuali*, in *Cibo e diritto. Una prospettiva comparata*, V. Zeno Zencovich-L. Scaffardi (eds), vol. 1, Roma, p. 237 ff.



to the whole context in which agricultural production activities are located: for the aspects here discussed, it undoubtedly affects the supply chain as the place where contractual relations for the supply of agricultural products, but also the territorial sphere in which agricultural enterprises themselves are located. This perspective emerges significantly in the legislative drafting of the Directive 2019/633 on unfair trading practices in the agricultural and food supply chain, that represents the last act among the regulatory instruments related to the CAP 2014-20<sup>5</sup>.

Furthermore, the distorting effect of unfair behavior of processing and distribution agribusiness operators in the supply chain, causing detriment in particular to agricultural producers, has long been reported. In this regard it is not surprisingly that a EU Commission study summarized the development perspective of agriculture outlining the need to increase aggregations between producers as well as to correct distortions in the supply chain, with regard to the different stages of supply<sup>6</sup>.

The regulatory framework arising from the adoption of the CAP 2014-20, definitively increased the role of producers organized into groups as an integral part of the agrifood system, as proactive part of its regulative framework. Indeed, producers organizations as subjects empowered with the functioning of supply relationships governance, as far as groups of producers enhancing quality products, have been progressively assigned functions of governance of the system of supply chain relations. At the same time, new special competition rules have been defined, aimed at strengthening the bargaining power of the recognized organizations of agricultural producers<sup>7</sup>.

Indeed, the role of producer organizations is focused primarily on the purpose of increasing supply concentration functions and price bargaining; but also on the related goal to define rules of conduct that affect profiles not exclusively related to the mere supply of goods on the market: this other goal, not secondary in the functioning of the market, complete the role given to the producers organizations in the agrifood system, since it can contribute to improve the value of products and the internal organization of groups of farmers, with the effect to improve the efficiency and

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<sup>5</sup> To recap the political framework about the adoption of the Directive, read P. DE CASTRO, *La direttiva UE contro le pratiche commerciali sleali nel settore agroalimentare. Cosa cambia per le imprese e i consumatori italiani*, Bruxelles, European Parliament, 2019.

<sup>6</sup> Agricultural Markets Task Force *Improving market outcomes. Enhancing the position of farmers in the supply chain*, European Commission, November 2016.

<sup>7</sup> See Art. 152 of Regulation 1308/2013, as amended by Regulation 2017/2393, as discussed in I. CANFORA, *Organizzazione dei produttori agricoli*, in *Digesto, priv. Civ. agg.* XI, 2018, p. 355.

making them more competitive.

In this framework, the provision of interbranch organizations, as the conjunction ring between the recognized organizations of agricultural producers and the organizations of processors and/or distributors is designed to contribute to the achievement of objectives of the functioning of the supply chain, among which are highlighted, according to the amendments of Regulation 2021/2117, also the initiatives related to sustainability, becoming a justifying cause of the special discipline on competition (Art. 210bis Regulation 1308/13, introduced by Regulation 2021/2117).

Overall, the abovementioned market instruments represent the ordinary set of rules aimed at the governance of the supply chain, in accordance with CAP 2014-20 (and currently with CAP 2023-27), based on the role of business operators and on a new framework of contractual relations<sup>8</sup>.

### *3. The role of Producer Organizations in agricultural sector*

The organizations of agricultural producers (POs), subjects whose constitution is entrusted to the voluntary choice of aggregation by agricultural producers belonging to the same production sector, in a specific geographical area, play an important role in regulating the agri-food market, which can affect in the sense of strengthening the bargaining power in the formation of the price with the buyer, a processing or distribution company (Reg. 1308/13, Art. 152 ss). These are in particular the functions related to the marketing of products and the placing of production on the market, ranging from production planning, to the optimization of production costs, to the concentration of supply up to the possibility of negotiating contracts for the offer of agricultural products. Carrying out contractual negotiations on behalf of the members represents one of the key functions of the POs. It is not a binding condition for recognition – except for certain sectors (dairy, fruit and vegetables and oil and table olives) in which the concentration of supply is considered strategic. In any case, for all POs that undertake to place the products of the members on the market, the European legislation provides for some significant advantages in terms of the applicable legal rules, related to the exemption from the application of the competition rules, an essential

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<sup>8</sup> I. CANFORA, *Rapporti tra imprese e ripartizione del valore nella filiera agroalimentare*, in *Riv. Dir Alimentare*, 2022.

perspective for strengthening the role of POs as intermediaries in the agri-food chain. In fact, the POs recognized «by way of derogation from Article 101 par. 1 TFEU» can legitimately «plan production, optimize production costs, place on the market and negotiate contracts concerning the offer of agricultural products, on behalf of the members»<sup>9</sup>. The negotiation activity includes the definition of the sale price of the agricultural production of the members: circumscribing its contents and methods significantly affects the application of the general competition rules, without prejudice to the rule according to which the agreements cannot have the effect of applying identical prices (Art. 209, par. 2 Regulation 1308/13)<sup>10</sup>.

Moreover, depending on the sectors and types of market, and also in relation to individual national experiences, the role of groups is an important, although not decisive, tool for responding to the imbalance of power in negotiations on the formation of the sale price of products. In fact, the possibility to establish recognized groups is left to private autonomy, albeit encouraged by incentive legislation. So, we can expect, in the future, a wider use of such legal schemes even in Member States or regional areas less interested in their implementation until now<sup>11</sup>.

#### 4. Contractual schemes for the sale of agricultural products and price formation

Another regulatory instrument aimed at improving the functioning of the agri-food chain, introduced by the CAP reform 2014-20, is represented by the provision of a uniform regulation, at European level, of contracts for the first sale of agricultural products, as per Art. 168 of reg. (EU) 1308/13.

Indeed, the legislative choice to apply a binding contractual framework

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<sup>9</sup> Art. 152, par. 1 *bis* Regulation (EU) 1308/13.

<sup>10</sup> On which see the interpretative position of the Court of Justice in the judgment of 14 November 2017, case C-671/15. On this point, cf. A. JANNARELLI, *Dal caso "indivia" al regolamento omnibus*, *Dir agroalim.* 2018, p. 115 ff. An amendment or the declaration of nullity of agreements entered into by POs (if a violation of the competition rules is ascertained, in contrast with the objectives of agricultural policies) will produce effects only after notification to the companies, without prejudice to the effects already produced. Refer to I. CANFORA, *La cessione dei prodotti tramite le organizzazioni di produttori*, in *Trattato di diritto alimentare italiano e dell'Unione Europea*, P. Borghi-I. Canfora-A. Di Lauro-L. Russo (eds), Milano, 2021, p. 147; I. CANFORA, *Organizzazione dei produttori agricoli*, in *Digesto, priv. Civ. agg.*, XI, 2018, p. 355 ff.

<sup>11</sup> As discussed in: I. CANFORA, *La PAC 2023-2027: un nouvel équilibre dans les relations contractuelles au sein de la filière agroalimentaire*, in *Revue de droit rural*, 3/2003, dossier 17.

in all member countries has remained incomplete, for a number of reasons<sup>12</sup>.

In this regard, a consideration must be made. The rules that affect contractual transparency, in a situation where the imbalance between parties does not depend on the simple information gap on the conditions of the contractual structure, as happens for consumer contracts, have limited effects in themselves. In fact, the imbalance in the agri-food chain concerns the different power between the parties, mainly concerning the ability to support negotiations that lead to an adequate economic result, as regards the conditions of the supply contract and the profitability of the sale price.

Therefore, in the absence of provisions that actually affect the formation of prices, an issue to which we will return shortly, provisions of a formal nature, which guarantee the transparency of the contractual content, do not appear to be decisive for the underlying issue highlighted above<sup>13</sup>.

That said, the weakness of the initial regulatory framework should also be considered: the introduction of a uniform contractual scheme for all contracts for the sale of agricultural products was originally left to the choice of Member States; the obligation to standardize the content of the national legislative framework to the provisions of the European regulation occurred in the event that the State had chosen to regulate contracts for the first sale of agricultural products within the national territory. Subsequently, as a result of the 2017 CAP mid-term review, the provision was corrected by introducing the possibility, for individual agricultural producers or producer organizations, to directly enforce the obligation of form and content provided for by Article 168 of the Regulation (EU) 1308/13.

A step forward, in terms of effectiveness with respect to the need to intervene on the balance of value in the agri-food chain, was recently taken with a new amendment to the provision, provided for by Regulation (EU) 2021/2117. The regulation intervenes, albeit with caution, on the methods of forming the price and determining indicators that make the value corresponding to what can be expected from a transfer contract that meets parameters of fair remuneration for agricultural producers.

In fact, the latest version of the standard now provides that the price

<sup>12</sup> Refer to I. CANFORA, *Raggiungere un equilibrio nella filiera agroalimentare. Strumenti di governo del mercato e regole contrattuali*, in *Cibo e diritto. Una prospettiva comparata*, V. Zeno Zencovich-L. Scaffardi (eds), vol. 1, Roma, p. 237.

<sup>13</sup> On this topic, see L. COSTANTINO, *La problematica dei prezzi dei prodotti agricoli: strumenti normativi tra antichi problemi e nuove crisi*, in *Riv. Dir. agrario*, 2020, p. 783 ff.

(resulting from the written supply contract) is alternatively: fixed and established in the contract and / or «calculated by combining various factors established in the contract, which may include *objective indicators*, which can be based on prices and relevant production and market costs, as well as indices and methods of calculating the final price, which are easily accessible and understandable and which reflect changes in market conditions, quantities delivered and the quality or composition of agricultural products delivered: *such indicators can be based on relevant prices and production and market costs*; to this end, the Member States may establish the indicators, according to objective criteria and based on studies concerning production and the food chain; the contracting parties are free to refer to such indicators or to any other indicator they deem relevant» (emphasis added).

The provision reaffirms the principle of freedom in the formation of the price, specifying that it is the faculty of the parties to use or not indicators in the formation of the price and the choice of which of them to use in the transaction; just as it provides for an option – and not an obligation – for the Member States to set such indicators, with the consequence that the application of these parameters is left to a choice of internal legislative policy.

Having said that, the introduction of this provision may represent an opportunity to intervene in correcting imbalances in the distribution of value along the supply chain, not only in the interest of equitable remuneration of agricultural producers, but also in the perspective of intervening on critical factors, for example through the valorization of the costs linked to wages and duly declared work. In this regard, the link between low remuneration of the price of agricultural products and the risk of increasing illegality in employment relationships in agriculture, as highlighted most recently in the Italian National Plan against work exploitation and gang-master system (2020-2022)<sup>14</sup>, can be mentioned.

##### 5. Regulatory action to ban unfair commercial practices

The regulatory framework for business relationships in the agri-

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<sup>14</sup> Cfr. I. CANFORA-V. LECCESE, *Lavoro irregolare e agricoltura. Il Piano triennale per il contrasto allo sfruttamento lavorativo, tra diritto nazionale e regole di mercato nella nuova PAC*, in *Dir. agroalim.*, 2021, p. 39 ff.

food sector, defined by European regulations through the instruments for the functioning of the common organization of the market, finds its completion with the Directive on unfair trading practices in the agricultural and food supply chain, no. 2019/633, implemented by Italy through Legislative Decree 8 November 2021, no. 198, issued on the basis of the criteria defined by Art. 7 of the law delegation 22 April 2021, no. 53.

Indeed, if we take into account the need to intervene on the balance of relations in the supply chain – especially in a regulatory framework in which private economic actors play a decisive role in the governance of the market – the simple attention given to instruments aimed at strengthening, through the establishment of groups and the contractual rules mentioned above, the first segment of relations in the agri-food chain (agricultural enterprises–first buyer) may be insufficient on its own to correct distortions of downstream economic operators, such as large-scale organized retailers, which have a much greater economic and contractual power than even producers associations.

Price decisions are generally made by large retailers, not only regarding the price fixing to the consumer, but also regarding the price of the supply of goods. The discounts on consumer prices end up being «discharged» on economic operators who do not have the ability to impose themselves in bargaining: firstly on agricultural enterprises, as a result of organizational decisions in the relationships of the supply chain that are beyond their control, as well as small and medium-sized enterprises processing agricultural products, which are included in Directive no. 2019/633, which covers the whole context of business relations in the agri-food sector.

Directive no. 2019/633 intervened, in fact, to establish balancing rules in the market for the agri-food chain as a whole, with the aim of hitting the distortions that mainly affect agricultural producers: it is stated in recital 10 that «The protection provided by this Directive should benefit agricultural producers and natural or legal persons that supply agricultural and food products, including producer organizations, whether recognized or not, and associations of producer organizations, whether recognized or not, subject to their relative bargaining power». From the list of subjects representing the agricultural part (including the POs themselves, which up to now we have seen as the main response of European law in order to ensure a balance in the negotiations for the supply of agricultural raw materials), it therefore appears that the level of distortions that may occur in the agri-food chain, because of the presence of subjects with bargaining power such as to impose unfair conditions on economic operators upstream of agri-food production, is able to neutralize even the «ordinary» tools

introduced and implemented by Regulation no. 2013/1308 over the years.

The Directive provides for a minimum list of prohibited practices to be transposed into the laws of the Member States, some of which are still prohibited (such as: payment beyond the terms of the law, abrupt cancellations of orders, unilateral changes to the terms of the agreement, request for payments for services not related to the sale, attribution of payments for loss of products, etc.), other prohibited if they have not been the subject of negotiations between the parties (see Art. 3 of the Directive).

Since this is a minimal corrective action, Member States have been allowed to intervene in their national legislation and to introduce further cases to be prohibited *ex lege*.

This choice, although it may appear to be a desire not to impose excessive restrictions on competition, is undoubtedly an important element in the context we are examining. In fact, in addition to the list of expressly prohibited practices, the Directive provides for a uniform system of reaction to unfair practices, which requires, for example, the definition of a law enforcement authority at national level, as well as the protection of the complainant's confidentiality, to avoid commercial retaliation by economic operators sanctioned for violation of the rules.

In addition, in providing for the extension to further cases by the Member States, if they are compatible with the rules relating to the functioning of the internal market, Art. 9 par. 2 allows to prohibit at national level specific unfair commercial practices that may be more or less relevant depending on the market areas in the European Union.

Such a rule represents an important opportunity for States, which leads them to identify specific situations in national markets and to adapt their law enforcement tools to national reality, allowing stricter national rules (provided they are compatible with the functioning of the internal market) to be maintained or introduced.

If we look at the Italian experience, in fact, it is immediately evident that the choice of the national legislator has been oriented towards adopting specific and additional provisions that have an immediate impact on the economic balance in the sector, aimed at counteracting the dispersion of value to the detriment of weaker companies in the chain of contractual relations.

In the Italian experience, as far as the case is concerned, if we examine the text of the delegated law and the subsequent D. Lgs. no. 2021/198 that has implemented it, the innovations introduced at national level are in fact the prohibition of double-down auctions, the classification of sales below production costs as an unfair commercial practice and the introduction of specific rules on sales below cost in the food sector: cases corresponding to



recurrent practices which had been denounced by several parties at national level and which, not surprisingly, have a direct impact on price formation and therefore on the distribution of value in the sector<sup>15</sup>.

In particular, the definition, among unfair trading practices, of the sale of agricultural and food products at prices below production costs – as species of the genus of unfair practices consisting in imposing contractual conditions that are excessively burdensome for the seller – refers, together, to the need for a transparent determination of production costs, as well as the identification, at national level of average production costs: aspect, the latter, which in Italy is entrusted to ISMEA (“Istituto di Servizi per il Mercato Agricolo Alimentare”) and which acts as a parameter in assessing the violation of the prohibition<sup>16</sup>.

In this regard, it is appropriate to stress the importance of these aspects in the balance of contractual relations. Indeed, the consideration of production costs related to the fair price is referred to both as a criterion for determining the price clause at the stage of the negotiations, in the aforementioned amendment of Art. 168 of Regulation no. 2013/1308 (directly applicable in our legal system), as well as an element useful to qualify unfair conduct of business operators in the agrifood chain (for the purpose of art 5 lett. b, Legs. Decree 2021/198).

As for the definition of the law enforcement authority, the choice to concentrate in the *Ispettorato centrale qualità repressione frodi* (ICQRF) of *Ministero dell'agricoltura, della sovranità alimentare e delle foreste* all the functions of intervention against unfair commercial practices in the agricultural and food sector, as a designated law enforcement authority at national level (Art. 8, D. Lgs. 2021/198) is reflected in the choice to carve out a new space for the competition rules of the agri-food sector. This is in line with the choice made by the European Union Directive, based on Art. 43 TFEU<sup>17</sup>, that outline the peculiarity of the functioning of agricultural

<sup>15</sup> For a more precise analysis of d.lgs. no. 2021/198, see I. CANFORA-V. LECCESE, *Pratiche sleali, equilibrio del valore e legalità dei rapporti di lavoro nella filiera agroalimentare*, in *Dir. Lav. Rel. Ind.*, 2022, p. 135 ff.

<sup>16</sup> I. CANFORA-V. LECCESE, *Pratiche sleali, equilibrio del valore e legalità dei rapporti di lavoro nella filiera agroalimentare*, cit., p. 146. Regarding the relevance of the price determination and the criteria for setting average production prices, following the first definition of average production cost, in accordance to Art. 10-*quater* of l. no. 2019/44, A. JANNARELLI, *Prezzi dei prodotti agricoli nei rapporti di filiera e rispetto dei costi medi di produzione tra illusioni ottiche ed effettiva regolazione del mercato*, in *Riv. Dir. Agr.*, 2019, p. 559.

<sup>17</sup> See F. ALBISINNI, *La Direttiva (UE) 2019/633 tra PAC e mercati*, in *Riv. Dir. Alim.* 2021, p. 7



and food markets, by adopting regulatory measures against unfair acts of business operators affecting the entire agri-food sector.

#### *6. Intervention on prices and market balance in the implementation of Member States*

The measures aimed at a fair distribution of value which affect price formation do not therefore deny private autonomy in the free determination of the content of the contract, so far as they are intended to adapt the market balance or to correct abuses in terms of the economic value of trade, in situations of structural inequality between the parties in the contractual relations<sup>18</sup>.

Even before the entry into force of Directive no. 2019/633, this aspect was also clarified by the Court of Justice with the judgment of 13 September 2019 that dealt with Lithuanian antitrust law, to protect farmers in price formation<sup>19</sup>. The Lithuanian national legislation introduced measures aimed at modulating the setting of prices in the milk sector in order to combat unfair practices by purchasers who imposed lower purchase prices on farmers, unable to engage in effective negotiations in the supply of raw milk, for reasons of size and also for the concrete difficulty of aggregating in groups: in this situation, the price negotiation process did not appear to be developing in the free play of competition, but was imposed by dominant buyers who took advantage of the fragmentation of producers and product characteristics, highly perishable, to impose excessively low purchase prices. Indeed, as the Court of Justice states, the principle of free pricing applies under conditions of effective competition; if, on the other hand, situations of imbalance arise, Member States are also entitled to intervene by means of provisions which may influence the functioning of the internal market, provided that such measures are appropriate to ensure the objective and do

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<sup>18</sup> See S. MASINI, *L'abuso nella contrattazione di impresa nella filiera agroalimentare*, in *Dir. Agroalimentare*, 2019, p. 259 ff.; I.CANFORA, *Le pratiche commerciali sleali nella filiera agroalimentare alla luce della giurisprudenza della Corte di Giustizia dell'UE*, in *Dir. agroalimentare*, 2023, p. 43.

<sup>19</sup> EU Court of Justice, 13 November 2019, C-2/18, *Lietuvos Respublikos Seimo*. Regarding the judgement, see the observations of S. PAGLIANTINI, *Dal B2C al B2B: una prima lettura della dir. (UE) 2019/633 tra diritto vigente e in fieri*, in *Nuove leggi civ. comm.*, 2020, p. 220 ff.

not exceed what is necessary to achieve it<sup>20</sup>.

Similarly, our *Autorità Garante della Concorrenza e del Mercato* (ACGM), in a case involving recurrent unfair practices in the milk market for the production of Pecorino Romano cheese, also prohibited practices which resulted in the payment of below-cost prices to agricultural producers. This against a market contingency that evidenced an imbalance in the system of the chain, with immediate repercussions on the profitability of prices, with reference to the same coverage of production costs by farmers<sup>21</sup>.

The imbalance in value may indeed depend on contingent situations, as evidenced by the intervention on the crisis of national PDO production, but also practices rooted in certain market segments.

It is clear, anyway, that circumstances which complement the criteria of unfair practices are more easily identifiable and codifiable as prohibited practices at a national level, with regard to the types of situations encountered in market practice and which are brought about by economic operators, situations that would be complex to identify and to regulate in a uniform way at Union level.

Therefore, the real disruptive factor of Directive no. 2019/633 is given by Art. 9, which provides for the adoption of stricter rules and a catalogue of further prohibited practices to enhance the functions of the institutional structures specifically identified in implementation of the Directive. This provision, in the context of a dialogue between national experiences, could lead to a gradual widening of cases, both at national and European level, also in view of the transnational nature of trade in the agri-food markets.

<sup>20</sup> Principle thus reaffirmed in the subsequent judgment of Court of Justice of the European Union, 11 March 2021, in Case C-400/19, *European Commission/Hungary*, paragraphs 36 and 37: «In that regard, it should be noted at the outset that, although the Commission does not allege infringement of a specific provision of Regulation No 1308/2013, but infringement of that regulation as a whole, the fact remains that, in the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of that regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraph 37 and the case-law cited). However, the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, provided that those rules are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (see, to that effect, judgment of 13 November 2019, *Lietuvos Respublikos Seimo narių grupė*, C-2/18, EU:C:2019:962, paragraphs 30 and 56, and the case-law cited)».

<sup>21</sup> ACGM, AL21 – *Prezzi del latte in Sardegna, Provvedimento* n. 27805 of 12 June 2019.

Nor is it to be assumed that such a rule would lose the unity of the vision of the agri-food market.

As has been said, in fact, situations of market imbalance can come to the attention of law enforcement authorities, in particular economic areas evaluated at national level, within the framework outlined by Directive no. 633/2019. Moreover, the national importance of the market also emerges in the provisions of Regulation no. 2013/1308 as amended by Regulation no. 2021/2117, which recalls criteria for pricing in first-sale contracts based on relevant production and market prices and costs, to be determined by the Member States.

Proper price formation and value balance in the agri-food chain therefore become the subject of a growing plurality of interventions, in the future organization of the agri-food market: they are important aspects of the public interest in the face of a structural imbalance, which threatens to produce distortions both to the detriment of the weakest operators, and ultimately of the operation of the production chain in its complexity, not being able to renounce to a fair and sustainable organization of the agri-food chain that requires the presence of productive agricultural enterprises in the European territory.

Raffaele Torino

*Bargaining power and unfair trading practices  
in the agri-food chain*

SUMMARY: 1. Introduction – 2. The so-called european «staggered mechanism» and the presumption of bargaining power imbalance – 3. Objectively unfair trading practices, unfair trading practices if not agreed upon and unfair trading practices as imposed – 3.1. Objectively unfair trading practices – 3.2. Unfair trading practices if not agreed upon – 3.3. Unfair trading practices as imposed – 4. Final remarks.

1. *Introduction*

The Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (hereinafter referred to as the 'Dir. 2019/633') is explicitly intended to «*combating practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another*» (art. 1, par. 1).

According to the EU legislators' position, on the basis that «*[w]ithin the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence*» (recital n. 1), «*[t]hose imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction*» (recital n. 1). EU legislators intend to combat such unfair business practices as these «*are likely to have a negative impact on the living standards of the agricultural community*» (recital n. 1).

In basic terms, in order to safeguard and support the standard of living of the agricultural community, Dir. 2019/633 prohibits those unfair trading practices identified by the same directive and regarded to have as a genetic

requirement a difference in bargaining power between the supplier (who is presumed to have less bargaining power than his counterpart) and the buyer.

For the EU Legislators, the assumption of a discrepancy in bargaining power between the supplier and the buyer is an essential element of an unfair trading practice.

Indeed, recital 9 expressly states: *«The number and size of operators vary across the different stages of the agricultural and food supply chain. Differences in bargaining power, which correspond to the economic dependence of the supplier on the buyer, are likely to lead to larger operators imposing unfair trading practices on smaller operators. A dynamic approach, which is based on the relative size of the supplier and the buyer in terms of annual turnover, should provide better protection against unfair trading practices for those operators who need it most. Unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain. Enterprises larger than SMEs but with an annual turnover not exceeding EUR 350 000 000 should also be protected against unfair trading practices to avoid the costs of such practices being passed on to agricultural producers. The cascading effect on agricultural producers appears to be particularly significant for enterprises with an annual turnover of up to EUR 350 000 000. The protection of intermediary suppliers of agricultural and food products, including processed products, can also serve to avoid the diversion of trade away from agricultural producers and their associations which produce processed products to non-protected suppliers».*

From this assumption derives a European discipline that requires, as an essential element for the application of the directive itself, a significant difference in economic size between the seller and the buyer of the agri-food product, which must be on the lower and upper ends of a given yearly turnover threshold (2, 10, 50, 150, and 350 millions), introducing a so-called *«staggered mechanism»*.

By making use of the option to maintain or introduce national rules stricter than the European rules, as allowed by Article 9 of the Directive, in implementing the Directive into the Italian legal system, the Italian legislator has decided to make no distinction and to apply the provision of Legislative Decree 198/2021 to all commercial relations of the agri-food supply chain, without requiring a different economic dimension between seller and buyer and, presumably, a different negotiating power.

In light of the above, the purpose of this essay is to determine whether the Italian legislator's decision to eliminate the so-called *«staggered mechanism»* renders irrelevant the different economic size and bargaining power of the two parties in a commercial relationship, or whether the assessment

of such profiles nevertheless finds a way to influence the application and interpretation of the Italian implementing legislation, at least in certain hypotheses.

Therefore, I will examine the so-called «*staggered mechanism*» outlined in the European directive, including its characteristics and potential limitations (par. 2); examine in detail the cases of unfair trading practices contemplated by the Italian implementing regulation in order to identify, where applicable, any general or specific reference that highlights – for the purposes of the prohibition – the different economic dimensions and bargaining power of the various parties in the commercial relationship (par. 3 et seq.); and provide some final remarks regarding a possible improved Italian discipline interpretation (par. 4).

## *2. The so-called european «staggered mechanism» and the presumption of bargaining power imbalance*

Article 1, paragraph 2, of the Directive states the following in determining the scope of the European directive based on the evaluations outlined in Recital 9:

*«This Directive applies to certain unfair trading practices which occur in relation to sales of agricultural and food products by:*

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

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

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

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

*suppliers which have an annual turnover of more than EUR 150 000 000 and not exceeding EUR 350 000 000 to buyers which have an annual turnover of more than EUR 350 000 000».*

In a nutshell, a trading practice can be deemed unfair in accordance

with the European directive only if the provider and customer demonstrate a disparity in their respective turnovers. Specifically, given the turnover stagger in which the supplier is placed (e.g., the second stagger provides for a supplier's turnover between EUR 2 million and EUR 10 million), the buyer's turnover must exceed the upper limit of the supplier's stagger (i.e., EUR 10 million in the example) in order to apply the directive.

According to the apparent reasoning of the European legislator, recital 14<sup>1</sup> establishes that the aforementioned gap in revenues is regarded as adequate proof of different and substantial negotiating power.

However, it should be noted that the directive's «*staggered mechanism*» appears to be unduly rigid, mechanical, and not always adapted to fulfilling the directive's objective of targeting commercial relationships in which significant differences in bargaining power may lead to abuse.

First, the mechanism is designed so that the closer the supplier's and buyer's turnovers are, the less (assuming the turnover equals bargaining power equation is valid) the application of the directive is consistent with the stated objective, resulting in the Directive's application when the «*economic size*» of the two parties to the commercial relationship is nearly identical or very close. I will just present one example: the Directive applies even if the supplier has a turnover of 9.999.000,00 euros and the buyer has a turnover of 10.000.001,00 euros. In these instances, it is evident that the turnover cannot be used as a trustworthy indicator (the EU legislators use – Whereas 14 – the term «*suitable approximation*») of a different negotiating power.

Second, the mechanism does not appear to be less stringent when it eliminates the application of the Directive if the supplier and buyer are in the same staggered but have significantly different annual turnover. Let me give you another example: the directive does not apply if the supplier's turnover is 150 million euros plus 1,00 euro and the buyer's turnover is euros 349.999.999,00. Contrary to the apparent intent of the EU legislators, in this instance a difference of 200 million euros would not be considered to indicate a considerable disparity in negotiation power.

Consequently, as a preliminary conclusion, I share the concerns over the

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<sup>1</sup> Recital n. 14 states: «*This Directive should apply to the business conduct of larger operators towards operators who have less bargaining power. A suitable approximation for relative bargaining power is the annual turnover of the different operators. While being an approximation, this criterion gives operators predictability concerning their rights and obligations under this Directive. An upper limit should prevent protection from being afforded to operators who are not vulnerable or are significantly less vulnerable than their smaller partners or competitors. Therefore, this Directive establishes turnover-based categories of operators according to which protection is afforded.*».



aforementioned «*staggered mechanism*» established by the EU legislators, as well as the relief that it has not been applied in Italian law, due in part to my personal aversion to mechanistic and merely algebraic legal solutions, which do not allow the legal rule (*ius positum*) to adapt to the concrete reality of the facts (properly subsumed and within the limits granted by the legal system) and to be implemented taking into account features that are typically ambiguous and cannot be framed in precise mathematical terms. The measuring of turnover (and the mere comparison of numerical data) for the purpose of opposing the (potential) illegal prevarication of one entrepreneur over another is, in my opinion, a striking indication of the death of the legal rule's vital capacity to adapt (in order to be correctly applied in accordance with its underlying rationale) to the particular case.

### 3. Objectively unfair trading practices, unfair trading practices if not agreed upon and unfair trading practices as imposed

Legislative Decree 198 of 2021 (which implemented Dir. 2019/633 in Italy) states that it lays down provisions for regulating business relationships and combating unfair trading practices between buyers and suppliers of agricultural and food products, defining the prohibited trading practices as contrary to good faith and fair dealing and unilaterally imposed by one trading partner on another, rationalising and strengthening the existing legal framework towards greater protection of suppliers and operators active in the agricultural and food supply chain in relation to the aforementioned practices (Art. 1, par. 1)<sup>2</sup>.

The trading practices listed in Articles 3 (Principles and essential elements of sales contracts), 4 (Unfair trading practices), and 5 (Other unfair trading practices) are therefore prohibited under Legislative Decree 198 of 2021 if they a) violate the principles of good faith and fair dealing and b) are unilaterally imposed by a contracting party on its counterparty.

Leaving aside the question of whether the lists and cases referenced

<sup>2</sup> The Italian original text is the following one: «*Il presente decreto reca disposizioni per la disciplina delle relazioni commerciali e per il contrasto delle pratiche commerciali sleali nelle relazioni tra acquirenti e fornitori di prodotti agricoli ed alimentari, definendo le pratiche commerciali vietate in quanto contrarie ai principi di buona fede e correttezza ed imposte unilateralmente da un contraente alla sua controparte, razionalizzando e rafforzando il quadro giuridico vigente nella direzione della maggiore tutela dei fornitori e degli operatori della filiera agricola e alimentare rispetto alle suddette pratiche*».



in Articles 3 to 5 of Legislative Decree 198/2021 are exhaustive or not, it must be assumed that the lists and cases referenced in the aforementioned articles of the Italian legislative decree have been identified to facilitate interpretation by providing a number of predefined cases in which the trading practice may be regarded as contrary to good faith and fair dealing (nonetheless, some of these cases are so «open» that the interpreter must examine them from the standpoint of breach of good faith and fair dealing).

Beyond the objective content of the unfair trading practice (which is fairly well defined by the Italian legislature), the question remains as to whether the trading practices affected by unfairness and, therefore, prohibited and sanctioned, must also be characterized by a specific genetic mode, i.e. the unilateral imposition of one party on the other or, at the very least, the ability of one party to (unilaterally<sup>3</sup>) impose itself on the other

To address this question, it is necessary to analyse and understand the relationship that our legislator intended to establish between Article 1 of Legislative Decree 198/2021, which defines prohibited trading practices as those «*unilaterally imposed by a contracting party on its counterparty*», and Articles 4 and 5 (although, sound reasons can suggest that the evaluation should also include Article 3), which provide lists of prohibited trading practices without reference to one party's ability to impose itself on the other. In other words, one wonders whether the imposition of the unfair trading practice (which frequently takes the form of a specific contractual phrase or a specific action in the performance of the contract) is a prerequisite for the application of the Articles 4 and 5 lists; thus, before any of the practices on the aforementioned lists could be deemed unfair and prohibited, it would be essential to examine and identify the presence of this prerequisite.

In this regard, whereas with regard to the repealed Article 62 of the Decree-Law of 24 January 2012, regulating the matter before the implementation of the Dir. 2019/633, the position of the legislator and the supervisory authority was clear in requiring greater commercial strength, Legislative Decree 198/2021 is silent, so it is up to the interpreter to determine the relationship between Article 1's general requirements and the listings in Articles 4 and 5.

To comprehend their core and rationale, I deem it necessary to analyse in depth the numerous cases of unfair trading practices identified by Italian law.

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<sup>3</sup> I employ the adverb «*unilaterally*» one last time since I believe the imposition can only be unilateral and, therefore, the Italian legislator's use of the adverb seems unnecessary.

### 3.1. *Objectively unfair trading practices*

As previously mentioned, despite the language provisions of Article 1, Legislative Decree 198/2021 identifies and deems unlawful a number of unfair trading practices from a purely objective standpoint, without permitting an evaluation of the negotiating power relationship between the parties and without any agreement from the parties establishing the legality of such practices.

First, according to Article 3 of Legislative Decree 198/2021, the oral conclusion of sales agreements, the absence of a written agreement prior to the transfer of products, the omission of key terms in the sales contract, and the duration of sales contracts lasting less than one year are unquestionably unlawful.

Second, any objectively specified and identified trading practices referred to in Paragraph 1 of Article 4 of Legislative Decree 198/2021 (such as inability to meet specified payment deadlines or certain conducts typically attributed to the agri-food products purchaser), for which the legislator does not appear to require a specific strength-weakness relationship between the parties, must be considered unlawful (and sanctioned).

Certain trading practices objectively identified in Article 5 of Legislative Decree 198/2021 are prohibited (and sanctioned) as well. Specifically, these are the practices mentioned under a, b (with particular reference to the sale of agricultural and food products below production costs), c, j, and k. In each of these instances, the restriction appears to exist on the basis of the business practice's sheer occurrence.

Article 5 of Legislative Decree 198/2021 also prohibits other trading practices that may only be objectively determined, albeit with less clear interpretative and applicability boundaries. I am referring to the prohibition of:

- a) applying objectively dissimilar conditions to identical services (sub-paragraph e), Article 5 of Legislative Decree 198/2021);
- b) conditioning the conclusion and execution of contracts as well as the regularity of commercial relations to the performance of contractors that, by their nature and according to commercial usage, have no connection to the subject matter of each other (sub-paragraph f), Article 5 of Legislative Decree 198/2021);
- c) obtaining unilateral advantages that are not warranted by the nature or content of the commercial relationships (sub-paragraph g), Article 5 of Legislative Decree 198/2021).

Since it is evident that, with respect to the aforementioned collection of practices, no consideration is given to whether or not one party imposed the practice on the other (without regard to the parties' potential differences in negotiating power), it is reasonable to assume that all of these practices share the legislator's prior and conclusive (irreversible) view that they violate the norms of (objective) good faith and fairness that the law imposes as a prerequisite for the formation of a contractual relationship and its performance.

The mechanics of the legislative stigma with which such business practices are definitely and irretrievably branded renders them of little consequence with respect to the analysis of the rationale behind the prohibition as it exists in the Italian legal system.

### *3.2. Unfair trading practices if not agreed upon*

From the perspective of comprehending the rationale behind the prohibition of certain trading practices, it is more interesting to consider those trading practices in which the agreement between supplier and purchaser renders valid certain conducts that the legislator would otherwise deem unfair.

In fact, in addition to objectively unfair practices mentioned in the Directive (Article 3, paragraph 2), the Legislative Decree 198/2021 also identifies certain trading practices whose validity is «saved» by the parties' agreement despite being abstractly unfair. These are the trading practices described in Article 4(4) that, if previously agreed upon by the supplier and customer in clear and unambiguous terms, cannot be considered unfair and are therefore neither prohibited or sanctioned.

Regarding these practices, the Italian legislator (as well as the European legislators) accords significance to the parties' common will, which is formalized in the agreement, and retrieves one of the two profiles that, according to Article 1 of Legislative Decree 198/2021, represent unfair trading practices: the imposition of the trading practice. Indeed, the parties' agreement must be construed in a substantial and not only formal meaning. Moreover, upon closer analysis, given that all of these practices involve a request by the buyer and an adherence by the supplier (which may suffer a greater financial burden as a result of the practice he agrees to), the mutual agreement between the parties finally results in the supplier's ability to make the practice fair or unfair based on its voluntary and unquestionable assent.

Now, as a reasonable supplier would not agree to a trading practice

that (when evaluated individually) would amount to nothing more than a financial burden for him, a supplier-buyer agreement regarding such practices could only be reached if the buyer proposes a contractual condition to the supplier (e.g. a higher price, a larger commitment to purchase, etc.) that guarantees the supplier to be fully compensated (at least in theory) for the additional economic burden that he/she will have to bear.

There is, of course, the possibility that a particularly powerful buyer (in terms of bargaining power) could effectively compel the supplier to give his/her consent; for instance, by convincing the supplier that any future (or other) commercial relationship with the buyer (who may be a buyer of paramount importance to the supplier, verging on indispensability for the supplier's company survival) would be severed if the unwanted condition is not accepted.

Nevertheless, in my opinion, even in the aforementioned instance (in accordance with the general principles of the law), the burden of proving the imposition of an unfair trading practice will always rest with the supplier, in conformity with the customary principles and procedures of evidence. In this regard, given that the Italian legislator did not want to replicate the European «*staggered mechanism*» that emphasized the different economic power of the parties, it seems illogical to assert that a buyer's strong bargaining power would automatically lead to the imposition of the trading practice. In other words, a reversal of the burden of proof appears inadmissible in the case of a trading practice that has been previously defined in writing using clear and unambiguous terms; the party claiming its consent was coerced must demonstrate the form and manner of the compulsion that led to the imposition of the practice.

### 3.3. *Unfair trading practices as imposed*

A third category of prohibited trading practices can be enucleated by examining the hypotheses in which the Italian legislature, by expanding the number of unfair trading practices considered by the Directive, demands an extra criterion regarding the relationship between the supplier and buyer of agri-food products to determine unfairness: the imposition of the practice (i.e., of the contractual clause) by one party on the other party.

- In particular, Article 5 of Legislative Decree 198/2021 provides that:
- a) in one instance (letter b), the imposition should be to the seller/supplier's detriment;

- b) in other instances (letters m, n, o, and p), the imposition should be to the purchaser's detriment;
- c) in three instances (letters d, i, and l), the imposition may be equally detrimental to the supplier or the buyer.

In these instances, since the unilateral imposition of the trading practice is a defining characteristic of the trading practice's unfairness (consequently, if there were no imposition, the trading practice would not be unfair), the precise content of this characteristic must be defined.

According to one of the most popular Italian dictionaries, the verb 'impose' means to rule or to command, by virtue of a legal or moral authority or an acquired position of strength, sometimes with a more or less explicit sense of constraint or overwhelming<sup>4</sup>.

Therefore, imposition requires a dominant position of one contracting party over the other. In other words, imposition requires that one party has a status (in the sense of a *de facto* condition) that enables such party to impose its will on the weaker party in the event of a conflict (i.e., when a party does not freely agree to a particular contractual provision or business partnership stipulation), leaving the weaker party with the following options: accept the proposed contractual condition or be forced to reject the contract and the commercial relationship.

The '*de facto* condition' that places one party in a 'position of strength' or a specific 'position of weakness' relative to the other party is variable and oscillates between two extremes that must be evaluated in light of precise and particular circumstances.

At one extreme is the inevitable necessity for one party (the 'weaker party') to establish a certain contractual and commercial relationship that enables it to attain (otherwise unattainable) objectives. In the context of the agri-food chain, for example, the producer of fruit and vegetable food must sell his harvest before it spoils and becomes unsellable, resulting in the irretrievable loss of economic resources employed to generate the harvest. In a similar fashion, it is essential for the operator in the chain to stock those «must-have» food products in the store, as they are essential to the spending of virtually every consumer. Otherwise, the consumer will immediately turn to a competing operator, resulting in the progressive loss of customers and the eventual closure of the business.

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<sup>4</sup> G. DEVOTO, G.C. OLI, *Il dizionario della lingua italiana*, ed. 2000-2001, Firenze, 2000, p. 997. The Italian definition in the dictionary is the following one: «prescrivere o comandare, in virtù di un'autorità giuridica o morale o di un'acquisita posizione di forza [...] talvolta con un senso più o meno esplicito di costrizione o sopraffazione».

At the opposite extreme is the party's lack of need to enter into a particular and specific contractual and commercial relationship in order to achieve its objectives, which it may do through other alternative contractual and commercial relationships. Continuing with the examples from the preceding paragraph, such is the situation for the producer of fruit and vegetable food who has many and differentiated options for selling his products, allowing him to theoretically pick between several purchasers based on the contractual and economic connection that best suits his preferences (economic and contractual in general); similarly, the purchaser of fruit and vegetable foods has the capacity to select from a number of producers of his preferred food, all of whom are theoretically willing to offer him their products.

In most cases the relationship between the supplier and the buyer (and their conflicting interests and needs) will fall somewhere between the two extremes described above. Thus, a concrete and careful analysis is required to determine which of the two parties has the real and effective power to impose itself on the other and to «wrest» acceptance of the trading practice (of the contractual clause) that is in theory unfair to the other party.

Regarding the first profile, I believe that the assessment of the bargaining power relationship (and, consequently, the ability of one party to impose itself) cannot be reduced to a simple numerical comparison of the two parties' respective turnovers. Rather, as previously indicated, it will be important to determine globally (and not mechanically) which of the supplier and the buyer has the greatest need and urgency to enter the commercial partnership in order to sell or acquire the agri-food products, leaving him unable to negotiate and ultimately unable to reject the contractual clause as presented by the other party.

Regarding the second profile, it should not be forgotten that a clause that objectively falls under the unfair trading practice at issue here (e.g., an apparently unjustifiably onerous contractual condition, theoretically prohibited under Article 5(d) of Legislative Decree 198/2021) may not have been imposed, but properly signify the mere concession of one party to the other in exchange for another contractual condition favourable to the former, which thus achieves the perfect contractual balance.

#### 4. *Final remarks*

Despite what is stated in the provision governing the scope of application of Legislative Decree 198/2021 (the imposition of the unfair trading practice or, at the very least, the capacity of one party to impose itself on the other), the Italian law creates a split in the fight against unfair trading practices, in my opinion and in light of the direction the actual application of the rule appears to be taking.

The mentioned split occurs between trading practices that can be defined as «*objectively unfair*» and trading practices that can be defined as «*subjectively unfair*».

Former practices are prohibited regardless of the relative negotiating power of the parties and, hence, regardless of the imposition of terms or manner of the commercial partnership by one party on the other (see paragraph 3.1). The second category of unfair business practices are those in which one party (due to its dominant negotiation position and overwhelming bargaining power) imposes itself on the other party (see paragraph 3.3) compelling this party to accept undesirable clauses and/or modalities of the contractual relationship. I believe this second category should also include those trading practices whose possible unfairness is neutralized by the parties' agreement (see paragraph 3.2).

According to this reconstruction, therefore the interpretation that the unilateral imposition is not a 'constitutive fact' (but rather an 'impeditive fact') of the unfair trading practice has to be rejected; also rejecting the conclusion that the burden of proving that any unfair commercial practice has not been imposed would definitively be on the buyer<sup>5</sup>. Actually, if this interpretation can be accepted respect to the practices I have identified as «*objectively unfair*», it appears to lack sufficient grounds with respect to «*subjectively unfair*» practices. Indeed such interpretation disregards the Italian regulation's textual data and the rationale of the European and implementing Italian regulation. Regarding these latter practices, in my

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<sup>5</sup> According to an Italian scholar (S. Pagliantini, *L'attuazione della direttiva 2019/633/UE e la toolbox del civilista*, in *NLCC*, 2/2022, 397-398) «scartata la differenza dei fatturati [...] nell'economia dell'art. 1, insomma, la dipendenza economica dell'impresa vessata, eletta a fatto costitutivo, nell'art. 9 L. n. 192/98, non è un co-elemento di applicabilità per la ragione che l'impresa subalterna è tutelata quantunque non versi in un difetto di alternative economiche soddisfacenti [...] il d.lgs. n. 198/21 non fa quindi dell'imposizione unilaterale un fatto costitutivo bensì impeditivo, con il risultato che è la GDO ad avere l'onere di fornire la prova che il venditore, o per la quantità dei prodotti forniti o per il suo potere economico, era nella condizione di negoziare e di ottenere la soppressione delle clausole inique».

opinion the party asserting the unfairness of the trading practice must continue to carry the burden of proving that it has been subjected to the imposition by producing sufficient factual and/or legal evidence.





Lorenzo Bairati

*Contractual governance in global food systems\**

SUMMARY: 1. Introduction – 2. Transnational private governance: drivers and trends – 3. Regulating and regulated actors in food governance by contract – 4. Impact and consequences of food governance by contract from a comparative law perspective – 5. Conclusions.

1. *Introduction*

Food law is becoming more and more a matter for private law experts. In fact, it is increasingly being shaped by private and hybrid non-state actors, thus making private law sources a fundamental component in this sector<sup>1</sup>. Indeed, the vast number of food governance sources, which includes standards, codes of conduct, criteria, guidelines, policies and rulebooks, has reached such a level that it cannot be overlooked when studying comparative and global food law.

These sources have proliferated primarily as a consequence of the globalization of food chains. They are used by the entirety of downstream supply chain businesses, are imposed on those operating at its beginning (e.g. raw material producers), are characterized by a quality management system approach via third party audits to certify conformity and, finally, are communicated to consumers.

In this context, in order to enforce such pervasive standards governing quality, safety, labor, and environmental practices, a fundamental role is played by contracts, by which providers upstream the supply chain are

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<sup>1</sup> B. VAN DER MEULEN, *Private food law. The emergence of a concept*, in B. Van Der Meulen (ed), *Private food law. Governing food chains through contract law, self-regulation, private standards, audits and certification schemes*, Wageningen Academic Publishers, Wageningen, 2011, (pp. 29-50), p. 32.

bound to comply with the terms and conditions imposed by large distribution corporations. Consequently, the food sector is more and more regulated through bargaining and mutual agreements between private actors than through hierarchical structures of command and control; or, to put it more simply, contracts have been gaining more and more importance in food systems governance<sup>2</sup>.

This essay aims to examine this issue by focusing on the use of transnational commercial contracts as regulatory instruments in the global food sector. Section 1 will analyze their scope by focusing on the drivers for the proliferation of such sources and by considering their evolution both in terms of quantity and quality at the global level. Section 2 will consider the perspectives of the different actors involved in contractual agreements and will point out criticisms concerning their application in the food sector. Section 3 will highlight several insights regarding global governance by contract, the use of commercial contracts as proxies for legal change and global homogenization, and the power imbalance within food chains also as it relates to the newly adopted Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. Conclusions will address the issue of power and authority within global governance by contract and on the perspectives of both private and public strategies in pursuing sustainability goals.

## *2. Transnational private governance: drivers and trends*

Scholarly enquiries on transnational law have abundantly explored the phenomena of interface, intersection or transection between both public and private and national and international sources and levels, pointing out their proliferation throughout a wide variety of sectors, such as textiles, apparel, forestry, agricultural, electronics and others<sup>3</sup>. At the same time,

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<sup>2</sup> A.C. CUTLER-T. DIETZ, *The politics of private transnational governance by contract: Introduction and analytical framework*, in A.C. Cutler-T. Dietz (ed), *The Politics of Private Transnational Governance by Contract*, Routledge, London and New York, 2017, (pp. 1-36), p. 9.

<sup>3</sup> On self-regulation and transnational law in the food sector, see P. Verbruggen-T. Havinga (ed), *Hybridization of Food Governance. Trend, Types and Results*, Edward Elgar, Cheltenham, UK; Northampton, MA, 2017; F. CAFAGGI, *Transnational Governance by Contract: Private Regulation and Contractual Networks in Food Safety*, in A. Marx-M

this development has continued to evolve in quantity, scope and function, addressing a wide spectrum of values and needs used to differentiate products and create market segmentation. However, in this respect, the food sector has its own specific features. In fact, in this field the phenomenon is especially apparent as a consequence not only of the globalization of food systems, but also of the interaction between different players and of the wide-reaching implications of decisions and problems related to food production, marketing, and consumption in terms of safety, public health, sustainability, and so on.

In this regard, several drivers for the emergence of such forms of regulation (primarily transnational commercial contracts incorporating standards) have been identified. They are, first of all, a consequence of the rapid increase in cross-border trade in goods and services that, over the past decades, have enabled firms at the end of the supply chain to manage compliance and control liability risks while at the same time shifting the costs of ensuring and monitoring quality to businesses higher up the chain<sup>4</sup>. Another reason for their proliferation is that they are a highly efficient method of pursuing goals in the food safety sector, where public regulation (and monitoring) has lacked public trust<sup>5</sup>. In fact, more than other industries, food businesses try to establish a trust-based relationship with consumers due to the highly sensitive and emotional relationship between consumers and food, which does not have any equivalent with other goods. Additionally, from the perspective of law and economics, self-regulation has important advantages in terms of higher stakeholder expertise, lower organizational and administrative costs, higher motivation of the stakeholders to comply with such norms

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Maertens-J. Swinnen-J. Wouters (eds), *Private Standards and Global Governance*, Edward Elgar, Cheltenham, UK; Northampton, MA; 2012, (pp. 195); N. HACHEZ, J. WOUTERS, *A Glimpse at the Democratic Legitimacy of Private Standards - Democratic Legitimacy as Public Accountability: The Case of GLOBALG.A.P.*, in *Journal of International Economic Law*, 17, 3, 2011, (pp. 677-710).

<sup>4</sup> P. VERBRUGGEN, *Private Regulatory Standards in Commercial Contracts: Questions of Compliance*, in R. Brownsword-R. Van Gestel-H.W. Micklitz (eds), *Contract and regulation: A handbook on new methods of law making in private law*, Edward Elgar Publishing, Cheltenham, UK; Northampton, MA, 2017, (pp. 284-322), p. 290.

<sup>5</sup> For example, private entities employ private standards, certification protocols, third-party auditing and transnational contracting practices in the food safety sector, e.g. implementing the HACCP system or pesticide codes of conduct. See C.F. LIN, *The Emergence and Influence of Transnational Private Regulation of Food Safety*, in S. Halabi (ed), *Food and Drug Regulation in an Era of Globalized Markets*, Academic Press, London, 2015, (pp. 183-203), p. 186.

and standards, and so on<sup>6</sup>.

The proliferation of this form of regulation has gained additional support particularly where the concept of food quality has been enriched with attributes of sustainability which, according to one of the most famous definitions, implies meeting «the needs of the present without compromising the ability of future generations to meet their own needs»<sup>7</sup>. In this regard, it is well-known that the overall food sector is in the midst of a global evolution. In fact, until just a few years ago, the political food-agenda priority was food security and food safety followed by (at least in the EU) production diversification, while sustainability was, per se, not considered in shaping food policies, and only reflexively with respect to other priorities<sup>8</sup>. As a consequence, current food law is generally outdated. As an example, the main EU regulations on food safety and food quality, i.e. Regulation 178/2002 («laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety») and Regulation 1151/2012 («on quality schemes for agricultural products and foodstuffs»), have been elaborated without considering either the costs of implementing such food safety provisions – in terms of waste over-production – or sustainability issues as quality attributes; and only recently have European Institutions demonstrated that it has become a priority in the EU's political agenda<sup>9</sup>. In particular, the necessity for the food

<sup>6</sup> On CSR in general, see, above all, D. VOGEL, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, Brooking Institution Press, Washington, 2006, whose theories have been recently commented on in H.W. MICKLITZ, *Organizations and Public Goods*, in S. GRUNDMANN, H.W. MICKLITZ- M. RENNER, *New Private Law Theory. A Pluralist Approach*, Cambridge University Press, Cambridge, 2021, (pp. 414-434). Regarding advantages and disadvantages of CSR, see M. FAURE-S. YAYUN, *Environmental Liability as a Tool to Promote Sustainability*, in B. Akkermans, G. Van Dijck (eds), *Sustainability and Private Law*, Eleven International publishing, The Hague, 2019, (pp. 79 – 116), p. 103.

<sup>7</sup> G. BRUNDTLAND, *Our Common Future*, World Commission on Environment and Development - Oxford University Press, Oxford, 1987.

<sup>8</sup> See M.P. VANDENBERGH, *Private Environmental Governance*, in *Cornell Law Review*, 99, 1, 2013, (pp. 129-200), pp. 140-141.

<sup>9</sup> C. MACMAOLAIN, *Securing Safety, Controlling Crises: Development and Misapplication of Food Law in the European Union*, in A. Antoniadis, R. Schutze, E. Spaventa (eds), *The European Union and Global Emergencies. A Law and Policy Analysis*, Hart, Oxford; Portland, Or., 2011, (pp. 193-204); C. BRADSHAW, *Waste Law and the Value of Food*, in *Journal of Environmental Law and Litigation*, 30, 2, 2018, (pp. 311-331); L. BAIRATI, *Eichettatura, packaging e nuove tecnologie. Stato dell'arte e prospettive di sviluppo di un diritto europeo della sostenibilità alimentare*, in M. Torsello-G. Guerra (eds), *Temi e prospettive per un corso di diritto agroalimentare transnazionale e comparato*, Edizioni

sector to undergo a fundamental transformation has been confirmed by the European Commission's Green Deal, with a special focus on the reform of the food supply chain<sup>10</sup>.

Apart from the development of public food law, the power of the processing industry and retailers to put food production and consumption on a sustainable path is evident, as the European Commission has highlighted<sup>11</sup>. As a matter of fact, these corporations have communicated their pledge to pursue sustainability goals in terms of combatting climate change, pollution, biodiversity loss, food waste, inequality, and child labor in addition to promoting minimum wage laws, food security, animal welfare, and so on. In fact, the lengthening of food chains favors the mismatch between the «territorial logic of law» and the «transnational logic of capital» in which the respecting of process attributes, such as labor conditions, environmental protection, and human rights, is at stake<sup>12</sup>.

In this way, such corporations, by elaborating sustainability standards (and including them in commercial contracts), pursue two needs. On the one hand, these tools help to protect a company's reputation and establish

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Scientifiche Italiane, Napoli, 2022, (pp. 127-145), p. 129.

<sup>10</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the European Committee of the Regions: The European Green Deal COM/2019/640 final. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System, according to which «manufacturing, processing, retailing packaging and transportation of food make a major contribution to air, soil, and water pollution and GHG emissions and profoundly impact biodiversity», and «food systems remain one of the key drivers of climate change and environmental degradation». At the time of writing, the proposal for a legislative framework for sustainable food systems (with the goal of accelerating and making the transition to sustainable food systems easier and having as its core objective «the promotion of policy coherence at EU level and national level, mainstream sustainability in all food-related policies and strengthen the resilience of food systems») is under consideration to be adopted by the Commission by the end of 2023. See [https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework\\_en](https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework_en) (last visited 19 August 2023).

<sup>11</sup> «Questions and Answers: Farm to Fork Strategy - building a healthy and fully sustainable food system». QANDA/20/885, 20 May 2020.

<sup>12</sup> F. CAFAGGI-P. IAMICELI, *Supply Chains, Contractual Governance and Certification Regimes*, in *European journal of law and economics*, 37, 1, 2014, (pp. 131-173), p. 165; A. MACKLIN-P. SMIONS, *The Governance Gap: Extractive Industries, Human Rights, And The Home State Advantage*, Routledge, Abingdon, UK, 2014; T. NGUYEN, *Co-Constructing Business Governance*, in *Stanford Law & Policy Review*, 31, 1, 2020, (pp. 143-186), p. 150; M.N. MOODY, *Warning: May Cause Warming*, in *Vanderbilt Law Review*, 65, 5, 2019, (pp. 1401-1446), p. 1414.

a trust-based relationship with consumers. As a result, more and more big food businesses (especially those traditionally the least involved in sustainability issues), have focused on communicating their mission as it relates to sustainability<sup>13</sup>. In fact, big producers and big distributors and retailers are focused on communicating to consumers that they conform to food supply chains and therefore contribute to the achievement of sustainability goals, or, better yet, on making explicit where and for what purpose they exercise their power within food chains<sup>14</sup>. In this way, they try to respond to the increasing demand for sustainability by those consumers who both recognize and value the welfare-enhancing benefits of sustainability and who are willing to pay more for sustainable products. On the other hand, standards and codes of conduct, especially when part of a contract, can be invoked by companies as a defence in tort cases. In fact, one corporation acting in compliance can prove its good faith in order to be exonerated from liability, while another might invoke it in order to demonstrate that it was not complicit in a human rights violation at the other end of the value chain<sup>15</sup>. It is part of the «due diligence defence», based on self-elaborated assurance systems, through which both producers and retailers demonstrate to have exercised due diligence in order to avoid committing an offence<sup>16</sup>.

As a consequence, transnational contracting increasingly makes reference to and interacts with certification schemes such as the Marine Stewardship Council's (MSC) ecolabel for sustainable fishing practices, the Forest Stewardship Council (FSC) certification, the Roundtable of Sustainable Palm Oil (RSPO), and so on. More generally, businesses are engaged in the increasingly popular phenomenon of Corporate Social Responsibility (CSR), i.e., a form of self-regulation standards that go beyond those

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<sup>13</sup> An analysis of such a phenomenon in the fast-food sector is provided by L. BAIRATI, *Fast-Food Law: A Comparative Law Analysis*, Wolters Kluwer, Milano, 2022, p. 74.

<sup>14</sup> See E. HYSING, *Government Engagement with Political Consumerism*, in M. Bostrom-M. Micheletti-P. Oosterveer (eds), *The Oxford Handbook of Political Consumerism*, Oxford University Press, Oxford, 2019, (pp. 833-854), p. 839.

<sup>15</sup> See as an example, *Nestle USA, Inc. v. Doe* - 141 S. Ct. 1931 (2021). See in this regard, H. MUIR WATT, *Theorizing transnational authority: a private international law perspective* in R. Cotterrell-M. Del Mar (eds), *Authority in Transnational Legal Theory*, Edward Elgar, Cheltenham; Northampton (Massachusetts), 2016, (pp. 325-360), p. 343.

<sup>16</sup> A regime of human rights due diligence is provided by the *Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, "Balancing Buyer and Supplier Responsibilities", by the Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains - American Bar Association Section of Business Law. See [https://www.americanbar.org/groups/human\\_rights/business-human-rights-initiative/contractual-clauses-project/](https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/) (last visited 19 August 2023).



imposed by governments. In such contracts, environmental performance can be addressed, as well as other credence attributes, such as those related to animal welfare<sup>17</sup>. However, as highlighted in scholarly literature, the primary concern of most companies relates to working conditions and child labor, so that CSR standards that stem from accepted international conventions, such as those of the International Labour Organization, are imposed<sup>18</sup>.

### 3. *Regulating and regulated actors in food governance by contract*

As it relates to the present essay, an especially important role is played by those standards and codes of conduct that are incorporated as contract terms, which encourage private firms to go beyond traditional commercial contracts concerning pricing, quantity, quality, and delivery timing so as to also include environmental and social regulatory criteria into their supply contracts. This is the case with those standards incorporated into contracts between distributors and their suppliers, so that their non-compliance can lead to contractual remedies that may range from suspension of performance to contract termination<sup>19</sup>.

This form of governance by contract needs to be further explored by considering, first of all, the roles and perspectives of the different actors involved either as regulators or the regulated. As scholars have abundantly highlighted, there is no doubt that businesses that play a prominent role as regulators are the very leading firms that also play a central role in the governance of value chains from production to consumption, either because they

<sup>17</sup> In the area of environmental protection, a key standard included in commercial contracts is ISO 14001. See, in this regard, P. VERBRUGGEN, *Private Regulatory Standards in Commercial Contracts: Questions of Compliance*, in R. Brownsword-A.J.R. van Gestel-H.-W. Micklitz (eds), *Contract and Regulation*, Edward Elgar Publishing, Edward Elgar, Cheltenham, UK; Northampton, MA, 2017, p. 293.

<sup>18</sup> D. MCBARNET-M. KURKCHIYAN, *Corporate Social Responsibility through Contractual Control?: Global Supply Chains and "Other-regulation"* in D. McBarnet-A. Voiculescu-T. Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Oxford University Press, Oxford, 2007, (pp. 59-92), pp. 61-62.

<sup>19</sup> As an example, see Unilever General Terms and Conditions for the Purchase of Products and Services, Article 11.2, according to which «The Agreement may be terminated earlier in whole or part by the Buyer without any penalty or further obligation or liability: b) on no less than 7 days' written notice where there is material or deliberate or persistent non-compliance with clause 6.1». In turn, clause 6.1 requires compliance of Unilever Responsible Sourcing Policy.



are distributors themselves, or because they are considered manufacturers by consumers, but outsource, at least partially, aspects of their manufacturing to other value chain actors<sup>20</sup>. More and more they have become regulators themselves and have competed with public policy-makers in regulating food systems, so that they are currently identifiable as relative authorities that inhabit, negotiate, and accommodate jurisdictional spheres<sup>21</sup>.

From the private law perspective, they regulate value chains through contractual mechanisms. However, in general, standards whose compliance is imposed through such tools are not elaborated by such businesses. In fact, it is much more common that the regulatory framework of supply chains is determined outside the chain in which it is implemented. More often than not, they are developed by standard-setting bodies, such as the Global Food Safety Initiative, the Global Partnership for Good Agricultural Practices, Safe Quality Food, the International Food Standard, and the British Retail Consortium. It is also common that standards incorporated into supply contracts are designed and promoted by subjects of a hybrid nature, i.e., industry trade associations, industry-NGO collaborations, and NGOs (e.g., those active in human rights, religious organizations, and other public interest groups), which exert normative influence beyond state regulations by developing such schemes as requiring or prohibiting certain production practices, or setting goals or targets that end up as contract terms<sup>22</sup>. This

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<sup>20</sup> J. SALMINEN, *Sustainability and the Move from Corporate Governance to Governance through Contract*, in B. Sjäffell-C.M. Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, Cambridge University Press, Cambridge, 2019, (pp. 57-70), p. 61.

<sup>21</sup> Regarding the role of businesses, transnational agencies and other hybrid-nature fora with regulatory functions in global governance, see H.W. MICKLITZ, *Rethinking the Public/Private Divide*, in L.M. Piores Pessoa Maduro-K. Tuori-S. Sankari (eds), *Transnational Law Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge; New York, 2014 (pp. 271-306), p. 291. According to another reconstruction, they are part of a liquid authority structure where such liquidity «is characterized by four main features: the use of informal rather than formal and binding means; the reliance on substantive rather than formal resources as grounds of authority; a multiplicity of actors instead of a unitary or focal authority; and a dynamic rather than stable nature of authority constellations». N. KRISCH, *Authority, solid and liquid, in postnational governance* in R. Cotterrell-M. Del Mar (eds), *Authority in Transnational Legal Theory* Edward Elgar, 2016, (pp. 25–48), p. 39. See also S. QUACK, *Expertise and Authority in Transnational Governance*, in R. Cotterrell-M. Del Mar (eds), *Authority in Transnational Legal Theory. Theorising Across Disciplines*, Edward Elgar, Cheltenham; Northampton (Massachusetts), 2019, (pp. 361 – 387), p. 369.

<sup>22</sup> M. WATT, *Theorizing transnational authority: a private international law perspective*, p. 333. The most well-known and developed case of hybrid nature standard setters is the

is also the case with collective organizations of producers. For example, in order to register a PDO/PGI they are requested to file an application demonstrating the link between the product's quality attributes and its geographical origin in addition to providing product specifications that contain the rules producers must comply with to use PDO/PGI labels. Standards, particularly related to the geographical areas where ingredients are produced – which encompass farming rules (e.g., breeds/varieties/cultivars, chemical inputs, or process density and yields, season change, technological change, etc.), processing rules (e.g., input from farm level, or technology change/mechanization, length of process, temperature, etc.), final product characteristics (weight/size/shape/cut/portions, color, chemical composition, organoleptic properties, additional quality, packaging, labeling, traceability and monitoring system, etc.) – can be also inserted as clauses into contracts between actors operating within the food chain.

According to recent studies on the use of CSR-related standards in commercial contracts, multinational corporations make them binding by requiring suppliers to either sign a code or incorporate it into a contractual agreement, either by reference or as general terms<sup>23</sup>. Even if both modes are possible, incorporating codes by reference is more common and, in any case, suppliers are required to comply with these standards while buyers are granted the right to perform audits and inspections in order to assess compliance with contractual obligations. This leads to two other categories of actors: those who certify and those who are subject to regulation.

Considering that conformity to such standards needs to be assessed within third-party certification schemes, a fundamental role is also played by those entities that are in charge of independently verifying that supplier performance is up to standards. These audits, which are necessary to obtain certification, sometimes develop in conjunction with civil society actors, are focused on verifying contract compliance, and «have also become an important regulatory mechanism for defining and enforcing transnational norms of corporate conduct»<sup>24</sup>. The increasing relevance of these subjects

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International Standardization Organization (ISO).

<sup>23</sup> L. VYTOPIL, *Contractual Control in the Supply Chain On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability*, Eleven International Publishing, The Hague, 2015. On the techniques of reference to such schemes see, in particular, F. CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, in *Fordham international law journal*, 36, 6, 2013, (pp. 1557-1618), p. 1592.

<sup>24</sup> G. LEBARON-J. LISTER-P. DAUVERGNE, *The new gatekeeper. Ethical audits as a mechanism of global value chain governance*, in A.C. Cutler-T. Dietz (eds), *The Politics of Private Transnational Governance by Contract*, Routledge, London, 2017, (pp. 97-114), p. 98.

has been pointed out by scholars because of the important consequences stemming from the expansion of audit regimes in terms of global governance and public perceptions of corporate practices. In particular, what has been stressed is that, even where diverse stakeholders are involved, corporate, civil society, and public interests are not always equally safeguarded.

The regulated subjects, i.e., the rule takers, are individual suppliers who, despite international recommendations, generally do not participate in defining the rules, but are requested to comply with them and to apply them to sub-suppliers<sup>25</sup>. In this regard, it should be stressed that suppliers have to comply with a set of specific standards in order to avoid breach of contract, even if such standards and codes of conduct are, per se, voluntary instruments (in the sense that they are backed by public law sanctions). In other words, businesses that formally pertain to value chains have a choice whether or not to subject themselves to such a regime, which acquires contractual legally binding force in the internal regulator-regulated relationship only after such businesses have given their consent<sup>26</sup>. However, scholars have often pointed out that as long as the compliance of a certain standard is required by a relevant group of businesses, it becomes *de facto* mandatory, because, for all intents and purposes, the consequence of noncompliance is exclusion from the market<sup>27</sup>. More disputed is whether they are also binding in the external relationship between regulated actors and sub-suppliers, which primarily depends on how private regulators use contractual mechanisms. In fact, they can also spread such standards throughout the supply chain to second-tier suppliers and beyond, and not only to first-tier suppliers, through «perpetual clauses» or also, but very rarely, can directly impose obligations upon third parties<sup>28</sup>.

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<sup>25</sup> Regarding the pressure from international organizations towards an ex ante engagement of the relevant stakeholders by large corporations (with a special focus on the OECD-FAO, *Guidance for Responsible Agricultural Supply Chains* (2015)), see F. CAFAGGI, P. IAMICELI, *Contracting in Global Supply Chains and Cooperative Remedies*, in *Uniform Law Review*, 20, 2-3, 2015, (pp. 135-179), p. 139.

<sup>26</sup> P. VERBRUGGEN, *Enforcing Transnational Private Regulation. A Comparative Analysis of Advertising and Food Safety*, Edward Elgar, Cheltenham, Northampton, 2014, p. 12.

<sup>27</sup> On the *de facto* compulsory nature of such standards, primarily because compliance is a condition for market access, see B. VAN DER MEULEN, *The anatomy of private food law*, in B. VAN DER MEULEN, *Private Food Law. Governing food chains through contract law, self-regulation, private standards, audits and certification schemes*, Wageningen Academic Publishers, The Netherlands, 2011, (pp. 75-111), p. 76.

<sup>28</sup> P. VERBRUGGEN, *Regulatory governance by contract: The rise of regulatory standards in commercial contracts in 'Regulatory Governance'*, in *Recht der Werkelijkheid*, 35, 3, 2014, (pp. 79-100), p. 89; CAFAGGI, *The Regulatory Functions of Transnational Commercial*

The main feature of such standards, where inserted as contract clauses, is that they have an external dimension, in the sense that they also produce effects beyond the regulator-regulated relationship. In fact, they seek to regulate the external activities of the regulated actors, so that other actors, such as third-party regulatory beneficiaries, are also brought in. The identification of such beneficiaries, whether consumers or other business partners, employees, local communities or the public at large, depends on the scope of such standards, e.g., their compliance with human rights, the protection of the environment, animal welfare, product safety, labor conditions, etc.<sup>29</sup> In this regard, the doctrine of «third party beneficiaries» does not help very much due to the diffuse, undefined nature of such beneficiaries. In fact, even if it is recognized by national and international contract law, only under strict conditions can the beneficiaries of a corporate code of conduct, which has been incorporated into a contract between a buyer and a supplier, sue for damages against the promisor<sup>30</sup>. As scholars have suggested, a more satisfactory solution would require that contractual clauses expressly mention and identify the parties who have the right to enforce clauses that are beneficial to them or, more realistically, to rely also on tort law remedies<sup>31</sup>.

*Contracts: New Architectures*, p. 1557.

<sup>29</sup> M.C. MENTING, *Industry Codes of Conduct in a Multi-Layered Dutch Private Law*, Tilburg University, 2016, p. 45.

<sup>30</sup> Regarding the barriers raised before recognizing their binding nature also towards third parties, see (apart from the bibliography already cited) A. BECKERS, *Enforcing Corporate Social Responsibility Codes: on Global Self-regulation and National Private Law*, Hart Publishing, Oxford, 2015; M.C. MENTING, *Industry Codes of Conduct, the Foundations of Contract Law and Regulation: a Bottom-Up Perspective*, in R. Brownsword-R. Van Gestel-H.W. Micklitz (eds), *Contract and Regulation. A Handbook on New Methods of Law Making in Private Law*, Edward Elgar Publishing, Cheltenham, UK; Northampton, MA, 2017, (pp. 39 - 88), p. 60. However, it is worthwhile to consider that in some cases courts have held that codes of conduct, per se, do not create a binding contract between foreign suppliers and their employees. See, in this regard, K.E. KENNY, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, in *Northwestern Journal of International Law & Business*, 27, 2, 2007, (pp. 453-473); M.P. VANDENBERGH, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, in *UCLA Law Review*, 54, 4, 2007, (pp. 913-970), p. 944. A comparison between different solutions in Europe and the United States is provided in CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, p. 1594.

<sup>31</sup> C. PONCIBÒ, *The Contract Governance of Sustainable Development*, in *Isaidat Law Review*, 1, 2022, (pp. 35-55), p. 48. See also V. ULFBECK, O. HANSEN, *Interplay between contract and tort in the supply chain*, in V. Ulfbeck-A. Andhov-K. Mitkidis (eds), *Law and Responsible Supply Chain. Contract and Tort interplay and overlap*, Routledge, Abingdon, 2019, (pp. 133-145).

#### *4. Impact and consequences of food governance by contract from a comparative law perspective*

Lastly the growing importance of governance by contract (and of private regulatory initiatives in general) needs to be assessed from a twofold perspective. On the one hand, by considering its operation within global governance and, on the other, by analyzing it in light of the most critical aspect of food chains, i.e. the imbalance of power among the involved actors.

As it relates to the first point, scholars have already highlighted that, despite the different features of those legal disciplines regulating food systems, it is more and more difficult to clearly distinguish territorially defined and sharply opposed legal systems. This is due to the fact that the globalized nature of food issues today poses global challenges that transcend the competencies of individual nation states and enhances a coexistence and interaction among a number of layers and legal orders<sup>32</sup>. At the same time, the historical unity of state and law as well as the association of governance with public governmental authorities, are further contradicted by these standards, especially when incorporated into commercial contracts among actors operating within the food chain. Moreover, due to its greater effectiveness, flexibility, and efficacy as opposed to traditional public legal sources, transnational governance by contract emerges as a complementary component of legal systems, blurring the boundaries between domestic and international, private and public law. This does not imply that transnational law is going to replace domestic law. Rather, as it evolves within the global economic arena, it is going to increasingly interplay with domestic law as private standard setters increase their power. At the same time, it is not fully detached from national legal systems, and is often enforced by nation state courts, as scholars have also recently noted<sup>33</sup>. However, many public institutions feel compelled to change their role by operating more and more as supporters, overseers, enablers, facilitators, and orchestrators for the establishment of private regulatory initiatives<sup>34</sup>. In sum, even if such private

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<sup>32</sup> B. VAN DER MEULEN, *Development of Food Legislation Around the World: Concluding Observations*, in C.E. Boisrobert et al. (eds), *Ensuring Global Food Safety: Exploring Global Harmonization*, Elsevier, Amsterdam, 2010, (pp. 5-69), p. 65-66.

<sup>33</sup> M. RENNER, *Transnational Law*, in S. GRUNDMANN-H.W. MICKLITZ-M. RENNER, *New Private Law Theory: A Pluralist Approach*, Cambridge University Press, Cambridge, 2021, (pp. 472 – 483), p. 482.

<sup>34</sup> K. ABBOTT-D. SNYDAL, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, in *Vanderbilt journal of transnational law*, 42, 2, 2009, (pp. 501-578). The attribution of responsibility for governance by public

initiatives are not going to substitute traditional sources, it seems likely that they will continue to blur the hierarchy of norms and institutions, so that, more and more, food systems will be regulated by bottom-up, negotiated, and private competing and interacting arrangements instead of by public regulations backed by traditional sanctions<sup>35</sup>.

From a comparative perspective, the proliferation of commercial contracts has a double impact. On the one hand, the fact that through contracts private regulators provide solutions that are imitated by public regulators means that contractual governance is a proxy for legal change, in the sense that it influences the legal systems where businesses operate. Therefore, it is possible to find many examples of private legal transplants regarding food and agricultural law due to the greater efficiency and pervasiveness of private solutions and to the incentive that public legislatures have to imitate the private model as a way to facilitate their own businesses enter into foreign markets<sup>36</sup>. On the other, according to a more macro approach, the transnational nature of commercial contracts directly influences the idea of legal systems and the idea of systematicity that such a concept encompasses. I am referring to the fact that transnational contractual governance is a component of every legal system, but at the same time emerges at the points in which they intersect and ultimately develops across them, producing a cross-system homogenization as well as a divergence between law and territory<sup>37</sup>. As a consequence, it does not contradict the notion of legal

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institutions to private actors, i.e. in the design and implementation of national policies and global regulations in the food sector is tackled in T. LANG, D. BARLING, M. CARAHER, *Food Policy: Integrating Health, Environment and Society*, Oxford University Press, Oxford, 2009. In this regard, see also L. BAIRATI, *Legal Culture and Food Culture in Labelling Regulation: An EU/US Comparative Analysis*, in *Global Jurist*, 20, 1, 2020, (pp. 1-12).

<sup>35</sup> K. ABBOTT-D. SNYDAL, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in W. Mattli-N. Woods (eds), *The Politics of Global Regulation*, Princeton University Press, Princeton; Oxford, 2009, (pp. 44-88).

<sup>36</sup> L. LIN, *Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, in *American Journal of Comparative Law*, 57, 3, Summer 2009, (pp. 711-744); J.L. SHORT, *Transplanting Law in a Globalized World: Private International Regulation and the Legal Transplant Paradigm*, in F. Bignami-D. Zaring (eds), *Comparative Law and Regulation. Understanding the Global Regulatory Process*, Edward Elgar, Cheltenham; Northampton (Massachusetts), 2016, (pp. 430-444); T. FERRANDO, *Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation*, in *Transnational Legal Theory*, 5, 1, 2014, (pp. 20-59).

<sup>37</sup> D. LEVI-FAUR, *From "Big Government" to "Big Governance"?*, in D. LEVI-FAUR, *The Oxford Handbook of Governance*, Oxford University Press, Oxford, 2012, (pp. 3-18), p. 14; J. KARTON, *Sectoral Fragmentation in Transnational Contract Law*, in *University of Pennsylvania Journal of Business Law*, 21, 1, Fall 2018, (pp. 142-199); G. BELLANTUONO,



systems as far as intended according to a loose theoretical model, such as those that do not require systemic unity and admit that the same rule can be classified into more than one legal system<sup>38</sup>. As a matter of fact, through the creation of common sets of standards shared with members across commercial networks, private actors contribute to legal pluralism, consisting of multiple overlapping normative communities, and «have structured their supplier relationships in ways that make the legal system irrelevant to their contracting relationships»<sup>39</sup>.

A second set of comments relates to the food sector's growing inequality of some parties' bargaining power over others' that characterizes food chains. In view of this, scholars have already suggested that the rise of contractual governance is not politically neutral, in the sense that it clearly favors some operators at the expense of others<sup>40</sup>. In fact, those scholars who have studied this phenomenon from the perspective of power have suggested that especially transnational corporations and intermediary actors are most likely to benefit from the expansion of governance by contract<sup>41</sup>. In this regard, scholars have listed both the trade-enhancing and the trade-distorting impacts of such a standard, because on the one hand, «they can contribute to product differentiation, improve quality and safety, disseminate modern and efficient technologies, and ultimately guarantee market access», but on the other, «they disguise protectionist measures, artificially fragment markets, impose unreasonable requirements on suppliers, and thus restrict

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*Contract Law and Regulation*, in P.G. Monateri (ed), *Comparative Contract Law*, Edward Elgar, Cheltenham; Northampton (Massachusetts), 2017, (pp. 111-142).

<sup>38</sup> H. PSARRAS, *Law's Authority and Overlapping Jurisdictions*, in R. Cotterrell-M. Del Mar (ed), *Authority in Transnational Legal Theory. Theorising Across Disciplines*, Edward Elgar, Cheltenham; Northampton (Massachusetts), 2016, (pp. 96 – 121), p. 102; J. RAZ, *Practical Reasons and Norms*, Oxford University Press, Oxford, 1999, p. 150.

<sup>39</sup> C. PONCIBÒ, *The Contract Governance of Sustainable Development*, in *Isaidat Law Review*, 1, 2022, (pp. 35-55), p. 45. Regarding this phenomenon see, in particular, P.S. BERMAN, *The Evolution of Global Legal Pluralism*, in R. Cotterrell-M. Del Mar (eds), *Authority in Transnational Legal Theory: Theorising across Disciplines*, Edward Elgar, Cheltenham; Northampton (Massachusetts) 2016, (pp. 151-190), p. 152.

<sup>40</sup> Regarding this inequality and the legal tools used to facilitate global commerce and support sustainability standards, see K. SOBEL-READ- G. ANDERSON-J. SALMINEN, *Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity*, in *Tulane Law Review*, 93, 1, 2018, (pp. 1-46).

<sup>41</sup> We accept, in this regard, Weber's definition, according to which it is «the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests». Cited from M. WEBER, *Economy and Society: An Outline of Interpretive Sociology*, University of California Press, Los Angeles, 1978, p. 53.

market access»<sup>42</sup>. This is especially clear as it relates to sustainability attributes. In this sector auditors are not politically neutral, in the sense that their role is not (merely) focused on improving the environmental and social performance of those firms supplying multinational retailers and manufacturers, but also on defining and enforcing status quo transnational norms of corporate behavior. Moreover, large corporations are increasingly delegating regulatory power to auditors - usually through purchase order contracts - to communicate to suppliers the necessity of complying with a code of conduct or multi-stakeholder standard<sup>43</sup>. In this regard it is well-known that public legislatures have tried to guarantee the credibility and effectiveness of conformity assessment<sup>44</sup>. However, a structural feature of their position cannot be eradicated, i.e., the fact that certification bodies are selected by the very companies both seeking and paying for certification, therefore the auditors are under constant pressure to please them<sup>45</sup>. As a consequence, even when the audit regime involves NGOs, multi-stakeholder groups, and governments, it's ultimately the auditors who interpret, implement and enforce the rules.

Regarding the main problem of the imbalance of power within food chains, at the EU level, Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices

<sup>42</sup> M. MAIDANA-ELETTI, *International Food Standards and WTO Law*, in *Deakin Law Review*, 19, 2, 2014, (pp. 1 - 25), p. 20.

<sup>43</sup> This is the case with Coca Cola whose Bottler's Agreement specifies, «In addition, the Company, in its sole discretion, may through written notice to the Bottler appoint a third party as its representative to ensure that the Bottler carries out its obligations under this Agreement, with full powers to oversee the Bottler's performance and to require from the Bottler its compliance with all the terms and conditions of this Agreement». In this regard, see CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, p. 1602.

<sup>44</sup> Regulation No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 is commented on in E. CRISTIANI, G. STRAMBI, *Public and Private Standards – Official Controls*, in L. Costato-F. Albisinni (eds), *European and Global Food Law*, Wolters Kluwer, Milano, 2016, (pp. 323-342), p. 336.

<sup>45</sup> On the «genetic problems» of private regulation schemes see F. CAFAGGI-A. RENDA, *Public and Private Regulation Mapping the Labyrinth*, in *CEPS Working Document n. 370*, October 2012, (pp. 1-35), p. 17. These phenomena are even more acute when the firm requesting certification is a large business, which potentially calls the independency of the certifier into question. See L.K. MCALLISTER, *Regulation by Third-Party Verification*, in *Boston College Law Review*, 53, 1, 2012, (pp. 1-64); J.C. FROMER, *The Unregulated Certification Mark(et)*, in *Stanford Law Review*, 69, 1, January 2017, (pp. 121-200), p. 155.



in business-to-business relationships in the agricultural and food supply chain was based on the assumption that such uneven bargaining power between food-system actors is «likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction». In this regard, we could say that, at the base of the proliferation of transnational commercial contracts, there is the same imbalance between actors operating within the food system, which the UTP directive is trying to adjust. The UTP directive is especially focused on price and on the clearest anticompetitive practices, so self-regulation is clearly not the core of EU strategy. However, as scholars have highlighted, such practices connected to abuses of dominant positions «were the structural reasons underlying the worsening of food quality or the deterioration of the environmental sustainability of the food chain in several documented cases, often facilitated by high level of concentration at processing and retailing level of the value chain»<sup>46</sup>. In this respect, Article 102 TFEU, according to which «Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States», could therefore also be applied to oppose the implementation of such contractual terms on weaker parties.

## 5. Conclusions

Three additional inferences can be concluded from this analysis.

The first one relates to the fact that the regulatory power of large corporations within global food systems (with a huge number of participants and stakeholders) depends on their increasing market power. This is the reason why distributors and big food businesses downstream in the chain gain authority as global regulators coexisting, influencing, and competing in different ways with traditional policy-makers. Though this is undoubtable, it only provides a partial explanation for their legitimacy as regulatory authorities. In fact, their influence does not simply depend on their size and role within food chains, but also on their connection with other actors,

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<sup>46</sup> C. LOMBARDI, T. FERRANDO, *An Environmentally and Socially Broken Global Food System: What Role for Competition Law?*, in S. Holmes-D. Middelschulte-M. Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability*, Institute of Competition Law, New York, 2021, (pp. 339 - 350), p. 344.

such as firms, NGOs and experts that, depending on the case, complement, support, or compete with them. In this regard, the authority does not simply depend on market power, but also, and increasingly, on the degree of expertise necessary to capture policy-making initiatives and to influence both food-chain regulation and overall legal systems so as to attain the objectives that each actor is pursuing, either independently or through private or hybrid forums and networks. As a consequence, a higher degree of expertise and organization can counterbalance the shift of power, which also calls for a high degree of cooperation and self-regulation also among smaller and more isolated commercial actors.

The second one relates to contracts as regulatory tools. Indeed, their use in regulating product and process attributes in addition to their impact on regulating food systems on third parties clearly demonstrate that they cannot simply be considered tools for facilitating exchanges, but rather as increasingly relevant sources of global governance. As a consequence, they influence us to reconsider some traditional categories of contract law, such as the principle of privity, which, in its most classical sense, provides that a contract can give rise to rights and duties only for those who are parties to the contract, and third parties are generally not allowed to recover damages from a breaching party. At the same time, they can contribute to achieving goals (such as those of sustainability) as defined by international public regimes, even if they cannot be efficiently enforced through typical public law enforcement mechanisms. In fact, in case of violation, the use of commercial contracts and certifications triggers simultaneous remedial systems, thus serving as a gap filler when traditional sources provide scarce or unavailable solutions.

The third one is linked to the second one as it relates to the extent to which it is possible to leverage governance by contract in order to pursue public goals. Even in domains that are traditionally public, a circular dynamic of interaction between state and non-state regulations, voluntary and mandatory rules, and private and public actors has to be established. However, what remains variable in the diachronic sense, and also when comparing different legal systems, is to what extent and in what way government actors leave the regulation of some aspects related to sustainability, such as environmental and biodiversity protection, social sustainability and fairness of trade practices, animal welfare, and so on, to governance by contract. Until now, the overlapping of public and private sources and the interaction between private and public regulators has resulted in a series of endless criticisms in terms of coherence in the

governance of food systems. In fact, the debate about the real possibility of combining public and private sources in an efficient way, i.e. overcoming the deficiencies of both systems to create more robust regulatory regimes, is ongoing, but the related problems are so urgent that new solutions need to be found soon. There is no doubt that governance by contract has been more efficient and reliable in pursuing sustainability goals also due to a diffusion and qualitative improvement of certification and auditing mechanisms, especially when commitments are made clear by the business whose impact data are published and audited. However, it remains essential to pursue public goals, first and foremost, with public actors by means of hard law, while considering private initiatives, at most, as subsidiary solutions not lacking their criticisms and inefficiencies. Achieving environmental and social sustainability is one of the greatest challenges of this century, something that cannot be entirely delegated to large businesses and market forces.

Enrico Bonadio, Nicola Lucchi, Magali Contardi

*Extending the protection of geographical indications  
within and beyond the EU*

SUMMARY: 1. Introduction – 2. Broadening GIs' scope of protection under EU law – 3. Old World v New World – 4. The EU goes East: the GIs aspects of the EU-Japan Economic Partnership Agreement – 5. Conclusion.

1. *Introduction*

Agricultural products have always had problems with coordination between the different stages of the supply chain, resulting in high transaction costs. At the same time, in the European agricultural market, rules and regulations have been increasingly relaxed. This has made business transactions very uncertain and put farmers in a difficult position between the enormous power of suppliers, processors and retailers at the other end of the chain. In response, European authorities have created new regulatory solutions to improve coordination and increase transparency along the supply chain. In this context, a better functioning food supply chain has become one of the main objectives of the Common Agricultural Policy (CAP).

In particular, the link between agri-food and food quality in economic development has attracted the interest of policy makers in various countries as global challenges such as sustainability and food security are reconsidered and reassessed. The critical role of food production in economic development has been highlighted through targeted agricultural quality measures to protect and promote products with distinctive characteristics associated with their geographical origin, as well as traditional products. As a result, efforts have been made to make agricultural products, which are increasingly traded on international markets, more identifiable at the national level.

The agricultural and food product quality policy was developed in what is now the European Union (EU)<sup>1</sup> with the intention of being one of the instruments of the Common Agricultural Policy (CAP) and helping reduce overproduction, increase farmers' incomes and preserve rural communities<sup>2</sup>. There is no doubt that the protection of geographical indications (GIs), primarily focused on the concept of *terroir* (which can be defined as an ecosystem characterised by several factors including local climatic conditions, geography and topography), is one of the most important tiles in the variegated mosaic of EU laws which promote the agrifood sector<sup>3</sup>. The regulations of GI not only protect local producers from those who appropriate and exploit their names in the marketplace. They also contribute to the promotion of public "goods" such as the conservation of biodiversity, the protection of cultural heritage and know-how, socio-cultural development and the fight against rural poverty<sup>4</sup>.

There are currently four pieces of EU legislation on GIs addressing different categories of products, i.e. agricultural products and foodstuffs<sup>5</sup>,

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<sup>1</sup> See "The future of rural society", Commission communication transmitted to the Council and to the European Parliament. COM (88) 501 final, 28 July 1988. Bulletin of the European Communities, Supplement 4/88. [EU Commission - COM Document].

<sup>2</sup> See A. DI LAURO, *Le Denominazioni di Origine Protette (DOP) e le Indicazioni Geografiche Protette (IGP)*, in *Trattato di diritto alimentare italiano e dell'Unione europea*, Paolo Borghi et al. (eds), Milano, 2021, p. 431.

<sup>3</sup> See e.g. G. BELLETTI-A. MARESCOTTI, *Origin Products, Geographical Indications and Rural Development*, in E. Barham, B. Sylvander (eds), *Labels of Origin for Food: Local Development, Global Recognition 75* (CABI 2011); A. ZAPPALAGLIO, *The Transformation of EU Geographical Indications Law: The Present, Past and Future of the Origin Link*, Routledge, 2021.

<sup>4</sup> See e.g. P. CULLET, *Intellectual Property Protection and Sustainable Development* 333-36 (2005) (arguing how geographical indications can function as a tool for addressing traditional knowledge concerns); D. ZOGRAPHOS, *Can Geographical Indications Be a Viable Alternative for the Protection of Traditional Cultural Expressions?*, in *New Directions in Copyright Law* 37, p. 55 (F. Macmillan & K. Bowrey, eds, 2006); T. KONO, *Geographical Indication and Intangible Cultural Heritage*, in B. Ubertazzi and E. Muñiz Espada (eds), *Le indicazioni di qualità degli alimenti* 289, 293 (2009); D. GERVAIS, *Traditional Knowledge: Are We Closer to the Answers? The Potential Role of Geographical Indications*, *ILSA J. of Int. and Comp. Law* 551 (2009); T. DAGNE, *Intellectual Property and Traditional Knowledge in the Global Economy: Translating Geographical Indications for Development* (2014) (examining the role GIs can play in protecting traditional knowledge).

<sup>5</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, 2012 OJ (L 343).

wines<sup>6</sup>, aromatised wines<sup>7</sup> and spirit drinks<sup>8</sup>. The very first piece of EU GI legislation was introduced in the early 1990s, i.e. Regulation 2081/92<sup>9</sup>. It was negotiated at the time when European Union decision-makers were discussing the reform of the CAP and ultimately provided an important opportunity to further harmonize GI by creating two important titles of protection: protected designations of origin (PDOs) and protected geographical indications (PGIs)<sup>10</sup>. The process has not been smooth initially for a variety of reasons, including the fact that some EU Member States had not adopted any scheme of GI protection before 1992<sup>11</sup>. Regulation 2081/92 was subsequently replaced by Regulation 510/2006<sup>12</sup>, which in turn was repealed by Regulation 1151/2012<sup>13</sup>. Although the original system has been substantially maintained, the current system has undergone some changes, including the legal basis used to enact the act. While the previous basis was the CAP, the current one is also found in Article 118 of the Treaty on the Functioning of the European Union, which allows the European Parliament and the Council to establish measures to create pan-European

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<sup>6</sup> Regulation (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products and repealing Regulations 922/72, 234/79, 1037/2001 and 1234/2007, 2013 OJ (L347).

<sup>7</sup> Regulation (EU) 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Regulation 1601/91, 2014 OJ (L84).

<sup>8</sup> Regulation EU 2019/787 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation 110/2008, 2019 OJ (L130).

<sup>9</sup> Regulation (EEC) 2081/92 of the Council of July 14, 1992, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, 1992 O.J. (L208).

<sup>10</sup> Regulation 2081/92 also created the so-called Certificates of Specificity, now called Traditional Speciality Guaranteed (TSG). This title protects the traditional aspects of a product e.g. the manufacturing technique. When a name is registered as TSG, it is protected against falsification and misuse.

<sup>11</sup> See A. DI LAURO, *Le Denominazioni di Origine Protette (DOP) e le Indicazioni Geografiche Protette (IGP)*, cit.

<sup>12</sup> Commission Regulation (EC) No 510/96 of 22 March 1996 concerning the classification of certain goods in the combined nomenclature, 1996 OJ (L76/7).

<sup>13</sup> Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, 2012 OJ (L 343).

intellectual property (IP) rights<sup>14</sup>. Therefore, geographical indications are protected in the EU not only to implement agricultural product quality policy, but also to promote intellectual property and fair competition in the relevant markets.

The protection offered to PGIs and PDOs in the EU is notoriously strong. Both titles protect names of products which have qualities linked to the soil and local areas and are made according to specific methods of production (e.g. “Rioja” and “Champagne” wines; “Parmigiano Reggiano” cheese; salame felino; mortadella di Bologna; Mutarde de Bougorgne; Gruyère). While PDOs guarantee that the whole manufacturing process is carried out from the beginning until the end in a specific geographical area, PGIs are granted even when just one phase of the productive process is performed in the territory in question. Because of this inextricable link between the quality and reputation of the product and the area from which it comes, the EU’s geographical indication system promotes cultural and gastronomic heritage. For some years, the possibility of protecting non-agricultural traditional products such as cutlery, leather, ceramics and glassware (e.g. Murano glass) as GI has also been discussed. Some countries have already taken legislative action and introduced GI protection for industrial products, but a common framework at EU level is still lacking in this specific area. In April 2022, the European Commission put forth a proposal for a novel regulation concerning Geographical Indications (GIs), encompassing the safeguarding of both craft and industrial products<sup>15</sup>.

It is interesting to note that what can be protected as a PDO or PGI are also GIs from countries outside the EU<sup>16</sup>. The right to register non-EU GIs

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<sup>14</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 118, 2010 O.J. C 83/47 (stating that «In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament»).

<sup>15</sup> See Proposal for a Regulation of the European Parliament and of the Council on European Union geographical indications for wine, spirit drinks and agricultural products, and quality schemes for agricultural products, amending Regulations (EU) No 1308/2013, (EU) 2017/1001 and (EU) 2019/787 and repealing Regulation (EU) No 1151/2012, COM/2022/134 final/2.

<sup>16</sup> Article 11, para. 2, Regulation 1151/2012.



was initially subject to the existence in the state where the GI applicant was established of a kind of protection similar to the one granted by the EU. This condition triggered two disputes at the World Trade Organization (WTO), with the US and Australia challenging certain substantive and procedural requirements imposed on non-EU countries where GI applicants came from – requirements which were considered by the complainants as discriminatory. The WTO Panel partially sided with US and Australia<sup>17</sup>. To date, seventeen non-EU countries have registered GIs through the EU GIs system, with the first African PDO being protected in 2021, i.e., Rooibos / Red Bush<sup>18</sup>.

With this in mind, the chapter is structured as follows. Section II looks at the recent case law of the Court of Justice of the European Union (CJEU) on the scope of GI protection, which has been considerably extended. Section III then looks at the differences between the GI protection regimes of the EU (*Old World*) and several countries that were former colonies of European states, including the US, Canada, Australia and Chile (*New World*). Section IV focuses on the GI provisions of the 2018 EU-Japan Economic Partnership Agreement: this case study is a good example of

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<sup>17</sup> See *EC — Protection of trademarks and GIs for agricultural products and foodstuffs* (DS174 and DS290). US and Australia claimed that several aspects of the old EU Regulation 2081/92 (related to the filing, opposition and inspection procedures as well as labelling requirements) violated the TRIPS national treatment clause, and were therefore discriminatory. Specifically, and more importantly, it was complained that non-EU GIs could be registered in EU only provided that (a) the non-EU country the GI applied for originated from had in place a GI registration procedure similar to the one provided under the EU Regulation in question; and that (b) the non-EU country offered EU GIs a protection similar to the EU regime. As mentioned, the WTO Panel sided with US and Australia and found that the EU equivalence and reciprocity requirements offered non-EU subjects a less favourable treatment. In other words, those requirements amounted to “extra hurdles” which ended up in giving non-EU products less chances of access to the EU market. This was confirmed by the fact that until the EU regime had not been modified by eliminating the equivalence and reciprocity requirements, no GI from non-EU countries had ever been registered in the EU. The US also partially prevailed as to the aspects related to the inspection procedures. As a matter of fact, under Regulation 2081/92 non-EU GIs could be registered in the EU provided that the country of origin had adopted EU-style inspection procedures. What the WTO Panel found discriminatory was the compulsory involvement of national governments of the country of origin of the GI in setting up the required inspection structures: indeed, it was up to said governments to set up and approve these structures, and release non-EU applicants statement confirming that such structures had been set up in their country. As to the claims related to filing and oppositions procedures and labelling requirements, the EU prevailed on both issues.

<sup>18</sup> On this registration see E. BONADIO-M. CONTARDI, *Rooibos tea: EU protection is good news for South African agriculture*, 29 June 2021, *The Conversation*.



how the EU succeeds in using bilateral trade or economic partnership agreements to protect its GI -intensive industries in international markets. Section V concludes.

## 2. Broadening GIs' scope of protection under EU Law

The scope of GI protection under EU law is notoriously broad. It allows holders of geographical indications to prevent others from using the geographical name not only in such a way as to mislead consumers as to the geographical origin and quality of the product, but also to use that name in a purely allusive manner that does not confuse consumers, for example when accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like, or when used in translations. In simpler terms, a German cheese producer could not use the expressions “Parmigiano-type” or “Parmesan-style” in connection with its products, even if consumers understand that the cheese is produced in Germany and not in the area around the Italian city of Parma. Therefore, the owners of GI have the right to prevent others from using the evocative power of their sign.

In recent years, the concept of “evocation” has been interpreted quite broadly by the CJEU<sup>19</sup>. Moreover, the Court has extended the protection of GI so that not only the sign itself, but also the characteristics of the product GI are protected. The three most recent cases in which such a broad interpretation<sup>20</sup> has been applied are *Morbier*<sup>21</sup>, *Queso Manchego*<sup>22</sup> and *Champanillo*<sup>23</sup>.

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<sup>19</sup> A. ZAPPALAGLIO, *EU Geographical Indications and the protection of producers and their investments*. In: *The Cambridge Handbook of Investment-Driven Intellectual Property*, E. Bonadio, P. Goold (eds), Cambridge University Press, 2022.

<sup>20</sup> This is not to say that the CJEU has always given a wide interpretation of GIs' scope of protection. For example, in *Comité Interprofessionnel du Vin de Champagne v Aldi Süd Dienstleistungs-GmbH & Co.OHG* (C-393/16), the CJEU found that a sorbet could be marketed under the name “Champagner Sorbet” if it featured, as one of its essential characteristics, a taste that was predominantly attributable to the Champagne wine.

<sup>21</sup> *Syndicat interprofessionnel de defense du fromage Morbier v Societe Fromagere du Livradois SAS* (C-490/19) EU:C:2020:1043; [2021]. On this case see S. MARTIN-L. BOURDEAU, *Judge a cheese by its cover, says the Court of Justice in the Morbier case*, 43 *Eur. Intell. Prop. Rev.* 475 (2022).

<sup>22</sup> *Fundacion Consejo Regulador de la Denominacion de Origen Protegida Queso Manchego v Industrial Quesera Cuquerella SL* (C 614/17), EU:C:2019:344, at [18], [25].

<sup>23</sup> *Comité Interprofessionnel du Vin de Champagne v GB* (C-783/19) EU:C:2021:713; [2021]

In *Morbier*, the CJEU concluded that a PDO is protected not only against the use of the registered name by third parties, but also against the imitation of the distinctive shape or appearance characteristic of the GI-protected product: in this case, that feature was the blue horizontal line of the French creamy cheese Morbier. The Court recalled that the scope of protection of GI is so broad that its owner may prohibit others from imitating the shape or appearance characteristic of the GI product if such imitation is liable to mislead consumers as to the true origin of the product in question<sup>24</sup>. To resolve disputes, therefore, the CJEU went on, it must be determined whether that representation is likely to mislead a reasonably well-informed (as well as a reasonably observant and circumspect) consumer, taking due account of all factors, such as the way in which the products are presented and marketed to the public. Furthermore, the Court noted that the protected name and the product identified by it are inevitably closely linked, as the PDO is protected because it designates a product with certain qualities or characteristics. Therefore, imitation of the shape or appearance of a GI product may constitute an infringement of that GI even if it is not reproduced on the product or its packaging.

Moreover, in *Queso Manchego*, the Court extended the concept of evocation to figurative elements, since such elements have the potential to «trigger directly in the consumer’s mind the image of products whose name is registered on account of their ‘conceptual proximity’ to such a name»<sup>25</sup>. Queso Manchego is a PDO owned by the homonymous Fundación, which protects the famous cheese from the Spanish region of Castilla La Mancha.

The CJEU held that the sale of cheese products using images evoking the famous character Don Quixote de La Mancha, landscapes with windmills and sheep, and a bony horse (all elements from Cervantes’ novel)<sup>26</sup> may infringe the PDO Queso Manchego, as these figurative signs are capable of creating a “conceptual proximity” to the GI and directly evoke the famous cheese in the consumer’s mind. This interpretation was later adopted by the Spanish Supreme Court in the national proceedings following the preliminary ruling of the CJEU<sup>27</sup>.

<sup>24</sup> Indeed, Article 13(1)(d) of Regulation 1151/12 provides that the GI holder is entitled to prevent «any other practice liable to mislead the consumer as to the true origin of the product».

<sup>25</sup> *Syndicat interprofessionnel de défense du fromage Morbier v Societe Fromagere du Livradois SAS* (C-614/17).

<sup>26</sup> What was also used by the PDO owner’s competitor was the term ‘Rocinante’, which is the name of the horse ridden by Don Quixote in Cervantes’ novel.

<sup>27</sup> Judgement no 451 of the Spanish Supreme Court of 18 July 2019.

These two judgments seem to go too far. Indeed, it can be argued that granting a monopoly on the shape of a product, as well as on images that merely evoke characters and landscapes of the geographical area associated with a particular GI, is inherently contrary to the principles of free trade and competition. In particular, with regard to the *Morbier* decision, it could be argued, as Andrea Zappalaglio notes, that geographical indications are not trademarks and, in particular, «are not signs arbitrarily designed by their users»<sup>28</sup>. It is therefore far-fetched to conclude that a dark blue line on a cheese resulting from a well-known and non-unique production technique has acquired distinctive character as if it were a trademark.

Finally, what about the Champanillo case? The Comité Interprofessionnel du Vin de Champagne - the association of Champagne producers that administers the homonymous PDO - has filed a lawsuit in Spain to stop a tapas bar chain from using the word “champanillo”. The tapas bar chain’s defense argument was that it uses the term as a brand name for catering establishments and that such use cannot cause confusion with wines from the Champagne region. The CJEU did not allow this point to stand. In particular, it ruled that a PDO protects not only products but also practices relating to services. The Court also clarified that in order to determine whether there is an “evocation” to a PDO, it is not necessary to first establish that the product protected by the PDO and the disputed sign are identical or similar. It is sufficient that when the consumer comes across the disputed term, he immediately thinks of the PDO product, in this case champagne<sup>29</sup>. Thus, the concept of “evocation” does not require that the two signs, the protected sign and the challenged sign, be identical or in any way similar. What is required, rather, is a sufficiently clear and direct link between the contested designation and the PDO in the mind of the average informed European consumer. Once again, the CJEU has extended the scope of protection against the evocation to a PDO, thus granting protection that in some respects goes even further than that of trademarks.

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<sup>28</sup> See e.g. A. ZAPPALAGLIO, *EU Geographical Indications and the protection of producers and their investments*. In: *The Cambridge Handbook of Investment-Driven Intellectual Property*, E. Bonadio, P. Goold (eds), Cambridge University Press, 2022.

<sup>29</sup> *Comité Interprofessionnel du Vin de Champagne v GB* (C-783/19) EU:C:2021:713; [2021] , §53 ff.

### 3. *Old World v New World*

As mentioned, protecting GIs via PDOs and PGIs is at the heart of Europe's agricultural and food policy. But other countries, particularly in the so-called *New World* (i.e. the former colonies of European countries), do not offer geographical names the same strong protection as the EU does<sup>30</sup>. The US, Canada and other states for example do protect geographical signs, but they do so via trademark law based on the 'first come first served' rule. This may create conflicts between European producers of wine, cheese and ham and local competitors in the new world. Chile, for instance, had not adopted a comprehensive law on geographical indications until 2005 - and several Chilean producers of wine in the past used European GIs. One of these was Champagne (which is protected in more than 120 countries). Chile claimed that this term had been used locally by several Chilean wine-makers as both a generic term and a component of registered trademarks,

<sup>30</sup> Scholarly work on the dichotomy "old world" / "new world" in the field of GIs is extensive. See F. ADDOR and A. GRAZIOLI, *Geographical indications beyond wines and spirits: A roadmap for a better protection for geographical indications in the WTO/TRIPS agreement* (2002) 5 *J. World Intell. Prop.* 865; J.M. CORTÈS MARTIN, *The WTO TRIPS agreement: the battle between the Old and the New World over the protection of geographical indications* (2004) 7(3) *The Journal of World Intellectual Property* 287; A. KAMPERMAN SANDERS, *Future Solution for Protecting Geographical Indications Worldwide* (2005) 25 *Studies in Industrial Property and Copyright Law* (IIC Studies); M. PEREZ PUGATCH, *The intellectual property debate: Perspectives from law, economics and political economy* (Edward Elgar Publishing, 2006); I. CALBOLI, *Expanding the protection of geographical indications of origin under TRIPS: Old debate or new opportunity* (2006) 10 *Marq. Intell. Prop. L. Rev.* 181; G.E. EVANS-M. BLAKENEY, *The protection of geographical indications after Doha: Quo vadis?*, (2006) 9(3) *Journal of International Economic Law* 575; I. CALBOLI, *Intellectual property protection for fame, luxury, wines and spirits: Lex specialis for a corporate "dolce vita" or a "good-quality life"?*, in *Intellectual Property and General Legal Principles* (Edward Elgar Publishing, 2015a); I. CALBOLI, *Of markets, culture, and terroir: the unique economic and culture-related benefits of geographical indications of origin*, in *International Intellectual Property* (Edward Elgar Publishing, 2015b); I. CALBOLI, *Time to Say Local Cheese and Smile at Geographical Indications of Origin-International Trade and Local Development in the United States* (2015c) 53 *Hous. L. Rev.* 373; C. HEATH-D. MARIE-VIVIEN, *Geographical indications and the principles of trade mark law—A distinctly European perspective* (2015) 46(7) *IIC-International Review of Intellectual Property and Competition Law* 819; B. O'CONNOR-G. DE BOSIO, *The global struggle between Europe and United States over geographical indications in South Korea and in the TPP economies, in The importance of place: Geographical indications as a tool for local and regional development* (Springer, 2017) 47; D. FRIEDMANN, *Geographical Indications in the EU, China and Australia, WTO Case Bottling Up Over Prosecco*, (2018) *European Integration and Global Power Shifts: What Lessons for Asia* 18.

dating back to the 1930s<sup>31</sup>. From a European perspective, this is perceived as an unfair behaviour which aims to free ride on the reputation of European food and agricultural products' brands and heritage, and may also end up confusing consumers as to the real geographical provenance of the goods. The specific Chilean case was settled in 2002 when Chile and the EU signed a free trade agreement which provided for 12 years of coexistence after which all Chilean trademarks including the expression "champagne" would be cancelled and any generic use of the term would cease<sup>32</sup>. This period ended in 2015<sup>33</sup>.

Disputes of this kind have also materialised in sectors other than wine. One of these occurred between producers of cured ham made in the area around the Italian town of Parma, and the Canadian company Maple Leaf Foods Ltd.<sup>34</sup>, which owned trademark rights in Canada for the term "Parma" (in the EU the sign "Prosciutto di Parma"<sup>35</sup> is protected as a PDO, and owned by the Consorzio del Prosciutto di Parma)<sup>36</sup>. The trademark registration held by Maple Leaf Foods resulted in the Italian producers

<sup>31</sup> See F. MEKIS, *Simposio sobre la Protección Internacional de las Indicaciones Geográficas – Denominaciones de Origen Posición de las vias de Chile en el concierto del nuevo mundo y relación con las negociaciones con la unión Europea* OMPI/GEO/MVD/01/4, 9 Noviembre 2001, World Intellectual Property Organisation (WIPO) (noting that at that time (2001) «[t]he word 'champagne' is also currently incorporated in numerous trademark-labels which constitute complex marks which they cannot be deprived of without infringing rights enshrined in our Constitution», and further arguing that when 'Champagne' is used alone, it would be considered as generic name under article 19 n. 23 of the Chilean constitution, but when used as part of a complex sign it would qualify as trademark, thus protected by proprietary rights under the Chilean Constitution).

<sup>32</sup> Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002). O.J. L 26 of 31.01.2003.

<sup>33</sup> Vitisphere, *Indicación Geográfica: el Champagne es protegido en Chile y Ecuador* (May 2015), available at <https://www.vitisphere.com/news-72912-Indicacion-geografica-el-champagne-es-protegido-en-Chile-y-Ecuador.html>.

<sup>34</sup> *Consorzio Del Prosciutto Di Parma v. Maple Leaf Meats Inc.*, (2001) 205 F.T.R. 176 (TD).

<sup>35</sup> Canadian Intellectual Property Office, Trademark registration no. TMA179637. Available at: <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/viewTrademark.html?id=281563&lang=eng&status=&appKey=281563-00&starting-DocumentIndexOnPage=1>. For a detailed review of the decision see: *Dr Crowne, Pounds of Flesh, the Merchants of Parma & Ham-Lets: a Review of The Parma Ham Litigation Across Canada and the UK* (2010) 18 *Intellectual Property Journal* 443. See also: See in this regard C. VIJU-W.A. KERR-C. MEKKAOUI, *Everything is on the Table: Agriculture in the Canada-EU Trade Agreement*.

<sup>36</sup> eAmbrosia no. PDO-IT-0067.

being banned from using signs incorporating the term Parma in Canada and being forced to resort until very recently to alternative brands such as “Le Jambon original” or “The original prosciutto”<sup>37</sup>.

One of the arguments put forward by countries in the *New World* is that these terms often do not identify anything but just describe the product itself (e.g., the average consumer in the US does not know that “Parmigiano” is the famous cheese produced in the Italian town of Parma); and that therefore the attempt by the EU to claw-back names which have become common in those states constitutes a protectionist measure aimed at monopolising descriptive terms and signs to the detriment of competition and consumers (see, for instance, the Chilean claims regarding “Champagne”). This is thus a fight between the *New World* which embraces a minimalist approach to protecting geographical names<sup>38</sup>, and the *Old World*, especially Europe, which advocates for a strong protection - not only at home, but also in other states via bilateral trade or economic partnership agreements. Indeed, the EU has constantly sought enhancing protection for its geographical names by shifting away from the WTO arena (where the more than two decades long discussion over reforming the TRIPS regime of GIs has been fruitless)<sup>39</sup> toward a variety of bilateral accords that range from standalone agreements on GIs to sectorial accords that provide for mutual recognition and protection of names for wines or spirits<sup>40</sup>. Specifically, the EU has in the latest years concluded comprehensive agreements with other

<sup>37</sup> La Repubblica – *Parma, Ceta: Prosciutto di Parma in Canada con proprio nome* (September 2017). Available at: [https://parma.repubblica.it/cronaca/2017/09/20/news/alimentare\\_prosciutto\\_di\\_parma\\_in\\_canada\\_con\\_proprio\\_nome-1760197271](https://parma.repubblica.it/cronaca/2017/09/20/news/alimentare_prosciutto_di_parma_in_canada_con_proprio_nome-1760197271) (noting that CETA allows for the coexistence between the prior Parma trademark, owned by Maple Leaf Foods, and the Italian GI “Prosciutto di Parma”; and cheering the fact that as of 2018 Italian producers of Parma ham have been able to use the term ‘Parma’ on the packaging and advertising).

<sup>38</sup> T. JOSLING, *The war on terroir: geographical indications as a transatlantic trade conflict* (2006) 57(3) *Journal of agricultural economics* 337.

<sup>39</sup> The TRIPS Agreement is one of the WTO treaties: Agreement on Trade-Related Aspects of Intellectual Property Rights 15 April 1994 33 Marrakesh.

<sup>40</sup> For instance, the Agreement between the European Community and Australia on trade in wine (1994, renewed in 2008), 2009 O.J. (L) 28/13; the Agreement between the European Community and the United Mexican States on the mutual recognition and protection of designation for spirit drinks, 1997 O.J. (L) 152/16; the Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 2002 O.J. (L) 352; the Agreement between the European Community and the Republic of South Africa on trade in wine, 2002 O.J. (L) 28; and the Agreement between the European Community and the United States of America on trade in wine, 2996 O.J. (L) 87/2.



nations that include a chapter on GIs<sup>41</sup>, e.g. the treaty concluded with Canada (CETA)<sup>42</sup>.

The GIs rules included in IP chapters of FTA have always been a sensitive issue for European countries such as Italy which have a strong wine and food heritage that is often misused and appropriated in other countries. Take CETA for example. Canada has accepted to protect just 41 Italian GIs – e.g. ‘Aceto balsamico’ e ‘Aceto balsamico Tradizionale di Modena’, ‘Parmigiano Reggiano’, ‘Culatello di Zibello’, ‘Mozzarella di Bufala Campana’ – out of the 291 list that Italy had sought to protect. As a result, Italy has decided to delay the ratification of the agreement<sup>43</sup> on the grounds that it covers only a small number of its protected GIs.

The tension between the *Old World* and the *New World* also emerged during the negotiations between the US and the EU for concluding the Transatlantic Trade and Investment Partnership (TTIP). These talks failed also because of the opposition of US producers of wines and food (especially cheeses) which could not accept the EU claw-back demands. Emblematic and eloquent was the letter sent by fifty-five US senators to the US Trade Representative in 2014, expressing their dislike of the EU requests. It included the following exhortation: «we urge you to make clear to the EU counterparts that the US will reject any proposal in the TTIP negotiations now underway that would restrict in any way the ability of US producers to use common names (eg for cheeses)»<sup>44</sup>. The TTIP negotiations were then interrupted after Trump was elected US President, and at the date of writing

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<sup>41</sup> M. HUYSMANS, *Exporting protection: EU trade agreements, geographical indications, and gastronomic nationalism* (2020) *Review of International Political Economy* 1.

<sup>42</sup> EU-Canada Comprehensive Economic and Trade Agreement (CETA), OJ (L) 11 of 14.1.2017. For a full overview of the agreement, see: B. O’CONNOR, *Geographical indications in CETA, the comprehensive economic and trade agreement between Canada and the EU* (2014) NCTM Association d’avocats, [http://www.origin-gi.com/images/stories/PDFs/English/14.11.24\\_GIs\\_in\\_the\\_CETA\\_English\\_copy.pdf](http://www.origin-gi.com/images/stories/PDFs/English/14.11.24_GIs_in_the_CETA_English_copy.pdf).

<sup>43</sup> Being a mixed type treaty, that is an agreement concerning areas of shared competence between of EU Member States, it needs the ratification of individual Member States to become fully applicable. Pending ratification at national level, the agreement then enters into force for all the parts that are the exclusive competence of the EU, postponing the full application of all chapters until the national ratification process of the agreement according to domestic national law. Thus, CETA agreement (partially) entered into force provisionally.

<sup>44</sup> F. ARFINI, M.C. MANCINI and M. VENEZIANI, *Intellectual Property Rights for Geographical Indications: What is at Stake in the TTIP?* (Cambridge Scholars Publishing, 2016); the Senator’s letter is available at: U.S. Senator Tammy Baldwin of Wisconsin ([senate.gov](http://senate.gov)).

there is no concrete sign that they would be resumed soon.

#### *4. The EU goes East: the GIs aspects of the EU-Japan Economic Partnership Agreement*

The EU has also concluded GI-protecting treaties with countries from the Far East. For example, in 2020 it signed a sectorial agreement with China on the protection of GIs<sup>45</sup>. The trade accord concluded with Korea<sup>46</sup> also contains an IP chapter with several important GI provisions. And so does the EU-Japan Economic Partnership Agreement (JEPA)<sup>47</sup>. JEPA was signed on 1 July 2018 and entered into force on 1 February 2019, with Chapter 14 focusing on IP rights. JEPA should be hailed as a positive contribution to strengthening IP protection in both the EU and Japan, and therefore further promoting trade and reciprocal investments<sup>48</sup>.

JEPA's Chapter 14 does include a section on GIs, in particular in relation to foodstuff and agricultural products as well as wines, spirits and other alcoholic beverages<sup>49</sup>. Chapter 14 reaffirms the strong protection that the EU and Japan already have in connection with geographical names<sup>50</sup>. In both countries registrations are granted by governments after

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<sup>45</sup> Agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications, *OJ (L) 4081 of 4.12.2020*. The recently entered into force EU-China Agreement (March 1, 2021) recognises 26 important Italian denominations for food– e.g., Prosciutto di Parma, Grana Padano, Parmigiano Reggiano –, but also names of wines – e.g. Chianti, Barolo, Brunello di Montalcino, Prosecco - Conegliano Valdobbiadene. Among overall GIs protected under the agreement (100), Italy is the European country with the highest number of protected names.

<sup>46</sup> European Union–South Korea Free Trade Agreement, *OJ (L) 127 of 4.05.2011*. For a full overview of the agreement, see: B. O'CONNOR and G. DE BOSIO, above in fn. 30.

<sup>47</sup> Agreement between the European Union and Japan for an Economic Partnership, *OJ (L) 330 of 27.12.2018*.

<sup>48</sup> See JEPA Art. 14.1.

<sup>49</sup> Chapter 14 does not cover geographical names for industrial products, as it is indirectly confirmed by Art. 14.22(1), which mentions just wines, spirits, other alcoholic beverages and agricultural products. Therefore, as far as agricultural products are concerned, Japan and the EU are bound by the minimum standard obligations under Articles 22-24 TRIPS.

<sup>50</sup> As far as the EU is concerned see the already mentioned Regulation No 1151/2012 and Regulation 2019/787. As far as Japan is concerned, see the 2005 Act on Protection



an examination is carried out that aims at checking the quality of the relevant products and the link between such quality and the geographical areas. Specifically, both the EU and Japan already have in place an advanced system of GI registration procedure, which complies with the requirements under Chapter 14<sup>51</sup>. Such system consists of steps such as:

- (1) making available to the public the lists of registered GIs;
- (2) managing administrative processes aimed at verifying that the name identifies a product as originating from the geographical area in question, where the quality, reputation or other feature of the good is essentially attributable to its geographical origin;
- (3) an opposition procedure that allows the legitimate interests of third parties to be taken into consideration; and
- (4) a cancellation procedure<sup>52</sup>.

Also, both EU and Japanese laws offer a wide scope of protection, as GI owners are given the right to prevent others from using their signs not only to confuse consumers as to the geographical origin of the product, but also from merely evoking and recalling such names. Chapter 14 confirms such wide scope of protection also for the 217 EU GIs as well as the 56 Japanese GIs included in JEPA<sup>53</sup>. Thus, the EU has obtained protection of many European geographical names in Japan (this has happened through a procedure which has included publication and the submission of opinions by interested parties, and which was finalised before JEPA entered into force). Champagne, Feta, Parmigiano-Reggiano, Camembert de Normandie, Prosciutto Toscano and Prosecco are just a few examples. Obviously, Japan has also secured protection of some of its own GIs in the

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of the Names of Specific Agricultural, Forestry and Fishery Products and Foodstuffs as well as the 2015 Notice on Establishing Indication Standards Concerning GI for Liquor. For a summary of the former, see [http://www.maff.go.jp/e/policies/intel/gi\\_act/attach/pdf/index-3.pdf](http://www.maff.go.jp/e/policies/intel/gi_act/attach/pdf/index-3.pdf). For the text of the latter, see [https://www.nta.go.jp/english/taxes/liquor\\_administration/geographical/01.htm](https://www.nta.go.jp/english/taxes/liquor_administration/geographical/01.htm).

<sup>51</sup> Art. 14.23. For a summary of the Japanese regime of GI protection, and most important aspects of GIs provisions under JEPA, see the website of the general trading company Mitsui, at [https://www.mitsui.com/mgssi/en/report/detail/\\_\\_\\_icsFiles/afieldfile/2019/05/30/1904c\\_matano.pdf](https://www.mitsui.com/mgssi/en/report/detail/___icsFiles/afieldfile/2019/05/30/1904c_matano.pdf). For an additional summary of the most relevant features of JEPA, see the website of the EU-Japan Centre for Industrial Co-operation, a no-profit venture between the European Commission and the Japanese government, at <https://www.eubusinessinJapan.eu/sites/default/files/geographical-indications-factsheet.pdf>.

<sup>52</sup> See again Art. 14.23.

<sup>53</sup> Art. 14.25.

EU, ‘Kobe beef’ being the most notable example. Yet, the EU has obtained by far the highest number of protected indications. A quick look at the long list of EU protected names referred to in JEPAs Annex 14-B, as opposed to the shorter list of the corresponding Japanese indications, is quite telling. As shown above, the EU does have 217 GIs (72 for food and 145 for wines and spirits) while Japan has just 56 (48 for food and 8 for wines and spirits)<sup>54</sup>. The lists may also be amended (and possibly expanded) in the future<sup>55</sup>, leaving the EU and Japan free to decide at a later stage to protect additional GIs<sup>56</sup>.

## 5. Conclusion

The EU regularly seeks strong protection for geographical indications for agricultural products and foodstuffs, as well as for wines and spirits, both at home and in countries with which bilateral negotiations are taking place. This pressure for stronger protection, which is certainly much higher than in other countries, comes from powerful lobbies within the agri-food sector, particularly in countries such as France, Italy, Spain, Portugal and Greece.

Within the EU, the CJEU has recently extended the scope of protection of geographical indications. However, whether this is necessarily a result consistent with the traditional aims of GI is debatable. In particular, the CJEU rulings in the *Queso Manchego* and *Morbier* cases are quite controversial and risk making the EU sui generis GI protection system an easy target for criticism. Most aspects of such a system are certainly to be commended, but it seems difficult to justify the extended protection recently approved by the ECJ with such an overbroad notion of “evocation” (*Queso Manchego*) and the unusual protection of characteristics of the GI product (*Morbier*). It may well be that the CJEU will take a different (and narrower) position in future disputes over the scope of GI protection.

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<sup>54</sup> See Annex 14-B List of geographical indications.

<sup>55</sup> Art. 14.30.

<sup>56</sup> JEPAs also contains some exceptions which limit the ability of EU GI owners to use and claim exclusive rights over their signs. Yet, overall, these exceptions do not tilt the balance in favor of Japan as the EU is clearly the party which has obtained most benefits when it comes to protecting GIs. On such exceptions, and in general for a full overview of the intellectual property aspects of JEPAs see E. BONADIO-L. McDONAGH-T. SILLANPAA, *Intellectual property aspects of the Japan-EU economic partnership agreement* (2020) 2 *International Trade Law & Regulation*.

What is also criticised, especially in *New World* countries, is the EU's 'expansionist' approach. We have seen that the EU is trying to export as much as possible an EU-like regime of GI protection through free trade agreements and economic partnership agreements. While in some cases the EU was not always able to impose the level of protection it wanted, in other cases most of the EU demands were accepted at the end of the negotiations: The EU-Japan agreement is an example of this latter trend. Indeed, Japan has made concessions to the EU and accepted to protect, through JEPA, more than two hundred European geographical names such as Champagne, Parmigiano and Feta (conversely, the number of Japanese geographical indications protected in the EU under this agreement is much lower)<sup>57</sup>. It should be remembered, however, that this treaty has caused discontent in other parts of the world. For example, Australian wine producers who sold sparkling wine in Japan with the Prosecco label have lost the right to continue using that brand in the Japanese market precisely because of JEPA. The latter agreement, in fact, has protected the name 'Prosecco' as a geographical name in Japan, the registration being owned by the Italian consortium for Prosecco wine. This is a serious blow to Australian wine producers, who will inevitably suffer losses due to the loss of sales in Japan<sup>58</sup>. However, while the critique of the EU's 'expansionist' strategy can be understood from the perspective of the New World, it appears weak when viewed through the prism of EU policy. After all, all states tend to satisfy their interests as much as possible when it comes to negotiating trade agreements. The EU was not the first and will not be the last to do so.

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<sup>57</sup> It should be noted however that Japan mostly benefits from other non-IP parts of JEPA, for example from the removal of EU import duties on Japanese cars (Japan's automobile sector is notoriously strong and that the EU is the biggest importer of road vehicles in the world). It is therefore no surprise that JEPA has been ironically labelled as the "cars-for-cheese" agreement.

<sup>58</sup> Australian wine producers also claim that the term 'Prosecco' is not a real geographic name, being instead just the name of the grape variety, which therefore should not be monopolised. See M. DAVISON-C. HENCKLES-P. EMERTON, *In Vino Veritas? The Dubious Legality of the EU's Claims to Exclusive Use of the Term 'Prosecco'* (2019) 29 *Australian Intellectual Property Journal*, pp. 110-126. For an opposite view, see E. BONADIO-M. CONTARDI, *The GI Prosecco Battle between Italy and Australia: Some Lessons from the History and Geography of the Most Famous Italian Wine*, (2022) 23 *The Journal of World Investment and Trade*, pp. 260-292..

Roberta Peleggi

*Agricultural production under contract:  
an overview*

SUMMARY: 1. Introduction – 2. Contract farming: a multiform economic practice – 3. At the core of contract farming: main features of agricultural production contracts – 4. Selected issues – 4.1. Obligations of the parties – 4.2. Remedies for breach of contract – 4.3. Excuses for non-performance – 5. The relevant legal framework – 5.1. The national regulations on contract farming: a sketch – 5.2. The UNIDROIT/FAO/IFAD Legal Guide on Contract Farming – 6. Closing Remarks.

1. *Introduction*

In modern agriculture, the relationship between producers and their buyers (processors, retailers, exporters, etc.), which is typically affected by contractual disparity, is also very often regulated through agreements entered before the commencement of the growing season to satisfy the needs of the final buyers in advance.

Such agreements, termed as agricultural production contracts, are at the core of a more complex economic practice, known as contract farming. Already long employed in industrialized countries as a tool for the modernization of agriculture<sup>1</sup>, contract farming has gradually been promoted also in developing and transitional economies to improve agricultural performance under the drives of market liberalization, the advancement in the logistic, storage, and communication systems, the growing and increasingly sophisticated demand for food on a global scale<sup>2</sup>.

After a short introduction to the practice of contract farming and its

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<sup>1</sup> See A. JANNARELLI, *Contractual Framework and Inter-firm Co-operation in the Agriculture Sector*, in *Unif. Law Rev.*, 2012, p. 247 ff.

<sup>2</sup> See M. MAERTENS, J. SWINNEN, *Agricultural Trade and Development: A Value Chain Perspective*, WTO Staff Working Paper, No. ERSD-2015-04, Geneva, 2015, p. 6.

potential advantages and drawbacks (2), this paper will attempt at illustrating the main features of the bilateral legal relationship known as agricultural production contract (3). It will then address some issues of key interest for the concerned matter (4), namely the typical obligations undertaken by the parties (4.1), the remedies in case of breach of contract (4.2) and the impact of supervening events on contractual performance (4.3). The contribution will proceed with a brief description of the relevant legal framework for this kind of transaction (5) at domestic (5.1) and international levels (5.2), followed by short concluding remarks (6).

## 2. *Contract farming: a multiform economic practice*

From an economic viewpoint, contract farming can be described as a particular form of supply chain governance adopted by firms to secure access to agricultural products, raw materials, and supplies within certain specifications as to the quantity, quality, origin, and timing<sup>3</sup>.

This form of production is operated to cultivate plant varieties, in animal husbandry, aquaculture and forestry for commodities intended for both industrial processing and human or animal consumption. However, particularly suitable for this practice are highly perishable goods as well as goods requiring the respect of stringent quality standards and destined to satisfy sophisticated production needs<sup>4</sup>.

Contract farming may take different forms: In related literature, five different models or schemes of contract farming have been identified<sup>5</sup>, which are usually differentiated based on the product characteristics, the number of parties involved, the targets and resources available to the firms, the farmers' skills<sup>6</sup>.

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<sup>3</sup> See C.A. DA SILVA, *The Growing Role of Contract Farming in Agri-Food Systems Development: Drivers, Theory and Practice*, Agricultural Management, Marketing and Finance Service FAO, Rome, 2005.

<sup>4</sup> E. REHBER, *Contract Farming in Practice: An Overview*, Zwick Center for Food and Resource Policy Research Report No.7, University of Connecticut, 2019, p. 4 ff.

<sup>5</sup> See, among others, C.M. PROWSE, *Contract Farming in Developing Countries - A Review*, Agence Française Développement, February 2012; E. REHBER, *Vertical Coordination in the Agro-Food Industry and Contract Farming: A Comparative Study of Turkey and the USA*, Food Marketing Policy Center, Research Report No. 52, Department of Agricultural and Resource Economics, University of Connecticut, 2000, p. 10 ff.

<sup>6</sup> C. EATON & A.W. SHEPHERD, *Contract Farming: Partnership for Growth*, FAO Agricultural Services Bulletin, n.145, Rome 2001, p. 47 ff.; P. SHARMA, *Contract*

To start, contract farming can take the shape of a centralized model, in which the contractor, typically a large and public-private company, makes agreements with a large number of producers and exerts extensive power over the subsequent phases of processing and marketing of the goods. This model is quite common for the cultivation of tobacco, cotton, cane sugar, bananas, coffee, tea, cocoa, but it is also largely used for poultry, pork, and beef breeding<sup>7</sup>.

The nucleus estate model is a variant of the centralized model, in which the contractor owns or obtains concession for using the land needed for production, on which it can also establish its own facilities. This model has been adopted, for example, in Indonesia and Papua New Guinea for palm oil and other perennial crops, as well as for dairy products<sup>8</sup>.

Furthermore, the multipartite scheme can be envisaged, examples of which are found in Mexico, Kenya, West Africa, China. This model entails the presence of various actors: besides the farmer and the contractor, one can find local governments, NGOs, banks or other private parties engaged in it as sub-suppliers, product processors, financiers and facilitators<sup>9</sup>.

As for the informal model, this is to be found in situations where individual businesses or small businesses conclude (even orally) seasonal contracts with agricultural producers, usually for crops such as fresh vegetables and tropical fruits, which require only a minimum level of processing. The contribution to production by the purchaser, in this case, is normally very limited.

Finally, there is the intermediary model, in which large companies purchase products through associations of producers or individual collectors who, in their turn, enter into informal agreements with producers. This model predominates in Southeast Asia<sup>10</sup>.

As amply discussed in literature and evidenced by empirical studies, the spread of contract farming globally is associated with the potential advantages for both producers and contractors<sup>11</sup>. Producers (especially

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*Farming*, New Delhi, 2012, p. 7 ff.

<sup>7</sup> P. SHARMA, *Contract Farming*, cit., p. 9 ff.

<sup>8</sup> Under this model, the contractor may start its activity with a pilot farm and, after a trial period, it may introduce the farmers - also called «satellite» farmers - to the technology and production methods of the concerned crop.

<sup>9</sup> P. SHARMA, *Contract Farming*, cit., p. 11 ff.

<sup>10</sup> Cf. C. EATON & A.W. SHEPHERD, *Contract Farming*, cit., p. 54 ff.

<sup>11</sup> Cf. A.T. MELESE, *Contract Farming: Business Models that Maximise the Inclusion of and Benefits for Smallholder Farmers in the Value Chain*, in *Unif. Law Rev.*, Vol. 17, Issue 1-2, 2012, p. 291 ff. (294 ff.)

small farmers) can rely on a higher and more stable income (thus reducing the temptation to use illegal labor<sup>12</sup>), be provided with technically advanced inputs, satisfy stringent quality standards set up domestically or internationally, have access to credit, and enter more lucrative markets to commercialize their products<sup>13</sup>.

In their turn, contractors can reduce transaction and production costs, rely on a steady supply of goods with specific attributes, mitigate risks, have access to land and other natural resources needed for production<sup>14</sup>, and guide the production process.

It is also generally recognized that contract farming, as a device lying in between traditional spot market and complete vertical integration<sup>15</sup>, can strengthen coordination and efficiency within the supply chain, at the same time contributing to food safety and security<sup>16</sup>. Likewise, this kind of practice can create new employment opportunities and promote the inclusion of certain categories of laborers, like for instance women<sup>17</sup>, alleviate poverty and help preserve natural resources thus contributing to sustainable development.

Despite its many benefits, however, this form of production also presents disadvantages and risks, mainly because it very often results in an unbalanced relationship between the parties involved in the contract.

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<sup>12</sup> Regrettably, illegal recruitment by unauthorized intermediaries ('gangmasters') and labor exploitation of low-skilled domestic and migrant workers are global emergencies in the agriculture sector: for a recent account of the situation in Italy, Spain and Greece, see the Report of Terra!, «(Eu)xploitation. The gang Mastering: a Southern Question. Italy, Spain, Greece», [https://www.associazioneterra.it/wp-content/uploads/2021/02/Euexploitation\\_ENG\\_WEB.pdf](https://www.associazioneterra.it/wp-content/uploads/2021/02/Euexploitation_ENG_WEB.pdf).

<sup>13</sup> P. SHARMA, *Contract Farming*, cit., p. 50 ff.

<sup>14</sup> It is noteworthy, in this respect, that contract farming represents an economic model alternative to plantation agriculture and, as such, it is viewed as a tool to contrast the recent phenomenon known as land grabbing. Indeed, whereas this latter presupposes the acquisition of land, especially in developing countries, by foreign States or private entities to produce food or biofuels for export; contract farming, instead, is a practice that permits to preserve ownership and/or possession of the land in the farmers' hands, thus leaving the rights of local communities and indigenous groups untouched.

<sup>15</sup> Indeed, contract farming is defined as quasi-vertical integration or contract integration. In traditional spot market, there is no written or oral agreement between the firm and the farmer for both buying and selling; hence, the farmer receives supplies from whoever it chooses and sells its products to whoever will pay the best price. On the contrary, vertical integration implies the consolidation of two or more stages in the production and marketing process under the management of a single firm.

<sup>16</sup> Cf. E. REHBER, *Contract Farming in Practice*, cit., p. 57 ff.

<sup>17</sup> See P. SHARMA, *Contract Farming*, cit., p. 57 ff.



Indeed, with its weaker bargaining strength and economic power, the agricultural producer is typically exposed to unfair conduct and practices by the agribusiness firm; and this is all the more so when the market appears highly concentrated on the demand side<sup>18</sup>.

Additionally, especially in the poorest rural areas of the planet, the introduction of monoculture agricultural production due to contract farming ventures can deprive farmers (and, more generally, the populations living there) of the resources necessary for sustenance, as well as representing a serious threat to the ecosystem in the case of predatory cultivation practices.

### *3. At the core of contract farming: main features of agricultural production contracts*

While contract farming displays great variety in practice, what is unique is that it rests on a bilateral contractual relationship between the agricultural producer and the contractor.

The former can be either an individual farmer (typically a small- or medium-sized enterprise, acting also as a partner of a joint undertaking) or a corporate legal entity; or a group of producers<sup>19</sup>, as those convened in the most widespread forms of associations or cooperatives<sup>20</sup>.

As regards the contractor, this is typically a private business entity engaged in food processing or marketing of products<sup>21</sup>. Occasionally, public

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<sup>18</sup> It can happen that the contractor refuses to comply with the agreed price, especially in the case where the price on the open market becomes comparatively lower, or puts in place strategies to delay payment or adjust delivery schedule to take advantage of price volatility. Also, it can happen that contractor tries to diminish the quantity or quality of the final products through intentional actions or omissions regarding input supply or production methods.

<sup>19</sup> In certain countries, also traditional communities or indigenous groups can function as producer organizations, as they are a legal personality recognized by statute, with members having their own assets and their respective head being entitled to enter into agreements for all members.

<sup>20</sup> As is well known, associations and cooperatives among agriculture producers are essential to increase the bargaining power of the category: see, for further considerations, A. JANNARELLI, *Contractual Frameworks*, cit., p. 258 ff.

<sup>21</sup> The contractor may indeed sell the goods either to final consumers, as increasingly happens with supermarket brands, or to other chain participants for further processing and sale. Contractors may also be wholesalers and/or exporters.



entities may directly act as contractors<sup>22</sup>.

It is worth noting that a contract farming agreement is other than an employment relationship. Even though it may be difficult, in certain situations, to draw a clear line between the two (and it is especially so where the contractor has extensive supervisory power over the producer), the parties to an agricultural production contract are independent from each other and not involved in a labor relationship<sup>23</sup>.

Quite apart from the fact that an agricultural production contract may present a level of detail that changes from case to case, it usually gives rise to a variety of reciprocal and interrelated obligations 'to do' and 'to give' by either party.

This is to say that typically this kind of arrangement is not simply an agreement entered into before or during production, by which the producer agrees to grow and supply at a future time specific goods to the contractor, and this latter commits to paying (an often predetermined) price and taking delivery of the output<sup>24</sup>.

Rather, under such agreement, the contractor very often undertakes to support production by supplying certain physical or immaterial inputs<sup>25</sup>, extension services, and/or is entitled to prescribe specific methods or techniques that the producer is bound to follow in the production process<sup>26</sup>.

Equally importantly, the contractor frequently consents to provide financial support in the form of inputs on credit terms, loans or guarantees. In fact, while on the side of purchasers there are often large companies or industrial or large-scale distribution giants with huge resources at

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<sup>22</sup> Public entities are directly involved as contractors when they purchase commodities intended for schools, hospitals and the military; major public purchasers can also be humanitarian agencies under emergency assistance programs.

<sup>23</sup> The fact that an agricultural production contract is to be distinguished from an employment relationship is sometimes even explicitly clarified in national legislations: see, for example, Art. 625-3 (2) *Código civil of Catalonia* and Art. 2 of the *Brasílian Lei n. 13.288 «sobre contratos de integração»*.

<sup>24</sup> This kind of agreement, which is traditionally known as a «market specification contract», falls squarely under the traditional legal scheme of the sale transaction, even if it could nevertheless be covered by a broad economic definition of contract farming.

<sup>25</sup> Typically, the contractor commits to providing seeds and fertilizers for crop production, animals and animal feed, medicines and veterinary products; it can also provide technology in the form of know-how or use of patents and intellectual property rights. This kind of agreement can be labeled a «resource providing contract» (see A. JANNARELLI, *Contractual Frameworks*, cit., p. 251).

<sup>26</sup> This kind of agreement is known as a «production management agreement»; under this sort of agreement, the contractor may also guarantee a minimum income to the farmer (see, A. JANNARELLI, *Contractual Frameworks*, cit., p. 251).

their disposal (Nestlé, Carrefour, Olam, Unilever, Wal-Mart, Chiquita, Del Monte, etc.), on the side of the agricultural producers we often have medium-small enterprises, which, in the rural areas of the world poorest countries, are family-run. The financial support that small farmers can obtain through these operations is therefore essential to consent them to abandon subsistence farming and find a commercial channel for their output, though facing the risk of not repaying the loans received if their revenues would not be as good as expected.

#### 4. *Selected issues*

Before addressing, in synthetic terms, the legal framework surrounding agriculture production agreements, it is convenient to illustrate some of the key aspects of these arrangements.

##### 4.1. *Obligations of the parties*

As already mentioned, agriculture production contracts typically give rise to an array of interrelated obligations between the parties.

On the part of the producer, what is central is the obligation to produce goods in conformity with the contract terms as to quantity and quality.

Quantity is an aspect whose definition is considered essential under national legislations on contract farming<sup>27</sup>, even if a concrete determination is left to the parties' will. It can be noted that the situation where the contractor undertakes to purchase the entire output is very common in practice and this is usually interpreted as entitling the buyer to exclusive rights on the products.

Conversely, the contractor may agree to buy only part of the production, expressed in the form of a percentage or a specific (minimum or variable) quantity. In these situations, the producer is normally free to dispose of the remaining part of the goods, albeit the contractor may be granted a right of first refusal. Agricultural production contracts may also require the producer to respect a quota, which can be understood as a minimum quantity, a threshold not to be exceeded or both.

As far as quality requirements are concerned, they can be imposed either

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<sup>27</sup> See, *infra*, § 5.1.

by express terms in the contract or by mandatory or default national legal rules<sup>28</sup>. It is also very common for external quality standards set up either by private or public authorities at both domestic and international levels to be incorporated by reference<sup>29</sup>.

However, it is hardly disputable that quality compliance is more and more dependent on the production process, with the result that the final control is very often preceded by production monitoring by the contractor. Also relevantly, assessment and evaluation of the conformity of the goods are mainly carried out by third parties through certification schemes.

As regards the contractor, its main obligations under the agreement are to accept the goods and pay the agreed price. National legal rules on agricultural production contracts include price among those terms that cannot be omitted<sup>30</sup>. However, there are only a few cases in which specific criteria for its determination are established by the legislator (for example, identifying a minimum and/or maximum price), whilst the parties normally enjoy a wide margin of discretion. Therefore, in the absence of government regulation, the parties are free to choose the price formula<sup>31</sup>; yet, practice

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<sup>28</sup> The inspection of the products and the verification of the quality requirements by the contractor usually take place upon delivery, at the same time when the price is also determined. Hence, to prevent fraudulent behavior, especially on the part of the buyer, aimed at manipulating quality (or quantity) and make the other party accept a lower price than one expected, the contract or applicable law may require the presence of the producer, his representatives or an independent expert during measurement operations. For example, according to Article 38 of the *Ley de la producción, industrialización y comercialización de la agroindustria azucarera* of El Salvador, representatives of sugarcane producers may appoint delegates to verify the weight and quality of sugarcane delivered to sugar mills. In France, producers have the right to request the presence of one of their representatives in weighing, counting, or grading operations (see *Article R326-1 (4) Code rural et de la pêche maritime*). In California, in the tomato production sector, a specific advisory board is entrusted with the measurement operations.

<sup>29</sup> Compliance with standards is, in principle, voluntary; however, in most cases, it results in a sort of imposition on the producer and a 'conditio sine qua non' for market access: see, for further considerations, (cfr. J. SWINNEN, K. DECONINCK, T. VANDEMOORTELE, A. VANDEPLAS, *Quality Standard, Value Chains and International Development*, New York, 2015).

<sup>30</sup> See, *infra*, § 5.1.

<sup>31</sup> The price formula chosen by the parties, which will depend on various factors such as the kind of commodities supplied under the contract, the characteristics of the related market, etc., may be fixed, variable or both. In the first situation, the price is set at the beginning of the season and can be tied to a number of indices or factors such as, for example, the price of the product in the local or global market. Alternatively, the price can be determined to reflect production costs and what can be considered as reasonable revenue. In the variable formula, which is often used for goods destined for export, the

shows that price clauses are often ambiguous or excessively complex, thus leading agricultural producers to misunderstand how the price will be calculated.

Furthermore, as already pointed out, it is common for contractors to undertake to supply (directly or indirectly) tangible or intangible elements needed for production<sup>32</sup>, and for producers to pay the related price, usually by deducting it from the payment they are entitled to after the goods have been delivered<sup>33</sup>.

As a consequence of the contractor's supply of inputs, the producer may have to comply with a series of obligations (relating to the receipt, notification of defects, caretaking, use according to the instructions received<sup>34</sup>), in addition to any mandatory obligation derived from the contract and the applicable law concerning the production method<sup>35</sup>. On its part, the contractor may assume obligations concerned with monitoring and control over the inputs use and the production process<sup>36</sup>, which often

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price determination may be based on price scales or depend on performance indices with reference, in particular, to the quantity and final quality of the products. Price determination may be also linked to the revenues obtained by the contractor after selling the goods. In livestock contracts, the price is normally calculated taking into account the weight increase registered at the time of delivery.

<sup>32</sup> If the contractor is committed to supplying physical inputs such as seeds, live animals, chemicals, etc., it may retain title over them. This is clearly beneficial to contractors, as they will be in a better position to challenge potential claims from the farmers' creditors over the object of the contract. Yet, the risk of the animals dying or becoming unusable because of illness rests generally on the farmer (see C. PULTRONE, *An Overview of Contract Farming: Legal Issues and Challenges*, in *Unif. Law Rev.*, 2012, p. 263 ff. (p. 284).

<sup>33</sup> National regulations often require the inclusion of a clause in the contract indicating the price of inputs so that the agricultural producer can make a reliable prevision of the production costs and expected revenues, and avoid opportunistic behavior by the contractor (see *infra*, § 5.1).

<sup>34</sup> Detailed instructions in the contract are often provided as to the use of fertilizers and pesticides and to harvesting. As for the agreements concerning livestock and poultry production, they may require compliance with prescribed standards as to size, sanitation, litter and contain directions regarding pasture management and collection methods for animal produce.

<sup>35</sup> Compliance with production methods requires parties to respect mandatory norms relating, among others, to environmental and sustainability concerns, working conditions, safety and hygienic standards.

<sup>36</sup> Such obligations often regard the access to planting areas by the contractor itself or authorized third parties subject to specific conditions concerning frequency, hour, and advance notice for the visits. Also, direct or indirect oversight of the production process by the contractor often gives rise to ancillary obligations regarding handling, packaging, storage of goods before delivery.

gives rise also to ancillary obligations regarding handling, packaging, storage of the goods before delivery.

Lastly, if the contractor undertakes to supply services<sup>37</sup>, performance needs to be in conformity with the standards set out in the contract as well as in accordance with national regulations or professional standards of conduct.

#### 4.2. Remedies against breach of contract

The remedies open to either party in case of breach of the obligations descending from an agriculture production agreement will depend on the contract terms and the rules provided by the applicable law.

However, as pointed out by legal doctrine<sup>38</sup>, the distinctive features of this sort of agreement embedded, as it is, into a 'close' supply chain, calls for the prevalence, whenever appropriate, of the so-called cooperative remedies, which include in-kind and corrective measures<sup>39</sup>. These remedies could also be agreed upon by the parties after a dispute has arisen, as a result of an amicable attempt to solve the matter.

For instance, if a breach imputable to the producer regarding process-related obligations materializes in the early stages of the production cycle, the contractor may demand modifications to the techniques and methods applied by the producer or request him to comply with the given instructions<sup>40</sup>. Undoubtedly, in the same situation a remedy such as compensatory damages could not appear appropriate, for what is of most importance for both parties and other participants in the value

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<sup>37</sup> The contractor may undertake to provide technical advice such as agronomic or veterinary assistance or direct intervention in the form of soil preparation, harvesting, transportation of produce, etc.

<sup>38</sup> Cf. F. CAFAGGI, P. IAMICELI, *Contracting in Global Supply Chains and Cooperative Remedies*, 20 *Unif. L. Rev.* 135 (2015).

<sup>39</sup> Cooperative remedies, as a general category, can be intended as comprising remedies by which the parties try to achieve the results defined by the contract and to safeguard specific investments made with the contract. In particular, the in-kind remedies include specific performance, repair and replacement of non-conforming goods; corrective measures include the use of warnings, the adoption of corrective plans, product withdrawal and recall.

<sup>40</sup> Depending on the type of contractual relationship, the request for corrective measures may be addressed directly to the producer, the processor or also to third parties. In fact, corrective measures are often part of an action plan that the processor is obliged to sign in cooperation with the contractor or with the certifying body, when certification is required (see F. CAFAGGI, P. IAMICELI, *Contracting in Global Supply Chains*, cit., p. 165 ff.).

chain is that the reasons causing non-performance (or possible non-performance) are removed. This is especially true when the market structure is highly concentrated and the creditor cannot easily enter into a substitute transaction with third parties.

Moreover, when non-performance by the producer results in non-conformity of the goods, the contractor may avail himself, at least in principle, of remedies such as repair or replacement. Yet, as can be easily understood, a contractual remedy such as repair could be inadequate when it comes to agricultural products, while replacement may be rendered impracticable both by the fact that products of the same sort are not available through traditional channels, and that the producer may not have access to the free market. It should also be considered that substitution by the same producer will only be possible provided that there is a surplus of the quantity produced over the one required, and at least part of the goods is in compliance with the contractual requirements.

Conversely, if non-conformity becomes apparent only after delivery, the contractor may be interested in a price reduction, in selling the second-rate products on a secondary market, or, if non-conformity is serious, in bringing the contract to an end and seeking for damages.

Besides, to address cases where products turn out to be dangerous or unsafe, in contractual practice clauses are common that assign a contractor the right to require withdrawal or recall of the goods (depending on whether or not they have already been marketed). Such measures typically require collaboration or cooperation with other supply chain participants, especially if they are sought after the agricultural production contract has expired or the products have left the producer's sphere of control.

As for the producer's remedies, in the case of delayed supply of inputs by the contractor or failure to provide conforming inputs or to supply inputs altogether, the producer may withhold performance. However, the producer may not have sufficient contractual force to threaten such a remedy, or in some instances withholding production may turn out to be inconsistent with the production schedule, whilst that remedy may instead appear appropriate in cases where the producer is not in a position to obtain substitute inputs or adopt reasonable measures to limit the consequences of their non-conformity, or again when the contractor fails to provide the producer with the necessary finance to complete production in due time.

Lastly, it is worth mentioning that also in agricultural production agreements the parties often agree on sanctions as a result of contract breach either in the form of monetary penalties (when permitted under the

applicable law) or of non-monetary sanctions, as for instance prohibiting the producer from entering into a new agreement within the same supply chain, or 'blacklisting', i.e. divulging on the relevant market that the producer has failed to properly perform its obligations under the contract.

#### 4.3. *Excuses for non-performance*

Agriculture is an inherently risky activity. Agricultural production agreements are no exception: the producer's ability to perform may indeed be seriously hampered by the occurrence of disruptive natural phenomena such as floods, drought, extraordinary high or low temperatures, epidemics, insect invasions.

Not unlike other types of agreements, agricultural production contracts are also vulnerable to changes affecting the political and economic environment: changes in domestic legislation or policy, wars, strikes, embargos, import or export bans, etc.<sup>41</sup>.

The consequences that the above-mentioned events may have on one party's ability to perform depend on whether the event in question constitutes a real impediment that renders the performance impossible, even if only temporarily, so as to fall within the sphere of the so-called *force majeure*; or if it determines a significant alteration of the original equilibrium of the contract without resulting in a real impossibility, this latter situation being referred to as a *change of circumstances* or *hardship*. While acknowledging that the line between the two is sometimes quite subtle, these legal institutions are to be kept functionally distinct<sup>42</sup>.

In the agreements under discussion, hardship-like clauses are uncommon and, since not all legal systems attach relevance to supervening events that (merely) render performance more burdensome, the absence of a specific

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<sup>41</sup> Cf. C. PULTRONE, *An Overview*, cit., p. 281 ff.

<sup>42</sup> Force majeure generally identifies events occurring after contract conclusion, which are unforeseeable, unavoidable, irresistible, beyond the parties' control and that render performance of either party (totally or partially) impossible, thereby exonerating it from liability. In contrast, a change of circumstances may be said to occur when supervening events (still exceptional, unforeseeable and outside the disadvantaged party's sphere of control) do not impede performance but are such that they fundamentally alter the original equilibrium of the contract and render fulfillment much more onerous: see, among others, D. MASKOW, *Force Majeure and Hardship*, 40 *Am. J. Comp. L.* 657 1992; C. KESSEDJIAN, *Competing Approaches to Force Majeure and Hardship*, 25 *Int'l Rev L & Econ* 2005 415, p. 427.



clause may leave the affected party without protection<sup>43</sup>.

On the contrary, force majeure clauses are recurrent in this context, even if a consolidated practice regarding their negotiation and drafting is lacking. Moreover, such clauses are often formulated to the detriment of the producer or, in any case, in a rather vague way, failing to indicate the events that may fall within their coverage or to make it clear, if such an indication exists, whether it is an exhaustive list or whether the clause may instead be interpreted extensively.

The latter consideration is particularly relevant as, if the clause contains only a general reference to force majeure, circumstances such as bad – and even extraordinarily bad – weather conditions or epidemics that may destroy production will not likely be treated as amounting to a real impediment<sup>44</sup>; the same holds true for events such as strikes. Conversely, occurrences like an interruption of transportation services, export restrictions or workplaces closures (as those measures adopted by national governments to combat the spread of COVID-19<sup>45</sup>) will be more likely to be included in its coverage.

Even in the absence of an express contractual provision, under national laws the occurrence of force majeure typically triggers the affected party to be exonerated from performance, thus impairing the other party's right to claim damages. However, it should be noted that when the producer is exempted from liability on account of a force majeure event, this does not necessarily also free it from the obligations of paying for the inputs or repaying the loans received by the contractor; in fact, many contracts expressly state the contrary.

Although termination of contract is the typical remedy against force

<sup>43</sup> However, contract farming agreements often contain price adjustment terms, which may successfully be invoked in case of situations akin to hardship.

<sup>44</sup> At least in developed countries, the classic method for minimizing risks and cover damages resulting from adverse natural events is to stipulate an insurance contract. While in some countries such stipulation is imposed by law, the corresponding premium, not unlike those contracts that are merely optional, is normally borne by the agricultural producer, in whole or in part, depending on whether he can benefit from government contributions or subsidies (for an interesting analysis, cf. V. H. SMITH, J. W. GLAUBER, *Agricultural Insurance in Developed Countries: Where Have We Been and Where Are We Going?*, in *Applied Economic Perspectives and Policy*, Vol. 34, 2012, p. 363 ff.) Some form of protection against loss of production due to an unfavorable climatic trend can also be offered by the so-called weather derivatives, which are, however, functionally different from insurance (see, for further considerations and references, S. LANDINI, *Assicurazione del rischio in agricoltura*, in *Diritto agroalimentare*, no. 3/2021, p. 2499 ff.)

<sup>45</sup> See, for further considerations, A. JANSSEN, C. J. WAHNSCHAFFE, *COVID-19 and International Sale Contracts: Unprecedented Grounds for Exemption or Business as Usual?*, in *Unif. L. Rev.*, Vol. 25, 2020, p. 466 ff.



majeure, this may also occur in the case of a change of circumstances, in most instances after an attempt to renegotiate contract terms has failed. Right or duty to renegotiate is indeed typically contemplated in clauses or national provisions dealing with the occurrence of events affecting the circumstances in which the contract was originally concluded. In some cases, to facilitate the new agreement, the parties may defer the matter to a mediation body. When the parties are unable to reach an agreement and the dispute is brought before state courts or arbitrators, these latter may be empowered to adjust the contract to the new circumstances.

### *5. The relevant legal framework*

The legal framework surrounding agricultural production agreements consists of a range of sources operating at different levels.

To begin with, an agricultural production contract remains subject to a series of mandatory public laws and regulatory measures, set up either domestically or internationally, which can affect its formation and implementation. This is true, among others, for those norms aiming at ensuring food safety and traceability<sup>46</sup>, protecting intellectual property rights<sup>47</sup>, promoting decent work for all agriculture workers, including migrants<sup>48</sup>, as well as good health conditions for human beings, animals, plants and the environment<sup>49</sup>.

With regard to private law sources, the discipline governing this type of agreement depends on whether or not there exist dedicated norms at the

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<sup>46</sup> See, among others, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the standards developed by the Codex Alimentarius Commission.

<sup>47</sup> Of particular relevance are the TRIPs Agreement (1994) and the International Convention for the Protection of New Varieties of Plants («UPOV» Convention) (1961).

<sup>48</sup> In addition to ILO Conventions having general applicability, of particular relevance for the agriculture sector are the ILO Convention on Safety and Health in Agriculture (2001) (C184) and the relating Safety and Health in Agriculture Recommendation, 2001 (No. 192), the ILO Convention on Holidays with Pay (Agriculture), 1952 (C 101), the ILO Rural Workers' Organizations Convention, 1975 (C141) and the U.N. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

<sup>49</sup> In this context, reference is to be made, among others, to the standards approved under the auspices of the FAO International Plant Protection Convention (IPPC).

national level<sup>50</sup>. If it is the case, the agricultural production agreement is treated as a special category of contract with its own governing rules; yet, where no specific rules exist, the relevant legal regime will depend on the characterization of the transaction in accordance with the categories known under domestic law<sup>51</sup>. In all cases, norms pertaining to other areas of law can be of great relevance in this context, such as those concerned with land titles, labor law, commercial and competition law, tax law.

Lastly, it is noteworthy that in some countries and with respect to certain commodity sectors, private autonomy is limited by the application of collective contracts approved (if so required) by public authorities and binding on all individual relationships<sup>52</sup>. Special legislations may also provide for model contract forms to be used for single or collective contracting<sup>53</sup>.

## 6. *Domestic regulations on contract farming: a sketch*

Countries that have enacted regulations dealing with contract farming practices are still a minority across the world.

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<sup>50</sup> It is noteworthy that, albeit an agricultural production contract often presents an element of internationality (for example, because the products are destined to export), it remains in principle subject to a specific domestic law, i.e. the law of the country where the producer is located and the production takes place. Yet, where the contract involves a plurality of States and it is entirely or partly to be qualified as a contract for the sale of goods, the relevant legal regime may be represented by the U.N. Convention on Contracts for the International Sales of Goods (CISG), which is currently in force in 95 countries around the globe ([https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status)). Also, when the contract is international, the parties may decide to subject their agreement to a neutral set of legal rules such as the UNIDROIT Principles of International Commercial Contracts; however, in order for a choice in favor of the UNIDROIT Principles to be effective as veritable choice of the applicable law, the parties are generally required to resort to arbitration as a means for the settlement of disputes.

<sup>51</sup> As an agricultural production contract will be in most cases characterized as a mixed contract under the applicable domestic law, the result is that legal norms more likely to come into play for its discipline are those relating to sales or provision of services agreements. However, depending on the single case, either a combination of both schemes or one scheme will apply. In some cases, other legal schemes – often drawn from the classic agrarian or land law (lease, bailment, and so on) – may become relevant for the classification of the agreement.

<sup>52</sup> See, for example, Art. 326-5 French *Code rural*.

<sup>53</sup> See, for example, art. L326-4 French *Code rural*.

In Europe, this is the case for France<sup>54</sup>, Belgium<sup>55</sup> and Spain<sup>56</sup>, while in Italy contract farming-related legislation is lacking<sup>57</sup>. Beyond European borders, the most comprehensive legislations are those approved in some U.S. States<sup>58</sup>, in Brazil<sup>59</sup> and in India<sup>60</sup>. A specific set of rules has also been

<sup>54</sup> See the pioneering Law 6 July 1964, no. 678, regarding «*les contrats d'intégration*», subsequently merged, with amendments, into Art. L 326-1 ff. *Code rural et de la pêche maritime*. For an analysis of the most relevant profiles of the French legislation, see A. JANNARELLI, *Contractual Framework*, cit., p. 253 ff.

<sup>55</sup> See Law 1<sup>st</sup> April 1976 regarding *l'intégration verticale dans le secteur de la production animale*.

<sup>56</sup> To be precise, there is no specific legislation for agricultural production contracts (*contratos de integración*) at the national level in Spain. However, there has been early attention to the phenomenon within the autonomous Communities, the most interesting experience being that of Catalonia where a specific regulation, though limited to the livestock sector, was originally adopted in 1984. In 2017, the rules on agricultural production contracts have been inserted into the reformed Catalonia's *Código civil* (see Art. 625-1 ff.)

<sup>57</sup> For Italy, the only relevant regulatory framework is represented by Legislative Decree no. 102/2005, which is, however, concerned with «contratti di coltivazione, allevamento e fornitura» (much closer to the scheme of sales or forward sales agreements), and limited to agreements concluded through the intermediation of trade organizations. On the other hand, the legislation on unfair commercial practices in the agri-food chain provided for by Art. 62 of D.L. 24 January 2012, no. 27 (with subsequent amendments), though relevant to some extent, does not capture agricultural production agreements.

<sup>58</sup> U.S. legislations usually regard poultry and livestock industry. In 1990, Minnesota became the first State to enact legislation on contract farming (The Minnesota Agricultural Contracts Act 1990 (Minn. St. §§17.90-19.98 (2017))). Since the adoption of the Model Producer Protection Act in 2000, several States, including Arkansas, Oklahoma, Georgia, Illinois, Wisconsin, Iowa and Nebraska, have passed legislation in this field, incorporating the Model Law to a greater or lesser extent (see generally A. PECK, *State Regulation of Production Contracts*, National Agricultural Law Center (2006)).

<sup>59</sup> See Law 16 May 2016, no. 13.288, «sobre contratos de integração».

<sup>60</sup> A rather comprehensive discipline for contract farming is offered by the Model Law entitled «The Agricultural Produce Marketing (Development and Regulation) Act (APMC)». Approved by the central government in 2003 and completed by the Model APMC Rules in 2007, the Model Law has not, however, been implemented by all Indian States; also, sometimes the implementation has been just partial. The only State in India to have adopted an *ad hoc* legislation on contract farming was Punjab in 2013; however, such legislation was repealed in 2021. Yet, with the purpose of further promoting contract farming ventures, in 2018 another Model Law has been approved by the Indian central Government, termed as the «The State/UT Agricultural Produce and Livestock Contract Farming and Services (Promotion and Facilitation) Act, 2018».

enacted in Panama<sup>61</sup>, Uruguay<sup>62</sup>, Morocco<sup>63</sup>.

The routes taken by regulators vary<sup>64</sup>: in some cases, an *ad hoc* legislation has been passed; in others, provisions on contract farming have been inserted into agrarian codes<sup>65</sup>, or in sector- or commodity-specific laws<sup>66</sup>. Sometimes, provisions on contract farming operations can be found in supply chain legislations<sup>67</sup>.

Leaving aside the divergencies that inevitably exist among the national regulations<sup>68</sup>, the common goal they pursue is to promote transparency, help design the contractual agreements in a more balanced and sound manner and afford stronger protection to the weaker party. In particular, the most recent legislations – especially those of Brazil and India, countries where problems such as the economic and social inequalities, the inadequacy of infrastructures, the exploitation of workers, are particularly urgent – show a tendency towards a more incisive limitation of the parties' autonomy through the imposition of extensive information duties on agribusiness firms in the negotiation phase, and the establishment of specific bodies with supervisory and monitoring powers<sup>69</sup>.

<sup>61</sup> See *Código agrario de la República de Panamá*, Part IV («Vertical Integration in Agriculture and Agribusiness Relationship»).

<sup>62</sup> See Ley N° 17.777 de fecha 21/05/2004 «Constitución de asociaciones y sociedades agrarias y de contratos agrarios colectivos y de integración».

<sup>63</sup> See Law n° 04-12 regarding «l'agrégation agricole».

<sup>64</sup> Cfr. C. PULTRONE, *An Overview*, cit., 263 ff. (p. 267 ff).

<sup>65</sup> This is the case in France with its *Code rural et de la pêche maritime* and in Panama with its *Código Agrario de la República de Panamá*.

<sup>66</sup> This is the case, for example, of the Kenyan legislation for milk and sugar sectors, contained, respectively, in the *Dairy Industry Act* (1967) (as amended in 2006) and the *Sugar Act* 2001; or the Tanzanian legislation for tea, coffee and tobacco sectors, contained, respectively, in the Tea Act, 1997 (No. 3 of 1997); the *Coffee Industry Act*, 2001 (Act No. 23 of 2001); the *Tobacco Industry Act*, 2001 (Act No. 24 of 2001).

<sup>67</sup> See, for example, for Spain: *Ley Reguladora de los Contratos Tipo de Productos Agroalimentarios*, (2000); for India: the *Agricultural Produce Marketing Act* (APMC) (2003).

<sup>68</sup> For a deeper description of the most representative contract farming legislations, may I refer to R. PELEGGI, *Il Contract Farming: contributo per un dialogo interdisciplinare*, Napoli, 2020.

<sup>69</sup> For instance, under Brazilian law, a special body called the *Commission for Monitoring, Development and Conciliation* (CADEC) is established, made up equally of representatives of farmers and contractors, with a supervisory role over certain strategic aspects of the relationship such as the quality of inputs and final products. On the parties' initiative, the CADEC can solve contractual interpretative issues and settle possible disputes between the parties.

Many domestic legislations require agricultural production contracts to be stipulated in written form to enhance clarity and transparency. In some instances, it is also specifically required for the language to be clear and understandable to help informed consent by the farmers<sup>70</sup>. Where the form requirement is not stated in express terms, it can nonetheless be deduced from the law's requirement for contract registration or for the inclusion of specific terms in the agreement.

Indeed, domestic regulations generally provide for a list of mandatory clauses dealing with key aspects of the relationship to be included in the agreement. These clauses may concern quantity and quality of the goods, time of delivery, price determination, payment method, nature and cost of inputs, contract duration, conditions for renewal and termination.

Furthermore, the most recent national regulations require the inclusion of provisions allocating parties' liability with respect to the fulfillment of environmental duties<sup>71</sup>. Also, clauses can be imposed in the agreement providing for mediation or arbitration as a means for dispute resolution<sup>72</sup>.

In other cases, the producer is granted a lien for payments due by the contractor<sup>73</sup>, and clauses are prohibited that would inhibit the producer from seeking legal, financial, or agricultural advice relating to the contract<sup>74</sup>.

### *7. The UNIDROIT/FAO/IFAD Legal Guide on Contract Farming*

First published in 2015, the Legal Guide on Contract Farming (hereinafter also: Legal Guide or Guide), which has inaugurated a period of fruitful collaboration among the International Institute for the Unification of Private Law (UNIDROIT), the Food and Agriculture Organization of the United Nations (FAO) and International Fund for Agricultural Development (IFAD)<sup>75</sup>, represents the most comprehensive

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<sup>70</sup> For Brazil, see Art. 4 of *Lei sobre os contratos de integração vertical nas atividades agrossilvipastoris*, (Nº13.288); for U.S., see Sec. 4 *Model Producer Protection Act* (2000).

<sup>71</sup> For Brazil, see art. 11 *Lei n. 13.288*.

<sup>72</sup> See, for example, *Minn. Stat. Ann.* § 17.91.

<sup>73</sup> Cf., for example, Sec. 7 *Model Producer Protection Act* (2000).

<sup>74</sup> This is the case of confidentiality clauses: cf., for example, Sec 6 *Model Producer Protection Act*.

<sup>75</sup> Cf. H.D. GABRIEL, *UNIDROIT's Work in Contract Farming and Land Investment in the Broader Context of Agricultural Development and Food Security*, in *Unif. L. Rev.*, no.2/2018, p. 270 ff.

text of international law dedicated to the agricultural sector in existence.

The purported objective of the Guide is to contribute to the creation of a sound legal framework for agricultural production agreements. Indeed, its primary goal is to assist private parties engaged in contract farming arrangements to increase knowledge and awareness of the legal implications of their future relationship and fill any informational asymmetry that may exist between them.

The Guide also aspires to influence the shape of any attempted agreement. Since it provides an outline of the most common contract terms as well as a description of workable solutions for the most frequent problems in practice<sup>76</sup>, the Guide may serve as a sort of checklist – and even a template – for contract negotiation and formulation, thereby generally helping to design more complete and fairer agreements.

Furthermore, even though not specifically addressed to lawmakers, the Guide is meant to boost reform efforts in the concerned sector, thus encouraging the adoption of legislations or specific provisions that incorporate its recommendations.

Additionally, the Legal Guide aims to provide advice and guidance to cooperation agencies, non-governmental organizations or private actors that have an active role to play in the achievement of sustainable development agricultural strategies and capacity-building programs<sup>77</sup>, as well as to lawyers, adjudicating bodies and mediators called upon to solve disputes related to contract farming.

Doubtless, the several goals exhibited by the Guide are not easy to be attained in practice. In order to implement one of the most difficult objectives for the Guide as a soft law instrument to achieve – that of serving as a sort of blueprint for agriculture production agreements –, an instrumental tool is offered by the ‘Model Agreement for Responsible Contract Farming’, which has been jointly prepared by the FAO and the International Institute for Sustainable Development (IISD) in collaboration

<sup>76</sup> The Guide is composed of seven chapters dealing with the key issues of an agricultural production agreement, preceded by an Introduction where the principal benefits and risks of contract farming as well as the scope of the legal instrument are described. For further details, may I refer to R. PELEGGI, *Promoting Effectiveness and Fairness in Agricultural Production Agreements: the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming*, in *Dir. comm. intern.*, 2019, p. 257 ff.

<sup>77</sup> See F. MESTRE, *Un nuevo instrumento internacional de orientación jurídica para los contratos de producción agrícola: la guía jurídica sobre agricultura por contrato UNIDROIT/FAO/IFAD*, in *Revista Iberoamericana de Derecho Agrario - Número 6 - Julio 2017*, available at [http://ar.ijeditores.com/articulos.php?Hash=983ff3132ed38183d2e69d-59f72155e2&hash\\_t=530f9905798cc59f67ea68ca0f9cf91b](http://ar.ijeditores.com/articulos.php?Hash=983ff3132ed38183d2e69d-59f72155e2&hash_t=530f9905798cc59f67ea68ca0f9cf91b).

with the other two co-authors of the Legal Guide. The Model Agreement, which is available in two versions, one generic and two ‘customized’ for tomato and coffee contracts, respectively, could also be adopted on the initiative of governmental authorities for the regulation of agricultural production agreements<sup>78</sup>.

## 8. *Closing remarks*

The promotion of a sustainable agriculture system is, for both national and international regulators, one of the major challenges of our time.

Contract farming has its role to play in this respect to contribute to rural development, to coordinate production capacities and market needs, to create economic wealth, while promoting an inclusive business model and respect for the natural resources.

However, for contract farming to be beneficial to both producers and contractors, it is essential that the agricultural production agreements – i.e., the complex arrangements at the heart of this economic practice – be crafted in a sound and balanced manner.

This is especially true for those terms in the agreements concerning aspects such as price determination, cost of inputs, quality assessment, in relation to which the information asymmetry and chronic uneven bargaining and economic power of the two parties as well as the stringent control over production typically exerted by the contractor can result in abuses and unfair practices to the detriment of the producer. Also, it would be convenient for the parties to agree on a fair risk-sharing mechanism to tackle production losses not imputable to the farmer’s conduct, or the occurrence of environmental damage resulting from the agricultural activity. Additionally, clauses should be avoided that, especially in the case where the farmer must sustain considerable costs to start production, would entitle the contractor to unilaterally terminate the contract at any time and for any reason.

Needless to say, national governments’ active role in promoting an enabling environment for this kind of practice is of utmost importance. In this framework, an international document such as the UNIDROIT/FAO/IFAD Legal Guide, which offers a comprehensive soft guidance to

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<sup>78</sup> The Model Agreement for Responsible Contract Farming can be retrieved at <http://www.fao.org/3/CA1772EN/ca1772en.pdf>

all possible actors involved in these operations whilst at the same time supporting domestic legislators willing to undertake legal reform, can represent a veritable step forward for a more responsible contract farming.





Luigi Costato

*Covid and agri-food chain*

SUMMARY: 1. The solidity of the European food supply chain at time of Covid 19 and the poor functioning of the WTO in the epidemic period – 2. Globalization, food supply chain and poor distribution of food products on earth – 3. Food sovereignty or world government – 4. Some observations on the effects of the rules on traceability that strengthen the position of the «weak» party in the relations regulated by EU Directive 2019/633.

*1. The solidity of the European food supply chain at time of Covid 19 and the poor functioning of the WTO in the epidemic period*

The pandemic that hit *homo sapiens* between 2020 and 2021 has put many production chains in crisis, but has almost totally spared the European food supply chain.

The flow of supplies of foods produced directly by EU farmers or of agricultural raw materials to be processed in industry has not undergone significant alterations compared to usual during the pandemic; of course, a part of road transport has been affected, temporarily, by some moderate interruptions due to the fear of drivers of moving from a Country considered safe from Covid 19 to another in which the disease was widespread. Besides, there have been cases of consumers hoarding, completely unjustified, which have resulted only in the imbalance of the activities of the suppliers, who have, however, been able to cope with the temporary excess of demand which has collapsed a couple of months later. Not even the circulation of exotic goods coming from distant Countries has suffered any significant delay; in the end, the food supply chain, although consisting of products coming from all over the world, has not suffered interruptions due to Covid 19 in the European Union. Obviously, worse problems have been encountered in poor countries, where the number of hungry people has increased very significantly, so much so that, in 2021,

FAO was prompted to sound an alarm<sup>1</sup>.

Therefore, the pandemic has revealed, even though mainly in sectors other than food, that the presence of treaties and Agreements (particularly those contained in the 1994 Marrakesh treaty) drawn up in order to ensure the free circulation of goods and services was not sufficient to avoid some failures and the disappearance from the world market, though temporary, of some products, in particular if related to the fight against pandemic infection.

As a matter of fact, the outbreak of the Covid 19 epidemic entailed a sudden increase in demand for some medical products whose production, due to the low manufacturing cost, had been mainly localized in the East, and in particular in China, where it seems certain that the disease has originated. This situation has forced the European Union, which also produced, even though to a modest extent, some of these products, to intervene to reduce the impact of their shortage. In order to deal with this emergency, the European Union has, therefore, passed rules concerning the authorization to export personal protective medical devices, trying, however, not to neglect the possibility of access to them for the most vulnerable third countries.

Indeed, two WTO agreements regard measures taken by members to protect public health or public safety: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).

The SPS Agreement<sup>2</sup> establishes that members have the right to restrict trade by taking the SPS measures necessary for the protection of human, animal or plant life or health. These measures, which should only be applied to the extent necessary to achieve their objectives, must be based on scientific principles and be supported by scientific evidence. If scientific evidence is insufficient, members may adopt SPS measures, only provisionally, on the basis of relevant information available.

The TBT agreement was adopted to ensure that technical regulations, standards and conformity assessment procedures are not discriminatory

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<sup>1</sup> Very recently, the United Nations Food and Agriculture Organization (FAO) called for a gradual increase in humanitarian aid to Afghanistan after the evacuation of US and Otan troops. the country, in fact, continues to be hit by drought which threatens the survival of at least 7 million farmers, many of whom are already among the 14 million Afghans affected by food insecurity, also due to heavy internal emigration also due to political problems.

<sup>2</sup> L. COSTATO and L. RUSSO, *Corso di diritto agrario italiano e dell'Unione europea*, Fifth Edition, Giuffrè Lefebvre, Milano, 1919, p. 115 ff.

and do not create unjustifiable barriers to trade. At the same time, the agreement recognizes the right of WTO members to implement measures to achieve legitimate political goals, such as the protection of human health and safety.

Both the SPS and TBT agreements require WTO members to notify any new or changed requirements that affect trade and to respond to requests for information on new or existing measures. The measures taken during the pandemic, especially in the East, did not comply with the limits to intervention provided for by the aforementioned agreements, thus causing almost the end, even though temporary, of the circulation of some medical aids and equipment.

Thus, Covid 19 has exposed certain evident limits of some agreements contained in the Marrakesh treaty, worsened by the US refusal to appoint an arbitrator for the Appellate body, behavior that made it impossible for the institution to function, for which an attempt has been made to find a remedy by means of an agreement between some member states to provisionally introduce an alternative mechanism, but which, obviously, can only work for disputes between the adhering states.

## *2. Globalization, food supply chain and poor distribution of food products on earth*

The process of globalization that has developed in recent decades has been both the cause and the consequence, at the same time, of the delocalization of production processes previously in the secondary sector, and then in the tertiary sector. This occurrence has not happened massively in agriculture, due to the non-transferability of the land, an essential factor of primary production. It is certain, however, that some horticultural crops, in which labor has a significant impact, have developed in non-traditional areas, such as tomatoes in China, to give just one example.

The not easy transferability of agricultural production is therefore linked to the nature of the soil and the climate; from this derives the phenomenon of bad distribution of food production. As an example, in arid areas and in areas subject to severe climatic phenomena, food production is more and more insufficient for the population which, in turn, tends not to reduce its growth and is safer than formerly from serious diseases, especially childhood ones, now prevented with many vaccines.

The Marrakesh Agreement on Agriculture<sup>3</sup> has, in effect, canceled the facilitated exports that the United States and the European Union (then called the European Community) used extensively for foreign and military policy reasons; even if the purposes were not noble, wheat, flour and other food raw materials arrived in abundance in African states, at least in those that Westerners wanted to keep friends.

Today these expeditions have almost ceased; and the African population, especially the population of the Sahel, and part of the Middle Eastern and Eastern population are in pitiable nutritional conditions. In 2021 FAO found that chronic hunger, which was already present in these territories, has now been made worse by the pandemic affecting at least 10% of the world population; besides, the same UN institution found that hundreds of millions of children in those territories are severely undernourished while an almost corresponding number of peers living in the rich part of the world are obese.

In short, bad food distribution existed prior to Covid 19, but the pandemic has worsened the situation, combining with climate change.

In any case, however, the recent pandemic events have not significantly affected, for the European Union, international trade, either for import or for export, of agricultural raw materials and industrial food products. Actually, the strong decrease in the circulation of non-food goods has caused a considerable reduction in sea freights, allowing for savings in the costs of transporting agri-food products.

However, if the food supply chain has not suffered major consequences in rich countries, significant events that caused difficulties in the supply of some products owing to the Covid 19 pandemic have followed one another over time; first there was a shortage of masks and of some substances useful in the search for the virus, then other imbalances in the production chain of some appliances, due to the sudden shortage of essential components, such as those of the production system of cars in difficulties due to the scarcity of microchips. In this last case it seems that the occurrence, most likely temporary, was due to the rapid increase in the use of these appliances, which occurred in the countries that first came out of the pandemic and resumed production very quickly and strongly oriented it towards the automation of vehicles and machinery, in addition to some delays in the full resumption of operations by manufacturers of these components.

These events highlight the strong development of the interconnection

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<sup>3</sup> L. COSTATO and L. RUSSO, cit., p. 113 f.

that binds the production or supply chains of the entire planet and the lack of consistency of the world political system with the global scale of economy. The production chains of individual objects, not necessarily complicated ones, consist of elements, which are sometimes in a high number, that come from all parts of the world, and the production system is thus based on the timely and constant arrival of the individual parts in the place where the final product, or also the semi-finished product is assembled.

The promptness and security of electronic means of communication and of means of transport by air, sea and rail, as well as by road, and the rules contained in the Marrakesh Treaty, during times of normality, have enabled the creation of a very dense network of relationships that, all in all, have made the planet much smaller and territories that were once very distant have become much closer.

These new conditions, which have recently emerged as a consequence of the development of communications technology, have received the legal impulse from the agreements contained in the Marrakesh treaty, the governance of which, even though representing an advance compared to the previous situation, has repeatedly shown its deficiency and the limitations which have already been briefly mentioned.

On closer inspection, when communications were difficult, the political and dimensional arrangement of the states was different; the Roman Empire was administratively highly decentralized and the army itself, its strong point, consisted of separate armies, stationed in Gaul, Britain, the Middle East, etc<sup>4</sup>. The Chinese Empire, which was unified in the third century BC, was governed in a decentralized way by mandarins, who were the result of powerful schooling and extremely difficult examinations; in any case, central power was guaranteed only by the army, if loyal to the emperor. The Incas used to maintain territorial connections through messengers running to the capital with a bunch of strings that contained rudimentary messages for the leaders.

The medieval economic recovery was centered, in Europe, on the city-state, a solution that was suitable for its functioning and for the control that the rulers of the moment could exercise over a limited population and a not too large territory<sup>5</sup>.

Very soon developments in the field of armaments and fleets enabled

<sup>4</sup> A.H.M. JONES, *The Roman Economy*, Basil Blackwell, Oxford, 1974, First Chapter.

<sup>5</sup> V. Y. RENOARD, *Gli uomini d'affari italiani del Medioevo*, Italian translation, Milano, 1975, *passim*.

initially very weakly centralized or modestly sized kingdoms to establish themselves as nation states and to develop colonial policies; it was the moment in which Europe quickly took control of almost the whole world, especially exploiting its military and technological superiority.

The world was dotted with colonies of many European countries, but especially British colonies; in fact, the British kingdom was able to conquer and control a vast empire, which stretched from Africa to the East and America.

Iron and steam ships first, then diesel ships, and the telegraph made possible an efficient, even if still imperfect, remote connection with the colonial possessions; but India, for example, was for a long time a type of colony held by a private company, like for the most part of the Dutch empire, and very often the local kings were considered formally in power even if supported and substantially manipulated by imperial troops or troops belonging to the occupying companies.

Nevertheless, there were in Europe and in parts of Asia, states that gathered together different peoples, whose rulers aspired to expand their kingdoms, such as the kings of Prussia, later emperors of Germany, and the Czars of Russia, while others were trying, with great difficulty, to keep united under themselves their composite states, as the emperor of Austria and king of Hungary.

The diminished substantial size of the world caused that the first conflict described as a “world war”, actually, involved mostly Europe and the Middle East, as the Chinese-Japanese conflict remained in many respects a separate matter; the arrangement determined by the subsequent peace treaties, which did not take into account Wilson’s 14 points but, instead, the desire for revenge and power of France and the United Kingdom, put the League of Nations in a position not to function and sowed the seed from which the second war would have germinated, this one truly a world war.

Airplanes, radars, aircraft carriers, submarines, code-breaking machines decrypting secret messages characterized this war which was fought a lot at sea, in tank battles and with the massive involvement of civilians as a result of terrible bombings, the heaviest of which put an end to the conflict with the release of two atom bombs on two Japanese cities<sup>6</sup>.

This was a very bloody war and also very technological: but the subsequent growth of knowledge, in particular in the field of physics, became exponential also thanks to the research done by the Americans to

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<sup>6</sup> E.J. HOBSBAWM, *Age of Extremes. The Short Twentieth Century 1914 – 1991*, Pantheon Books, 1997, *passim*.

carry out the expedition to the Moon. And today the discoveries follow one after the other from day to day, in the sector of communications of all types (electronic, air and naval) and in every other field thanks to the spread of knowledge, the monopoly of which has been lost by the West.

### 3. *Food sovereignty or world government*

Hence the substantial reduction of distances and the increase in the possibility of control with the new means available; as the first important but modest, for some outcomes, attempt that was signed in Marrakesh demonstrated, all this implies that centralization of decision-making is needed in some sectors essential for human life on Earth: the fight against climate change and pollution, the control over the distribution of food and of essential medicines, the resolution of disputes without the use of weapons, the homogenization of some tax policies. Separately, it was decided to fight, together, against climate change.

The periodic meetings of the G7 and the G20 clearly prove this need, but they still constitute a weak system that constantly requires an agreement based on compromise, if it is reached at all, for the required unanimity, a remnant of the old notion of sovereignty.

It would probably be better to strengthen the Marrakesh Agreements by partially modifying them and adding the sectors described above. In other words, a set of confederative agreements should be created which should be limited to certain matters essential to the survival of the *homo sapiens*, meaning that a progressive reduction of the scope of national sovereignty should be carried out in favor of a centralized power in the fields of common interest and which cannot be usefully managed individually.

The proposed solution may not be fulfilled, at least in the short term. In that case it seems appropriate to reconstruct the events caused by Covid 19 to seek a different solution to the problem.

The outbreak of the pandemic caught Europe unprepared at least as regards masks and breathing devices; the production of these protection devices had almost disappeared from our Countries and the requirements were met by purchasing them in China and other eastern countries, at very favorable prices. But China initially kept for itself its production until it got over the most acute phase of the crisis and Europe had to make do by promoting the creation of new factories of masks and breathing devices



which, however, have been unobtainable for a considerable period of time.

These events occurred violating, probably only mildly, the Marrakesh rules<sup>7</sup>, which are largely flexible as emerges from par. 6 of art. 5 of the SPS Agreement, where it is provided that in establishing health measures, Members ensure that they will not be more restrictive of trade than is necessary to achieve an adequate level of protection, with the obligation, and this is the part that seems that has been somewhat violated, to choose the restriction that has the least impact on trade.

These events are reminiscent of others, in some ways, similar, even if not health-related: one that took place in 1974 (before the signing of the Marrakesh Agreements), on the occasion of President Nixon's second visit to the USSR, who accompanied the negotiations for the reduction of missiles with the sale of an enormous quantity of U.S. grain to the Soviet Union: no less than 45 million tons, which caused a huge jump in grain prices.

Another, more recent, event occurred in 2010. The Plains of Russia were hit by a giant fire that obliged the government to stop exports (it should be noted that in 1974 the Soviet economy was unable to produce enough cereal, but that after the fall of the USSR, Russia quickly returned to being a major exporter of grain, as it used to be at the time of the Czars).

This stoppage brought up the market price of wheat, and the effects of it were particularly suffered by the Arab countries facing the Mediterranean Sea, whose governments practiced a government-established price of flour to keep down the price of bread. Thus the Arab Spring broke out, which made the lord of Tunisia run away and Mubarak end up in jail, and it was made known to the world as a revolution that called for democracy; actually, except for some easing in Tunisia, the other countries quickly returned to the *status quo* and, anyway, it was not so much democracy that those peoples were asking for, as for the return of the price of bread to the previous level.

These two examples reveal that the potential shortages are not necessarily limited to medical aids and equipment but can also be linked to a food famine. In fact, the stocks of commodities detected by FAO at the end of 2019 were equivalent to the requirements for the year plus four months of reserves; FAO also specified that, for these purposes, the 11% of the world population was not considered among consumers, because not able to get the money to buy grain.

A more recent communication from FAO itself, already mentioned,

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<sup>7</sup> The common agricultural policy (CAP), after Marrakesh, has taken a reverse path to that adopted previously, partly losing its position as a major agri-food power. The new direction is characterized by the compression of the production of commodities and by a strong Green orientation.

points out that due to Covid 19 the number of people affected by hunger has greatly increased, that the number of undernourished children is very high but that the number of obese children is equally high, as evidence of the bad distribution of food. To date, it seems unlikely that there will be a shortage of wheat or rice and maize in the near future, but climatic events which are no longer extraordinary could, in the not too distant future, endanger the crops of the whole Earth.

Having learned from the experience of masks and from the history of humanity, the EU Commission should take itself seriously and give practical implementation to the vague proposals put forward in the Communication of 20 May 2020: either to favor the increase of European cereal production or, in order to not violate the agricultural agreement, to ensure strategic stocks of agricultural products that are the basis of our food. In conclusion, if we have been working for food safety for some time, it is necessary to implement a food security policy that manages to state that a power of the size of the European Union must claim its food sovereignty. Actually, against a famine, what use could we have for mobile phones, cars and thousands of current technological tools? Faced with the lack of a global agreement such as the one hinted above, it is essential that the European Union, as far as we are concerned, regains Food sovereignty. In any case, whatever solution will be adopted to make food supplies in the European Union more secure, it will be necessary to strengthen the organization of farmers in sales by creating structures capable of concentrating the supply and of making it less weak than purchasers, also in the presence of the national rules implementing Directive 2019/633, after having overcome, first of all, the agricultural policy which in the twenty-first century discouraged the European production of commodities.

#### *4. Some observations on the effects of the rules on traceability that strengthen the position of the «weak» party in the relations regulated by EU Directive 2019/633*

The Directive 2019/633 represents the most recent EU intervention to remedy farmers' chronic state of weakness with respect to the Market of their products. It decrees, first of all, that Member States may retain their own national rules aiming at fighting unfair commercial practices that are more stringent than those provided for in the Directive or even introduce

stricter ones. As a matter of fact, in Italy, a discipline of commercial relations regarding the sale of agricultural and agri-food products was in force even before the Directive and its implementation into domestic law, established by Article 62 of Decree-Law n. 1/2012, as amended by Decree-Law n. 51/2015, and in the implementation Ministerial Decree n. 199 dated 19 October 2012; furthermore, the decree law n. 51/2015, in Art. 2, paragraph 2, established rules concerning commercial relations regarding the sale of raw milk. Then, Legislative-Decree n. 198 of 2021 gave implementation to Directive 633 and repealed Article 62 of Decree-Law n. 1/2012.

The Directive 2019/633 is, therefore, a further attempt to protect the weaker party in commercial relations involving products of the food supply chain, as the opening words of its first whereas immediately emphasize: «Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. Those imbalances in bargaining power are likely to lead to unfair trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction».

The European Union seems, at last, to become aware that, once the protection system implemented with the application of the 1<sup>st</sup> Mansholt plan has ceased, the bargaining strength of suppliers of agricultural products has become weak; but also that, regardless of the opening to the world market, producers of industrial foods, especially small ones, are very weak compared to who has the final contact with the consumer, that is, above all, large-scale distribution.

More generally, with some exceptions that can be found in the sector of some PDOs or some industrial product helped by famous brands in great demand by consumers, the food supply chain, the agricultural one in particular, especially in Italy, is very fragmented and a series of intermediaries represents an encumbrance that, in terms of price, especially affects entrepreneurs in the primary sector but also, particularly through the so-called «white-labels», the process manufacturers.

The European Union also seems to have, at last, noted what the Italian authors have been repeating, for about a century, on the particular nature of the agricultural production cycle, as shown in whereas n. 6 of the Directive 633: «While business risk is inherent in all economic activity, agricultural production is particularly fraught with uncertainty due to its

reliance on biological processes and its exposure to weather conditions. That uncertainty is compounded by the fact that agricultural and food products are to a greater or lesser extent perishable and seasonal. In an agricultural policy environment that is distinctly more market-oriented than in the past, protection against unfair trading practices has become more important for operators active in the agricultural and food supply chain». In this regard, it should be remembered that in the middle of the last century there were those who, speaking of the agricultural entrepreneur's business, observed that it was subject to the «double risk», commercial and bioclimatic.

In this whereas, indeed, not only the importance of the biological cycle in agriculture is highlighted but also the reasons for the special regulations reserved for the primary sector in the EU treaties since 1958 are emphasized, made explicit once more, in particular, by Art. 39<sup>8</sup> TFEU, which, precisely, takes into account the so-called «double risk»<sup>9</sup>.

The adoption of Directive 633 aims to protect the weak party in negotiations and in the performance of contracts, but does not guarantee EU farmers «a fair standard of living», because the formation of the market price is affected by the presence of agricultural or commercial suppliers from all over the world who can offer prices much lower than those needed by European farmers to at least break even, even adding to it the various supports provided by the current CAP (and certainly also by the one that should come into force in 2023), which are essentially decoupled from production.

The national legislation that derives from Directive 633 intervenes only on moments subsequent to the determination of the price; however, it should be noted that the new CAP, on which an agreement was reached in the trialogue at the end of June 2021, provides that in the Common Market Organization the extension of the possibility of production planning is allowed to all PDO and PGI products in order to adjust supply to market demand (yet this limitation only concerns a part, not prevalent

<sup>8</sup> On Art. 39 TFEU v. L. Russo, *Comment on art. 33 (now 39) in Commentario breve ai trattati della comunità e dell'Unione europea*, in *Breviaria iuris Cian Trabucchi*, F. Pocar (ed), Giuffrè, Milano, 2001, p. 187 ff.

<sup>9</sup> The Italian doctrine has noted the specificity of the agricultural enterprise, subject to a further risk than the others, namely the «meteorological risk». One master of commercial law even denied the entrepreneurial nature of the agricultural enterprise for the supposed eventuality of its production for the market: V. G. FERRI, *L'impresa agraria è impresa in senso tecnico?* in *Atti del terzo congresso di diritto agrario*, Giuffrè, Milano, 1954, p. 395 ff.

nor commercially weaker, of agricultural products).

It should also be noted that EU law continues its path of gradual clarification about the methods of communicating, on the part of producers and distributors, increasingly accurate data which today are principally addressed to consumers (at the beginning the purpose of product traceability was the prevalent one) making the labels more detailed, also with the purpose of highlighting supply, including the agricultural one. In fact, these developments allow that through these other data it is possible to highlight foods linked to traditional or, in any case, historically established agricultural production. In this way, therefore, communication also performs a promotional function.

The possibility of indicating the origin of the agricultural raw material has enabled also process manufacturers to promote their product since by declaring the origin of the basic raw material they can secure a competitive advantage over their competitors who cannot make such declaration because, perhaps, they are afraid of not being able to secure the availability of raw materials grown in their territory or because, and this is the most frequent case, they prefer to avoid this complication and buy indifferently on the world market and on the national one, keeping the cost of agricultural raw material low.

In fact, through traceability, which originally had purely health reasons, it is possible to follow the route taken by the agricultural raw material in all its steps and ensure that the declaration of origin of the raw material is based on an efficient mechanism.

The widening of the purposes of the rules on the origin of agricultural raw material is, in fact, remarkable and changes the very meaning of traceability; traceability, while maintaining its health purposes (it should always be remembered that it is fruit of the events of the so-called mad cow epidemic), has become a potential promotional tool in favor of agriculture. The rules on labeling are, therefore, characterized by being «food related» in general, but also «agricultural», as evidenced, among others, in the rule that exempts from the indication of the components of the food product, which affects mostly agricultural products, as well as in the one that provides for the obligation to indicate the origin of the primary ingredient, abandoning the old rule, of a customs nature, which preferred the country of final processing of the product, omitting the link with the origin of the raw material.

This last rule, alone, is the real turning point in favor of the most historically established agricultures, among which the Italian one stands

out. There has long been a dispute, in the European Union, on the reasonableness of such a requirement, arguing that, in the end (and perhaps not without reason), pasta does not clearly state the territory of origin of the wheat, for example. The opposite thesis, which preferred to provide more detailed information to the consumer, prevailed under the spur of the European Parliament which managed to get Regulation 1169/2011 passed.

However, the European Commission, repeating what it did in 2002 with the Regulation 1019/2002 on olive oil, both with the implementing Regulation n. 1337/2013 on the origin of meat of swine, sheep, goat and poultry, and with the implementing Regulation n. 2018/775 on the indication of the origin of ingredients, which admits «EU» or «non-EU» or even «EU and non-EU» as a possible indication of origin seemed to significantly reduce the strength of the regulation of the European Parliament and the Council. In this regard, it is worth remarking that the European Parliament, even if amending the implementing regulation n. 1337/2013 on meat, nothing has observed with regard to the implementing Regulation n. 2018/775 although this appears to be designed according to principles different from those stated in the regulation n. 1169/2011 which represents the legislative act delegating the Commission. These fluctuations are due to the fact that, while for some processed products the relevance of the territorial origin of the agricultural raw material is unquestionable, in other cases the mixture of agricultural products from different origins can serve to fill the qualitative gaps of the local product, without forgetting the fact that expertise in the industrial processing of the raw material can achieve important results in terms of the quality of the final product.

Despite this, the attention of the European regulator towards the agricultural origin of food products is growing, in order to enhance the essential purpose still assigned to farming today. Agriculture, a discovery that has enabled man to reach this stage of development – with advantages and disadvantages worthy of a separate analysis – produces food as well as raw materials for food and non-food products; but these last ones have progressively lost importance, as, for example, we dress mostly with petroleum by-products rather than with vegetable or animal fibers, while we use cattle hides for shoes and bags, but this is mainly because we breed these animals to obtain meat and milk, and they are the most numerous large mammals on Earth (about 10 billion head, large producers of CO<sub>2</sub> and methane). Food and agriculture, therefore, are, to date, an irreplace-

able industry and the studies on non-animal proteins but with the same taste are still experimental and above-ground crops are not very common; in fact, vertical crops on cardboard and the like are interesting and may allow us to obtain some products in the counter season, but not to feed 7 billion humans, while it seems still far away the moment in which bovine meat will be produced in the laboratory on an industrial scale, which, however, will be an activity that will probably need agricultural products to be carried out.

Europe, which comprises territories occupied by man for many centuries, and Italy is a peculiar example, is characterized by monuments of stone or marble, by paintings and sculptures, by literary works of all kinds – philosophical, poetic, scientific etc. – work of the intellect of our ancestors, but also by foods invented centuries ago, such as certain cheeses and certain wines, and not just them, which also are monumental elements of a past full of genius and passion that maintains its charm and its grip on the consumer, extending this one, in fact, far beyond continental borders. Besides, Italian agriculture, quantitatively limited, as the peninsula has very few plains, being instead very endowed with hills and mountains, nevertheless, has been able to produce a large number of recipes of noble food products, very much imitated, and highly demanded from abroad.

These delicacies, produced, in any case, by Italian process manufacturers, often exceed the production capacity of our primary sector, but the skills of Italian entrepreneurs manage to promote the Made in Italy brand, especially if they are able to curb production, something that sometimes escapes the control of some producers but soon it will be possible to plan it, as pointed out, at least for PDO and PGI goods, in order to pursue a reasonable relation between supply and demand, thanks to the exception for agriculture provided for by the TFEU in the sector of competition.

These rules, old or in the making, outweigh the effects that Directive 633 will be able to wield on the relations between sellers and buyers, for which reference is made to the contents of the work of Luigi Russo present in this volume.

PART II

THE MEMBER STATES' FRAMEWORK IN THE LIGHT OF THE  
IMPLEMENTATION OF DIRECTIVE (EU) 2019/633





Bert Keirsbilck, Elisa Paredis

*The regulation of B2B relations  
in the agri-food chain in Belgium*

SUMMARY: 1. Introduction – 2. The scope of application of the UTP Act and its overriding mandatory nature – 3. Unfair trading practices – 3.1 No general clause in the Belgian UTP Act – fall back *lex generalis* – 3.2. Blacklist – 3.3 Grey list – 4. Enforcement 4.1 Public enforcement by the Economic Inspectorate of the Federal Public Service Economy – 4.2. Private enforcement and legal redress – 4.3. Alternative dispute resolution – 5. Relation with general private law – 6. Conclusion.

1. *Introduction*

*Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain* («UTP Directive»)<sup>1</sup> aims to curb certain unfair trading practices («UTPs») which grossly deviate from good commercial conduct in the chain concerned and which result from an abuse of the stronger bargaining position of buyers vis-à-vis their suppliers<sup>2</sup>. The *Belgian Act of 28 November 2021 implementing Directive (EU)*

<sup>1</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111, 25.4.2019, pp. 59–72. See on the run-up E. PAREDIS, B. KEIRSBILCK, *Run-Up, Legal Basis and Scope of Application*, in B. Keirsbilck and E. Terryn (eds), *Unfair Trading Practices in the Food Supply Chain: Implications of Directive (EU) 2019/633*, Intersentia, 2020, pp. (1) 3-16. See on the Directive B. Keirsbilck and E. Terryn (eds), *Unfair Trading Practices in the Food Supply Chain: Implications of Directive (EU) 2019/633*, Intersentia, 2020, 182 pp.; J.U. FRANCK, *The Directive on Unfair Trading Practices in the Agri-Food Supply Chain: Regulatory Ambitions and Legal Instruments*, ZEuP 2021, pp. 843-891. See also H. SCHEBESTA, T. VERDONK, K. PURNHAGEN, B. Keirsbilck, *Unfair Trading Practices in the Food Supply Chain: Regulating Right?*, *European Journal of Risk Regulation* 2019, pp. 690-700.

<sup>2</sup> See in detail Commission staff working document, Impact assessment accompanying the document Proposal for a Directive on unfair trading practices in business-to-business

2019/633 and amending the Code of Economic Law («UTP-Act»)<sup>3</sup> transposes the Directive in Books VI («Market Practices and Consumer Protection») and XV («Law Enforcement») of the Code of Economic Law («CEL»). In particular, a new Section 4 «Unfair market practices in relations between undertakings in the agricultural and food supply chain» was inserted in Book VI, Title 4, Chapter 2 of the CEL (Article VI.109/4 CEL and following). The UTP Act has entered into force on 15 December 2021. Supply contracts concluded before 15 December 2021 must be brought in line with the UTP Act by 15 December 2022<sup>4</sup>.

The UTP Act is the first piece of Belgian *hard law* that specifically offers protection to undertakings in the agrifood supply chain, more particularly to suppliers of agricultural and food products vis-à-vis their more powerful buyers. The UTP Act transposes the UTP Directive almost one-on-one, yet it broadens the scope of application and implies punctual changes to the blacklist of *per se* prohibited practices and to the grey list of practices which are prohibited only in absence of a clear and ambiguous agreement in this regard<sup>5</sup>.

Already for more than a decade before the adoption of the UTP Act, a voluntary initiative with a similar purpose and sectoral approach existed in Belgium, i.e. the *Agrofood Supply Chain Consultation* («AFSCC»)<sup>6</sup>. This initiative consists of, first, a *soft law* code of good conduct similarly prohibiting unfair behavior, though in a non-binding manner, and, second, a complaint handling mechanism, yet devoid of any real enforcement powers. Both aspects are now accommodated by the *hard law* UTP Act combined with public as well as private enforcement mechanisms.

It is important to note at the outset of this chapter that, in Belgium, the protection of suppliers in the agrifood sector goes beyond that offered by the sector-specific UTP Act, which functions only as the ‘first layer’ of

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relationships in the food supply chain, 12 April 2018, SWD (2018) 92 final, 20-21.

<sup>3</sup> Act of 28 November 2021 implementing Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain and amending the Code of Economic Law, *Moniteur belge* 15 December 2021.

<sup>4</sup> Article 18 Belgian UTP Act.

<sup>5</sup> See the first analysis of the Belgian UTP Act (in Dutch) by B. KEIRSBILCK, E. PAREDIS, *De omzetting van Richtlijn (EU) 2019/633 inzake oneerlijke handelspraktijken («UTP») in B2B-relaties in de landbouw- en voedselvoorzieningsketen in België en de buurlanden*, DAOR 2022, nr. 2, in print; S. DE POURCQ, *Leveranciers in de landbouw- en voedselvoorzieningsketen beter beschermd tegen oneerlijke marktpraktijken*, TBH 2022, in print.

<sup>6</sup> <https://supplychaininitiative.be/nl/>

protection. Indeed, the UTP Act acts as a *lex specialis* to, first, the general B2B protection which was only recently introduced in the CEL by the *Act of 4 April 2019 amending the Economic Code with regard to abuse of economic dependency, unfair terms and unfair market practices between undertakings* («B2B-Act»)<sup>7</sup> and, second, to the general private law principles of the Civil Code («CC»)<sup>8</sup>.

Prior to the B2B Act, B2B relations were mainly governed by general doctrines of civil law and by the general prohibition of unfair competition (Article VI.104 CEL). The latter general clause prohibits «*any act that is contrary to fair market practices and that harms or may harm the professional interests of one or more undertakings*». Thus, undertakings were largely left to use their own bargaining power and freedom of contract to protect their own interests, with only a few civil law corrections (e.g. the theory of «vitiating consent», the principle of good faith, or the doctrine of abuse of rights). Specific protection of weaker professional contracting parties was largely lacking, mainly because Article VI.104 CEL essentially outlaws only certain extra-contractual practices in ‘horizontal’ B2B relations (between competitors), such as slavish imitation, defamation, deceptive marketing and the like. With the B2B Act, the Belgian legislator switched to the completely other end of the spectrum and introduced a ‘cocktail’ of new B2B prohibitions in the CEL with a view to address inequality of bargaining power in ‘vertical’ B2B relations (between undertakings at different levels in the production and supply chain). Unlike the sector-specific UTP provisions, the *lex generalis* has a very broad scope of application, covering nearly all sectors<sup>9</sup> and without regard to the (relative) size of the undertaking.

So, the protective regime in Belgium reaches far beyond the protection of the weaker supplier as well as far beyond the agrifood sector. If a B2B practice in the agricultural and food supply chain is perceived as unfair but is not specifically prohibited by the UTP Act<sup>10</sup> or if the commercial rela-

<sup>7</sup> Act of 4 April 2019 amending the Code of Economic Law with regard to abuse of economic dependence, unfair terms and unfair market practices between undertakings, *Moniteur belge* 24 May 2019.

<sup>8</sup> See also Explanatory Memorandum to Draft Law transposing Directive (EU) 2019/633 on unfair trading practices in relations between undertakings in the agricultural and food supply chain and amending the Economic Code, *Parl. Doc.* 2021, doc 55 2177/001, p. 7 (hereinafter: «Explanatory Memorandum to the UTP Act»).

<sup>9</sup> Except financial services and contracts originating from public procurement. See Article VI.91/1 CEL.

<sup>10</sup> E.g. other unfair practices by buyers than those prohibited by the current blacklist and grey list, unfair practices by suppliers vis-à-vis buyers, etc.

tionship simply falls outside of the scope of the UTP Act<sup>11</sup>, that practice may still be caught by the *lex generalis* of the CEL. Essentially, three sets of overriding mandatory<sup>12</sup> provisions (introduced by the B2B Act into the CEL)<sup>13</sup> provide a ‘second layer’ of protection which applies across all sectors and to either party of the commercial relationship.

- First, the CEL contains a general prohibition of unfair B2B contract

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<sup>11</sup> E.g. practices vis-à-vis suppliers with an annual turnover exceeding EUR 350 million, unfair practices in any non-food supply chain, etc.

<sup>12</sup> See in relation to the overriding mandatory nature of the B2B Act: E. TERRY, *Onrechtmatige bedingen tussen ondernemingen* in W. DEVROE, B. KEIRSBILCK, E. TERRY (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, (95) pp. 102-103.

<sup>13</sup> See J. STUYCK, B. KEIRSBILCK, *De nieuwe Belgische wet met betrekking tot misbruik van economische afhankelijkheid, onrechtmatige bedingen en oneerlijke marktpraktijken tussen ondernemingen: een eerste commentaar*, SEW 2019, pp. 374-394; B. BÉNICHOU, *Oneerlijke bedingen en oneerlijke marktpraktijken in B2B-contracten*, in *L'entreprise face à ses nouveaux défis*, Bruxelles, Larcier, 2019, pp. 55-80; I. CLAEYS, T. TANGHE, *De b2b-wet van 4 april 2019: bescherming van ondernemingen tegen onrechtmatige bedingen, misbruik van economische afhankelijkheid en oneerlijke marktpraktijken*, RW 2019-20, pp. 323-345, 363-379; S. DE POURCQ, *Belangrijke wijzigingen op komst voor de contractuele verhouding tussen ondernemingen: misbruik van economische afhankelijkheid, onrechtmatige bedingen en misleidende en agressieve marktpraktijken worden verboden*, TBH 2019, pp. 642-665; G. STRAETMANS and B. BONET, *Actualia Ondernemingsrecht. Het nieuwe ondernemingsbegrip en de B2B-wet toegelicht*, Antwerpen, Intersentia, 2019; G. STRAETMANS, *De nieuwe b2b-marktpraktijken uit de wet van 4 april 2019*, DAOR 2020, afl. 133, pp. 3-13; G. STRAETMANS, *De onderneming als beschermingswaardige entiteit*, in *Eerlijke en vrije mededinging: wijsheid is maat*, Mortsel, Intersentia, 2021, pp. 71-96; W. Devroe, B. Keirsbilck and E. Terry (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, 242 p.; R. STEENNOT, Artikel VI.91/1, Artikel VI.91/2, Artikel VI.91/3, Artikel VI.91/4 en Artikel VI.91/5, Artikel VI.91/6, Artikel VI.91/7, Artikel VI.91/8, Artikel VI.91/9, OHRA, afl. 86, Kluwer, Mechelen, 2019; T. TANGHE, *Sancties voor onrechtmatige bedingen in ondernemingscontracten in het licht van de b2b-wet van 4 april 2019*, TBH 2019, pp. 1194-1210; S. GEIREGAT and R. STEENNOT, *Impact van de B2B-wet op de wilsautonomie en de rechtszekerheid: een rechtsvergelijkende analyse*, TPR 2019, pp. 973-1053; R. JAFFERALI and E. DE DUVE (eds), *Les clauses abusives B2B après la loi du 4 avril 2019*, Bruxelles, Anthemis, 2020; C. HEEB and M. DE MAN, *De B2B-wet van 4 april 2019 in vogelvlucht*, in S. De Rey, N. Van Damme and T. Gladinez (eds), *Grenzen voorbij*, 2020, pp. 593-618; R. JAFFERALI, *Les clauses abusives dans les contrats B2B après la loi du 4 avril 2019 ou le règne d'incertitude*, JT 2020, pp. 273-285, 301-316; S. DE POURCQ, *De impact van de wet van 4 april 2019 op de contractuele B2B-verhouding*, in *Verbintenissenrecht in de onderneming*, VPG-studiecyclus 2020, Mechelen, Wolters Kluwer, 2020, pp. 41-88; D. PHILIPPE and G. SORREAU, *Labus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises: premiers regards sur la loi du 4 avril 2019*, DAOR 2019, pp. 22-51.

terms<sup>14</sup>. Article VI.91/3 CEL defines such terms as «*any term of an agreement concluded between undertakings that, read alone or in conjunction with one or multiple other terms, creates a significant imbalance between the rights and obligations of the parties*», which resembles the general clause of Directive 93/13/EEG on unfair terms in consumer contracts<sup>15</sup>. The general clause is complemented by a blacklist of four *per se* prohibited practices (Article VI.91.4) and a grey list of eight practices which are presumed to be unfair, unless evidence to the contrary is provided (Article VI.91.5). On top of this, a transparency requirement applies in relation to written B2B terms (Article VI.91.2 CEL).

- Secondly, the above-mentioned general prohibition of unfair market practices (Article VI.104 CEL) is now complemented with two new 'small' general clauses on misleading and aggressive B2B market practices (Articles VI.105, 105/1 and VI.109/2 CEL)<sup>16</sup> – very much in the image and likeness of the B2C prohibitions implementing Directive 2005/29/EC concerning unfair business-to-consumer commercial practices<sup>17</sup>.
- Thirdly, Belgian competition law now also generally prohibits any abuse of «economic dependence» (relative market dominance)<sup>18</sup>, in-

<sup>14</sup> See on this subject E. TERRY, cit., pp. 95-147.

<sup>15</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29-34. The general clause (Article 3) was implemented in Article I.8, 22° *juncto* Article VI.84 CEL. Article VI.83 establishes a blacklist of 33 *per se* prohibited consumer contract terms. Article VI.37 imposes a transparency requirement in relation to written terms.

<sup>16</sup> See B. KEIRSBILCK, *Een meer uitgebreide controle van misleidende en agressieve marktpraktijken tussen ondernemingen: een goede zaak?*, in W. Devroe, B. Keirsbilck and E. Terry (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, (149) 149-193; S. DE POURCQ, *Het verbod op misleidende en agressieve marktpraktijken in de B2B-verhouding: eerste toepassingen in de rechtspraak*, TBH 2021, 4, 503-512.

<sup>17</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22–39. See the implementing provision in Articles VI.92 up until V.103 CEL.

<sup>18</sup> See the definition of «economic dependence» in Article I.6, 12bis CEL: «*position of subjection of an undertaking vis-à-vis one or more other undertakings characterized by the absence of a reasonably equivalent alternative, available within a reasonable period of time, and under reasonable conditions and with reasonable costs, which permit these or each of these undertakings to impose obligations or conditions that cannot be obtained under normal market conditions*».

spired by the French and German examples (Article IV.2/1 CEL)<sup>19</sup>. Although that new prohibition requires that competition may be affected on the relevant Belgian market or on a substantial part of it, recent case law applies this condition very broadly (or not at all)<sup>20</sup>. The prohibition also gives a number of examples of such «abuse»<sup>21</sup>.

Additionally, if neither the UTP Act nor the B2B Act are of any help, the fall back provisions of the Civil Code constitute the third layer of protection. In this respect, it must be observed that the Belgian law of obligations<sup>22</sup> and Belgian contract law<sup>23</sup> are undergoing a major overhaul and modernization process. As the B2B Act has faced rocky reception in legal literature, it might well be that this Act will be repealed or substantially amended in the context of a general recalibration of the legal protection of the professional contracting party (see *infra*, section 6).

This chapter will examine the peculiarities of the Belgian UTP Act, as its provisions constitute the main source of protection of suppliers in the agri-food chain. Throughout the analysis of the UTP Act, we will however discuss links, overlaps or inconsistencies with the B2B Act, as, unfortunately, the Belgian legislator made little effort to streamline the provisions of both Acts, which has resulted in a awkward-looking *millefoglie*<sup>24</sup>. We will embark

<sup>19</sup> See W. DEVROE, *Modernisering van Belgisch mededingingsrecht en invoering van een verbod van economische afhankelijkheid*, in W. Devroe, B. Keirsbilck and E. Terryn (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, pp. 47-93.

<sup>20</sup> See J. STUYCK, *Ongewenste reflexwerking van het verbod van misbruik van economische machtspositie op de norm der eerlijke handelsgebruiken*, *TBH* 2021, 5, pp. 653-657.

<sup>21</sup> Such abuse may, in particular, consist of: 1° refusing a sale, a purchase or other commercial conditions; 2° directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; 3° limiting production, markets or technical development to the prejudice of consumers; 4° applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; 5° making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

<sup>22</sup> Legislative proposal of 24 February 2021 containing Book 5 «Obligations» of the Civil Code, *Parl. Doc.* 2021, doc 55 1806/001.

<sup>23</sup> See Ministerial Decree of 15 June 2021 establishing Commissions for the reform of contract and prescription law, *Moniteur belge* 2 July 2021. The contract law reform commission is chaired by Bernard Tilleman and Paul-Alain Fories. The Commission for the reform of the law of limitation is presided and composed by Geert Jocuqué and Maxime Marchandise. Eric Dirix and Patrick Wéry are in charge of coordinating the work of these two Commissions.

<sup>24</sup> Compare J. STUYCK, *Implicaties van de Richtlijn oneerlijke handelspraktijken in de landbouw- en voedselvoorzieningsketen voor het Belgisch recht*, in W. Devroe, B. Keirsbilck



with an analysis of the scope of application of the UTP Act and its «overriding mandatory» nature (section 2). Next, we will discuss the unfair trading practices caught by the blacklist and grey list of the UTP Act, which does not provide for a sector-specific general clause (section 3). Subsequently, we will look into enforcement and legal redress (section 4), including public and private enforcement mechanism and the continued role of self-regulation and alternative dispute resolution. Before concluding (section 6), we will also discuss the most important aspects of the relationship with the forthcoming new Belgian law of obligations and contracts (section 5).

## *2. The scope of application of the UTP Act and its overriding mandatory nature*

Article VI.109/4, first paragraph CEL states that «*without prejudice to the application of Title 3/1 of this Book and Sections 1 to 3 of this Chapter, the provisions set out in this Section shall apply to relationships in the agricultural and food supply chain between, on the one hand, buyers and, on the other hand, suppliers whose annual turnover does not exceed EUR 350 000 000*».

The UTP Act copies the definition of «supplier», «buyer» and «public authority»<sup>25</sup> and holds on to the Directive's one-sided application to the buyer, i.e. protection of the supplier only. Moreover, in line with the Directive, the UTP Act clearly states that the transposition provisions apply when either the supplier or the buyer, or both, are established in Belgium<sup>26</sup>.

However, the scope of application of the UTP Act is broader than that of the UTP Directive. First, like the Directive, the Belgian provisions apply to «agricultural products» and «food product», but the latter concept is defined in such a way that it encompasses both *food* and *feed*<sup>27</sup>.

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and E. Terryn (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, p. (229) 237: «One may hope that the legislator will strive for a coherent whole. This will require additional efforts» (freely translated).

<sup>25</sup> Article I.8/1, 2°, 3° and 4° CEL. See also Explanatory Memorandum to the UTP Act, p. 13-16.

<sup>26</sup> Article VI.109/4, paragraph 4 CEL. See Explanatory Memorandum to the UTP Act, p. 18-19. See also Report from the Commission, COM(2021) 652 final, 7, which states that in a number of other Member States, the transposition provisions apply to sales where the supplier or the buyer (or both) are established in the Member State concerned rather than throughout the EU.

<sup>27</sup> Article I.8/1, 1° CEL. See Explanatory Memorandum to the UTP Act, p. 10 and p.



Second, whereas the Directive makes a distinction between perishable and non-perishable agricultural and food products, the UTP Act provides for an identical regime for all agricultural and food products (see *infra* on Art. 109/5, 1° and 2° CEL). Therefore, a transposition of the definition of «perishable products» was not necessary<sup>28</sup>.

Third, the UTP Act does not adopt the turnover-based categories of the UTP Directive to determine whether a buyer is ‘stronger’ than the supplier and hence has to comply with the UTP Act<sup>29</sup>. Pursuant to Article 2, para. 1 UTP Directive, the Directive applies only to certain UTPs by stronger buyers vis-à-vis weaker suppliers (on the basis of turnover scales). The UTP Act applies generally to all supplier-to-buyer relationships in the agricultural and food supply chain, without any requirement of significant imbalance in bargaining power between them. This approach is in line with the B2B Act, which also offers protection against unfair terms and market practices, regardless of the undertaking’s size or bargaining power. Nonetheless, the UTP Act maintains the Directive’s threshold of a maximum annual turnover of EUR 350 million for suppliers to benefit from protection<sup>30</sup>, except for recognised producers’ organisations (which thus benefit from protection regardless of their turnover)<sup>31</sup>. As a result, in practice it might well be that a supplier with a (substantial) higher annual turnover than the buyer (but less than EUR 350 million) can invoke protection against this smaller buyer, while this is not the case the other way around. The fact that the UTP Act thus allows large undertakings with sufficient bargaining power to invoke protection against even smaller companies, is regrettable.

The Directive explicitly provides that it applies also to «*services supplied by the recipient to the supplier, to the extent that such services are expressly mentioned in Article 3*» (notably in the grey list), such as the advertising of

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12-13. The rationale is that the supplier of agricultural products often does not know immediately whether his product will be processed for human or animal consumption, which could lead to problems of application and lack of protection.

<sup>28</sup> Explanatory Memorandum to the UTP Act, p. 10 and p. 16-17. The rationale here is that the notion of «perishable product» would be very difficult to delineate and could be a source of confusion and dispute between parties.

<sup>29</sup> Explanatory Memorandum to the UTP Act, p. 8 and p. 18. On the one hand, it would be too difficult and cumbersome to check the turnover of the other party each time. On the other hand, this turnover figure changes every year, so that a certain practice could be considered unfair one year and not the next.

<sup>30</sup> Compare the justification in the Explanatory Memorandum to the Draft B2B Act, doc 54 1451/003, p. 32 with the justification in the Explanatory Memorandum to the UTP Act, p. 9.

<sup>31</sup> See also Explanatory Memorandum to the UTP Act, p. 9-10, p. 15-16 and p. 18.

agricultural and food products<sup>32</sup>. In Belgium, this provision, which adds little to the text of the conditional prohibitions in the grey list, was not transposed as such.

The provisions of the UTP Act constitute «overriding mandatory provisions». As a result, they are applicable to any situation within the scope of those prohibitions, irrespective of the law otherwise applicable to the contract between the parties<sup>33</sup>. The Explanatory Memorandum of the UTP Act merely mentions the «mandatory» nature of the UTP Act, adding that it is «*not only a matter of protecting the supplier, but more generally of eliminating unfair market practices in order to avoid all negative consequences and possible cascading effects of such practices*»<sup>34</sup>. Presumably, the legislator means that the transposition provisions constitute «overriding mandatory» provisions.

As mentioned, if the B2B relationship does not fall within the scope of the UTP Act, the buyer or the supplier may still call upon the second or third layer of protection offered by the B2B law or the Civil Code. Moreover, the UTP Act applies «*without prejudice*» to the B2B Act and the Civil Code (Article VI.109/4 CEL). Therefore, even suppliers in a commercial relationship falling *within* the scope of the UTP Act, yet confronted with a UTP which is not on the UTP blacklist or grey list, may still find relief under these fall back provisions. The UTPs as outlawed by the Belgian UTP provisions are discussed briefly in the following section.

### 3. *Unfair trading practices*

#### 3.1. *No general clause in the Belgian UTP Act – fall back lex generalis*

In line with the UTP Directive, the Belgian UTP Act aims to combat practices «*that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another*»<sup>35</sup>. The Explanatory Memorandum to the UTP Act makes reference to this general description of UTPs within the meaning of

<sup>32</sup> Article 1, para. 2, penultimate subparagraph UTP Directive. See also Recital 13 of the preamble.

<sup>33</sup> Article 3, para. 4 UTP Directive.

<sup>34</sup> Explanatory Memorandum to the UTP Act, p. 11.

<sup>35</sup> Article 1, para. 1 UTP Directive. See also Recital 1 of the preamble.

the Directive<sup>36</sup>. This description may play some role in the interpretation of the specific prohibitions of the UTP Act<sup>37</sup> or even of similar prohibitions of the B2B Act. It should be noted that the Belgian UTP Act does not contain a ‘dedicated’ general clause on UTPs in the agricultural and food supply chain, although the minimum harmonization character of the Directive would have allowed for such a general catch-all clause (in order to address practices not specifically mentioned in the blacklist or grey list)<sup>38</sup>. However, as mentioned, the Belgian *lex generalis* has plenty of general B2B clauses in place.

Like Article 3, para. 1 and para. 2 UTP Directive, the Belgian UTP Act contains a blacklist of nine *per se* prohibited practices as well as a grey list of six practices which are prohibited unless they have been previously agreed upon in a clear and unambiguous manner by the buyer and the supplier. Article VI. 109/5 and VI.109/6 simply copy the blacklist and the grey list from the UTP Directive with only a few adjustments in order to make these prohibitions even more supplier-friendly (e.g. identical regime for perishable and non-perishable products). No other practices were added to those lists. None of the practices were moved from the grey list to the blacklist (although at least for one of the practices on the grey list this would have been better – see *infra*). Additionally, however, a delegation to the King was provided to complete or amend these lists (Article VI.109/7 CEL)<sup>39</sup>.

### 3.2. Blacklist

Article VI.109/5 CEL implements the blacklist of Article 3, para. 1 UTP Directive.

#### a) Late payments

Article VI.109/5, 1° CEL implements Article 3, para. 1, (a) UTP Directive, which imposes maximum payment terms of 30 days for perishable products and 60 days for non-perishable products. However, the Belgian prohibition does not make a distinction between perishable and non-perishable products and provides for a maximum payment term of 30

<sup>36</sup> Explanatory Memorandum to the UTP Act, p. 11.

<sup>37</sup> A. PIŚCZ, *EU Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain: Dipping a Toe in the Regulatory Waters?*, in Z. Meškić et al., *Balkan Yearbook of European and International Law 2019*, Springer, 2020, p. (109) 118.

<sup>38</sup> See Recital 40 of the preamble. See also J. STUYCK, cit., pp. (229) 230-231.

<sup>39</sup> See Explanatory Memorandum to the UTP Act, pp. 27-29.

days for both perishable and non-perishable agricultural and food products. The starting point of the payment period depends on whether the supply agreement provides for the delivery of products on a regular basis (or not) and on whether the buyer sets the amount payable (or not). For the remainder, the options and exceptions set out in the UTP Directive<sup>40</sup> were also adopted<sup>41</sup>.

The UTP payment periods (*lex specialis*) take precedence over the payment periods in the *lex generalis* of the Belgian Late Payments Act (implementing *Directive 2011/7/EU on combating late payment in commercial transactions*<sup>42</sup>)<sup>43</sup>. The latter Act was recently amended. From 1 February 2022 onwards, it is no longer possible to contractually deviate from the maximum payment term of 60 days, regardless of the size of the enterprise<sup>44</sup>. In addition, companies can no longer avoid the maximum payment period by making contractual arrangements regarding the date of receipt of the invoice or regarding the timeframe within which the conformity of the goods and services must be checked<sup>45</sup>. In line with the UTP Directive<sup>46</sup>, the consequences and remedies contained in the Late Payments Act continue to apply in full to the mandatory UTP payment periods in the CEL<sup>47</sup>.

<sup>40</sup> Article 3, para. 1, second and third subparagraph UTP Directive.

<sup>41</sup> See Explanatory Memorandum to the UTP Act, pp. 20-21, referring to the vulnerability of the suppliers of agricultural and food products, the difficulties in interpreting the concept of perishable products and the transposition of the Late Payment Directive in our neighbouring countries.

<sup>42</sup> Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, pp. 1–10.

<sup>43</sup> See Recital 18 of the preamble Directive 2011/7/EU.

<sup>44</sup> Act of 14 August 2021 amending the Act of 2 August 2002 on combating late payment in commercial transactions, *Official Gazette* 30 August 2021 (entry into force 1 February 2022). The possibility of contractually agreeing on a term longer than 60 days was previously only excluded if the creditor was an SME and the debtor was not an SME.

<sup>45</sup> Previously, companies were able in practice to extend the payment period by delaying the start of the payment period, in particular by contractually fixing the date of receipt of the invoice or by setting a 30-day time limit for the verification of conformity (whereby the payment period only starts to run after the end of the verification period, artificially extending the payment period to 90 days instead of 60). The audit period for verification of conformity is now part of the maximum payment period.

<sup>46</sup> Article 3, para. 1, second subparagraph UTP Directive.

<sup>47</sup> See Article 3 and 6 Late Payments Directive. See further S. DE POURCQ and E. TERRY, *Prohibited and Conditionally Permitted Unfair Trading Practices*, in E. Terry and B. Keirsbilck (eds), *Unfair Trading Practices in the Food Supply Chain: Implications of Directive (EU) 2019/633*, Intersentia, 2020, pp. (37) 37-59; E. PAREDIS, *Richtlijn*

*b) Short-term cancellation of orders*

Article VI.109/5, 2° CEL implements Article 3, para. 1, (b) UTP Directive, which prohibits the practice of cancelling an order for agricultural and food products at such short notice (before the agreed delivery period) that the supplier cannot reasonably be expected to find alternative means of trading or using those products. Unlike the UTP Directive, the Belgian UTP Act applies this prohibition not only to orders of perishable products, but also to non-perishable products<sup>48</sup>. In light of the *rationale* behind this prohibition, i.e. that the supplier should not be left with unexpected costs, one can doubt whether this Belgian extension was needed and desirable. The Directive introduced this ban for perishable products only, because a short cancellation period deprives the supplier of the possibility to find a new trading partner before the product perishes, leaving the supplier with unexpected costs. The damage that this prohibition seeks to prevent is therefore directly linked to the perishability of the product, which allows the supplier only a short period of time to find an alternative<sup>49</sup>. Naturally, suppliers of non-perishable products do not face the same problem and, given the nature of the products, have more time to find an alternative.

Following the approach of the Directive, Article VI.109/5, 2° CEL states that notice of less than 30 days shall always be considered as short notice. In addition, the King was given the power to prohibit a cancellation period of less than 30 days for specific sectors in duly justified cases, as allowed by the UTP Directive. In any event, in the context of this prohibition, which is worded very openly, there remains a lot of uncertainty about the *tipping point* at which a notice exceeding 30 days before the agreed delivery period becomes unreasonably short and thus *per se* unfair. Unfortunately, the Belgian legislator did not provide any further guidance on this matter. A guiding principle in this respect should be the *rationale* of the prohibition, i.e. that the supplier should not be left with unexpected costs.

Moreover, looking at the bigger picture of the UTP Act, caution is advised with regard to the interplay of the *per se* prohibition on short-notice cancellations of Article VI.109/5, 2° CEL and the ‘conditional’ prohibition

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*oneerlijke handelspraktijken in b2b-relaties in de landbouw- en voedselvoorzieningsketen*, in W. Devroe, B. Keirsbilck and E. Terryen (eds), *Nieuw economisch recht in b2b-relaties*, Intersentia, 2020, p. (195) 210.

<sup>48</sup> The Belgian legislator justifies this extension on the basis the allegedly difficult delimitation of the notion of «perishable» on the one hand and the willingness to guarantee a higher level of protection for suppliers on the other.

<sup>49</sup> In addition, the Directive recognizes that in some sectors of *perishable* products, a period of less than 30 days may be sufficient to find an alternative.

(subject to prior agreement) on returning unsold products without payment (see *infra* on Art. VI.109/6, 1° CEL). Since returns are less strictly regulated than cancellations, there may be a shift from cancellations (prohibited *per se*) to returns (allowed subject to prior agreement in that sense).

Finally, the interplay with the *lex generalis* renders an odd picture as well. The *lex generalis* contains a rebuttable presumption of unfairness of B2B contract terms which do bind parties to a contract without offering an opportunity to exit the contract – even if it is a fixed-term contract (!) – by giving reasonable notice (Article VI.91/5, 5° CEL). The aim of this prohibition is diametrically opposed to the *per se* prohibition on short-notice cancellations of Article VI.109/5, 2° CEL: whereas the *lex specialis* aims to offer farmers as much stability as possible and avoid unexpected costs due to the loss of orders, the *lex generalis* aims to prevent undertakings to be held hostage in long-term contracts that could restrict free competition<sup>50</sup>.

### c) *Unilateral contract changes*

Article VI.109/5, 3° CEL transposes Article 3, para. 1, (c) UTP Directive which prohibits unilateral changes to the terms of the supply agreement that concern the frequency, method, place, the timing or volume of deliveries of agricultural and food products, as well as unilateral changes to provisions regarding quality standards, payment terms or prices. In addition, the buyer may not make unilateral changes to the conditions for the provision of services listed in the grey list (such as the marketing of the products).

In line with the UTP Directive, Article VI.109/5, 3° UTP Act applies even if the buyer stipulates a reasonable notice or has an objectively justified reason for the modifications. Importantly, the prohibition only tackles unilateral changes to *already agreed* conditions in the supply agreement. Article VI.109/5, 3° CEL does not prevent the buyer from suddenly not renewing an expired supply agreement, or from doing so only on the condition of agreeing to a lower price or a lower volume than under the previous agreements. Similarly, it does not prevent the buyer and supplier from not yet fully determining a specific element of the future transactions and from stipulating that the buyer may determine this element at a later stage.

It should be observed that the new sector-specific *per se* prohibition goes significantly beyond the *lex generalis* which creates a rebuttable presumption of unfairness of any contract term which grants an undertaking the right to unilaterally change the contract terms *without any valid reason* (Article VI.91/5, 1° CEL).

<sup>50</sup> Amendments to the Proposal to amend the Code of Economic Law concerning the abuse of relative market power, *Parl.* 2019, doc 54 n° 1451/003, p. 43.

*d) Non-related payments*

Article VI.109/5, 4° CEL literally transposes Article 3, para. 1, (d) UTP Directive, which prohibits the buyer to require payments not related to the sale of the agricultural and food products of the supplier<sup>51</sup>. Which payments will be considered «non-related» depends on whether this provision will be interpreted more broadly or narrowly; here as well there is considerable legal uncertainty<sup>52</sup>. The Explanatory Memorandum of the UTP Act refers to the principles of good practice of the *Supply Chain Initiative*, which mentions the obligation of one of the parties to finance the business activities of another party, such as the obligation to contribute to the costs of opening a new branch of the buyer.

Non-related payments may also be caught by the Belgian prohibition of abuse of economic dependence, provided that competition may be affected on the Belgian market or on a substantial part of it<sup>53</sup>. Such abuse may, in particular, consist of making the conclusion of an agreement subject to acceptance of supplementary services which are not related to the object of that agreement<sup>54</sup>. This competition law provision is thus stricter than Article VI.109/5, 4° CEL, but may offer protection to suppliers (or buyers) that do not fall within the scope of application of the UTP Act.

*e) Transfer of risk for loss or deterioration*

Following Article VI.109/5, 5° CEL, which copies out Article 3, 1, (e) UTP Directive<sup>55</sup>, the buyer may not require the supplier to pay for the deterioration or loss of agrifood products that occurs at the buyer's premises or after the ownership of these products has been transferred to the buyer where the deterioration or loss is not caused by the negligence or fault of the supplier<sup>56</sup>. In essence, the provision prohibits the risk transfer for the deterioration or loss of agricultural or food products on the supplier. Unfortunately, the Belgian prohibition does not go beyond the Directive

<sup>51</sup> See also Explanatory Memorandum to the UTP Act, pp. 22-23.

<sup>52</sup> S. DE POURCQ and E. TERRY, cit., pp. (37) 48-49; E. PAREDIS, cit., (195) 214; V. DASKALOVA, *The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Frameworks?*, in *Journal of European Competition Law & Practice* 2019, p. (281) 290.

<sup>53</sup> Article IV.2/1, paragraph 1 CEL.

<sup>54</sup> Article IV.2/1, paragraph 2, 5° CEL.

<sup>55</sup> R. GJENDEMSJO and I. HERRERA ANCHUSTEGUI, *Regulating the food supply chain in Europe and the Unfair Trading Practices Directive*, in *REDC* 2020, p. (165) 182, for a comparison with the proposal for a Directive on the subject.

<sup>56</sup> See also Explanatory Memorandum to the UTP Act, p. 23.



with the clarification that the contract must define in a clear and comprehensible manner what is understood under «negligence or fault of the supplier»<sup>57</sup>. Moreover, this new *per se* prohibition, similar to that of Article VI.109/5, 2° CEL, is partly undermined by the less strict rule on returns (*supra*, on Article VI.109/6, 1° CEL).

The *lex generalis* creates a broad but rebuttable presumption of unfairness of any term which transfers the economic risk *without consideration* from the party who normally bears that risk to another party (Article VI.91/5, 3° CEL). The *per se* prohibition of Article VI.109/5, 5° CEL prevails over the conditional prohibition of undue transfer of risk of the *lex generalis*. For other cases of risk transfer, however, the *lex generalis* retains its application.

*f) Refusal of written confirmation*

Since unfair terms are more easily imposed by oral agreements, Article VI.109/5, 6° CEL, which literally transposes Article 3, para. 1, (f) UTP Directive, does not allow the buyer to refuse to confirm in writing the terms of the supply contract<sup>58</sup>. However, in line with the UTP Directive, an exception exists in the case where the supply agreement concerns products to be delivered by a member of a producer organisation, including a cooperative, to the producer organisation of which the supplier is a member, if the statutes of that producer organisation or the rules and decisions provided for in, or derived from, those statutes contain provisions having similar effects to the terms of the supply agreement. The effect of this prohibition is thus to make it more difficult for buyers to engage in unfair (contractual) market practices, because the written confirmation requested by the supplier provides the latter with proof of the prohibited terms<sup>59</sup>. According to the Explanatory Memorandum to the UTP Act, if the buyer does not respond to an e-mail of the supplier to confirm the agreed upon terms, this lack of response constitutes evidence that the buyer refused to comply with this obligation. This prohibition is likely to become particularly important in

<sup>57</sup> See in this sense S. DE POURCQ and E. TERRY, cit., p. (37) 50.

<sup>58</sup> See Explanatory Memorandum to the UTP Act, pp. 23-24, which states that proof that the buyer refuses to comply with this obligation can be provided by showing that the customer has not responded to an e-mail confirming the agreed terms in writing.

<sup>59</sup> European Commission, Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, 31 January 2013, COM(2013) 37 final, 20; A. Renda et al, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, 26 February 2014, 8, DOI: 10.2780/91447; European Parliament, «Draft legislative resolution», Amendment 58, in Report on the proposal for a directive on unfair commercial practices in relations between businesses in the food supply chain, A8-03/09/2018.



practice, although much will depend on effective enforcement<sup>60</sup>.

*g) Trade secrets*

Article VI.109/5, 7° CEL, which literally transposes Art. 3, para. 1, (g) UTP Directive<sup>61</sup>, prohibits the buyer from unlawfully obtaining, using or disclosing trade secrets of the supplier within the meaning of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure<sup>62</sup>. The Belgian provisions implementing the latter Directive (in Chapter XI, Title 8/1 of the CEL and the Civil Procedure Code) already define which practices fall under the unlawful acquisition, use or disclosure of trade secrets. In addition, these provisions already provide for specific private enforcement mechanisms and corresponding legal guarantees<sup>63</sup>.

The advantage of prohibiting such unlawful practices in relation to trade secrets (once again) as UTPs is that suppliers can make use of the additional UTP public enforcement mechanism<sup>64</sup>. Unlike ordinary court proceedings, the UTP enforcement mechanism takes into account the ‘fear factor’ and provides for fines, which may deter customers from unlawfully obtaining, using or disclosing trade secrets. In our view, the safeguards that apply under the Trade Secrets Directive in court proceedings as regards civil claims for damages should also apply in public enforcement proceedings under the UTP Directive<sup>65</sup>.

*h) (Threat of) retaliation*

If a buyer commits a UTP, the ‘fear factor’ can be an additional barrier for suppliers to challenge that UTP<sup>66</sup>. In particular, suppliers who are in a dependent position vis-à-vis their buyers, often do not dare to file a complaint in relation to UTPs for fear of losing the buyer as a business partner. For the same reason, they often tend to give in to commercial pressure by the buyer to include or change certain terms to the detriment of the

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<sup>60</sup> S. DE POURCQ and E. TERRY, cit., p. (37) 51.

<sup>61</sup> See Explanatory Memorandum to the UTP Act, p. 24.

<sup>62</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, pp. 1-18.

<sup>63</sup> Article XI.336/1 up until Article XI.336/5 CEL.

<sup>64</sup> See A.-S. CHONÉ-GRIMALDI, cit., no. 17; E. PAREDIS, cit., p. (195) 216.

<sup>65</sup> See also S. DE POURCQ and E. TERRY, cit., p. (37) 52.

<sup>66</sup> V. DASKALOVA, cit., p. (281) 295.

supplier<sup>67</sup>. Article VI.109/5, 8° CEL, which literally transposes Article 3, para. 1, (h) UTP Directive, aims to provide a solution for this concern: the buyer is prohibited from threatening to carry out or actually carrying out acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, which includes the right to file a complaint with enforcement authorities or to cooperate with enforcement authorities during an investigation. Under Belgian law, (the threat of) commercial retaliation can, under certain circumstances, also be qualified as an aggressive market practice under the *lex generalis* (Article VI.109/1 CEL)<sup>68</sup>.

### *i) Compensation for customer complaints*

Lastly, Article VI.109/5, 9° CEL, which copies out Article 3, para. 1, (i) UTP Directive, prohibits the buyer from requiring compensation from the supplier for the costs of examining customer complaints relating to the sale of the supplier's products, despite the absence of negligence or fault on the part of the supplier. Here again, this *lex specialis* prevails over the *lex generalis* on undue transfer of risk for conduct within the scope of application of the UTP Act. For other cases of risk transfer, however, the *lex generalis* remains applicable.

### 3.3. Grey list

Article VI. 109/6 CEL implements Article 3, para. 2 UTP Directive and contains the «grey list» of six conditionally prohibited UTPs. Unlike the practices prohibited *per se* by the black list, the practices on the grey list are prohibited, «*unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer*». As long as the fees, charges or payments on this grey list are predictable because they have been previously agreed in a clear and unambiguous manner, they are considered to be efficiency enhancing.

The question then becomes what is understood by «clear and unambig-

<sup>67</sup> E. PAREDIS, cit., p. (195) 217.

<sup>68</sup> If, during the course of a dispute, the buyer suddenly terminates the business relationship or suddenly refuses to deliver, but the supplier has difficulty proving that this is retaliation or the agreement is not covered by the UTP Act, he can also try to invoke Article VI.104 of the IPR on the grounds of refusal to purchase as an application of an abuse of rights, which case law has recently even linked to an abuse of a position of economic dependence. See Commercial court Ghent 16 April 2021, A/21/00024, *TBH* 2021, no. 5, pp. 646-653; Commercial court Ghent 28 October 2020, *Competitio* 2020, no. 4, pp. 369-372.

uous». According to the preparatory works of the UTP Directive, for these practices to be agreed «clear and unambiguous», it seems sufficient that there is a «common understanding» between the parties, regardless of the (written or oral) form of the agreement<sup>69</sup>. However, does this requirement merely refer to the clear and unambiguous wording of the practice (i.e. transparency requirement)? Or does the focus lie on clearly and unambiguously «agreed», so that it must be ascertained whether the agreed practice was indeed the true will of both parties?<sup>70</sup>

The Belgian legislator seemed to struggle with this issue as well. The Explanatory Memorandum to the UTP Act, for example, mentions that these grey practices are only not considered unfair if «*it is demonstrated that the supplier retained the necessary freedom of choice and action when contributing to these costs or fees*»<sup>71</sup>. However, several elements indicate that the requirement for clarity and lack of ambiguity refers merely to a transparency requirement as regards the terms of the supply agreement.

For example, the Explanatory Memorandum *also* states that proof that the practice is not unfair, must be provided by means of «clear and unambiguous *wording* in the supply agreement»<sup>72</sup>. Pursuant to Article VI.91/2, para. 1 CEL, all written B2B contract terms must be drafted in a clear and intelligible manner<sup>73</sup>. Since the provisions of the Belgian UTP Act apply without prejudice to the application of the B2B Act, it seems appropriate to interpret the terms «clear and unambiguous» in the *lex specialis* in conformity with the general transparency obligation in the *lex generalis*.

In addition, only for one of the grey practices (in relation to costs for a promotional campaign – see *infra* on Article VI.109/6, 3° CEL), the Belgian provisions go beyond the transparency obligation provided for in the UTP

<sup>69</sup> R. GJENDEMSJO and I. HERRERA ANCHUSTEGUI, cit., p. (165) 183; E. PAREDIS, cit., pp. (195) 218-219.

<sup>70</sup> E. PAREDIS, cit., pp. (195) 218-219.

<sup>71</sup> Explanatory Memorandum to the UTP Act, p. 27.

<sup>72</sup> Explanatory Memorandum to the UTP Act, p. 25.

<sup>73</sup> According to the parliamentary preparations, this requirement is closely linked to the question of «*whether and how the contract terms were communicated or made available*». However, the content of the requirement is not further explained. Since a similar transparency requirement exists in consumer law, which has already been clarified by the Court of Justice on several occasions, the interpretation of Article VI.91/2 CEL could take inspiration from this. However, the parliamentary preparations reject an analogous application of the case-law of the Court of Justice on B2B contracts to business contracts; see also I. CLAEYS and T. TANGHE, *De b2b-wet van 4 april 2019: bescherming van ondernemingen tegen onrechtmatige bedingen, misbruik van economische afhankelijkheid en oneerlijke marktpraktijken*, in *RW* 2019-20, pp. 323-345, 363-379.

Directive by explicitly requiring an «explicit agreement» on the amount of the costs for a promotional campaign, since in this case «*a mere information obligation does not offer sufficient protection to the suppliers*»<sup>74</sup>.

Since the UTP Directive was created on the premise that the supplier, given its position of dependence, often has no ‘real’ contractual freedom, one might ask whether a «clear and unambiguous agreement» as regards the practices (fees, charges or payments) mentioned on the grey list, always reflects the will of the supplier<sup>75</sup>. Therefore, it is regrettable that the Belgian UTP Act does not contain any additional safeguards against abuse, for instance by including substantive criteria for these practices to be considered fair (e.g. maximum percentage of unsold produce the buyer can return) or procedural elements (e.g. *when* exactly ‘prior to a promotion’ information concerning the period of the promotion and the expected quantity must be provided – see *infra*). The legislator assumes that the individual negotiation of such terms will automatically lead to a balanced result<sup>76</sup>. However, given the weaker position of suppliers, this assumption may not match reality.

Nonetheless, it should be recalled that market practices which are based on a «clear and unambiguous agreement», i.e. which do not qualify as UTPs, may still be caught by other prohibitions under the Belgian *lex generalis*. If a market practice – fair from the point of view of the *lex specialis* – is laid down in a clear and unambiguous contract term, this practice may still constitute an unfair term within the meaning of the blacklist (Article VI.91/4 CEL) or grey list (Article VI.91/5 CEL) or of the general norm (Article VI.91/3 CEL) of the *lex generalis*. However, the standard of proof of fairness for the practices on the grey list of the UTP Act differs from the standard of proof of fairness of the terms on the grey list of the B2B Act. The latter is a substantive test, namely proof that the contract term does not create a «*significant imbalance between the rights and obligations of the parties*», most likely in accordance with the general norm<sup>77</sup>. Both the UTP Act<sup>78</sup> and the

<sup>74</sup> Explanatory Memorandum to the UTP Act, p. 26.

<sup>75</sup> J. GLÖCKNER, *Unfair trading practices in the supply chain and the coordination of European contract, competition and unfair competition law in their reaction to disparities in bargaining power*, in *GRUR Int.* 2017, 416-434; E. PAREDIS, cit., p. (195) 219.

<sup>76</sup> S. DE POURCQ and E. TERRYIN, cit., p. (37) 53.

<sup>77</sup> For further explanations on the rebuttal of the grey list of presumably unfair clauses, see among others: E. TERRYIN, cit., (95) 128-130; R. JAFFERALI, *Les clauses abusives dans les contrats B2B après la loi du 4 avril 2019 ou le règne de l’incertitude (seconde partie)*, in *JT* 2020, n°6813, pp. 301-302.

<sup>78</sup> See, however, *infra* on the requirement of an «explicit agreement» on the contribution to costs for promotional actions, which, according to the Explanatory Memorandum,

B2B Act<sup>79</sup> do not explicitly limit the prohibitions to standard terms. Finally, such practices on the grey UTP list that are «clearly and unambiguously agreed» may still qualify as an act contrary to fair market practices that may harm the professional interests of one or more undertakings (Article VI.104 CEL), or even as an abuse of a position of economic dependence (Article IV.2/1 CEL).

*a) Returning unsold agricultural and food products without payment*

Pursuant to Article VI.109/6, 1° CEL, which takes over Article 3, para. 2, (a) UTP Directive, the supplier and buyer may agree in advance, in a clear and unambiguous manner, that the buyer may return unsold agricultural and food products to the supplier without paying for them or without paying for their disposal, or both<sup>80</sup>. Hence, this specific conditional prohibition was copy-pasted – and without further discussion – into Belgian law. The result is rather unsatisfactory, as the prohibition on the practice of returning unsold produce without payment is more suited on the black list than on the grey list. The Directorate-General for Competition, in its opinion on the impact assessment of the proposal for the UTP Directive, described claims for perishable or unsold goods as inefficient – just like all other trading practices that were blacklisted. This is because the initially agreed volume of goods sold is adjusted only after the transaction is completed ('ex-post'), more particularly when the buyer learns that the goods have not been sold. The final amount that a supplier will receive from the buyer for the delivered goods is thus unpredictable, as the buyer will not pay for the remainder of goods that were left unsold on the shelves. The buyer thus unfairly transfers his own risk (resulting from a defective market analysis) to the supplier<sup>81</sup>. Even the Belgian preparatory works underline the unfairness of the risk allocation and how such a practice removes every incentive to

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may only be agreed upon «by mutual consultation and agreement» (Explanatory Memorandum to the UTP Act, p. 25).

<sup>79</sup> See E. TERRY, *CIT.*, p. (95) 129, on the strange passus in the Explanatory Memorandum: «if the contracting parties concerned expressly agree to a scheme which would normally fall under one of the provisions listed in the grey list and yet deliberately opt for such a scheme, this would be an application of the principle of freedom of contract».

<sup>80</sup> Article VI.109/6, 1° CEL. See Explanatory Memorandum to the UTP Act, p. 25.

<sup>81</sup> T. VALLETTI, *Annex H: Economic impact of unfair trading practices regulations in the food supply chain (DG Competition)*, in *Impact assessment accompanying the document Proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain*, 12 April 2018, SWD (2013) 92 final, p. 265. See also E. PAREDIS, *cit.*, pp. (195) 219-220.

promote the products of the supplier in any way<sup>82</sup>.

Nonetheless, under Belgian law, a clear and unambiguous contract term allowing the buyer to return unsold products can still come under the (rebuttable) presumption of unfairness in the *lex generalis* of any term which transfers the economic risk without consideration from the party who normally bears that risk to another party (Article VI.91/5, 3° CEL).

*b) Fees, charges, payments*

Next, Article VI.109/6, 2° CEL, which implements Article 3, para. 2, (b) UTP Directive, prohibits the buyer from charging payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market, unless such payment was previously agreed in clear and unambiguous terms. All of these costs are normally borne by the buyer<sup>83</sup>. These costs can be transferred to the supplier, provided that there is a clear and unambiguous contractual basis for this transfer.

In line with the UTP Directive, the Belgian UTP Act also allows the supplier to bear (part of) the costs of promotional discounts (Article VI.109/6, 3° CEL – Article, 3, para. 2, (c)), marketing (Article VI.109/6, 4° CEL – Article 3, para. 2, (d)) and advertising (Article VI.109/6, 5° CEL – Art. 3, para. 2, (e))<sup>84</sup>, in the context of the resale of the supplier's agricultural and food products<sup>85</sup>.

The last practice on the grey list is a payment by the supplier for the buyer's staff to set up the premises used for the sale of the supplier's products (Article VI.109/6, 6° CEL – Article 3, para. 2, (f) UTP Directive). Such payment is also clearly linked to the sale of the supplier's products<sup>86</sup>.

In order to prevent suppliers from incurring unexpected costs, for each

<sup>82</sup> See Explanatory Memorandum to the UTP Act.

<sup>83</sup> See also Recital 26 of the preamble.

<sup>84</sup> See also Recital 27 of the preamble. See also R. GJENDEMSJO and I. HERRERA ANCHUSTEGUI, cit., pp. (165) 185-186.

<sup>85</sup> Although the trading practices in Art. 3, para. 2, (c), (d) and (e) do not specify that the payment must relate to the discounts, advertising and marketing of the *supplier's* products specifically, this can be deduced from a reading of Art. 3(2), (d) and (e) on the one hand and Art. 3(1)(d) *in conjunction with* recital 22 of the preamble on the other hand. Article 3(1)(d) prohibits payments for services which are not related to the sale of the *supplier's* agricultural and food products. Recital 22 makes it clear that the services on the grey list, including marketing and advertising, are related to these and are therefore not prohibited. See also E. PAREDIS, cit., p. (195) 221-222.

<sup>86</sup> S. DE POURCQ and E. TERRY, cit., p. (37) 58; also R. GJENDEMSJO and I. HERRERA ANCHUSTEGUI, cit., p. (165) 186.

of these charges or payments the UTP Act stipulates, in line with Article 3(3) UTP Directive, that the buyer must provide the supplier with a written estimate of the amount to be paid (per item or in total), the costs borne by the supplier and the elements on which the estimate of those costs is based<sup>87</sup>. This additional information obligation should help to prevent customers from imposing totally arbitrary charges on their suppliers. Unlike the UTP Directive, the Belgian legislator further strengthens the position of the supplier by generalising the above-mentioned information obligation (written estimate), even if the supplier does not request it<sup>88</sup>.

In addition, the UTP Act imposes an additional condition that the supplier may legitimately bear (part of) the costs of promotional activities (as referred to in Article 3(2)(c)). This commercial practice is only permissible if, *before the start of* the promotional campaign, the buyer specifies to the supplier on his own initiative (i) the period during which the promotion is to take place and (ii) the expected quantity of agricultural and food products to be ordered at the price obtained after deduction of the discount<sup>89</sup>. Similar as to the other provisions on fees, the buyer must provide the supplier with a written estimate in advance. These elements thus do not have to form part of the (earlier) supply agreement, nor is a reasonable period of notice imposed on the buyer<sup>90</sup>. However, here again, Belgium strengthens the protection of the supplier in comparison to the UTP Directive. Even more so, in contrast to the other practices on the grey list, the provision on discounts in the context of promotional campaigns explicitly requires the supplier to *explicitly agree* to the cost of these discounts<sup>91</sup>. If not, the supplier does not have to bear them.

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<sup>87</sup> See also Recital 26 of the preamble; Article VI.109/6, 2°-6° CEL. See Explanatory Memorandum to the UTP Act, pp. 26-27.

<sup>88</sup> At least according to the literal wording of the Belgian legal text (see Article VI.109/6, 3°, 4° and 5° CEL), where in comparison with the UTP Directive the term «upon request» is omitted. However, according to the Explanatory Memorandum, the customer is obliged to provide a written estimate «*at the supplier's request*», see Explanatory Memorandum to the UTP Act, p. 26.

<sup>89</sup> Article 3, para. 2 *in fine* UTP Directive.

<sup>90</sup> See also E. PAREDIS, cit., p. (195) 221.

<sup>91</sup> See Article VI.109/6, 3° CEL. The explanatory memorandum seems to exclude the possibility of the buyer obliging the supplier to contribute to the costs of promotional campaigns solely on the basis of a clause in an entry agreement. The Explanatory Memorandum states that such a practice should take place «*in mutual consultation and agreement*», which implies the need for an individually negotiated agreement. See Explanatory Memorandum to the UTP Act, p. 26.



#### 4. Enforcement

##### 4.1. Public enforcement by the Economic Inspectorate of the Federal Public Service Economy

The Economic Inspectorate of the Federal Public Service Economy, SMEs, Self-Employed and Energy (hereafter: «Economic Inspectorate») is competent to enforce the UTP Act<sup>92</sup>.

Book XV («Law Enforcement») of the CEL already granted extensive powers, similar to those listed in the UTP Directive, to the Economic Inspectorate to detect and identify breaches of the provisions of the CEL, including those listed in Book VI<sup>93</sup>. If an infringement is established and a warning is addressed to an undertaking infringing CEL provisions, the Economic Inspectorate may proceed to enforcement through the transaction procedure, administrative prosecution, or, in some cases, the transfer of the file to the Public Prosecutor for criminal prosecution<sup>94</sup>.

However, some adjustments were necessary to make the enforcement procedure compliant with the UTP Directive. Firstly, the Belgian UTP Act provides for a specific complaint procedure for suppliers who are victims of unfair market practices in the agricultural and food supply chain<sup>95</sup>. The Economic Inspectorate must examine this complaint and inform the complainant<sup>96</sup> within sixty days of the action taken on the complaint, in particular on whether or not an investigation will be launched<sup>97</sup>. Secondly, the enforcement mechanism of Book XV is adjusted to meet the ‘fear factor’: the complainant can request the Economic Inspectorate to keep his identity or other sensitive information confidential. Consequently, such sensitive information can, among other things, be deleted from the copy of the official report that is sent to the buyer<sup>98</sup>, or the warning procedure

<sup>92</sup> Article XV.2 CEL.

<sup>93</sup> Article XV.16/2 CEL

<sup>94</sup> However, the latter option is only available for violations of the prohibition on misleading and aggressive market practices (Article VI.104, 1° and 2° CEL), but *not* for a violation of the general prohibition on unlawful terms or unfair market practices.

<sup>95</sup> However, the complaints procedure must still be further elaborated by Royal Decree, art. XV.16/3 CEL.

<sup>96</sup> For the definition of «complainant in the agricultural and food supply chain», see Article I.20, 9° CEL.

<sup>97</sup> Article XV.16/3, §2 CEL.

<sup>98</sup> Article XV.16/3, §4 CEL.



can even be waived if there is a risk that this sensitive information will be disclosed<sup>99</sup>. Finally, the standard procedure was adapted (e.g. possibility of resorting to the transactional procedure or the criminal procedure even if the warning procedure is followed) and the sanctions were extended: in addition to more possibilities of disclosure<sup>100</sup>, infringements of the black and grey lists are punishable by a «level 2» sanction (i.e. criminal fine from 26 to 10,000 euros)<sup>101</sup>.

#### 4.2. *Private enforcement and legal redress*

The enforcement mechanism of the UTP Directive is aimed at detecting, establishing, terminating and imposing an appropriate (administrative) sanction on the perpetrator. However, this does not resolve the dispute *between the parties*. The Directive does not elaborate on the consequences of a UTP for the contract, nor on the matter of damages for the victim-supplier.

The CEL (partially) fills that void. Article VI.109/8 CEL provides that a term that «contractualises» a prohibited market practice can *also be* found unfair within the meaning of the general norm on unfair B2B terms in the *lex generalis* (Article VI.91/1 CEL)<sup>102</sup>. The sanction is therefore the same as for unfair terms: contractual terms that give rise to unfair market practices between a buyer and a supplier are prohibited and null and void<sup>103</sup>.

Moreover, to quickly end an ongoing (or recent) unfair market practice, the supplier can file for a cease and desist order from the President of the Commercial Court – at least in the absence of an existing contract (Article XVII.1 CEL). On the supplier's request, the President of the Commercial Court may establish an infringement of Article VI.104 CEL and grant a cease and desist order, i.e. order the infringing party to stop the illegal conduct. This competence is complemented neither with the competence to grant compensation, nor with the power to impose a positive act. To obtain redress in these cases, the supplier will have to initiate (separate) proceedings and follow the normal judicial process. The judgment of the President establishing an infringement will however bind the (ordinary) judge.

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<sup>99</sup> Article XV.16/4, paragraph 3 CEL.

<sup>100</sup> Article XV.16/4, last paragraph CEL and art. XV.60/21 CEL and Article XV.61, §4 CEL.

<sup>101</sup> Article XV.83, 15°/1 in conjunction with art. XV.70 CEL.

<sup>102</sup> See Explanatory Memorandum to the UTP Act, p. 18.

<sup>103</sup> Article VI.109/8 CEL.

Judicial enforcement however does not tackle the ‘fear factor’ as the identity of the supplier will not remain confidential – which was the exact reason why the UTP Directive introduced administrative enforcement. The combination of the ‘fear factor’, the legal costs involved, and typically having to bear the burden of proof has a deterrent effect and may make the private enforcement of UTPs ineffective. Based on published case law, judicial enforcement of UTPs in the agrifood chain on the basis of general contract law or the B2B Act has been rather limited in Belgium<sup>104</sup>. Although this observation may indeed partially be explained by the fear factor, the success of the Belgian alternative dispute mechanism (see *infra*) and the novelty (and the ‘hands-off’ approach of judges relating to unfair B2B contract terms) of the B2B Act play a role as well<sup>105</sup>.

#### 4.3. *Alternative dispute resolution*

Lastly, the Directive explicitly confirms that Member States may promote the voluntary use of effective and independent alternative dispute resolution mechanisms to resolve conflicts between suppliers and purchasers concerning possible unfair commercial practices<sup>106</sup>. Therefore, it leaves the above-mentioned *Agrofood Supply Chain Consultation* («AFSCC») untouched. The AFSCC has been founded by representatives of all the different links in the food supply chain to ensure fairness in the relationships between suppliers and buyers. Undertakings in the food supply chain can decide on a voluntary basis to join the initiative by sending over a signed document of accession.

The self-regulatory initiative puts emphasis on fostering partnership, collaboration and dialogue between all partners in the food supply chain. The AFSCC’s focus goes beyond preventing UTPs, but is more broadly focused on enlarging the value of the chain as a whole. In doing so, it sets out a number of principles of good conduct, which serve as a guide to inter-professional agreements.

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<sup>104</sup> (Published) case law on UTPs is very scarce and relates mostly to ‘refusals to sell’ as an application of art. VI.104 WER, see e.g. Court of Appeal Antwerp 27 October 2016, *Bierhalle Demeyer NV – Duvel Moortgat*, *TBM* 2016, n° 4, 442.

<sup>105</sup> There have only been a few applications of the B2B Act in case law, relating mostly to an abuse of economic dependence (art. IV.2 WER), see e.g. Commercial court Antwerp 16 April 2021, *Pletsers NV /Blaser Jagdwaffen GmbH and Mauser Jagdwaffen GmbH*, *RDC* 2021, nr. 5, p. 646.

<sup>106</sup> Article 7 UTP Directive.

As mentioned, this *soft law* code of conduct is combined with a complaint handling mechanism, yet without real enforcement powers. Individual suppliers who believe to be treated unfairly in breach of the code, are expected to resort first to the procedures that are the easiest, fastest and lowest in cost to resolve the dispute. In increasing order of complexity, speed and cost, these entail resolution by means of (i) commercial negotiations, (ii) mechanisms of dispute resolution foreseen in the contract, (iii) calling upon the internal dispute resolution body of the company, which must be set up by every large undertaking and must be independent, impartial and quick, (iv) mediation or arbitration and, finally, (v) jurisdictional methods according to national rules.

If commercial negotiations did not bring about a solution to the conflict, suppliers are also advised to file their complaint with the Governance Committee. This committee, consisting of representatives from each interest group in the food supply chain, has been set up to ensure the follow-up of compliance with the code of conduct. If the supplier's complaint is similar to other filed complaints, the Governance Committee can decide to act upon the matter by aggregating the complaints and facilitating reconciliation and to foster a solution benefiting all parties. This aggregation of complaints on violations of principles of the code is a condition for the Governance Committee's competence: it cannot act on such individual complaint alone. With regard to the reconciliation process on aggregated complaints, the complaining parties may decide to remain anonymous and confidentiality must in any case be guaranteed, during and after reconciliation. Anonymity of complaints addresses the fear factor of suppliers, who will be more inclined to act upon unfair behavior, and the confidentiality of the consultation assures retailers they will not suffer reputational damage once their alleged breach of the code becomes public, which will in turn facilitate their cooperation<sup>107</sup>.

Nevertheless, although the dispute resolution mechanism based on cooperation between all parties in the food supply chain is mostly seen as one of the AFSCC's biggest strengths, it can also form its biggest drawback, since if dialogue fails to bring about a solution, the Governance Committee can only issue non-binding advice on resolving the matter or suggest mediation, with the last word on the manner remaining in the hands of the strongest party. However, with the far-reaching enforcement of the UTP Act

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<sup>107</sup> P. VERHELST and B. MEULEMANS, *Tackling UTPs – Belgian farmers' thoughts about the Belgian experience with self-regulation*, in B. Keirsbilck and E. Terryn (eds), *Unfair Trading Practices in the Food Supply Chain: Implications of Directive (EU) 2019/633*, Intersentia, 2020, pp. 145-168.

as the ‘sword of Damocles’ above their heads, buyers may be more inclined to cooperate. On the other hand, suppliers who have the option to immediately file an individual complaint with the Economic Inspectorate, may not bother to take the detour of the AFSCC.

### 5. *Relation with general private law*

As mentioned, the law of obligations and contract law provide a ‘third layer’ of protection, where neither the UTP Act nor the B2B Act catch the alleged unfair conduct. It is interesting to note that the above-mentioned *Act containing Book 5 «Contracts» of the (New) Civil Code («NCC»)*<sup>108</sup> not only explicitly confirms the principle of freedom of contract and negotiation<sup>109</sup>, but also contains a number of new provisions to protect the position of the weaker contracting party.

First, Article 5.37 on «abuse of circumstances» prohibits the situation where (i) at the time of the conclusion of the contract (i.e. *ab initio*), there is an apparent imbalance between the mutually stipulated obligations (ii) as a result of (iii) the abuse by one party of circumstances connected with the weak position of the other party (physical, moral or financial emergency, weaknesses or ignorance or inexperience), or of its own economic or functional superiority. In this case, the injured party may claim adjustment of his obligations by the court and, if the abuse is decisive, relative nullity<sup>110</sup>.

Secondly, and more importantly, Article 5.52 introduces a general prohibition of unfair terms, defined as «*any term that creates an significant imbalance between the rights and obligations of the parties*» (taking into account all circumstances surrounding the conclusion of the contract). The scope is limited on the one hand to non-negotiable terms, but on the other hand applies across the board (both B2B, B2C, C2C etc.), in order to avoid any discrimination<sup>111</sup>. It however neither relates to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain and intelligible

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<sup>108</sup> Law of 28 April 2022 on the insertion of book 5 ‘Obligations’ in the Civil Code, *BS* 1 July 2022. The new provisions entered into force 1 January 2023.

<sup>109</sup> Articles 5.14 and 5.15 NCC.

<sup>110</sup> See Explanatory Memorandum to Book 5 “Obligations”, p. 45-48.

<sup>111</sup> *Ibid*, p. 58.

language. Apparently, the intent or hope of the drafters of the Law of Obligations is that the current *lex generalis* in the CEL would be abolished in due time<sup>112</sup>. If that were to happen (let us hope<sup>113</sup>), the level of protection of suppliers in the agricultural and food supply chain would also need to be re-evaluated. When transposing the UTP Directive, the Belgian legislator took into account the extensive arsenal of prohibitions introduced by the Belgian B2B Act, which are said to be «without prejudice» to the specific prohibitions of the UTP Act (Article VI.109/4 CEL).

In our view, when drafting a new law of obligations and/or a new general contract law, due account should be taken of the practices and contractual arrangements already specifically prohibited and sanctioned by the UTP provisions. It should be noted that the aforementioned general provisions on «abuse of circumstances» and «unfair terms» are much broader than the UTP provisions. Yet, due to their (natural<sup>114</sup>) *locus* in the Civil Code, only civil enforcement will be possible (compare *supra* on the so-called *fear factor* in certain B2B relations and the need for public enforcement).

In addition, also the relationship of the UTP Act with sales law<sup>115</sup> would deserve special attention. As mentioned, a major overhaul of Belgian special contract law is in the pipeline, which is expected to lead to a new *Book 7* «*Special contracts*» of the NCC<sup>116</sup> including new provisions on sales, service and lease contracts<sup>117</sup>. It would be recommendable, when drafting provisions of special contract law on, *inter alia*, conformity<sup>118</sup>, to take into account the

<sup>112</sup> *Ibid*, pp. 55-56: «It will be up to the legislator to decide, in the light of the planned evaluation of the Act of 4 April 2019 and its assessment by the doctrine, whether this Act should be retained or whether the interests of companies are not already sufficiently protected by the general provision inserted in Book 5». With this passus, the drafters of the Act primarily target the control regime of unfair B2B terms.

<sup>113</sup> See for a plea for the abolishment of the control regime of unfair B2B terms in the light of the New Civil Code, which we endorse: D. ROOSES, *Onrechtmatige bedingen B2B revisited in het licht van het wetsontwerp nieuw verbintenissenrecht: back to basics?*, in *RW* 2021-2022, nr. 23, pp. 891-899. See also E. DIRIX, *Actualiteit: Flitswetgeving*, *RW* 2018-19, p. 1402.

<sup>114</sup> Also E. TERRYIN, *cit.*, p. (95) 104.

<sup>115</sup> See recently among others B. TILLEMANN, S. DE REY, N. VAN DAMME and F. VAN DEN ABEELE, *Overzicht van rechtspraak. Bijzondere overeenkomsten. Koop (2007-2020)*, in *TPR* 2020, pp. 1007-1686.

<sup>116</sup> For the master plan see <https://justitie.belgium.be/nl/bwcc>

<sup>117</sup> See Ministerial Decree of 15 June 2021 establishing Commissions for the reform of contract law and prescription law, *Moniteur belge* 2 July 2021.

<sup>118</sup> See also in this sense M. STORME, *Remedies bij digitale inhoud en diensten*, in I. Claeys and E. Terryin (eds), *Nieuw recht inzake koop en digitale diensten*, Antwerpen, Intersentia,

practices before, during and after the sale of agricultural and food products already specifically prohibited and sanctioned by the UTP Act.

## 6. Conclusion

In this Chapter we have aimed to give an overview of how the UTP Directive was implemented in Belgian law, with an additional focus on links, overlaps or inconsistencies with the B2B Act. After an analysis of the scope of application of the UTP Act and its «overriding mandatory» nature, we have discussed the unfair trading practices caught by the blacklist and grey list of the UTP Act. Subsequently, we have looked into enforcement and legal redress, including public and private enforcement mechanism and the continued role of self-regulation and alternative dispute resolution. Finally, we have discussed the most important aspects of the relationship with the forthcoming new Belgian law of obligations and contracts.

The UTP Directive provides a baseline of protection for suppliers in the agricultural and food supply chain against unfair trading practices imposed by buyers that are in a position of superior bargaining power. Given the variety of legal traditions that regulate (imbalanced) commercial relations in a more or less restricted manner, the minimum harmonisation approach of the UTP Directive allows sufficient regulatory freedom to the Member States to implement its provisions in a manner best befitting their national regulatory traditions. Member States are free to maintain or introduce protection going beyond the UTP Directive. Belgium used this freedom to some extent. As a result, differences in the manner, degree and efficiency of the national regulations will inevitably continue to exist, although the obligation to exchange information and cooperate could, in time, somewhat foster a common approach based on the best practices of successful national enforcement authorities.

Apart from this, the implementation and application of the minimum protection of the weaker commercial trading partner in the specific sector of agriculture and foodstuff as forged by the UTP Directive implies a major challenge for the preservation of the (already highly endangered) coherence of private law, including in Belgium. Besides the above-mentioned Late Payment Directive and the classic Directive on commercial agents<sup>119</sup>, a third

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p. (233) 259.

<sup>119</sup> Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws

directive that harmonises a piece of commercial contract law (in addition to the recent P2B Regulation)<sup>120</sup> now comes into play. One can question to what extent the sector-specific approach of the UTP Directive will be sustainable over time. Moreover, one may ask to what extent this interference in Member States' legislation truly removes barriers to trade – if any existed in the first place. The limited scope of application and the minimum harmonisation approach allow goldplating to a significant degree, with the result that for each UTP one still has to verify whether the applicable law is stricter than the UTP Directive<sup>121</sup>.

Remarkably, two decades ago the Commission identified exactly the combination of minimum harmonisation and the sectoral approach that characterises the UTP Directive as one of the most prominent causes of the 'incoherence' of European contract law. Since then, at least European consumer law has moved towards full rather than minimum, and horizontal rather than vertical<sup>122</sup> harmonisation, although this cannot be called a unequivocal success either<sup>123</sup>.

Moreover, it is ironic that two decades after the Modernisation Regulation 1/2003<sup>124</sup>, that excluded by way of exception the 'convergence rule'<sup>125</sup> for national provisions on unilateral conduct<sup>126</sup> and that does not preclude the application of national provisions that pursue an objective

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of the Member States relating to self-employed commercial agents, *OJ L* 382, pp. 17-21.

<sup>120</sup> Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, *OJ L* 186, pp. 57-79.

<sup>121</sup> See E. PAREDIS, *cit.*, p. (195) 227.

<sup>122</sup> Vertical harmonisation focusses on one specific subject or one specific sector, whereas horizontal harmonisation has a general scope of application.

<sup>123</sup> See B. KEIRSBILCK, *An EU perspective on contract law harmonization*, in A. Hutchison, F. Myburgh (eds), *Research Handbook on International Commercial Contracts*, Chapt. 5, pp. 86-109, Edward Elgar, doi: 10.4337/9781788971065.00010

<sup>124</sup> Council Directive (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, *OJ L* 1, pp. 1-25.

<sup>125</sup> Article 3, para. 2 Modernisation Directive: «*The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty*».

<sup>126</sup> Article 3, para. 2 Modernisation Directive *in fine*: «*Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings*». See recital 8 of the preamble.



that is predominantly different from that pursued by the Articles 101-102 TFEU<sup>127</sup>, the divergence of national UTP provisions have become the ‘new normal’. We do remember that at one point of time the Commission even contemplated the extension of the convergence rule to the domain of Article 102 TFEU and national provisions on unilateral conduct<sup>128</sup>.

To ensure timely detection of possible shortcomings of the UTP Directive, the Commission must review the effectiveness of the UTP Directive no later than 1 November 2025<sup>129</sup>. This review should be based on the annual reports of the national enforcement authorities<sup>130</sup>. The report of the Commission will include the main findings of the evaluation and, if appropriate, legislative proposals. Some have already expressed their concern that the UTP Directive, which to a considerable extent intervenes in the freedom to contract and to compete<sup>131</sup> in an attempt to safeguard a fair standard of living for the agricultural community, might become a textbook example of counterproductive regulation<sup>132</sup>.

The Belgian UTP Act must be evaluated as well by 1 December 2024 at the latest<sup>133</sup>. In our view, the legislator has to take into account at least the following three elements. First, we regret that the UTP Act does not impose a difference in bargaining power as prerequisite below the protection threshold of 350 million euros (the preservation of which is in itself a good thing). Although this is also a sore point of the regime of unfair terms in the B2B

<sup>127</sup> Article 3, para. 3 Modernisation Directive: «Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty».

<sup>128</sup> Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003, SEC(2009) 574 final, para. 156-179, in particular para. 178-179; B. KEIRSBILCK, *Relatie mededinging en marktpraktijken*, in W. Devroe, K. Geens, P. Wytinck (eds), *Mijlpalen uit het Belgisch mededingingsrecht geannoteerd - Liber Amicorum Jules Stuyck*, Mechelen, Kluwer, 2013, pp. 185-215.

<sup>129</sup> Article 12, para. 1 UTP Directive. See also: Recital 44 of the preamble concerning the principle of proportionality. The review should also pay particular attention to whether the protection of buyers of agricultural and food products in the supply chain – in addition to the protection of suppliers – in the future would be justified. See Recital 43 of the preamble.

<sup>130</sup> Article 12, para. 3 and Article 10, para. 2 UTP Directive.

<sup>131</sup> See critically, J. STUYCK, cit., pp. (169) 176-180.

<sup>132</sup> See critically R. GJENDEMSJO and I. HERRERA ANCHUSTEGUI, cit., p. (165) 173; V. DASKALOVA, cit., p. (7) 35, with a sense of exaggeration.

<sup>133</sup> Article 17 UTP Act.



Act, this applies even more so to the UTP Act which excludes any contextual assessment of the practices on the black list and perhaps even the grey list<sup>134</sup>.

Secondly, the legislator must be vigilant that the practices on the grey list (e.g. return of products without payment) will not be misused to circumvent practices on the black list (e.g. risk transfer of wasted produce or annulments). Such circumvention could be avoided by, for instance, moving the conditionally fair practice of returning unsold produce (Article VI. 109/6, 1° WER) from the grey to the black list, following e.g. the German model. Thirdly, one can question the equal treatment of perishable and non-perishable products, at least as far as the prohibition on short-term cancellations is concerned.

In addition, the evaluation of the Belgian UTP Act undoubtedly also has to take into consideration the already extensive arsenal of prohibitions recently introduced by the B2B Act. The Belgian legislator made a (very) humble attempt to align the UTP Act with the B2B Act by not imposing a difference in bargaining power in the scope of application and by applying the sanction for unfair contract terms provided in the *lex generalis* to contractualised UTPs. However, the Belgian legislator left many questions in this regard unanswered as well: does the requirement of 'clear and unambiguous terms' have to be interpreted in the same manner as the transparency requirement for B2B contracts? Should the counterevidence for qualifying as a fair market practice within the meaning of the grey list of the UTP Act not be aligned with the counter evidence to qualify as a fair contract term within the meaning of the grey list of the B2B Act? The infamous B2B Act must be evaluated by 1 December 2022 at the latest.

Apart from the relationship between the B2B Act and the UTP Act and the planned evaluation of both acts, the relationship between the B2B and UTP Act(s) on the one hand and the law of obligations and contract law on the other deserves due attention in the near future.

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<sup>134</sup> An (individually negotiated) contract term that obliges the larger supplier to pay certain fees not related to the sale of his produce, may still be qualified as fair under art. VI. 81/3 CEL read in conjunction with the other clauses of the agreement or given the circumstances surrounding the closure of the agreement. On the basis of the UTP Act, this contract term is however always *per se* prohibited under Article VI.109/5, 4° CEL, regardless of the (even weaker) position of the buyer or the globally balanced character of the agreement.

Catherine Del Cont

*Was the transposition into French law of EU Directive 2019/633  
on unfair practices in commercial relationships  
in the agri-food chain pointless?*

SUMMARY: 1. Introduction – 2. A two-act transposition – 2.1. Transposition before the ordonnance of 30 June 2021 – 3. A transposition in a complex and very ineffective regulatory framework – 3.1 A complex legal framework that is constantly changing – 3.2. An ineffective legal framework.

1. *Introduction*

European Union Directive 2019/633 («the Directive») was transposed into French law by *Ordonnance* 2021-859, of 30 June 2021, which was published in the Official Journal on 1 July 2021<sup>1</sup> and came into force on 1 November 2021, the deadline set in the Directive. The transposition was a little late, as the Directive specified 1 May 2021 as the deadline for transposition.

This transposition occurred almost unnoticed by both legal scholars and professionals working in the food supply chain. In fact, while the French government had supported the adoption of the Directive and had constantly been reinforcing the legal framework governing commercial relationships in the agricultural sector, with the aims of rebalancing the relationships between the different businesses in the food supply chain and protecting farmers' incomes, the transposition aroused hardly any interest, and certainly did not overturn any existing laws. The text of the transposition is contained in only five relatively short articles, which prohibit three new unfair practices, compared to the 16 prohibited in the Directive<sup>2</sup>. This can be

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<sup>1</sup> The government was authorised to transpose the Directive into French law via an ordonnance by Article 7 of Law 2020-1228 of 12 December 2020.

<sup>2</sup> Cf. A. IANNARELLI, *La tutela dei produttori agricoli nella filiera agro-alimentare alla luce*

explained simultaneously by the socio-economic context, the nature of the Directive and the existing French laws governing commercial relationships in the food supply chain. The Directive is one of minimal harmonisation, to create a harmonised legal framework to fight unfair practices in the food supply chain, which is characterised by structural imbalances and by increasingly poor incomes for farmers. Thus, as stressed in the report relating to the *ordonnance* presented to the President of the Republic, «France has already benefitted from such a legal framework for a long time» and «most of the unfair practices outlawed by this Directive are already illegal in France»<sup>3</sup>.

The text was largely based on the existing law governing commercial relationships and competition-restricting practices<sup>4</sup>. In fact, the majority of the unfair practices outlawed by the Directive were already prohibited in French law as «competition-restricting practices» defined as behaviour by businesses that is forbidden *per se*, regardless of its effect on the market. What is more, the Directive arrived a few months after the adoption of the so-called «Egalim 1 Law» of 30 October 2018, on the balance of commercial relationships in the agricultural and food supply chain<sup>5</sup>. The text of this law had its origin in the Food Assembly (*Etats-généraux de l'alimentation*), a body made up of the different actors in the food supply chain, consulted by the government. The Egalim 1 Law had changed the legal framework governing existing commercial relationships in the food supply chain and had led to a restructuring of the law on competition-restricting practices (which were illegal *per se*) in the *ordonnance* of 24 April 2019<sup>6</sup>, a few days before the Directive was issued. The writing and issuing of the Directive had taken place against a background of a flurry of legal activity in France, which could

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*della direttiva sulle pratiche commerciali sleali business to business*, in *Rivista di diritto agrario*, 2019, pp. 3-4.

<sup>3</sup> Cf. Report to the President of the Republic on the *ordonnance* of 30 June 2021, published in the Official Journal on 1 July 2021, available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043727749/>.

<sup>4</sup> Cf. C. DEL CONT and A. IANNARELLI, *New competition rules for the agrifood chain in the CAP 2020*, Research Paper for the Agricultural Commission of the European Parliament, September 2018 (hereinafter «DEL CONT & IANNARELLI») available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/617497/IPOL\\_STU\(2018\)617497\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/617497/IPOL_STU(2018)617497_EN.pdf).

<sup>5</sup> Law 2018-938 of 30 October 2018 to balance commercial relationships in the agricultural and food supply sector and to ensure healthy, sustainable and accessible food for all, known as the Egalim 1 Law, see: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT00003754>. Cf. C. GRIMALDI-CHONÉ, *Loi Egalim: un nouveau droit de la distribution des produits agricoles et alimentaires*, *JCP E* 2019, 1021.

<sup>6</sup> *Ordonnance* 2019-359 amending Title IV of Book IV of the Commercial Code.

be seen as competing with the European Union to set standards. As for the text of the transposition *ordonnance* that is the subject of this article, it was published a few days after the parliamentary vote following the first reading of the proposed «Egalim 2 Law», which aims to protect farmers' incomes<sup>7</sup>. It is thus easier to understand why the transposition of the Directive into French law passed almost unnoticed. There has been no change in legal scholarship, nor to the most recent legal textbooks; at most they mention the date of the transposition *ordonnance* and include a link to the amended text of the Commercial Code<sup>8</sup>. Should it be deduced from this that the Directive's transposition into French law was pointless and brought nothing to the abundance, not to say plethora, of existing French law governing the food supply chain? Did the transposition allow the ambitious objectives of the European and French legislators to define and sanction abuses of power in commercial negotiations and to rebalance the food supply chain in favour of its «weakest links» to be met? To attempt to answer these questions, this article will (i) examine the changes made by the transposition *ordonnance* and then (ii) analyse its integration into the existing French law governing commercial relationships in the agricultural and food supply sector<sup>9</sup>.

## 2. *A two-act transposition*

The transposition of the Directive occurred in two stages. The first stage took place through the changes made to the legal framework governing commercial relationships in April 2019. In the *ordonnance* of 30 June 2021, the French legislature formally completed the process of transposition of the illegal practices that were not then included in the legal framework governing the constantly changing commercial relationships in the agricultural and food supply sector.

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<sup>7</sup> Law 2021-1357 of 19 October 2021 to protect farmers' incomes, known as the Egalim 2 Law2, see <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044220683>.

<sup>8</sup> Cf. C. RODA and M. FRISON-ROCHE, *Droit de la concurrence*, Dalloz 2022, 601, n. 710, as an example.

<sup>9</sup> This law is particularly complex, so in this article only the main measures governing commercial relationships in the food supply chain will be examined. For a more panoramic view, see «Relations commerciales dans le secteur agricole et alimentaire», *JCL Contrats-Distribution*, fasc., 12 September 2022 (hereinafter «JCL Contrats»).

### 2.1. *Transposition before the ordonnance of 30 June 2021*

While the Directive required its transposition into the national laws of the EU Member States by 1 May 2021 at the latest, the transposition measures were only ratified in France on 30 June 2021. This delayed transposition led to the European Commission beginning infraction proceedings against France. But was there really a delay in transposition? In its response to the Commission, the French government (like the Estonian government) argued that the Directive had already been partly transposed into its national law and that French law had, for many years, contained a legal framework that outlawed the unfair practices targeted by the Directive. This argument was repeated in the report presented to the President of the Republic with the *ordonnance* of 30 June 2021. In fact, French law had for decades contained a legal arsenal that not only sanctioned unfair and abusive practices and behaviour in commercial relationships under common law in Title IV of Book IV of the Commercial Code, but also abusive behaviour in agricultural relationships. This law was reinforced and updated in 2018. Following the adoption of the Egalim 1 Law, Title IV of the Commercial Code, which covers transparency, competition-restricting practices and other prohibited practices, was amended by the *ordonnance* of 24 April 2019. This amendment aimed to allow the easier identification of abusive practices which had developed all along the food supply chain and, ultimately, to rebalance commercial relationships in the agricultural and food supply sector.

Article L442-1 of the Commercial Code was amended to include the abusive behaviour arising from three illegal unfair practices: maintaining a significant imbalance in the rights and obligations of the parties, obtaining an advantage without making a concession in exchange, and the sudden ending of commercial relationships<sup>10</sup>. The new text covered all the unfair practices targeted in the Directive, except for three which would be covered in the transposition *ordonnance* of 30 June 2021. For example, obtaining an advantage without making a concession in exchange is targeted in Article 3 of the Directive: «Member States must ensure that at least all the following unfair commercial practices are prohibited: (...) when the buyer demands payments from the seller that are not linked to the sale of agricultural and food products produced by the seller».

The Directive was thus partially transposed into national law well before the adoption of the *ordonnance* of 30 June 2021, which explains why its text is so short, only containing five articles.

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<sup>10</sup> See: [https://www.legifrance.gouv.fr/codes/article\\_lcLEGIARTI000042657762/2020-12-09/](https://www.legifrance.gouv.fr/codes/article_lcLEGIARTI000042657762/2020-12-09/).

## 2.2. *The transposition by the ordonnance of 30 June 2021*

As it was to be implemented *rationae materiae*, the transposition *ordonnance* did not set conditions for its application based on the complex criterion of the buyers' and sellers' turnovers defined in Article 1.2 of the Directive<sup>11</sup>. The French legislators deviated from the approach chosen in the Directive with regard to these thresholds, as permitted in Article 9 of the Directive. In French law, the prohibition of unfair commercial practices applies to all businesses, without any turnover conditions<sup>12</sup>. The objective is to be able to include the unfair practices used in large, benchmark, distribution centres, whose turnovers are nearly always below the thresholds in the Directive. The key part of their business is to negotiate prices for their suppliers, producers and/or processors, rather than buying products as a principal. The solution chosen by French law results in a much wider field of application than that in the Directive, which does not aim to protect «small suppliers» confronted with buyers with huge negotiating power.

Using *rationae materiae*, the French legislators did, however, retain the Directive's field of application: food products and agricultural food products.

The *ordonnance* which provided the final transposition of the Directive created three new illegal unfair practices because some of the measures in Article 3 of the Directive were not yet also covered by the law on unfair practices in Title IV of Book IV of the Commercial Code: the cancellation of an order for perishable products at short notice (Article 3.1.b of the Directive), the refusal to confirm in writing the terms and conditions of a supply agreement (Article 3.1.f), and the obtaining or divulging of a supplier's confidential commercial information (Article 3.1.g). The obligation to state the forecast quantities of products on which promotional discounts have been agreed by the supplier was also transposed (Article 3 *in fine*). The three new restrictive practices were created by Article 2 of the *ordonnance* and were added to the Commercial Code as Articles L443-5, L443-6 and L443-7.

The prohibition of the cancellation of an order for perishable agricultural

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<sup>11</sup> Cf. Article 1, par. 2 for a definition of the thresholds and the methods used to calculate them.

<sup>12</sup> The abolition of the thresholds based on turnover was done in Article 9 of the DDAUE of 3 December 2020 authorising the government to transpose the Directive via an *ordonnance*, see <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042607095>.

or food products with less than 30 days' notice by the buyer<sup>13</sup> is enacted in the new Article L443-5 of the Commercial Code which applies sanctions against a party which cancels an order at short notice, thus severely disrupting the business of small suppliers and threatening their profitability or even their commercial survival. We should note that, in the same perspective of rebalancing relationships in the food supply chain, the French legislators chose not to prohibit the cancelling of orders by a supplier to the detriment of a buyer.

The new Article L443-6 prohibits the practice of illegally obtaining, using or divulging confidential commercial information belonging to a supplier by a buyer of agricultural and food products. This text is specific to the food supply sector and creates a few potential clashes with the common-law measures on business confidentiality contained in Articles L151-1 and following of the Commercial Code. In fact, the new Article raises the possibility of an accumulation of legal sanctions on top of the common-law sanctions laid down in Article L152-1.

The new Article L443-7 prohibits «the refusal by any person acting as a producer, processor, distributor or service provider to provide, on request by one of the parties, written confirmation of the conditions of a verbally agreed contract for agricultural or food products». The need for this new measure appears questionable because, in fact, other measures in the Commercial Code (Article L443-2) and the Rural Code (Article L631-24, XXI) already require, in many cases, the signing of a written contract between the supplier and the buyer. This obligation to contractualise commercial relationships has been continually expanded by reforms of the law governing agricultural commercial relationships between 2010 and 2021. What is more, the targeted unfair behaviour is already sanctioned by the measures covering significant imbalances in Article L442-7, I, 2 of the Commercial Code<sup>14</sup>. The penalties for those found guilty of these three new unfair practices are administrative fines of 75,000 euros for individuals and 375,000 euros for corporate entities.

Moreover, Article 2 of the *ordonnance* clarified the contractual formality required for promotional discounts agreed by suppliers on their products or services. Under the terms of Article L443-2, the conditions applied to these discounts (amount, type, period, forecast quantity of the products concerned, methods of implementation and accounting procedures) must be stated in the distributor's written order form sent to the supplier.

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<sup>13</sup> Products mentioned in Article L441-11 of the Commercial Code.

<sup>14</sup> On the significant imbalance, see *Droit de la concurrence*, cit., 672, Nos. 821-824.



In addition, the transposition of the Directive led to the amendment of Article L441-11, II, 1 because the *ordonnance* reduced the payment period for some agricultural and food products. This period cannot exceed 30 days for perishable products if there is no regular order in place, and 60 days for non-perishable products. For fruit and vegetables supplied under integration contracts the period is 30 days, and for wine, grapes and grape must for use in wine-making, the periods were also harmonised in Article L411-11, II, 4.

As French law already had a «public authority charged with implementing the prohibition of unfair commercial practices» as required by Article 4 of the Directive, no new authority was created. These practices are monitored by the Directorate-General for Competition, Consumer Affairs and the Prevention of Fraud (*Direction générale de la concurrence, consommation et répression des fraudes (DGCCRF)*) which was already in charge of monitoring and sanctioning competition-restricting practices and other practices listed in Title IV of Book IV of the Commercial Code. Reporting to the Minister of Economic Affairs, the DGCCRF is an authority monitoring practices between suppliers and distributors with powers of investigation and sanction<sup>15</sup>. The choice of sanctioning the new unfair practices by the imposition of administrative fines is questionable, because the choice of an administrative fine imposed by an administrative judge instead of a judicial judge of the Commercial Court, is surprising because the other unfair practices mentioned in Title IV are sanctioned by compensation and refund procedures. This increase in the sanctions and competent courts is an unnecessary complication of the law, makes it harder to understand and makes it less accessible to claimants<sup>16</sup>.

Finally, we note that, contrary to Article 7 of the Directive, the text of the *ordonnance* offers no recourse to extra-judiciary settlement of disputes. This is not in itself surprising. On the one hand, this method of dispute resolution is better suited to disputes between parties of equal strength. On the other hand, and above all, the mediation of agricultural commercial relationships<sup>17</sup> is already covered by French law and was reinforced before

<sup>15</sup> Cf. Articles L450-3 and L470-2 of the Commercial Code, available at: <https://www.economie.gouv.fr/dgccrf/dgccrf>.

<sup>16</sup> In theory, the supplier retains the right to seek compensation for the prejudice suffered based on the common law governing civil responsibility before a Commercial Court, but it would be better to harmonise the sanctions laid down in Title IV.

<sup>17</sup> The mediator is competent to hear cases about the ending and execution of contracts: the Egalim 2 Law created a Committee for the Settlement of Commercial Disputes (Article L631-28 of the Rural Code), available at: <https://agriculture.gouv.fr/le-media->



the *ordonnance* covering the First Reading of the Egalim 2 Bill came into force, in yet another reform of the judicial framework covered by the transposition.

### *3. A transposition in a complex and very ineffective regulatory framework*

The fact that the *ordonnance* came into effect almost unnoticed is undoubtably because it was being added to a part of French law that was already the subject of a plethora of measures that were constantly changing. As one legal scholar has stressed, the attention being paid to the food supply chain for more than a decade has led legislators to complicate the law governing commercial relationships in Title IV of the Commercial Code and in Article L631-24, I and following of the Rural Code<sup>18</sup>. Thus the Egalim 1 Law of 2018 (and the *ordonnance* bringing it into force of 24 April 2019) changed the judicial framework and made it more burdensome<sup>19</sup>. In 2021, the *ordonnance* transposing the Directive and the Egalim 2 Law (October 2021), which aimed to protect farmers' incomes, further complicated the law governing commercial relationships in the food supply chain. The endless changes made to this legal framework has been, and continues to be, widely criticised. There is not only a plethora of unnecessarily complex laws, but they have failed to achieve the objective of rebalancing the food supply chain in favour of the least economically powerful and most vulnerable parties, the farmers at the bottom end of the chain<sup>20</sup>.

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teur-des-relations-commerciales-agricoles.

<sup>18</sup> *Droit de la concurrence*, cit., 600, n. 710.

<sup>19</sup> The law governing commercial relationships and unfair practices has been amended 13 times since 1986 and the law governing commercial relationships in the food supply chain has been amended seven times since 2010, *Droit de la concurrence*, cit., p. 599; *JCL Contrats*, cit.

<sup>20</sup> On the chronic imbalance in the food supply chain since the move to market-oriented agriculture and the impossibility of farmers receiving fair incomes, see «The Agricultural Markets Task Force, improving market outcomes enhancing the position of farmers in the supply chain», Report of the Agricultural Markets Task Force, Brussels, November 2016; J. Bové (rapporteur), *Report on fair incomes for farmers: A better functioning food supply chain in Europe*, Committee on Agriculture and Rural Development (2009/2237(INI)).

### 3.1. *A complex legal framework that is constantly changing*

Between the LMAP Law of 2010<sup>21</sup> and the Egalim 2 Law, French legislators constructed a legal framework governing agricultural commercial relationships with the declared aim of fighting «against the spread of unfavourable value among farmers...who do not have the power to negotiate in a balanced way» and to prevent abusive contracts<sup>22</sup>, which is an aim also expressed in the Directive<sup>23</sup>. Two comments should be made on this. Firstly, the law governing agricultural commercial relationships has been partly constructed since 2010 based on the model of the common law governing commercial relationships in Title IV of Book IV of the Commercial Code, and can be characterised by a reinforcement of formalism and requirements for transparency. Secondly, the rules governing the agricultural and food supply sectors have been progressively integrated into the Commercial Code. The transposition of the Directive and the Egalim 2 Law confirm this trend. The new unfair practices originating in these transpositions (Articles L443-5 to 7 of the Commercial Code) and specific to the food-supply sector have come to complete the law governing unfair practices and make it more burdensome.

The Egalim 2 Law is the latest (but not the last?) step in this process. The law governing commercial relationships in the food-supply sector is now integrated into the Commercial Code. It covers all the commercial relationships in the food supply chain, from those between the farmers and their initial buyers at the bottom end, to those between the wholesale suppliers and the retail distributors at the top end.

*In the relationships at the bottom end of the supply chain*, the signing of a written contract between the farmer and the initial buyer is obligatory, in theory, under Article L631-24, I of the Rural Code, and acts as the «foundation of the negotiations between the parties»<sup>24,25</sup>. Written sales contracts

<sup>21</sup> Cf. C. DEL CONT, *Filières agroalimentaires et contrat: l'expérience française de contractualisation des relations commerciales agricoles*, *Rivista di diritto alimentare*, 2012/3, and *Les producteurs agricoles face au marché: contrat, concurrence et agriculture dans le règlement UE 1308/2013*, *Revue de droit rural*, 2015, n°436, pp. 23-33.

<sup>22</sup> Explanation of the reasons for the proposed Egalim Law 4134.

<sup>23</sup> For example, see the six first sections of the text.

<sup>24</sup> Article L441-1 of the Commercial Code requires that the suppliers Terms and Conditions of Sale must form the «sole basis of commercial negotiations».

<sup>25</sup> The Rural Code specifies that an offer of a contract can also take the form of a framework contract drawn up by a «professional organisation» or an «association of professional organisations» (Article L631-24-II) or «an interprofessional body» (Articles

must henceforth be for a minimum of three years. Since 2018, the offer of the contract must come from the farmer<sup>26</sup>. The legislators thus wanted to base the pricing process on production costs and not on the wholesale buyers' and/or distributors' requirements. The Egalim 2 Law consolidated the requirement for written contracts, also with the aim of reinforcing the farmers' negotiating power. Making written contracts the norm aimed, above all, to make monitoring by the authorities easier: being written documents, the traceability of the factors taken into account in setting the price was guaranteed. These contracts must contain obligatory clauses (Article L631-24, III), which only differ slightly from those required under EU Single Market rules, and which target the methods used to set prices, the commercial conditions and the nature of the products.

The written contract must not only set the price but must also include an automatic price revision clause<sup>27</sup>, for revising prices up or down «as freely determined by the parties». The revisions must be made with reference to specified categories of price indices, for example those of «pertinent costs to agricultural production» (Article L632-24, I, 1). In theory at least, this allows farmers to pass on part of any increase in their costs to the sale price. It should be noted that these indices are set by interprofessional bodies and not a government body. The legislators chose this system even though the interprofessional bodies are structurally unbalanced because they are made up of delegates with contradictory vested interests (they represent farmers, wholesalers, industrial processors and distributors). A further pricing option, with the aim of securing farmers' incomes and ensuring a spread of value, is that the parties can fix «price tunnels» or «maximum and minimum price limits»<sup>28</sup> within which the agreed price can be varied to take account of changes in production costs. Here again, the parties remain free of the methods used to calculate the price revision formula.

These measures (obligatory written contracts, multi-year contracts and price revision clause) were supposed to ensure better incomes for farmers and the avoidance of unfair commercial practices in the whole length of the food

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L631-24-III & IV).

<sup>26</sup> As in the common law governing commercial relationships (Article L441-1 of the Commercial Code). Before the Egalim 1 Law came into effect, it was the buyer who had to make the offer of a contract.

<sup>27</sup> The automatic price revision clause, based on indices, including those with relevance to agricultural production costs, were made obligatory by the Egalim 1 Law but the production costs were determined by producers.

<sup>28</sup> Cf. Article L631-24-I and Decree 1415-2021 of 29 October 2021, this process is currently compulsory as part of a trial in the dairy farming sector.

supply chain. In addition, the first price set between the farmer and the first buyer must be taken into account during the price negotiations between the processor-supplier and the distributor. The new unfair practices created by the transposition of the Directive were added to the part of the law governing commercial relationships at the bottom end of the supply chain.

At the bottom end of the supply chain, the price of the agricultural raw materials is «enshrined»<sup>29</sup> in the chain of price negotiations: the cost of the raw agricultural materials in a product is non-negotiable, to avoid farmers falling victim to «price wars» or price pressure in the commercial negotiations between the buyer/supplier and the distributor<sup>30</sup>. In other words, the contract between the buyer/supplier and the distributor must take into account the price of the raw agricultural materials in the product purchased from the farmer by the buyer/supplier and then sold on to the distributor. Under Article L443-8 of the Commercial Code, «the commercial negotiation does not extend to the part of the supplier's price that covers the cost of the raw agricultural materials and the processed products mentioned in Section I of Article L441-1».

This non-negotiability implies that suppliers must mention in their Terms and Conditions of Sale (or their price list on which negotiations are based) how much agricultural raw material is in the product and the proportion of the cost of these raw materials in the price quoted in the price list<sup>31</sup>. The agreement between the supplier and the distributor must also include a contract price revision clause based on the variation in the price of the agricultural raw materials used in the finished food product. Article L443-8 specifies, as for the bottom end of the supply chain agreement between the farmer and the buyer, that the parties should freely determine the price revision formula, taking into account the indices mentioned in Article L631-24.

Again theoretically, if the price revision clause is applied to the contract between the farmer and the buyer, it must also be applied to the later relationship between the supplier and the distributor. Finally, these contracts must contain a renegotiation clause (also freely determined by the parties)

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<sup>29</sup> The word «enshrined» is used in the legislation, cf. Besson-Moreau report to the National Assembly, n°4266, 2018.

<sup>30</sup> Cf. the parliamentary debates and the Besson-Moreau report to the National Assembly, cit.

<sup>31</sup> The supplier has recourse to 1/3 to certify that the price negotiation did not cover the cost of the agricultural raw materials. This option offers the advantage of protecting secret commercial information but involves an additional cost that is sure to be recuperated in the negotiations further up and down the chain.

that will apply if there are changes in the costs of energy, manufacturing, packaging or transport (Article L441-8).

Breaches of the contractual rules, which are part of public law, are sanctioned based on illegal commercial practices. At the top end of the supply chain, breaches of the rules are sanctioned by the administrative fines laid down in Article L631-25 of the Rural Code and the new unfair practices created by the transposition of the Directive (see above). At the bottom end of the supply chain, breaches of the rules are sanctioned by the new Article L442-1 of the Commercial Code, derived from the transposition of the Directive and the Egalim 2 Law: in addition to an administrative fine and a court order to cease the practices, the victim of the unfair practices can also claim damages for the prejudice suffered<sup>32</sup>.

The French legal framework governing commercial food supply chain contracts is much more restrictive than that required by the Directive. But does this complex, or even over-complicated, law meet the ambitious objectives of both French and European legislators: to rebalance commercial relationships within the food supply chain and to improve farmers' incomes? Nothing could be less certain.

### 3.2. *An ineffective legal framework*

Hardly had it been amended by the transposition of the Directive (in two stages), than this legal framework was thrown into upheaval again by the Egalim 2 Law of 18 October 2021, aimed at protecting farmers' incomes. This chronic legislative instability is in itself a sign of failure and ineffectiveness. Many other factors can also put the framework's effectiveness in doubt: we will only examine a few of them here.

Almost unanimously, all the professional parties involved at the different stages of the food supply chain, legal practitioners and legal scholars have criticised the instability, the unnecessary complexity and the naivety of the laws governing it<sup>33</sup>. Some of the measures seem to ignore the reality of the unbalanced relationships within the food supply chain. Contractual formalism, as an instrument for transparency and traceability in price-setting, is powerless to overturn the power differential in the unbalanced structural relationships that profit the parties at the top end of the food supply chain, where there are always fewer of them.

<sup>32</sup> For the sanctions for these practices, see *Droit de la concurrence*, cit., pp. 656-697 and the many footnotes.

<sup>33</sup> *Competition Law*, cit., 600, n. 709. We can add the French Senate to the list of critics, who complained about the «excessively complex and picky» nature of the texts.

The automatic price revision and renegotiation clauses, which aim to better spread value along the supply chain must be «freely negotiated by the parties», but these are parties that typically have asymmetric negotiating power. Thus, such measures are bound to be ineffective. As many legal scholars have stressed, this choice by the legislators is, to say the least, puzzling<sup>34</sup>. The effectiveness of the production cost indices must also be questioned<sup>35</sup>. They are supposed to allow the calculation of prices along the supply chain based on production costs and not on purchasing power or the competitive pressure exerted by industrial wholesalers and distributors. Once again, the choice of the legislators to allow these indices to be calculated by the interprofessional bodies brings their effectiveness into question. In fact, as these bodies are made up of delegates with unequal economic power (farmers, processors and distributors) and with often contradictory vested interests, their over-riding aim is to ensure the competitiveness of the entire supply chain, thus they are certainly not ideal places to defend the interests of the «weakest links in the chain», the farmers. This certainly calls into doubt the ability of the interprofessional bodies to create indices that reflect the reality of production costs and the diversity of production methods within the same food supply chain. The risk is that these indices will only represent the costs of the big producers, to the detriment of the smaller producers, was pointed out in the Besson-Moreau report.

Finally, with regard to the «enshrining» and non-negotiability of the price of agricultural raw materials, the legislation – complex in both its formulation and its implementation – seems to ignore the reality of the downward pressure on prices that exists all along the food supply chain. Now that the cost of the agricultural raw material is excluded from the price negotiations between the processor and the distributor, this downward price pressure has been transferred to other areas, such as the services provided by the processors, which can make them more fragile, and limit their ability to invest and innovate, thus leading to fewer outlets being available to farmers for their products. Another danger is that, in anticipation of price pressure from the distributor, the processors and wholesalers take a tougher stance in their negotiations with the farmers, thus achieving precisely the opposite result to that envisioned by the legislators. These difficulties were raised

<sup>34</sup> Cf. *JCL Contrats*, cit. n° 35; *Droit de la concurrence*, cit.

<sup>35</sup> Cf. A-S GRIMALDI, *La loi Egalim: un nouveau droit de la distribution des produits agricoles et agroalimentaires* JCP E 2019, 1021; C. GRIMALDI, *La loi Egalim 2 visant à protéger la rémunération des agriculteurs: inefficacité et médiocrité législative*, *LEDC* 2021/10.

during the debate on the Law in the Senate<sup>36</sup>.

In practice, the negotiations conducted under the terms of this legislation have not been more harmonious and the low incomes of many farmers remains a burning news issue. The measures presented by the government as «an effective and long-lasting response to the growing deficit between producers and those who sell mass-market products»<sup>37</sup> in 2021 have not achieved the desired effects. The fight against abusive contracts led by the DGCCRF<sup>38</sup> in recent years has only managed to sanction the most outrageous abuses, for example contractual formalism identified by monitoring the presence of the obligatory clauses, but it has done nothing to rebalance the unequal levels of negotiating power, as confirmed by the number of appeals to the commercial agricultural relationships mediator<sup>39</sup>.

These appeals are mostly about contractual clauses, for example, those that set prices, which govern the ending of the contract or that govern its execution.

The ineffectiveness of the measure is due to the complexity and accumulation of the legislative texts, which has been called «legislative mediocrity»<sup>40</sup>. However, this is not the only explanation, and we must follow this thought further.

This chronic failure to achieve the objective of rebalancing the food supply chain leads us to question the relevance of the legal instrument chosen by the French and European legislators: the contract, and the fight against unfair practices.

Can the contract remedy the structural imbalance in the food supply chain and can it rebalance the asymmetry in negotiating power within it?

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<sup>36</sup> Sitting of 21 September 2021, Loisir amendment, n. 159, available at: <https://www.senat.fr/seances/s202109/s20210921/s20210921019.html>.

<sup>37</sup> Cf. explanation of the reasons for the Egalim 2 Law, Proposal for new Law, National Assembly, n°4134, p. 3.

<sup>38</sup> On the monitoring implemented, see: <https://www.economie.gouv.fr/dgccrf/Publications/Vie-pratique/Fiches-pratiques/pratiques-restrictives-de-concurrence>.

<sup>39</sup> The field of competence of the mediator for commercial agricultural relationships, a nominee of the Minister for Economic Affairs, has been widened in recent years to include disputes between farmers and their first buyers (Article L631-27 of the Rural Code). The mediator's Opinions and Recommendations following the coming into force of the Egalim 2 Law have not yet been published.

<sup>40</sup> C. GRIMALDI, cit.; R. LOIR, *La loi Besson-Moreau: un nouveau coup dans l'eau*, D. 2021, 2097. La multiplication et la succession des textes sont en soi un aveu d'échec: *Droit de la concurrence*, cit., p. 601; F. RIEM, *Egalim 2 une loi visant à protéger la rémunération «de cet homme, dans la force de l'âge, qui avait choisi ce si beau métier d'agriculteur»*, *Contrats, Concurrence, Consommation*, n. 21, 2021, p. 1.



At this point, we should note that, while the food-processing and food-distribution sectors are becoming more and more concentrated onto large sites operated by industrial companies all over Europe, this trend is particularly advanced in France. These processors and distributors have very strong buying power due to their centralised negotiating (benchmarking) and purchasing structures<sup>41</sup>.

As has been pointed out since the publication of the original proposal for the Directive, the fight against unfair practices can hardly be used as an instrument to reinforce the negotiating power of farmers against the buyers of their products<sup>42</sup>. Claiming the opposite is based on an analytical error and a confusion between market power and negotiating power. The negotiating power of the buyers further up the food supply chain is due to their market power and their economic power. In other words, the structural imbalance between oligarchic buyers and «weakest link» farmers is the cause and the origin of the asymmetry in negotiating power. The unfair practices and abusive contracts are merely the consequences of this structural imbalance. As the fight against unfair practices, a contractual instrument, only affects micro-legal and micro-economic relationships, the bilateral contractual relationships between farmers and buyers cannot be used as a means of achieving the objectives set out in the Directive: that is to rebalance the commercial relationships within the food supply chain and to ensure a fair income for the farmers.

The transposition of the Directive into an already unstable and overloaded legal framework could be seen as an attempt to tinker with the margins of the abuse of economic power in contractual relationships. But it cannot in any way be seen as a means of correcting the imbalance of commercial relationships based on economic power within the food supply chain. The law governing commercial relationships<sup>43</sup>, does not have as its main objective the protection of the functioning or structure of markets. Consideration 9 of European Regulation 1/2003 concerning the implementation of competition rules clearly expresses the differing aims of competition law compared

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<sup>41</sup> Cf. sectorial analyses by the French Competition Authority since 2014, for example Opinion 15-A-06 of 31 March 2015 on the increasing closeness of centralised purchasing and benchmarking bodies in the retail distribution sector and Opinion 18-A-04 of 3 May 2018 on the agricultural sector. See also the Besson-Moreau report and the Senate report on the Egalim Law, cit.

<sup>42</sup> Cf. DEL CONT & IANNARELLI, cit., p. 55.

<sup>43</sup> Regardless of national legislation, cf. OECD Report «Competition Issues in the Food Chain Industry», 2013.



to unfair practices law<sup>44</sup>.

The legislation governing fairness in vertical commercial relationships in the food supply chain is of some use: it is a necessary, judicial instrument, but one that is accessory or complementary to competition law (monitoring of agreements, abuses of power and mergers) and the Common Agricultural Policy rules on the Single Market. In other words, the fight against unfair practices «should not replace the *ex-ante* monitoring of mergers in the processing and distribution sectors and of the consolidation of market-limiting processes»<sup>45</sup>. In its Opinion of 3 May 2018 on the agricultural sector, the French Competition Authority also stressed the importance of these two sets of rules to rebalance agricultural relationships and to regulate the food supply chain<sup>46</sup>.

The structural imbalance is, in large part, due to the mergers of economic operators at the top end of the food supply chain and the purchasing power that results from this. If this purchasing power cannot be «de-concentrated» then it is important to monitor mergers *ex-ante*. For, in a market characterised by successive crises and battles among retailers to sell at the lowest retail price, the operators are accentuating economic concentration. This is the case in France for the distributors who are seeking to increase their power to negotiate with the industrial processors and the farmers. For example, the distributor ITM (part of the Intermarché retail group) recently bought a large industrial processor of fruit. Now ITM is both a processor and a distributor, it has also become a buyer of the fruit from the farmers who grow it<sup>47</sup>. Its purchasing power and its negotiating power are thus reinforced on two levels. First, in its negotiations with industrial processors of similar products and competing brands; the increased pressure on the industrial processors will lead them to transfer all of their pricing pressure onto their relationships with the farmers. Second, in its negotiations with the farmers whose products it buys. It should also be noted that, as both an industrial producer and a distributor, its power within the interprofessional bodies is

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<sup>44</sup> EC Regulation 1/2003 of 16 December 2002, published in the EC Official Journal 4 January 2003.

<sup>45</sup> DEL CONT & IANNARELLI, cit., p. 55.

<sup>46</sup> Ibid. *supra* note 41.

<sup>47</sup> French Competition Authority Decision 22-DCC-134 of 21 July 2022, available at <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-autorise-le-rachat-de-saint-mamet-par-le-groupe-intermarche>. This distributor is also a dairy products producer and the direct owner of a fishing fleet. A similar phenomenon can be observed in Germany, where a large food distributor owns 39% of the land used for organic farming.

also increased, and it is these bodies that set the indices used to calculate production costs that are supposed to avoid abusive negotiations on the prices paid for the farmers' products. This concentration of market power is even more obvious when a distributor buys a dairy, therefore becoming a milk producer and a member of the milk sector's interprofessional body. Today, the Competition Authority has only been able to approve such acquisitions under competition law, which still requires adapting to the specifics of the food supply chain and which supports competition between the businesses in the entire food supply chain built on the paradigm of low prices<sup>48</sup>.

To achieve the objective of rebalancing the food chain and ensuring fair incomes for farmers – which is one of the objectives of the Common Agricultural Policy – it is also, and above all, important to consolidate their capacity to restrict the retail offering, as provided for in Regulation 1308/2013, as amended by the Omnibus Regulation<sup>49</sup>. Following the case law established in the *Endives* case<sup>50</sup>, the Omnibus Regulation reinforced the farmers' opportunities to restrict product offerings through their co-operatives<sup>51</sup>: in all sectors they were allowed to negotiate collectively, including on prices, for and on behalf of their members. This process of collective action by restricting the offer is excluded from the purview of the law governing agreements in Article 101 of the Treaty of Rome and is one of the essential means of counterbalancing the purchasing power and the negotiating power of the big food processors and distributors. However, it is not widely used today by farmers because it can only be used by «recognised organisations» (Article 152). For other organisations, restricting the offer is more difficult to implement and is insecure from a legal point of view, for example, under the law governing agreements. And it should also be noted that Article 209

<sup>48</sup> See A. IANNARELLI, *Dal caso "indivia" al regolamento Omnibus n.2393 del 13 dicembre 2017: le istituzioni europee à la guerre tra la PAC e la concorrenza*, *Rivista di diritto agroalimentare*, 2018, p. 109 ff.; C. DEL CONT, *La contractualisation des relations commerciales agricoles: brèves réflexions sur la prise en considération de la spécificité agricole*, in *Mélanges en l'honneur de François Collart Dutilleul*, Ed. Dalloz, 2017.

<sup>49</sup> EU Regulation 2017/2393 of 17 December 2017 amending the Single Market Regulation 1308/2013.

<sup>50</sup> C. DEL CONT, *L'arrêt de la Cour d'appel de Paris du 14 mai 2014: l'affaire Endives: quels enseignements pour l'avenir de la relation spéciale entre agriculture et concurrence*, *Rivista di diritto agrario*, 2/2015; *Affaire Endives suite et bientôt fin: la Cour de cassation saisit la Cour de Justice de l'Union européenne, Réflexions sur l'arrêt du 8 décembre 2015*, *Rivista di diritto agrario*, 2/2016; A. IANNARELLI, *Il caso indivia alla Corte di giustizia. Atto primo: le conclusioni dell'avv. generale tra diritto regolativo europeo e diritto privato comune*, *Rivista di diritto agrario*, 1/2017, p. 366.

<sup>51</sup> Cf. DEL CONT & IANNARELLI, *cit.*, p. 33.

of the Regulation prohibits agreements containing «an obligation to use fixed prices»<sup>52</sup>.

Combined with the fight against unfair practices, restricting the offer would simultaneously allow more balanced contracts and more power to the interprofessional bodies, thus contributing to a better value distribution, or, more precisely, less seizing of value by the big processors and distributors.

In a period of many severe crises in agriculture (for example, climate change, economic slump, the war in Ukraine, and rising inflation) and in food supply, the fight against unfair practices is merely an accessory to the required regulation of the food supply chain and not the answer to its structural imbalance. In the current circumstances of high inflation and intensified competition on price, the pressure exerted on farmers by the buyers of their products can only grow further, making it more necessary than ever to consolidate the efforts to restrict the offer by the co-operatives and interprofessional bodies and the monitoring of the purchasing power of the big processors and distributors under competition law. This would enable us to avoid sacrificing the objectives of rebalancing the food supply chain and ensuring fair incomes for farmers on the altar of the dogma of low retail prices for consumers and the competitiveness of the entire food supply chain<sup>53</sup>.

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<sup>52</sup> *Ibid.* at pp. 35 and 60.

<sup>53</sup> In the same direction, see F. RIEM, *cit.*; on the dogma of low prices, see footnotes in DEL CONT & IANNARELLI, *cit.*

Elisabeth Kraft

*Will the implementation of the UTP Directive ban the «fear factor»?  
A perspective from Germany*

SUMMARY: 1. Introduction – 2. The market for agricultural and food products in Germany – 3. Remedies against unfair trading practices in agricultural and food supply chains prior to the implementation of the UTP Directive – 3.1. Control of unfair business terms – 3.2. Prohibition of unfair commercial practices – 3.3. Antitrust law – 3.4. Insufficient practical impact of the law as it stood – 4. Implementation of the UTP Directive into German Law – 4.1. Scope of application of the AgrarOLkG – 4.2. Extended black list in the AgrarOLkG – 4.3. Enforcement and remedies according to the AgrarOLkG – 4.4. Interfaces with private law, competition law and antitrust law – 5. Critical review of the scope of the UTP Directive and its implementation – 6. Summarizing theses.

1. *Introduction*

The Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (henceforth: UTP Directive) was passed on 17<sup>th</sup> April 2019. The Directive is designed to protect agricultural producers<sup>1</sup>, who had to endure low prices in the agricultural and food sector in the past years and are particularly

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<sup>1</sup> EUROPEAN COMMISSION, 15.7.2014, COM (2014) 472 final, 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*. Accessible online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0472&from=EN> (last visited 14.12.2021); EUROPEAN COMMISSION, 29.1.2016, COM (2016) 32 final, Report from the Commission to the European Parliament and the Council *on unfair business-to-business trading practices in the food supply chain*. Accessible online: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0032&from=EN> (last visited 14.12.2021); EUROPEAN PARLIAMENT Resolution of 7.7.2016 *on unfair trading practices in the food supply chain*, P8\_TA(2016)0250 final. Accessible online: [https://www.europarl.europa.eu/doceo/document/TA-8-2016-0250\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0250_EN.html) (last visited 14.12.2021).

vulnerable to unfair trading practices<sup>2</sup>. Agricultural producers are subject to uncertainties in their businesses for several reasons: their contractual partners are usually powerful players on the market; agricultural products perish quickly; agricultural producers are dependent on biological processes and exposed to weather conditions<sup>3</sup>. Furthermore, observers point to the problem that even when unfair trading practices are prohibited by law or contract, the weaker parties to the contract (often agricultural producers) could refrain from enforcing their rights, so as to not compromise the contractual relationship<sup>4</sup>. The producers in the agricultural and food supply chain are said to be often dependent on the buyers (so-called «fear factor»)<sup>5</sup>. Therefore the UTP Directive requires the Member States to establish a public enforcement mechanism (Art. 4 ff. UTP Directive).

Since the European legislator assumes that the relative bargaining power of the players can be determined based on their annual turnover, the scope of application of the UTP Directive, as defined in Art. 1 (2), focuses on the differences in turnover of the economic operators<sup>6</sup>.

The UTP Directive does not only include primary producers, but also other actors in the agricultural and food supply chain, such as possible intermediaries involved in the food supply chain, because unfair trading practices wherever they do occur in the chain, can ultimately have a negative impact

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<sup>2</sup> The average profits in the business fell from approx. 63,000 EUR to approx. 43,000 EUR per undertaking between the years 2013/2014 to 2014/2015 and remained at a similarly low level in 2015/2016, until they rose again in 2016/2017; cf. for Germany BMEL, *Referat 121, Daten und Fakten – Land, Forst und Ernährungswirtschaft mit Fischerei und Wein- und Gartenbau*, 2017, p. 20. Accessible online: [https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/Daten-und-Fakten-Landwirtschaft.pdf?\\_\\_blob=publicationFile&v=6](https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/Daten-und-Fakten-Landwirtschaft.pdf?__blob=publicationFile&v=6) (last visited 14.12.2021); cf. EU COMMISSION, 29.1.2016, COM (2016) 32 final, p. 2 further stating that the price drop of food and agricultural products was aggravated by a decrease in demand and an import ban on western agricultural products by Russia; cf. also J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824.

<sup>3</sup> Recital (6) UTP Directive and below, par. 2.

<sup>4</sup> EUROPEAN COMMISSION, 15.7.2014, COM (2014) 472 final, p. 7; EUROPEAN COMMISSION, 12.4.2018, COM (2018) 173 final, Proposal for a Directive of the European Parliament and the Council on *unfair trading practices in business-to-business relationships in the food supply chain*. Accessible online: <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-173-F1-EN-MAIN-PART-1.PDF> (last visited 14.12.2021).

<sup>5</sup> EUROPEAN COMMISSION, 15.7.2014, COM (2014) 472 final, p. 7; EUROPEAN COMMISSION, 12.4.2018, COM (2018) 173 final.

<sup>6</sup> For the determination of relative bargaining power: Recital (14) UTP Directive.

on primary producers as the intermediaries may pass on to them the loss incurred due to the unfair practice<sup>7</sup>.

The UTP Directive determines a number of absolutely prohibited commercial practices in the so-called «black list» of Art. 3 (1) (for example the short-term cancellation of orders of perishable agricultural and food products: Art. 3 (1) lit. b) UTP Directive)<sup>8</sup>.

The «grey list» of Art. 3 (2) UTP Directive lists such commercial practices that are prohibited unless both parties have explicitly and clearly agreed to them in a contractual agreement<sup>9</sup>. The grey list for example includes the buyers' request for payments from the supplier for advertising from the buyer of agricultural and food products (Art. 3 (2) lit. d) UTP Directive).

The UTP Directive lays down a minimum level of harmonization, meaning that the Member States must at least grant the level of protection required by the Directive, but are free to grant more extensive protection (Art. 1 (1), 9 (1))<sup>10</sup>.

This contribution highlights the legal position of agricultural producers before the implementation of the UTP Directive into German Law and gives a short overview over its implementation.

At the outset, the contribution describes some particularities of the German food market (2) and briefly reflects on some ways the parties in the food-supply chains had already been protected against unfair trading practices under German law before the Directive was implemented (3). Thereafter, the Agricultural Organizations and Supply Chains Act (AgrarOLkG)<sup>11</sup>, which includes provisions implementing the UTP Directive into German law, will be presented (4). The UTP Directive's and the AgrarOLkG's scope will then be critically assessed (5). The contribution will close with some summarising theses (6).

<sup>7</sup> Rc. (7) UTP Directive; EUROPEAN COMMISSION, 12.4.2018, COM (2018) 173 final, p. 2, 13.

<sup>8</sup> Out of many, see e.g. J. ACKERMANN, *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, p. 284; J. GLÖCKNER, in H. Harte-Bavendamm, F. Henning-Bodewig, *UWG*, 5<sup>th</sup> Edt. 2021, Einl. Rc 190.

<sup>9</sup> Out of many, see e.g. J. ACKERMANN, *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, p. 285; J. GLÖCKNER, in H. Harte-Bavendamm, F. Henning-Bodewig, *UWG*, 5<sup>th</sup> Edt. 2021, Einl. Rc. 189.

<sup>10</sup> J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 825.

<sup>11</sup> *Agrarorganisationen-und-Lieferketten-Gesetz*, 24.8.2021, BGBl. I, p. 4036.

## 2. *The market for agricultural and food products in Germany*

Agricultural and food products are sold through various channels in Germany. Whereas agricultural producers do sell some of their products directly on their farms or on weekly markets, the large majority of their products are sold to intermediaries or in supermarkets<sup>12</sup>. Supermarkets developed in Germany in the 1950s and from then on successfully conquered the market<sup>13</sup>. «Discount» supermarkets soon carried their own brands to escape the price fixing that prevailed in Germany at the time<sup>14</sup>.

Today a total of 614,000 employees work in the German food industry, 90% of whom are employed in smaller companies with up to 250 employees<sup>15</sup>. In 2020, the German food industry had a nominal turnover of 185 billion Euro, making it one of the most important industrial branches in the country<sup>16</sup>.

According to the Association of the German Food Industry (*Bundesvereinigung der deutschen Ernährungsindustrie*, henceforth: BVE) the vast majority of food sales occurs in grand food retail stores<sup>17</sup>. These sales are strongly concentrated in four food retailing companies, which account for almost three-quarters of the annual turnover in food retailing<sup>18</sup>. This results in strong competition among food producers for shelf space in large food retailers and in considerable price pressure<sup>19</sup>. For this reason, according to the BVE, food producers have weak negotiating positions and have to accept the conditions dictated by the food retailers in order to keep their products on the shelves of the large retailers and thus not lose contact with

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<sup>12</sup> BVE Jahresbericht 2020-2021, p. 36. Accessible online: <https://www.bve-online.de/presse/infothek/publikationen-jahresbericht/bve-jahresbericht-ernaehrungsindustrie-2021> (last visited 14.12.2021).

<sup>13</sup> L. LANGER, *Revolution im Einzelhandel: die Einführung der Selbstbedienung in Lebensmittelgeschäften der Bundesrepublik Deutschland (1949-1973)*, 2013, p. 196 ff.

<sup>14</sup> L. LANGER, *Revolution im Einzelhandel: die Einführung der Selbstbedienung in Lebensmittelgeschäften der Bundesrepublik Deutschland (1949-1973)*, 2013, p. 296. The price fixing was declared inadmissible with the 2<sup>nd</sup> Amendment of the GWB and is now only admissible for press products, such as newspapers, magazines and books, cf. section 30 GWB, Book Price Fixation Act (*Buchpreisbindungsgesetz*). R. BECHTOLD, W. BOSCH, in R. Bechtold/W. Bosch, *GWB*, 9<sup>th</sup> Edt. 2018, Einf. R. 9.

<sup>15</sup> BVE Jahresbericht 2020-2021, p. 25.

<sup>16</sup> BVE Jahresbericht 2020-2021, p. 25.

<sup>17</sup> BVE Jahresbericht 2020-2021, p. 36.

<sup>18</sup> BVE Jahresbericht 2020-2021, p. 36.

<sup>19</sup> BVE Jahresbericht 2020-2021, p. 36.



the customers<sup>20</sup>. Price adjustments, for example due to rising production costs, usually have to be borne by the food producers themselves<sup>21</sup>.

### *3. Remedies against unfair trading practices in agricultural and food supply chains prior to the implementation of the UTP Directive*

It has been pointed out, that German law already covered the problems addressed in the UTP Directive to a large extent<sup>22</sup>. However, the remedies against unfair trading practices were mostly subject to private enforcement, while the UTP Directive and the AgrarOLkG now foresee a public enforcement mechanism. To give a comprehensive account on the legal protection of agricultural producers in the food supply chain, this section covers relevant fields of German (private) law prior to the implementation of the UTP Directive.

First of all, it can be observed that even though German law already included a number of agricultural and agri-food regulations, the position of producers in the agricultural and food supply chain had so far barely been addressed by sector-specific legislation<sup>23</sup>.

#### *3.1 Control of unfair business terms*

The contracts in the agricultural and food supply chain are typically sale contracts or contracts for work and services since German law does not provide for a specific type of contract between agricultural producers and

<sup>20</sup> BVE Jahresbericht 2010-2021, p. 36. This conclusion is in coherence with Rc. (9) UTP Directive.

<sup>21</sup> BVE Jahresbericht 2020-2021, p. 36.

<sup>22</sup> For a detailed analysis see J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827 ff., who examined the need of implementation in German law and in doing so already examined remedies under contract law, competition law and antitrust law for unfair trading practices now prohibited by the UTP Directive. Cf. also E. FALKOWSKI ET AL., *JRC Technical Reports, Unfair trading practices in the food supply chain*, 2017, p. 48, stating that in Germany contract law, competition law and antitrust Law were utilized to address unfair trading practices.

<sup>23</sup> Regarding unfair trading practices: E. FALKOWSKI ET AL., *JRC Technical Reports, Unfair trading practices in the food supply chain*, 2017, p. 48.



buyers<sup>24</sup>. However, the contracts in the agricultural and food supply chain generally comprise a large number of ancillary agreements, which usually take the form of standard business terms<sup>25</sup>. Since standard business terms are pre-formulated for a large number of contracts (section 305 (1) BGB) and the opposing party does not have influence on their content, that party is protected by sections 305 ff. BGB<sup>26</sup>. In a business-to-business-relationship, the so-called test of reasonableness of contents (*Inhaltskontrolle*) BGB is of relevance (section 307 BGB)<sup>27</sup>: standard business terms are void if, contrary to the requirement of good faith, they unreasonably put at disadvantage the party to the contract with respect to the party drafting the terms of the contract<sup>28</sup>. The same provision also stipulates that, inter alia, an unreasonable disadvantage can stem from the breach of a transparency requirement (section 307 (1) s. 2 BGB)<sup>29</sup>. In the agricultural food supply chain, a standard business term unreasonably disadvantaging agricultural producers would thus be void. However, the remedies provided in this area are of private law nature and might therefore be inadequate to stop and prevent unfair trading, since producers could refrain from taking action due to the «fear factor»<sup>30</sup>.

<sup>24</sup> C. GRIMM/R. NORER, *Agrarrecht*, 4<sup>th</sup> Edt. 2015, p. 221.

<sup>25</sup> C. GRIMM/R. NORER, *Agrarrecht*, 4<sup>th</sup> Edt. 2015, p. 221.

<sup>26</sup> On the concept of protection within the regulation of standard business clauses cf. H. SCHULTE-NÖLKE, in R. Schulze BGB, 10<sup>th</sup> Edt. 2019, Vorbem. sections 305-310 BGB Rc. 4.

<sup>27</sup> On the applicability of section 307 BGB in a business-to-business relationship cf. section 310 (1) BGB; further see J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827; A. STADLER, in *O. Jauernig BGB*, 18<sup>th</sup> Edt. 2021, section 307 BGB Rc. 3 ff.

<sup>28</sup> J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827; A. STADLER, in *O. Jauernig BGB*, 18<sup>th</sup> Edt. 2021, section 307 BGB Rc. 3 ff.; W. WURMNEST, in *MüKo BGB*, 8<sup>th</sup> Edt. 2019, section 307 BGB Rc. 33.

<sup>29</sup> J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827; A. STADLER, in *O. Jauernig BGB*, 18<sup>th</sup> Edt. 2021, section 307 BGB Rc. 6 ff.; W. WURMNEST, in *MüKo BGB*, 8<sup>th</sup> Edt. 2019, section 307 BGB Rc. 56.

<sup>30</sup> Differing J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827 stating that the implications of the «fear factor» are diminished, since according to section 306 BGB, only the contractual clause in question will be void, while the rest of the contract remains in effect; making it possible for the seller to enter into the contract well knowing it is partially ineffective and only taking action when it becomes necessary.

### 3.2 Prohibition of unfair commercial practices

Additionally, competition law already included some provisions protecting competitors, consumers and also other market participants against unfair commercial practices potentially occurring in agricultural and food supply chains<sup>31</sup>. An agricultural producer can qualify as an «other market participant» according to section 2 (1) no. 2 UWG (including also any person that supplies and demands goods or services who is not a competitor or consumer). The general clause of section 3 UWG considers unfair commercial practices as illegal and the following sections show specific examples of such «unfairness»<sup>32</sup>. In the context of agricultural and food supply chains especially section 3a UWG, on breach of statutory provisions, intended to regulate market conduct, and section 4a UWG, declaring aggressive commercial practices as unfair under section 3 UWG, could be relevant<sup>33</sup>. As to available remedies, competitors and business as well as consumer associations and chambers of commerce can make negatory claims pursuant to section 8 UWG, without facing the «fear factor»<sup>34</sup>. Also competitors can be entitled to compensation according to section 9 UWG<sup>35</sup>.

### 3.3 Antitrust law

By contrast, antitrust law provides for private as well as public enforcement. Additionally, the UTP Directive and the AgrarOLkG *inter alia* prohibit such trading practices that have already been addressed by the so-called

<sup>31</sup> For an extensive assessment J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in WRP 2019, p. 824, 828 ff. This section is based on UWG 2015, as this reflects the situation prior to the implementation of the UTP Directive. A reform of the UWG took place in 2022.

<sup>32</sup> See sections 3a, 4, 4a (1) s. 1, 5 (1) s. 1, 5a (2), (6), 6 (2) UWG. Further cf. T. LETTL, *Lauterkeitsrecht*, 4<sup>th</sup> Edt, 2021, p. 15.

<sup>33</sup> In detail J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in WRP 2019, p. 824, 828 ff.

<sup>34</sup> J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in WRP 2019, p. 824, 829.

<sup>35</sup> Out of many, see e.g. J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in WRP 2019, p. 824, 829; A. OHLY, in *A. Ohly/O. Sosnitza UWG*, 7<sup>th</sup> Edt. 2016, section 9 UWG Rn. 23.

«tapping ban» (*Anzapfverbot*; sections 19 (2) no. 5, 20 (2) GWB)<sup>36</sup>.

Section 19 GWB lays down a comprehensive prohibition of abuse of a dominant market position<sup>37</sup>. However, the market dominance within the meaning of section 19 GWB is based on the concept of *absolute* market dominance<sup>38</sup>, which is a situation rather unlikely to occur in the agricultural and food supply chain since there are several large retailers as well as producers on the German food market and therefore competition at the production and retail level does exist<sup>39</sup>.

But section 20 (2), (1) GWB extends section 19 (1), (2) no. 1, no. 5 GWB's scope of application to undertakings with relative market power, which exists if the suppliers are dependent on the buyers in a way that there is no sufficient and reasonable possibility to switch to other buyers<sup>40</sup>. The decisive factor therefore is whether other sales opportunities exist<sup>41</sup>.

However, it should be noted that this understanding of market power does not coincide with that characterizing the UTP Directive's or AgrarOLkG's scope of application: both the Directive and the AgrarOLkG

<sup>36</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 46. Accessible online: <https://dserver.bundestag.de/btd/19/261/1926102.pdf> (last visited 14.12.2021); A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 329 ff.; S. LEGNER, *Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?*, in *EuZW* 2020, p. 85.

<sup>37</sup> Out of many, see e.g. A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 1.

<sup>38</sup> See section 18 (1) GWB, which specifies three cases of market-dominance. Cf. also J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 830. Further H. WEYER, in W. Jaeger, J. Kokott, P. Pohlmann, D. Schroeder, *Frankfurter Kommentar zum Kartellrecht*, 99<sup>th</sup> Edt. 3.2021, section 19 GWB Rc. 35, 37.

<sup>39</sup> Since the market dominating position requires a market-wide consideration; also S. LEGNER, *Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?*, in *EuZW* 2020, p. 85, 86; also J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 829 ff.

<sup>40</sup> See the legal definition in section 20 (1) s. 1 GWB; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 830.

<sup>41</sup> R. BECHTOLD, W. BOSCH, in R. Bechtold/W. Bosch, *GWb*, 9<sup>th</sup> Edt. 2018, section 20 Rc. 11 ff.; «alternative options» («*Ausweichmöglichkeiten*») according to C. GRAVE, in W. Jaeger, J. Kokott, P. Pohlmann, D. Schroeder, *Frankfurter Kommentar zum Kartellrecht*, 99<sup>th</sup> Edt. 3.2021, section 20 GWB Rc. 40.

focus on the relative comparison of turnover, which does not necessarily imply market power within the meaning of sections 19, 20 GWB (cf. below, par. 4)<sup>42</sup>.

If an undertaking has relative market power in the agricultural and food supply chain, the «tapping ban» of section 19 (2) no. 5 GWB is of particular relevance<sup>43</sup>. Effectively section 19 (2) no. 5 GWB prohibits the abuse of the buyer's power, which occurs when an undertaking uses its market power to demand services from a supplier that are not objectively justified<sup>44</sup>.

So far, the number of cases in which a violation of section 19 (2) no. 5 GWB was identified is low<sup>45</sup>. But sections 19 (2) no. 5, 20 (2), (1) GWB can be relevant in the so-called «wedding discount» cases (*Hochzeitsrabatte*)<sup>46</sup>. The term «wedding discounts» refers to claims of discounts which an undertaking requests after the merger with another undertaking («wedding»)<sup>47</sup>. For example: the supermarket chain *Edeka* took over branches of the supermarket chain *Plus* and demanded that the suppliers of the former *Plus* branches, in this case producers of sparkling wine, retroactively adjust their contracts<sup>48</sup>. Among other things *Edeka* demanded that payment terms and prices were adjusted, compensation payments had to be made, as well

<sup>42</sup> Regarding the UTP Directive S. LEGNER, *Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?*, in *EuZW* 2020, p. 85, 86.

<sup>43</sup> DEUTSCHER BUNDESTAG, *Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes*, 25.1.2021, Drs. 19/26102, p. 46; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 830 ff.

<sup>44</sup> Section 19 (2) no. 5 GWB; A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 325.

<sup>45</sup> A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 327; W. KIRCHHOFF, *Von "Hochzeitsrabatten" und "Partnerschaftsvergütungen" Zum Anzapfverbot nach der Grundentscheidung des BGH vom Januar 2018*, in *GRUR* 2021, p. 262 ff.

<sup>46</sup> Out of many, see e.g. A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 330; A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 327; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 831; W. KIRCHHOFF, *Von "Hochzeitsrabatten" und "Partnerschaftsvergütungen" Zum Anzapfverbot nach der Grundentscheidung des BGH vom Januar 2018*, in *GRUR* 2021, p. 262 ff.; S. LEGNER, *Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?*, in *EuZW* 2020, p. 85, 89.

<sup>47</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 330.

<sup>48</sup> BGH (23.01.2018 – KVR 3/17), *NZKart* 2018, p. 136.

as payments for renovations and improvements of former *Plus* stores<sup>49</sup>. According to the BGH, *Edeka's* claims against the producers of sparkling wine violated the «tapping ban» of section 19 (2) no. 5 GWB<sup>50</sup>.

Violations of sections 19 and 20 GWB can have civil as well as public law consequences<sup>51</sup>. Private enforcement includes the possibility of injunctions and compensations for damages (sections 33, 33a GWB)<sup>52</sup> and in the case of unjustified benefits in violation of section 19 (2) no. 5 GWB the contract will usually be void<sup>53</sup>. Following the public enforcement procedure the competent antitrust authority<sup>54</sup> can prohibit the illegal conduct according to section 32 GWB and order the restitution of monetary value, if the undertaking has gained an economic advantage and acted intentionally or negligently (section 34 GWB)<sup>55</sup>.

According to section 54 (1) GWB the cartel office can introduce proceedings *ex officio* or upon application and the complainant can also remain anonymous in the proceedings (section 54 (1) s. 2 GWB), so that the so-called «Horse and Rider» (*Ross und Reiter*) problem, which addresses a similar situation described by the «fear factor», shall be solved<sup>56</sup>. An

<sup>49</sup> OLG Düsseldorf (18.11.2015 – VI – Kart 6/14 (V)), *NZKart* 2015, p. 541 ff.

<sup>50</sup> BGH (23.01.2018 – KVR 3/17), *NZKart* 2018, p. 136, 137. The Decision is based on an old version of section 19 (2) no. 5 GWB. The German Legislator made amendments to this provision, since uncertainties existed in this case: the German Federal Cartel Office first assumed, that the tapping ban was fulfilled, cf. BKartA (03.07.2014 – B2-58/09) Rc. 527; but the OLG Düsseldorf denied this, cf. OLG Düsseldorf (18.11.2015 – VI – Kart 6/14 (V)), *NZKart* 2015, p. 541, 544. For this in detail cf. J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 831; A. FUCHS, in U. Immenga/E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 326; W. KIRCHHOFF, *Von «Hochzeitsrabatten» und «Partnerschaftsvergütungen» Zum Anzapfverbot nach der Grundentscheidung des BGH vom Januar 2018*, in *GRUR* 2021, p. 262 ff.

<sup>51</sup> In detail A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 360 ff; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 831.

<sup>52</sup> A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 394.

<sup>53</sup> A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 393.

<sup>54</sup> On the structure of antitrust authorities see section 48 GWB.

<sup>55</sup> Out of many, see e.g. A. FUCHS, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 371, 382.

<sup>56</sup> Generally, on the «*Ross und Reiter*»-problem: BKartA, Tätigkeitsbericht 1997/1998, Ds. 14/1139, p. 31. Accessible online: <https://www.bundeskartellamt.de/SharedDocs/>

intentional or negligent violation of sections 19 (2) no. 5, 20 (2) GWB also constitutes an administrative offence according to section 81 (2) no. 1 GWB, which can be fined with a monetary sanction of up to one million EUR (section 81c (1) s. 1 GWB)<sup>57</sup>.

#### 3.4. *Insufficient practical impact of the law as it stood*

This brief assessment, highlighting some of the remedies available to the weaker parties to a contract in the agricultural and food supply chain, shows that German law already provided for substantive protection<sup>58</sup>. However, as it would appear, these measures have not been sufficient in tackling unfair trading practices in agricultural and food supply chains<sup>59</sup>. Thus, the question arises, whether the implementation of the UTP Directive into German law does have the potential to eliminate, at least to some extent, unfair trading practices occurring in the agricultural and food supply chain.

#### 4. *Implementation of the UTP Directive into German law*

The Agricultural Organizations and Supply Chains Act (AgrarOLkG), implementing the UTP Directive into German law, entered into force on 9<sup>th</sup> June 2021. The UTP Directive was implemented by expanding the

Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20Taetigkeitsbericht%201998.pdf;jsessionid=C770E2BC516467B2502E5BA5FB0A9142.1\_cid362?\_\_blob=-publicationFile&v=5 (last visited 14.12.2021); further A. BACH, in U. Immenga, E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 54 GWB Rc. 8. On the matter, that the powers of the cartel office under section 54 GWB are close to those foreseen in Art. 5, 6 UTP Directive, S. LEGNER, *Die Umsetzung der Richtlinie über unlautere Handelspraktiken in das Kartellrecht?*, in *EuZW* 2020, p. 85; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 831.

<sup>57</sup> Out of many, see e.g. A. FUCHS, in U. Immenga/E. J. Mestmäcker, *Wettbewerbsrecht*, 6<sup>th</sup> Edt. 2020, section 19 GWB Rc. 384; also J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 831.

<sup>58</sup> So already J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827.

<sup>59</sup> Correspondingly BVE Jahresbericht 2020-2021, p. 36; J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 827.



Agricultural Market Structure Act so as to include regulations on unfair trading practices and renaming the said Act<sup>60</sup>. An earlier draft law had proposed that the UTP Directive should be implemented into German law by providing almost identical rules, but the law underwent some changes in the final version<sup>61</sup>. In conformity with the minimum harmonization clause laid down in the directive<sup>62</sup>, the AgrarOLkG goes beyond the scope of the UTP Directive with regard to some particular points<sup>63</sup>, which will be highlighted in the following section.

#### 4.1. *Scope of application of the AgrarOLkG*

According to section 2 (1) no. 1 AgrarOLkG the material scope of application concerns agricultural, fishery and food products<sup>64</sup>. The AgrarOLkG's personal scope of application generally corresponds to that of Art. 1 (2) UTP Directive and is based on the same turnover ratios of suppliers and buyers (section 10 (1) no. 1 AgrarOLkG)<sup>65</sup>. However, with regard to large suppliers of dairy and meat products, as well as fruit, vegetable and horticultural products, including potatoes, with an annual turnover of up to four billion Euro, the scope of application of the AgrarOLkG was extended until May 1<sup>st</sup> 2025 compared to the UTP Directive, if the total annual turnover of the supplier does not exceed 20 percent of the total annual turnover of the buyer (section 10 (1) s. 2 AgrarOLkG)<sup>66</sup>. Subsequently the German Parliament (*Bundestag*) may

<sup>60</sup> AgrarOLkG; DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 1.

<sup>61</sup> In detail A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 322 ff.

<sup>62</sup> Art. 1 (1), 9 (1) UTP Directive.

<sup>63</sup> For an assessment cf. already A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 322 ff.; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537 ff.

<sup>64</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537.

<sup>65</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537.

<sup>66</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 324; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*,

prolong the extension by resolution (section 10 (1) s. 3 AgrarOLkG)<sup>67</sup>. The personal scope of application was extended at the request of producers and other stakeholders after they outlined that also large undertakings can be affected by unfair trading practices even though they generate sales above the upper limit of the UTP Directive<sup>68</sup>. But since the annual turnover of four billion Euro only extends to the turnover of suppliers in the respective segment, the AgrarOLkG's scope of application is much wider than the UTP Directive: also undertakings generating a larger overall turnover are included within the scope of application (section 10 (1) s. 2 AgrarOLkG)<sup>69</sup>.

#### 4.2. *Extended black list in the AgrarOLkG*

Section 23 AgrarOLkG transposes the black list of the UTP Directive into German law. Section 23 s. 1 AgrarOLkG prohibits the exploitation of an economic imbalance between the buyer and the supplier through unlawful trading practices; section 23 s. 2 AgrarOLkG, by referring to sections 11-17 AgrarOLkG, provides an exhaustive list of cases where such exploitation of economic imbalance occurs. However, the AgrarOLkG extends the black list of the UTP Directive by adding practices that the Directive includes only in the grey list and prohibits these practices regardless of a contractual agreement<sup>70</sup>.

In detail, the AgrarOLkG prohibits the return of unsold products from the buyer to the suppliers without payment and – if the products are no longer usable – without payment for the disposal of the products, irrespective of a contractual agreement (sections 12, 23 s. 2 no. 1 lit. b), no. 3 AgrarOLkG)<sup>71</sup>. In the UTP Directive, the practice of return without payment is laid out in the so-called grey list and it would be allowed if

in *NZKart* 2021, p. 537, 538.

<sup>67</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 324.

<sup>68</sup> Stellungnahme der BVE, 22.2.2021. Accessible online: [https://www.bundestag.de/resource/blob/822808/d23d460e3db5a4712f79dc9c22395b94/07\\_F\\_Stellgn-BVE-data.pdf](https://www.bundestag.de/resource/blob/822808/d23d460e3db5a4712f79dc9c22395b94/07_F_Stellgn-BVE-data.pdf) (last visited 14.12.2021); also A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 324.

<sup>69</sup> Likewise, A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 324.

<sup>70</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538.

<sup>71</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538.



previously contractually agreed in clear and unambiguous terms (Art. 3 (2) lit. a) UTP Directive). However, according to the German legislator such a contractually agreed practice is a strong indicator of an imbalance of power, since it passes on the risk of overorder to the supplier<sup>72</sup>. The buyer, according to the German legislator, would hence not be sufficiently incentivized to market the products, whilst the supplier could not sell the (perishable) products to another buyer in time in case of return<sup>73</sup>. Accordingly, in the AgrarOLkG the trading practice of return without payment is included in the black list.

According to sections 14, 23 s. 2 no. 1 lit. d), no. 5 AgrarOLkG, it is also prohibited to contractually agree that the storage costs that are generated by the buyer are charged to the supplier<sup>74</sup>. This also constituted a grey list practice of the UTP Directive (Art. 3 (2) lit. b) alt. 1 UTP Directive). However, according to the German legislator, there would be no reason for the supplier to bear the buyers storage costs, since it falls within the area of risk of the buyer to provide for sufficient storage space and thus such a practice is very unlikely to occur in a balanced relationship<sup>75</sup>. Furthermore, the buyer has no sufficient incentive to realistically assess sales opportunities, if he is not burdened by storage costs<sup>76</sup>.

Both prohibitions are also intended to contribute to a reduction of food waste, since the buyers will supposedly order the products more consciously<sup>77</sup>.

Moreover, sections 17, 23 s. 2 no. 1 lit. g), no. 5 AgrarOLkG prohibit the contractual agreement of payments or price reductions for the listing of products («listing fees») that are already on the market<sup>78</sup>. On the contrary buyers and suppliers can still contractually agree on listing fees for products

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<sup>72</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 43.

<sup>73</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 43.

<sup>74</sup> Cf. also already P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in NZKart 2021, p. 537, 538.

<sup>75</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 43.

<sup>76</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 43.

<sup>77</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 43 ff.

<sup>78</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in NZKart 2021, p. 537, 538.

at the time of their market launch<sup>79</sup>: this practice is included in the grey list laid down in section 20 AgrarOLkG.

The extension of the black list in the AgrarOLkG has been criticized, as the grey list practices can also generate efficiencies and the UTP Directive is based on the assumption that the contractual agreement related to said practices does not necessarily prejudice the interests of the suppliers<sup>80</sup>. It has also been questioned whether the conversion of grey list practices into absolutely prohibited practices is compatible with EU law; it may become necessary to submit this issue to the European Court of Justice<sup>81</sup>. Nevertheless, the UTP Directive is a minimum harmonization directive (Art. 9 (1) UTP Directive)<sup>82</sup>.

#### 4.3. Enforcement and remedies according to the AgrarOLkG

Since the «fear factor» has been referred to as one of the reasons for the existence of unfair trading practices in the agricultural and food supply chain, the enforcement of the prohibitions is of great relevance<sup>83</sup>.

The Federal Agency for Agriculture and Food (*Bundesanstalt für Landwirtschaft und Ernährung*, henceforth: BLE) is designated as the enforcement authority (section 3 (4) AgrarOLkG). For this purpose, the BLE has substantive investigative powers (sections 28 (1) no. 1, 54 (1) AgrarOLkG and AgrarOLkGV<sup>84</sup>)<sup>85</sup>.

According to section 28 (1) no. 2 AgrarOLkG, the BLE can determine

<sup>79</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in NZKart 2021, p. 537, 541.

<sup>80</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in ZWeR 2021, p. 317, 322; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in NZKart 2021, p. 537, 541.

<sup>81</sup> In detail P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in NZKart 2021, p. 537, 540 ff.

<sup>82</sup> This corresponds to the reasoning of the German Legislator, cf. DEUTSCHER BUNDESTAG, *Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes*, 25.1.2021, Drs. 19/26102, p. 33.

<sup>83</sup> To the importance of enforcement F. CAEAGGI, P. IAMICELLI, *Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive*, in *Eur. Rev. Priv. Law* 2019, p. 1075, 1103 ff.

<sup>84</sup> *Agrarorganisationen-und-Lieferkettenverordnung*, 11.10.2021, BGBl. I, p. 4655.

<sup>85</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in ZWeR 2021, p. 317, 327.

whether the buyer has violated the provisions of sections 23 s. 2, 11-21 AgrarOLkG. The buyer must be offered the chance to present its view in a hearing. The BLE has to reach its decision in accordance with the Federal Cartel Office (*Bundeskartellamt*) (section 28 (2) s. 1 AgrarOLkG). The AgrarOLkG, in this regard, establishes a ‘duplicate’ administrative structure<sup>86</sup>, which may turn out to be costly and time consuming. The designation of only one authority, plausibly the Federal Cartel Office, could have been the preferable option<sup>87</sup>.

The powers and procedures of the authorities are accompanied by the attribution of significant sanctioning powers (section 55 (1) no. 1b, (2) AgrarOLkG). Fines up to 750,000 Euro can be applied if, contrary to section 23 (1) s. 1 AgrarOLkG, there is a finding of exploitation of economic imbalance pursuant to section 23 (1) s. 2 AgrarOLkG<sup>88</sup>.

The BLE is also authorized to use coercive measures under administrative enforcement law to enforce such orders as may be necessary to remedy the violation and prevent future violations of sections 23 s. 2, 11-21 AgrarOLkG. The BLE may also publish these decisions on its website (section 28 (1) no. 3, (5)-(7) AgrarOLkG)<sup>89</sup>, but before doing so, is required to give the Federal Cartel Office the opportunity to comment (section 28 (2) s. 2 AgrarOLkG).

The second section of the AgrarOLkG deals with the supplier’s or producer organization’s right of complaint (section 25 AgrarOLkG) and ensures their anonymity in this process<sup>90</sup>. Section 26 AgrarOLkG provides for the confidential treatment of the complainant’s identity and other information at the complainant’s request, in conformity with Art. 5 UTP Directive. These provisions are intended to overcome the «fear factor»<sup>91</sup>.

<sup>86</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 332; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538 ff.

<sup>87</sup> Likewise, P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538 ff.

<sup>88</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538.

<sup>89</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 328.

<sup>90</sup> Sections 25 ff. AgrarOLkG. See also P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 539.

<sup>91</sup> J. GLÖCKNER, *Unlautere Handelspraktiken in der Lebensmittelversorgungskette zwischen Vertragsrecht, Wettbewerbsrecht und Regulierung*, in *WRP* 2019, p. 824, 826; cf. also P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ord-*

Pursuant to section 27 AgrarOLkG, in accordance with Art. 7 UTP Directive, suppliers and buyers claiming to have been victim of unfair trading practices falling within the scope of the AgrarOLkG may apply to a mediator's office (*Ombudsstelle*) and initiate alternative dispute resolution proceedings<sup>92</sup>. An agreement on alternative dispute resolution does not affect the suppliers' right of complaint according to section 25 AgrarOLkG or the authority's powers according to section 28 AgrarOLkG (section 27 AgrarOLkG).

#### 4.4. Interfaces with private law, competition law and antitrust law

The AgrarOLkG itself stipulates that contractually agreed trading practices that are part of the black list are invalid, but the rest of the contract remains unaffected (section 22 (2) AgrarOLkG)<sup>93</sup>.

Evidently, the provisions of the AgrarOLkG can interfere with other areas of law. E.g. claims for damages under the law of obligations seem possible. In addition to claims for a breach of a contractual duty based on section 280 (1) BGB or a pre-contractual duty, *culpa in contrahendo* (sections 280 (1), 311 (2), 241 (2) BGB), also claims under tort law may come into consideration when a buyer breaches the provisions of the AgrarOLkG<sup>94</sup>. For example, section 823 (2) BGB could become relevant regarding claims for damages, which a supplier, as the protected party of the provision, incurred due to a violation of the AgrarOLkG by the buyer<sup>95</sup>. Section 823 (2) BGB in conjunction with section 1004 BGB could be the

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*nungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 539.

<sup>92</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 326; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 539;

<sup>93</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 328.

<sup>94</sup> J. U. FRANCK, *The Directive on Unfair Trading Practices in the Agri-food Supply Chain: Regulatory Ambitions and Legal Instruments*, in *ZEuP* 2021, p. 843, 886; cf. further A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 329.

<sup>95</sup> DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 47; J. U. FRANCK, *The Directive on Unfair Trading Practices in the Agri-food Supply Chain: Regulatory Ambitions and Legal Instruments*, in *ZEuP* 2021, p. 843, 886.

basis of claims for injunctions<sup>96</sup>.

Whether the courts will recognize the AgrarOLkG as a rule of market conduct in the sense of section 3a UWG, with the consequence that a violation also constitutes an unfair business practice within the meaning of the UWG, remains to be seen<sup>97</sup>.

Further, also the interrelation between the AgrarOLkG and the GWB is of interest and is explicitly addressed within the framework of the AgrarOLkG, as the «tapping ban» under German antitrust law and the prohibitions under the AgrarOLkG overlap considerably (see above, par. 3)<sup>98</sup>.

According to section 24 AgrarOLkG, the GWB, particularly sections 19, 20, and the AgrarOLkG are parallelly applicable. The German legislator states that the objective of the AgrarOLkG is to expand the protection of agricultural producers and not to limit it<sup>99</sup>. Therefore, the cross-sector GWB shall also be fully applicable in the agricultural sector<sup>100</sup>. The AgrarOLkG is thus not intended to take precedence over the GWB as *lex specialis*<sup>101</sup>. The German legislator points out that there may be cases in which the provisions against abuse of market power of the GWB may exceed the prohibitions of the AgrarOLkG and there is nothing wrong with this<sup>102</sup>. Although this can lead to simultaneous proceedings by different authorities, a consistent practice should be expected, since the AgrarOLkG provides for a duplicate administrative competence of the BLE and the Federal Cartel Office<sup>103</sup>.

<sup>96</sup> J. U. FRANCK, *The Directive on Unfair Trading Practices in the Agri-food Supply Chain: Regulatory Ambitions and Legal Instruments*, in *ZEuP* 2021, p. 843, 886.

<sup>97</sup> Advocated by J. U. FRANCK, *The Directive on Unfair Trading Practices in the Agri-food Supply Chain: Regulatory Ambitions and Legal Instruments*, in *ZEuP* 2021, p. 843, 887.

<sup>98</sup> Cf. also A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 330; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 542 on details of the interrelationship.

<sup>99</sup> Cf. DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 46.

<sup>100</sup> Cf. DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 46.

<sup>101</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 542.

<sup>102</sup> Cf. DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 46.

<sup>103</sup> Cf. DEUTSCHER BUNDESTAG, Gesetzesentwurf der Bundesregierung Entwurf eines

Furthermore, due to the allocation of jurisdiction, the Senate of the OLG Düsseldorf usually dealing with anti-trust proceedings, is also the competent court of first instance for disputes under the new AgrarOLkG (sections 32, 44, 49 ff. AgrarOLkG)<sup>104</sup>.

### 5. Critical review of the scope of the UTP Directive and its implementation

Even though the protection of primary producers with regard to the strong concentration of supermarket chains is an important concern, the UTP Directive and its implementation into German Law considerably restrict the contractual freedom of the parties, particularly through the black list<sup>105</sup>. Instead of a grey and a black list of unfair trading practices, a general clause (possibly with specific examples) could have been adopted<sup>106</sup>. This would have enabled the competent authorities to make case-by-case decisions as well as to react to changing contractual relationships between the parties<sup>107</sup>. On the other hand, a general clause could constitute a «shadow

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zweiten Gesetzes zur Änderung des Agrarmarktstrukturgesetzes, 25.1.2021, Drs. 19/26102, p. 46; A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 331.

<sup>104</sup> A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 332 ff.; P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 539.

<sup>105</sup> J. ACKERMANN, *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, p. 337 ff. who assessed the UTP Directive in the light of contractual freedom of Art. 16 CFR and concludes, that the prohibited practices of Art 3 (2) UTP Directive are not suitable to achieve the purpose pursued by the UTP Directive and the prohibited practices of the black list are unreasonable. Cf. further A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 322.

<sup>106</sup> Advocated by J. ACKERMANN, *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, p. 296 ff., 299, proposing the wording of such a general clause. The Commission however advocated specific unfair trading practices to be prohibited versus a more general clause, invoking the difficulties of interpretation which occurred in Germany during the «Hochzeitsrabatte» case («wedding discount» case). Cf. EUROPEAN COMMISSION, COM (2016) 32 final, p. 6.

<sup>107</sup> J. ACKERMANN, *Wohlgeordnetes Agrarwettbewerbsrecht mit Blick auf Erzeugerorganisationen und unlautere Handelspraktiken*, 2020, p. 296 ff.



GWB»<sup>108</sup> and thus could have entailed significant interference with competition<sup>109</sup>. In addition to this, it can be noted that the current list of unfair trading practices provides clear rules for the actors of the agricultural and food supply chain.

Another relevant point of criticism is the narrow sectoral approach of the UTP Directive. Not only actors in the agricultural and food supply chain are subject to considerable pressure by their purchasers, but also suppliers of the non-food sector, for example cosmetic producers, can need protection<sup>110</sup>. Yet, actors in the agricultural and food supply chain are often faced with particular challenges: for example, the fact that many food products perish very quickly makes it impossible for the producers to sell the products to another buyer after short term cancellations or the return of products<sup>111</sup>. Nonetheless, sector specific regulations always have to be critically questioned, as they would, if they became widely spread, create an inextricable legal patchwork. For the moment, it seems reasonable to assume that the implementation of the UTP Directive into German law will contribute to eliminating unfair trading practices occurring in the agricultural and food supply chain at least to some extent. However, a precise assessment will only be possible when the relevant provisions will be applied in practice.

## 6. *Summarizing Theses*

- (1) In Germany unfair trading practices in the agricultural and food supply chain are likely to occur due to the high degree of concentration on the market.
- (2) Before the implementation of the UTP Directive into German law,

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<sup>108</sup> “Schatten-GWB”, see P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538.

<sup>109</sup> P. PICHLER, *Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm*, in *NZKart* 2021, p. 537, 538 f.

<sup>110</sup> J. BASEDOW, *Sektorielles Wettbewerbsrecht – Zu Handelspraktiken in der Lebensmittelversorgungskette*, in *EuZW* 2019, p. 137, 138; A. I. BERNHÖFT, *Die europäische Richtlinie gegen unfaire Handelspraktiken und ihre Umsetzung ins deutsche Recht*, in *ZWeR* 2021, p. 317, 321.

<sup>111</sup> Recital (6) UTP Directive.



unfair trading practices, often reported to occur, have not consequently been challenged before the courts even though German law provided plenty of remedies. This might be attributable to the «fear factor», which is said to prevent food producers from enforcing their rights.

- (3) The AgrarOLkG exceeds the UTP Directive with regard to some important points, such as the personal scope of application and the extension of the black list of absolutely prohibited trading practices.
- (4) Regarding the relevant provisions, the AgrarOLkG establishes a duplicate administrative enforcement structure, by entrusting powers of compliance control to the Federal Agency for Agriculture and Food (BLE) and the Federal Cartel Office (Bundeskartellamt).
- (5) The AgrarOLkG strongly impedes the contractual freedom of the actors in the agricultural and food supply chain through a sector specific regulation. Whether the AgrarOLkG will contribute to eliminating unfair trading practices occurring in the supply chain remains to be seen in the light of the future experience in the practical application of the law.



Antonio Jannarelli

*The implementation of Directive no. 633 of 2019 in the Italian experience*

SUMMARY: 1. Introduction – 2. The Italian enabling act and the legislative decree n. 198 of 2021: the fight against unfair practices within the framework of the regulation of commercial relations between suppliers and buyers in the agri-food chain – 3. The unfair practices in the legislative decree: compliance with the Directive and new general clauses to protect not only suppliers but also buyers – 4. The fight against unfair practices and the protection of the remuneration of agricultural producers between price control and the importance of production costs – 5. Unfair practices and market discipline: the ban on double-discount auctions and the new rules for selling below cost – 6. The new supervisory authority, the ICQRF, and the role of the competition authority – 7. The powers of the ICQRF, the procedures for complaints and administrative sanctions: brief notes – 8. Individual and collective private remedies - 9. The regulation of contracts for the sale of agricultural and agri-food products: the Italian regulation and the rules of the CAP.

1. *Introduction*

At the basis of directive no. 633 of 2019 there was fundamentally the profound change in the Community agricultural policy: the abandonment by the CAP of the traditional system aimed at protecting farmers through the setting of administered prices for agricultural products and an adequate “defense” of the same from competition from third country producers. This forced European agricultural producers to suffer on the one hand the global fluctuations in the prices of agricultural products, on the other, given their structural weakness, the excessive power of their economic interlocutors located upstream, in the supply of modern factors of production, and, downstream, in the marketing of their products.

In this situation, it has emerged, with growing evidence, that an important role in the income remuneration of agricultural producers is constituted by the presence of both increasing production costs, which are difficult to manage by individual agricultural operators, and additional costs unloaded on them by operators located downstream in the agri-food chain

which purchase basic agricultural products. Hence the need to focus on an agricultural policy aimed above all at effectively strengthening the bargaining power of farmers in setting prices (to be implemented through a progressive review of the special rules on competition that have remained unchanged for decades) as well as, more generally, to ensure clarity and transparency in the sales operations of agricultural products and to combine that with a distinct policy of the law of the regulation of contractual relationships in the agri-food chain. It is a policy aimed at reducing the impact on farmers' incomes of costs and of the additional direct and indirect risks caused by unfair behavior by other operators present in the agri-food chain as buyers of basic agricultural products and of agricultural-based food products.

In the EU reg. n. 1308 of 2013, the discipline referred to in Articles 148 and 168 dealt exclusively with contracts in which only agricultural producers are present as suppliers, in order to give transparency to the negotiation operations in the perspective of the better functioning of the agricultural market.

Conversely, directive no. 633 of 2019 assigned the discipline against unfair practices in the supply chain to protect all suppliers of agricultural products with reference not only to basic agricultural producers but also to any natural or legal person who sells agricultural and food products, more precisely, «the products listed in Annex 1 of the TFEU or products not listed in that Annex, but processed for food use starting from the products listed in that Annex».

The prerequisite for protection, to be verified in practice, is that in principle the suppliers have a lower bargaining power than the buyers. As stated in recital 8 of the directive, in order to simplify the application of the discipline on unfair practices, the identification of the difference in contractual power (i.e. the verification of the weakness of the individual supplier with respect to the individual buyer), was entrusted to the difference in turnover between the protagonists of contractual relations, according to a specific grid contained in Art. 1, in order to distinguish, concretely and from time to time, the presence of weak suppliers contractually bound with strong buyers on the assumption that in such situations there would still be negative effects for primary agricultural producers.

The choice made by the Directive to rely on turnover, which is not binding for national legislators, was intended to take concrete account of the significant diversity of socio-economic structures that the agri-food chains present in European countries. In any case, regardless of the understandable reservations about the adopted criterion, it remains undoubted that, on

an operational level, the adopted criterion aimed at facilitating the task entrusted to the supervisory authority regarding the verification of the presence of that contractual imbalance between the parties, as a prerequisite for the application of the discipline relating to unfair practices.

The unfair practices are provided in detail in the Directive according to the distinction between those always prohibited (the so-called black list), and those prohibited only in the absence of a prior agreement in clear and unambiguous terms between the parties in the conclusion of the supply agreement or of another following one (the so-called gray list). Without taking up individually the unfair practices listed in Art. 3 of the Directive, it is important to remember that for those absolutely prohibited (the black list), the text does not contain any reference about their possible presence in practice only as mere behavior unilaterally imposed by the buyer or also as explicit provisions contained in written clauses. Conversely, the practices listed in para. 2 of Art. 3 (the so-called gray list) are considered correct only if agreed between the parties as a contractual clauses.

Finally, if we analyze all the clauses considered unfair and destined to be sanctioned, it is immediately clear that the Directive has not dealt with the problem of prices of agricultural products in any case. It has dealt exclusively with those commercial practices present in the supply chain relationships that determine, for weak suppliers, additional costs compared to production costs, with the effect of negatively affecting the overall remuneration of these subjects, regardless of the prices of the products agreed in the same sale contracts.

## *2. The Italian enabling act and the legislative decree n. 198 of 2021: the fight against unfair practices within the framework of the regulation of commercial relations between suppliers and buyers in the agri-food chain*

In the Italian legal experience, both the enabling act and the legislative decree implementing the directive, have moved in a broader and different direction in line with the original choices already adopted in Art. 62 of law no. 27 of 2012. First of all, Art. 7 of the enabling act (“legge delega”) 22 April 2021, n. 53<sup>1</sup>, in establishing the guiding principles and criteria therein

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<sup>1</sup> For a first reading of Art. 7 of the enabling law, v. A. JANNARELLI, “Contractual justice” in the agri-food chain: preliminary considerations for the implementation of Directive no. 633 of 2019, in *Giustizia Civile*, 2021, p. 199 ff.

for the implementation of directive no. 633 of 2019, omitted any reference to the presence of the imbalance of contractual power between the parties in the single commercial relationship which in the Directive is at the basis of the presence of unfair practices to be combated to protect suppliers.

In fact, Art. 7, para. 1, only emphasizes the need to rationalize and strengthen «the existing regulatory framework in the direction of greater protection of *operators in the agricultural and food supply chains*, with respect to the problem of unfair practices, without prejudice to the application of the discipline to all sales of agricultural and agri-food products, regardless of company turnover» [italics ours].

The issue of unfair practices, connected to the implementation of the Directive, is here set in a regulatory context aimed not so much at combating the only pathological deviations in the market that emerge in the presence of actual punctual situations of imbalance of contractual power between the negotiating parties, but rather, more generally, at regulating all contractual relationships that intervene in the agricultural and agri-food chain.

The same approach proposed in the enabling law is found in Art. 1 legislative decree n. 198 of 2021, according to which the decree intervenes both «on the regulation of commercial relations» and «on the contrast of unfair commercial practices in relations between buyers and suppliers of agricultural and food products», in order to define «prohibited commercial practices as contrary to the principles of good faith and fairness and imposed unilaterally by *a contractor to his counterpart*»: all in order to «rationalize and strengthen the legal framework in force in the direction of greater protection of *suppliers and operators in the agricultural and food chain* with respect to the aforementioned practices» [italics ours], moreover «regardless of the turnover of suppliers and buyers».

Therefore the scope of the decree is wider than the mere implementation of Directive no. 633 of 2019. Furthermore, the legislation introduced is not aimed at the protection of suppliers only, albeit in the broad meaning adopted by the Directive itself, but also includes that of buyers (such as «other operators in the agricultural and food chain»). Moreover, in line with the provisions of Art. 1 of the decree, among the unfair practices added by our legislator in Art. 5, there are, as will be seen more fully below, also hypotheses aimed precisely at the protection of buyers against suppliers.

On the other hand, the importance that the decree has assigned to the discipline of commercial relations, as such, in the relations of the agri-food chain, with respect to the fight against unfair practices alone, is extremely evident in the same Art. 1, para. 4, of the legislative decree. In fact, this

paragraph opens with the statement according to which «the provisions referred to in articles 3, 4, 5 and 7 of this decree constitute mandatory rules ...» and ends with the phrase «Any agreement or contractual clause contrary to the aforementioned provisions is null. The nullity of the clause does not entail the nullity of the contract».

Article 1, para. 4, considers the rules referred to as a general discipline applicable to all contracts for the sale of agricultural and agri-food products, regardless, therefore, of the verification of the actual occurrence of a specific economic dependence of one contractor with respect to the other which is, on the other hand, an operational prerequisite in Directive 633 of 2019.

In particular, consider the discipline contained in Art. 3 of the decree on «the principles and essential elements of the sale contracts». The prescription of the written form of the contract to be stipulated before the delivery of the products sold, with the indications of the duration not less than twelve months, of the quantities and characteristics of the products as well as of the method of delivery and payment of the price, applies to all sale contracts and certainly not only those marked in practice by an imbalance of contractual power.

The general relevance of the provisions on the specific form and content of the contract is also the basis of the following paragraph 5 of the same Art. 3. On the one hand, this provision has the effect of subtracting the contractual clauses, including those relating to prices, from a possible negative evaluation, in the presence of framework agreements stipulated by the most representative organizations at the national level, on the other it still requires persistent compliance with Articles 4 and 5 of the decree, that is the provisions in which the practices to be considered unfair are listed.

Ultimately, the system (civil and administrative sanctions) outlined in the legislative decree intends to provide for the general regulation of supply chain relations concerning the sale of agricultural and agri-food products as such<sup>2</sup>, that is, well beyond mere pathological and deviant events due to the actual recurrence of an imbalance of negotiating power between the negotiating parties and to the presence of unfair clauses of Directive no. 633 de 2019.

In this perspective, then, it is evident the definitive overcoming of the different and narrower area of Art. 62 of law no. 27 of 2102, which has thus been completely repealed, and the undoubted distance that is today recorded

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<sup>2</sup> This regulation, in turn, forks internally: in the case of sales that have agricultural producers as suppliers, the regulations contained in the implementing decree of directive no. 633 of 2019 is to be integrated in particular with that contained in Articles 148 and 168 of reg. 1308 of 2013.



between the discipline based on the effective economic dependence of one party on the other, at the basis of Art. 9 of the law n. 192 of 1998 and subsequent amendments, and that contained in the legislative decree which went beyond the simple implementation of Directive no. 633 of 2019.

*3. The unfair practices in the legislative decree: compliance with the Directive and new general clauses to protect not only suppliers but also buyers*

In the implementation of the directive the Italian legislator, first of all, recalled the various hypotheses already listed in the directive with reference to both to those absolutely forbidden (the so-called black list), as to those forbidden in the event that their agreed provision is lacking in the contract, or in the framework agreement or in another subsequent agreement, provided that these clauses are formulated in clear and unequivocal terms (the so-called gray list). In the so called black list of the decree, however, the Italian legislator introduced (Art. 5) other original hypotheses. These are in line with the choice present in the Directive aimed at ensuring a minimum harmonization in the field of combating unfair practices in the agri-food chain and, therefore, leaving it to the States, as stated in the Art. 9 of the Directive, the right to maintain or introduce stricter rules in this regard, as long as they are compatible with the rules relating to the functioning of the internal market. Alongside Art. 5, which contains some regulatory indications already present in Art. 62 of law no. 27 of 2012, there are the sales below cost determinations contained in Art. 7.

a) It is not necessary here to analytically retrace the practices provided for in Art. 4 of the legislative decree and corresponding, albeit with a language that does not always coincide, to those present in Art. 3 of the Directive.

As regards the absolutely prohibited practices and which refer to precise and detailed behavior and claims of the purchaser towards the supplier, the national legislator has moved away from the letter of the Directive: the responding version of the decree presents some sloppiness as well as a real overcoming of the indications provided by the European provision.

In particular, Art. 3, para. 1, lett. c), of the Directive refers to the hypothesis in which «the buyer unilaterally modifies the conditions of an agreement for the supply of agricultural and food products relating to the frequency, method, place, timing or volume of the supply or delivery of agricultural and food products, quality standards, payment terms or prices

or relating to the service».

The Italian version of that provision not only affects a unilateral buyer's initiative but introduces one in which the supplier is an active protagonist vis-à-vis the counterpart. This solution is certainly not in contrast with the Directive, but it still signals the attention of the Italian legislator for the protection, albeit in limited cases, also of the buyer and not always and only of the supplier in contracts for the sale of agricultural products: attention supported, however, by some hypotheses of unfair practices introduced in Art. 5 of the legislative decree, as will be highlighted below.

Conversely, the other hypothesis contained in Art. 4, para.1, lett. g) of the legislative decree, corresponding to that provided for in Art. 3, para. 1, lett. f), of Directive no. 633 of 2019. In fact, while the provision of the Directive refers to the case in which «the buyer refuses to confirm in writing the conditions of a supply agreement between the buyer and the supplier for which the latter has requested a confirmation written», the legislative decree speaks of the «refusal, by the buyer or supplier, to confirm in writing<sup>34</sup> the conditions of a supply contract in place between the buyer and the supplier for which the last has requested a written confirmation»!

Furthermore, among the prohibited practices, Art. 4, para.1, lett. a) and b) of the legislative decree places the hypotheses in the delays in payments due to the supplier. In this regard, a double distinction is envisaged according to whether it is a transfer with agreed delivery on a periodic basis (lett. a) or with an agreed delivery on a non-periodic basis (b); within these hypotheses, the rules are divided according to whether they are perishable or non-perishable products.

As regards the first distinction, the solution adopted in the decree does not appear to coincide exactly with that present in the text of the Directive. Indeed, the text of the Directive (Article 3, para. 1) envisages the distinction between supply agreements with delivery on a regular basis and supply agreements that do not involve regular delivery. In both cases, there are always multiple deliveries, but only in the first hypothesis is the agreed predetermination of the terms in which deliveries are to be made, in order to verify the timeliness of the consequent payment of the amount to the supplier.

In the implementing decree of the Directive there is a correspondence between the hypothesis of deliveries on a periodic basis and the regular ones referred to in the Directive<sup>3</sup>: moreover, pursuant to Art. 2, para. 1, lett.

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<sup>3</sup> In the case of deliveries on a periodic basis, the same Art. 4, para. 3, provides for some specific hypotheses removed from the discipline referred to in paragraph 1.

f), the expression «sale contract with delivery agreed on a periodic basis» includes both «a framework agreement», as defined in letter a), of the same article and «a supply contract with periodic or continuous services».

However, this correspondence does not appear precise in the second hypothesis. Indeed, the text of the Directive only provides that delivery times may not be regular. Conversely, the text of the implementing legislative decree speaks of non-periodic delivery: the formula used could also suggest the hypothesis of a single delivery, i.e. a hypothesis which, however, conflicts with the duration of the supply contract.

With regard to the so-called “gray list”, laid down in Art. 3, para. 2, of the Directive, the corresponding Art. 4, para. 4, of the legislative decree has faithfully adhered to the content of the Directive, reproducing the hypotheses envisaged therein as legitimately practicable, provided that they have been «agreed between the parties» and set forth in the contract in clear and unambiguous terms.

b) Conversely, the original hypotheses added by the national legislator and contained in Art. 5 as «other unfair commercial practices» are to be considered absolutely prohibited.

In the extensive list contained in Art. 5 only some hypotheses refer to situations objectively identified in point of fact, in the same way as those contained in the black list and gray list adopted by the Directive and transposed into Art. 4 of the decree, mentioned above.

In particular, reference is made here to the hypotheses referred to respectively in lett. a): «purchase of agricultural and food products through the use of double-discount electronic tenders and auctions»; letter c): «omission, in the stipulation of a contract concerning the sale of agricultural and food products, of even one of the conditions required by Article 168, para. 4 of regulation (EU) no. 1308/2013 of the European Parliament and of the Council of 17 December 2013»<sup>4</sup>; letter j): «exclusion of the application of default interest to the detriment of the creditor or credit recovery costs»; lett. k): «provision in the contract of a clause that obligatorily imposes on the supplier, after the delivery of the products, a minimum term before being able to issue the invoice, except in the case of delivery of the products in several installments in the same month, in which case the invoice can be

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<sup>4</sup>This hypothesis incorporates what is already provided for in art. 10-quater, paragraph 3, of the legislative decree 29 March 2019, n. 27, converted into law 21 May 2019 n. 44, which, however, for the purposes of the existence of an unfair commercial practice, required the setting by the buyer of «a price significantly lower than the average production costs resulting from the elaboration of the ISMEA ... ».

issued only after the last delivery of the month».

Other hypotheses, increasingly uncertain, refer to situations in which on the one hand the unfairness requires a concrete evaluation, on the other it is also doubtful whether the provision works to the advantage of the supplier alone and not also of the buyer himself. In particular, in some of them, the margin of indeterminacy is undoubtedly relative: think of the hypotheses referred to in lett. e) «*application of objectively different conditions for equivalent services*»; lett. g) «*achievement of undue unilateral services, not justified by the nature or content of commercial relations*»; lett. f) «making the conclusion, execution of contracts and the continuity and regularity of the same commercial relations subject to the execution of services by the contracting parties *which, by their nature and according to commercial usage, have no connection with the object of the and others*»; lett. i) «imposition, by a party, of services and ancillary performances *with respect to the main object of the supply, even if these are provided by third parties, without any objective, direct and logical connection with the sale of the product covered by the contract*» [italics ours].

In other cases, on the other hand, the indeterminacy is wider and increased the margin of evaluation due: a) to the supervisory authority when ascertaining the unfairness of the practice as well as the setting of penalties, b) to the civil judge as to the consequent ascertainment of the nullity of any contractual clauses contemplating such situations.

In this area fall, in particular, the cases referred to (lett. b): «imposition of *excessively burdensome contractual conditions* for the seller, including that of selling agricultural and food products at prices below production costs»; (lett. d) «direct or indirect imposition of conditions of purchase, sale or other *unjustifiably burdensome contractual conditions*»; (lett. h) «adoption of *any further unfair commercial conduct* that is such also taking into account the complex of commercial relations that characterize the procurement conditions»; (lett. l) «imposition of *an unjustified and disproportionate transfer of the economic risk by one party to its counterpart*» [italics ours].

In other words, we are faced with real general clauses capable of embracing and going beyond all the specific hypotheses identified by the legislator and which remain totally entrusted to the sanctioning interventions of the administrative authority and to those of the judge according to their respective competences established by the legislative decree.

In the final part of Art. 5 of the decree, there are some singular hypotheses of unfair behavior which are explicitly charged to the suppliers with respect to the buyers, in a completely independent and divergent

perspective from that adopted by the Directive, all oriented to the protection of the supplier, although through the filter represented by the imbalance between the respective company turnover of the contractors. The assumptions contained in Art. 5 referred to here are, respectively, in lett. m) «imposition on the buyer, by the supplier, of products with expiry dates that are too short compared to the residual life of the product itself, established contractually»; n) «imposition on the buyer, by the supplier, of contractual obligations for the maintenance of a certain assortment, understood as the set of goods that are offered for sale by a commercial operator to meet the needs of its customers»; lett. o) «imposition on the buyer, by the supplier, of the inclusion of new products in the assortment»; lett. p) «imposition on the buyer, by the supplier, of privileged positions of certain products on the shelf or in the business».

In this specific regard, the need, positively felt by the national legislator, to envisage some hypotheses for better protection of the buyer towards the supplier, constitutes a realistic reading about the effective complex articulation of the business-to-business relationships present within the agri-food chain. This complex articulation highlights the irreducible distance between the undoubted need for protection of agricultural producers as such, in light of their overall structural weakness in market relations, and that to be recognized also to other economic operators in the supply chain. In fact, it is all too evident that the hypotheses recently reported, relating to unfair practices put in place by suppliers towards buyers, refer concretely to behaviors put in place certainly not by basic agricultural producers in the role of suppliers, but by other economic entities with greater economic strength that, along the supply chain itself, operate as wholesale suppliers of agricultural products and, above all, as suppliers of processed or semi-finished agricultural products and who in fact may well have greater negotiating power compared to that of downstream buyers.

#### *4. The fight against unfair practices and the protection of the remuneration of agricultural producers between price control and the importance of production costs*

In the analysis of the legislative decree implementing directive no. 633/2019, the question of the impact of the regulation of sales contracts and the contrast of unfair commercial practices with regard to the selling

prices of agricultural and agri-food products and the overall distribution of value throughout the supply chain deserves an autonomous analysis. This is a crucial issue in the specific regulation of agricultural markets that goes far beyond the mere question of the distortions that can further derive from the presence of unfair practices to the detriment first of all of basic agricultural producers. These distortions, in fact, add to the inefficient functioning of a market that is physiologically unbalanced in itself, with the result that the outcomes are aggravated.

The problem relating to the formation of prices on agricultural markets, which tend to be not very profitable for farmers, especially when compared with the prices that final consumers pay to commercial enterprises for the same agricultural products, even unprocessed, requires answers with regard to the structuring and governance of agricultural markets. These responses are placed on a totally different and distinct level from that which includes the regulatory solutions necessary to deal with the simple further deviations, in terms of unfair practices, which can intervene in business-to-business relationships in the agri-food chain. The operational scope of the fight against unfair practices in commercial relations that intervene in this supply chain should not be confused with that relating to the correction of the overall malfunctioning of agricultural markets which, moreover, constitute only the first step, albeit fundamental, of the process which starts from agricultural production to reach, with the intervention of intermediate operators in the supply chain, the final production of food for consumers. It is all the more misleading to think that a discipline on unfair practices in business-to-business relationships in which agricultural producers intervene as suppliers can constitute an adequate response to their structural weakness with regard to the formation of agricultural commodity prices in their relations with other operators in the supply chain.

The discipline on unfair practices is above all aimed at repressing the presence, in the economic relations between suppliers and purchasers of agricultural and agri-food products, of situations destined to affect suppliers to the detriment of their overall economic balance, also in terms of rights and obligations, which goes far beyond the simple fixing of the price of the goods to be sold. Indeed, the actual remuneration of suppliers deriving from participation in such commercial relations certainly does not coincide with the sole monetary consideration that the supplier receives in exchange for the sale of the products. The presence of unfair practices actually adds to suppliers new costs and new risks [moreover, also, but not only, with the corresponding relief of the negotiating counterpart] which negatively affect the profitability of the economic operation for suppliers, regardless from the

same physiological risks and production costs, which are ever increasing, that every agricultural producer already encounters in his activity.

Moreover, the Unfair Practices Directive is completely silent in this respect, except to recognize in recital 6 that «In a decidedly more market-oriented agricultural policy context than in the past, protecting against unfair commercial practices is now more important for operators present in the agricultural and food supply chain». And, in fact, within the framework of the CAP, referred to in reg. 1308 of 2013, regarding the contracts for the sale of agricultural products by agricultural producers, Art. 168 provided for their written form as well as the necessary forecast of the agreed price; in turn, Art. 172-*bis* of the same regulation introduced the possibility of negotiating a better distribution of value in the supply chain relations between agricultural producers and first buyers.

Conversely, the national legislative decree, in the wake of the suggestions that have emerged in recent years due to repeated crises in the prices of agricultural products, has included, in the context of the problem relating to unfair practices, hypotheses that have to do with both the price of product agreed between the parties, both with procedures capable of inducing lower prices to the detriment of primary producers.

Art. 5, paragraph 1, lett. b) of the decree introduced, among the prohibited unfair practices, the «imposition of excessively burdensome contractual conditions for the seller, including that of selling agricultural and food products at prices below production costs».

The formula used in the decree incorporates, but to a more radical extent, those contained respectively: a) in Art. 4, para. 2, of the administrative decree of 19 October 2012, n. 199 implementing art. 62 of law no. 27 of 2012 and today repealed, which spoke of *prices clearly below the average production costs* of the products subject to commercial relations and sales by agricultural entrepreneurs; b) and in art. 10-*quater*, para. 3, of law no. 44 of 2019, now repealed by the same decree that is examined here, according to which an unfair commercial practice was deemed to exist in any case in the event that, alongside the lack of at least one of the conditions required by Art. 168, para. 4, of reg. n. 1308/2013, there was also the setting by the buyer of *a price significantly lower than the average production costs resulting from the elaboration of the ISMEA* (“Istituto di servizi per il mercato agricolo alimentare”).

Unlike the latter, the hypothesis accepted in the decree refers to the mere presence of a price lower than the cost of production, where the previous normative formulas required something more, that is a more evident detachment, always in the sign of inferiority with respect to production



costs. Furthermore, the version present in the decree simply speaks of «production costs», whereas in the provisions now repealed reference was made to the average production costs. If we consider that, in repealing some paragraphs contained in Art. 10-*quater* of law no. 44 of 2019, only the paragraph that authorizes Ismea to process «monthly the average production costs of agricultural products on the basis of the methodology approved by the Ministry of Agricultural, Food, Forestry and Tourism Policies» was spared «precisely» «in order to allow the ascertainment of situations of significant imbalance in the sale contracts», it can legitimately be concluded that even in the more concise version present in the legislative decree, reference must always be made to the average production costs. If this were not the case, i.e. if the parameter to be taken into consideration in order to ascertain the recurrence of the unfair practice were the concrete cost of production borne by the single agricultural producer, the rule would be irrational and of dubious constitutionality and it would lead, at the same price adopted by the same buyer, to divergent solutions as to the unfairness of the practice, in relation to the simple difference in production costs of the individual suppliers.

To these first critical considerations, it must also be added that the solution accepted in the decree does not take into account the distinct cases contained in the enabling law.

In fact, Art. 7, para. 1, of the enabling law contains two distinct cases in which production costs are mentioned: lett. h) speaks of «production costs», and refers in general to sales contracts (but, in reality, it only concerns those stipulated by basic non-agricultural producers); letter q) speaks of «average production costs» and refers to the lower measure of 15 per cent, with reference only to the sale contracts stipulated by basic agricultural producers pursuant to Art. 168 of reg. 1308 of 2013. The unitary solution present in the decree is in contrast with the parameters present in Art. 7, para. 1, lett. q), of the delegated law no. 53, although the legislator has already intervened with Art. 9 of the law 23 December 2021 n. 238 which eliminated the reference to «15 per cent» in this provision. In fact, the aforementioned delegating rule, with specific reference to contracts for the sale of agricultural products put in place by agricultural suppliers-producers (given the explicit reference to Art. 168 of reg. 1308/2013) not only continues to express reference to the «average cost of production» but also clarify that these circumstances do not automatically imply the existence of an unfair practice and must be considered «as control parameters for the existence of the unfair commercial practice».

The entire provision of the decree remains difficult to apply since it

assumes the presence of a buyer who can effectively impose a price on the supplier that is lower than the average cost of production. Such a hypothesis could emerge only if there were a real monopsony, that is a situation in which for the supplier there are no concrete outlet alternatives on the production market. In this case, however, more than an unfair practice, there would be a real abuse of a dominant position within the competence of the AGCM. As evidenced by the milk crisis of recent years and the consequent negative opinions of the AGCM itself in the disputes regarding Art. 62 of law no. 27 of 2012<sup>5</sup>, the actual possibility that the prices of an agricultural raw material are placed at a lower economic level than the same production costs is linked to the presence of a crisis that simultaneously affects the entire agricultural market and the entire supply chain: so it is completely unlikely to find in such circumstances the existence of an imposition attributable to a single buyer, assumed as a pathological deviation from the loyal behavior of other buyers. On the other hand, as the AGCM remarked about milk and the interpretation of Art. 62 of law no. 27, the establishment by law of an absolute prohibition for buyers to charge prices lower than the cost of production would be equivalent to carrying out a regulatory type intervention to protect the entire sector, in terms of indications to the market about the fair price to be applied, rather than to protect individual weak contractors. Regulatory intervention, aimed at putting at the center of attention the problem of the production costs of agricultural operators and their relationship with the formation of product prices, which, in the current European context, requires systematic responses at the level of agricultural policy of the Union.

Ultimately, the radical hypothesis adopted by the legislative decree is in any case misleading. It is placed on the side of the fight against unfair practices, that is, deviant with respect to the behaviors found in a fully functioning market. In presence of a market crisis, it is up to the European and national legal system to refine techniques for further derogatory interventions, exceptionally<sup>6</sup>, in relation to the application of the rules on competition with respect to the same regulatory framework of European source which, in the matter of primary sector, has recently begun, albeit in unsatisfactory and ambiguous terms, to strengthen the contents of

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<sup>5</sup> See, among others, the provision AL21 *Milk prices in Sardinia* on the subject of “Discipline of relations commercial on the sale of agricultural and agri-food products” published in the Weekly Bollettino of the Authority no. 26 of 1 July 2019, p. 22 ff.

<sup>6</sup> So Art. 222 of reg. 1308 of 2013, to be applied in cases of serious imbalance in the markets.

agricultural exceptionalism with regard to competition law<sup>7</sup>.

For the sake of completeness of the investigation, it should be noted that the nullity referred to in Art. 1, para. 4, in this case would involve only the clause relating to the fixing of the price and not the entire contract, with the consequent need for the fixing of the correct price to be judicially established. If the contract has already been executed, in order to integrate the correct amount due to the supplier, reference must be made to the current prices in similar contracts at the time of the original stipulation between the parties.

##### *5. Unfair practices and market discipline: the ban on double-discount auctions and the new rules for selling below cost*

A different evaluation deserves the hypothesis concerning «the purchase of agricultural and food products through the use of electronic tenders and double-discount auctions» in Art. 5, para. 1, lett. a) of the decree. In this case, the purchase mechanism is based on the request to suppliers to make a sale proposal with the setting of a price and, subsequently, to proceed to an auction on the basis of proposals received from suppliers.

Furthermore, the offers are advanced in the dark, i.e. without the participants in the auction being able to know who they are competing with, so there is also a strong risk that, in the absence of transparency of the entire operation, there will be instrumental proposals piloted downward, in order to arrive at extremely convenient offers for the buyer which, in many cases, are the background for the subsequent implementation of sales below cost to consumers.

Indeed, the mechanism of double-discount auctions leads to a forced reduction in prices since, in order to win the auction and obtain the supply order, the suppliers participating in the auction are induced to bid down the price, with exclusive advantages for the buyer and a mortification of the entire market basin.

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<sup>7</sup> On the modification of the reg. 1308 of 2013, intervened with reg. n. 2393 of 2017 after the judgment of the Court of Justice in case C-671/2015 see A. JANNARELLI, *Dal caso «indivia» al regolamento omnibus n. 2393 del 13 dicembre 2017: le istituzioni europee à la guerre tra la PAC e la concorrenza?* in *Diritto agroalimentare* 2018, p. 108 ff. The other developments following the reg. 2117 of 2021, see A. JANNARELLI, in *Mercato e concorrenza nella nuova PAC: un cantiere aperto su un futuro incerto*, in *Rivista di diritto agrario*, 2021, p. 553 ff.

The choice made by the Italian legislator to subject also double-discount auctions to the same discipline provided for the other unfair practices has to be positively judged. Furthermore it can be added that, in the case of double-discount auctions the prohibition operates differently when compared to the other unfair practices listed in the Directive as well as to those added by the national legislator.

The latter practices are unfair precisely as they concretely affect, from time to time, a single commercial relationship, that is an individual supplier who entered into the supply contract. Conversely, the ban on the use of double-discount auctions expressly aims to remove from the buyers' negotiating practice the use of a method of concluding contracts that produces negative collective effects, starting with the suppliers participating in the auction: negative effects that go far beyond the position of the only supplier who could win the tender with the maximum discount.

As practice has shown, the price emerging from the use of the double-discount auction system ends up representing a point of reference for other buyers, in particular for other distribution companies, with the consequent mortification of prices on the entire market.

In other words, in this case the provision intervenes on the same general methods of bargaining in the supply chain, in order to prevent a practice that negatively affects the functioning of the market itself: what is imposed here unilaterally by the buyer is a method of conclusion of the contract, in particular of the price formation, in which it is the supplier himself who proposes it downwards, with negative effects on all supply chain relationships.

In our opinion, the same assessment also deserves the discipline contained in Art. 7 relating to below-cost sales which, in practice, very often follow the implementation of such auctions, with further negative effects of price depression on the entire market to the detriment of suppliers.

To correctly illustrate the content of this article, it should be remembered that the Italian legislation in force, starting from the legislative decree 31 March 1998, n. 114 and of the Presidential Decree 6 April 2001, n. 218, refers the expression «below cost sales» to the hypothesis of sale to the public by commercial establishments, that is, to situations that intervene on the terminal markets intended for consumers. This discipline intervened in order to regulate the phenomenon as it is considered as a particular occasion of possible distortion of competition between commercial operators, with probable impact on the upstream supply chain relationships.

According to Art. 15, para. 7, of the legislative decree n. 114/1998, «By sale below cost we mean the sale to the public of one or more products

made at a price lower than that resulting from the purchase invoices plus the value added tax and any other tax or tax related to the nature of the product and less any discounts or contributions attributable to the product itself as long as they are documented». In turn, the implementing regulation of this discipline contained in the Presidential Decree 6 April 2001, n. 218, in specifying (Art. 1, para. 8) the difference in sales below cost from promotional sales not carried out below cost and from clearance and end-of-season sales, as well as from those ordered by the judicial authority as part of a forced execution procedure or bankruptcy, clarified (Art. 1, para. 7) that «For the purpose of identifying a sale below cost, the retail price of a product means the price actually charged to consumers at the checkout».

The 2001 regulation not only established that any sales initiative below cost «must be communicated to the municipality where the business is located at least ten days before the start and can only be carried out three times during the year», not being able to a duration of more than ten days with a «number of references subject to each sale below cost ... more than fifty», but, among other things, it has entrusted the competition and market authorities with the task of imposing sanctions in the event of violation of the discipline.

Within the rules contained in the Presidential Decree n. 218 of 2001, Art. 2 has also provided for specific cases in which such sales are admissible without the need for prior communication to the municipality for their execution. Among the hypotheses identified in Art. 2, important, for the purposes of our reflection, are those (para. 1) which referred respectively to the sale: lett. a) «of fresh and perishable food products»; and lett. b) «of food products if there are less than three days to the expiration date or less than fifteen days to the date of the minimum conservation term ... ».

Having said that, Art. 7, para. 1, of the legislative decree of 2021 has innovated the previous regulations on the subject of sales below cost with exclusive regard to the sale to the public of «fresh and perishable agricultural and food products». In particular, by changing the original regime of full admissibility of such sales, the new provision allowed the implementation of the same only «in the case of unsold product at risk of perishable nature or in the case of commercial operations planned and agreed with the supplier in the form written».

In this way, while still relating to the final marketing of such products to the public, i.e. to consumers, the provision also aimed at ensuring the protection of suppliers, that is to say in the upstream relationships with which buyers obtain supplies.

The modification of the discipline on selling below cost was at the center

of another autonomous legislative measure already in progress in Parliament well before the implementation of the Directive, indeed already approved by a branch of the same. From this point of view, its inclusion on the occasion of the legislative decree concerning the discipline of commercial relations and unfair practices relating to the sale of agricultural products is not fully coordinated with the other provisions introduced for this purpose by the decree.

This remark, however, is relevant regardless of the fact that the penalties resulting from the violation of Art. 7 have remained within the competence of the competition authority, where, as will be seen below, those relating to unfair practices referred to in Directive no. 633 were, on the other hand, entrusted to the competence of the Central Inspectorate for the protection of quality and fraud prevention of agri-food products of the Ministry of agricultural, food and forestry policies. (ICQRF): competence, in turn subtracted from the competition authority which *ab initio* intervened in the event of violation of Art. 62 and Art. 10-*quater* of law no. 44 of 2019.

It can be noticed that the provision in Art. 7, para. 1, in modifying the pre-existing regulatory framework referred to in Presidential Decree no. 218/2001, explicitly reduced the range of choices that the trader can make in terms of sales below cost. But it did so without adequate coordination with the issue relating to the discipline dictated for commercial relations and unfair practices regarding the sale of agricultural and agri-food products.

In particular, according to Art. 7, para.1, the commercial operator can carry out sales below cost of perishable agricultural and food products in only two circumstances: that this subject has not been able to sell promptly and for which, consequently, there is the risk of perishability; b) when such commercial transactions have been planned and agreed in writing with the supplier, not necessarily at the time of signing the supply contract.

With reference to these hypotheses, para. 2 of the same Art. 7 of the legislative decree establishes that «It is, in any case, forbidden to impose contractual conditions on the supplier such as to affect the supplier the economic consequences deriving, directly or indirectly, from the deterioration or loss of agricultural and food products sold below cost not attributable to the negligence of the supplier». The prohibition provided for by this rule contained in Art. 7 binds the prescription of the only nullity of such contractual clauses present in Art. 1 of the same decree analyzed above.

The provisions contained in Art. 7 mentioned up to now are consistent respectively with the disciplinary framework of below cost sales and the legislation on commercial relations between suppliers and buyers at the heart of the legislative decree that is examined here. Unfortunate is the

wording of par. 3 of the same Art. 7, according to which «In case of violation of the provision referred to in paragraph 1, the price established by the parties is replaced by law, pursuant to Art. 1339 of the civil code, from the price resulting from the purchase invoices or, if it is not possible to match the purchase invoices, from the price calculated on the basis of the average production costs recorded by the Institute of services for the agricultural food market - ISMEA or, in the absence of the latter, the average price charged for similar products in the reference market».

Indeed, this rule appears to be aimed at avoiding that, in the presence of sales below cost in violation of the new regulations referred to in paragraph 1, the same commercial operator, buyer of fresh and perishable agricultural and food products, obtains an unjustified reduction in fees for suppliers.

The provision intends to complete, with regard to private law, the consequences relating to the violation of that relating to contracts for the sale of such products present in other provisions of the same legislative decree, in particular the incorrect practice constituted by the reduction of the price unilaterally adopted by the buyer.

In fact, the introduction of the mandatory written form of such supply contracts to be stipulated well before the delivery of the products as well as the explicit need for the price of the product to be already indicated therein and not unilaterally modifiable by the purchaser certainly appear sufficient only to prevent, in light of the penalties to be applied, that the buyer unilaterally modifies the price of the goods purchased on the simple basis of having proceeded or willing to proceed with sales below cost of the products purchased.

Art. 7, para. 3 rule, aims to ensure a rebalancing within the same exchange relationship between supplier and buyer on the assumption that the buyer, following the sale below cost carried out or planned by him, has transferred to the supplier the negative effects of the loss of profit due to his initiative, requesting a refund of part of the price already actually paid and shown on the invoice. The rule provides for automatic replacement pursuant to Art. 1339 of the Italian Civil Code of the «lowest» price paid to the supplier and shown on the invoice with that «calculated on the basis of the average production costs recorded by the Institute of Services for the Agricultural Food Market (ISMEA) or, in the absence of the latter, with the price average applied for similar products in the reference market».



### 6. *The new supervisory authority, the ICQRF, and the role of the competition authority*

In line with the indication present in the enabling law, the legislative decree designated the ICQRF, i.e. the Central Inspectorate for the protection of quality and fraud prevention of agri-food products of the Ministry of agricultural, food and forestry policies, as the national law enforcement authority, appointed to ascertain violations of the provisions referred to in Articles 3, 4 and 5 of the decree and to impose the related administrative sanctions, in compliance with the procedures referred to in law no. 68/1981.

With this choice, the jurisdiction originally entrusted to the competition authority regarding the application of sanctions related to the violation of Art. 62 of law no. 27 of 2012, now repealed, ceased, while the same authority has jurisdiction with regard to the sanctions applicable in the event of a violation of the discipline on below-cost sales pursuant to Art. 7 of the legislative decree (as well as in case of abuses of economic dependence having repercussions on the functioning of the market pursuant to Art. 9 para. 3-*bis* of *legge* n. 192/1998, on subcontracting).

As a result, with regard to abusive practices, there is currently a split between the competence of the AGCM in relation to business to consumer relations and, when applicable – with regard to the protection of micro enterprises in relations with “professionals” (see Art. 19 of the consumer code), and that entrusted to the ICQFR for business-to-business relationships, in particular for those between suppliers and buyers of agricultural and agri-food products in the agri-food supply chain.

The identification of a specific authority for this last area also corresponds to the widespread need to emphasize the peculiarity of the agri-food sector, above all due to the low sensitivity with which the competition authorities of European countries continue to approach the themes specific to the agricultural sector in light of the particular paradigms underlying the European agricultural policy inspired by the so-called “Agricultural exceptionalism”, that is to the marked need to protect the agricultural part of these production chains, also with a relative sacrifice of the rules on the protection of competition itself.

In the Italian legal experience, the practice followed up to now by the Competition Authority has only very recently begun to approach with greater attention to the peculiarities of the agricultural sector, whose market is an integral part of the wider agri-food sector; but it has done so

with insufficient cultural sensitivity and attention to issues concerning the legal discipline of the primary sector.

Having said this, the choice of entrusting a new authority with the control of compliance with the regulations on unfair practices and the regulations on commercial relations in the sale of agricultural and agri-food products does not go in the direction outlined above. In fact, in the light of the legislative decree, the coexistence of a competence of the competition authority is determined in the same area due to the effects that on the entire market may also derive from incorrect practices that involve a concrete abuse of economic dependence (Art. 9, para. 3-*bis*, of law no.192 of 1998).

Moreover, with regard to the ICQRF, there is no doubt that it is a highly specialized technical structure as far as controls on food fraud are concerned. However, it does not have within it, given the invariance of the financial endowment of its structure expressly confirmed by the same legislative decree, the appropriate and sufficient legal skills to ascertain the violation of the discipline on unfair practices. In particular, this deficiency is highly perceptible if we consider the judgement on the existence of the unfair practices referred to in Art. 5 is based on discretionary assessments based on general clauses, not on an ascertainment of facts. These assessments, indeed, require careful consideration from a legal point of view since, as has already been noted, the general clauses have a margin of indeterminacy which must be filled by the interpreter with adequate legal weightings consistent with the overall legal system.

Finally, unlike the competition authority and other so-called authorities independent, the ICQRF is an institutional structure within the ministry of agriculture: as such it does not have the independence that should be expected from an authority that carries out a control activity on private market relations: a circumstance, this, not of little importance, all the more so if we add to the observations made so far that Art. 10, para. 13, of the decree provides that «in order to strengthen the effectiveness of the activity of contrasting unfair commercial practices referred to in this decree, the proceeds obtained from the payment of administrative pecuniary sanctions are paid upon receipt of the state budget to be reassigned to the relevant expenditure items of the Department of the Central Inspectorate for the protection of the quality and repression of fraud of agri-food products of the Ministry of Agricultural, Food and Forestry Policies ... ».

### 7. *The powers of the ICQRF, the procedures for complaints and administrative sanctions: brief notes*

With regard to the ICQRF as a law enforcement authority against unfair commercial practices in the sale of agricultural and food products, as well as the powers granted to it in order to exercise this task, Art. 8 of the decree has substantially taken over the indications contained in Art. 6 and 10 of the Directive, with some further indications.

In particular, alongside the inspection and investigation powers necessary for the performance of its duties to be exercised also *ex officio*, it is the responsibility of the ICQRF to ascertain the violation of the provisions of the decree and to require the author of the violation to put an end to the prohibited practice<sup>8</sup>, as well as start the procedures for the imposition of the pecuniary administrative sanction envisaged: all according to the procedures detailed in Art. 9, paras. 4-6.

Regarding the complaints that can trigger the action of the ICQRF, the decree differs from the text of the directive. In fact, this has always and only aimed at the protection of suppliers, regardless of the buyer's nationality<sup>9</sup>. In particular, Art. 5 of the Directive provides that «Suppliers may submit complaints to the law enforcement authority of the Member State in which they are established or to the law enforcement authority of the Member State in which the buyer suspected of having implemented a prohibited commercial practice is established», with the consequence that the competence for the application of sanctions rests with the authority to which the complaint is addressed.

Furthermore, always in line with this approach, the same Art. 5 provides that «Producer organisations, other organisations of suppliers and associations of such organisations, shall have the right to submit a complaint at the request of one or more of their members or, where appropriate, at the request of one or more members of their member organisations, where those members consider that they have been affected by a prohibited trading practice. Other organisations that have a legitimate interest in representing

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<sup>8</sup> Except for some limits in order to protect the identity of the complainant and some of his information.

<sup>9</sup> Ultimately, the rule provides for the extraterritorial application of Directive no. 633 of 2019: on this point, with specific emphasis on the data contained in directive no. 633 of 2019, A. BECKERS and H-W. MICKLITZ, *Une perspective holistique sur la réglementation des chaînes d'approvisionnement mondiales*, in *Rev. intern. droit econ.*, 2020, p. 343 ff. already published in German (BECKERS & MICKLITZ, *Eine ganzheitliche Perspektive auf die Regulierung globaler Lieferketten*, in *Europäisches Wirtschafts- und Steuerrecht EWS*, 6/2020).

suppliers shall have the right to submit complaints, at the request of a supplier, and in the interest of that supplier, provided that such organizations are independent non-profit-making legal persons».

Conversely, in the legislative decree, there is no reference to suppliers. In fact, Art. 9, para. 1, provides that complaints must be addressed either to the ICQRF by subjects established in the national territory, regardless of the place of establishment of the subject suspected of having implemented a prohibited commercial practice, or to the law enforcement authority of the Member State in which it is established the person suspected of having implemented a prohibited commercial practice.

With regard to complaints promoted by collective subjects, the decree does not only refer to producer organizations, other supplier organizations, and associations of such organizations, but also embraces buyer associations and establishes that they «can lodge complaints on request of one or more of their members or, where appropriate, at the request of one or more of the members of the respective organizations included within them, if such members consider themselves victims of a commercial practice prohibited under the decree».

Furthermore, going beyond the determinations of the Directive, Art. 9, para. 2, of the decree extends the legitimacy to make complaints also to different organizations «as long as they have a qualified interest, provided that said organizations are independent non-profit entities». As it is easy to observe, on the one hand, the decree does not require that the complainant is a legal persons, and considers it sufficient that the entity at stake is endowed with legal subjectivity (think for example of agricultural and commercial unions); on the other hand, and in this case very questionably, it does not require that, for the purposes of the complaint, there must be a request from the operator concerned, similarly to what is provided for organizations of which this operator is a member<sup>10</sup>.

In addition to the publication of an annual report on the activities carried out and the transmission to the European Commission by 15 March of each year of a report on the law enforcement activities carried out in the previous year, the authority is required to publish regularly the number of complaints received, that of investigations initiated and concluded, with a summary illustration of the case, the outcome of the investigations and the decision taken, while always respecting the confidentiality obligations in favor of the complainant specified in Art. 9, para. 3.

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<sup>10</sup> The legal treatment afforded to trade unions is broader than that granted to agricultural producer organizations and other suppliers.

As regards the administrative pecuniary sanctions that the authority can adopt against the economic operator who has violated the provisions of Articles 3, 4, and 5, Art. 10 of the decree provides an articulated grid in relation to the individual cases, with aggravating circumstances in the event of repetition of the same violations. This grid assumes as a basis for the measurement of the sanction a percentage, from a minimum to a maximum, of the turnover achieved by the subject who committed the violation in the last financial year preceding the assessment. The criterion envisaged in the legislative decree for the purposes of effectively identifying the sanction is different from that found in the directive. The latter, in fact, in the final period of Art. 6, limits itself to providing that «The penalties ... shall be effective, proportionate and dissuasive, taking into account the nature, duration, recurrence and gravity of the infringement».

Conversely, in the decree, the provisions of Art. 10, para. 8 and para. 10, establish that the concrete measure of the penalties «is determined by referring to the benefit received by the person who committed the violation as well as to the extent of the damage caused to the other contractor».

### *8. Individual and collective private remedies*

The above mentioned Article 10 of the legislative decree helps to clarify the remedies of private law referred to in the Directive. The Directive, in fact, analyzes the issue of incorrect practices also in relation to the single specific contractual relationship, in the awareness that, in the case of vertical business-to-business relationships, the concern of suppliers to lose contacts, always precious and sometimes in the absence of alternatives, with buyers (the so-called fear effect), it leads to a preference first of all for interventions by third parties, i.e. by a supervisory authority, rather than just the use of private law remedies by the same victim of improper practices.

In this perspective, moreover, there is also the possibility, promoted by the same Directive, on the one hand that national codes of conduct are adopted in supply chain relations or that the Supply Chain Initiative is used to prevent the implementation of unfair practices, on the other hand, that, in the presence of disputes related to contracts of sale, the parties resort to mediation procedures (to be carried, in Italy, out according to the legislative decree 4 March 2010, n. 28) or to other alternative dispute resolution procedures.

Art. 9, para. 7 of the decree specifies that the failure to solve the dispute by way of mediation or other ADR does not deprive the parties of the right to lodge complaints before the courts and even less does it affect the power of the ICQRF to take action *ex officio*.

Regarding the private remedies to be activated in the presence of unfair practices prohibited by the decree, the first fundamental problem that arises concerns the relationship between the administrative sanctions that are the responsibility of the ICQRF, following the finding of the violation of the decree itself, and the interventions on the contractual relationship under the jurisdiction of the civil judge.

Unlike the area of business-to-consumer relations, in the case of business-to-business relations, in particular those present in the vertical relations of the supply chain, the legislative preference for public enforcement is due to the consideration according to which the victim economic operators of such practices could encounter greater difficulties, than those of simple consumers, in opening a private dispute: there is in fact the fear that the continuation of economic relationships, for them sometimes irreplaceable or difficult to replace, will be jeopardized, precisely with the interlocutors responsible for such unfair practices.

In any case, the decree lacks a provision similar to that in the consumer code, which is already at the center of a wide debate, regarding the link between the interventions of the AGCM and those of the civil judge. On the other hand, the letter of Art. 10, last para., of the legislative decree, at the conclusion of the articulated rules on sanctions imposed by the ICQRF, provides that «Legal actions for compensation for damage deriving from violations of the precepts sanctioned by this article, even if promoted by the subjects referred to in article 9, paragraph 2». In the absence of any indication, albeit indirect, from the text of the decree, it is legitimate to believe that, in the case of the improper practices dealt with by the legislative decree, the operator who considers himself damaged, supplier or buyer, can resort to civil judge without the prior intervention of the ICQRF, although it is still more and more likely that a judicial initiative by the operator victim of such practices will follow the intervention of the ICQRF.

Among the private remedies available to the injured party, first of all is the one aimed at having the declaration of nullity, which is expressly referred to in Art. 1, para. 4, of the decree with regard only to contractual agreements or clauses that are in contrast with Articles 3, 4, 5 and 7 of the decree. In the light of the indications emerging from the decree, in our opinion, the nullity in consideration is a «protective nullity» («nullità di

protezione»), as such to be invoked and declared only by the same subject, supplier or buyer, harmed by the unfair practices referred to in Articles. 3, 4, 5 and 7 (or by the court itself *ex officio*, provided that it corresponds to the interest of the weak party).

In these cases, however, in consideration of the preservation of the validity of the contract and the various content of the clauses affected by the nullity, other remedies can be asked for before the civil judge: restitution of what has already been unjustifiably done or compensation for damages.

In this last regard, it is appropriate to consider more closely the Art. 10, para. 14. On the one hand, it explicitly mentions the more general compensation protection, on the other it also provides for the possibility of judicial initiatives by collective subjects, albeit with a provision of unclear meaning. At the conclusion of the punctual list of penalties provided for cases of violation of the discipline on unfair practices with regard both to single and reiterated violation, Art. 10, para. 14, provides that «Actions in court for compensation for damage resulting from violations of the precepts sanctioned by this article are reserved, even if promoted by the subjects referred to in Art. 9, para. 2. The aforementioned subjects are also entitled to act, to protect the collective interests represented, requesting the injunction to conduct in violation of the precepts sanctioned by this article pursuant to articles 840-bis and following of the code of civil procedure».

As regards the first hypothesis, it should be remembered that the compensation due primarily to the supplier for the unfair practices suffered, as the direct protagonist of a commercial relationship with a buyer of agricultural products, already in itself includes, according to the definition of supplier referred to in Art. 2, lett. i) of the decree, also the case in which the supplier is a collective entity, in particular also a producer organization, an association of such organizations or a cooperative company.

Therefore, it is correct to believe that Art. 10, para. 14 of the decree is to be interpreted so as to legitimize the collective entities referred to in Art. 9, para. 2, as subjects who are only indirectly damaged by the violation of the rules on unfair practices occurred in relations between suppliers and buyers with respect to which they are third parties. Moreover, Art. 9, para. 2, does not only refer to organizations of suppliers or buyers of which the economic operator directly involved in a commercial relationship in the agri-food chain and direct victim of improper practices is a partner: indeed the rule also includes other different collective bodies as long as, for statutory and mission purposes, have a qualified interest in respecting loyalty in commercial relations along the agri-food chain, are independent and non-profit.



In this case, the compensation, provided that damage is proven, refers to the collective interest of these entities, as such different and distinct from the damage suffered by the supplier or buyer in the single specific commercial relationship.

Moreover, the protection of the collective interests of the subjects indicated above is explicitly referred to in the second part of the same para. 14 of Art. 10. In this, however, express reference is made to articles 840-bis et seq. of the code of civil procedure, concerning class actions, and to the rules of the code of procedure allowing these collective subjects to apply for an injunction. On closer inspection, this remedy goes far beyond the scope of the individual commercial relationship as it is aimed at affecting the overall illegal activity carried out by the economic operator in the field of unfair practices. In this respect, Art. 10, para. 14, of the decree, although it recalls the discipline provided for in Art. 840-bis et seq., goes beyond the precise operational sphere of class actions, as introduced in these articles in the code of civil procedure.

#### *9. The regulation of contracts for the sale of agricultural and agri-food products: the Italian regulation and the rules of the CAP*

To complete the survey, it is appropriate, finally, to focus on the rules contained in the decree intended to regulate, more generally, the contracts for the sale of agricultural and agri-food products already referred to above. The discipline still refers only to business-to-business relationships, therefore it does not apply to sale contracts with final consumers and to the products conferred by agricultural producers to cooperatives or to producer organizations of which they are shareholders (in conformity with Legislative Decree no. 102 of 2005).

The legislative decree, with more analytical provisions than those contained in Art. 62 of law no. 27 of 2012, opportunely pointed out that in the concrete reality it is possible to be faced with a pure and simple contract for the sale of agricultural and agri-food products as well as in the face of more complex hypotheses. The latter include the stipulation of a framework agreement, also in terms of a regulatory agreement between private entities, to which a plurality of subsequent contractual relationships are connected in implementation, according to a model already present in the supply chain and commercial distribution relationships.

In any case, the contract is intended as a supply contract, that is, it does not provide for the simultaneous delivery of the product and payment of the price. In this regard, Art. 3, para. 2 of the decree requires that it must be stipulated in writing. This provision goes beyond the provisions of Art. 168 of reg. n. 1308 of 2013 according to which, for the purpose of concluding the contract, it is up to the first buyer to make an offer in writing. Without prejudice to the elements related to the content of the contract laid down in Art. 168 of reg. 1308/2013 in the event that the suppliers are primary agricultural producers, according to Art. 3, para. 2 of the decree, the text of the supply contract must contain an indication of the duration of the contractual relationship, the quantities and characteristics of the product sold, the relative methods of delivery and payment of the price which can be fixed or in any case determinable on the basis of criteria established in the contractual text.

This last rule is fundamental for the purposes of transparency and fairness of the agreement: the supplier, with particular regard to the agricultural producer, must be enabled to know, in advance, at the time of signing the contract, the price he will receive, in order to remain protected from any fluctuations that could occur between the stipulation and the time of harvest and delivery of its production to the buyer.

In line with a more restrictive interpretation adopted by the AGCM in its resolutions regarding Art. 62 of law no. 27 of 2012, Art. 3, para. 3, of the decree abandoned the very questionable solution adopted by the administrative regulation that had implemented Art. 62. It has been appropriately specified that compliance with the written form can also be fulfilled with some equivalent forms, but only on a fundamental condition: that such equivalent forms have been preceded by the stipulation of a framework agreement between buyer and supplier already containing all the elements mentioned above and provided for in para. 2. As equivalent forms, the paragraph in question refers to the transport or delivery documents, invoices, purchase orders by which the buyer commissions the delivery of products.

With this clarification, the provision of the decree has in fact restricted the possibility for the contracting parties to resort to forms equivalent to the written document with respect to the stipulation in writing of the supply contract including the precise clauses referred to above, to be always concluded in advance of the time of execution of the relationship. On the other hand, according to Art. 3 of the decree, not only is the written form, expressly provided only for the supply contract, mandatory also for the

framework agreement, but must incorporate the most qualifying clauses of the agreement, starting first from the price (in conformity with the trend which is called by the Italian doctrine as «neo-formalismo negoziale»).

With regard to the duration of the supply agreement, Art. 3, par. 4, establishes a duration of not less than 12 months, with the consequence that, in the event of non-compliance by the policyholders, the legal duration replaces the shorter term established by agreement.

The only permitted exception to the minimum duration of 12 months and which must always be motivated «also by reason of the seasonality of the products being sold» is that the shorter duration is always agreed between the parties and results from a contract stipulated with the assistance of the respective most representative professional organizations in at least five chambers of commerce or in the National Council for Economy and Labor.

This regulatory solution, in some ways singular, clearly highlights, albeit in a timid form, the more general drive of professional organizations (including, above all, agricultural ones) to take on a leading role also in the relations within the agri-food supply chains, on the basis of what happened in the past only for the same agricultural trade unions in agricultural relations, on the basis of Art. 45 of the law n. 203 of 1982.

This conclusion, on closer inspection, is also the basis of another singular, but highly questionable, provision contained in the decree, in the wake, moreover, of what has already been established in Art. 7 of the enabling law.

In order to examine this hypothesis, it is good to return to the framework agreements already referred to above. In fact, with regard to sales contracts, it was previously noted that in supply chain relationships it is frequent the case in which individual sales relationships of agricultural products, albeit of duration, are preceded by the stipulation between the same private contractors of a framework agreement or basic contract which, as its very definition indicates, is the framework, in terms of a regulatory contract, for the subsequent implementation contracts of the entire broader negotiating program agreed between the parties. Moreover, the agreement between private individuals concluded at the purchasing center level referred to in Art. 2 of the decree, must comply with the specification contained in the last para, of Art. 3 according to which «in the framework contracts concluded with the purchasing centers, the names of the associates who have conferred the mandate must be indicated in an attachment».

Art. 2 of the legislative decree, in referring to the case just mentioned, while using interchangeable terminology – framework contract, framework

agreement or basic contract –, very appropriately, specified that it should not be confused with the notion of framework contract referred to in Art. 1, para. 1, lett. f), of the legislative decree 27 May 2005 n. 102. This rule defines in terms of framework contracts the collective inter-professional agreements stipulated between «organizations of agricultural producers» and «organizations of processing, distribution and marketing companies» and concerning the production, processing, marketing, distribution of products, as well as the general criteria and conditions that the parties undertake to respect.

Art. 3, para. 5, of the legislative decree on unfair practices, in contrast with the provisions of the agreements referred to in Legislative Decree no. 102 of 2005 on the basis of the European discipline on inter-branch agreements, provides, conversely, the possibility that the most representative professional organizations at national level represented in at least five chambers of commerce or in the National Resource Council, without prejudice to compliance of articles 4 and 5 of the decree on unfair practices, stipulate «framework agreements» concerning the supply of agricultural and food products, with the consequent identification of the relative contractual clauses, «including those relating to prices».

The envisaged possibility of fixing the price in such agreements appears to be in contrast with the current national and European competition rules. It is the result of lobbying pressures that the national legislator has consciously suffered rather than the manifestation of a conscious untimely as well as careless choice. In fact, Art. 1, para. 1, lett. f), of the legislative decree n. 102 of 2005, in line with the European regulations on agricultural competition, now present in reg. 1308 of 2013 and also intended for collective agreements within the trade, has explicitly specified that this framework contract, although it may contain a standard contract to be made available to individual economic operators regarding the sale of products, cannot and must not set prices.

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*The regulation of contractual relationships in the agri-food chain in Poland*

SUMMARY: 1. Structure of the Polish agri-food market – 2. The Act on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products and its precedent – 2.1. Relationship to other laws – 2.2. The subjective scope of application of the Act – 2.3. «Contractual advantage» – 2.4. Statutory list of unfair practices – 2.5. The general clause – 3. Administrative-law measures: 'soft actions' and contractual advantage proceedings – 3.1. Powers of inspection – 3.2. Possible outcomes of proceedings – 3.3. Administrative measures applied under the Former Contractual Advantage Act: what has been the practice so far? – 4. Civil law protection against the abuse of contractual advantage: introduction – 5. Types of contracts between participants in the agricultural and food supply chain – 6. The protection of the weaker party in business-to-business relationships – 6.1. Control of standard business terms in B2B transactions – 6.2. Other civil law measures to protect the weaker party in B2B relationships – 7. The Act on Combating Unfair Competition – 8. The Late Payments Act – 9. Assessment of the implementation of Directive 2019/633 into Polish law – 9.1. The need to address matters not covered by the Directive in the national law – 9.2. Conclusions on the implementation of Directive 2019/633 into Polish law – 9.3. Critical remarks with regard to civil remedies.

1. *Structure of the Polish agri-food market*

The market for agricultural and food products can be broken down to several separate but interconnected segments, such as the agricultural production, the food industry processing agricultural products and the (wholesale and retail) distribution of agri-food products.

The most characteristic feature of modern Polish agriculture is its very considerable fragmentation. Polish farming is based mainly on individual family farms, many of which have little economic potential and low

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productivity. The spatial polarisation of the structure of farms has been very visible for many years. In the south-east and in the central part of Poland, small farms (up to 20 ha) and very small farms definitely dominate. In the western and northern parts, large farms with an area exceeding 50 hectares are much more common. The latter, unlike the former, are capable of developing agricultural production and improving their competitiveness<sup>1</sup>. Nowadays, changes in the structure of farms have been observed showing an increase in the number of larger agricultural holdings. According to the official statistics for 2020, more than half of all agricultural holdings (51,2%) are the smallest farms of up to 5 hectares of agricultural land. The percentage of the largest farms (50 hectares and more) has increased in recent years, but it is still relatively very low (only 3%). The average area of agricultural land employed by a farm amounted to 11.1 hectares in 2020<sup>2</sup>. It has been slowly, but systematically, increasing for the last years.

Characteristic for Poland is the relatively high share of people involved in the agriculture sector, which is a consequence of slowly occurring structural changes and demographic conditions. It is estimated that in 2018 Polish agricultural sector employed nearly 15% of all persons working in the national economy, who had 4,4% of the gross fixed assets at their disposal (excluding residential buildings)<sup>3</sup>. It is one of the highest employment rates in agriculture sector in the European Union.

In terms of products, the Polish agriculture is dominated by animal farming (mainly slaughter livestock, milk and eggs) while arable farming is primarily focused on cereals, potatoes, industrial plants, vegetables and fruit. Agricultural production is exposed to many risks that affect profitability (*e.g.*, low prices of agricultural products, high prices of inputs, the impact of weather conditions and diseases). What determines market production most in terms of volume and market changes is the purchase of agricultural products.

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<sup>1</sup> See report of the Foundation for the Development of Polish Agriculture entitled “*Rural Poland 2020. The Report on the State of Rural Areas*”, J. Wilkin, A. Hałasiewicz (eds), Warszawa 2020, <https://sir.cdr.gov.pl/wp-content/uploads/2020/06/Raport-o-stanie-wsi-Polska-Wies-2020.pdf>, pp. 78-82 [access: 19 April 2023].

<sup>2</sup> *Agriculture in 2020. Statistical Analyses of the Central Statistical Office (GUS)* (“*Rolnictwo w 2020 r. Analizy statystyczne GUS*”), Warsaw 2021, pp. 15, 24, <https://stat.gov.pl/obszary-tematyczne/rolnictwo-lesnictwo/rolnictwo/rolnictwo-w-2020-roku>, 3,17.html [access: 19 April 2023].

<sup>3</sup> Data based on the report of the Foundation for the Development of Polish Agriculture entitled “*Rural Poland 2020. The Report on the State of Rural Areas*”, *cit.*, pp. 76-78, <https://www.fdpa.org.pl/polska-wies-raport-o-stanie-wsi-v1>, pp. 78-82 [access: 19 April 2023]. As it was stressed in this publication, at the same time in Germany and France this indicator was respectively 1,5% and 2,8%.

With regard to purchase of agricultural products, numerous malpractices have been discovered in recent years – particularly visible in those specific production sectors which involve perishable products. It is pointed out that unfair practices take place there, such as the imposition of prices by collection centres where the price depends on the future market situation (which is impossible for the supplier to calculate before delivery), the use of standard contracts which provide for long payment periods that endanger the financial situation of suppliers, or late payments. Other aspects to be highlighted are the inadequately low volume of agricultural production covered by contracts of pre-contracted deliveries<sup>4</sup>, the low legal awareness on the part of producers and the fact that they do not use the opportunities to form producer groups to cover processing activities<sup>5</sup>.

On the other hand, the food production and processing segment in Poland is very concentrated. It is comprised of, among others, entrepreneurs engaged in animal product processing (*e.g.*, meat or dairy industry), plant processing (*e.g.*, the cereal and pasta industry), secondary processing (*e.g.*, baking and confectionery industry) and alcohol production. The concentration and consolidation processes in the food industry at the beginning of the 21st century resulted from the growing importance of Polish industrial plants which was stimulated by their access to the common European market. In most branches of the food industry, groups of large and medium-sized enterprises emerged which have developed their product range whilst improving the condition of and upgrading their plant, equipment and infrastructure<sup>6</sup>. The market shares of foreign food corporations also increased significantly. The high level of concentration among the producers had an effect on their bargaining position in relations with smaller wholesalers or retailers. The prices offered to such smaller operators are often higher than those negotiated with larger customers. This situation leads to the strengthening of large retail chains at the expense of small local stores operating in the food retail sector.

Wholesale trade in Poland is still fragmented, although much less than

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<sup>4</sup> For contracts of pre-contracted delivery of agricultural produce (*umowa kontraktacji*) see below, para. 5.

<sup>5</sup> *Taking Contractual Advantage. Report on the Activities of the President of UOKiK on the Fruit Market* (“Wykorzystywanie przewagi kontraktowej. Raport z działań Prezesa UOKiK na rynku owoców”), pp. 33-39, [https://www.uokik.gov.pl/aktualnosc.php?news\\_id=15026](https://www.uokik.gov.pl/aktualnosc.php?news_id=15026) [access: 19 April 2023].

<sup>6</sup> J. KRACIUK, *Concentration Processes in the Food Industry* (“Procesy koncentracji w przemyśle spożywczym”), Research Bulletin of the Warsaw University of Life Sciences (Zeszyty Naukowe Szkoły Głównej Gospodarstwa Wiejskiego w Warszawie) 2008, v. 5, p. 54.



in the 1990s. The partial consolidation of this market segment was forced by the situation in which larger operators were taking over independent local stores supplied by traditional wholesalers. What was more, with the growing expansion of big retailers, various large chains opened their own logistics centres and were gradually eliminating wholesalers from the supply chain. Currently, wholesalers in Poland have strongly engaged in the process of developing franchise stores, trying to counteract the negative effects of the shrinking number of small local shops. It is believed that, in the current reality, many smaller wholesalers do not have the sufficient purchasing power to secure competitive terms when trading with global food producers<sup>7</sup>.

On the other hand, retail trade in Poland is currently dominated by large (mostly foreign) chains. Discount stores, which have developed dynamically in recent years, have the strongest position on the market, followed by supermarkets and hypermarkets<sup>8</sup>. In the large retail segment, there have also been many consolidation processes in recent years, involving foreign entities that decided to withdraw from the Polish market, as well as Polish entrepreneurs who were unable to withstand the growing competition. It is estimated that between 2000 and 2014, 46 medium-sized and large retail chains were taken over<sup>9</sup>. The growing consolidation of retail trade and the expansion of retail chains is gradually making the Polish economy similar to the more developed economies of the European Union.

As the range of large retail in Poland has been expanding in recent years, independent small stores, which continue to be the main distribution channel for food in Poland<sup>10</sup>, have been gradually losing their market share. That segment was developing dynamically in the early 1990s when it was

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<sup>7</sup> M. IZDEBSKI, R. MOMOT, *Food Production Market in Poland. Report of the Republican Foundation* ("Rynek Produkcji Spożywczej w Polsce. Raport Fundacji Republikańskiej"), Warsaw 2016, p. 14, <https://fundacjarepublikanska.org/wp-content/uploads/2016/10/Rynek-produkcji-spo%C5%BCywczej-raport-2016-10-27.pdf> [access: 19 April 2023].

<sup>8</sup> According to estimates for 2018, there were 4,007 discount stores, 3,281 supermarkets and 341 hypermarkets in Poland. Only the latter did not show an upward trend at that time. Data based on: *Impact Assessment of Sunday Trade Restrictions. Report of the Ministry of Entrepreneurship and Technology* ("Ocena wpływu ograniczenia handlu w niedziele. Raport Ministerstwa Przedsiębiorczości i Technologii"), p. 9, <https://www.gov.pl/attachment/66da2b75-6e32-4012-9470-c16c14f45329> [access: 19 April 2023].

<sup>9</sup> R. MOMOT, *Rynek detalicznego handlu spożywczego w Polsce* ("Food Retail Market in Poland"), Warsaw 2016, pp. 21-22, [http://www.pih.org.pl/images/dokumenty/FR\\_Raport-Rynek-detalicznego-handlu-spyowczego.pdf](http://www.pih.org.pl/images/dokumenty/FR_Raport-Rynek-detalicznego-handlu-spyowczego.pdf) [access: 19 April 2023].

<sup>10</sup> In 2018 there were 98,748 «small-format» stores in Poland. For comparison, the figure was 102,031 in 2017, 105,642 in 2016 and 108,798 in 2015. For details see *Impact assessment*, cit., p. 9.

taking over the market share of collapsing state-owned enterprises. With the emergence of foreign competition, these stores began to continuously lose their market share, at the advantage of larger retail chains. This process is still ongoing and involves the annual closure of thousands of small shops. There are opinions that, with the current market situation, independent retailers are doomed to be slowly marginalised and their market shares will decline consistently<sup>11</sup>. This is also influenced by demographic factors: depopulation of rural areas and greater labour mobility of the working population. In the current economic climate, the main defence of these operators against the increasing market competition is to join forces under various types of franchise agreements to increase their negotiating power in commercial relations with economically stronger food producers<sup>12</sup>.

As it stems from the above observations, the agri-food market in Poland (in all its segments) is currently vulnerable to the risks associated with the asymmetries of trade - caused by excessive concentration on the one hand and excessive fragmentation on the other. The result of this situation is a loss of equilibrium in both the production and the distribution of agricultural and food products. This may lead to stronger concentration, elimination of smaller players from the market and, consequently, to a reduction in competition.

## *2. The Act on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products and its precedent*

In the Polish legal system, the protection of entrepreneurs involved in production and trade of agricultural and food products is ensured by two cross-sectoral acts: the Competition and Consumer Protection Act of 16 February 2007<sup>13</sup> and the Act of 16 April 1993 on Combating Unfair Competition<sup>14</sup>. The first of these statutes contains public-law instruments

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<sup>11</sup> According to estimates, the market share of these shops was 51% in 2008, while in 2015 it was only 37%. See *Study by the Polish Chamber of Commerce: Polish Trade Market* ("Analiza Polskiej Izby Handlowej: Polski rynek handlu"), p. 3, <http://www.pih.org.pl/index.php/9-projects/1591-reports-o-trade> [access: 19 April 2023].

<sup>12</sup> R. MOMOT, *Food Retail Market*, cit., pp. 12-13.

<sup>13</sup> Consolidated text in the Journal of Laws of 2021, item 275, as amended, hereinafter referred to as «CCPA».

<sup>14</sup> Consolidated text in the Journal of Laws of 2022, item 1233, hereinafter referred to as «UCA».

aimed at preventing restrictive practices. The latter provides for private-law protection of entrepreneurs against acts of unfair competition. This Act gives entrepreneurs the right to pursue the civil remedies specified therein, including the right to claim damages and to request the restitution of benefits wrongly acquired in connection with an act of unfair competition (Art. 18.1.4-5 UCA). In cases concerning certain acts of unfair competition, national or regional organisations whose statutory objective is to protect the interests of entrepreneurs also have the standing to bring proceedings to pursue claims listed in the Act (Art. 19.1.2 UCA).

Furthermore, contracts concluded for sale of agricultural products (processed and unprocessed) are, generally, governed by the Civil Code<sup>15</sup> and can be reviewed under the general provisions on review of contracts. The provisions of other statutes also apply to such contracts, including the Act of 8 March 2013 on Counteracting Excessive Delays in Commercial Transactions<sup>16</sup>, which implements Directive 2011/7/EU on combating late payment in commercial transactions.

The need to introduce additional solutions in the Polish legal framework to prevent the abuse of contractual advantage in trade in agri-food products has increasingly been highlighted in recent years. This resulted in the adoption of the Act of 15 December 2016 on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products<sup>17</sup>, which entered into force on 12 July 2017 and has been repealed and replaced by the new Act of 17 November 2021 on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products<sup>18</sup>, which came into force on 23 December 2021.

In the surrounding debate doubts have been raised as to whether the trade in agri-food products should really be distinguished from the other sectors of the national economy (such as the construction, automotive, fuel or pharmaceutical industries) in which there may also be a need to counteract the unfair use of contractual advantage. The Polish legislature finally decided that the introduction of such special provisions was needed

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<sup>15</sup> The Act of 23 April 1964, consolidated text in the Journal of Laws of 2022, item 1360, as amended, hereinafter referred to as «CC».

<sup>16</sup> Consolidated text in Journal of Laws of 2023, item 711, as amended, hereinafter referred to as the «Late Payments Act» or «LPA». See below, para. 8.

<sup>17</sup> Consolidated text in Journal of Laws of 2020, item 1213, hereinafter referred to as the «Former Act on Unfair Use of Contractual Advantage», the «Former Contractual Advantage Act» or «FCAA».

<sup>18</sup> Consolidated text in Journal of Laws of 2023, item 351, as amended, hereinafter referred to as «CAA».

in view of the specificity of the agri-food industry, whose products are short shelf life. The legislator emphasised the specific structure of such markets which are characterised by the presence of economically strong distribution and processing operators and weaker agricultural producers. According to the legislators, the elimination of unfair trading practices from the supply chain is directly associated with the country's national food security and is, as such, part of the national security strategy; therefore, there is a need to counteract the pressure on food suppliers which may cause them to scale down or discontinue their production, or to use inferior quality products or cheaper technological solutions in the production process<sup>19</sup>.

The first attempt at implementing a special statute to prevent abuse on the market of agri-food products was the Sejm<sup>20</sup> deputies' Bill of 6 May 2015 on Combating Unfair Market Practices used by Entrepreneurs Trading in Food or Agricultural Products against the Suppliers of such Products<sup>21</sup>. The Bill has met with criticism<sup>22</sup>. After it had been submitted to the Sejm, it was not dealt with until the end of the Sejm's 7th legislative period.

During the Sejm's 8th legislative period, a new bill was submitted containing legislative solutions which were, in many respects, different from those in the previous Bill. The new Bill was passed into law as the Act of 15 December 2016 on Counteracting Unfair Use of Contractual Advantage

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<sup>19</sup> See: *Explanatory Memorandum to the Governmental Bill on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* ("Uzasadnienie rządowego projektu ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi"), Sejm Paper No. 790, pp. 1-3, Sejm of the 8th legislative period, available at <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=790> [access: 19 April 2023].

<sup>20</sup> The Sejm is the lower chamber of the Polish Parliament.

<sup>21</sup> See the *Private Members' Bill of 6 May 2015 on Combating Unfair Market Practices used by Entrepreneurs Trading in Food or Agricultural Products against the Suppliers of such Products* ("Poselski projekt ustawy o zwalczaniu nieuczciwych praktyk rynkowych przedsiębiorców zajmujących się obrotem produktami spożywczymi lub rolnymi wobec dostawców tych produktów"), Sejm of the Republic of Poland of the 7th legislative period, Sejm Paper No. 3604, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3604> [access: 19 April 2023].

<sup>22</sup> J. AFFRE, P. SKOŁUBOWICZ, *Analiza problemów związanych z regulacją relacji pomiędzy dostawcami produktów spożywczych i rolnych a sieciami handlowymi na podstawie rozwiązań zaproponowanych w projekcie ustawy PSL o nieuczciwych praktykach rynkowych*, IKAR 2015, v. 8; P. SOBOLEWSKI, *Opinia prawna i merytoryczna na temat poselskiego projektu ustawy o zwalczaniu nieuczciwych praktyk rynkowych przedsiębiorców zajmujących się obrotem produktami spożywczymi lub rolnymi wobec dostawców tych produktów (druk sejmowy nr 3604)*, Biuro Analiz Sejmowych, <http://orka.sejm.gov.pl/rexdomk7.nsf/Opdodr?OpenPage&nr=3604> [access: 19 April 2023].

in Trade in Agricultural and Food Products (FCAA). This Act entered into force on 12 July 2017 and was valid until 22 December 2021. It had been amended several times. The most significant changes were introduced by the Act of 4 October 2018 amending the Act on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products<sup>23</sup>.

The provisions of the Former Contractual Advantage Act referred only to business-to-business (B2B) relationships. According to the prevailing interpretation, they covered not only the cases where a contract had been concluded, but they could also apply to the pre-contractual relations, and, in particular, to the circumstances surrounding the negotiation of the contractual terms<sup>24</sup>. Unlike the Private Members' Bill of 6 May 2015, this Act was applicable both to suppliers and buyers of agricultural or food products.

The essence of the solution provided for in the FCAA lied in the introduction of a general prohibition of unfair use of contractual advantage in trade in agricultural and food products, both in the buyer towards supplier and supplier towards buyer relations (Art. 6 FCAA)<sup>25</sup>.

According to the definition which was included in the original wording

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<sup>23</sup> Journal of Laws of 2018, item 2203, hereinafter referred to as: «AFCAA».

<sup>24</sup> K. KOHUTEK, *Commentary on the Act of 15 December 2016 on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* ("Komentarz do ustawy z dnia 15 grudnia 2016 r. o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi"), LEX 2017, cit., Art. 4.

<sup>25</sup> In the original wording of FCAA, in order for its provisions to be applicable, two conditions relating to the volume of turnover of the parties to the contract for the purchase of agri-food products needed to be fulfilled. On the one hand, the Act required that the total amount of sales/purchases between the parties exceeded PLN 50,000 in the year in which proceedings were initiated in the matter of unfair contractual advantage practices or in any of the 2 years preceding the year in which the proceedings were initiated (Art. 2.1 FCAA). On the other hand, the Act required that the turnover of the purchaser or the supplier who engaged in the practice of unfairly using its contractual advantage in the year preceding the year in which the proceedings were initiated exceeded PLN 100,000,000 (Art. 2.2 FCAA). As a result of the amendment made by Art. 1.1 AFCAA, both of the above thresholds limiting the application of the Contractual Advantage Act were removed from Polish law. The legislators decided that these thresholds were too high and excessively narrowed down the range of situations in which the public authority could intervene to counteract the abuse of contractual advantage. See: *Explanatory Memorandum to the Governmental Bill on Amendments to the Act on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* ("Uzasadnienie rządowego projektu ustawy o zmianie ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi"), Sejm Paper No. 2791, p. 1, Sejm of the 8th legislative period, <https://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=790> [access: 19 April 2023].

of Art. 7.1 FCAA, the contractual advantage was a situation in which: 1) there were no sufficient and actual opportunities for the supplier to sell agricultural or food products to other buyers and there was a significant imbalance in the economic strength to the advantage of the buyer, or 2) there were no sufficient and actual opportunities for the buyer to purchase agricultural or food products from other suppliers and there was a significant imbalance in the economic power to the advantage of the supplier.

In its original wording, the definition of contractual advantage was based on two conditions which could be described as the condition of «market closure» and the condition of economic disparity (imbalance). The relevance of the former can be illustrated by one of the supervisory decisions of the President of UOKiK<sup>26</sup> in a matter concerning the vegetable market<sup>27</sup>. In this case, carrot root suppliers were found to have significant difficulties in changing their buyers: economically stronger buyers imposed certain crop specifications on suppliers (*e.g.*, requiring that only seeds from the supplier may be used, imposing crop varieties, plant protection products to be used, *etc.*). The suppliers were strongly tied with their existing buyer due to the potential costs of changing their buyer.

Although the condition of «market closure» may have seemed justified, its practical application posed many interpretation problems. Legal scholars pointed out that it was advisable to abandon it<sup>28</sup>. Under Art. 1.3 AFCAA, the legislator simplified the definition of contractual advantage by removing this condition and leaving in art. 7.1 FCAA only the requirement of economic disparity. It is worth pointing out that the provisions of FCAA did not define the criteria according to which economic disparity could be found to exist between two entrepreneurs. Legal scholars assumed that such an assessment was always needed on a case-by-case basis<sup>29</sup>. In the practice of

<sup>26</sup> The President of the Office of Competition and Consumer Protection (hereinafter referred to as the «President of UOKiK» or «UOKiK President») is the Polish central government body for competition and consumer protection.

<sup>27</sup> Decision of the President of UOKiK of 5 March 2018, ref.: RBG-440-01/18/PS, [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf) [access: 19 April 2023].

<sup>28</sup> See A. STASZEK, M. MROCZEK, *Conditions for Establishing Contractual Advantage in the Practice of Unfair Use of Contractual Advantage* (“Przesłanki stwierdzenia przewagi kontraktowej w praktyce nieuczciwego wykorzystania przewagi kontraktowej”), *IKAR* 2017, v. 8, p. 58.

<sup>29</sup> In this respect, various criteria could be taken into account, including the turnover, the assets held, the number of employees. See M. Namysłowska, A. Piszcz (eds), *The Act on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products. Commentary* (“Ustawa o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi. Komentarz”), Warsaw 2017, *Legalis*, Art. 7, marginal no. 6.



the President of UOKiK to date, the criterion of comparing the turnover of each of the parties has been prevailing<sup>30</sup>.

Another crucial provision of the Former Contractual Advantage Act was its Art. 7.2. where the unfair use of contractual advantage was defined. According to this provision, such situation might have occurred when the conduct of one party was contrary to principles of morality and infringed (or threatened to infringe) significant interests of the other party. The provision contained a general clause referring to the system of non-legal norms and values that made up the concept of commercial integrity in the broad sense. Such clause needed to be interpreted and applied by the competent authority on a case-by-case basis.

In Art. 7.3. FCAA, the Polish legislator provided several examples of unfair use of contractual advantage, such as: a) terminating or threatening to terminate a contract without a good reason; b) giving only one of the parties the right to terminate or rescind the contract; c) making a conclusion or continuation of a contract conditional on the acceptance or provision by one of the parties of another performance where there is no material or causal link between such performance and the subject-matter of the contract; d) extending, without a good reason, payment periods for agri-food products which have been delivered, in particular in breach of the provisions of LPA.

It is important to stress that the list provided for in Art. 7.3 FCAA was not exhaustive. Here, the legislator also decided not to apply the solution provided for in the Bill of 6 May 2015 which included an exhaustive list of examples of unfair use of contractual advantage. The argument used against this solution was that it could fail to take account of the dynamics of future market developments and the emergence of new, and negatively perceived, trading practices<sup>31</sup>. Therefore, the provisions of FCAA could be applicable also to other unfair market practices which met the general

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<sup>30</sup> In one of the decisions, the President of UOKiK pointed out that the criteria laid down in Art. 1(2) of Directive 2019/633 can be used in assessing the negotiating power of participants in the food supply chain (although this Directive had not yet been implemented in the Polish legal system at that time). See decision of the President of UOKiK of 1 October 2019, ref.: RBG.440.3.2018.PS, [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf) [access: 19 April 2023].

<sup>31</sup> K MANTEUFFEL, M. PIASKOWSKI, *Relationship between the general clause and the example list of unfair practices in the act on counteracting unfair use of contractual advantage in trade in agricultural and food products* ("Relacja klauzuli generalnej do przykładowego katalogu nieuczciwych praktyk w ustawie o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi"), *IKAR* 2017, v. 1, p. 41.



conditions of Art. 7.2<sup>32</sup>. On the other hand, the mere fact that a clause belonged to the list of unfair practices under Art. 7.3 FCAA did not automatically trigger intervention by the authority responsible under the Act. Indeed also the conditions of Art. 7.2 FCAA (being the practice contrary to principles of morality, infringing or threatening to infringe the interests of the other party) had to be met. Accordingly, situations were possible in which a practice listed in Art. 7.3 FCAA was not assessed to be an unfair use of contractual advantage as it did not meet all the conditions of Art. 7.2 FCAA<sup>33</sup>.

As of 23 December 2021, the new Act of 17 November 2021 on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products (CAA) is in force. It repealed the previously applicable Act of 15 December 2016 (FCAA). The enactment of the Act of 17 November 2021 gave implementation to EU Directive 2019/633 (albeit belatedly, as the time limit for the transposition of the Directive into the legal systems of the Member States was the 1<sup>st</sup> November 2021). Because Directive 2019/633 introduced some new solutions going beyond the scope of the FCAA, the legislator considered it necessary to replace the latter with a new legal act, which has the same title<sup>34</sup>. This does not change the fact that certain solutions adopted in the Act of 15 December 2016 have been retained in the Polish legal system.

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<sup>32</sup> According to the doctrine, other examples could be: applying vague or ambiguous contractual terms *ex tunc*; passing on excessive risks or unforeseeable costs to the weaker counterparty; using confidential information; demanding payment for goods or services which are of no value to the other party; exerting downward pressure on prices; charging «slotting fees»; applying territorial supply constraints, *etc.* See K. KOHUTEK, *Commentary*, 2017, cit., Art. 8. See also below, para. 3.3, for examples of unfair practices used by entrepreneurs inspected by the President of UOKiK.

<sup>33</sup> M. SALITRA, *Analysis of Selected Rules Introduced by the Act on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products - What are the Changes in Polish Law?* (“*Analiza wybranych regulacji wprowadzonych ustawą o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi - jakie zmiany w polskim prawie?*”), *IKAR* 2017, v. 1, p. 136.

<sup>34</sup> See: *Explanatory Memorandum to the Governmental Bill on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* (“*Uzasadnienie rządowego projektu ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi*”), Sejm Paper No. 1502, pp. 28-30, Sejm of the 9th legislative period, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1502> [access: 25 April 2022].

## 2.1. *Relationship to other laws*

Although the provisions of the Contractual Advantage Act have formally been excluded from the framework of the Competition and Consumer Protection Act and the Act on Combating Unfair Competition, this does not preclude the application of protection measures available under these statutes. As expressly provided for in Art. 4 CAA, the protection against unfair use of contractual advantage does not preclude the protection arising from other laws. Therefore, according to the prevailing view, the provisions on counteracting unfair use of contractual advantage should be applied in parallel with other laws of a cross-sectoral nature. For example, certain practices which involve a restriction to market access (*e.g.*, the so-called «slotting fees») may be classified under Polish law as both an unfair use of contractual advantage (Art. 7 CAA) and an act of unfair competition (Art. 15.1.4 UCA)<sup>35</sup>. This means that such a practice may, generally, lead to the initiation of the separate procedures provided for in each of the aforementioned Acts. Another reason why there is no collisions here is that these procedures serve different purposes: while the provisions of the Act on Combating Unfair Competition provide for private-law claims, the Contractual Advantage Act introduces elements of public-law protection into the legal framework. Other laws referred to in Art. 4 CAA that can be applied to protect the weaker party also in the trade in agri-food products, are LPA and CCPA, which will be discussed below, in later sections of this report.

## 2.2. *The subjective scope of application of the Act*

The current Act on Counteracting Unfair Use of Contractual Advantage may be applied to protect both suppliers<sup>36</sup> and buyers of agricultural or food products<sup>37</sup>. Therefore the Act is in line with Art. 6 FCAA and goes

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<sup>35</sup> K. KOHUTEK, *Commentary*, 2017, cit., Art. 4.

<sup>36</sup> According to Art. 3.4 CAA, agricultural and food products shall be understood as products listed in Annex I to the Treaty on the Functioning of the European Union, as well as products not listed in that Annex, but processed for consumption with the use of products listed in that Annex.

<sup>37</sup> According to Art. 3.1 CAA, a supplier should be understood as an entrepreneur who produces or processes agricultural or food products or sells them to the buyer for consideration. On the other hand, the buyer should be understood as an entrepreneur or entity referred to in Art. 4 of the Act of 11 September 2019 - Public Procurement Act

beyond the scope of Directive 2019/633, which prohibits only unfair practices carried out by the buyer of agricultural and food products against its supplier<sup>38</sup>. As it was emphasised in the explanatory memorandum to the CAA, the fact that in the 4-year history of Polish regulation of contractual advantage on agri-food market there were not reported cases of unfair practices carried out by a supplier vis-à-vis a buyer, is not sufficient to rule out that also such a practice will occur in the future<sup>39</sup>.

The Act refers only to business-to-business (B2B) relationships, so it does not apply to those contractual relationships where one of the parties is a consumer. The protection of consumers against abuses similar to those listed in Art. 8 CAA is provided for in other Polish laws<sup>40</sup>.

Instead of including an autonomous definition of an entrepreneur in Art. 3.5 CAA, the legislator referred to the definitions provided in other existing legislation (and in particular to Art. 4.1 CCPA which, in turn, partly refers to Art. 4.1-2 of the Entrepreneur Law Act of 6 March 2018<sup>41</sup>). The legal definition of entrepreneur resulting from such complex regulation, is formulated very broadly with respect to relationships where contractual advantage is abused. It applies to the following entities: a) natural persons, legal persons, or organisational units not being legal persons in which a separate statute vests legal capacity, who carry out business activities (Art. 4.1 CCPA in conjunction with Art. 4.1 ELA); b) partners of civil-law partnerships within the scope of their business activities (Art. 4.1 CCPA in conjunction with Art. 4.2 ELA); c) natural persons, legal entities, as well as organisational units not being legal persons in which the statute vests legal capacity, that organise or provide public utility services which are not economic activities within the meaning of the provisions of the

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(consolidated text in the Journal of Laws of 2022, item 1710, as amended; hereinafter referred to as «Public Procurement Act»), who directly or indirectly purchases agricultural or food products from the supplier (Art. 3.3 CAA).

<sup>38</sup> This is in line with Directive 2019/633, as this directive only requires minimum harmonisation from the Member States.

<sup>39</sup> See: *Explanatory Memorandum to the Governmental Bill on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* (“Uzasadnienie rządowego projektu ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi”), pp. 12-13, Sejm Paper No. 1502, Sejm of the 9th legislative period, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1502> [access: 19 April 2023].

<sup>40</sup> In particular the Civil Code and the Act of 23 August 2007 on Counteracting Unfair Market Practices, consolidated text in the Journal of Laws of 2023, item 845.

<sup>41</sup> Consolidated text in Journal of Laws of 2023, item 221, as amended, hereinafter referred to as the «Entrepreneur Law Act» or «ELA».

Entrepreneur Law Act (Art. 4.1(a) CCPA); (d) natural persons practising a profession in their own name and on their own account, or who pursue economic activities in relation to that profession (Art. 4.1(b) CCPA); e) natural persons who exercise control over at least one undertaking, even if such persons do not carry out economic activities within the meaning of the provisions of the Entrepreneur Law Act, if these persons take further actions that are subject to the control of concentrations referred to in Art. 13 CCPA (Art. 4.1(c) CCPA); (f) associations of undertakings – this shall be understood as chambers, associations, and other organisations of undertakings, as well as their respective associations (Art. 4.1(d) CCPA).

### 2.3. «Contractual advantage»

Just like Art. 6 FCAA, Art. 5 CAA establishes a general prohibition of unfair market practices carried out using the buyer's contractual advantage over the supplier and vice versa. It should be noted that – as its name implicitly suggests – CAA does not sanction the existence of such an advantage in trade relationships between the seller and the buyer of an agri-food product; the law only prohibits the abuse of such a position where the «weaker» party is forced to accept provisions that are unfavourable to it. The definition of «contractual advantage» is crucial in this respect.

The Act of 17 November 2021, similar to the former Art. 7.1 FCAA, defines contractual advantage as the existence of a significant disproportion in the economic power of the buyer in relation to the supplier or supplier in relation to the buyer. However, a clear difference is the fact that, while based on the FCAA the interpretation of this criterion was left to the assessment of the doctrine and institutions applying the Act<sup>42</sup>, in the CAA the legislator itself provided for some legal presumptions of contractual advantage. They are based on the comparison of the economic size of the supplier and the buyer and refer to certain thresholds related to the turnover provided for in

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<sup>42</sup> However, it is worth pointing out that in decisions issued under the Former Contractual Advantage Act, the President of UOKiK used to refer to the criteria taken from Art. 1.2 of Directive 2019/633, as an auxiliary source.

Art. 1.2 of Directive 2019/633 (Art. 7.2<sup>43</sup> and Art. 7.3 CAA)<sup>44</sup> (although the Directive does not make use of a presumption in this respect).

The above-mentioned presumptions are rebuttable. On the other hand, it is also possible that a contractual advantage will occur in relations between two entities, even though they do not meet the criteria under Art. 7.2-7.3 CAA.

#### *2.4. Statutory list of unfair practices*

On the basis of the current Act on Counteracting Unfair Use of

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<sup>43</sup> A significant disproportion in economic power in the case of practices unfairly using the contractual advantage used by the buyer over the supplier, occurs between: 1) supplier which has an annual turnover not exceeding the PLN equivalent of EUR 2 000 000 to buyer which has an annual turnover of more than the PLN equivalent of EUR 2 000 000; 2) supplier which has an annual turnover exceeding the PLN equivalent of EUR 2 000 000 and not exceeding the PLN equivalent of EUR 10 000 000 to buyer which has an annual turnover of more than the PLN equivalent of EUR 10 000 000; 3) supplier which has an annual turnover of more than the PLN equivalent of EUR 10 000 000 and not exceeding the PLN equivalent of EUR 50 000 000 to buyer which has an annual turnover of the PLN equivalent of more than EUR 50 000 000; 4) supplier which has an annual turnover of more than the PLN equivalent of EUR 50 000 000 and not exceeding the PLN equivalent of EUR 150 000 000 to buyer which has an annual turnover of more than the PLN equivalent of EUR 150 000 000; 5) supplier which has an annual turnover of more than the PLN equivalent of EUR 150 000 000 and not exceeding the PLN equivalent of EUR 350 000 000 to buyer which has an annual turnover of more than the PLN equivalent of EUR 350 000 000; 6) supplier which has an annual turnover not exceeding the PLN equivalent of EUR 350 000 and buyer who is an entity referred to in Art. 4 of the Public Procurement Act.

<sup>44</sup> A similarly constructed presumption of significant disproportion in the economic power in favour of the supplier that occurs between: 1) buyer which has an annual turnover not exceeding the PLN equivalent of EUR 2 000 000 to supplier which has an annual turnover of more than the PLN equivalent of EUR 2 000 000; 2) buyer which has an annual turnover exceeding the PLN equivalent of EUR 2 000 000 and not exceeding the PLN equivalent of EUR 10 000 000 to supplier which has an annual turnover of more than the PLN equivalent of EUR 10 000 000; 3) buyer which has an annual turnover of more than the PLN equivalent of EUR 10 000 000 and not exceeding the PLN equivalent of EUR 50 000 000 to supplier which has an annual turnover of the PLN equivalent of more than EUR 50 000 000; 4) buyer which has an annual turnover of more than the PLN equivalent of EUR 50 000 000 and not exceeding the PLN equivalent of EUR 150 000 000 to supplier which has an annual turnover of more than the PLN equivalent of EUR 150 000 000; 5) buyer which has an annual turnover of more than the PLN equivalent of EUR 150 000 000 and not exceeding the PLN equivalent of EUR 350 000 000 to supplier which has an annual turnover of more than the PLN equivalent of EUR 350 000 000.

Contractual Advantage, the Polish legislator uses two completely different techniques for identifying a given practice as non-compliant with the Act. On the one hand, in Art. 6 CAA the Polish legislator refers to the general clause equivalent to Art. 6.2 FCAA (stipulating that the use of a contractual advantage is unfair if it is contrary to morality and threatens to infringe or infringes an essential interest of the other party). On the other hand, an extensive list of practices considered to be «use of contractual advantage» is provided for (Art. 8.1 CAA). These practices are ‘independent’, in the sense that they are not subject to further assessment according to the criteria of Art. 6 CAA. This is a significant difference compared to the solution adopted in the previously applicable Act of 16 December 2016, according to which in assessing the unfairness of the market practices belonging to the list also the requirements provided in the general clause had to be met. Besides, the introduction of further requirements in order to consider a given practice as unfair, could constitute an infringement of Directive 633/2019, as it would go below the required minimum standard of harmonisation.

Article 8.1. CAA contains a list of prohibited practices characterised by the use of contractual advantage, which gives implementation to Art. 3 of Directive 2019/633. According to this provision, such practices are the following:

- 1) the buyer pays the supplier, where the supply agreement
  - a) provides for the delivery of products on a regular basis:
    - for perishable agricultural and food products<sup>45</sup>, later than 30 days after the end of an agreed delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;
    - for other agricultural and food products, later than 60 days after the end of an agreed delivery period in which deliveries have been made or later than 60 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;
  - b) does not provide for the delivery of products on a regular basis:
    - for perishable agricultural and food products, later than 30 days after the date of delivery or later than 30 days after the date on which the amount payable is set, whichever of those two dates is the later;
    - for other agricultural and food products, later than 60 days after the date of delivery or later than 60 days after the date on which the amount payable is set, whichever of those two dates is the later.

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<sup>45</sup> Perishable agricultural and food products are understood as agricultural and food products that by their nature or at their stage of processing are able to become unfit for sale or processing within 30 days after harvest, production or processing (Art. 3(2) CAA).

2) the buyer cancels orders of perishable agricultural and food products less than 30 days before the expected date of delivery of perishable agricultural or food products;

3) the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services and performance of activities referred to in points 11-16;

4) the buyer unjustifiably reduces the amounts due for the delivery of agricultural or food products after their acceptance by the buyer in full or in the agreed part, in particular as a result of a request for a discount;

5) the buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier;

6) the buyer requires the supplier to pay for the deterioration or loss of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier;

7) the buyer refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation; this shall not apply where the supply agreement concerns products to be delivered by a member of recognised:

a) group of agricultural producers referred to in the provisions of Act of 15 September 2000 on agricultural producer groups and their associations and amending other acts (Journal of Laws of 2022, item 935) who sells agricultural or food products to this group;

b) organisation of producers of fruit and vegetables referred to in the provisions of the Act of 19 December 2003 on the organisation of the fruit and vegetable markets and the hop market (Journal of Laws of 2022, item 2101), which sells fruit or vegetables to this organisation;

c) producer organisation referred to in the provisions of the Act of 11 March 2004 on the organisation of certain agricultural markets who sells agricultural or food products to this organisation;

d) producer organisation referred to in the provisions of the Act of 20 April 2004 on the organisation of the milk and dairy products market, which sells agricultural or food products to this organisation

- if the founding act of this group or organisation, or an agreement between a member of that group or that organisation and the group or organisation, contains provisions with effect similar to the terms of the contract;



8) the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Art. 11.2 UCA;

9) the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights;

10) the buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's agricultural or food products despite the absence of negligence or fault on the part of the supplier;

11) the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products;

12) the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market;

13) the buyer requires the supplier to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion;

14) the buyer requires the supplier to pay for the advertising by the buyer of agricultural and food products;

15) the buyer requires the supplier to pay for the marketing by the buyer of agricultural and food products;

16) the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.

Under Polish law, practices listed in points 1-10 are strictly prohibited. In contrast, practices listed in points 11-16, are not considered to be practices unfairly using contractual advantage, if they have been previously agreed in clear and unambiguous terms in the supply agreement between the supplier and the buyer (see Art. 8.2(1) CAA). The practice listed in point 13, is not considered to be a practice unfairly using contractual advantage, if the contract between the supplier and the buyer was concluded before the expected date of the promotion and contains provisions specifying the date of the promotion, its duration and the amount of agricultural or food products that will be covered by the promotion (Art. 8.2(2) CAA).

It should be noted that the statutory list of Art. 8.1 CAA is slightly wider than the list provided for in Art. 3.1-2 of Directive 2019/633. The Directive does not mention the practice of unjustified reduction of the amount due for the supply of agricultural and food products after its acceptance by the buyer in whole or in part, in particular as a result of a request for a discount

(Art. 8.1 point 4 CAA). The Polish legislator justified the addition of this practice to the statutory list mainly by the situation on the retail food market. On this market, numerous malpractices have been observed in the discount policy conducted by the largest retail chains in their relations with smaller suppliers of agri-food products. Particular doubts were raised by the use of new types of discounts (so-called «*retro-discounts*»). These discounts often were not agreed between parties at the initial stage of their cooperation, but were introduced under additional agreements after the transactions were already concluded. Therefore, they caused uncertainty for suppliers as to the amount of the income they could reasonably expect<sup>46</sup>. The Polish legislator decided that the above practice, commonly used by the largest retail chains, is so disturbing that it requires constant monitoring as a possible unfair use of contractual advantage on the agri-food market. However, the authorities applying the act have been given certain discretion in assessing in which situations such a practice may be considered unjustified<sup>47</sup>.

### 2.5. *The general clause*

As mentioned above, the general clause of the unfair use of contractual advantage has not been abandoned in the Polish Act of 17 November 2021. It has been included in Art. 6 CAA where the legislator determined that the use of contractual advantage is unfair if it is contrary to principles of morality and threatens to infringe or infringes significant interests of the other party. According to Art. 9 CAA, the above-mentioned clause does not affect the assessment of the market practices listed in Art. 8.1 CAA. The Polish legislator has correctly considered that the application of this general clause with regard to the practices listed in Art. 8.1 CAA would be contrary to Directive 2019/633, which requires all practices listed in Article 3 of the Directive to be prohibited by Member States in all circumstances<sup>48</sup>.

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<sup>46</sup> On this issue see also para. 3.3.

<sup>47</sup> See: *Explanatory Memorandum to the Governmental Bill on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* (“*Uzasadnienie rządowego projektu ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi*”), pp. 10-12, Sejm Paper No. 1502, Sejm of the 9th legislative period, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1502> [access: 19 April 2023].

<sup>48</sup> See: *Explanatory Memorandum to the Governmental Bill on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* (“*Uzasadnienie rządowego projektu ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi*”), pp. 13, Sejm Paper No. 1502,

The general clause of Art. 6 CAA allows the competent authorities to counteract practices that unfairly use contractual advantage even if such practices are not contemplated in the list of Art. 8.1 CAA. Any suspected practice will be subject to individual assessment in terms of its compliance with principles of morality and significant interests of the other party. This is in full accordance with Directive 2019/633, which does not prohibit the Member States from introducing more extensive protection of participants in agri-food exchange. In particular, based on such a solution, it will be possible to enforce the prohibition of the use of unfair practices by suppliers of agricultural and food products against their buyers, which have not been mentioned at all under Art. 8.1 CAA.

The requirements of the general clause in Art. 6 CAA are not worded very sharply. On the one hand, this may enable flexible application of this regulation in different factual situations. On the other hand, it may create uncertainty among trading participants as to the assessment of their market practice. In the course of interpreting Art. 6 CAA, it seems justified to refer to the views of the doctrine and to the case law relating to Art. 7.2 FCAA, which had the same formulation. In the opinions relating to the latter provision, it was pointed out that practices that exploited the ignorance or advantage of one of the parties, interfered with fair competition, or that were intended to misinform the business partner, should be considered to be contrary to the principles of morality. For example, in one case it was considered desirable – in the light of the principles of morality – to draft the contract in such a way that it does not transfer excessive economic risks to the weaker party and allows it to plan its production process properly<sup>49</sup>.

Under Art. 7.2 FCAA, the use of contractual advantage was considered to threaten or infringe the interest of the other party if the buyer was the only customer of the supplier and was not able to find another market for its goods. This could occur if, for the weaker party, a loss of its trade contract would involve a temporary loss of liquidity, occurrence of slow-moving stock, *etc.* This condition might have also been met if the weaker party became liable to its own suppliers for damages, for example as a result of late payment by the stronger party<sup>50</sup>.

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Sejm of the 9th legislative period, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=1502> [access: 19 April 2023].

<sup>49</sup> See decision of the President of UOKiK of 5 March 2018, ref.: RBG-440-01/18/PS, [https://decyzje.uokik.gov.pl/bp/dec\\_prez.nsf](https://decyzje.uokik.gov.pl/bp/dec_prez.nsf) [access: 19 April 2023].

<sup>50</sup> I. SZWEDZIAK-BORK *Entia Non Sunt Multiplicanda Praeter Necessitatem: the Need to Enact a Law on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products* (“*Entia non sunt multiplicanda praeter necessitatem, czyli o*

### 3. *Administrative-law measures in case of unfair use of contractual advantage: 'soft actions' and contractual advantage proceedings*

The competent authority for matters of unfair use of contractual advantage in trade in agricultural and food products is the President of UOKiK (Art. 11 CAA). The same authority is also competent for matters under the Competition and Consumer Protection Act of 16 February 2007 (CCPA). The procedure before the President of UOKiK in cases concerning unfair use of contractual advantage is modelled on the solutions adopted in the CCPA. Therefore, the legal writings and case law relating to CCPA can also be successfully used in the interpretation of CAA.

First of all, the President of UOKiK, without instituting any proceedings, may give a warning to an entrepreneur<sup>51</sup> in matters related to unfair use of contractual advantage in trade in agricultural and food products. This is to give the entrepreneur an opportunity to discontinue the infringements of the Act without the need for the authority to initiate proceedings<sup>52</sup>. The entrepreneur must be given the opportunity to raise objections and defend himself/herself within the time frame defined by the President of UOKiK, which shall be no less than 14 days (Art. 16 CAA in conjunction with Art. 49a.2-3 CCPA).

Furthermore, where the President of UOKiK considers that the public interest so warrants, he or she shall present his/her view to the court before which a case is pending. This new competence of the President of UOKiK aims at providing the courts with additional information concerning relations between suppliers and purchasers and as a result strengthen the position of the weaker party to the civil proceedings. The President's view will not be binding for the court.

The President of UOKiK can also initiate explanatory proceedings on its own motion by way of a decision which cannot be appealed. The purpose of these proceedings is, in particular, to determine whether there has been a violation of the Act which provides grounds for initiating contractual advantage proceedings (Art. 14.2 CAA). Explanatory proceedings are

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*potrzebie uchwalenia ustawy o przeciwdziałaniu nieuczciwemu wykorzystywaniu przewagi kontraktowej w obrocie produktami rolnymi i spożywczymi*"'), IKAR 2017, v. 8, p. 112.

<sup>51</sup> As well as entities indicated in Article 4 of the Public Procurement Act.

<sup>52</sup> *Explanatory Memorandum to the Governmental Bill on Amendments to the Competition and Consumer Protection Act and Certain Other Acts*, Sejm Paper No. 3662 of the Sejm of the 7th legislative period, p. 1; Art. 49a.2-3 CCPA were added by the Act of 5 August 2015 on Amendments to the Competition and Consumer Protection Act and Certain Other Acts (Journal of Laws of 2015, item 1634), which entered into force on 17 April 2016.

a mere “internal» administrative stage of proceedings where there are no parties within the meaning of the general administrative procedural law<sup>53</sup>. The proceedings are concluded by a decision which takes the case to the substantive stage at which the President of UOKiK undertakes a specific action such as, for example, initiating the contractual advantage proceedings. No complaint (*zażalenie*) is available against such a decision.

The proper proceedings in the matter of unfair use of contractual advantage are initiated by the President *ex officio*, but may be triggered by a notification of a suspected unfair use of contractual advantage. Anyone can notify an unfair use of contractual advantage to the President of UOKiK (Art. 15 CAA)<sup>54</sup>. The notification shall be accompanied by all documents which may serve as evidence of a breach of CAA provisions. The identity of the notifier and the content of the notification are not disclosed to the parties to the proceedings at any stage unless the notifier expresses consent to the disclosure (Art. 15.5 and 15.6 CAA). This is to prevent a situation in which the notifier would be afraid of the impact of his/her initiative on his or her existing business relationship with the counterparty (so called ‘fear factor’)<sup>55</sup>. This provision also applies in the explanatory proceedings stage.

The notification is not binding on the President of UOKiK in the sense that he or she is not obliged to initiate proceedings when such notification is made<sup>56</sup>. The notifier does not acquire any rights in respect of the notification, in particular, he/she does not become a party to the proceedings instigated in result of such a notification. Consequently, the notifier has no access to the case file and, if a decision is made to discontinue the proceedings, the notifier cannot challenge it. This may raise concerns if the notifier would like to bring in front of the state court a claim for damages against the entity which the notification related to<sup>57</sup>. The President of UOKiK shall

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<sup>53</sup> See K. KOHUTEK, *Commentary*, 2017, cit., Art. 10. See also the Supreme Court resolution of 8 April 2010, III SZP 1/10, *Legalis* No. 218251.

<sup>54</sup> Following the amendment introduced by AFCAA. Under the previous statutory provisions, only entrepreneurs were allowed to do so.

<sup>55</sup> See the Governmental Bill on Amendments to the Act on Counteracting Unfair Use of Contractual Advantage in Trade in Agricultural and Food Products, Sejm Paper No. 2791 of 3 August 2018, Sejm of the 8th legislative period.

<sup>56</sup> K. KOHUTEK, *Commentary*, 2017, cit., Art. 11.

<sup>57</sup> A similar solution was also adopted under CCPA which raises fundamental doubts. It is noteworthy that, under the Act of 21 April 2017 on Claims for Reparation of Losses Caused by Infringements of Competition Law, Journal of Laws of 2017, item 1132 (which implements Directive 2014/10/EU of the European Parliament and of the Council of 26 November 2014, OJ L 349, 5.12.2014), the final decision of the President of UOKiK that a given practice restricts competition, or a final and unappealable court

inform the notifier in writing of the way the notification has been dealt with, notwithstanding that the notifier is not permitted to make an appeal<sup>58</sup>.

Anyone against whom proceedings in the matter of unfair use of contractual advantage have been initiated shall be a party to the proceedings (Art. 17 CAA). Accordingly, the party is not the entity which previously submitted a notification pursuant to Art. 15 CAA nor the entity whose significant interests are threatened or infringed by the unfair use of contractual advantage.

The President of UOKiK shall issue a decision to initiate contractual advantage proceedings and notify this to the parties to the proceedings. No complaint is available against this decision<sup>59</sup>. Although the decision does not have to contain a statement of grounds, it should nevertheless specify which practice of a given entrepreneur may, in the President's opinion, infringe Art. 8 CAA (the allegation against the entrepreneur), so as to make the entrepreneur able to defend its rights and gather appropriate evidence to present it to the President of UOKiK<sup>60</sup>.

Entrepreneurs<sup>61</sup> are obliged to provide all the necessary information and documents when so requested by the President of UOKiK<sup>62</sup>. A request for information and documents may be made only in the course of the proper proceedings or during the explanatory proceedings. It is assumed (and confirmed by case law relating to CCPA) that the requirement to provide the President of UOKiK with information and documents may only be addressed to an entity having the status of an entrepreneur, but the latter does not have to be a party to the proceedings<sup>63</sup>. As to what information this requirement applies to, the Act does not actually provide for any

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ruling passed following an appeal against such a decision, are binding – to the extent that they found an infringement of competition law – on the court in proceedings for redress of damage caused by such an infringement (Art. 30). *A contrario*, decisions to discontinue proceedings are not considered to be binding for the court.

<sup>58</sup> This view is taken under CCPA which contains a provision of the same wording. This is why legal scholars take the same view with respect to Art. 11 CAA (A. PISZCZ, in: M. NAMYSŁOWSKA, A. PISZCZ, *The Act*, 2017, cit., Art. 11, marginal no. 14).

<sup>59</sup> Art. 141.1 of the Administrative Procedure Code (consolidated text in the Journal of Laws of 2023, item 775, as amended, hereinafter referred to as «APC») in conjunction with Art. 29 CAA.

<sup>60</sup> K. KOHUTEK, *Commentary*, 2017, cit., Art. 13, thesis 3; A. PISZCZ, in: M. NAMYSŁOWSKA, A. PISZCZ, *The Act*, 2017, cit., Art. 13, marginal no. 13.

<sup>61</sup> And entities indicated in Art. 4 of the Public Procurement Act.

<sup>62</sup> Art. 18.1 CAA. The content of the request is set out in Art. 18.2 CAA.

<sup>63</sup> A. PISZCZ, in: M. NAMYSŁOWSKA, A. PISZCZ, *The Act*, 2017, cit., Art. 14, marginal no. 5.

restriction. It is for the President of UOKiK to decide whether a given piece of information is necessary to fulfil the statutory duties of this authority, and the entrepreneur concerned may not refuse to provide the requested information on the grounds that it disagrees with the scope of the obligation imposed on it<sup>64</sup>. An entrepreneur may not refuse to provide the information requested by the President of UOKiK on the grounds of having to protect business secrets<sup>65</sup>.

If an entrepreneur is not advised of the sanctions for failure to provide information or for providing false or misleading information (Art. 18.2 CAA), these sanctions cannot be imposed on it. This is particularly important given that a fine of up to EUR 50,000,000 may be imposed on an entrepreneur under Art. 43.1 CAA for failure to provide all or part of the requested information and documents within the required deadline or for late submission of such information and documents.

Finally, pursuant to Art. 18.3 CAA, everyone has the right to submit explanations in writing concerning the relevant circumstances of a given case, whether on their own initiative or at the request of the President of UOKiK. Nevertheless the possible refusal is not penalised.

As regards matters not governed by CAA, the provisions of the APC shall apply to proceedings before the President of UOKiK. On the other hand, in matters concerning evidence, to the extent not governed by the Act, the provisions of Arts. 227-315 of the Act of 17 November 1964 - the Civil Procedure Code shall apply accordingly.

### 3.1. *Powers of inspection*

Besides the power to request information and documents, the President of UOKiK may also carry out inspections at entrepreneurs' premises, both at the stage of the explanatory proceedings and during the proper proceedings. An inspection may be carried out of any entrepreneur within the scope of the proceedings (Art. 21.1 CAA); it can be carried out only with regard to entrepreneurs, even if they do not necessarily need to be those entrepreneurs who are parties to proceedings before the President.

In order to obtain information which may constitute evidence in a case, the authorised inspector is entitled to, *i.a.*, enter any land, buildings, premises, or other spaces, as well as transport vehicles of the entrepreneur

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<sup>64</sup> A. PISZCZ, in: M. NAMYSŁOWSKA, A. PISZCZ, *The Act*, 2017, cit., Art. 14, marginal no. 6.

<sup>65</sup> Art. 20 CAA in conjunction with Art. 69 and Art. 71 CCPA.



subject to inspection, request access to files, books, any letters, documents and their copies and extracts, correspondence sent by e-mail, electronic data carriers and other devices containing electronic data or IT systems, make notes based on the abovementioned materials and correspondence; request the entrepreneur subject to the inspection to make copies or print-outs of those materials, and information contained on other carriers, devices, or IT systems, and request explanations or access to and handing over of items which may constitute evidence in the case from the entrepreneur that is subject to the inspection or persons authorised by it. The powers of inspectors do not include the right to perform a search, as the CAA gives no such powers to the President of UOKiK<sup>66</sup>.

The list of obligations of the person subject to inspection is exhaustive, and a breach, whether intentional or not, of the obligation to cooperate in the course of an inspection is punishable by a fine of up to EUR 50,000,000 (Art. 43.2 CAA). Such a penalty may be imposed on an entrepreneur, as well as on the managers or members of governing bodies of the enterprise (Art. 46.1.2 CAA). With regard to the provisions of CCPA, there is a rigorous approach to the obligation of «cooperating» that is imposed on the entrepreneur<sup>67</sup>.

In the course of the inspection, the President of UOKiK may issue an administrative decision to seize files, books, any letters, documents, correspondence, or electronic data carriers, devices as well as other items that may constitute evidence in the case (Art. 105g.1 CCPA). The administrative decision on the seizure of property may be appealed by persons whose rights have been infringed (Art. 105g.3 CCPA). Filing of an appeal shall not postpone the execution of this decision. However, an entrepreneur who has suffered damage caused by the inspection carried out in breach of the law shall be entitled to compensation (see Art. 27 CAA in conjunction with Art. 46.1 ELA).

### 3.2. Possible outcomes of proceedings

Prior to the conclusion of proceedings on practices unfairly exploiting contractual advantage, the President of UOKiK may, *ex officio* or at the

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<sup>66</sup> K. KOHUTEK, *Commentary*, 2017, cit., Art. 17, thesis 1.

<sup>67</sup> In particular, according to a consolidated line of cases, deleting certain documents (definitively) or moving them to the «bin» folder during an ongoing inspection demonstrates a failure to cooperate. See Supreme Court judgement of 21 April 2016, III SK 23/15, *ZNSA* 2017, v. 1, p. 122.

request of a party to the proceedings, make a proposal to all parties to the proceedings to enter into a procedure of voluntary submission to a financial penalty, if they consider that the application of such a procedure will contribute to the acceleration of the proceedings (Art. 34.1 of the CAA). This procedure allows to reduce by up to 50% the amount of the fine that may be imposed on the party to the proceedings whose final position submitted in the proceedings has been taken into account by the President of UOKiK (Article 34.3 CAA).

The proceedings may be concluded by issuing:

1. a decision to discontinue the proceedings (Art. 39 CAA or Art. 105.1 APC<sup>68</sup> in conjunction with Art. 29.1 CAA);
2. a decision to consider the practice at issue as an unfair use of contractual advantage (Art. 31 CAA);
3. a decision requiring a party to the proceedings to take or refrain from taking specific actions in order to terminate the infringement or to remove its effects (Art. 32 CAA);
4. a decision to impose only fines under Arts. 42-44 in conjunction with Art. 40 CAA.

The proceedings are discontinued, *inter alia*, in case of prescription (time-bar). The limitation periods are governed by Art. 38 CAA, according to which proceedings on unfair use of contractual advantage shall not be initiated if two years have elapsed since the end of the year in which such practices were discontinued.

Under Polish law, a decision by the first-tier authority (here: the President of UOKiK) is not enforceable if an appeal is lodged against it. As a rule, only final decisions are enforceable (Art. 108 APC). However, the President of UOKiK may declare the decision immediately enforceable in whole or in part if this is required to protect significant interests of suppliers or buyers (Art. 35 CAA). In such case, the decision is enforceable regardless of any appeal against it.

A decision of the President of UOKiK<sup>69</sup> may be appealed to the Court

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<sup>68</sup> This provision states that where proceedings have, for whatever reason, become devoid of purpose, whether in whole or in part, a public administration authority shall issue a decision to discontinue the proceedings in whole or in part, as appropriate.

<sup>69</sup> The President of UOKiK publishes the full text of decisions issued under CAA on the UOKiK website (<https://www.uokik.gov.pl/>; available also in English), provided that the publication of the statement of grounds shall not include business secrets as well as other

of Competition and Consumer Protection (Art. 37 CAA). The President of UOKiK has also the right to a self-review of the decision (see Art. 81 CCPA). If the President of UOKiK does not exercise this right, the appeal is heard by the Court of Competition and Consumer Protection – the Circuit Court in Warsaw<sup>70</sup> (hereinafter «CCP Court»). The CCP Court is the court of first instance. Parties may appeal against judgements of the CCP Court to a higher court which is the Warsaw Court of Appeal. Its judgements may be further appealed to the Supreme Court (this appeal is referred to as the cassation complaint, or «*skarga kasacyjna*» in Polish). The appeal to the CCP Court is the only way to challenge the administrative decisions of the President of UOKiK<sup>71</sup>.

### *3.3. Administrative measures applied under the Former Contractual Advantage Act: what has been the practice so far?*

In the context of the Former Contractual Advantage Act, fourteen administrative decisions of the President of UOKiK have been issued so far in cases involving trade in agricultural or food products<sup>72</sup>. However, there have been no rulings of the CCP Court on any appeals. Significantly, all the decisions made by the President of UOKiK in these cases to date refer to unfair use of contractual advantage by an economically stronger buyer of agricultural or food products towards its weaker suppliers.

Most of these cases were related to the authority's intervention on the market for industrial apples and soft fruit (currant, blueberry, strawberry, raspberry and chokeberry), which is particularly vulnerable to the risk of abuse of contractual advantage due to the short shelf life of these products<sup>73</sup>.

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information protected under separate provisions (Art. 36 CAA).

<sup>70</sup> Currently, this role is performed by the 17th Division - Competition and Consumer Protection of the Warsaw Circuit Court (see the Regulation of the Minister of Justice of 18 December 2013 on the Establishment of Divisions in Circuit Courts and on Remote Branches of Circuit Courts, Official Journal of the Ministry of Justice of 2013, item 334, as amended).

<sup>71</sup> See Art. 29 CAA in conjunction with Art. 82 CCPA.

<sup>72</sup> As of 11 January 2022, when section 3.3 of this report was prepared, there were still no decisions on the current CAA on record.

<sup>73</sup> Decision of the President of UOKiK of 1 October 2019, ref.: RBG.440.3.2018.PS; decision of the President of UOKiK of 20 May 2019, ref.: RBG.440.4.2018.PS; decision of the President of UOKiK of 22 July 2019, ref.: RBG.440.5.2018.PS; decision of the President of UOKiK of 30 September 2019, ref.: RBG.440.6.2018.PS; decision of the President of UOKiK of 2 November 2020, ref. RBG.440.1.2020.PS. All decisions are

In these cases, the Authority confirmed (or plausibly demonstrated<sup>74</sup>) that the fruit buyers and processors widely used the market practices prohibited by the provision of Art. 7.3 (4) FCAA by imposing long payment periods on suppliers or making payments late without a good reason. It was also found that some buyers applied extremely vague criteria which made it impossible to calculate the price precisely (not only did they fail to specify the price explicitly but also to provide any basis on which to calculate it)<sup>75</sup>. The latter market practice was also observed in an individual case on the sugar market. A sugar producer (being part of a multinational corporation) inspected by the President of UOKiK used a complicated mechanism in contracts for calculating prices to sugar beet growers. This mechanism was dependent on the arrangements made internally within the organisational structure of the whole multinational. According to the authority, no possibility was ensured for suppliers to verify this calculation objectively<sup>76</sup>.

Furthermore, in one of the cases, the President of UOKiK found a specific type of abuse of contractual advantage in carrot root trade. The Authority accused the inspected entity that it reserved the right under its contracts to unilaterally set delivery deadlines for suppliers with the notice of only three days. In the opinion of the authority, where delivery deadlines are set this way, the farmer may find it impossible to reasonably organise his or her work in the field and operations of the farm. If there is no guarantee that the produce will be collected evenly – as much as possible – from all contracted suppliers, this may also lead to a situation where some of them will have to wait longer before they are so requested to deliver (which also includes the risk of making the so-called winter delivery). This may cause significant harvesting difficulties for suppliers – including the risk of losing their crops – or result in a rejection of the agricultural product they supply on the grounds that it fails to meet quality criteria. Furthermore, the entrepreneur subject to inspection was accused in this case of forcing its suppliers

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published on the website: <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

<sup>74</sup> Under CCA, the condition for the issuance of the so-called commitment decision (Art. 27 CAA), which does not involve any financial penalty on the entrepreneur subject to inspection, is to plausibly demonstrate (not to prove) that the prohibition of unfairly using contractual advantage was violated.

<sup>75</sup> In one of the cases, a buyer forced its suppliers to calculate the price based on criteria such as market supply, weather conditions and competitive behaviour which could not be verified clearly. See decision of the President of UOKiK of 20 May 2019, ref.: RBG.440.4.2018.PS, <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

<sup>76</sup> Decision of the President of UOKiK of 26 April 2019, ref.: RBG.440.2.2018.JP, <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

to agree to a deduction from the sums payable to them for the benefit of a trade association with which the entrepreneur agreed the terms of production and purchase. Such deduction was to correspond to the membership fee of this association (referred to as the growers' «association fee», *opłata plantatorska*). The President of UOKiK stressed that the contract with suppliers for pre-contracted deliveries of agricultural produce must respect every supplier's freedom of choice regarding its membership in the association and payment of the membership fee. Contract terms which violate this right lead to unfair use of the contractual advantage<sup>77</sup>.

In most of the above cases, the President of UOKiK considered it sufficient to make use of the power conferred on him by Art. 27.1 FCAA<sup>78</sup> to issue a decision requiring the entrepreneur to cease unfair trading practices. Such a decision is preceded by a «*quasi-agreement*» with the entrepreneur which is to allow it to voluntarily abandon the unfair practice without any financial penalty. To benefit from such a solution, the entrepreneur should submit a proposal to the authority to eliminate the practices related to unfair use of contractual advantage. In addition, the commitment decision imposes an obligation on the entrepreneur to provide the Authority with information on the degree to which the obligations so imposed have been fulfilled<sup>79</sup>. In the cases discussed here, the President of UOKiK waived the fines on the inspected entities after they declared their readiness to take corrective measures such as, in particular: correcting the relevant contractual clauses or terms of standard contracts (*e.g.*, by stipulating the minimum price or ensuring the suppliers the right to verify quality tests), paying the arrears to suppliers, carrying out an internal audit to verify late payments, providing training to suppliers to improve the document flow necessary for payment, *etc.*

In three cases, the President of UOKiK imposed a fine on the entrepreneur due to the failure to provide the information necessary to assess whether the entrepreneur abused the contractual advantage in its activities<sup>80</sup>.

In four of the administrative proceedings which were completed, the

<sup>77</sup> Decision of the President of UOKiK of 5 March 2018, ref.: RBG-440-01/18/PS, <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

<sup>78</sup> Currently: Article 32.1 CAA.

<sup>79</sup> Art. 27.3 FCAA; currently: Article 32.3 CAA.

<sup>80</sup> Decision of the President of UOKiK of 17 June 2020, ref.: RBG.430.2.2020.MB-Sz; decision of the President of UOKiK of 26 June 2020, RBG.430.2.2020.MB-Sz; decision of President of UOKiK of 23 November 2020, ref.: RLU.430.1.2020.MS.MWi. All decisions published on the website: <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

President of UOKiK declared an unfair use of contractual advantage and imposed a fine on the entity subject to inspection. In two of those cases this solution was applied to the entities which were accused by the authority of intentionally violating the provisions of FCAA by organising their businesses that relied on a permanent process of late payments<sup>81</sup>.

Particularly significant are three recent decisions of the President of UOKiK of 30 November 2021, of 11 December 2020, and of 30 November 2021<sup>82</sup>, in which very high fines were imposed on entrepreneurs. In the first of these cases, the Authority controlled the activities of a company that is the owner of a corporate group which includes the largest domestic chain of wholesalers and associated points of sale organised on a franchise basis<sup>83</sup>. The entrepreneur stipulated in contracts with its suppliers of agricultural and food products for its own benefit (or for the benefit of other entities participating in the capital group) various fees for so-called «sales support services and general-network basic services» (*e.g.*, ensuring the maintenance of the product in the commercial offer, organising promotional campaigns, monitoring market demand or organising training for network employees). In the opinion of the authority, those services did not have any substantive benefit for the suppliers and their real aim was to reduce the payment due from the buyer. The second case concerned the activity of the owner of the largest national network dealing with retail trade in food and other products (*e.g.*, household chemicals, personal care products). This entrepreneur imposed on its suppliers post-sale discounts (so-called «*retro-discounts*»), which lowered the price paid after the delivery of agricultural and food products. Those discounts were stipulated in contracts concluded at the end of an accounting period (without prior agreement of their amount and conditions for granting them before its commencement). In the third case, very similar practices regarding the discount policy against the suppliers were found in the activities of another company that owns a large chain of retail stores (selling mainly food, beverages and tobacco products).

In reference to the case resolved by the decisions of the President

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<sup>81</sup> Decision of the President of UOKiK of 1 October 2019, ref.: RBG.440.3.2018.PS; decision of the President of UOKiK of 2 November 2020, ref. RBG.440.1.2020.PS. Both decisions published on the website: <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

<sup>82</sup> Decision of the President of UOKiK of 30 November 2021, ref.: RBG.440.5.2020.PS, of 11 December 2020, ref.: RBG.440.1.2019.RP and of 30 November 2021, ref. RBG.440.3.2021.MCh-S. All decisions published on the website: <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

<sup>83</sup> Decision of the President of UOKiK of 30 November 2021, ref.: RBG.440.5.2020.PS available on the website: <http://uokik.gov.pl/decyzje> [access: 25 April 2023].

of UOKiK of 11 December 2020<sup>84</sup>, the Authority initiated additional explanatory proceedings regarding discount practices applied by nineteen of the largest companies dealing with retail trade in agricultural and food products in Poland. As a result of these findings, it was stated, *inter alia*, that buyers of food and agricultural products carried out some rebate practices that raise suspicions of unfair using of contractual advantage<sup>85</sup>, such as, in particular, the practice of significantly prolonging negotiations, despite the deliveries that have already started, is noted there. Such practice may lead to determining the terms of the rebate to the detriment of the supplier (in extreme cases a year after the deliveries commenced). The President of UOKiK found also that some buyers impose overlapping discounts (*e.g.*, monthly, quarterly and yearly) on the same delivery<sup>86</sup>. Another disturbing market practice is that some buyers of agricultural and food products stipulate contractual penalties for failure to fulfil obligations connected with the discount that may be disputed by the supplier (*e.g.*, when supplier refuses to issue a corrective invoice)<sup>87</sup>. In this Report, the President of UOKiK announced possible further proceedings related to the unfair use of contractual advantage in retail trade of agricultural and food products<sup>88</sup>.

#### 4. *Civil law protection against the abuse of contractual advantage: introduction*

The Contractual Advantage Act does not provide for any civil law safeguards against the abuse of contractual advantage and focuses on administrative law measures. Of course, this does not mean that there are no civil law measures in Polish law that could serve to protect weaker participants in the trade of agricultural products. As stipulated in Art. 4 CCA, protection against practices unfairly exploiting contractual advantage in trade in agricultural products provided for in this Act does not exclude protection under other acts. Therefore, in order to analyse the legal

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<sup>84</sup> Ref.: RBG.440.1.2019.RP.

<sup>85</sup> “Report summarising the explanatory proceedings by the President of UOKiK on trade discounts applied in relations between commercial networks and suppliers of agricultural and food products” of April 2021 (hereinafter referred to as: “Report”. Full Report is available on the website: [https://uokik.gov.pl/aktualnosci.php?news\\_id=17420&news\\_page=7](https://uokik.gov.pl/aktualnosci.php?news_id=17420&news_page=7) [access: 25 April 2023]).

<sup>86</sup> Report, p. 61.

<sup>87</sup> Report, p. 61.

<sup>88</sup> Report, p. 66.



framework for civil remedies, it is necessary to first present the measures provided for in general civil law provisions that could serve to protect the participants in the trade of agricultural products and then assess whether these measures are sufficient to achieve the objectives of the Directive or whether there is a need to amend the current civil legislation in this respect.

### *5. Types of contracts between participants in the agricultural and food supply chain*

The provisions of CCA generally use the term of «acquisition» of agricultural and food products<sup>89</sup> which is more general than the term of «delivery» of products. Agricultural and food products can be acquired under various types of contracts. In the Polish system of civil law, there are various types of contracts governed by statutory provisions, including mainly the Civil Code (they are referred to as «nominate contracts»). By virtue of the principle of freedom of contract (Art. 353<sup>1</sup> CC) it is also permissible to conclude contracts that do not match any of the types of nominate contracts (these are referred to as «innominate contracts»). The most common types of nominate contracts in the agricultural and food supply chain are: the contract of delivery (Arts. 605-612 CC), the contract of sale (Arts. 535-602 CC) and the contract of pre-contracted deliveries of agricultural produce (Arts. 613-626 CC). In particular, by the contract of delivery the delivering party undertakes to produce things specified as to their kind only and to deliver them in parts or periodically, whereas the receiving party undertakes to collect the things and to pay the price (Art. 605 CC). The main difference between the contract of delivery and the contract of sale is that, in the case of delivery, the supplier not only transfers the ownership of the thing and delivers it to the receiving party, but also produces the things he or she delivers. Delivery can be defined as the sale of future things produced by the supplier combined with an obligation to deliver them periodically to the receiving party; the object of the contract are always *res futurae* (future things) which do not exist at the time of concluding the contract. However, the contract of delivery is not a transaction subject to the condition that the thing is produced: if the supplier does not produce the products within the

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<sup>89</sup> Cf. Art. 3 CAA: «The Act shall apply to contracts for the acquisition of agricultural or food products concluded between the acquirers of such products and their suppliers, hereinafter referred to as “contracts”».

required time limit, he or she is liable for non-performance according to the general rules (Art. 471 *et seq.* CC)<sup>90</sup>. In matters not governed by the provisions on the contract of delivery, the provisions on sale shall apply, *mutatis mutandis*, to the rights and duties of the delivering party and the receiving party (Art. 612 CC).

A specific nominate contract intended for participants in trade of agricultural products is the contract of pre-contracted deliveries of agricultural produce. One of the parties to this contract is always to be an agricultural producer<sup>91</sup>. By the contract of delivery of pre-contracted agricultural produce the agricultural producer undertakes to produce and to deliver to the pre-contracting party a specified amount of agricultural produce of a determined kind and the pre-contracting party undertakes to collect that produce within the time limit agreed on, pay the price agreed on and perform specified additional performance if the contract or specific provisions provide for a duty to render such performance. The contract of pre-contracted deliveries of agricultural produce is considered to be a modified form of the contract to produce a work (*umowa o dzieło*)<sup>92</sup>. Unlike in the contract of sale or delivery, the object has to be the agricultural produce. The producer is obliged to produce these products at his or her farm (specified in the contract), which means that the producer must be a producer of agricultural products and not merely an intermediary buying these products from others for resale to the ordering party<sup>93</sup>. The object of the contract of pre-contracted deliveries of agricultural produce are always future things which do not exist at the time of concluding the contract.

Another characteristic feature of the contract of pre-contracted deliveries of agricultural produce is that the parties may agree in such contract to require the pre-contracting party to render an additional performance stipulated in the contract to the agricultural producer (Art. 615 CC). The Civil Code does not provide any restriction as to what kind of performance

<sup>90</sup> P. SOBOLEWSKI, in: *Civil Code. Commentary*, K. Osajda (ed), 2021, *Legalis*, Art. 605 CC, thesis no. I.

<sup>91</sup> The agricultural producer may also be a group of agricultural producers or their association, and an agricultural cooperative within the meaning of the Act of 4 October 2018 on Agricultural Cooperatives or their association: see Art. 613.4 CC.

<sup>92</sup> P. SOBOLEWSKI, in: *Civil Code*, 2021, K. Osajda (ed), Art. 613 CC, thesis no. I.

<sup>93</sup> See, *inter alia*, judgement of the Szczecin Court of Appeal of 13 May 2015, I ACa 26/15, *Legalis*; A. SUCHOŃ, in: *Civil Code. Commentary*, M. Gutowski (ed), 2019, *Legalis*, cit., Art. 613 CC, marginal no. 3; P. SOBOLEWSKI, in: *Civil Code*, 2021, K. Osajda (ed), Art. 613 CC, thesis no. I, *op. cit.*; K. ZARADKIEWICZ, in: *Civil Code. Commentary*, K. Pietrzykowski (ed), 2021, *Legalis*, Art. 613 CC, marginal no. 3.

can be rendered. It only lists examples of such additional performances: 1) providing the producer with a possibility to acquire certain means of production and to obtain financial aid; 2) agrotechnological and zootechnical aid; 3) pecuniary bonuses; 4) non-cash bonuses.

Unlike the provisions on the contract of delivery, the provisions on the contract of pre-contracted deliveries of agricultural produce do not contain any general reference to the application of the provisions on the contract of sale in matters not regulated in the provisions on the contract of pre-contracted deliveries. Only the provisions on warranties in the sale of goods are to be applied (with the amendment that the right to renounce the contract due to a physical defect of the object of the pre-contracted deliveries of agricultural produce shall be vested in the pre-contracting party only where the defects are substantial; see Art. 621 CC).

In addition to the above nominate contracts, participants in the agricultural and food supply chain may also conclude innominate contracts. The general provisions of civil law contained in Book I of the Civil Code and the general provisions on obligations (Book III, Titles I-X CC) are applicable to such contracts. To the extent any matters are not governed by either these general provisions or the contract, the provisions on nominate contracts may be applied by analogy.

### *6. The protection of the weaker party in business-to-business relationships*

Among the civil law measures that may serve to protect the weaker party in the trade in agri-food products from unfair exploitation of contractual advantage, the first to be mentioned are all those relating to the stage of shaping the very content of the agreement which is at the basis of legal relations between the supplier and buyer of the products<sup>94</sup>.

In business-to-business relationships, the weaker party to a contractual relationship is protected by the general limitations to the freedom of contract. According to Art. 353<sup>1</sup> CC, parties entering into a contract may determine the legal relation at their own discretion, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of community coexistence.

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<sup>94</sup> About civil law measures protecting the weaker party in business-to-business relationships see also J. PISULIŃSKI, *Judicial Review of Commercial Contracts in Poland*, in: *Judicial Review of Commercial Contracts. A Comparative Handbook*, H. Wais, T. Pfeiffer (eds), München, Oxford, Baden-Baden, 2022, pp. 195-218.

In cases where the content or purpose of a legal act is contrary to the provisions of the statute or is intended to circumvent the statutory provisions, such act shall be null and void unless the appropriate provision envisages a different effect, in particular that those provisions of the act in law which are null and void are replaced by the appropriate provisions of statutory law (Art. 58.1 CC). If only a part of a legal act is affected by invalidity, the act shall remain valid as to its remaining parts unless it follows from the circumstances that without the provisions affected by invalidity the act would not have been performed (Art. 58.3 CC). One of the characteristics of the invalidity of a legal act is that it is taken into account by the authorities applying the law on their own motion, without the entity concerned having to invoke that invalidity.

On the basis of Art. 58.1 CC not only legal acts contradictory to the statutes within the scope of the civil law, or more broadly, of the private law, but also legal acts conflicting with provisions of other fields of law, *e.g.*, administrative law, are invalid if the aim of the public law norm is to prevent the establishment of the legal relation contradictory to this norm. In such situations it is justified to apply the sanction of absolute invalidity of the legal transaction on the basis of Article 58.1 CC<sup>95</sup>. Therefore, the invalidity of a legal act may be considered as a measure of protection against some of the practices unfairly exploiting contractual advantage listed in Art. 8 CAA. In cases where the use of practices listed in Art. 8 of the CAA results from the fact that the very content of the contract concluded between the supplier and the buyer contains clauses prohibited by this Article (*e.g.*, the contract provides for payment periods longer than those set out in Art. 8.1.1 CAA, or the contract provides for compensation by the supplier for the costs listed in Art. 8.1.10 CAA), contracts concerning trade in agricultural products which contain such clauses, are to this extent null and void as contrary to the statutory provisions, which expressly prohibit shaping the content of contractual relations in the manner specified in this Article.

Furthermore, in the case of a significant contractual advantage of one of the parties, it is possible to rely on the clause contained in Art. 353<sup>1</sup> CC concerning contracts that prejudice principles of community coexistence which limit the freedom of the parties in determining their contractual relationship. If a contract is considered to be contrary to the principles of community coexistence, this leads to its invalidity resulting from Art. 58.2 CC which provides that: «An act in law that is contrary to the principles of

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<sup>95</sup> Supreme Court judgment of 26 November 2002, V CKN 1445/00, OSNC 2004, No 3, item 47; Supreme Court judgment of 23 February 2006, II CSK 101/05, *Legalis* No. 177873.

community coexistence shall be invalid».

According to a view adopted by Polish courts, «the reference to the principles of community co-existence is a reference to the idea of equity in the law and to commonly recognised values in our culture and society. Generally speaking, it can be assumed that the principles of community coexistence are to be understood as the fundamental principles of ethical and fair conduct»<sup>96</sup>. One of the ethical values which are considered to be protected under Art. 58.2 CC, is the fair equality of contracting parties. Accordingly, it is permissible to declare a contract invalid under Art. 58.2 CC in certain cases if the contract was entered into or it was given its specific content as a result of an abuse of a stronger position by one of the contracting parties<sup>97</sup>.

Moreover, it is stressed that one of the principles of community coexistence is the principle of contractual equity (fairness), which means «an even distribution of rights and obligations in a legal relationship – or of the benefits and burdens and risks and opportunities associated with the creation and implementation of that relationship»<sup>98</sup>. In order to determine whether a particular contract does not violate contractual fairness in this sense, the values of performances of both parties are usually compared. A breach of the rules of fairness can be presumed when the disproportion in these values is gross, *i.e.*, where it significantly exceeds the usual fluctuations in prices of goods and services or the usual profit margins of one of the parties to the transaction<sup>99</sup>. However, the distribution of other obligations and rights between the parties (not only the consideration given by each party) is also to be examined. Therefore, to maintain the contractual fairness, reciprocity or adequacy of the parties' rights must also be ensured: both parties are to have the same rights or to have rights that are different but equivalent<sup>100</sup>. The imbalance between the values of performances in a contract may be adjusted by an unequal distribution of other rights and obligations, which counters allegations of a breach of contractual

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<sup>96</sup> Supreme Court judgement of 28 November 2001, IV CKN 1756/00, *Legalis* No. 61221. It can be assumed that the concept of rules of social co-existence coincides in normative content with the concept of morality used in Art. 6 CAA. In Polish law, there is a tendency for the legislator to gradually replace the notion of principles of social co-existence, having its origins in the former socialist system, with a more contemporary concept of morals.

<sup>97</sup> P. MACHNIKOWSKI, in: *Civil Code. Commentary* ("Kodeks cywilny. Komentarz"), E. Gniewek, P. Machnikowski (eds), 2021, *Legalis*, Art. 58 CC, marginal no. 14.

<sup>98</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17.

<sup>99</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17.

<sup>100</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17.

fairness. In the context of contractual fairness, the emphasis is also placed on maintaining the proportionality of the parties' rights, *i.e.*, the extent of such rights is to be adjusted to the actual need of protecting the interests of a particular party<sup>101</sup>. A breach of contractual fairness is assumed to occur, *inter alia*, when a contract concluded by a party is not an expression of a decision made reasonably by a party who is entirely free to decide because the content of the contract was affected by economic pressures resulting, for example, from the use of a dominant position by one of the parties, unless this is caused by negligence of the injured party<sup>102</sup>. When assessing whether the parties exceeded their power to determine the content of their contract, it is very important to take account of the attitudes of the parties themselves. Negative assessment of a contract according to the moral criteria contained in the community coexistence clause is only justified if the stronger party acted unfairly, using (knowingly or negligently) its advantage<sup>103</sup>.

From the legal perspective, there are no obstacles to applying the sanction of invalidity to B2B contracts – including those in the agri-food supply chain – on the grounds of violation of the principles of community coexistence.

Applying the above sanctions to the practices listed in Art. 8 CAA, it must be assumed that nullity under Art. 58.1 CC applies to contractual clauses which are contrary to Art. 8.1.(1) to (10) CAA, as the practices listed in these provisions are strictly prohibited<sup>104</sup>. On the other hand, the situation is different when clauses corresponding to the practices listed in Art. 8.1(11)-(16) CAA are included in the contracts: these clauses will not be null and void under Art. 58.1 CC, if they have been clearly and unambiguously agreed in the contract previously agreed between the buyer and the supplier, because Art. 8.2(1) CAA explicitly states that in such cases the use of those practices does not constitute unfair exploitation of contractual advantage. Similarly, nullity under Art. 58.1 CC will also not occur in the case described in Art. 8.2(2) CAA which allows to use the practice described in Art. 8.1(13) CAA provided that the contract between the supplier and the buyer has been concluded before the anticipated date of the promotion and contains provisions specifying the

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<sup>101</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17.

<sup>102</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17.

<sup>103</sup> P. MACHNIKOWSKI, in: *Civil Code*, 2021, cit., Art. 353<sup>1</sup> CC, marginal no. 17. See also Supreme Court judgement of 18 March 2008, IV CSK 478/07, *Legalis* No. 293654, as referred to therein.

<sup>104</sup> See above, para. 2.4.

date of commencement of the promotion, its duration and the quantity of agricultural or food products which will be covered by the promotion. However, if the contract provides for the use of the practices described in Art. 8.1(11)-(16) CAA, but these provisions do not meet the requirement of being clearly and unambiguously agreed in the contract<sup>105</sup>, then those practices could be considered to constitute unfair use of contractual advantage if they meet the additional criteria set out in Art. 6 CAA. As the criteria provided for in this provision correspond in their normative content to the grounds for nullity of a legal act under Art. 58.2 CC, such contractual provisions would be null and void under the latter provision.

It should also be recalled that the list of practices listed in Art. 8 CAA is not exhaustive. Other practices which also consist in shaping the content of a party's contract to the detriment of the weaker party, and which are considered to meet the general criteria of Art. 6 CAA, also result in the invalidity of such contractual provisions (Art. 58.2 CC).

Other provisions restricting the freedom of the parties to determine the content of their contract may also be considered as safeguards protecting the weaker party to a legal relationship. For example, Art. 473.2 CC provides for invalidity of the contractual stipulation that the debtor shall not be liable for damage that he or she may inflict intentionally on the creditor.

However, the invalidity (based both on Art. 58 sec. 1 as well as sec. 2 CC), is a highly flawed measure of protection of the weaker party; moreover, it is not adapted to the features of trade in agricultural and food products. This is because the sanction of invalidity is very far-reaching. The invalidity of a part of a contract may lead to the entire contract being null and void if there are reasons to assume that, in a given case, the parties would not have entered into the contract on such terms without that particular provision affected by invalidity (Art. 58.3 CC). Yet the invalidity of the entire contract may not correspond to the interest of the weaker party in the trade in agri-food products, and it might have been appropriate for the legislator to introduce a specific provision in order to prevent the application of the general provisions of CC leading to such a far-reaching consequence (see below, para. 9.3).

From the perspective of protecting the weaker party, also provisions on the form of transactions may be of some importance. In the case of the

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<sup>105</sup> For example, the contract provides for a complicated mechanism, difficult for the weaker party to understand, the application of which leads in practice to the effects described in Art. 8.1(11)-(16) CAA, but this effect is not apparent at first sight from a reading of those contractual clauses.



contract of pre-contracted deliveries of agricultural produce and contract of delivery, Polish law provides that they should be made in writing (see Arts. 606 and 616 CC); however, failure to meet this requirement in B2B relationships will not have any negative consequences for the parties, as the contract will still be valid<sup>106</sup>. The provisions on the contract of sale of movables do not require any specific form. Moreover, there are no provisions in the currently applicable law that would allow one of the parties to demand a written confirmation of the terms of the contract which was concluded<sup>107</sup>.

### 6.1. *Control of standard business terms in B2B transactions*

To a certain extent, protection against unfair use of a contractual advantage by one party may be provided by the control of standard business terms (SBT) used by this party. However, most of the Polish civil law provisions on the control of standard business terms apply to relationships between entrepreneurs and the consumers. Only few provisions apply to standard business terms used in business-to-business relationships. They relate to the manner of incorporating the SBT into the contract (Art. 384 sec. 1 and 2 1st sentence CC<sup>108</sup>), use of SBT in electronic form (Art. 384.4

<sup>106</sup> According to the general rules of the Polish civil law, in case of non-observance of the (written) form requirement, generally, witness testimony or the hearing of the parties in a dispute will not (with some exceptions) be admitted into evidence to prove that a legal act was made. However, the provisions on the consequences of the non-observance of the form required for evidentiary purposes (*ad probationem*) shall not apply to legal acts in relations between entrepreneurs (see Art. 74.1-4 CC). Hence the conclusion that the non-observance of the written form required only for evidentiary purposes does not have negative consequences.

<sup>107</sup> Cf., however, Art. 38q of the Act of 11 March 2004 on the Organisation of Certain Agricultural Markets (consolidated text in the Journal of Laws of 2023, item 1502), which requires a written form with regard to agreements concerning certain agricultural products: cereals, sugar from sugar beet, hops, flax and hemp, fruit and vegetables, tobacco, beef and veal, milk and dairy products from raw milk, pork, mutton and goat meat, eggs and poultry. The requirement is met also if the contract is concluded in a document form or electronic form. The buyer is obliged to keep the contract for 2 years from the end of the year in which the last delivery under such contract was made.

<sup>108</sup> «§ 1. Standard business terms determined by one of the parties, in particular the general terms of contracts, the contract form, the rules and regulations, shall bind the other party if they were delivered to it prior to the conclusion of the contract. § 2. In the case where using the standard business terms is customarily accepted in relations of a given kind, they shall also be binding where the other party might have learned of their content with ease».

CC<sup>109</sup>), the binding effect of standard business terms issued during the course of a contractual relation of continuous nature (Art. 384<sup>1</sup> CC<sup>110</sup>), the precedence of individually agreed contract terms over the SBT and the principles of drafting contract templates (Art. 385 sec. 1 and 2 1st sentence CC<sup>111</sup>) and the situation where standard business terms used by the parties are contrary to each other (Art. 385<sup>4</sup> CC<sup>112</sup>).

On 1 January 2021, amendments to the Civil Code have come into force to modify the legal framework relating to contracts with entrepreneurs who are natural persons<sup>113</sup>. The amendments extend certain consumer protection provisions to situations in which an entrepreneur who is a natural person concludes a B2B contract which – although directly related to his or her business or professional activities – is of a non-professional nature for this person<sup>114</sup>. As from 1 January 2021, the provisions contained in Arts. 385<sup>1</sup>-385<sup>3</sup> CC which used to apply to consumers, primarily the provisions on control of standard business terms, apply to a natural person who concludes a contract directly related to his or her business activities if it results from the content of such contract that it is non-professional for that person. The registered business of an entrepreneur, as disclosed in the public register of entrepreneurs<sup>115</sup>, determines whether a given contract is of a professional nature for the entrepreneur. This is to ensure the ease of verifying whether a

<sup>109</sup> «If one of the parties uses standard business terms in an electronic form, he or she shall make them available to the other party prior to the conclusion of the contract in such a manner that the latter is able to store and retrieve the standard business terms in the regular course of actions».

<sup>110</sup> «Standard business terms issued during the course of a contractual relation of continuous nature shall bind the other party if the requirements provided for in article 384 were fulfilled, and the party has not terminated the contract by notice at the earliest possible time».

<sup>111</sup> «§ 1. Where the content of a contract is contrary to the standard business terms, the parties shall be bound by the contract. § 2. Standard business terms shall be drafted in plain and intelligible language».

<sup>112</sup> «§ 1. An agreement between entrepreneurs who use different standard business terms shall exclude these terms which are contrary to each other. § 2. The contract shall not be concluded where after having received an offer the party notifies the other immediately that he or she has no intention to conclude the contract on terms provided for in § 1».

<sup>113</sup> See Art. 86(5) of the Act of 31 July 2019 Amending Certain Acts in Order to Reduce the Regulatory Burden (Journal of Laws of 2019, item 1495 as amended).

<sup>114</sup> See the *Explanatory Memorandum to the Bill Amending Certain Acts in Order to Reduce the Regulatory Burden*, Sejm Paper No. 3622 of the Sejm of the 8th legislative period, p. 3 of the Explanatory Memorandum.

<sup>115</sup> Such register for entrepreneurs who are natural persons in Poland is the *CEIDG* (Central Business Activities Records and Information Service).

given activity falls within the scope of activities performed professionally as part of the business that is actually carried out by the entrepreneur<sup>116</sup>.

However, as can be seen, the amendments entered into force on 1 January 2021 do not change the legal situation of the entities in the agri-food supply chain. Only the regime governing the conclusion of entrepreneurs' non-professional contracts has changed. Therefore, with reference to the agricultural and food supply chain, these changes do not apply to contracts of delivery of agri-food products by suppliers/sellers who are engaged in the production/supply/sale of these products as their professional activity. Therefore, the new provisions on certain contracts concluded by entrepreneurs do not affect the legal relationships covered by CAA.

#### *6.2. Other civil law measures to protect the weaker party in B2B relationships*

Paragraph 6 above describes the civil law consequences of a legal act which constitutes an infringement of the prohibitions laid down in the CAA provisions. These sanctions will not apply, however, if the unfair use of contractual advantage does not originate from the very terms of the contract between the parties but is expressed in the actual conduct of the stronger party in its relations with the weaker party. In such cases, in addition to the administrative law remedies already discussed, other civil law remedies may offer protection to the weaker party in business-to-business relationships. Such civil law measures include various types of parties' rights to unilaterally cancel their contractual obligations<sup>117</sup> as well as the pursuit of claims for damages or for the return of unjust enrichment or claims arising from the so-called exploitation (Art. 388 CC), *i.e.*, claim for reduction of the party's performance or an increase of the performance due to it, alternatively for invalidation of the contract.

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<sup>116</sup> *Explanatory Memorandum to the Bill Amending Certain Acts in Order to Reduce the Regulatory Burden*, p. 4.

<sup>117</sup> Terminology borrowed from a publication by G. TRACZ, *Methods of Unilaterally Cancelling Contractual Obligations* ("Sposoby jednostronnej rezygnacji z zobowiązań umownych"), Warsaw 2007.

The statutory provisions on the contract of sale<sup>118</sup>, contract of delivery<sup>119</sup> and the contract of delivery of pre-contracted agricultural produce<sup>120</sup> provide for only a few circumstances in which a party may rescind the contract. Furthermore, the grounds for rescission of contract are provided for in the general provisions on reciprocal contracts<sup>121</sup>. Other cases when a party has the right to rescind may result from the contract (contractual right of rescission) but it is then required to specify the period within which the party will have the right to rescind the contract (Art. 395.1 CC). The late payment provisions of CC fail to provide adequate protection for the seller of agricultural products. These provisions are based on the principle of freedom of contract and leave the parties to a contract a very high degree of freedom in setting time limits for rendering pecuniary performance<sup>122</sup>. While the Civil Code gives the party awaiting payment the right to rescind the contract in the event of delay in the other party's performance, rescission is not a measure which could ensure that agri-food products are sold on fair conditions, *i.e.*, that a buyer for such products is found and fair payment is received within reasonable time. Here, it should also be noted that the right of rescission in the event of default on payment by the other party does not

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<sup>118</sup> Art. 552 CC provides for the seller's right to rescind the contract if the buyer has committed qualified delay in paying the price for the delivered part of the things sold or if given his financial state it is doubtful whether payment for the part of things which are to be delivered later will be effected on time. Art. 560 sec. 1 and 4 CC provides for the right of the buyer to rescind the contract of sale in the case of a material defect of the thing sold. Another provision, contained in Art. 562 CC, refers to the buyer's right to rescind a contract if the contract of sale stipulates that the delivery of things sold is to be made in parts and the seller despite the buyer's demand failed to deliver, instead of defective things, the same amount of things free from defects.

<sup>119</sup> The provisions grant the receiving party the right to rescind the contract of delivery prior to the lapse of the time limit if the delivering party delays in commencing to produce the object of the delivery or its respective parts to such an extent that it is unlikely that he delivers it on the agreed time (Art. 610 CC) and if during the production process of the delivery object it transpires that the delivering party produces the object in an imperfect manner or in a manner contrary to the contract (Art. 611 CC).

<sup>120</sup> See Art. 621 CC which grants the right to rescind a contract due to physical defects of the object of the contract of pre-contracted deliveries where the defects are substantial.

<sup>121</sup> The right of rescission in the event of the other party's qualified delay in performing the obligation arising from a reciprocal contract (Arts. 491-492 CC); right to rescind a contract if the party obliged to render performance declares that he or she will not perform (Art. 492<sup>1</sup> CC); right of rescission in the event of a consequential impossibility of one of the reciprocal performances (Arts. 493 and 495 CC).

<sup>122</sup> However, there are restrictions on the freedom to set excessively long payment periods which result from the Late Payments Act, see below, para. 8.

provide the seller with any real protection, especially regarding perishable products.

It is also worth noting that the statutory provisions on delivery and pre-contracted deliveries of agricultural produce are very brief and do not contain any special rules which could protect the weaker party in the contractual relationship. On the other hand, the provisions on the contract of sale provide for a far-reaching protection, but they apply, generally, to consumers. Although some of the provisions relating to consumers are applicable (from 1 January 2021) to a certain category of contracts concluded by entrepreneurs who are natural persons, this does not apply to the professional activity of such entrepreneurs, as already explained above.

In the circumstances of a particular case, the unlawful conduct of a party which involves using a prohibited (unfair) trading practice may constitute a tort within the meaning of Art. 415 CC<sup>123</sup>. A claim for damages under this provision is an appropriate remedy for agri-food market participants in cases where they have suffered pecuniary loss caused by practices of the stronger party that constitute unfair use of a contractual advantage within the meaning of CAA, but where these practices have not been expressed in the formation of the content of the contract in a manner contrary to Art. 8.1 CAA, but in an actual conduct contrary to it.

Where the unfair use of a contractual advantage also constitutes a non-performance or improper performance of the contract by the stronger party, the injured party can claim damages for breach of a contractual obligation based on Art. 471 CC. A situation may occur in which a breach of contractual obligations constitutes a tort at the same time (Art. 415 CC mentioned above). The concurrence of claims for damages under these two legal provisions is governed by Art. 443 CC according to which a circumstance that an act or omission which caused the damage constituted non-performance or improper performance of a pre-existing obligation shall not exclude a claim in tort, unless something else results from the content of the pre-existing obligation. The entitled person may then choose the grounds for his or her claim<sup>124</sup>.

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<sup>123</sup> The concurrence of claims of unjust enrichment and claims for compensation is governed by Art. 414 CC. The view that there is a competitive relationship between the two claims seems to prevail among legal scholars, given the need to protect the interests of the entitled party and the latter's freedom to choose the appropriate legal remedy. See W. DUBIS, in: *Civil Code*, 2021, E Gniewek, P. Machnikowski (eds), cit., Art. 414, marginal no. 1.

<sup>124</sup> See the judgment of the Katowice Court of Appeal of 26 January 2016, I ACa 239/15, *Legalis* No. 1410231.

In the context of trade in agricultural products, it is also worth mentioning that damages for breach of an obligation can be claimed even if the statutory warranty for defects in goods sold expires<sup>125</sup>.

The conditions for and the extent of a claim for damages depend on whether the breach of a party's obligations which is classified as an unfair trading practice occurs before the conclusion of the contract (*culpa in contrahendo*) or thereafter, at the stage of performance<sup>126</sup>.

The granting of protection to parties in the event of infringement of pre-contractual obligations is justified in the light of Recital 22 of Directive 2019/633. In Polish law, the liability for damages for unreliable conduct of negotiations is governed by Art. 72.2 CC, according to which the party that commenced or conducted negotiations in violation of good practices, in particular with no intention of concluding the contract, shall be obliged to redress the damage that the other party suffered as a result of his or her reliance on the conclusion of the contract. This is a case of *ex delicto* liability<sup>127</sup> and the injured party is entitled to redress of the loss related to its reliance interest (reliance damages)<sup>128</sup>, as a way of exception to the principle of full compensation<sup>129</sup> provided for in Art. 361.2 CC.

Because the contracts on the acquisition of agricultural and food products are generally reciprocal contracts, a provision on claims arising from the so-called exploitation may apply to them. Pursuant to Art. 388 sec. 1 and 2 CC, if one of the parties, taking advantage of the forced circumstances, infirmity or inexperience of the other party, in exchange of its performance accepts or reserves for itself or for a third party a performance whose value at the moment of the conclusion of the contract exceeds to a glaring extent the value of its own performance, the other party may demand a reduction of its performance or an increase to a performance due to it, or, alternatively, it may demand invalidation of the contract. The aforementioned rights shall expire upon the laps of three years from the day of the conclusion of the

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<sup>125</sup> See Supreme Court judgement of 25 August 2004, IV CK 601/03, *Legalis* No. 65029.

<sup>126</sup> The claims to which the party is entitled when an unfair trading practice is, at the same time, an act of unfair competition, are discussed below, para. 7.

<sup>127</sup> See the judgment of the Szczecin Court of Appeal of 30 April 2015, I ACa 161/15, *Legalis* No. 1326882.

<sup>128</sup> Judgement of the Szczecin Court of Appeal of 31 October 2012, I ACa 446/12, *Legalis* No. 741056.

<sup>129</sup> See, for example, judgement of the Białystok Court of Appeal of 26 October 2018, I ACa 443/18, *Legalis* No. 1857614.

contract<sup>130</sup>. This regulation shall apply to B2B transactions<sup>131</sup> in a narrow definition<sup>132</sup>.

Mention should also be made of a claim for restitution of unjust enrichment. A claim for return of unjust enrichment (undue performance)<sup>133</sup> arises, among other things, if the performance is rendered based on a contractual term that is invalid (originally or as a result of meeting the conditions of voidability) or on the basis of a non-binding contractual term. The extent and subject-matter of the claims of the parties is determined by Art. 405 *et seq.* CC (releasing the unduly obtained profit or its substitutes, reimbursement of expenditures on the object of enrichment, *etc.*). This claim may, therefore, arise if the contract under which the parties' performances have been made, is void because it contradicts the provisions of the CAA (cf. above, para. 6).

### *7. The Act on Combating Unfair Competition*

Civil law measures of protection against unfair market practices are also provided for in the Act on Combating Unfair Competition and can also be used to protect against unfair use of a contractual advantage in the trade in agricultural products.

The aim of the Act on Combating Unfair Competition is to prevent and fight against unfair trading practices in business, including in the agricultural production (Art. 1 UCA). By protecting market competition, the Act is intended to protect not only consumers but also smaller entrepreneurs whose interests may be threatened by stronger players on the market.

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<sup>130</sup> Six years when the party to the contract is a consumer.

<sup>131</sup> See: P. MACHNIKOWSKI, in: *Civil Code*, 2021, E. Gniewek, P. Machnikowski (eds), cit., Art. 388, marginal no. 2.

<sup>132</sup> According to the amendment of art. 388 CC introduced by Act of 2 December 2021 amending the Act - the Civil Code, the Act - the Code of Civil Procedure and certain other acts (Journal of Laws, item 2459), the entitled party may freely choose the mean of protection between claims for: reduction of its performance, increase of the performance due to it, and invalidation of the contract. Moreover, where the value of the performance of one party at the time of the conclusion of the contract is at least twice as great as the value of the performance of the other party, such performance is presumed to exceed the performance of the other party «to a glaring extent».

<sup>133</sup> It is generally accepted that undue performance is only a specific case of unjust enrichment; see W. DUBIS, in: *Civil Code*, 2021, E. Gniewek, P. Machnikowski (eds), Art. 410, marginal no. 1.



The practices addressed therein may therefore relate to the activities falling within the scope of Directive 2019/633. An «act of unfair competition» (unfair trading practice) within the meaning of UCA is an action contrary to the law or morality, if it threatens or undermines the interests of another entrepreneur or customer (Art. 3.1 UCA<sup>134</sup>), provided that such an action is in connection with business activities. All of these conditions must be fulfilled to conclude that an act of unfair competition was committed in a particular situation. It is not relevant here whom the perpetrator's conduct affects – it suffices to prove an unlawful conduct of an entrepreneur<sup>135</sup>. Such unlawfulness is understood not only as conduct that is contrary to the law but also to principles of community life (coexistence)<sup>136</sup>. However, not every infringement of the law in itself is to be considered an act of unfair competition, as it is necessary to prove that the infringement resulted in a competitive advantage for the infringer<sup>137</sup>.

Generally, an act of unfair competition can only be performed by an entrepreneur or, exceptionally, also by another entity in the cases specified in the Act<sup>138</sup>. Consequently, the Act on Combating Unfair Competition applies, in principle, to relations which are professional from both sides, *i.e.*, business-to-business relationships.

Besides the general clause discussed above (Art. 3.1 UCA), the Act lists examples of types of acts of unfair competition (Art. 5-17g UCA). Of these, the following are worth noting in the context of CAA: 1) the disclosure, use, or obtaining another party's information constituting a business secret (Art. 11.1 UCA). The legislator specified in Art. 11.4-6 UCA when, in particular, the said conduct shall be an act of unfair competition. When interpreting

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<sup>134</sup> Cf. Art. 6 CAA which refers to similar criteria.

<sup>135</sup> Cf. judgement of the Poznań Court of Appeal of 24 June 1992, I ACa 204/92, *LEX* No. 9144.

<sup>136</sup> Cf. E. NOWIŃSKA, in: E. NOWIŃSKA, K. SZCZEPANOWSKA-KOZŁOWSKA, *The Act on Combating Unfair Competition. Commentary* (“*Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*”), Warsaw 2018, Art. 3, thesis 2.

<sup>137</sup> See K. JASIŃSKA, J. SZWAJA, in: *The Act on Combating Unfair Competition. Commentary* (“*Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*”), J. Szwaja (ed), Warsaw 2019, Art. 3, marginal no. 50; M. KĘPIŃSKI, *The general Problems of the New Act on Combating Unfair Competition* (“*Problemy ogólne nowej ustawy o zwalczaniu nieuczciwej konkurencji*”), *RPEiS* 1994, v. 2, p. 5. Therefore, a breach of rules on matters of order (*normy porządkowe*), *e.g.*, failure to register business activities, cannot be considered an act of unfair competition (see Supreme Court judgement of 2 February 2001, IV CKN 255/00, OSNC 2001, No. 9, item 137).

<sup>138</sup> E. NOWIŃSKA, in: E. NOWIŃSKA, K. SZCZEPANOWSKA-KOZŁOWSKA, *The Act*, 2018, cit., Art. 3, thesis 18.

this provision in conjunction with Art. 3.1 UCA, it must be concluded that it is prohibited to unlawfully obtain, disclose or use business secrets<sup>139</sup>; 2) hindering market access by imposing charges other than trade margins for acceptance of merchandise for sale (Art. 15.1.4 UCA; this concerns, *inter alia*, the so-called «slotting fees», *i.e.*, fees charged by a buyer of goods to the seller in order to accept the goods for further sale, they are unrelated to the trade margin). In addition to finding that a fee other than a trade margin has been charged (*e.g.*, charges for promotions, advertising, proper display of the goods), it is necessary to establish that access to the market has been hindered as a consequence of charging the fee<sup>140</sup>; 3) unjustified postponement of payments for delivered goods or services (Art. 17g UCA), consisting in particular in a violation of the provisions of the Late Payments Act<sup>141</sup>.

The practices which unfairly exploit contractual advantage under CAA are a specific type of acts of unfair competition. Consequently, the protection measures provided by UCA and CAA are independent of one another. If a particular conduct can be qualified as a practice unfairly exploiting a contractual advantage in trade in agricultural and food products, the entitled person can seek the protection provided for under both, UCA and CAA.

The Act on Combating Unfair Competition provides for two types of protection measures in the event of an act of unfair competition: civil liability (Art. 18-20 UCA) and criminal liability (Art. 23-27 UCA)<sup>142</sup> of

<sup>139</sup> See S. SOŁTYSIŃSKI, SZ. GOGULSKI, in: *The Act*, 2019, J. Szwaja (ed), cit., Art. 11, marginal no. 41.

<sup>140</sup> However, the need to demonstrate that the condition of hindering market access was satisfied is disputable under Polish law (see: T. SKOCZNY, M. BERNATT, in: *The Act*, 2019, cit., J. Szwaja (ed), Art. 15, marginal no. 85; C. BANASIŃSKI, M. BYCHOWSKA, *Hindering Market Access by Charging Fees other than Trade Margin for Accepting Goods For Sale (Art. 15.1.4 UCA)* (“Utrudnianie dostępu do rynku poprzez pobieranie innych niż marża handlowa opłat za przyjęcie towaru do sprzedaży”), *PPH* 2008, v. 4, p. 13). This matter seems to have been decided in the judgement of the Constitutional Tribunal of 16 October 2012, SK 20/12 (Journal of Laws 2014, item 1458), in which the Tribunal held that Art. 15.1.4 UCA prohibits the charging of only those fees which hinder access to the market while being, at the same time, contrary to principles of morality and infringing or threatening to infringe the interests of other entrepreneurs or of the customer.

<sup>141</sup> This Act will be discussed below, para. 8.

<sup>142</sup> UCA provides for criminal sanctions for certain acts of unfair competition. It is worth noting, in particular, the criminal liability of the entrepreneur who discloses to another person or uses in his or her own business activities business secret information, thus causing serious damage to the entrepreneur (Art. 23.1 UCA) or who, having illegally obtained business secret information, discloses that information to another person or uses it in his or her own business activities (Art. 23.2 UCA).

the perpetrator.

Pursuant to Art. 18.1 UCA, the entrepreneur who has been harmed by an unfair competition practice may request from the perpetrator: 1) the discontinuation of the illegal practice; 2) the removal of the effects of the illegal practice; 3) the issuance of a relevant statement once or several times in the specified form and of the specified content; 4) repair of the damage caused; 5) surrender of the wrongly acquired benefits; the entrepreneur may also request that the perpetrator be ordered to pay an appropriate amount of money to support Polish culture or to protect national heritage, if the unfair trading practice was culpable. In the event of an act of unfair competition, the entitled person has a choice between the claims provided for<sup>143</sup>.

The range of entities which have the standing to bring proceedings in order to pursue the claims specified in the provisions of UCA is limited to entrepreneurs only. As has been mentioned, liability for an act of unfair competition does, generally, not depend on the fault of the infringer as it is sufficient to prove the unlawfulness of the conduct. The occurrence of a loss (except for Art. 18.4 UCA) is also, generally, not the condition for claims under Art. 18.1 UCA to arise.

First of all, it is possible to demand the illegal practice to be discontinued (Art. 18.1.1 UCA)<sup>144</sup>.

Secondly, one can request the removal of the effects of the illegal practice (Art. 18.1.2 UCA).

In the case of the compensation claims provided for in Art. 18.1.4-5 UCA, a reference needs to be made to the provisions of the Civil Code. This is because the former do not constitute independent grounds for claims. Therefore, it is necessary to prove that the conditions for liability for damages caused by a delict (Art. 415 *et seq.* CC) or a breach of an obligation (Art. 471 *et seq.* CC)<sup>145</sup>, or conditions for a claim of unjust enrichment (Art. 405 *et seq.* CC) are fulfilled<sup>146</sup>.

The entitled person may also request the court to rule on items associated with an unfair trading practice, such as, for example, products, packaging,

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<sup>143</sup> Cf. A. JAKUBECKI, K. JASIŃSKA, R. SKUBISZ, J. SZWAJA, in: *The Act*, 2019, J. Szwaja (ed), cit., Art. 18, marginal no. 4 *et seq.*

<sup>144</sup> The purpose of this claim is to bring an end to the infringer's illegal practices and to prevent future acts of unfair competition (see Supreme Court judgement of 22 March 2017, III CSK 86/16, *LEX* No. 2361200).

<sup>145</sup> An example of a «contractual» act of unfair competition giving rise to liability under Art. 471 CC may be imposing charges other than trade margins for acceptance of merchandise for sale which is addressed in Art. 15.1.4 UCA.

<sup>146</sup> See above, para. 6.2.

advertising materials (Art. 18.2 UCA). This provision refers to all items directly associated with an act of unfair competition, *i.e.*, items associated with the unfair practice in such a way that, generally, they cannot be legally used<sup>147</sup>. The court may, for example, order that the items are destroyed or allocated for compensation.

The claims provided for in Art. 18 UCA are of a pecuniary nature and are subject to prescription<sup>148</sup>. They become time-barred after a period of three years; such a period beginning separately for each violation (Art. 20.1 UCA). Claims for damages, on the other hand, shall be time-barred after three years from the date on which the injured party knew about the damage and the person liable to compensate it or should have known if he or she had exercised due diligence. However, such a time limit may not be longer than ten years from the day when the event causing the damage occurred (Art. 442<sup>1</sup> sec. 1 CC in conjunction with Art. 20.2 UCA), unless the act of unfair competition is simultaneously a criminal offence, as in that case the limitation period elapses after 20 years from the date of the crime (Art. 20.3 UCA).

### 8. *The Late Payments Act*

The Late Payments Act provides for measures aimed at motivating the debtor to render performance in a relatively short time<sup>149</sup>; it implements Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions. Generally, the Act applies to business-to-business relationships only (Art. 2.1 LPA). It also applies when the parties to a contract are entities engaged in agricultural production activities (Art. 2.2 LPA in conjunction with Art. 6.1.1 ELA). Consequently, the provisions of the Late Payments Act may generally apply in cases covered by CAA. The protection provided by the LPA is mostly independent of that laid down in CAA, which provides for measures of administrative law. However, in some cases governed by the CAA, certain provisions of the LPA do not apply, as will be set out further below.

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<sup>147</sup> See K. SZCZEPANOWSKA-KOZŁOWSKA, in: E. NOWIŃSKA, K. SZCZEPANOWSKA-KOZŁOWSKA, *The Act*, 2018, cit., Art. 18, thesis 95.

<sup>148</sup> See Supreme Court judgement of 8 March 2007, III CZ 12/07, *LEX* No. 319939.

<sup>149</sup> Cf. Ł. CUDNY, *The Time Limits for Payment Act. Commentary* (*“Ustawa o terminach zapłaty. Komentarz”*), K. Osajda (ed), Warsaw 2017, Art. 1, marginal no. 27.

One of the ways to protect the principle of timely payment, which is the purpose of the Late Payments Act as well as of Directive 2011/7, is the interest on the so-called trade credit. This is because, if the parties have provided for a payment period longer than 30 days, the creditor may claim statutory interest upon the expiry of 30 days following the date of his or her performance and delivery of the invoice or bill confirming the supply of the goods or the service to the debtor until the date of payment, but no longer than until the date on which the payment is due (Art. 5 LPA). Therefore, under LPA, the legislator allows to reserve a time limit of more than 30 days for the payment, but the creditor may charge statutory interest from the 31st day after the date on which he or she provided his or her performance, even though the due date has not been reached. The claim for payment of interest shall arise *ipso iure* with the expiry of the 30 day time limit without any action being needed from the creditor. Such interest is considered to be interest on the principal amount, which is why Art. 360 CC applies under which interest shall be payable every year at the end of it and where the time limit for payment of a pecuniary sum is shorter than a year – along with the payment of that sum. However, this provision is of a dispositive nature so the parties may agree a different payment period for interest<sup>150</sup>.

Under Art. 5 LPA, the interest shall be calculated no longer than until the date on which the pecuniary performance (consideration) becomes due. After that date, the creditor is entitled to the late payment interest calculated in accordance with Art. 7.1 LPA. The application of Art. 5 LPA is excluded in certain situations governed by CAA. One such case is where the buyer has a contractual advantage over the supplier within the meaning of the CAA, the supply contract provides for delivery of perishable goods on a regular basis, and it stipulates that the payment for the products is to be made later than 30 days after the end of the delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, if that day is later than the end of the agreed delivery period in which the products were delivered (cf. Article 8.1.1a, first indent CAA). Another case concerns the situation where the buyer has a

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<sup>150</sup> There are doubts as to whether the creditor may claim interest on unpaid interest (see Art. 482.1 CC) when the debtor has rendered the main performance but fails to pay interest under Art. 5 LPA. The prevailing view among Polish legal scholars accepts that Art. 482.1 CC applies to both statutory interest for delay and interest on the principal amount. Cf. M. LEMKOWSKI, in: *Civil Code. Volume II. Commentary*. Articles 353-626 (“*Kodeks cywilny. Tom II. Komentarz. Art. 353-626*”), M. Gutowski (ed), Warsaw 2019, Art. 482, marginal no. 3; K. ZAGROBELNY, in: *Civil Code*, 2021, E. Gniewek, P. Machnikowski (eds), cit., Art. 482, marginal no. 1.

contractual advantage over the supplier within the meaning of the CAA, the supply contract concerns the delivery of perishable goods, and it does not provide for the delivery of products on a regular basis, but it stipulates that the payment for the products is to be made later than 30 days after the date of delivery or later than 30 days after the date on which the amount payable is set, if that day is later than the day on which the products were delivered (Article 8.1.1b, first indent CAA)<sup>151</sup>. In these cases, stipulating a payment period longer than 30 days is not permissible and it results in the absolute nullity of such a clause, which could lead to the nullity of the entire contract (Art. 58.3 CC) or nullity of this specific clause only<sup>152</sup>.

Pursuant to Art. 6.1 LPA, if the parties have not provided for any time limit for rendering the pecuniary performance, the creditor shall be entitled to statutory interest for late payment from the 31<sup>st</sup> day following the date on which he or she rendered his or her performance – or on which the procedure of examining goods or services for conformity with the contract was completed, if the contract provided for such a procedure (Art. 9.1 LPA) – until the date of payment by the debtor. Article 6.1 of the LPA in a case falling under the scope of the CAA applies if the contract provides for longer payment periods than those set out in Article 8.1.1 a-b CAA and this does not result in the invalidity of the entire contract (cf. Art. 58.3 CC), but only the clause stipulating the payment period is invalid. The consequence of the invalidity of clauses stipulating longer payment periods is that the payment period is considered not regulated in the contract. Therefore, the creditor is entitled to interest as from the 31<sup>st</sup> day according to Article 6.1 of the LPA.

Under LPA, the contractual period for rendering the performance generally cannot exceed 60 days. Article 8.1.1. CAA allows the same length of payment periods, with the above-mentioned exception regarding the payment period for perishable goods, which is 30 days. According to LPA, under certain conditions, it is permissible to stipulate a longer payment period than 60 days as long as the parties expressly agree so in their contract, provided that this is not grossly unfair to the creditor entitled to demand payment (see Art. 7.2-3 and Art. 11a.1 LPA). However, in cases covered by

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<sup>151</sup> In addition, the CAA also prohibits practices involving an actual time lag between delivery of the goods and payment; not only contractually agreed payment terms are covered by the prohibition. So if there was a 30-day payment period in a perishable goods contract, but the actual time lag between delivery of the goods and payment was longer, the contract itself would comply with the CAA, but the practice would still constitute an abuse of contractual advantage under the CAA. Under the LPA, such situations would fall under Article 7.1.

<sup>152</sup> See above, para. 6.

Article 8.1.1 CAA, these provisions of LPA do not apply.

It is also worth noting that pursuant to Art. 13.2 LPA, the time limit agreed by the parties for the performance of the pecuniary performance (payment period) is reduced by operation of law to 60 days if the period longer than 60 days was agreed in breach of the LPA. In turn, CAA does not provide for a similar provision. Thus, it is to assume that under CAA, the stipulation of longer payment periods than the 30-day-periods specified in Article 8.1.1 CAA for the payment for delivery of perishable goods leads to the absolute nullity of such clauses (and may lead to the absolute nullity of the entire contract). However, Article 13.2 LPA could apply (instead of the sanction of invalidity of the contractual clause) to the cases referred to in Article 8.1.1 a and b, second indents, CAA, *i.e.*, where the contract concerns products other than perishable goods. This would lead to the payment period for the delivered products being reduced by law to 60 days, and Article 6.1 of the LPA would no longer apply to such cases, as it applies to contracts that do not specify a payment period.

LPA also stipulates that if the payment period agreed in the contract is more than 120 days from the date of delivery to the debtor of an invoice or bill, confirming the supply of the goods or the service, and such stipulation is grossly unfair to the creditor, the creditor has the right to rescind or terminate the contract (Art. 7.3a LPA). In such a case, the claim for payment for goods or services which have already been supplied becomes due within 7 days from the date of termination of the contract. Upon the expiry of this period, the creditor is entitled to claim statutory late payment interest pursuant to Art. 7.1 LPA (Art. 7.3b LPA). However, both those provisions do not apply in cases falling within the scope of Article 8.1.1 CAA.

The claim for payment of the late payment interest under LPA becomes due on each day of delay separately and, as a consequence, the limitation period to such claim also runs separately for each day of delay (Art. 481.1 CC).

## *9. Assessment of the implementation of Directive 2019/633 into Polish law*

Under the provisions of Directive 2019/633, Member States are required to ensure that appropriate and effective mechanisms are in place to counteract unfair trading practices in the agricultural and food supply chain.



In order to reconstruct the model of protection provided for in the Directive, and, as the next step, to come up with an adequate implementation model for the Polish legislature, it is necessary to analyse individual provisions relating to the scope of such protection (*i.e.*, the persons and matters the protection applies to). When looking for an adequate model for the protection of the supply chain participants, reference should be made both to the specific provisions of Directive 2019/633 (for example, the list of unfair trading practices – Art. 3(1) of Directive 2019/633, supplemented by Art. 1 which lists the features required for a given conduct to be considered an unfair trading practice<sup>153</sup>) and its recitals. Examining the content of these rules will make it possible to determine what kind of safeguards and sanctions the EU legislator expects from each Member State in order to ensure the effective achievement of the objectives of Directive 2019/633<sup>154</sup>. This will, in turn, allow an assessment of which of the sanctions and protection measures can be applied under the existing law and which would require additional enactments or statutory clarification.

First of all, in the light of Recital 11 of Directive 2019/633, the protection arising thereunder should cover commercial transactions irrespective of whether they are carried out between enterprises or between enterprises and public authorities, given that public authorities, when buying agricultural and food products, should be held to the same standards; therefore the Directive should apply to all public authorities acting as buyers. As to the time when practices occur<sup>155</sup>, the protection should apply to the pre-contractual<sup>156</sup>, contracting<sup>157</sup> and performance stages, as well as to possible subsequent contract modifications<sup>158</sup> and even after the fulfilment of the contractual obligations.

The possible sanctions for unfair trading practices in the agri-food supply chain may be of civil, administrative, or criminal nature<sup>159</sup>. Indeed Directive

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<sup>153</sup> According to Article 1(1) of the Directive, these are practices «that grossly deviate from good commercial conduct», «that are contrary to good faith and fair dealing», and «that are unilaterally imposed by one trading partner on another».

<sup>154</sup> This refers to the combating of the practices which are listed under Art. 3(1) of Directive 2019/633 and, in addition, satisfy the conditions under Art. 1 of Directive 2019/633.

<sup>155</sup> See Recital 15 of Directive 2019/633

<sup>156</sup> See also Recital 22 of Directive 2019/633.

<sup>157</sup> See Recital 20 of Directive 2019/633.

<sup>158</sup> See Recital 21 of Directive 2019/633.

<sup>159</sup> See Recital 25 of Directive 2019/633 under which suppliers should be able to file complaints against certain unfair trading practices.

2019/633 refers to the possibility of introducing the so-called deterrent (in the form of fines) in the national law without specifying whether it should be a sanction applied in administrative proceedings or criminal proceedings. Furthermore, neither the recitals of Directive 2019/633 nor its provisions contain any rule on civil-law sanctions for unfair contractual practices; in particular, it is not specified whether the unfairness of a given practice entails the absolute nullity of the contract, some other 'defect' of the contract or the possibility for the court to intervene on the content or existence of the contractual relationship.

According to Recital 24, Directive 2019/633 does not intend to harmonise the rules on the burden of proof in proceedings before national enforcement authorities and the rules of national law apply in this respect. It follows from the context of the provision that this reference is to both the substantive rules governing the burden of proof and the procedural rules on evidence.

Importantly, Directive 2019/633 sets a minimum standard of protection, which means that protective measures more far-reaching than those provided for in the Directive can be introduced by the national legislature; consequently, a legislative model providing for a full range of sanctions, from civil to criminal, complies with the Directive<sup>160</sup>.

### *9.1. The need to address matters not covered by the Directive in national law*

When drafting the Directive 2019/633, the European legislator decided to adopt the minimum harmonisation approach. The possibility for Member States to ensure a higher level of protection regime than provided for in the Directive is limited by the need to ensure compliance with the rules on the functioning of the internal market. The enforcement requirements under Directive 2019/633 are also minimal in the sense that the Member States may provide for stricter rules on which government authorities may sanction unfair trading practices of buyers<sup>161</sup>.

It would seem that the EU legislature has correctly identified the problem of imbalances in bargaining power in the agricultural supply chain.

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<sup>160</sup> This conclusion can be drawn, in particular, from Article 9(1) of Directive 2019/633, which allows the legislature of Member States to maintain or establish stricter rules than those laid down by Directive 2019/633.

<sup>161</sup> See proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain from 12.04.2019, COM (2018) 173 final, p. 3.

The Commission's reasoning on this point is quite convincing<sup>162</sup>. However, a question arises whether the annual turnover of market participants is the proper criterion for assessing the bargaining power. For example, it follows from Article 1(2)(a) of Directive 2019/633 that the Directive applies to unfair trading practices of buyers which have an annual turnover of more than EUR 2 000 000 towards suppliers which have an annual turnover not exceeding EUR 2 000 000. Where the turnover of the supplier and the buyer is similar (*e.g.*, EUR 1 999 999 in the case of the supplier and EUR 2 000 001 of the buyer), it does not seem appropriate to conclude automatically that the buyer has a greater bargaining power. The adopted solution may not allow the achievement of the European legislator's objectives. It would be appropriate to introduce, in such a case, a rebuttable presumption of the buyer's greater bargaining power. The buyer could, during proceedings in the matter of unfair trading practices, challenge the attribution of a greater bargaining power over the supplier, which would exclude the application of the rules implementing Directive 2019/633.

It should be noted that contractual advantage will, generally, occur on the part of the buyer of agricultural products. However, it is not impossible for a supplier of agricultural products to have a stronger bargaining position, as this may occur depending on the actual market conditions<sup>163</sup>. This is because the supplier within the meaning of Directive 2019/633 is not only an agricultural producer but also an operator (natural or legal person) who sells food products (Article 2(4) of Directive 2019/633). An example is the negotiating position of a supplier offering a «strong brand» that is well-recognised by consumers. It would therefore be appropriate to extend the Directive's protection to other actors in the agricultural supply chain, as done by the Polish legislator in the Contractual Advantage Act<sup>164</sup>.

What also needs to be considered is whether the list of prohibited unfair trading practices contained in Directive 2019/633 is complete. As Member States may ensure greater protection to suppliers, it seems appropriate for the national law to extend the list of unfair practices contained in Art. 3 of Directive 2019/633. As it follows from the Opinion of the European Economic and Social Committee<sup>165</sup>, examples of unfair practices include:

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<sup>162</sup> See proposal from 12 April 2019, p. 2.

<sup>163</sup> Cf. Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe COM (2013) 37 final, p. 2.

<sup>164</sup> See above, para. 2.2.

<sup>165</sup> See Opinion of the European Economic and Social Committee on the 'Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain' [COM (2016) 32 final], 2017/C

use of unclear or unspecified contractual terms; use of product cosmetic specifications to reject delivery of food or reduce the price paid; pressure to cut prices; threats of withdrawal from sale. Although these practices could have been considered unfair based on Art. 1(1) of Directive 2019/633, they cannot be found in the list of the trading practices prohibited, whether in all or in certain circumstances, in Directive 2019/633<sup>166</sup> which means that they cannot be regarded as «unfair» within the meaning of the Directive as the Directive does not provide for a general clause on unfair practices. However, it would be reasonable to give them a prominence in the provisions of the national law implementing the practices listed in Art. 3 of Directive 2019/633. Furthermore, some of these behaviours may occur at the pre-contractual stage. The supplier may, therefore, be forced to enter into a contract due to an economic pressure exerted as early as at the pre-contractual stage. As a consequence, it would be appropriate to extend the protection of the counterparty which is at disadvantage also to the pre-contractual stage<sup>167</sup>.

### *9.2. Conclusions on the implementation of Directive 2019/633 into Polish law*

While implementing the Directive 2019/633, the Polish legislator decided to enact the new Act on Counteracting the Use of Contractual Advantage in Trade in Agricultural and Food Products which at the same time repeals the previously binding regulation (FCAA). The new act introduces a general clause of unfair use of contractual advantage. Pursuant to Art. 6 CAA, this occurs when the conduct is contrary to the principles of morality and fair dealing and threatens or infringe a material interest of the other party. The European legislator focused on providing a minimum list of practices that are prohibited (either in all or in certain circumstances) without providing a general clause. This catalogue has been implemented into the Polish law as an exemplary list of practices which are deemed to constitute unfair use of contractual advantage (Art. 8.1(1)-(10) CAA). The practices listed in Art. 8.1(1)-(10) CAA may be treated – following the

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034/21, pp. 3-4.

<sup>166</sup> The Polish legislator has included in the list of unfair practices only a pressure to cut prices (Art. 8.1.4 CAA).

<sup>167</sup> Due to the application of the general clause of unfair practices (art. 6 CAA) as well as a non-exhaustive list of unfair practices (Art. 8 CAA) by the Polish legislator, it is justified to assume that also a conduct at the pre-contractual stage may be sanctioned by CAA.

example of the Directive 2005/29 – as the so-called 'blacklist' of conducts which should *a priori* be deemed unfair in all circumstances. Therefore, the assessment whether a given behaviour was contrary to principles of morality and fair dealing and threatened or infringed a material interest of the other party is excluded (Art. 9 CAA)<sup>168</sup>. It is, however, worth considering supplementing the catalogue of unfair trade practices with the following practices, aforementioned in this study (para. 2.4): using unclear or imprecise contractual terms; using excessively detailed product specifications to refuse to accept deliveries or to lower the purchase price; pressure to lower prices; threatening to withdraw products from the offer.

According to Art. 3.3 CAA, the Act refers not only to B2B relation, but also to the situation when the purchaser of agricultural or food products is an entity referred to in Art. 4 of the Public Procurement Law. This regulation follows the Directive 2019/633, which also applies to the sale of agricultural and food products by suppliers to all buyers who are public authorities (Recital 11; Article 1(2) of the Directive 2019/633).

The CAA extended the scope of application of Directive 2019/633. The measures provided for in the Directive 2019/633 refer only to the protection of the supplier. The European legislator chose to adopt the minimum standard of harmonisation, so that the extension of protection in Polish law was – under the reservations made earlier (see para. 9.1) – legitimate. Pursuant to Art. 5 CAA, practices unfairly exploiting the contractual advantage of the buyer against the supplier and of the supplier against the buyer are prohibited. This solution has to be approved as the protection envisaged by the Directive 2019/633 could be in specific situations insufficient.

The way in which Art. 1(2) of the Directive 2019/633, referring to the annual turnover of market participants as a criterion for assessing

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<sup>168</sup> In turn, practices listed in Art. 8.1(11)-(16) CAA may be called a «grey list», because under some circumstances they are not considered unfair. See Art. 8.2 CAA according to which: «The practices referred to in paragraph 1 shall not be regarded as unfairly exploitative of a contractual advantage:

1) points 11-16 - if they have been clearly and unambiguously agreed in the contract between the purchaser and the supplier prior to their use;

2) point 13 - if the contract between the supplier and the purchaser has been concluded before the expected date of the promotion and contains provisions specifying the date of commencement of the promotion, its duration and the quantity of the agricultural or food products to be covered by the promotion». However, as stated in Art. 9 CAA, the grounds set out in the general clause (Art. 6 of CAA) shall not be taken into account when assessing all the unfairly exploitative contractual advantage practices listed in Art. 8(1) CAA, *i.e.*, for both the «blacklist» and the «grey list».

bargaining power, has been implemented should also be viewed positively. Strict adherence to the criteria of achieving a certain level of turnover could make it impossible to achieve the objectives of the Directive. The Polish legislator decided to introduce a definition of contractual advantage as the existence of a significant disproportion of the economic power of the buyer against the supplier and the supplier against the buyer. At the same time, the CAA provided a presumption that a significant disproportion of the economic power occurs, if – respectively – the buyer and the supplier reaches a specific level of annual turnover and – respectively – the supplier and the buyer does not reach this level (Art. 7.2-3 CAA). This solution is appropriate because in exceptional situations, where the turnovers of the supplier and the buyer are similar, it would be unjustified to automatically settle a significant disproportion in economic power (see para. 4.1). This presumption is rebuttable and therefore it is possible to prove that – despite this difference in annual turnover – there is no significant disproportion in economic potential.

What is important, the protection against practices unfairly exploiting the contractual advantage in trade in agricultural or food products provided by the CAA does not exclude protection under other regulations (Art. 4 CAA). Consequently, an entitled person may use protection measures provided for in the Act on Combating Unfair Competition (see para. 7), the Late Payment Act (see para. 8), administrative-law measures in case of unfair use of contractual advantage (see para. 3-3.3), as well as measures of private law (see para. 4-6.2).

### *9.3. Critical remarks with regard to civil remedies*

When implementing the Directive, the Polish legislator focused its attention only on administrative measures to prevent and combat practices constituting unfair use of contractual advantage in trade in agricultural and food products. Naturally, the importance of administrative law measures cannot be overestimated, as they have both a preventive function, discouraging the use of unfair practices, and a repressive function. However, the focus on administrative law measures has affected the level of protection of weaker participants in trade in agri-food products in the civil law area. In terms of civil law measures, the legislator only indicated in Art. 4 CAA that the protection provided in the CAA does not exclude the protection granted under other provisions (which also means civil law provisions). This implies the use of instruments which are dispersed over

various pieces of legislation and not fully adapted to the problems encountered in the trade in agri-food products.

Moreover, it is apparent that during the works on the implementation of the Directive, no due attention was paid to the consequences of the introduction of the provisions of the CAA with regard to civil law remedies. As indicated earlier (para. 6), the use in a contract between a supplier and a buyer of agri-food products of clauses corresponding to the practices listed in Art. 8.1(1)-(10) CAA leads to the invalidity of these clauses on the basis of Art. 58.1 CC and, further, may also lead to the invalidity of the entire contract on the basis of Art. 58.3 CC; also the provisions in the contract leading to the practices described in Art. 8.1(11)-(16) CAA may result in the invalidity of the corresponding contractual clauses on the basis of Art. 58.2 CC and therefore to the invalidity of the entire contract on the basis of Art. 58.3 CC. The objective of Directive 2019/633 is that the unfair terms listed in Art. 3(1) are prohibited in all circumstances (absolute prohibition). At the same time, one has to bear in mind that buyers and suppliers of agricultural and food products can (and often do) have long-term – and in any case not one-off – commercial relationships, which could effectively discourage the weaker party from invoking the nullity of unfair contract terms used by the stronger party. Thus, the sanction of nullity of such clauses is, in general, the proper sanction as it renders such a clause completely void, with *ex tunc* effects, irrespective of whether the unfairness of the term is invoked by the interested party or by the enforcement authority of its own motion. Also, the stronger party's awareness that a given term will be regarded as null and void irrespective of whether the weaker party invokes the unfairness of the term is much more effective in preventing the stronger party from using the term.

However, the sanction of invalidity of the entire contract which contains a clause deemed unfair or contrary to the statutory provisions, may be counterproductive. Invalidity of the entire contract is generally not the adequate measure to ensure contractual balance and protection of the weaker party. Although the weaker party to an (invalid) contract will not be bound by the provisions of the contract that deprive him/her of their rights, the invalidity of the whole contract will rarely be the desired result (*e.g.*, when the weaker party depends on the sale of its products to that buyer, as due to the nullity of the clause the former may «lose» the entire contract and also be obliged to return the performance already received). Especially where perishable products are traded, the obligation on both parties to return the performances as a consequence of the invalidity of the contract will not in any way improve the situation of the weaker contracting party. Thus, to ensure contractual



fairness, it is more appropriate to apply the sanction of partial invalidity (affecting only the terms concerned) while leaving the parties bound by the contract. To this effect an explicit exemption from Art. 58.3 CC would be necessary. The Polish legislator did not exclude the application of this provision to contracts which include clauses falling under the list of practices prohibited under Art. 8.1.(1)-(10) CAA. The lack of such an exclusion is to be assessed critically.

As an alternative (instead of excluding the application of Art. 58.3 CC), with regard to those cases in which the CAA provides for maximum acceptable payment periods for the goods delivered and minimum acceptable cancellation<sup>169</sup> periods for the delivery of perishable goods prior to their delivery (Art. 8.1.(1)-(2) CAA), the Polish legislator could also have considered introducing a regulation stating that, if a contract stipulates payment periods longer than the maximum permissible deadlines (see Art. 8.1.1 CAA) or shorter than the minimum permissible cancellation periods (see Art. 8.1.2 CAA), invalid contract terms shall be replaced by statutory provisions specifying these maximum/minimum permissible terms. This solution would also prevent the contract from being invalid in its entirety if a shorter/longer term than the permissible one is agreed upon. A similar solution exists in the LPA (Art. 13.2<sup>170</sup>), but this provision only applies in cases where contracts

<sup>169</sup> The CAA, like the Directive, uses the general concept of «cancellation of orders of products». It is to be assumed that this concept may encompass various legal instruments that allow one of the parties to cancel a previously placed order, *e.g.*, the contractual right of withdrawal (Art. 395 CC), the revocation of an offer made by the entrepreneur (Art. 66<sup>2</sup> CC), or the contractual right of one of the parties to unilaterally change the delivery dates of the products. If, according to the contract, the cancellation deadline is shorter than 30 days before the planned delivery date of perishable products, such a provision of the contract will be invalid as contrary to Art. 8.1.2 CAA (cf. Art. 58.1 CC). However, if the contract does not expressly provide for the party's right to cancel the order, and Art. 66<sup>2</sup> CC allowing the entrepreneur to cancel its own offer within a limited timeframe, is not applicable, and the buyer nevertheless declares that it «cancels» the order, under Polish law such declaration will lack legal significance and should be treated as ineffective; if as a result the buyer refuses to accept the products delivered to it within the timeframe set forth in the contract, it breaches its obligation and exposes itself to liability for damages towards the supplier of the goods (see para. 6.2).

<sup>170</sup> See para. 8. Initially, the LPA did not contain this provision, but this raised doubts, among others similar to those raised above, about the consequences of stipulating in the contract a payment term longer than permissible under the LPA. These doubts were resolved by the introduction of Art. 13.2 LPA. Before this change, the legal doctrine suggested that the exact same solution as that subsequently introduced by the legislator should be adopted, but through a pro-EU interpretation (see B. OSTRZECHOWSKI, K. RIEDL, *Act on Counteracting Excessive Delays in Commercial Transactions. Commentary* (“*Ustawa o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych*.”

between entities subject to the CAA set payment deadlines contrary to the prohibition in Art. 8.1.1. (a) and (b) CAA; it does not apply to deadlines that are longer than 30 days but shorter than 60 days; moreover, it only applies to the payment deadlines, not to deadlines for cancellation of orders.

In the current legal situation, in the light of the above-mentioned deficiencies of the CAA, it can be assumed that a pro-EU interpretation of the provisions of Art. 8.1.(1)-(10) CAA in connection with Art. 58.1-3 CC is to be privileged, to the effect that a contract containing clauses contrary to the prohibitions set forth in Art. 8.1(1)-(10) CAA may be regarded as valid, and with the proviso that, in the case of contractual clauses containing deadlines contrary to Art. 8.1(1)-(2) CAA, the deadlines set forth in those articles are to be applied instead.

The inadequacy of the weaker party's remedies against the unfair use of contractual advantage is, however, not only expressed in the questionable effectiveness of the sanctions applicable in case of a breach of the prohibitions listed in Art. 8 CAA. The protection of weaker agri-food market participants also appears to be insufficient with respect to the civil-law claims they may make in the event of practices that unfairly use contractual advantage, such as claims for damages caused by tort or by non-performance or improper performance of the contract. Suppliers and buyers of agri-food products often have long-term commercial relationships, and for one of the parties the continuation of this relationship may even be crucial to the existence of that entity. Weaker entities and those economically dependent on stronger counterparties may be very reluctant to pursue their claims, for fear of losing their business partner. This fear may be stronger than the desire to obtain redress from the counterparty. A solution to this problem could be to introduce a provision according to which a certain category of organisations representing such traders would be entitled to pursue claims on behalf of them. A similar solution is introduced in the LPA (Art. 12 LPA).

Moreover, many of the general regulations concerning, for example, limitation periods for claims are not adjusted to the pursuit of claims against the economically stronger contractor. These claims are time-barred within a short period of 3 years which generally runs from the date on which the damage occurred (for claims for failure to perform or improper performance of the contract; see Arts. 471, 118 and 120 CC) or from the date on which the injured party learned or could have learned of the damage and the person obliged to redress it (Art. 442<sup>1</sup> § 1 CC). There are frequent cases, in which throughout the limitation period a weaker contractor

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*Komentarz*"), K. Osajda (ed), Warsaw 2021, Art. 13, marginal no. 20-21).

remains in commercial relations with a stronger contractor and does not decide to pursue its claims for fear of losing the business partner, and after the cooperation ends its claims are already time-barred. A solution could be to suspend the running of the limitation period until the commercial relationship between the stronger and weaker counterparty has ended. The running of the statute of limitations is also, in the current legal state, independent of the administrative proceedings before the President of UOKiK, which also does not seem to be a proper solution.

Also the procedural solutions currently used to satisfy civil-law claims of agri-food market participants do not seem appropriate. In particular, there is a lack of proper regulation of the relationship between administrative proceedings conducted by the President of UOKiK and rulings issued in these proceedings and civil law proceedings conducted by injured parties against an entity unfairly using the contractual advantage. In practice, it is difficult to use the findings of the President of UOKiK in civil proceedings and the issue of civil courts being bound by the findings of the President of UOKiK is also very ambiguous. It seems that the national legislator should comprehensively consider the difficulties encountered in the current state of the law in pursuing compensation claims against stronger counterparties in the agri-food trade and, on this basis, develop legislative changes providing for mechanisms needed to effectively pursue such claims (*inter alia*, with regard to the statute of limitations, mutual relations between civil proceedings and administrative proceedings conducted by the President of UOKiK, distribution of the burden of proof, facilitating the weaker party to obtain evidence needed in the course of the proceedings, *etc.*).

As it results from the above, in the field of civil law protection, there is still a lot to be done in the Polish legal system to ensure that weaker participants in the trade of agri-food products are adequately protected against the use of contractual advantage.

Pablo Amat-Llombart

*The regulation of the agri-food chain in Spain:  
food contracts and unfair trading practices*

SUMMARY: 1. National legal framework: the first special laws – 2. Law 12/2013 on measures to improve the functioning of the food chain – 2.1. Purpose and goals of Law 12/2013 – 2.2. Scope of Law 12/2013 – 2.3. Concept, legal nature and types of food contracts – 2.4. Food contracts' content: freedom of contract and mandatory minimum contractual conditions – 2.5. Food contracts' formal requirements: consequences for non-compliance – 2.6. Food contracts through electronic auctions – 2.7. Food contracts' registration – 3. Transposition of Directive 2019/633 by Law 16/2021 amending Law 12/2013 – 3.1. The list of unfair trading practices according to Law 12/2013 – 4. Conclusions.

*1. National legal framework: the first special laws*

Spanish legislator's interest in regulating commercial and contractual relations between agricultural holdings and their buyers, dates back to the beginning of the eighties of the 20<sup>th</sup> century, a few years before the entry of the Kingdom of Spain into the European Economic Community, in 1986. Indeed, Law 19/1982, of May 26<sup>th</sup>, on agricultural product contracts (*Ley 19/1982, de 26 de mayo, sobre contratación de productos agrarios*)<sup>1</sup>, belongs to this first period.

The primary objective of Law 19/1982 was to establish «the principles of contractual economy applicable to the circulation of agricultural products, to promote and organize the contractual relations between agricultural companies, on the one hand, and industrialization or processing companies, on the other» (Article 1). It was intended to promote entrepreneurial initiatives, as well as agreements between «the parties», the primary-

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<sup>1</sup> In relation to this Law, see L. AMAT ESCANDELL, *La legislación española sobre contratación de productos agrarios como medio de regulación del mercado*, in *Revista de Derecho Agrario y Alimentario*, (8) 1987, pp. 7-18.

producer sector, on the one hand, and the processing-industrial sector, on the other. The responsibility was thus granted to the Professional Agrarian Organizations and the representatives of the industrial or commercial companies, in charge of promoting the negotiation and conclusion of agreements between the parties.

The system put into place by the law consisted, first, in providing for the submission of such agreements and contracts to the Spanish Ministry of Agriculture, Fisheries and Food, who had to approve them, and this would finally permit Agrarian Organizations to access to public support and incentives provided for in the same Law. The specific modalities of agreements could consist of any of the following: a) inter-professional agreements; b) collective agreements; c) contracts for the sale of products, negotiated either collectively or individually. In sum, the relationships and transactions between agricultural producers and their buyers, with respect to the product object of the agreement, were governed by the standard contracts subject to approval by the Ministry of Agriculture.

Subsequently Law 2/2000, of January 7<sup>th</sup>, on standard contracts for agri-food products (*Ley 2/2000, de 7 de enero, reguladora de los contratos tipo de productos agroalimentarios*)<sup>2</sup>, was passed. This law reflects the change towards a dynamic economic relations system, in which the primary sectors are totally oriented to the market and adapt their productions to market demands. Indeed, the entry of Spain into the EEC, the full application of the Common Agricultural Policy (CAP) to national productions, the promotion and specialization of Spanish farms and agricultural productions in those two decades<sup>3</sup>, led to the essential transformation of the Spanish primary agricultural sector. Thus, the new possibilities of access to the

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<sup>2</sup> For a more detailed study of the content of Law 2/2000 see P. AMAT LLOMBART, *Perfiles jurídicos del contrato tipo agroalimentario en España y mejoras del funcionamiento de la cadena alimentaria*, in *Legal aspects of sustainable agriculture*, Slovak University of Agriculture in Nitra, 2012, pp. 351-359. See also G. DOMÉNECH MARTÍNEZ, *La comercialización de los productos agroalimentarios a través de los contratos tipo de productos agroalimentarios y la mediación en la resolución de sus controversias*, in *Revista de Derecho Agrario y Alimentario*, (60) 2012, pp. 47-64.

<sup>3</sup> In fact, the legal nature of agricultural holdings in the Spanish legal system is not well defined. There is a lack of systematic regulation concerning all the main aspects so as to guarantee legal certainty: on this issue see the observations of P. AMAT LLOMBART, *La explotación agraria, sus elementos integrantes y tipos cualificados de explotación. La reforma legislativa pendiente*, in E. Muñiz Espada and P. Amat Llobart (eds), *Tratado de derecho agrario*, La Ley, Madrid, 2017, pp. 157-205. See also E. MUÑIZ ESPADA, *La urgencia de legislar sobre la cohesión territorial: urbanismo y espacio rural*, in *Revista de Derecho Agrario y Alimentario*, (63) 2013, pp. 93-140.

single European market, together with the necessary compliance with the successive regulations and reforms of the CAP, generated unsuspected tensions to farmers, as well as the need for the latter to be more competitive in an increasingly and more demanding open market.

Law 2/2000 highlights the idiosyncrasies of agricultural production and the specific connected risks: «Agriculture and fishing entail a biological activity with a close dependence on the natural environment. These conditions imply the existence of risks both due to the production process and the perishable nature of the products, all this determining a high degree of uncertainty in the activity. As they are biological processes, production cycles are long and the production is seasonal. In addition to this, as these products are, in general, perishable, their supply shows rigidity, is not flexible and lacks of adaptability to demand».

Consequently, the special and perishable nature of a large part of the agri-food production, in addition to the risks assumed by the suppliers, require adequate consideration as far as legal framework regulating contracts within the agri-food chain.

Also special structural characteristics of the agri-food system make it difficult, on the other hand, to know the transactions that the different and numerous operators carry out. This causes a lack of transparency in the market, far from the desirable perfect competition.

In the light of the above, the primary objective of Law 2/2000 (as well as of Law 19/1982) is «to promote market transparency, by improving competition»; to this purpose «agri-food standard contracts» are the envisaged solution. The regulation aims at promoting transactions' regulation, by setting supply conditions and establishing guarantees for the mutual fulfillment of the parties' obligations. It is assumed that also competition rules and principles must be complied with.

Law 2/2000 regulates any agri-food contract, independently of interbranch or collective agreements. It also establishes the procedure for its approval. The agri-food standard contract is defined as the contract that refers to commercial circulation of products in the agri-food system which obtains approval from the Ministry of Agriculture, Fisheries and Food. This approved standard-contract will be considered as the model to which the agri-food system operators may adjust their own individual contracts, subject to the private law rules.

## 2. Law 12/2013 on measures to improve the functioning of the food chain

Before the implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, the Spanish legislator introduced another legislative measure affecting the agri-food chain: Law 12/2013, of August 2<sup>nd</sup>, on measures to improve the functioning of the food chain (*Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*)<sup>4</sup>. The Law aims to partially regulate some aspects of the food products' contractual regime (food contracts) by eradicating certain unfair commercial practices; it promotes good practices (Codes of good practices), sets up the Food Chain Observatory, and, finally, establishes a system of administrative sanctions.

This law has been modified in recent years, in particular by Law 16/2021, of December 14, implementing Directive (EU) 2019/633

With regards to definitions, it can be observed that while Law 2/2000 was based on the concept of «agri-food system», Law 12/2013 refers to the notion of «food chain»<sup>5</sup>, defined as «the set of activities carried out by the different operators involved in the production, processing and distribution of agricultural or food products, excluding the activities of transport and hotel and catering companies with a turnover of less than ten million euros, also excluding companies supplying accommodation services with a turnover of less than 50 million euros» (Article 5.a). Furthermore, Law 12/2013 considers the «food sector» as «the set of agricultural, livestock, forestry and fishing productive sectors, as well as those of processing and

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<sup>4</sup> The commentaries on this new regulation are numerous. See among others D. CRESPO PEREIRA and F.J. ARIAS VARONA, *Hacia una regulación de la cadena alimentaria*, in *Gaceta Jurídica de la Unión Europea y de la Competencia*, (33) 2013, 9-18; T. PAZ-ARES RODRÍGUEZ and A.J. MONTORO MORENO, *Cuestiones clave de la ley de medidas para mejorar el funcionamiento de la cadena alimentaria*, in *Actualidad Jurídica Uría Menéndez*, (36) 2014, pp. 97-104; A. MOLLA LATORRE, *Ley española 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, in *Actualidad Jurídica Iberoamericana*, (2) 2015, pp. 663-676; P. AMAT LLOMBART, *Mejoras en el funcionamiento de la cadena agroalimentaria en la Unión Europea y en España a partir del régimen jurídico de negociación y contratación: el contrato alimentario y el contrato tipo agroalimentario*, in *Revista de Derecho Agrario y Alimentario*, (66) 2015, 7-50; T. RODRÍGUEZ CACHÓN, *Relaciones contractuales en la cadena alimentaria: análisis a la luz de la nueva regulación*, in *Revista de Derecho Civil*, (1) 2018, pp. 191-227.

<sup>5</sup> From this conceptual point of view see J.L. PALMA FERNÁNDEZ, *La noción «cadena alimentaria» como concepto jurídico integrador de la actividad agroalimentaria*, in *Diario La Ley*, (8548) 2015.



distribution of their products» (Article 5.b).

Both the laws refer to the process known as «farm to fork», in which different actors intervene one after the other at the different stages. First link in the food chain is the primary agricultural production, carried out by farmers and ranchers, organized as a small holding, an agricultural cooperative or as a large company. Second link is the processing phase, where large food industries play a leading role in converting agricultural raw materials into food and feed ready to be traded on the market. Then it follows in the chain the food product distribution and commercialization. Finally, products reach final consumers' plates.

We can conclude that the food chain is made up of a more or less organized and coordinated set of companies and operators from different economic subsectors, whose «chained» or «linked» activities in successive phases are aimed at producing, processing and supplying food to the market in adequate conditions and suitable for final consumption by citizens.

Certainly, there is no doubt of the enormous importance that for the human beings (and for animals, pets included) the constant and adequate food supply, at reasonable prices, assumes, also in terms of quantity and quality.

Furthermore, the preamble to Law 12/2013 also states that «food in Spain is a sign of identity that arises from the great variety and wealth of agri-food productions in this country is a consequence of the diversity of its lands, seas, ecosystems and traditions». It also points out: «Therefore the importance of everything related to food does not derive only from the need to satisfy a primary function of every human being, but from the intrinsic relationship traditionally existing in Spain between food, on the one hand, and the society, the economy and the rural environment, on the other». It follows that «the agri-food sector in Spain has an undeniable strategic value for the national economy, as demonstrated by the high economic contribution which it gives to the GDP, to the commercial balance, as well as by its dimension, the number of jobs it generates or its production levels, which place it as the leading manufacturing sector and one of those with the greatest international projection<sup>6</sup>».

<sup>6</sup> The doctrine has also highlighted the importance of the agri-food sector in Spain within the framework of the European Union. See M.J. CAZORLA GONZÁLEZ, *Relaciones contractuales en la cadena alimentaria y su incidencia en la competitividad de los mercados*, in *Revista de Derecho Agrario y Alimentario*, (62) 2013, pp. 11-14. Also E. MUÑIZ ESPADA, *Derecho agroalimentario y ciberseguridad*, Reus, Madrid, 2019, who argues the need for legal reforms in response to the dependency of the agri-food chain on cybersecurity (see Chapter II).

Nevertheless, what is to be remarked in this area are not only the benefits of the agricultural sector as a whole and its contribution to the wealth of the country, but also those problematic issues which have been affecting the proper functioning of the food chain for decades.

### 2.1. *Purpose and goals of Law 12/2013*

Law 12/2013 aims to establish measures to improve the functioning of the food supply chain in order to achieve the goals established in Article 3. In the first place, the law aims to increase the efficiency and competitiveness of the Spanish food sector as a whole (Article 3.a). In this perspective, it aims to improve the competitiveness, efficiency and innovation capacity of agricultural production, industry and food processing (Article 3.f), as well as guaranteeing market unity to improve the competitiveness of the food chain (Article 3.i).

Spanish agri-food production must continue to be oriented towards the market, in order to satisfy market needs in terms of quantity and quality of products supply, at the same time satisfying the society's and final consumers' interest. For years there has been tough competition in increasingly globalized international markets, well beyond the national or European dimension. In fact, the World Trade Organization was established in order to regulate commercial relations at a global level and agricultural production has been included in its ambit of action. Within this institutional framework, the EU is one of the various parties involved and as such it is forced to negotiate with other nations and economies in an increasingly global and competitive agri-food market<sup>7</sup>.

The first goal pursued by the law includes also the achievement of the benefit for the society and consumers. It can be said that improving the efficiency of the agri-food sector as a whole will undoubtedly benefit citizens, even if in times of health and economic crisis such as those we have been experimenting due to the pandemic and to the war more difficulties arise.

Law 12/2013 provides that «In order to improve the competitiveness of agricultural production, there will be support for measures and programs to promote quality, to improve logistics efficiency, innovation and the use of

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<sup>7</sup> On this topic see A. MASSOT MARTÍ, *De la crisis de la Unión Europea a la crisis de la PAC: por un nuevo proyecto para la agricultura europea en un entorno globalizado*, Real Instituto Elcano, Madrid, 2005.

new technologies<sup>8</sup>) (Article 27.3).

The second pursued by the law is the improvement of the functioning and structure of the food supply chain, for the benefit of all the operators involved, while ensuring at the same time a sustainable distribution of added value throughout all the sectors concerned (Article 3.b). In close connection with the former, the aim is also the strengthening of the production sector and the promotion of the activities of interbranch agri-food organizations (Article 3.e).

This second objective is particularly relevant to the issue we are addressing: the lack of an adequate and balanced functioning of the food chain in Spain, generating obstacles and distortions, and finally causing a serious imbalance in the commercial relations between different chain operators.

Law 12/2013 dedicates Title VI, entitled «Supporting integration and enhance of the value chain development» (Article 27 ff.), to the improvement of the structure of the food chain. It tries to promote greater integration among the operators involved in the food chain, in order to facilitate greater efficiency and profitability in the different sectors. Such integration must occur by means of reinforcement of the functions of interbranch agri-food organizations (IAO)<sup>9</sup>, to which the various subsectors

<sup>8</sup> In this regard, consult the work of E. MUÑIZ ESPADA, *Derecho agroalimentario y ciberseguridad*, Reus, Madrid, 2019, in particular the chapters dedicated, respectively, to the application of new technologies and the generation of new agricultural models within the framework of their inclusion in the future CAP, as well as the influence of new technologies on the traceability principle. The author warns that intelligent agriculture or «smart farming» is already here. She highlights the necessary implementation and protection of the use of new technologies in agriculture against cyber threats, something essential for the agricultural business economy, food safety, public health, consumer protection and fraud prevention. In this new and modern framework, the jurist must be involved in the proposal of a regulation *ad hoc*, which broadens the horizons of policies and legislative interventions in the agricultural sector.

<sup>9</sup> On this subject, see among others: L. AMAT ESCANDELL, *Las organizaciones interprofesionales agroalimentarias*, in J.M. Ruiz-Rico Ruiz (ed), *Estudios de derecho agrario: ponencias y comunicaciones del VI Congreso Nacional de Derecho Agrario*, Málaga, 1997, pp. 61-76; P. AMAT LLOMBART, *La interprofesional citrícola española Intercitrus: Aspectos jurídicos y económicos*, in *Estudios de derecho agrario: ponencias y comunicaciones del VI Congreso Nacional de Derecho Agrario*, J.M. Ruiz-Rico Ruiz (ed), Málaga, 1997, pp. 233-248; C. DÍEZ RUBIO, *Organizaciones interprofesionales agroalimentarias a propósito de la nueva Ley 2/2000 de 7 de enero, reguladora de los contratos tipo de productos agroalimentarios*, in *Revista de Derecho Agrario y Alimentario*, (36) 2000, pp. 34-42; G. DOMÉNECH MARTÍNEZ, *Las organizaciones interprofesionales en las disposiciones normativas españolas y la contratación de productos agroalimentarios*, in E. Muñiz Espada and P. Amat Llobart (eds), *Tratado de derecho agrario*, La Ley, Madrid, 2017, pp. 383-441.

involved in the chain belong<sup>10</sup>.

In particular, in order to favor the structuring and balance of the food supply chain, it is necessary to reposition the production subsector within the food chain. To this purpose, the promotion of producers agricultural associations to ensure the concentration of the production offer<sup>11</sup>, the integration in the IAO of the most representative organizations, and the determination of a common and loyal negotiation framework, are essential.

On the other hand, the second objective of Law 12/2013 is also the guarantee of a sustainable distribution of added value throughout all the sectors of the food chain. On a practical level, in Spain specific initiatives have already been adopted to make sure that production sector operators and companies (farmers and ranchers) receive sufficient consideration and an adequate profit and an equitable standard of living for their activity. We refer, for example, to the measure introduced by Article 12 *ter* of Law 12/2013, aimed at preventing the destruction of value in the food chain. We will later analyze it in more detail.

The third goal pursued by Law 12/2013 is the achievement of greater balance and transparency in commercial relations between different chain operators (Article 3.d). To achieve this general objective, Law 12/2013 sets out rules in three areas: a) access to information and traceability of the food chain; b) regulation of commercial practices; c) promotion of codes of good commercial practices among operators.

With regard to access to information and traceability, promoting innovation on information and communication technologies inside the food chain (see Article 3.c) will improve transparency. Not only that information

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<sup>10</sup> The IAO legal regime in Spain is regulated by Law 38/1994, of December 30, as subsequently amended by Law 12/2013.

<sup>11</sup> It is worth highlighting some of the regulatory initiatives, more or less successfully taken in this context, such as Law 13/2013, of August 2, promoting the integration of cooperatives and other associative entities of agri-food nature. The purpose of this law is to promote the merger or integration of agri-food cooperatives and other entities, through the establishment or expansion of independent associative agri-food entities of sufficient economic size, implementing, where appropriate, the necessary measures to obtain an adequate size that allows them to achieve the purposes described in Article 2 (such as, *inter alia*, «Promoting the grouping of the first actors of the food chain, through the merger or integration of associative entities, in order to favor their resizing, improve their competitiveness and contribute to the valorization of their productions» (Article 2.1.a); and «in order to improve their position in the market and their participation in the process of valuing and marketing their products» (Article 2.1.d).

should circulate among chain operators, but should it also be provided to consumers in a fair measure and in an appropriate way, for example, in terms of transparency as to final prices.

As far as regulating of trading practices is concerned, commercial relations must be governed «by the principles of balance and fair reciprocity between the parties, freedom of contract, good faith, mutual interest, equitable distribution of risks and responsibilities, cooperation, transparency and respect for free competition in the market» (Article 4, on guiding principles). These essential principles can be implemented by specific measures and actions, providing better balance of the production sector in relation to the processing industry and large distribution.

A great imbalance between suppliers and buyers may give rise to abuses, in particular by the imposition of a set of contractual conditions by the stronger party to the detriment of the other.

Law 12/2013 provides for a special regulation on commercial contracts concerning food, the so-called «food contracts». Such regulation is also intended to achieve greater transparency in commercial relations within the food supply chain, including the discovering of underground economies (irregular employment in particular).

Furthermore, promoting approval and voluntary compliance with the Codes of good trading practices (Title III of Law 12/2013, «Good practices in food contracting») results in the desirable effect of reaching higher levels of self-regulation among operators<sup>12</sup>.

Finally, Law 12/2013 pursues some more purposes which can be grouped together as they have in common a social/public nature component, such as the achievement of benefits for society in general and the common and collective benefit, without focusing on a specific and determined sector. Therefore, they can be qualified as objectives of public order.

The first social goal is to guarantee consumer rights with regard to improving complete and effective information on food and its quality, transparency about the functioning of the supply chain, as well as the availability of food, of sufficient quantity and adequate quality (Article 3.h). In terms of access to information, the regulation aims to improve innovation, as well as to promote information and communication technologies within

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<sup>12</sup> This issue has been extensively covered by P. AMAT LLOMBART, *Buenas prácticas mercantiles en la contratación alimentaria: códigos y autorregulación*, in *Temas actuales de derecho agrario y agroalimentario*, Universidad Politécnica de Valencia, 2016, pp. 15-36. See also T. RODRÍGUEZ CACHÓN, *Posible consideración como acto de competencia desleal de algunas prácticas relacionadas con el Código de Buenas Prácticas Mercantiles en la Contratación Alimentaria*, in *Revista de Derecho Agrario y Alimentario*, (73), 2018, pp. 95-116.

the food chain.

The second goal is the promotion and the improvement of employment, given its importance for the society as a whole, for rural areas and for the national economy (Article 3.a), as outlined above.

The reference to the sustainability principle (or sustainable development principle) specifically applied to the food chain functioning, appears relevant and appropriate. The scope of the sustainable development principle, including its triple facet or constitutive content (economic, social and environmental sustainability), should necessarily entail an intensification of its effects throughout the successive stages within of the food supply chain. From an eminently legal perspective, the sustainable development principle can be considered a general principle of law. This informing principle of the Spanish legal system has also specific and practical implementations through countless national and regional decrees and laws, applicable to the agricultural and food sector. Indeed, among other areas, we can mention, for example, the area of the well-known “agri-environmental measures”, provided for under European rural development regulations, which seek to achieve compatibility between agricultural production systems and environmental protection, as well as to promote the protection and rational use of natural resources linked to the agri-food sector.

## 2.2. *Scope of Law 12/2013*

Article 2.1 of Law 12/2013 defines the scope of application<sup>13</sup>. The Law applies to «commercial relations between operators established in Spain involved in the food chain from production to distribution of agricultural and food products. It also applies to commercial relations between any of the operators involved in the food chain when one is established in Spain and another in a Member State, if the legislation of the other Member State is not applicable».

For the purposes of these trading relations, «agricultural and food products» are considered «the products listed in Annex I of the Treaty on the Functioning of the European Union, and also any substance or product intended to be ingested by human beings or with a reasonable probability of being so, whether or not they have been wholly or partially processed. It includes beverages, chewing gum and any substance, including water,

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<sup>13</sup> See A. SÁNCHEZ HERNÁNDEZ, *Las relaciones contractuales en la Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, in *Temas actuales de derecho agroalimentario*, Universidad Politécnica de Valencia, 2016, pp. 2-4.

voluntarily incorporated into food during its processing, preparation or treatment» (Article 5.e).

First, the concepts of «commercial relations» and «operators» are to be determined.

On the one hand, the Law seems to use without distinction the concepts «relationships», «operations» or «commercial transactions» whenever it refers to negotiations and agreements between subjects or companies operating in the food chain. Such transactions are contracts for the sale of agricultural or food products.

On the other hand, a food chain «operator» is defined as «the natural or legal person in the food sector, including a group, central or joint purchase or sale company, that carries out some economic activity within the food chain». «Primary producer» is defined as «natural or legal person whose activity is carried out in agricultural, livestock, forestry or fishing production» (Article 5, section c) and d) of Law 12/2013).

Final consumers do not have the status of food chain operators, because they are not food companies and do not regularly and professionally perform economic activity linked to food sector. Consequently, the aforementioned food chain commercial relationships include only economic transactions, purchases and sales of agricultural or food products between operators integrated in the subsectors of primary production, processing and distribution of such products<sup>14</sup>.

The Law also applies to commercial operations carried out between operators of the agri-food chain in the processes of packaging, transformation or stockpiling for subsequent commercialization, and in any case, purchases of live animals, feed and all raw materials and ingredients used for animal feed (section 3 of Article 2 of Law 12/2013).

From such definition it follows that the Law intends to include, on the one hand, transactions related or accessory to other main transactions (such as, for example, products packaging and storage, which are accessory to the sale), while it the Law «does not apply to any other purchase than those mentioned and made by farmers or ranchers to acquire the remaining agri-food inputs, such as machinery, pesticides, fertilizers or any other input than those expressly mentioned<sup>15</sup>». On the other hand,

<sup>14</sup> On the legal relations in the agribusiness sector see in particular M.J. CAZORLA GONZÁLEZ, *Relaciones contractuales en la cadena alimentaria y su incidencia en la competitividad de los mercados*, in *Revista de Derecho Agrario y Alimentario*, (62) 2013, p. 14 ff.

<sup>15</sup> A. SÁNCHEZ HERNÁNDEZ, *Las relaciones contractuales en la Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, cit., pp. 2-3.



any transaction linked to the production of livestock falls under the scope of the Law. In particular, operations on products, such as breeding and fattening live animals, feed, raw materials, ingredients..., can be attributed to the broad concept of food inputs to the extent that the resulting final product is food for human consumption.

According to Law 12/2013, most commercial transactions between food chain operators have to be carry out through «food contracts». As established in Article 2.4 «The scope of application of chapter I of title II of this law [it refers to food contracts] is limited to the commercial relations of the operators that carry out commercial transactions whose price is higher than the amount set in the first paragraph of Article 7.1 of Law 7/2012, of October 29<sup>th</sup>, modifying tax and budgetary regulations and adapting financial regulations for the intensification of actions in the prevention and fight against fraud». Therefore, for the Law to be applicable, a previous economic condition is required, i.e. a minimum price/value of the contract. Private transactions reaching or exceeding such minimum price, must be concluded in written form. Therefore the threshold value of the contract – 1,000 euros as laid down in Article 7.1 of Law 7/2012 – operates as a kind of «cut-off limit».

The rest of transactions to which Law 12/2013 does not apply (less than 1,000 euros), may or may not be formalized in a written form. Parties are free to decide; they can conclude the contract in any other form allowed by the law, including the verbal form, in conformity with the general principle set out in Article 1278 of the Civil Code, which establishes freedom of form as a general rule applicable to private or civil contracts.

Turning to the scope of Law 12/2013, it must further noticed that certain activities and commercial relations are excluded, for different reasons.

First of all, transport, hotel and restaurant activities are outside the operational scope of the food chain. Specifically, all transport activities are excluded; neither is the Law applicable to hotel and restaurant companies with a turnover of less than ten million euros, nor to companies running accommodation services with a turnover of less than 50 million euros.

Secondly, product deliveries made to agricultural cooperatives and other associative entities by their partners are excluded from the scope of application of Law 12/2013. To apply this exemption, partners will be obliged to make such deliveries according to the cooperative or association statutes (Article 2.2). This exclusion is justified by the special relation

between farmer members and the cooperative in which they are integrated. Such associative or contractual linkage of adhesion to the agricultural cooperative, naturally generates the duty of each member (for marketing purposes) to deliver all or a good part of his/her own production to the agricultural cooperative to which he/she belongs. In fact, when such deliveries occur, the product price is not usually determined and paid immediately to the farmer. Normally only much later, at the end of the agricultural season, a settlement is made with each member and only at that moment that member will be made aware of the amount he/she is going to receive. One of goals pursued by the organization in cooperatives, is the supply concentration: through collective bargaining, the cooperative will be able to obtain from buyers better contractual conditions and prices.

Finally, as mentioned before, «final consumers will not have the status of food chain operators» (Article 5.c). Therefore, all purchasing contracts where one of the parties is a «final food consumer» fall beyond the scope of the Law 12/2013. Transactions between food supply chain operators have a commercial nature; both parties are always companies or professionals belonging to a certain economic subsector and they act trying to get a profit. The commercial nature of the contract necessarily implies that the Law is not applicable to contracts between food companies and final consumers, who are, by definition, subjects acting for purposes which are outside their profession or business.

### 2.3. *Concept, legal nature and types of food contracts*

Article 5.f) of Law 12/2013 contains the legal definition of «food contract». This the contract on the basis of which one of the parties is obliged towards the other to sell agricultural or food products, for a certain price, whether it is a single or a continuous supply<sup>16</sup>. Contracts

<sup>16</sup> In more detail on this topic see A. SÁNCHEZ HERNÁNDEZ, *Los contratos alimentarios en la Ley de la cadena alimentaria (Referencia a la normativa y doctrina italiana «dei contratti di cessione dei prodotti agrícola e agroalimentari»)*, in *Actualidad Civil*, (3) 2015, pp. 1-46. See also T. RODRÍGUEZ CACHÓN, *Relaciones contractuales de la cadena alimentaria: Estudio desde el análisis económico del Derecho*, Dykinson, Madrid, 2020, pp. 40-54, and J.L. PALMA FERNÁNDEZ, *Los nuevos contratos alimentarios: análisis de la ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, in *Revista CESCO de Derecho de Consumo*, (7) 2013, pp. 240-245; P. AMAT LLOMBART, *Mejoras en el funcionamiento de la cadena agroalimentaria en la Unión Europea y en España a partir del régimen jurídico de negociación y contratación: el contrato alimentario y el contrato tipo agroalimentario*, cit., pp. 33-41.

with final consumers are excluded, as outlined above.

As far as the legal qualification of food contract according to internal law, we are dealing with a private, civil and special agri-food contract. First, its speciality comes from the applicable legal regulation, i.e. Law 12/2013. It is a specific regulation, outside the Civil Code, establishing an *ad hoc* contractual regime for certain food chain commercial relations. Second, the speciality comes from the parties involved in the contract: all of them belong to a particularly strategic and complex economic sector – the agri-food sector –, characterized by the production, elaboration, processing and distribution of agricultural or food supplies, live animals or feed, intended for human or animal supply and consumption. Finally, the speciality of food contracts derives from the objective element involved: agricultural or food products.

Under the general category of «food contracts», three types of contracts can be identified: sale contracts, supply contracts and integration contracts.

As to sale contracts, they are referred to by several Articles of Law 12/2013: Art. 5.f), in particular, defines the food contract; Art. 2.3 mentions «purchases of live animals, feed and all raw materials and ingredients used for animal feed»; finally, Art. 5.c) talks about «central or joint company dedicated to purchases or sales». As to the regulation applicable to such contracts, the general rules of the Civil Code must be complied with in addition to the specific regulation of Law 12/2013.

The second type of food contract is the supply contract. However, Law 12/2013 does not specifically establish its characteristics; it just states that it consists of the obligation to deliver agricultural or food products by one of the parties to the other as a «continuous supply». So it is the character of continuity in time of the product deliveries to justify the speciality of this contract.

The supply contract can be defined as the contract by which one party (supplier) undertakes to deliver to the other, in exchange for a unit price that can be paid periodically or each time, movable things (such as inputs, agricultural raw materials or food) that must be subject to successive deliveries, at the time and quantity established in a determined or determinable way. It can be noticed that the supply contract is not specifically regulated either in Spanish private law. It can be qualified as a collaboration contract between companies, which is of a commercial nature when the supply takes place between merchants. When the supplier is an agricultural producer, such sale contracts are not qualified as commercial according to Art. 325 of the Commercial Code; they are

civil contracts, regulated by the special rules of Law 12/2013 and by agreements freely signed between the parties.

The third type of food contract is the so-called integration contract («contrato de integración»)<sup>17</sup>. In more detail, Law 12/2013 defines this contract in Article 5.g) as a modality of food contract in which one of the parties («integrador»; «integrator»), is obliged towards the other party («integrado»; «integrated»), to provide all or part of the products, raw materials and inputs necessary for the production object of the contract, as well as, where appropriate, to exercise technical direction and take charge of production at the end of the production cycle. The integrated party is obliged to provide land, spaces and facilities, as well as the complementary means and services necessary to complete the production. Finally, once the production is obtained, integrated party must deliver it to the integrator. They are also known in the Spanish legal doctrine as «agro-industrial contracts»<sup>18</sup>.

#### *2.4. Content of food contracts: freedom of contract and minimum mandatory contractual conditions*

Article 9.2 of Law 12/2013 establishes the general criterion applicable to food contracts, i.e. freedom of contract. Thus, it establishes that «content and scope of the contract terms and conditions will be freely agreed upon by the parties, taking into account the guiding principles set out in Article 4 of this Law».

In order to achieve the purposes of Law 12/2013 (such as, in particular, more transparency in contracts, more balance and fair reciprocity between the parties, as well as strengthening of the producer sector), of great importance is the obligation to conclude food contracts in writing (Article

<sup>17</sup> See A. LUNA SERRANO, *Colaboración intersectorial y contratos de integración agroalimentarios*, in P. Amat Llobart, (ed), *Derecho agrario y alimentario español y de la Unión Europea*, Tirant lo Blanch, Valencia, 2007, pp. 363 -370.

<sup>18</sup> See J.M. CABALLERO LOZANO, *Los contratos agroindustriales: Reflexiones en torno a su naturaleza jurídica a la luz de la experiencia italiana*, in *Revista de Derecho Privado*, 1997, pp. 19-51; G. DOMÉNECH MARTÍNEZ, *La aparcería asociativa y los contratos agroindustriales en la Ley de Arrendamientos Rústicos*, in *Revista de Derecho Agrario y Alimentario*, (42) 2004, pp. 79-86; M.D. LLOMBART BOSCH, *Los contratos de integración agroindustrial: integración agroindustrial un posible modelo para conseguir en la Unión Europea, un derecho contractual más armonizado y uniforme en materias agrarias*, in *Revista General Informática de Derecho*, (1) 2006; G. DOMÉNECH MARTÍNEZ, *Los contratos de integración agroindustrial*, Ediciones Cooperativas, Buenos Aires, 2010.

8) and the obligation to include in their content various mandatory elements and minimum contractual conditions (Article 9). Indeed, written food contracts and its mandatory minimum content constitute two of the important innovations introduced by Law 12/2013.

We must point out that the Law does not impose a compulsory contract in which the obligatory content is determined in all aspects by the law itself, since the principle of freedom of contract is still fully in force. Rather, this regulation is intended to achieve a certain level of transparency and legal certainty for the parties involved in commercial relations in the food supply chain.

In particular, the legislator is committed to eradicating the widespread use of simple verbal agreements between producers (farmers or ranchers) and buyers (industry, distribution companies...) in the agri-food sector. The damage that this type of practice causes to the interests of the weakest party (the producer/seller/supplier), consists in forcing the latter to accept unwritten transactions in which the conditions, prices or terms of delivery are not specified; in short, agreements in which the performance of the obligations is often left to the discretion of the buyer (price, way of payments or payment periods, etc.).

Thus, Article 9.1 of Law 12/2013, provides that food contracts will contain at least the following elements.

- a) Identification of the contracting parties.
- b) Purpose of the contract, indicating, where appropriate, the categories and references.
- c) Price, with express indication of all payments, including applicable discounts, to be determined in a fixed or variable amount, based solely on objective factors, verifiable, non-manipulable and expressly established in the contract.

The price that a primary producer or a group of producers have to receive must be, in any case, higher than the total costs incurred by the producer or the actual cost of production, which will include all the costs assumed to carry out their activity. Among others, the cost of seeds and nursery plants, fertilizers, phytosanitary products, pesticides, fuels and energy, machinery, repairs, irrigation costs, animal feed, veterinary expenses, amortizations, interest on loans and financial services, contracted jobs and wage labor or labor provided by the producer or by members of his/her family unit.

The determination of the effective cost has to be made taking as a reference the whole of the marketed production for all or part of the

economic or productive cycle, which will be imputed according to the way that the supplier considers adequate depending on the quality and characteristics of the products.

d) Payment terms.

e) Conditions of delivery and availability of the products.

f) Rights and obligations of the contracting parties.

g) Information that parties must provide each other, in accordance with Article 13 of the Law.

In relation to this requirement, we can add that Article 13.1 of Law 12/2013 establishes the duty to put in writing the information that the parties must provide for the effective fulfillment of their respective contractual obligations, as well as the delivery period of such information, which in any case must be provided and justified on the basis of objective reasons related to the object of the contract.

h) Duration of the contract, with express indication of the date of its entry into force, as well as the conditions for its renewal and modification.

i) Causes, formalization and effects of the contract termination.

j) (removed).

k) Conciliation and conflict resolution, with express mention in the contract of the procedure that the parties may resort to in order to resolve the differences that may exist between them in the interpretation or execution of the contract, indicating either the arbitration tribunal or the courts to which possible claims would be submitted. Contractual penalties for non-conformity, accidents or any other duly documented circumstance, which must be proportionate and balanced for both parties.

l) Exceptions due to force majeure, in accordance with the provisions of Communication C (88) 1696 of the Commission regarding «force majeure» in European agricultural law, and in Article 1105 of the Civil Code.

As a first general remark, we can affirm that the fact that Law 12/2013 forces the parties to negotiate their contracts in such a way that at least they contain the essential elements of the agreement they intend to conclude can be considered a step that may rebalance bargaining positions between suppliers (producers) and buyers (industry and distribution) within the food supply chain. In such a way, operators have an instrument that provides greater legal certainty in transactions. By formally documenting the contract in writing, the content is established, the proof and evidence of the existing commercial relation between the parties is guaranteed. Furthermore the written form facilitates the interpretation and performance of the obligations and services, as well as

possible findings of unfair trading practices or unfair terms (in particular as contrary to the principle of good faith in business relations). However, this does not mean that Law 12/2013 imposes on the parties the specific content of each contractual term to be included in the agreement: in this respect, the principle of freedom of contract still applies.

A second and more specific general remark concerns price fixing. Also in this respect the Law marks a further step forward. Indeed the Law not only requires the parties to indicate the price in writing, but it also limits the parties' contractual freedom in determining the price, since its determination is subject to certain conditions. Thus, it is noteworthy that, in those contracts concluded by an operator in the primary producer sector (farmer, rancher, etc.) that sells its production to a first buyer, the price has to cover at least «the effective cost of production». The purpose of this provision amounts to what Art. 12 *ter* of Law 12/2013 calls «avoiding the destruction of value in the food chain». Therefore the effective cost of production of the product is calculated taking into account that the production costs actually incurred, assumed or similar, by the operator are one of the mandatory factors to determine the contractual price. The Law even goes so far as to describe the specific parameters to calculate said cost of production, either indicating the inputs to be valued and other specific production costs, or by referring to the data on effective costs of agricultural holdings. In short, we are faced with the legal response to the longtime buyers' practices of imposing on farmers and ranchers of prices which sometimes barely covered the real costs of production.

### *2.5. Formal requirements of food contracts: consequences for non-compliance*

Law 12/2013 establishes two types of formal requirements<sup>19</sup>: written

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<sup>19</sup> See A. CARRASCO PERERA and B. LOZANO CUTANDA, *Qué consecuencias tendrá para los operadores la ley de mejora de la cadena alimentaria?*, in *Análisis GA&P*, March 2013, pp. 1-5. Also E. MUÑIZ ESPADA, *Hacia unas nuevas relaciones entre el Registro mercantil y la actividad agraria*, Centro de Estudios Registrales, Madrid, 2020. This author justifies the need for a reorganization of agricultural administrative registrations – multiple and dispersed – as a means or support for a better structured, more profitable and efficient agricultural and agri-food sector. In this regard, she analyzes relevant strategies for the modernization of all the management that integrates the agricultural business activity, especially to favor cross-border commercial and business relations. Specifically, she proposes the use of the Mercantile Registration as a harmonization tool and as a binding instrument, invoking its value in the sense of providing security to legal traffic.



documentation of the contract and the obligation of temporary preservation of certain documents.

Regarding the requirement of written documentation of commercial transactions, the Law provides two possibilities: the written formalization of the food contracts themselves and the documentation by official invoice of certain cash sale transactions even if there is not obligation to conclude the food contract in writing. As a general rule, Article 8.1 states that «food contracts must be formalized in writing»<sup>20</sup>.

Law 12/2013 specifies that the written formalization of the contract has to take place before the performance of the contractual obligations (Article 8.1).

Finally, with regard to the implications of the mandatory written form, Article 8.2 of Law 12/2013 states that such requirement does not affect the existence and validity of the contract.

Thus, the formal requirement established by the Law is not provided *ad solemnitatem*; it is provided only *ad probationem*, i.e. as a means of proof between the parties and before third parties on the existence and the content of the contract. The absence of such requirement will not affect the validity or effectiveness of the contract, nor will cause the invalidity of the contract.

Nevertheless, it must be determined whether the breach of the requirement of written form produces some other type of consequence, and in particular whether it gives rise to any administrative wrong, punishable by the competent public authority. In fact, the original text of Article 23 of Law 12/2013, opening the chapter on offenses and sanctions in the matter of food contracting, established in its section 1.a) that the fact of not formalizing the contract in writing constitutes a minor infraction. Such conduct may be sanctioned by a fine of up to 3,000 euros (Article 24.1.a). As a result of the subsequent modifications undergone by Law 12/2013<sup>21</sup> in 2020 and 2021 this minor offense has been elevated in degree, becoming a serious offense (Article 23.2.b) for which the offender

<sup>20</sup> The formalization of contracts according to Article 8 ensures more transparency and greater equity, therefore rebalancing the position of the weaker party due to the vulnerability factors of the agricultural sector: atomization, territorial dispersion, seasonality, price and product volatility and perishability of products. See A. SÁNCHEZ HERNÁNDEZ, *Las relaciones contractuales en la Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria*, cit., p. 4.

<sup>21</sup> Royal Decree-Law 5/2020, of February 25<sup>th</sup>, by which certain urgent measures are adopted in the field of agriculture and food, ratified on this point by Law 8/2020, of December 16<sup>th</sup>, on certain urgent measures in the field of agriculture and food and by Law 16/2021, of December 14<sup>th</sup>, which modifies Law 12/2013.

could be punished with a fine between 3,001 and 100,000 euros.

As mentioned above, the Law provides some exceptions to the written form with regard to other transactions carried out through cash payment that do not require the conclusion of a food contract in writing, but only the identification of the parties as food chain operators and the obligation to keep a record of the operation through a formal invoice. Article 8.3 of Law 12/2013 reads: «In relations between food chain operators when the price payment is made in cash in exchange for food products, it will not be necessary to sign a food contract, but the parties will have the obligation to identify as operators and document the commercial relations by issuing the corresponding invoice with the requirements established in Royal Decree 1619/2012, of November 30<sup>th</sup>, approving the Regulation on billing obligations».

The second requirement of a formal nature is the obligation of temporary preservation of certain documents (basically accounting).

Article 11 of Law 12/2013 establishes the following.

First, food chain operators must keep all correspondence, documentation and supporting documents, in electronic or paper format, related to the food contracts they conclude within the framework of this law, for a period of four years.

Secondly, electronic auctions organizers will be obliged to maintain for four years a paper or electronic record of all the auctions carried out, including information on the identity of the participants, their offers and the formalization of the food contract.

It is certainly remarkable that the satisfactory fulfillment of this custody duty, as well as the temporary preservation of the business and contractual documentation of the operations and transactions carried out within the food chain, will provide greater transparency and security to the agri-food system as a whole. At the same time, it will facilitate, if necessary, the control and inspection functions of the competent administrative authorities in charge of ensuring correct compliance with the current legislation in this matter<sup>22</sup>. For these purposes, it should be

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<sup>22</sup> In this area Royal Decree 66/2015, of February 6<sup>th</sup>, applies. It regulates the control system to be applied by the Food Information and Control Agency, provided for in Law 12/2013, on measures to improve the operation of the food chain. Its scope of action relates to the verification of irregularities that emerge in the exercise of its functions or as a result of complaints which are processed and that entail breaches of the provisions of Law 12/2013 (Article 2). Specifically, the inspection bodies may verify that the operators of the food chain comply with the obligations established in Law 12/2013 (Article 10.2.c), recording in the inspection minutes the facts, actions, incidents and/or offenses

remembered that the breach of the obligations relating to documents preservation constitutes a minor offense, punishable by a fine of between 250 and 3,000 euros (Article 23.1.c) of Law 12 /2013).

### *2.6. Food contracts through electronic auctions*

Article 10 of Law 12/2013 is entitled «Carrying out electronic auctions»; it necessarily refers to Law 34/2002, of July 11, on information society services and electronic commerce. According to section 1 of Article Article 10 «food chain operators may carry out contract offers to the public in order to purchase or sale food products, under the terms established by the regulations on information society among their participants. Electronic auctions organization will be subject to the principles of transparency, free access and non-discrimination».

Both the explanatory preamble to Law 34/2002 and its Annex (dedicated to definitions), points that the concept of «information society services» is understood in a broad sense: in addition to the electronically contracting of goods and services, it includes the organization and management of auctions by electronic means or online markets and shopping centers.

Article 10.2 of Law 12/2013 continues stating that «auction organizers will make public general access conditions, possible participation costs and award mechanisms».

What is relevant is that the auction (whether electronic or face-to-face) implies a system and format for trading goods and products whose purpose is the conclusion of sale contracts. For this reason «the organizers of each auction will make public, after the award, the identity of the successful bidder. There will be an obligation to buy or sell by the organizer and to sell or buy by the winner of the entire awarded product, according to the general conditions of access and unless there is a mention of a price of reserve, below which the purchase or sale would not be made» (Article 11.3 of Law 12/2013).

The electronic contract is defined as any transaction in which the offer and acceptance are transmitted by means of electronic data processing and storage equipment, connected to a telecommunications network. Thus, Articles 23 to 29 of the aforementioned Law 34/2002 would

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detected. Such minutes will have the character of a public document and, unless the contrary is proven, will prove the facts that are collected in them (Article 19) within the subsequent sanctioning procedure.

be applicable; even though electronic contracts are ordinary private contracts (civil, commercial or consumer contract), as they are concluded through the use of electronic means, certain additional requirements of information, terms, form and obligations are necessary.

In relation to food products auctions, we can conclude that the operation will fall within the scope of the so-called «indirect electronic commerce». It is one that includes transactions carried out by electronic means related to tangible goods (food), so that the delivery of the purchased product cannot take place online, but rather requires the subsequent physical or material delivery of the contract object (food), and therefore the execution of this type of contract is necessarily deferred in time.

### *2.7. Food contracts' registration*

According to Article 11 *bis* of Law 12/2013, the Ministry of Agriculture, Fisheries and Food will keep a digital registry in which the food contracts signed with primary producers and their groups, and their modifications, will be recorded.

In view of this mandatory provision, those operators who buy from primary producers and their groups, will be obliged to register each food contract carried out and its modifications. The registration must be done before the delivery of the product, using the electronic means that will be specified by a future regulation.

Finally, the Food Information and Control Agency and the other competent authorities will have the power to access said registry to carry out the pertinent checks within the scope of their powers, in conformity with regulations on personal data protection and competition law.

## *3. Transposition of Directive 2019/633 by Law 16/2021 amending Law 12/2013*

Law 16/2021, of December 14, has modified Law 12/2013. The reform is justified by the need to transpose Directive (EU) 2019/633.

The legislative policy option chosen by the Spanish national legislator is clearly outlined in the preamble. First of all, Spain maintains in force Law 12/2013 as the essential regulatory framework on this matter. In addition, some specific aspects are improved. The objective scope of

application is broadened. All contractual relationships affecting operators in the food chain (with only some exceptions) are subject to the law, even if the parties are two SMEs or there is no special hierarchical dependency between operators, without taking into account the existence of an economic imbalance between contracting parties. Thus, the Spanish regulation does not limit its applicability and effectiveness with respect to commercial relations between operators based on certain levels of sales or annual turnover of suppliers and buyers.

The Spanish legislator considers that contractualization in commercial relationships in the agrifood sector and chain plays an essential role for its proper functioning. Likewise, the application of the Law extends not only to transactions between operators established in Spain, but also to commercial relations in which one operator is established in Spain and the other is established in another Member State.

Furthermore it can be noticed that Law 16/2021, unlike the Directive, follows a paradigm of reciprocity: an unfair practice has to be prevented not only when it is imposed by buyers on suppliers, but also when imposed by suppliers on buyers. Both parties may deserve the same protection and for this reason it is considered preferable to give legal coverage to any of the possible situations; therefore it can be that the beneficiary of protection in the concrete case would be the stronger party according to statistics.

Secondly, the implementation of the Directive into the Spanish legal system adds a set of additional practices to those already existing in domestic law. This is a relevant advance in limiting the elements that introduce larger distortions in the agri-food system. Thus, Law 16/2021 quite literally transposes Article 3 of Directive 2019/633 (Prohibition of unfair trading practices)<sup>23</sup>. Within the list of unfair practices, the so-called «black practices» are distinguished, i.e. those that, given their nature, are subject to an absolute prohibition and without exceptions. Also «grey practices» are included, i.e. those that are prohibited, unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer.

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<sup>23</sup> In more detail see M.J. CAZORLA GONZÁLEZ, *Armonización europea de las prácticas comerciales desleales: nuevas medidas para equilibrar la negociación en la cadena alimentaria*, Dykinson, Madrid, 2020.

### 3.1. *The list of unfair trading practices according to Law 12/2013*

Looking at the list of unfair trading practices included in Law 12/2013 after the implementation of the Directive, different reasons can support its justification. Also differences in their legal configuration can be found.

First, Article 12 deals with «unilateral changes and unexpected commercial payments».

These practices are established as legal prohibitions, but they may be valid if their content was previously agreed upon between the parties with adequate clarity and specificity. Therefore, they may be considered as relative prohibitions. Thus, the rule provides: «Changes of contractual terms established in the food contract are prohibited, unless they are made by mutual agreement of the parties and in accordance with the guiding principles set out in Article 4. Food contracts must lay down in specific clauses the procedure for their possible modification» (Article 12.1).

In practice, this prohibition intends to prevent the strongest party in the contractual relationship (processing, industrial or distributing party) from changing, unilaterally and without prior agreement, any term included in the food contract previously signed, to the detriment of the weaker party (the producer, seller or supplier).

Also «additional payments to the agreed price are prohibited, unless they refer to the reasonable risk of referencing a new product, or to the partial financing of a product commercial promotion, reflected in the unit price of sale to the public, and unless they have been agreed upon and expressly included in the corresponding contract in writing, together with the indication of the reasons underlying said payments» (Article 12.2.).

The prohibition of including these unexpected payments (which the producer usually has to pay for) could be overcome if three conditions are met: 1) circumstances expressly provided by the Law exist (reference of the product or commercial promotion); 2) presence of an express agreement between parties; 3) services to receive in exchange for making such payments are specified. In fact, in relation to the last condition, Article 12.3 provides that «the contract must establish the mechanisms for returning previous payments, when provisions, promotional or similar activities linked to such payments are not executed according to the agreed terms and conditions».

Second, Article 12 *bis* refers to «promotional activities agreements».

When examining the content of this Article – at least in its first two sections – we cannot conclude that it is a prohibitive rule (neither absolute

nor relative). First, general principles that should govern this type of promotional activities in the food chain are established (based on freedom of agreements; on mutual interest; and on the flexibility to adaptation to particular circumstances of the different operators: Article 12 *bis* 1). Indeed, the law makes a very forceful declaration of principle: the agreements on commercial promotions will be respected in their nature and integrity. Secondly, the Article determines the necessary conditions and content that such agreements must meet to be legal. Therefore, its violation could amount to a punishable unfair trading practice. These mandatory contents, that is, the aspects that define the agreed promotion are: terms (start and end dates), transfer prices, volumes, other matters of interest, aspects of the promotion related to the procedure, the type, the development, geographical coverage and evaluation of its results (Article 12 *bis* 2). Finally, a warning is made to the parties, which can be considered as a prohibition: agreements about promotional activities that mislead the consumer about food products real price and image, or agreements which could distort consumers' perception about food products quality or value are not permitted (Article 12 *bis* 3). Certainly, this rule is to be considered as a real absolute prohibition. Next, the law establishes specific conditions that must be included in such promotions: a) the purchase price included in the food contract must be taken into account; b) the operators must identify the price clearly in the advertising information, in the billboards and in the purchase receipts; c) promotions have to disclose the real price of the product; and d) the reason that gives rise to the promotion has to be indicated in a visible way to consumers.

Thirdly, Article 12 *ter* relates to «destruction of value in the chain».

In section 1 it is provided: «In order to prevent the destruction of value in the food chain, each operator must pay the immediately preceding operator a price that is equal to or greater than the cost of production of such product actually been incurred or assumed by such operator. The verification will be carried out in accordance with the means of proof admitted by Law».

Obviously, this rule is introduced into the food chain regulatory system in order to mitigate the loss of purchasing power of primary producers (the first stage of the food supply chain). It is common for farmers and ranchers to make the first sale of their product to a buyer with significantly greater economic and business weight (processing, industry, distribution). These operators can force buyers to accept prices that are even below the farmer's production cost. Thus, the rule establishes



an absolute prohibition aimed to prevent the conclusion of transactions below a certain price (cost of production). This Article is directly related to Article 9.1.c), on food contract pricing, stipulating that the price must always exceed the total costs incurred by the producer (effective cost of production, i.e. costs incurred by the farmer or rancher in carrying out their activity; among others, the cost of seeds and nursery plants, fertilizers, phytosanitary products, pesticides, fuel and energy, machinery, repairs, irrigation costs, animal feed, veterinary expenses, amortizations, interest on loans and financial products, contracted work and salaried labor, or labor contributed by the producer himself or members of his family).

The relationship and compatibility of Article 12 *ter* of Law 12/2013 with general competition law must be carefully considered. Indeed, Article 17.1 (sales at a loss) of Law 3/1991 on unfair competition, provides that «pricing is unrestricted unless otherwise specified by law or regulation». In other words, in the agri-food sector the practical effects of applying Law 12/2013 could have the result that food contracts' minimum price is mandatorily determined by law, regardless of what the parties could agree upon voluntarily. And this can have further consequences than preventing the erosion of chain value. In other words, it could possibly result in a provision contrary to the regulation on competition. It is also true that Article 17.2 of Law 3/1991 states that a transaction conducted at low cost or low purchase price may be deemed unfair only in certain circumstances (if it misleads consumers about the price level of other products or services of the same establishment; if it discredits the image of a different product or establishment; if it is a strategy to eliminate a competitor from the market).

Article 12 *ter*, section 2 states: «In order to protect the trading power of primary producers, operators who make the final sale of food products to consumers may not apply or offer a retail price lower than the actual purchase price of the food product».

In case of non-compliance with this price regulation the sale will be considered unfair (Article 12 *ter* 3).

An exception is also made for perishable products that are about to expire. Sales at a loss to the public of perishable foods that are near to being unusable, will not be considered unfair, if consumers are given full information about this scenario (Article 12 *ter* 3).

The last section of Article 12 *ter* states: «The operator that makes the final sale of the product to the consumer may under no circumstances pass on to any of the preceding operators the business risk resulting from its commercial policy for the prices presented to the public».

Certainly this provision represents a new absolute prohibition. It is worth recalling that Article 4 of Law 12/2013 («Guiding Principles») specifies that «commercial relations pursuant to this Law shall be governed by the principles of [...] equitable risks and allocation of responsibilities ...». Therefore, the operator bears his/her own risk, personal and non-transferable, and so most powerful operators in the food chain or the most dominant operators in the commercial relationship may not transfer such risk to any other operator previously participating in the chain, nor make it fall the economic consequences associated with retail prices, directly or indirectly, on the latter.

Fourth, Article 13 is entitled «Business secrets».

According to Article 13.1: «In food contracts, the information that the parties must provide for the effective fulfillment of their respective contractual obligations must be specified in writing, as well as the deadline for delivery of that information, which in any case must be provided and justified on objective grounds relating to the subject matter of the contract, without prejudice to the application of competition law».

This regulation contains neither a restriction nor an unfair practice to be prevented. Rather, it is a detailed elaboration of Article 9.1.g), which expressly refers to Article 13, specifying the information the parties are required to disclose. As a proposal to improve legal technique and to introduce more coherence, it seems to us that the content of this section could have been incorporated into Article 9.1.g), because no unfair practice is established, nor does it refer to properly «sensitive» information, but only to «information», without further specification.

On the other hand, the following sections 2, 3 and 4 of Article 13, do propose rules governing sensitive commercial information (business secrets). Beforehand, we must consider the fact that, for the purposes of Law 12/2013, «sensitive commercial information» is defined as «that set of technical knowledge that is not in the public domain, which refers to the nature, characteristics or purposes of a product, to the methods or processes for its production, to the means or forms for its distribution or commercialization, and whose knowledge is required for the manufacture or commercialization of the product» (Article 5 h). And Article 5 n) defines «business secrets in the terms of Law 1/2019, of February 20<sup>th</sup>, on Business Secrets» (see Article 1.1 of Law 1/2019).

Now, the regulation provided in this regard by such sections of Article 13 is as follows: «2. In no case an operator may demand from another chain operator any way of obtaining, using, or disclosing business secrets,

unless this is expressly indicated in the written contract in accordance with the provisions of the preceding section. 3. Business secrets gained in the course of negotiating or executing a food contract will be used exclusively for the objectives for which they were provided, with regard for the confidentiality of the information transferred or stored at all times. Similarly, information regarding a product's development or upcoming releases may not be essential. 4. Operators are not permitted to demand or divulge business secrets of other operators and, in particular, documents that permit the verification of such business knowledge».

This rule addresses secret or confidential data. Such data, for example, could be linked to patents or titles on plant varieties (protected as industrial property rights), which must remain within the commercial relationship between parties for the mere purposes of normal development and execution of the contractual services, without justifying any request for additional information beyond what is strictly necessary for that purpose, even less the disclosure or use for spurious or illegitimate purposes.

Then Article 14 of Law 12/2013 addresses «commercial brand management». This rule appears unnecessary (although it does not cause any particular difficulties to the system), as it merely refers to some unfair practices and acts already regulated by competition legislation (Law 3/1991 and Law 15/2007) or other regulations.

According to Article 14.1 «the criteria for the management of categories must be predetermined and will prevent unfair treatment, such as the exploitation by a company of the economic dependence in which its client or supplier companies may find themselves, as stipulated in the Article 16 of Law 3/1991, of January 10, on unfair competition. In accordance with the provisions of Law 15/2007, of 3<sup>rd</sup> July, on competition defense, and Law 3/1991, of January 10<sup>th</sup>, on unfair competition, operators will manage the brands of food products they offer to consumers, both their own brands and those of other operators, avoiding practices contrary to free competition or that constitute acts of unfair competition, as well as illegal advertising practices pursuant to Law 34/1988, of November 11, on general advertising. Similarly, operators will act in good faith when trading relevant innovations of their supplier's food products». And according to section 2 of Article 14, it is prohibited the improper use of another's business initiative by other operators and for their own benefit. It is also prohibited illicit advertising if considered unfair through the use (either in the packaging, presentation or in the product or service advertising) of any distinctive elements that create a risk of association

or confusion with products of another operator or with brands or trade names of another operator, in accordance with Law 17/2001, of December 7<sup>th</sup>, on brands and without prejudice to Articles 11 and 12 of the Law on unfair competition. It seems to us that this rule does not add anything to the regulation on food contracts and unfair practices. Therefore it should be suppressed in a future legal reform, as it does provide no extra value.

Finally, the last provision of Chapter II, Article 14 *bis*, regulates «Other unfair trading practices», and it is a fairly faithful translation of Article 3 of Directive 2019/633.

The first difference between the Spanish Law and the European Directive is the national law's bidirectional design of forbidden business practices.

A reading of Article 3 of the Directive reveals that the operator who carries out unfair trading practices is only the buyer. Therefore, according to the Directive, only the buyer may impose such practices on the supplier (e.g. canceling orders, changing contract terms, requiring improper payments or unrelated to the sale of the product, refusing to confirm in writing the agreement, disclosing trade secrets, carrying out acts of commercial retaliation, returning products, etc.). In contrast, if the operator who carried out any of these practices was the supplier/seller to the detriment of the buyer, according to the Directive 2019/633 such conduct would neither be deemed unfair nor sanctioned, as it does not fall within its scope of application.

On the contrary, Law 16/2021 (except on three occasions) does not correspond to Directive 2019/633. When addressing unfair trading practices, in general, Spanish Law adopts an aseptic position with regard to identifying the cause or the responsible for commercial disloyalty. In this sense, Spanish Law recognizes that unfair practices can be carried out by any party to the contract or transaction in the food chain, and in any case they must be prohibited and sanctioned wherever they come from. When defining each unfair practice, the law usually states as follows: «That one of the parties to the commercial relationship or the food contract... », followed by the specific practice that is prohibited (as it appears in Article 14 *bis*, section 1, letters b, c, d, f, g, h; and in section 2, letters a, b, c, d, e). Furthermore, in one case the Law outlines the prohibited practice without mentioning any of the parties who could be responsible (Article 14 *bis*, paragraph 1, letter a).

Another intriguing topic is the systematization of unfair trading practices. They are classified as «black» practices (totally prohibited,

always and without exception) and «grey» practices (prohibited except if there is agreement between the parties). This classification, established by the Directive, is incorporated into Spanish law.

Concerning the modalities, configuration and scope of unfair trading practices, Law 16/2021 incorporates them quite faithfully into the Spanish legal system, introducing certain simplification criteria and adapting some of them to pre-existing legislative requirements in Spanish legislation, in conformity with the minimum requirements of Directive 2019/633 (such is the case of the practice provided for in Article 14 bis 1 a) on payment periods of agricultural or food products).

We can conduct a systematic classification of unfair practices, grouping them by affinity with regard to their obligatory content and the moment of affectation to the parties' contractual relationship.

A first group of unfair practices consists of those in which one of the parties causes unilateral alteration of the contract content or of the risks assumed by the parties due to loss of the product (Article 14 bis 1, letters c) and e). Thus, there is a unilateral modification of certain terms of the agricultural and food products supply contract (frequency, method, place, time or volume of supply or delivery of products, quality standards, payment conditions or prices). Or there is an alteration of the theory of risks associated with the sale (the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products, even in cases in which such risk would not fall on the latter according to the law). Said modifications to the initially intended business program would take place prior to the specific execution of the services, and in practice would be the result of the buyer's unfair behavior, the strong part of the commercial relationship.

Another unfair practice that is sadly prevalent in the Spanish agricultural sector is the written formalization of food contracts. One of the parties refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier despite the request for such confirmation from the other party (Article 14 bis 1, letter f).

The following concerns one of the essential obligations of the food contract, which relates to the payment of the purchased products, specifically to the payment terms in case of deferment. Thus, any payment time beyond 30 days from the date of delivery of perishable food products, or 60 days in all other cases, will be deemed unfair and prohibited (Article 14 bis 1, letter a).

Next, we can include under the same group those unfair practices

in which one party demands to the other particular payments or expenditures that are ultimately abusive or excessive. The following should be mentioned:

- payments unrelated to the sale of the supplier's agricultural or food products (Article 14 *bis* 1, letter d).

- expenses for the cost of analyzing customer complaints on the sale of the supplier's products, despite the absence of negligence or fault on the supplier's side (Article 14 *bis* 1, letter i).

- payment for stocking, displaying, or listing its agricultural and food products, or for making such products available on the market (Article 14 *bis* 2, letter a).

- to absorb all or part of the expense of any discounts on agricultural and food products offered as part of a promotion by the buyer (Article 14 *bis* 2, letter b).

- payments for agricultural and food products advertising (Article 14 *bis* 2, letter c).

- payments for agricultural and food products marketing (Article 14 *bis* 2, letter d).

- payments for personnel for fitting-out premises used to sell the supplier's products (Article 14 *bis* 2, letter e).

The next group of unfair practices consists of those that result in a unilateral breach of contract in connection to the delivery and receipt of purchased products. On the one hand, it is prohibited for the seller to cancel an order for perishable agricultural and food products 30 days before to delivery (Article 14 *bis* 1, letter b). On the other hand, it is prohibited for the buyer to return unsold agricultural and food products to the supplier without paying for those unsold products or for the disposal of those unsold products, or both (Article 14 *bis* 2, letter f).

Lastly, we list two unfair practices that, while not directly related to the conventional mandatory content of the sales contract, are related to specific contract-derived material and data or the commercial relationship itself. First, the unauthorized acquisition, use or disclosure of the other party's trade secrets, as defined by Law 1/2019, of February 2<sup>nd</sup>, on business secrets, is forbidden (Article 14 *bis* 1, letter g). And secondly, it is prohibited to threaten to carry out, or carrying out, acts of commercial retaliation against the other party, when this party exercises its contractual or legal rights (Article 14 *bis* 1, letter h).

#### 4. *Conclusions*

In the European Union, and particularly in Spain, the agri-food sector has an undeniable strategic value for economy and society as a whole.

However, the Spanish agri-food sector is particularly vulnerable due to certain internal structural and organizational characteristics.

The evident imbalances between the different stages in the food supply chain have been revealed for a long time. Specifically, the primary production sector (agricultural, livestock, forestry...) is usually impacted by the large processing industry and distribution chains, which impose their large size and influence on trade relations, determining bargaining conditions and setting the prices finally incorporated into private contracts between operators in the food chain.

Indeed, when the debate on the current functioning of the food chain arises, the following issues are at the center: low prices received by farmers or ranchers for their agricultural production; prices that barely remunerate production costs; or the question of agri-food product prices stagnation or decrease, year after year, in the face of the constant increase of agricultural inputs prices and other production costs borne by producers. We can also include the low or no profitability of the primary agricultural sector, the imposition of unfair contractual conditions on the producer by large industry and distribution operators, the assumption from producers and farmers of typical high risks of agricultural activity (meteorological, biological, market risks...), the unfair competition practiced by producers from third countries, the limited margins of maneuver or reaction of the primary agricultural sector in the face of market crises or eventualities (Russia's blockade of EU agricultural products, health pandemic and economic crisis caused by COVID 19, war in Western Europe), etc.

The aforementioned characteristic circumstances of the agri-food market (together with other structural aspects such as the absence of young successors in the agricultural holding, the reduced territorial dimension of holdings, the lack of modernization and competitiveness, etc.), have led on many occasions to the abandonment of numerous farms and thus to the depopulation of large rural areas in Spain and the EU, with the aggravating circumstance that this entails not only the loss of agricultural production potential (removal of farmland), but also pernicious direct effects on the rural areas and the natural environment caused by such abandonment and depopulation of large areas and regions of the country.

In this global framework of permanent and successive crises that afflict



the agricultural sector (structural crisis, market crisis, food crisis, health crisis, price crisis...), the contracting regime affecting the development and conformation of activities and economic transactions within the food supply chain, should play a relevant role in improving the living and working conditions of farmers, through market fair remuneration when selling agricultural and food production.

For this reason, to achieve the primary sector's legitimate aspiration that agricultural or livestock products are fairly and reasonably remunerated by the market, producers must know how to take advantage of the incentives and opportunities the current regulations offer them to group and organize themselves around increasingly stronger organizations and associations (through much larger, more efficient and larger agricultural cooperatives, increasing merger processes between cooperatives, or through other organizations and associations of agricultural producers), and thus be able to concentrate the maximum supply in a much more efficient way than the current one. Only through this type of scale producer organizations and associations, agricultural producers will be able to increase their bargaining power on the market and obtain better prices and conditions in food contracts concluded between food chain operators.

In short, it is essential to make efforts in order to achieve ambitious strategic objectives within the framework of the food supply chain, such as the following: improving the functioning, balance and structure of the agricultural and food chain; strengthening producers and enhancing activities of interbranch agri-food organizations; guaranteeing fair, loyal and effective competition in the agri-food chain; increasing food sector efficiency and global competitiveness; intensifying efforts towards social objectives and goals.

Focusing on the regulatory field of contractual relationships generated in the agri-food chain, both European Union regulations (within the CAP), and State regulations (national and regional), have been establishing certain rules applicable to food chain contracts.

In Spain, the so called standard agri-food contract was initially regulated. It was intended to serve as a model born within the IAOs and then approved by the competent public authority (Ministry of Agriculture), in order to represent certain official overtones and legal security. However, the merely voluntary nature of the standard agri-food contract, the difficulties in reaching an agreement between food chain stages represented in the IAOs and the need for financial contributions by the operators who used that standard contract, may have contributed to

the limited effectiveness and application of such standard contract, despite the existence in certain sectors (especially in citrus farming...) of various approved standard contracts that seem to have had a certain proliferation and development.

The Law 12/2013, for its part aimed to improve the functioning of the food chain. It has opted to compulsorily demand certain formal, writing and minimum content requirements for so-called «food contracts», signed between food chain operators (price amount over 1,000 euros). Controls, inspections and administrative sanctions are also introduced for the case of non-compliance with the mandatory legal requirements on food contracts.

This implies more vigorous measures to implement the objective of providing greater transparency and balance to contractual relations between primary producers and buyers of agricultural and food products (processing industry, large distribution...).

However, such a task faces enormous obstacles (of legal and economic nature) which cannot be ignored: traditional voluntary nature of civil regulations regarding private contracts (including agricultural and food contracts); possible discrepancies and internal divergences between State law and regional law regarding agricultural contracts; freedom of enterprise, market freedom and free prices fixing principles; competition regulation; and most importantly, the great economic, bargaining and organizational power of one of the contracting parties (industry, distribution) compared to the manifest weakness of the other (producers, sellers such as farmers, ranchers...) when «negotiating» contractual terms and conditions, including the prices of each contract and transaction.

The amendments subsequently made to Law 12/2013 by the Spanish legislator, especially during 2020 and at the end of December 2021, have completed the transposition process of the Directive 2019/633 on unfair trading practices.

Brussels-promoted reforms are an indication that things are not proceeding well in practice and must be improved. In Spain, the practical effects of new legal requirements, introduced between 2013 and 2021 within the private contractual relationships affecting operations in the food chain, appear to be on track to trying to influence and make the legislative power intervene in the ordering, transparency and rebalancing of food chain commercial relationships. This is also due to the harmonizing intervention of the EU legislator.

Regarding future reforms in this matter, it is essential to keep in mind that the global framework of reference should not be limited to

mere trading relations between food companies, whose dysfunctions and unfair commercial practices have been already outlined and analyzed. As a fundamental strategic sector for Spain, for Europe and its citizens, the relevance of the agri-food sector as a whole must be valued and taken into account. This is an essential sector, especially in times of crisis and in times of health and economic uncertainty we are deeply experiencing, in order to guarantee people a satisfactory essential product supply.

Future legislation must also keep in mind (and not only in Law explanatory statements or preambles to laws but in applicable Articles) the special characteristics in which agricultural and livestock production is developed, with high levels of risk due to the dependence on biological processes that are not always under human control, weather events and changing market circumstances (price fluctuation, supply/demand, incidence of the perishable nature of products, etc.).

Future regulations must protect the weakest part of the food chain, that is the primary production sector, which in Spain, to a large extent, is dominated by small or medium-sized farms (SMEs), many of which are still family-run. A large number of such farms make considerable efforts to carry out quality production, yet they are not rewarded fairly and equitably by the market. Thus, the significant economic dependence of suppliers (farmers) on buyers, makes them susceptible to unfair practices well known in other economic sectors and regulated for decades in Spanish legal system by Law 15/2007, of 3 of July, on competition defense and by Law 3/1991, of January 10, on unfair competition.

In fact, the existence of a consolidated regulation on competition defense and unfair competition, could initially suggest the uselessness of another more specific *ad hoc* regulation on that issue, but applicable to a particular economic agriculture and food sector. However, we believe that the special characteristics of commercial relationships between companies, operators and stages in the food supply chain require special regulations adjusted to each member State.

In light of the situation, regulations should guarantee the complete protection against unfair trading practices, that is, encompassing all the phases and stages of agri-food contracting. Therefore, it should exert its protective impact during preliminary, pre-contractual or preceding negotiations. Also during the configuration of commercial relations between the parties through contracts (preferably written and secure), in the execution phase of contractual provisions and obligations (purchase, sale, supply contract), and even after the transactions have been completed

(proper custody of documents, data protection, confidentiality, subsequent responsibilities, etc.).

Lastly, in the regulatory field of agricultural contracting (leaving aside the matter of leasing, which already has its own special law), a future reform would require a profound reorganization and systematization of Spanish national regulations regarding agricultural product sale contracts, that has really been lacking for decades. Leaving aside the ancient and scattered provisions of the Civil Code on animals or farm products sale, it would be necessary to review, update and, where appropriate, consolidate all the rules on agricultural production trading contracts under the same specialized legal body (it could be the Law on the food chain, but with an expanded title and scope).

Aniko Keller\*

*The regulation of contractual relationships  
in the agri-food chain in Hungary*

SUMMARY: 1. Introduction – 2. Contract law – 3. Competition law: the Trade Act – 4. The Unfair Distribution Practices Act 2009 on unfair distribution practices vis-à-vis suppliers of agricultural and food products – 5. Compliance of the Unfair Distribution Practices Act with the UTP Directive – 6. Public enforcement – 6.1. Summary report on administrative proceedings and case law – 7. Concluding remarks.

*1. Introduction*

In Hungary, B2B contracts, including contracts concluded between traders (buyers) and suppliers in the retail supply chain, are regulated by the general rules of Hungarian civil law. There is no special regime for such contracts. However, as set out in detail below, specific legislation has existed since June 1, 2006 aiming at the protection of suppliers against traders, which limits the contractual freedom of the parties. This legislation has addressed commercial practices regardless of economic sectors and suppliers have been protected against abuses by traders with significant market power as defined by the relevant legislation.

In addition, as of January 1, 2010, a special regime was introduced to specifically protect all suppliers of agricultural and food products against traders irrespective of the market power of traders and which provides a list of practices which are prohibited. Since then, this list of practices has been amended and extended several times by the legislature in light of the experience conveyed by suppliers and their representing bodies.

Below, we present both the relevant rules of Hungarian civil law in respect of B2B contracts and the specific pieces of legislation that have

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This contribution reflects the status quo as of February 2022.

governed the relationship of suppliers and traders in general since June 1, 2006 and specifically the relationship of suppliers of agricultural and food products and traders since January 1, 2010. Then, we analyze whether and to what extent the specific Hungarian legislation in force complies with the UTP Directive. Finally, we give a brief overview of the relevant case law and provide an evaluation of the national framework.

## 2. *Contract law*

Hungarian law does not provide for a special contractual law regime with respect to the agricultural and food supply chain. Instead, the general rules as set out in Act V of 2013 on the Civil Code (hereinafter: Civil Code) apply.

With regards to the contractual relationship of suppliers and traders the most relevant rules can be found in the provisions of the Civil Code regarding general terms and conditions of contract and their interpretation, and in the provisions relating to the unfairness of such general terms and conditions and the legal consequences attached to it, which are applicable to both B2C and B2B contracts.

Sections 6:77 and 6:78 of the Civil Code are the legal basis with regard to the agreements concluded by way of general terms and conditions, *i.e.*, agreements which have been unilaterally drafted in advance by one of the parties for several transactions involving different parties, and which have not been individually negotiated by the parties (standard contracts, contracts concluded by way of general conditions of contract).

The general safeguard for ensuring fair terms is the obligation to explicitly inform the other party of any standard contract term that differs substantially from the relevant legislation and from the customary contractual practice (hereinafter: Differing Term), except if they are in line with any practice the parties have established between themselves. The customary contractual practices are defined by the case-law on a case-by-case basis.

A further safeguard is the rule regarding the interpretation of the general terms and conditions. In business-to-business relationships, if there is a disagreement on the interpretation of a Differing Term, then Section 6:86 of the Civil Code provides that the interpretation which is more favorable to the non-drafting party is to be preferred.

In accordance with Section 6:102 of the Civil Code, a general contract term has to be considered unfair if, contrary to the requirement of good faith and fair dealing, it causes a significant and unjustified imbalance in contractual rights and obligations, to the detriment of the party entering into the contract with the party imposing such contract term. The assessment of whether a certain term can be deemed unfair is not a mechanical process. In making this assessment, the nature of the services has to be taken into account, as well as all significant circumstances relevant to the contract. An unfair provision included in the general conditions of contract can be contested in civil proceedings.

Section 6:106 of the Civil Code introduces the notion of «unfair contract term» in case of contracts concluded between businesses, and between a business and a contracting authority. According to this provision, a contractual term included in the general conditions of contract will be deemed unfair if the deadline for settlement of monetary debts, the amount or due date of interest for late payment is to be regarded as contrary to good faith and fair dealing, and it is unilaterally and unjustifiably unfair to the creditor.

The Civil Code entitles organizations representing the interests of business entities to dispute contracts including the above unfair term entered into by businesses they represent. These provisions were introduced by the domestic measure of implementation of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

The legal consequence of unfairness of certain general terms is the invalidity of such provisions. The aggrieved party or any party having an interest in voiding the contract are entitled to challenge such provision<sup>1</sup>.

The right to challenge the contract can be exercised within a one-year period as of its conclusion by either a legal statement addressed to the other party or by enforcing a claim directly before a court. Nevertheless, the interested party may raise the invalidity of the clause as a defense against the other party even after the above-mentioned one-year period. The right to challenge the contract ceases if a party is aware of a circumstance which enables him to challenge the contract and nonetheless reaffirms his contractual intention.

The above provisions of the Civil Code enable suppliers to challenge contract terms included in the general terms and conditions of traders should they consider such a contract term unfair. However, looking at the

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<sup>1</sup> Section 6:89 of the Civil Code.



judicial case law, we could not identify any decision adopted in disputes between traders and suppliers based on the above-mentioned provisions of the Civil Code.

### *3. Competition law: the Trade Act*

In Hungary, the first attempt to regulate the disparity of power with tools not falling within the scope of 'traditional' antitrust law was Act CLXIV of 2005 on Trade (hereinafter: Trade Act). The Trade Act entered into force on June 1, 2006.

The explanatory memorandum to the Trade Act<sup>2</sup> presents the reasons why the Hungarian legislature decided to introduce additional rules to protect suppliers. The general prohibition of the abuse of dominance set forth in Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter: the Competition Act), which corresponds to the prohibition set forth in Art. 102 TFEU, was considered insufficient to handle the issues that characterize the legal relationship between suppliers and traders. Indeed, although traders themselves do not have a dominant position from the competition law point of view, they still may have significant market power (hereinafter: SMP) towards their suppliers. In particular, small and medium-sized enterprises are in a vulnerable position when negotiating with traders, because typically, a significant volume of the sales of a supplier derives from contractual relationships with a trader having SMP. Therefore, in practice, these traders are unavoidable contractual partners of suppliers and the latter cannot negotiate with the former on an equal footing. As a consequence, the supplier's ability to innovate and its competitiveness is at risk on the long term.

Section 7 of the Trade Act prohibits large retailers that have SMP from abusing their market power vis-à-vis suppliers. Until July 31, 2012, the prohibition applied irrespective of the economic sector the suppliers are active in and of the products supplied by them. From August 1, 2012, the scope of the Trade Act was narrowed to non-food products (see below the detailed explanation).

The authority in charge of enforcing the rules set forth in Section 7 of

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<sup>2</sup> In Hungary, bills adopted by the Hungarian Parliament do not have an official reasoning adopted by the Hungarian Parliament. Instead, the reasoning drafted by the proponents of the bill are published and used as guidelines for interpretation.

the Trade Act is the Hungarian Competition Authority (hereinafter: the HCA) in accordance with the procedural rules set forth in the Competition Act.

According to the Trade Act, the term «supplier» means an entity selling products or services for the purpose of resale to an entity engaged in trading activities, while the term «trader» means an entity pursuing trading activities, which includes both retail, wholesale and agency activities.

Pursuant to the Trade Act, SMP is a market situation where the trader has become reasonably indispensable for the supplier in selling its goods and services to the purchasers, and due to its market share, is able to influence, either regionally or nationwide, the conditions for the market entry of the products or group of products.

The Trade Act establishes a non-rebuttable presumption by setting forth that a trader must be considered to have SMP if the turnover from trade activities of the trader's company group (or in case of purchasing alliances, the members' turnover) exceeds HUF 100 billion (approx. EUR 270 million)<sup>3</sup>.

Furthermore, the trader's SMP is deemed to exist if, based on the market structure, the market entry barriers, the trader's market share, its financial strength and other resources, the extension of its trading network, the size and location of its stores and its trading and other activities, the trader enjoys an advantageous bargaining position *vis-à-vis* its suppliers.

The Trade Act introduces a general prohibition against abusing SMP *vis-à-vis* suppliers, and includes a non-exhaustive list of abuses. According to this list, it is prohibited to:

- a) unjustifiably apply discriminative measures against suppliers,
- b) unjustifiably restrict suppliers' access to sales opportunities,
- c) impose unfair conditions on suppliers, which result in an allocation of risks unilaterally benefiting the trader, in particular to disproportionately shift costs which are incurred also in the business interests of the trader, such as costs of storage, advertising, marketing etc., on the suppliers,
- d) unjustifiably amend contractual conditions to the detriment of the supplier, after concluding the contract or reserving this option to the trader,
- e) subject future business relations of the trader with the suppliers to

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<sup>3</sup> Exchange rate used in this paper is the exchange rate of the Hungarian National Bank on January 4, 2022: EUR 1 = HUF 365.44.

unjustified conditions, in particular stipulating or retrospectively enforcing the application of a most-favourable-conditions clause or obliging the suppliers to give discounts, in respect of certain products and for a specified period of time, exclusively to the trader in question or obliging the suppliers to produce, in order to get any of their products to be distributed, products sold under the trade mark or brand of the trader,

- f) charge fees unilaterally to suppliers for, in particular, putting them on the trader's suppliers-list or allowing their goods to become part of the trader's product range or in consideration of services not demanded by the suppliers,
- g) threaten with termination of the agreement in order to impose contractual terms unilaterally beneficial to the trader,
- h) unjustifiably force suppliers to avail themselves of third persons as suppliers or of an own service provider of the trader,
- i) apply sales prices, in cases in which the trader is not the owner of the goods, which are lower than the invoice prices determined in its contracts, save for prices applied in the sales of substandard goods or in clearance sales within a seven-day period before the expiry of the quality preservation term or introduction prices applied no longer than 15 days or prices applied in end-of season clearance sales or in cases where the types of products dealt with or the field of activities are changed or in clearance sales of stocks of outlets which will be closed down.

#### *4. The Unfair Distribution Practices Act 2009 on unfair distribution practices vis-à-vis suppliers of agricultural and food products*

In 2009, a new act was adopted by the Hungarian Parliament, namely, Act XCV of 2009 on the prohibition of unfair distribution practices *vis-à-vis* suppliers of agricultural and food products (hereinafter: the Unfair Distribution Practices Act). The Unfair Distribution Practices Act entered into force on January 1, 2010 and has been amended several times.

According to its preamble, the Unfair Distribution Practices Act aims at building mutual trust and cooperation between actors in the food

chain, settling market relations, enforcing standards of ethical business conduct, and ensuring a balanced bargaining position between actors while maintaining food security and consumer confidence.

As for the relationship between the Trade Act and Unfair Distribution Practices Act, the Unfair Distribution Practices Act initially set forth that no proceedings under the Unfair Distribution Practices Act may be initiated and pending proceedings must be terminated and decisions adopted on the merits must be revoked if proceedings were initiated against the trader under the Trade Act in relation to the same conduct. In other words, initially, the Trade Act prevailed if a conduct was capable of violating both the Trade Act and the Unfair Distribution Practices Act.

However, as of August 1, 2012, another provision was added to the Trade Act according to which «the provisions regarding the prohibition of the abuse of SMP will be no longer applicable in cases falling under the scope of the Unfair Distribution Practices Act». This means that, as of August 1, 2012, the Trade Act no longer applies in respect of matters falling under the scope of the Unfair Distribution Practices Act and is still applicable to infringements which do not fall under the scope of the Unfair Distribution Practices Act. Furthermore, since August 1, 2012, the Hungarian Competition Authority did apply the Trade Act to practices of traders carried out in connection with non-food products only.

The Unfair Distribution Practices Act lists very similar reasons to those underlying the Trade Act in order to justify the introduction of the special legislation. This may indicate that the legislature did not find Section 7 of the Trade Act and/or its enforcement appropriate and efficient. The reasoning again emphasizes that suppliers are in a weaker position than traders for three reasons: firstly, in most of the cases, traders can easily substitute the products of a certain supplier, meaning that it is the supplier who is dependent on the trader, not the other way around. Secondly, traders may compete with suppliers when creating private label products. Finally, traders sell a number of services to the supplier (listing, merchandising, logistics, etc.) which, in most of the cases, suppliers are not in a position to reject, or what is more, are forced to use. Some of the services do not even represent added value and suppliers are threatened by «delisting», termination of contract and similar measures if they do not accept the trader's offers.

As mentioned, the Unfair Distribution Practices Act is applicable to agricultural and food products. More precisely, under the Unfair Distribution Practices Act, agricultural and food products mean the

products as defined in Art. 2 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, which do not require further processing to sell them to end consumers<sup>4</sup>.

As to the definitions of trader and supplier set forth in the Unfair Distribution Practices Act, it may be argued that it covers the entire chain of suppliers and traders from the producer to the end consumer due to an amendment in force as of August 1, 2012<sup>5</sup>.

The scope of the act extends to:

- a) legal persons, business associations without legal personality, other business organizations, natural persons (including small-scale agricultural producers, private entrepreneurs and family farmers) producing or processing agricultural products and food, as well as to producer organizations or producer groups set forth in a separate legal norm,
- b) legal persons, business organisations without legal personality, other business organizations, natural persons distributing agricultural and food products or selling them to final consumers without processing, and related undertakings as set forth in Act C of 2000 on Accounting (hereinafter the Accounting Act), as well as to intermediaries providing services for the above organizations or persons in connection with the supply or sale of such products by establishing a direct business relationship with the product supplier.

According to the Unfair Distribution Practices Act, «supplier» is

(a) any natural person, legal person or organisation not having legal personality, which produces or processes agricultural and food products or any natural person, legal person or organisation not having legal personality, which is controlled by or qualifies as a producer organisation or producer group pursuant to a separate legal act, and sells the products produced or processed to traders, and (b) any natural person, legal person or organisation not having legal personality, which is not under the sole control of the trader or is not an affiliated company of the trader within the meaning of the Accounting Act or does not form a joint purchasing alliance

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<sup>4</sup> Item d) of Section 2(1) of the Unfair Distribution Practices Act.

<sup>5</sup> As of August 1, 2012, the definition of trader was amended so that it includes all entities which resell products and not only to entities which sell products to end consumers.

with the trader, which sells agricultural and food products to traders<sup>6</sup>.

«Trader» is any natural person, legal person or organisation not having legal personality and their affiliated companies within the meaning of the Accounting Act and that has the following business activity: reselling the product purchased directly or indirectly from the supplier without transformation (processing) furthermore, third intermediaries which provide services to such entities in connection with the supply or the sale of the product and (i) which is not under the sole control of the supplier or is not an affiliated company of the supplier within the meaning of the Accounting Act or (ii) does not form a joint purchasing alliance with the supplier<sup>7</sup>.

The Unfair Distribution Practices Act provides an exhaustive list of unfair distribution practices vis-à-vis suppliers. As mentioned, such unfair distribution practices are prohibited irrespective of the market power of the trader. It must be noted that in the list of unfair distribution practices, «final consumer» is a defined term and it means all those to whom the trader sells the products<sup>8</sup>.

The following must be considered as unfair distribution practices<sup>9</sup>:

- a) imposing conditions on suppliers which result in a distribution of risks that unilaterally benefit the trader;
- b) applying contractual terms – other than obligations in connection with deficient performance – which requires the supplier to take back products supplied:
  - ba) with the exception of products purchased by the trader for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the «use by» date; and
  - bb) at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier;
- c) the charging of a part of or all the costs to the suppliers by the trader or through the involvement of a third intermediary which occur in the interest of the trader's business, in particular costs relating

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<sup>6</sup> Item a) of Section 2(2) of the Unfair Distribution Practices Act.

<sup>7</sup> Item b) of Section 2(2) of the Unfair Distribution Practices Act.

<sup>8</sup> Section 3(9) of the Unfair Distribution Practices Act in force as of September 1, 2012.

<sup>9</sup> Section 3(2) of the Unfair Distribution Practices Act.

- to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the trader to another logistical unit or to the store;
- d) the charging of fees, by the trader or through the involvement of a third intermediary, to suppliers for putting them on the trader's suppliers-list or for allowing their goods to become or to remain part of the trader's product range;
  - e) the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:
    - ea) for services not provided;
    - eb) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;
    - ec) in consideration for services not requested by them or not serving their interests, or obliging suppliers to use services not requested by them or not serving their interests;
    - ed) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the trader in connection with the distribution of the products;
  - f) requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a)<sup>10</sup>;

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<sup>10</sup> In connection with item f), Section 3(2a) sets forth that the trader must settle the discount provided and the related quantity with the supplier within 30 days following the final date of the discount provided to final consumers with the contribution of the supplier, or, if the trader's net turnover in the previous year did not exceed HUF 100 million (approx. EUR 270,000), within 30 days after the preparation of the inventory related to the preparation of the report in accordance with the Accounting Act.



- g) charging the costs to suppliers, which arise in connection with the non-compliance of the trader with the legal requirements applicable to trader;
- h) with the exception of deficient performance, the payment of the purchase price of the products to the supplier or to the person to whom the suppliers assigned it, takes place:
  - ha) later than 30 days after the taking into possession of the products by the trader or by the person acting in favour of the trader (as for item h) hereinafter: delivery) if the supplier provides the trader with the proper invoice within 15 days following the delivery;
  - hb) later than 15 days after the receipt of the proper invoice, if the invoice was provided to the trader more than 15 days after the delivery<sup>11</sup>;
- i) applying rebate if the trader pays the purchase price within the payment deadline;
- j) the exclusion of late payment interest, contractual penalty or other collaterals for the benefit of the supplier;
- k) with the exception of products branded under the trader's brand, applying exclusive supply obligation for the benefit of the trader without proper consideration, or requiring a most-favourable-conditions clause;
- l) the application of non-written contractual terms if such terms were not put down in writing within 3 business days following such a request by the supplier;
- m) submitting to the supplier the purchase order or the amendment thereof beyond a reasonable deadline;
- n) unilateral amendment of the contract by the trader due to a reason which is objectively not justifiable and which is not attributable to an event external to the trader's business.;

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<sup>11</sup> According to Section 3(2c), should payment not be performed by the deadline as set forth in item h), the trader shall pay a late payment interest which amounts to double the base interest rate of the National Bank of Hungary. The contract must contain the authorization of the supplier by the retailer to file a direct collection order relating to the consideration of the product and the interest amounting to double the base interest rate of the National Bank of Hungary in the case that the payment is not performed by the deadline set forth in item h) above.

- o) omission of the publication of the standard contractual terms, deviation from the standard contractual terms made public, as well as the application of terms not included in such standard contractual terms;
- p) the restriction of the legitimate use of the trademark of the supplier;
- q) distribution of the product to the final consumer below costs, including the general operational expenses, in the case of the supply price invoiced by the supplier and in the case of production by the trader, with the exception of clearance sales lasting for at the most 15 days, notified to the agricultural authority in advance, due to the termination of the trader's operations or due to the trader's profile change, and with the exception of the clearance sales of reduced value products (including the products of short duration accumulated in the stocks of the trader due to an unforeseeable reason);
- r) the imposition of a rebate, commission or fee payable by the supplier, based on the quantity distributed by the trader, on any legal title whatsoever, with the exception of a retroactive rebate which motivates the trader to increase sales based on additional distribution in comparison to distributed quantities in a previous period or in comparison to an estimation, in accordance with the features of the distribution of the product and in a proportional rate;
- s) if the trader does not reimburse the supplier the amount of the public health product tax payable by the supplier within the deadline as set forth in item h);
- t) the non-compliance with the provisions set forth in Sections 3(2b) or 3(2c) of the Unfair Distribution Practices Act (please see below the detailed explanation);
- u) discriminatory pricing on the basis of national origin in respect of the consumer prices of products which are identical from the point of view of their composition and their visible properties.
- x) if the trader unilaterally reduces the purchase price vis-à-vis the supplier despite the supplier's objection, or if, in order to impose a reduction of the purchase price, the trader threatens the supplier to terminate the contract, to cancel orders, to reduce the volume of

orders, to cancel sales promotions or to use other means that cause material or moral loss to the supplier<sup>12</sup>.

According to Section 3(2b), the trader must notify the supplier about the compensation claim 5 days prior to enforcement. The compensation claim may be enforced if the supplier does not dispute the amount thereof on the basis of well-grounded reasons or does not raise well-grounded objections based on defective performance. The trader must notify the supplier about the grounds of the compensation claim within 15 days following the enforcement. The trader must return the invoice issued incorrectly to the supplier within 5 days after the receipt.

Furthermore, the trader must make public the terms and conditions relating to the services that may be provided to the supplier in connection with the distribution of products in the form of standard contractual terms, and the amendments thereof. Publication must take place on the homepage if the trader has a homepage, and if not, in the customer area open to the public; the same information has to be sent to the competent authority in advance<sup>13</sup>. The obligation of preparation and publication of the standard contractual terms shall not apply to traders whose net turnover in the previous year does not exceed HUF 20 billion (approx. EUR 55 million).

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<sup>12</sup> Item x) was adopted in 2020 during the pandemic and entered into force on May 5, 2020: see Government Decree no. 180 of 2020 (V.4.) on the amendment of the Government Decree no. 122 of 2020 (IV. 16.) on the differing application of certain agricultural regulations in the framework of the Action Plan for the Protection of the Economy and Section 347 of Act LVIII of 2020 on the transitory rules in connection with the termination of the state of emergency and on the state of epidemiological preparedness. According to the reasoning, the amendment was introduced due to the experiences of the pandemic and not as the implementation of the UTP Directive. According to Section 3(2d) of the Unfair Distribution Practices Act, when applying item x) above, the trader must prove that the reduction in the purchase price was not made as contrary to the prohibition laid down in item x) if the proceedings of the NFCSO was initiated upon the supplier's notification; furthermore item x) is applicable in cases only where a) the supplier's annual turnover does not exceed HUF 500 million (approx. EUR 1.37 million) and the trader's turnover exceeds HUF 1 billion (approx. EUR 2.74 million); b) the supplier's annual turnover exceeds HUF 500 million (approx. EUR 1.37 million), but does not exceed HUF 5 billion (approx. EUR 13.7 million), and the trader's turnover exceeds HUF 20 billion (approx. EUR 54.7 million); c) the supplier's annual turnover exceeds HUF 5 billion (approx. EUR 13.7 million), but does not exceed HUF 75 billion (approx. EUR 205 million), and the trader's turnover exceeds HUF 100 billion (approx. EUR 274 million); d) the supplier's annual turnover exceeds HUF 75 billion (approx. EUR 205 million) and the trader's turnover exceeds HUF 200 billion (approx. EUR 547 million).

<sup>13</sup> Section 3(5) of the Unfair Distribution Practices Act

The standard contractual terms must specify the contents of the services that may be provided to suppliers by the trader, the terms and conditions of the provision of such services, the maximum fee payable for the service and the method of calculation used in the case of settlement; furthermore, they shall contain the terms and conditions to become a supplier of the trader and the termination of this status<sup>14</sup>.

The Unfair Distribution Practices Act sets forth that the contractual term which includes unfair distribution practices or circumvents the corresponding prohibition shall be null and void. The omission of the publication of the standard terms in itself will not result in the invalidity of the contractual term. On the contrary the supplier's consent to a distribution practice which is unfair is not regarded as valid.

The National Food Chain Safety Office (hereinafter: NFCSO, in Hungarian: *Nemzeti Élelmiszerlánc-biztonsági Hivatal*, Hungarian abbreviation: NÉBIH) has the competence to investigate unfair practices carried out by traders.

It is important to note that in the event the HCA initiates investigation procedure against the same undertaking due to the same practices on the basis of Section 21 of the Competition Act (abuse of dominant position), the NFCSO is obliged to suspend its procedure. If the HCA adopts a decision in the above-mentioned case, the NFCSO must terminate its procedure, or revoke its decision, if already adopted.

The below table shows the comparison between the prohibited practices under the Trade Act and under the Unfair Distribution Practices Act.

Similar practices were listed in the same row of the table. From the table below, it is quite clear that the two lists of prohibited practices are similar to each other, and although the list set forth in the Unfair Distribution Practices Act includes more practices, these are, most of the time, more specific, *i.e.*, narrower in scope than the ones listed in the Trade Act. Also, the list of the Trade Act is not exhaustive and it is based on the general clause «it is prohibited to abuse SMP towards suppliers»; therefore also additional conducts not listed in the Trade Act may be found unlawful. Furthermore, the broader definitions of the practices listed in the Trade Act leave more room for interpretation.

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<sup>14</sup> Section 3(6) of the Unfair Distribution Practices Act.

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
<p>item a) unjustifiably apply discriminative measures against suppliers</p>	
<p>item b) unjustifiably restrict suppliers' access to sales opportunities</p>	
<p>item c) impose unfair conditions on suppliers, which result in an allocation of risks unilaterally benefiting the trader, in particular to disproportionately shift costs which are incurred also in the business interests of the trader, as costs of storage, advertising, marketing etc., on the suppliers</p>	<p>item a) imposing conditions on suppliers which result in a distribution of risks that unilaterally benefit the trader</p> <p>item c) the charging of a part of or all the costs to the suppliers by the trader or through the involvement of a third intermediary which occur in the interest of the trader's business, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the trader to another logistical unit or to the store</p> <p>item e) the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <p>a) for services not provided;</p> <p>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;</p> <p>c) in consideration for services not requested by them or not serving their interests, or obliging suppliers to use services</p>

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
	<p>not requested by them or not serving their interests,</p> <p>d) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the trader in connection with the distribution of the products</p> <p>item f) requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a)</p> <p>item g) charging the costs to suppliers, which arise in connection with the non-compliance of the trader with the legal requirements applicable to trader</p> <p>item j) the exclusion of late payment interest, contractual penalty or other collaterals for the benefit of the supplier</p>
<p>item d) unjustifiably amend contractual conditions to the detriment of the supplier, after concluding the contract or reserving this option for the trader</p>	
<p>item e) subject future business relations of the trader with the suppliers to unjustified conditions, in</p>	<p>item e)</p>

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
<p>particular stipulating or retrospectively enforcing the application of a most-favourable-conditions clause or obliging the suppliers to give discounts, in respect of certain products and for a specified period of time, exclusively to the trader in question or obliging the suppliers to produce, in order to get any of their products to be distributed, products sold under the trade mark or brand of the trader</p>	<p>the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <ul style="list-style-type: none"> <li>a) for services not provided;</li> <li>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;</li> <li>c) in consideration for services, or obliging suppliers to use services not requested by them or not serving their interests,</li> <li>d) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the trader in connection with the distribution of the products</li> </ul> <p>item f) requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a)</p> <p>item i) applying rebate if the trader pays the purchase price within the payment deadline</p>



Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
	<p>item r) the imposition of a rebate, commission or fee payable by the supplier, based on the quantity distributed by the trader, on any legal title whatsoever, with the exception of a retroactive rebate which motivates the trader to increase sales based on additional distribution in comparison to distributed quantities in a previous period or in comparison to an estimation, in accordance with the features of the distribution of the product and in a proportional rate</p>
<p>item f) charge fees unilaterally to suppliers for, in particular, putting them on the trader's suppliers-list or allowing their goods to become part of the trader's product range or in consideration of services not demanded by the suppliers</p>	<p>item d) the charging of fees, by the trader or through the involvement of a third intermediary, to suppliers for putting them on the trader's suppliers-list or for allowing their goods to become or to remain part of the trader's product range</p> <p>item f) requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a)</p> <p>item r) the imposition of a rebate, commission or fee payable by the supplier, based on the quantity distributed by the trader, on any legal title whatsoever, with the exception of a retroactive rebate which motivates the trader to increase sales based on additional distribution in comparison to distributed quantities in a</p>

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
	previous period or in comparison to an estimation, in accordance with the features of the distribution of the product and in a proportional rate
item g) threaten with termination of the agreement with the intention to enforce contractual terms unilaterally beneficial for the trader	item x) if the trader unilaterally reduces the purchase price vis-à-vis the supplier despite the supplier's protest, or if in the interest of the reduction of the purchase price, the trader threatens the supplier to terminate the contract, to cancel orders, to reduce the volume of orders, to cancel sales promotions or by other means that cause material or moral loss to the supplier
item h) unjustifiably force suppliers to avail themselves of third persons as suppliers or of an own service provider of the trader	
item i) apply sales prices, in cases in which the trader is not the owner of the goods, which are lower than the invoice prices determined in its contracts, save for prices applied in the sales of substandard goods or in clearance sales within a seven-day period before the expiry of the quality preservation term or introduction prices applied no longer than 15 days or prices applied in end-of season clearance sales or in cases where the types of products dealt with or the field of activities are changed or in clearance sales of stocks of outlets which will be closed down	item q) distribution of the product to the final consumer below costs, including the general operational expenses, in the case of the supply price invoiced by the supplier and in the case of production by the trader, with the exception of clearance sales lasting for at the most 15 days, notified to the agricultural authority in advance, due to the termination of the trader's operations or due to the trader's profile change, and with the exception of the clearance sales of reduced value products (including the products of short duration accumulated in the stocks of the trader due to an unforeseeable reason)
	item b) applying contractual terms – other than obligations in connection with deficient performance – which requires the supplier:

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
	<p>a) to take back products supplied, with the exception of products purchased by the trader for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the "use by" date; and</p> <p>b) to take back products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier</p>
	<p>item h) with the exception of deficient performance, the payment of the purchase price of the products to the supplier or to the person to whom the suppliers assigned it, takes place:</p> <p>a) later than 30 days after the taking into possession of the products by the trader or by the person acting in favour of the trader (as for item h) hereinafter: delivery) if the supplier provides the trader with the proper invoice within 15 days following the delivery;</p> <p>b) later than 15 days after the receipt of the proper invoice, if the invoice was provided to the trader more than 15 days after the delivery</p>
	<p>item l) the application of non-written contractual terms if such terms were not put down in writing within 3 business days following such a request by the supplier</p>
	<p>item m) submitting to the supplier the purchase order or the amendment thereof beyond a reasonable deadline</p>
	<p>item n)</p>

Prohibited practices under the Trade Act	Prohibited practices under the Unfair Distribution Practices Act
	unilateral amendment of the contract by the trader due to a reason which is objectively not justifiable and which is not attributable to an event external to the trader's business.
	item o) omission of the publication of the standard contractual terms, deviation from the standard contractual terms made public, as well as the application of terms not included in such standard contractual terms
	item p) the restriction of the legitimate use of the trademark of the supplier
	item s) if the trader does not reimburse the supplier the amount of the public health product tax payable by the supplier within the deadline as set forth in item h)
	item t) the non-compliance with the provisions set forth in Sections 3(2b) or 3(2c)
	item u) discriminatory pricing on the basis of national origin in respect of the consumer prices of products which are identical from the point of view of their composition and their visible properties

### *5. Compliance of the Unfair Distribution Practices Act with the UTP Directive*

As set forth in the UTP Directive, the deadline for implementation was May 1, 2021 and the rules in the UTP Directive must be applied as of November 1, 2021.

On June 6, 2021, Government Decree no. 398 of 2021 (VII. 6.) on the amendment of certain government decrees concerning some agricultural matters was adopted, a part of which gave implementation to the UTP Directive. This part of the government decree transposing the UTP Directive amended Government Decree no. 22 of 2012 concerning the National Food Chain Safety Office, the enforcement authority, and added another task to its competences, in conformity with Art. 10(1)-(2) of the UTP Directive<sup>15</sup>.

According to the amendment, the NFCSO must publish an annual report on its website about its activities falling under the scope of the Unfair Distribution Practices Act in connection with unfair distribution practices, in which it, among others, reports the number of complaints received and the number of investigations opened and closed during the previous year. This report must contain for each closed investigation a summary description of the matter, the outcome of the investigation, and where applicable, the decision taken, subject to the confidentiality requirements as set forth by the UTP Directive in Art. 5(3). In addition to this, by March 15 of each year, the NFCSO must send to the European Commission a report on unfair trading practices towards suppliers detected in connection with food and agricultural products.

Until the finalization of this chapter, in Hungary, no further measures for the implementation of the UTP Directive took place. Therefore, below it is summarized whether the regulation laid down in the Unfair Distribution Practices Act may be regarded compliant with the UTP Directive.

First, it must be emphasized that the UTP Directive foresees minimum harmonization. This means that Member States may maintain or introduce stricter national rules providing for a higher level of protection against unfair trading practices in business-to-business relationships in the agricultural and food supply chain, and should also be able to maintain or introduce national rules designed to combat unfair trading practices that are not within the scope of the UTP Directive, subject to the limits of Union law applicable to the functioning of the internal market, provided

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<sup>15</sup> See Section 4/D of the Government Decree no. 22 of 2012.

that such rules are proportionate<sup>16</sup>.

In the following, we will analyze the subject matter and the scope of the UTP Directive and those of the Unfair Distribution Practices Act, the agricultural and food products covered by them, the list of unfair practices, and last but not least the proceedings and measures as well as sanctions that may be taken and applied by the Hungarian regulatory authority, the NFCSO, to see whether additional legislation may be necessary to implement the UTP Directive in Hungary.

a) Subject matter and scope of the UTP Directive and the Unfair Distribution Practices Act

The personal scope of the UTP Directive extends to the entire agri-food chain. This is clear from the definition of buyer and supplier which include any natural or legal person or any public authority in the Union who buys / sells agricultural and food products.

Under the Unfair Distribution Act, supplier means any entity which produces, processes or sells agricultural and food products to a trader, while a trader means any entity which resells such products as a business activity without processing them.

It seems that the personal scope of the Unfair Distribution Practices Act, similarly to that of the UTP Directive, covers the entire agri-food chain. However, we have to note that, based on the cases published by the NFCSO, in practice the traders subject to the proceedings before the NFCSO are exclusively retailers which sell agricultural and food products to end consumers.

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<sup>16</sup> Art. 1(1) of the UTP Directive. See also recital (1): «... *A minimum Union standard of protection against unfair trading practices should be introduced...*» and recitals (39) and (40): «(39) As a majority of Member States already have national rules on unfair trading practices, albeit diverging rules, it is appropriate to use a Directive to introduce a minimum standard of protection under Union law. This should enable Member States to integrate the relevant rules into their national legal order in such a way as to enable cohesive regimes to be established. Member States should not be precluded from maintaining or introducing in their territory stricter national rules that provide for a higher level of protection against unfair trading practices in business-to-business relationships in the agricultural and food supply chain, subject to the limits of Union law applicable to the functioning of the internal market, provided that such rules are proportionate.

(40) Member States should also be able to maintain or introduce national rules designed to combat unfair trading practices that are not within the scope of this Directive, subject to the limits of Union law applicable to the functioning of the internal market, provided that such rules are proportionate. Such national rules could go beyond this Directive, for example as regards the size of the buyers and suppliers, protection of buyers, the scope of products and the scope of services. Such national rules could also go beyond the number and type of prohibited unfair trading practices listed in this Directive».

As to the definition of buyer of the UTP Directive and the definition of trader of the Unfair Distribution Practices Act, a significant difference is worth noting: while the definition of buyer laid down in the Directive simply refers to any natural or legal person or public authority, who buys agricultural and food products, the definition of trader does not seem to include all entities which buy such products, since it only includes entities which, as a business activity, buy and then resell agricultural and food products.

There is another noteworthy difference between the UTP Directive and the Unfair Distribution Practices Act with regard to the turnover threshold of buyers (traders) and suppliers. Namely, the Unfair Distribution Practices Act, unlike the Directive, protects all suppliers against all traders irrespective of their turnover. This, however, may be considered as a case of stricter national approach, which is permitted under the UTP Directive. The only exception is the practice introduced in item x) of Section 3(2) of the Unfair Distribution Practices Act as of May 5, 2020 (unilateral price reduction or threatening with unilateral price reduction by the trader). Furthermore, the Unfair Distribution Act, like the UTP Directive, protects only suppliers against traders.

b) The agricultural and food products covered by the UTP Directive and by the Unfair Distribution Practices Act

As mentioned, the Unfair Distribution Practices Act covers agricultural and food products as defined in Art. 2 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, which do not require further processing to sell them to end consumers.

The agricultural and food products covered by the UTP Directive are, however, the products listed in Annex I to the TFEU as well as products not listed in that Annex, but processed for use as food using products listed in that Annex.

Thus, it seems that a broader scope of agricultural and food products is covered by the UTP Directive.

c) List of unfair practices

While the UTP Directive lays down a black-list including nine types of conduct, which must be prohibited in any event and then includes a grey-list with six types of conduct, which should be prohibited only if they have not been previously agreed in clear and unambiguous terms in



an agreement between the supplier and the buyer, the Unfair Distribution Practices Act has a black list only, i.e. it only lists practices which are prohibited under any circumstances, but it has no grey-list in the sense mentioned above. Therefore, this is a stricter regulation than that of the UTP Directive.

Also, the practices listed in the Unfair Distribution Practices Act are formulated in a very sophisticated and detailed manner. Therefore, it is not crystal clear whether the provisions of the Unfair Distribution Practices Act can be regarded as a proper implementation of the UTP Directive, since much depends on the interpretation of such provisions by the competent authority and the courts.

The first practice listed on the blacklist of the UTP Directive is the late payment for products purchased, which is more than 30 days for perishable agricultural and food products and more than 60 days for other agricultural and food products. The deadline starts running at the end of an agreed delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later. Item h) of Section 3(2) of the Unfair Distribution Practices Act includes a similar, however, in our view, stricter rule when stating that the practice is prohibited if the payment of the purchase price of the products to the supplier takes place: a) later than 30 days after the delivery of the products by the trader if the supplier provides the trader with the proper invoice within 15 days following the delivery; or b) later than 15 days after the receipt of the proper invoice, if the invoice was provided to the trader more than 15 days after the delivery. It can be seen that the deadlines established by the Hungarian legislation are shorter, and therefore, stricter than the ones set forth in the UTP Directive.

The second practice prohibited by the UTP Directive is the cancellation of orders of perishable agricultural and food products from the buyer at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercializing or using those products. According to the UTP Directive, a notice of less than 30 days must always be considered as short notice, and Member States may set periods shorter than 30 days for specific sectors in duly justified cases. In item m) of Section 3(2) of the Unfair Distribution Practices Act a similar provision may be found: it prohibits the trader from submitting to the supplier the purchase order or the amendment thereof beyond a reasonable deadline.

On the one hand, the Unfair Distribution Practices Act does not

narrow the scope of this prohibition to perishable agricultural and food products and does not require that the supplier cannot reasonably be expected to find an alternative means of commercializing, so the Hungarian legislation is stricter than the UTP Directive in this respect. On the other hand, however, the Unfair Distribution Practices Act does not mention the 30-day deadline. Therefore, the interpretation of this provision in conformity with the UTP Directive should lead to conclude that the deadlines for cancelling orders shorter than 30 days are not allowed in case of perishable agricultural and food products.

The third prohibited conduct in the UTP Directive is the unilateral change by the buyer of the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or the provision of services indicated in the grey list of the UTP Directive. Item n) of Section 3(2) of the Unfair Distribution Practices Act is slightly different, since it prohibits the unilateral amendment of the contract by the trader only if it is due to a reason which is objectively not justifiable and which is not attributable to an event external to the trader's business. This item seems to be less strict than the prohibition included in the UTP Directive, since under the Hungarian rules, the trader may unilaterally amend the contract if such amendment is objectively justifiable and is attributable to an event external to the trader's business.

The fourth prohibited conduct of the UTP Directive is when the buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier.

Item e) of Section 3(2) of the Unfair Distribution Practices Act sets forth a similar prohibition, but its scope is narrower. It does not prohibit in general any and all payments not related to the sale of the products made by the supplier. According to this item, it is prohibited to charge fees to suppliers under any title by the trader or through the involvement of a third intermediary:

- a) for services not provided;
- b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store without providing any no additional service to the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;

- c) in consideration for services not requested by them or not serving their interests, or obliging suppliers to use services not requested by them or not serving their interests;
- d) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the trader in connection with the distribution of the products;

However, reading this item in conjunction with item c) of Section 3(2) of the Unfair Distribution Practices Act, which prohibits the trader from charging the suppliers with a part of or all the costs incurred in the interest of the trader's business, the Hungarian regulation seems to be stricter than that of the UTP Directive. This is because it prohibits all services which are not requested by or are not in the interests of the supplier; in addition to this, even if a service is requested and in fact provided by the trader, the consideration paid for such service must be proportionate.

The fifth prohibited conduct is when the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs in the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier. While this exact prohibition is not included in the Unfair Distribution Practices Act, item a), item b) and item c) of Section 3(2) of the Unfair Distribution Practices Act may be interpreted in a way which includes this prohibition:

- item a) prohibits to impose conditions on suppliers which result in a distribution of risks that unilaterally benefit the trader,
- item b) prohibits to apply contractual terms – other than obligations in connection with deficient performance – which requires the supplier a) to take back products supplied, with the exception of products purchased by the trader for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the "use by" date; and b) to take back products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier, while
- item c) prohibits to charge a part of or all the costs incurred in the interest of the trader's business to the suppliers by the trader, in particular costs relating to the trader's operations.

The sixth prohibited conduct is the buyer's refusal to confirm in

writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation. A very similar provision is included in item l) of Section 3(2) of the Unfair Distribution Practices Act, according to which it is prohibited to apply non-written contractual terms if such terms had not been put in writing within 3 business days following such a request by the supplier.

The seventh prohibited conduct is the unlawful acquisition, use or disclosure from the buyer of the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council. The Unfair Distribution Practices Act does not include this prohibition. Therefore, the amendment of the Unfair Distribution Practices Act seems to be necessary in this respect.

The eighth prohibited conduct is the threat from the buyer to carry out, or the carrying out of, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation. The Unfair Distribution Practices Act includes a similar prohibition in item x) of Section 3(2): it is prohibited for the trader to: unilaterally reduce the purchase price vis-à-vis the supplier despite the supplier's protest, or in the interest of the reduction of the purchase price; threaten the supplier to terminate the contract, to cancel orders; reduce the volume of orders; cancel sales promotions, or pursue other means that cause material or moral loss to the supplier. This prohibition is, however, narrower in scope and therefore amendment of the Hungarian legislation seems to be necessary.

The last, ninth prohibited conduct on the black-list is the request made by the buyer to the supplier for compensation of the costs of examining customer complaints relating to the sale of the supplier's products incurred by the buyer, despite the absence of negligence or fault on the part of the supplier. Item c) and item g) of Section 3(2) of the Unfair Distribution Act seem to cover this provision of the UTP Directive, when prohibiting the trader from charging the supplier for a part of or all the costs incurred in the interest of the trader's business, and when prohibiting the trader from charging suppliers for costs deriving from non-compliance by the trader with the legal requirements that the same trader has to satisfy.

According to the first practice on the grey-list of the UTP Directive, the buyer is prohibited from returning unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both. Item b) of Section 3(2) of the

Unfair Distribution Practices Act seems to include this practice. This item prohibits to apply contractual terms – other than obligations in connection with deficient performance – which requires the supplier to take back: a) products supplied, with the exception of products purchased by the trader for the first time in the course of an introduction of the products into its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the «use by» date; b) products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier.

The second prohibition on the grey list of the UTP Directive is the prohibition to charge the supplier with a payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market. This prohibition can be found in items d) and eb) of Section 3(2) of the Unfair Distribution Practices Act. These prohibit to charge fees by the trader to suppliers for putting them on the trader's suppliers-list or for allowing their goods to become or to remain part of the trader's product range and to charge fees to suppliers for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store without providing any additional service to the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals.

According to the third provision in the grey list of the UTP Directive the buyer is forbidden from charging the supplier with all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion. In this regard, item f) of Section 3(2) of the Unfair Distribution Act prohibits to require to the supplier (partial or full) contribution to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer.

The fourth practice on the grey list of the UTP Directive sets forth is the imposition from the buyer on the supplier of any payment for the advertising by the buyer of agricultural and food products, while the fifth prohibits the buyer from requiring the supplier to pay for the marketing

by the buyer of agricultural and food products. It may be argued that the above practices are also covered by item eb) of Section 3(2) of the Unfair Distribution Practices Act, according to which it is prohibited to charge fees to suppliers for activities in connection with the sale of products to the final consumer by the trader without providing any additional service to the supplier.

Finally, the last provision on the grey-list of the UTP Directive prohibits the buyer from charging the supplier for staff costs for fitting-out premises used for the sale of the supplier's products. This prohibition is covered by item c) of Section 3(2) of the Unfair Distribution Practices Act when it prohibits to charge a part of or all the costs to the suppliers by the trader which occur in the interest of the trader's business, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the trader to another logistical unit or to the store.

Below a table summarizing the prohibited practices both under the UTP Directive and the Unfair Distribution Practices Act.

<p><b>Prohibited practices under the UTP Directive</b></p>	<p><b>Prohibited practices under the Unfair Distribution Practices Act</b></p>
<p>item 1. (a)</p> <p>late payment for products purchased, which is more than 30 days for perishable agricultural and food products and more than 60 days for other agricultural and food products. The deadline starts running at the end of an agreed delivery period in which deliveries have been made or later than 30 days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later.</p>	<p>item h)</p> <p>with the exception of deficient performance, the payment of the purchase price of the products to the supplier or to the person to whom the suppliers assigned it, takes place:</p> <ul style="list-style-type: none"> <li>a) later than 30 days after the taking into possession of the products by the trader or by the person acting in favour of the trader (as for item h) hereinafter: delivery) if the supplier provides the trader with the proper invoice within 15 days following the delivery;</li> <li>b) later than 15 days after the receipt of the proper invoice, if the invoice was provided to the trader more than 15 days after the delivery</li> </ul>
<p>item 1. (b)</p> <p>the buyer cancels orders of perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercializing or using those products; notice of less than 30 days shall always be considered as short notice; Member States may set periods shorter than 30 days for specific sectors in duly justified cases</p>	<p>item m)</p> <p>submitting to the supplier the purchase order or the amendment thereof beyond a reasonable deadline</p>
<p>item 1. (c)</p> <p>the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services indicated on the grey list of the UTP Directive</p>	<p>item n)</p> <p>unilateral amendment of the contract by the trader due to a reason which is objectively not justifiable and which is not attributable to an event external to the trader's business</p>



Prohibited practices under the UTP Directive	Prohibited practices under the Unfair Distribution Practices Act
<p>item 1. (d)</p> <p>the buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier</p>	<p>item c)</p> <p>the charging of a part of or all the costs to the suppliers by the trader or through the involvement of a third intermediary which occur in the interest of the trader's business, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the trader to another logistical unit or to the store</p> <p>item e)</p> <p>the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <ul style="list-style-type: none"> <li>a) for services not provided;</li> <li>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals;</li> <li>c) in consideration for services not requested by them or not serving their interests, or obliging suppliers to use services not requested by them or not serving their interests,</li> <li>d) which are disproportional or which are calculated in a certain ratio of the supply price by taking into account the tax rate incurred in connection with the product, for services requested by the supplier and provided by the</li> </ul>

Prohibited practices under the UTP Directive	Prohibited practices under the Unfair Distribution Practices Act
	trader in connection with the distribution of the products
<p>item 1. (e)</p> <p>the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier</p>	<p>item a)</p> <p>imposing conditions on suppliers which result in a distribution of risks that unilaterally benefit the trader</p> <p>item b)</p> <p>applying contractual terms – other than obligations in connection with deficient performance - which requires the supplier:</p> <p>a) to take back products supplied, with the exception of products purchased by the trader for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the "use by" date; and</p> <p>b) to take back products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier</p> <p>item c)</p> <p>the charging of a part of or all the costs to the suppliers by the trader or through the involvement of a third intermediary which occur in the interest of the trader's business, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used</p>

Prohibited practices under the UTP Directive	Prohibited practices under the Unfair Distribution Practices Act
	by the trader to another logistical unit or to the store
<p>item 1. (f)</p> <p>the buyer refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation; this shall not apply where the supply agreement concerns products to be delivered by a member of a producer organisation, including a cooperative, to the producer organisation of which the supplier is a member, if the statutes of that producer organisation or the rules and decisions provided for in, or derived from, those statutes contain provisions having similar effects to the terms of the supply agreement.</p>	<p>item l)</p> <p>the application of non-written contractual terms if such terms were not put down in writing within 3 business days following such a request by the supplier</p>
<p>item 1. (g)</p> <p>the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council</p>	N/A
<p>item 1. h)</p> <p>the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation</p>	<p>item x)</p> <p>the trader unilaterally reduces the purchase price vis-à-vis the supplier despite the supplier's protest, or in the interest of the reduction of the purchase price, the trader threatens the supplier to terminate the contract, to cancel orders, to reduce the volume of orders, to cancel sales promotions or by other means that cause material or moral loss to the supplier</p>
<p>item 1. (i)</p>	<p>item g)</p>

<p><b>Prohibited practices under the UTP Directive</b></p>	<p><b>Prohibited practices under the Unfair Distribution Practices Act</b></p>
<p>the buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier</p>	<p>charging the costs to suppliers, which arise in connection with the non-compliance of the trader with the legal requirements applicable to trader</p>
<p>item 2. (a)</p> <p>the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both</p>	<p>item b)</p> <p>applying contractual terms – other than obligations in connection with deficient performance - which requires the supplier:</p> <p>a) to take back products supplied, with the exception of products purchased by the trader for the first time in the course of an introduction to the products in its assortment, and the products purchased with a short durability which remained in the stock of the trader after the expiry of the durability or the "use by" date; and</p> <p>b) to take back products supplied at a price not properly reduced in comparison to the supply price, taking into account the features of the product and the possibility of their use by the supplier</p>
<p>item 2. (b)</p> <p>the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market</p>	<p>item d)</p> <p>the charging of fees, by the trader or through the involvement of a third intermediary, to suppliers for putting them on the trader's suppliers-list or for allowing their goods to become or to remain part of the trader's product range</p> <p>item eb)</p>

Prohibited practices under the UTP Directive	Prohibited practices under the Unfair Distribution Practices Act
	<p>the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <p>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals</p>
<p>item 2. (c)</p> <p>the buyer requires the supplier to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion</p>	<p>item f)</p> <p>requiring (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a)</p>
<p>item 2. (d)</p> <p>the buyer requires the supplier to pay for the advertising by the buyer of agricultural and food products</p>	<p>item eb)</p> <p>the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <p>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional</p>

Prohibited practices under the UTP Directive	Prohibited practices under the Unfair Distribution Practices Act
	service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals
<p>item 2. (e)</p> <p>the buyer requires the supplier to pay for the marketing by the buyer of agricultural and food products</p>	<p>item eb)</p> <p>the charging of fees to suppliers under any legal title by the trader or through the involvement of a third intermediary:</p> <p>b) for activities in connection with the sale of products to the final consumer by the trader which do not provide an additional service for the supplier, in particular for placing the products of the supplier at a particular place in the trader's store that provides no additional service for the supplier, for the costs of storage or for the refrigeration of products or for keeping live animals</p>
<p>item 2. (f)</p> <p>the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products</p>	<p>item c)</p> <p>the charging of a part of or all the costs to the suppliers by the trader or through the involvement of a third intermediary which occur in the interest of the trader's business, in particular costs relating to the establishment of stores, operation, and those relating to the transport of products from a logistical unit used by the trader to another logistical unit or to the store</p>

As illustrated in the above table, most practices regulated by the UTP Directive are regulated in a stricter manner in the Unfair Distribution Practices Act, while there are some practices which are not regulated by the UTP Directive at all, while regulated in the Unfair Distribution Practices Act:

- applying rebate if the trader pays the purchase price within the payment deadline (item i);
- the exclusion of late payment interest, contractual penalty or other collaterals for the benefit of the supplier (item j);
- with the exception of products branded under the trader's brand, applying exclusive supply obligation for the benefit of the trader without proper consideration, or requiring a most-favourable-conditions clause (item k);
- omission of the publication of the standard contractual terms, deviation from the standard contractual terms made public, as well as the application of terms not included in such standard contractual terms (item o);
- the restriction of the legitimate use of the trademark of the supplier (item p);
- distribution of the product to the final consumer below costs, including the general operational expenses, in the case of the supply price invoiced by the supplier and in the case of production by the trader, with the exception of clearance sales lasting for at the most 15 days, notified to the agricultural authority in advance, due to the termination of the trader's operations or due to the trader's profile change, and with the exception of the clearance sales of reduced value products (including the products of short duration accumulated in the stocks of the trader due to unforeseeable circumstances) (item q);
- the imposition of a rebate, commission or fee payable by the supplier, based on the quantity distributed by the trader, on any legal title whatsoever, with the exception of a retroactive rebate which motivates the trader to increase sales based on additional distribution in comparison to distributed quantities in a previous period or in comparison to an estimation, in accordance with the features of the distribution of the product and in a proportional rate (item r);
- if the trader does not reimburse the supplier the amount of the public health product tax payable by the supplier within the deadline as set forth in item h) (item s);
- the non-compliance with the provisions set forth in Sections 2(2b) or 2(2c) of the Unfair Distribution Practices Act (please see below the detailed explanation) (item t);
- discriminatory pricing on the basis of national origin in respect of the consumer prices of products which are identical from the point of view of their composition and their visible properties (item u).



## 6. *Public enforcement*

The National Food Chain Safety Office may initiate proceedings against traders *ex officio* and upon request. The procedural deadline for concluding proceedings is 45 days.

Should the NFCSO establish that the trader violated the Unfair Distribution Practices Act, it must notify the trader about the infringement. The trader may undertake a commitment to comply with the relevant rules of the Unfair Distribution Practices Act within 10 days after the notification. In other words, the main goal is to achieve compliance by way of voluntary commitments undertaken by the trader.

If the trader does not undertake the commitment within the deadline, the NFCSO establishes the infringement and imposes a fine on the trader. The amount of the fine may be in the range between HUF 100,000 (approx. EUR 270) and HUF 500,000,000 (approx. EUR 1.37 million), but at most 10% of the net turnover of the trader reached in the year preceding the (issuing of the) decision by the NFCSO. In case of a repeated infringement of the provisions of the Unfair Distribution Practices Act within 2 years after the final and binding imposition of the fine, the fine may not be less than one and half times the fine imposed earlier, but at least HUF 500,000 (approx. EUR 1,370) and at most HUF 2 billion (approx. EUR 5.47 million) or 10% of the net turnover of the trader reached in the year preceding the passing of the decision of the NFCSO.

The proceedings of the NFCSO does not prevent the supplier from initiating civil proceedings in order to claim damages caused by the unfair practice.

In case of a commitment decision, the NFCSO obliges the trader to fulfill the commitment without the establishing the infringement or the lack of it.

No commitment decision may be passed if:

- a) the trader's commitment declaration does not extend to all infringements as established by the NFCSO;
- b) the NFCSO earlier passed a decision accepting the commitment or imposing a fine in respect of the same infringement of the trader, or
- c) the trader's infringement caused serious harm or damage, or caused harm or damage to a wide circle of suppliers;
- d) the subject matter of the proceedings is item x) of Section 3(2) of the Unfair Distribution Practices Act.

The NFCSO carries out a post-investigation as to whether or not the commitment decision was complied with by the trader. If not, the NFCSO may initiate a new procedure and may impose a fine on the trader for the conduct in respect of which the same trader had undertaken the commitment.

Furthermore, the NFCSO may prohibit the trader from including in their general terms and conditions provisions if such provisions are not unambiguous, the service or the consideration payable for such service is not clear, or the fee payable to the trader is not proportionate to the related costs<sup>17</sup>.

### 6.1. *Summary report on administrative proceedings and case law*

The NFCSO is required by the Unfair Distribution Practices Act to publish data on the infringements it establishes for the prior two years<sup>18</sup>. Below, we analyze data relating to 2019, 2020 and 2021. These data include the (company) name and the address (registered seat) of the trader subject to the NFCSO's proceedings, the infringement established, the fine imposed, whether the decision was revoked, whether the decision is subject to judicial review, the content of the final and binding judgment, and the decision making the commitment undertaken by the trader mandatory. From these we can obtain some interesting statistics.

In 2019, the NFCSO established a total 18 counts of infringements in 17 cases, and imposed fines in the aggregate amount of HUF 166.1 million (approx. EUR 455,000). The cases were dominated by infringements of item h) (late payment of purchase price) and a) (uneven distribution of risks) of Section 3(2), with each one making up 38.8% of the cases. Item r) (the imposition of a rebate, commission or fee payable by the supplier with certain exceptions) only constituted 11% of the total cases and there was a single case based on item f) (contribution to the promotion by supplier organized by the retailer not in line with the statutory requirements) and c) (charging costs to the supplier which occur in the interest of the trader's business) respectively. Out of the 18 cases, 3 concluded with undertaking commitments, while in the rest the traders were sanctioned with fines. The highest fine was HUF 45 million (approx. EUR 123,100), while the lowest was HUF 0.5 million (approx. EUR 1,370), the average of the fines

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<sup>17</sup> Section 9 of the Unfair Distribution Practices Act.

<sup>18</sup> Section 6(8) of the Unfair Distribution Practices Act.

is HUF 12.8 million (approx. EUR 35,000).

In 2020, a total 17 counts of infringements were established in 16 cases, and fines imposed in the aggregate amount of HUF 180.69 million (approx. EUR 494,000). This year the total cases were dominated by item q) (sale below costs) of Section 3(2), which constituted 70.6% of all cases, item h) (late payment of purchase price) constituted 17.6%, while item f) (contribution to the promotion by supplier organized by the retailer not in line with the statutory requirements) constituted 11.76%. Out of the 17 cases, 3 concluded with undertaking commitments, while in the rest of the cases, the undertakings were fined. The highest fine was HUF 58,50 million (approx. EUR 161,000), the lowest was HUF 1 million (approx. EUR 2,700), the average was HUF 15.05 million (approx. EUR 41,200).

In 2021, a total 26 counts of infringements were established in 25 cases, and imposed fines in the aggregate amount of HUF 226.59 million (approx. EUR 620,300). This year the total cases were dominated by item q) (sale below costs) of Section 3(2) and item h) (late payment of purchase price), which constituted 48% of all cases respectively, and there was a single case based on item r) (rebate borne by the supplier not in line with the requirements) and c) (charging costs to the supplier which serve the business interests of the trader) respectively. Out of the 25 cases, 8 concluded with undertaking commitments, while in the rest of the cases, the traders were fined. The highest fine was HUF 67,50 million (approx. EUR 185,000), the lowest was HUF 0.5 million (approx. EUR 1,370), the average was HUF 9.06 million (approx. EUR 24,800).

The decisions taken or the reasons why the practice carried out by the traders was deemed to be unlawful are not made public. This means that unfortunately, no consequences can be drawn as to the way in which the NFCSO interprets the provisions of the Unfair Distribution Act and what are the best practices for traders if they would like to avoid infringements.

Based on the data published, in 2019, 5 decisions, in 2020, 3 decisions, while in 2021 no decisions were challenged. before the competent administrative courts. Court decisions are public, and some conclusions may be drawn as to the interpretation of certain provisions of the Unfair Distribution Practices Act. In the following, we discuss the case law relating to item f) of Section 3(2) and Section 3(2a) of the Unfair Distribution Practices Act.

According to item f), it is prohibited to require (partial or full) contribution of the supplier to the discount provided to the final consumer by the trader for a certain duration, for a duration that is longer than the

duration of the discount provided to the final consumer and in a quantity bigger than the quantity provided to the final consumer with discount; or, stipulating a contribution that is higher than the discount provided to the final consumer, as well as the non-compliance with the provision set forth in Section 3(2a).

Section 3(2a) sets forth that the trader must settle the discount provided and the related quantity with the supplier within 30 days following the final date of the discount provided to final consumers with the contribution of the supplier, or, if the trader's net turnover in the previous year did not exceed HUF 100 million (approx. EUR 270,000), within 30 days after the preparation of the inventory related to the preparation of the report in accordance with the Accounting Act.

The case law has dealt with two issues pertaining to the above provisions.

The first issue arose in connection with the exact subject of the settlement: whether the subject of the settlement includes not only the discount provided by the supplier to the final consumer (indirectly), but also the discount provided by the trader to the final consumer. If the discount provided by the trader to the final consumer at the expense of its own margin is also subject to the settlement, then the trader has no obligation to repay to the supplier the discount provided even if the trader could not sell the entire volume of the products sold by the supplier to the trader at a discounted price if the aggregate discount provided to the final consumer reached or extended the aggregate discount provided by the supplier to the trader.

The court practice, however, confirmed that the discount provided by the trader at the expense of its own margin must not be taken into account in the course of the settlement. Thus, if the entire volume of products purchased by the trader at a discounted price from the supplier could not be sold to final consumer, the trader is obliged to settle with the supplier the amount of discount relating to the products unsold<sup>19</sup>.

The second issue was the exact meaning of «settlement within the deadline» as set forth by Section 3(2a) of the Unfair Distribution Practices Act. According to the NFC SO, settlement means that the trader must repay to the supplier the outstanding amount relating to the discount of the unsold products within the deadline as set forth in Section 3(2a) of the Unfair Distribution Practices Act, which is usually 30 days. However, the

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<sup>19</sup> See the judgment of the Hungarian Supreme Court (Kúria) no. Kfv.37.891/2018/6, dated January 28, 2020.

case law confirmed that «settlement» means that the trader must provide the supplier with a calculation with respect to the outstanding amount relating to the discount of the unsold products. However, it does not mean that the trader must effectuate the payment to the supplier within that deadline<sup>20</sup>.

### *7. Concluding remarks*

It appears that the Hungarian regulation concerning the legal relationship between traders and suppliers in the agri-food sector, the Unfair Distribution Practices Act, is a regulation which is stricter and covers more types of practices than the UTP Directive. However, in some of the cases, it is difficult to establish whether the practices listed in the Unfair Distribution Practices Act entirely cover the practices listed in the UTP Directive, and this also depends on whether the interpretation and application of the Hungarian Act by the enforcement authority, the NFCSO and the competent courts, will be in conformity with the UTP Directive.

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<sup>20</sup> See the judgment of the Hungarian Supreme Court (Kúria) no. Kfv.37.476/2021/6. dated September 22, 2021.



Michael Cardwell

*Bargaining power in the agri-food supply chain:  
a United Kingdom perspective*

SUMMARY: 1. Introduction – 2. The 2006 Groceries Supply Investigation and the Groceries Code Adjudicator – 3. Brexit and Section 29 of the Agriculture Act 2020 – 4. Conclusion.

1. *Introduction*

The relative bargaining power enjoyed by the different stakeholders in the agri-food supply chain has been a frequent source of controversy in the United Kingdom. Indeed, as Parliament was debating the legislation to regulate agriculture post-Brexit, unequivocal reference could be made to «a persistent imbalance in the distribution of wealth within the sector from the primary producer to the retailer»<sup>1</sup>. And a recent illustration of this controversy has been the concern of farmers, as the food crisis deepened in May 2022, that supermarkets would cut prices for consumers at the expense of primary producers<sup>2</sup>. Such concerns have perhaps resonated most strongly across the dairy sector which has seen a long history of protests by farmers seeking to secure a higher return for their milk. In this context, a leading role has been played by the rural lobby group «Farmers for Action», which has frequently operated outside more established industry channels,

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<sup>1</sup> Grateful acknowledgements are extended to Carrie Bradshaw and Sarah Brown for the most insightful comments which they provided during the writing of this Chapter.

Hansard, 16 July 2020, House of Lords Debates, Vol. 804, No. 90, Col. 1805 (Lord Empey). See also, generally, for example, D. Burch-G. Lawrence (eds), *Supermarkets and Agri-food Supply Chains: Transformations in the Production and Consumption of Foods*, Edward Elgar, Cheltenham, 2007.

<sup>2</sup> See, for example, J. THYNNE-A. BLACK-E. PATE, *Price war plea*, Farmers Guardian, 29 April 2022, pp. 1 and 3.



including the blockading of creameries<sup>3</sup> – a *modus operandi* which has invited comparison with Confédération Paysanne in France. Initiatives have been made to address this imbalance: for example, a Dairy Industry Code of Best Practice on Contractual Relationships was introduced in 2012<sup>4</sup>; and many dairy farmers now have the benefit of contracts with supermarkets under which they receive prices based upon the cost of production as independently calculated. Yet the issues remain live. Thus, in March 2022, farmers could only expect to receive in the region of from 34 to 40 pence per litre under such contracts, a state of affairs that was prompting some farmers to seek their termination<sup>5</sup>.

Definitely, the present plight of dairy farmers can be sharply distinguished from the stability and security which they enjoyed in earlier days when the milk supply was regulated through statutory milk marketing boards, these being conferred with special rights of purchase and having the authority to equalise prices paid to producers<sup>6</sup>. By virtue of these rights, each of the boards was effectively a monopoly purchaser of milk from producers within its region, all receipts from sales by the boards to processors being pooled and distributed amongst its respective producers proportionately to the deliveries which they had made. Accordingly, prior to their dissolution over the course of 1994 and 1995, the boards had very significant bargaining power within the agri-food supply chain<sup>7</sup>; and, from

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<sup>3</sup> See, for example, R. FORD, *Müller attacks farmers over milk protest*, *The Grocer*, 20 December 2012 (available at: Müller attacks farmers over milk protest | News | The Grocer). And see generally M.N. CARDWELL, *Farmers, Milk Prices and Rural Indignation*, in *Oñati Socio-legal Series*, (5(1)) 2015, pp. 51-72 (available at: <http://ssrn.com/abstract=2563473>).

<sup>4</sup> Available at: <https://www.nfuonline.com/archive?treeid=60955>.

<sup>5</sup> See, for example, H. BINNS, *Farmers quit supermarket milk contracts*, *Farmers Guardian*, 11 March 2022, p. 6. See also generally Sustain, *Unpicking Food Prices: Where Does Your Food Pound Go, and Why Do Farmers Get So Little?* (2022).

<sup>6</sup> The five statutory boards were: the Milk Marketing Board for England and Wales; the Scottish Milk Marketing Board; the North of Scotland Milk Marketing Board; the Aberdeen and District Milk Marketing Board; and the Milk Marketing Board for Northern Ireland. Importantly, their rights were expressly recognised in European Economic Community law: Council Regulation (EEC) 1422/78 of 20 June 1978, [1978] OJ L171/14; and Commission Regulation (EEC) 1565/79 of 25 July 1979, [1979] OJ L188/29.

<sup>7</sup> The statutory schemes governing all but the Milk Marketing Board for Northern Ireland were revoked as from 1 November 1994, under the Agriculture Act 1993; and the scheme governing the Milk Marketing Board for Northern Ireland was revoked as from 1 March 1995, under the Agriculture (Northern Ireland) Order 1993 S.I. 1993 No. 2665 (N.I. 10). See generally F. SMITH, *Milking the Market*, in *European Law Review*,

the perspective of individual producers, even those operating on a small scale in remote areas had greater opportunity to compete in the market. In particular, the statutory schemes blunted the competitive advantage of those operating on a large scale who were also often favourably located near to urban areas<sup>8</sup>.

This Chapter will seek to explore the governance framework which has been developed since farmer protests reached a crescendo not long after the turn of the Millennium. First, it will address the groceries supply investigation which was instigated by the Competition Commission in 2006<sup>9</sup>, as well as the initiatives which followed its 2008 Final Report – including, importantly, the introduction of the Groceries Code Adjudicator. Secondly, it will consider the steps which have been taken to level the playing field for primary agricultural producers post-Brexit, with emphasis on Section 29 of the Agriculture Act 2020, which concerns «Fair dealing obligations of business purchasers of agricultural products». Finally, a concluding section will highlight the extent to which there has been focus on the consumer in constructing this governance framework and the relatively slow pace in developing policy and implementing legislation.

As a preliminary point it may be noted that more general United Kingdom legislation and case law does not provide extensive protection for farmers within the agri-food supply chain. In this context, two main legislative initiatives may be highlighted. First, Section 3 of the Unfair Contract Terms Act 1977 introduced measures which, *inter alia*, addressed terms (i) seeking to exclude or restrict liability for breach of contract or (ii) seeking to validate substantially different performance of the contract or no performance at all. These terms are placed subject to a reasonableness test

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(20(2)) 1995, pp. 214-219; and F. SMITH, *Deregulation of Public Monopolies under Article 90 E.C: Lessons from the Privatisation of the Milk Marketing Board*, in *Journal of Business Law*, 1995, pp. 506 -517.

<sup>8</sup> Following the dissolution of the statutory milk marketing boards, a response by farmers was to create the Milk Marque co-operative, which initially handled some 60 per cent of the milk supply in Great Britain. In light of this market share, a report was prepared by the Competition Commission, which addressed whether a monopoly situation existed; and, on the findings and recommendations in this report being largely accepted by the Secretary of State for Trade and Industry, Milk Marque proposed that it should be voluntarily divided into three smaller co-operatives. For consideration of the competition law aspects by the European Court of Justice, see Case C-137/00, 9-9-2003, *The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers' Union* [2003] ECR I-7975.

<sup>9</sup> See *Groceries Market Investigation (CC)* (available at: Groceries market investigation (CC) - GOV.UK ([www.gov.uk](http://www.gov.uk))).

and, notably, the relevant provisions are applicable in the business context where one party deals on the standard terms of business of the other (as would frequently be the case when farmers are contracting with first purchasers)<sup>10</sup>. On the other hand, the scope of the provisions is not apt to cover many of the specific difficulties faced by farmers, such as obligations to contribute to marketing costs or de-listing. Secondly, far broader protection is conferred by the Consumer Rights Act 2015, including the express regulation of «unfair terms» under Sections 61-76. Section 61(1), however, limits the application of these Sections «to a contract between a trader and a consumer» and, in consequence, they are more likely to place farmers under obligations when making direct sales to consumers than assist them when dealing with first purchasers. Similarly, the common law is unlikely to intervene. As recently emphasised by the Supreme Court in the case of *Pakistan International Airline Corporation v Times Travel (UK) Ltd*, «[t]he courts have taken the position that it is for Parliament and not the judiciary to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law»<sup>11</sup>. And it was also held in the same case that, «in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognised a general principle of good faith in contracting»<sup>12</sup>. That said, inequality of bargaining power may be a relevant factor in determining whether there has been duress at common law (including economic duress) or undue influence in equity, but the bar for such claims is set higher than simply entering into «a bad bargain»<sup>13</sup>. For example, in *Royal Bank of Scotland plc v Etridge (No. 2)* the House of Lords held that, for a finding of the exercise of undue influence, it would be necessary to show that the consent obtained «ought not fairly to be treated as the expression of a person's free will»<sup>14</sup>.

<sup>10</sup> It may be noted that the Section originally applied both where a party dealt as a consumer and where a party dealt on the standard terms of business of the other, but its application to consumer contracts was removed by amendment under the Consumer Rights Act 2015.

<sup>11</sup> [2021] UKSC 40 at para. 26 *per* Lord Hodge. Earlier, Lord Denning had supported the proposition that «inequality of bargaining power» was capable of providing relief: *Lloyds Bank Ltd v Bundy* [1975] 1 Q.B. 326 at 339.

<sup>12</sup> [2021] UKSC 40 at para. 27 *per* Lord Hodge. Interestingly, for the purpose of the Consumer Rights Act 2015, «[a] term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer»: s. 62(4).

<sup>13</sup> See, for example, E. PEEL, *Treitel: the Law of Contract*, 15<sup>th</sup> Edition, Sweet & Maxwell, London, 2020, pp. 505-535.

<sup>14</sup> [2002] 2 A.C. 773 at 795 *per* Lord Nicholls.

## 2. *The 2006 Groceries Supply Investigation and the Groceries Code Adjudicator*

### 2.1. *The 2006 Groceries Supply Investigation*

In May 2006 the Office of Fair Trading initiated a groceries supply investigation by the Competition Commission, leading to its 2008 Final Report<sup>15</sup>. There had been growing concerns at the low proportion of the retail price which was being captured by primary producers; and analysis by the Competition Commission for the purposes of this Report revealed that the proportion had declined between 1997 and 2006 in the case of milk, red meat and fresh fruit (although not in the case of pig meat)<sup>16</sup>. In contrast to this pressure on primary producers, the margins of retailers in the dairy sector had risen sharply from 3.1 per cent in 1995 to nearly 28 per cent in 2003<sup>17</sup>. The trend in farm incomes over recent years was not, however, solely ascribed by the Competition Commission to the ability of grocery retailers and intermediary purchasers to exert «buyer power» in order to drive down prices, recognition also being given to such matters as exchange rate variations, Common Agricultural Policy reform, food safety and animal health and welfare issues<sup>18</sup>.

Nonetheless, a key conclusion of the 2008 Final Report was «that the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if un-checked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers»<sup>19</sup>. This conclusion highlighted that a priority of the investigation was protection of the interests of consumers (rather than those of farmers), consistent with any detrimental effect on customers being a factor to consider in market investigations under the Enterprise Act 2002<sup>20</sup>. Indeed, the 2008 Final Report expressly confirmed that «the

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<sup>15</sup> Competition Commission, *The Supply of Groceries in the UK Market Investigation* (2008) (available at: Groceries Investigation: Final Report (nationalarchives.gov.uk)). For an excellent discussion of competition inquiries into the groceries market generally, see A. SEELY, *Supermarkets: Competition Inquiries into the Groceries Market* (House of Commons Library, Standard Note: SN03653, 2 August 2012) (available at: SN03653.pdf (parliament.uk)).

<sup>16</sup> Competition Commission (above n 15), p. 160.

<sup>17</sup> See, for example, *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31 at para. 25.

<sup>18</sup> Competition Commission (above n 15), p. 162.

<sup>19</sup> *Ibid.*, p. 6.

<sup>20</sup> Enterprise Act 2002, s. 134; and the Competition Commission stated in their 2008

future of UK farming and self-sufficiency in food» was not, in itself, a competition issue (the Competition Commission being restricted by statute from making findings on non-competition matters)<sup>21</sup>. Similarly the interests of consumers would seem to have trumped those of farmers in the investigation which was earlier formally commenced in 2004 by the Office of Fair Trading<sup>22</sup>. This investigation was undertaken against a number of supermarkets and suppliers for concerted practices in relation to price fixing for certain dairy products, notwithstanding that the ultimate aim of these practices was to secure a better return for dairy farmers (the better return being achieved by passing the proceeds of increased retail and cost prices on to the farmers, with the supermarkets and suppliers themselves making limited, if any, financial gain)<sup>23</sup>.

As indicated, the Competition Commission in its 2008 Final Report foresaw the transfer of excessive risks or unexpected costs that might affect the willingness of suppliers to invest or innovate. In this regard, it identified the making by retailers of retrospective adjustments to the terms of supply as the principal means by which such excessive risks or unexpected costs could be transferred, two illustrations provided being: «a requirement for a price adjustment after goods have been ordered or after products have been delivered»; and «requirements for financing or promotions that were not agreed with the suppliers»<sup>24</sup>. With specific reference to the supply chain, the Competition Commission proposed two remedies<sup>25</sup>. First, a Groceries Supply Code of Practice (GSCOP) should be established. This would be based on the existing voluntary Supermarkets Code of Practice, which flowed from an earlier 2000 investigation by the Competition Commission<sup>26</sup>, and which regulated dealings with their suppliers by the four largest grocery retailers (Asda, Morrisons, Sainsbury's and Tesco).

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Final Report that: «[w]e would expect to be able to identify current harm to consumers, or have an expectation that harm to consumers would result in the future, in order to take remedial action»: (above n 15), p. 156.

<sup>21</sup> Competition Commission (above n 15), p. 7.

<sup>22</sup> For full discussion of this aspect, see the appeal of the Decision by the Office of Fair Trading in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31.

<sup>23</sup> *Ibid*, para. 162.

<sup>24</sup> Competition Commission (above n 15), p. 165.

<sup>25</sup> *Ibid*, pp. 14-16.

<sup>26</sup> Competition Commission, *Supermarkets: a Report on the Supply of Groceries from Multiple Stores in the United Kingdom*, Cm 4842 (2000); and, for the text of the Supermarkets Code of Practice itself, see Office of Fair Trading, *The Supermarkets Code of Practice* (2004) Annexe A, Schedule 2.

Amendments to be effected under the GSCOP would encompass: its application to grocery retailers with groceries turnover in excess of £1 billion a year; an overarching fair-dealing provision; and a prohibition on grocery retailers from making retrospective adjustments to terms and conditions of supply. Secondly, undertakings were to be sought from grocery retailers for the establishment of a GSCOP Ombudsman to monitor and enforce compliance with the GSCOP. It was envisaged that the GSCOP Ombudsman would direct particular attention to disputes and complaints concerning suppliers without market power. And it was also recommended to the Department for Business, Enterprise and Regulatory Reform that, if no such undertakings were forthcoming within a reasonable period, the Department should itself take the necessary steps to establish the Ombudsman, who should then receive the power to levy significant financial penalties on the retailers for non-compliance.

Following the 2008 Final Report of the Competition Commission, the GSCOP came into force as from 4 February 2010, under the Groceries (Supply Chain Practices) Market Investigation Order 2009<sup>27</sup>, replacing the earlier Supermarket Code of Practice. As recommended, the changes which it effects include: application of the GSCOP to «Designated Retailers», namely (i) those specifically listed in Schedule 2 to the Order<sup>28</sup>, together with (ii) any other retailers having a turnover in excess of £1 billion for the retail supply of groceries in the United Kingdom (and which are so designated in writing by the Office of Fair Trading)<sup>29</sup>; an overarching fair-dealing provision; and a general requirement not to vary supply agreements retrospectively or to request or require that a supplier consent to such retrospective variations<sup>30</sup>. As from 1 March 2022, the GSCOP has applied to 14 retailers, the last to be added being Amazon<sup>31</sup>. On the other hand, the GSCOP only extends to direct suppliers to supermarkets covered by the GSCOP. And, further and importantly, the Competition Commission

<sup>27</sup> Available at: GSCOP Order ([publishing.service.gov.uk](http://publishing.service.gov.uk)).

<sup>28</sup> These were Asda Stores Limited, Co-operative Group Limited, Marks & Spencer plc, Wm Morrison Supermarkets plc, J Sainsbury plc, Tesco plc, Waitrose Limited, Aldi Stores Limited, Iceland Foods Limited and Lidl UK GmbH.

<sup>29</sup> The definition of «Designated Retailers» also extends to any person who carries on the whole, or a substantial part, of the business of any persons in either of these two categories.

<sup>30</sup> In this regard, the earlier Supermarkets Code of Practice had included only a requirement that there be no retrospective reduction in price without reasonable notice.

<sup>31</sup> Groceries Code Adjudicator, *Amazon now Bound by the Groceries Supply Code of Practice* (1 March 2022) (available at: [Amazon now bound by the Groceries Supply Code of Practice - GOV.UK \(www.gov.uk\)](http://www.gov.uk)).



was not able to secure from the relevant supermarkets a voluntary undertaking to establish an Ombudsman, so leading it to recommend to the Government that a statutory body be put in place<sup>32</sup>.

## 2.2. *The Groceries Code Adjudicator*

Since the Competition Commission was not able to secure a voluntary undertaking to establish an Ombudsman, a draft Groceries Code Adjudicator Bill was introduced to Parliament in May 2011<sup>33</sup>, but the powers to be conferred on the new Groceries Code Adjudicator were widely considered to be less than ideal. In particular, the levy of financial penalties was dependent upon authority to do so being granted under an order by the Secretary of State for Business, Innovation and Skills<sup>34</sup>. During the passage of the Bill through Parliament, amendment was made to address this concern, Sections 6 and 9 of the Groceries Code Adjudicator Act 2013 granting the Groceries Code Adjudicator the option to enforce through the imposition of financial penalties<sup>35</sup>. That said, the Act also provided that the Adjudicator could not impose a financial penalty in respect of a breach of the GSCOP that occurred before the coming into force of the first order by the Secretary of State specifying either the amount of the permitted maximum or how that amount was to be determined<sup>36</sup>. And there was some considerable delay in this requirement being satisfied, the Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 only coming into force on 6 April 2015<sup>37</sup>, such delay attracting criticism from the House of Commons Environment, Food and Rural Affairs Committee, which had earlier found «it extraordinary that the Government has left the Groceries Code Adjudicator for more than a year with no practical ability

<sup>32</sup> For full discussion of this aspect, see A. SEELY, *Supermarkets: the Groceries Code Adjudicator* (House of Commons Library Briefing Paper, Number 6124, 12 November 2015) (available at: [Supermarkets: the Groceries Code Adjudicator](http://www.parliament.uk) ([parliament.uk](http://parliament.uk))).

<sup>33</sup> Available at: [11-936-draft-groceries-code-adjudicator-bill.pdf](http://www.publishing.service.gov.uk) ([publishing.service.gov.uk](http://publishing.service.gov.uk)).

<sup>34</sup> See, for example, House of Commons Environment, Food and Rural Affairs Committee, *Pre-legislative scrutiny of the Draft Groceries Code Adjudicator Bill* (22 June 2011); and House of Commons Business, Innovation and Skills Committee, *Time to bring on the referee? The Government's proposed Adjudicator for the Groceries Code*, Ninth Report of Session 2010-12, HC 1224-I, paras. 103-113.

<sup>35</sup> It may be noted that the Groceries Code Adjudicator Act 2013 applies to all the United Kingdom: s. 24.

<sup>36</sup> Groceries Code Adjudicator Act 2013, s. 9(6) and (10).

<sup>37</sup> S.I. 2015 No. 722, reg. 1(1).



to use her legal powers»<sup>38</sup>. The 2015 Order did, however, set a permitted maximum of 1 per cent of the United Kingdom turnover of the retailer in question<sup>39</sup>, which has the potential to be a sizeable sum: by way of illustration, in its Annual Report and Financial Statement for 2021<sup>40</sup>, Tesco PLC reported group sales of £53.4 billion (although the amount for the purposes of the 2015 Order would be somewhat lower, one factor being that a proportion of the total was attributable to sales outside the United Kingdom).

What can nonetheless be said with some certainty is that an underlying focus of the Groceries Adjudicator Act 2013 remains on ensuring compliance with the GSCOP so as to strengthen the position of consumers rather than to rebalance the agri-food supply chain for the greater protection for farmers: in the words of the Secretary of State for Environment, Food and Rural Affairs early in the legislative process, «[f]ree and fair competition is the key to a healthy market, and it is right that the adjudicator should make sure the market is working in the best long-term interests of consumers»<sup>41</sup>. Moreover, the limited remit of the Groceries Code Adjudicator has attracted criticism. A Call for Evidence in October 2016 revealed views that her remit should cover also, for example, the regulation of contractual relationships between primary producers and processors or manufacturers, but the Government response was that any formal extension would not be appropriate at that time, since there was «no clear evidence of systematic widespread market failures»<sup>42</sup>. In this connection, a practical hurdle was the pressure which would be placed on the administrative resources of the Groceries Code Adjudicator, in that it was reported in 2015 that she was employed for only three days each week and was assisted by a team of just

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<sup>38</sup> House of Commons Environment, Food and Rural Affairs Committee, *Dairy prices*, Fifth Report of Session 2014–15, HC 817, para. 42.

<sup>39</sup> S.I. 2015 No. 722, regs. 2–4.

<sup>40</sup> Available at: [tesco-annual-report\\_2021.pdf](https://www.tescopl.com/tesco-annual-report-2021.pdf) (tescoplc.com).

<sup>41</sup> Hansard, 23 January 2012, House of Commons Debates, Vol. 539, Part 253, Col. 48.

<sup>42</sup> HM Government, *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 Chain* (2018) (available at: [groceries-adjudicator-consult-summary-of-responses-180216.pdf](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/68216/groceries-adjudicator-consult-summary-of-responses-180216.pdf) (publishing.service.gov.uk)), para. 15. Yet it was also accepted in the same paragraph that «there is significant potential to explore more targeted and proportionate approaches to enable primary producers to survive and thrive. These should go beyond existing reliance on voluntary codes of practice and encourage greater transparency and fairness».

five people<sup>43</sup>. Further, the Groceries Code Adjudicator has little authority to address a key factor in terms of bargaining power, namely price. The statutory role is limited to ensuring compliance by supermarkets with the GSCOP; and, in the GSCOP, matters of price do not feature prominently, being restricted to, for example, delays in payment and obligations to contribute to marketing costs<sup>44</sup>. For the purposes of addressing this potential deficiency, one suggestion put forward in Parliamentary debate was to adopt a middle way which, while stopping short of granting the Groceries Code Adjudicator the power to fix prices, would still grant the power to investigate and report on the balance of pricing throughout the supply chain in order to provide, *inter alia*, greater transparency<sup>45</sup>.

After the Groceries Code Adjudicator Act 2013 became law, statutory guidance was published in December 2013 on the carrying out of investigation and enforcement functions<sup>46</sup>, this guidance being mandated by Section 12 of the Act. And the first investigative report under the new legislation was issued early in 2016, the supermarket concerned being Tesco plc<sup>47</sup>. This report found, in particular, a material breach by Tesco of Paragraph 5 of the GSCOP relating to delay in payments, such breach arising through a combination of: unilateral deductions made by Tesco from suppliers; slow repayment of the money due; and occasional deliberate delay in making payment to the supplier. Enforcement was via recommendations (for example, that Tesco should not make unilateral deductions), the option of financial penalties not being available for the reason that the Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 was not in force at the time of the relevant breaches (it coming into force on 6 April 2015). In addition, an important

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<sup>43</sup> Hansard, 17 November 2015, House of Commons Debates, Vol. 602, No. 70, Col. 148WH (Julian Sturdy MP). See also the evidence of the Groceries Code Adjudicator before the House of Commons Environment, Food and Rural Affairs Committee: House of Commons Environment, Food and Rural Affairs Committee, *Farmgate prices*, Third Report of Session 2015–16, HC 474, para. 142.

<sup>44</sup> See also House of Commons Environment, Food and Rural Affairs Committee, *Dairy prices*, Fifth Report of Session 2014–15, HC 817, para. 35.

<sup>45</sup> Hansard, 17 November 2015, House of Commons Debates, Vol. 602, No. 70, Col. 150WH (Julian Sturdy MP).

<sup>46</sup> The updated version is available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/511676/GCA\\_Statutory\\_Guidance\\_updated\\_March\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511676/GCA_Statutory_Guidance_updated_March_2016.pdf).

<sup>47</sup> Groceries Code Adjudicator, *Investigation into Tesco plc* (26 January 2016) (available at: [GCA\\_Tesco\\_plc\\_final\\_report\\_26012016\\_-\\_version\\_for\\_download.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511676/GCA_Tesco_plc_final_report_26012016_-_version_for_download.pdf) (publishing.service.gov.uk)).

observation in the report was that, following the investigation, suppliers had noticed not only an improvement in the practices of Tesco (including less focus on meeting margin targets and more attention on the customer), but also significant changes in the personnel with whom they dealt<sup>48</sup>.

Since then, a number of further developments in the governance framework have taken place, of which three illustrations may be provided. First, as has been seen, the GSCOP has been extended to 14 retailers, with the addition of Amazon as from 1 March 2022. Secondly, reflecting longstanding concerns regarding anonymity<sup>49</sup>, it is now possible for groceries suppliers to use a confidential platform to report to the Groceries Code Adjudicator behaviour by «Designated Retailers» which the suppliers believe to be in breach of the GSCOP<sup>50</sup>. Thirdly, additional guidance documents have been issued, such as those in relation to «de-listing».<sup>51</sup> Paragraph 16 of the GSCOP imposes on a retailer an obligation not to de-list without complying with certain duties, such as the giving of reasonable notice of the decision («de-listing» being defined in Paragraph 1 as: «to cease to purchase Groceries for resale from a Supplier, or significantly to reduce the volume of purchases made from that Supplier»). In particular, the additional guidance documents provide assistance in interpreting what is meant by «significantly to reduce the volume of purchases made» and by «reasonable notice». And it may also be highlighted that what constitutes «reasonable notice», as interpreted by such guidance, was central to a subsequent investigation by the Groceries Code Adjudicator into the activities of the Co-operative Group Limited, the retailer being found in breach of the GSCOP, but not to such an extent as to merit a financial penalty<sup>52</sup>.

<sup>48</sup> *Ibid*, para. 56(1).

<sup>49</sup> See, for example, House of Commons Environment, Food and Rural Affairs Committee, *Pre-legislative scrutiny of the Draft Groceries Code Adjudicator Bill* (22 June 2011); and Hansard, 17 November 2015, House of Commons Debates, Vol. 602, No. 70, Col. 149WH (Julian Sturdy MP).

<sup>50</sup> Groceries Code Adjudicator, *'Tell the GCA' Launched for Confidential Reporting of Code Issues* (1 February 2021) (available at: 'Tell the GCA' launched for confidential reporting of Code issues - GOV.UK (www.gov.uk)). It may also be noted that the Groceries Code Adjudicator has statutory obligations in respect of confidentiality under Groceries Code Adjudicator Act 2013, s. 18.

<sup>51</sup> For the relevant guidance documents on «delisting», see Groceries Code Adjudicator, *Guidance on Delisting Practice* (27 November 2014) (available at: Guidance on De-listing practice - GOV.UK (www.gov.uk)); and *Fresh Produce Sector: Additional De-listing Information* (2 August 2016) (available at: Fresh produce sector: additional De-listing information - GOV.UK (www.gov.uk)).

<sup>52</sup> Groceries Code Adjudicator, *Investigation into Co-operative Group Limited* (25 March

### 3. *Brexit and Section 29 of the Agriculture Act 2020*

Following Brexit, it has been possible for the United Kingdom to introduce bespoke national legislation to address imbalances within the agri-food supply chain. And the flagship provision to be enacted for this purpose has been Section 29 of the Agriculture Act 2020 which, unlike many other parts of the Act, extends to the whole of the United Kingdom<sup>53</sup>. Under the provision, Section 29(1) authorises the Secretary of State for Environment, Food and Rural Affairs to make regulations: (i) which impose obligations on business purchasers of agricultural products when contracting to purchase agricultural products from qualifying sellers; and (ii) which provide for the enforcement of these obligation<sup>54</sup>. Significantly, Section 29(2) expressly stipulates that these powers «are exercisable for the purpose of promoting fair contractual dealing by business purchasers of agricultural products from qualifying sellers».

In addition, a non-exhaustive list is provided of the kinds of obligation which regulations made by the Secretary of State might impose, namely: obligations to contract in writing; obligations to include, or not to include, terms dealing with specified matters; and, where terms dealing with specified matters are included in the contract (whether or not by virtue of the new legislation), obligations relating both to their content and to compliance with specified principles and practices. Examples are also given of matters that may be specified, these being as follows:

- (a) the quantity and quality of products to be purchased;
- (b) how products are to be provided (including timing of deliveries);
- (c) pricing mechanisms (including mechanisms for adjustments, premiums and deductions);
- (d) payment (including timing and method of payments);
- (e) charges for processing, marketing or advertising products;
- (f) exclusivity of contractual dealing;

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2019) (available at: [GCA\\_report\\_of\\_investigation\\_into\\_Co-operative\\_Group\\_Limited.pdf](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814121/GCA_report_of_investigation_into_Co-operative_Group_Limited.pdf) (publishing.service.gov.uk)), para. 58(2).

<sup>53</sup> Agriculture Act 2020, s. 56.

<sup>54</sup> A seller, in relation to a contract for the purchase of an agricultural product, is a «qualifying seller» if the person is any of the following (whether within or outside the United Kingdom): «(i) a person carrying on an agricultural activity for the production of products of that kind or otherwise in connection with their production; (ii) a recognised producer organisation; (iii) a recognised association of producer organisations; (iv) a produce aggregator» (so far as not already a recognised producer organisation or a recognised association of producer organisations): Agriculture Act 2020, s. 29(3)(b).

- (g) the provision of information between the parties;
- (h) variation of a contract (including notice periods for variation and retrospective variations);
- (i) duration and termination of a contract<sup>55</sup>.

The examples under the Agriculture Act 2020 bear considerable similarity to the prohibited unfair trading practices as set out in Article 3 of Directive (EU) 2019/633 of the European Parliament and of the Council<sup>56</sup>. Importantly, their respective lists are non-exhaustive and under both measures further action is required for full implementation (in the case of the Agriculture Act 2020, the making of regulations by the Secretary of State; and, in the case of Directive (EU) 2019/633, transposition by the Member States as expressly laid down by Article 13). Moreover, several of the detailed provisions have shared characteristics, such as those covering the variation of contracts and circumstances where the buyer requires the supplier to pay for advertising<sup>57</sup>. That said, there are also a number of differences of substance, reflecting the fact that the non-exhaustive list of prohibited practices in Directive (EU) 2019/633 is generally more comprehensive, extending to, by way of illustration, circumstances where the buyer threatens to carry out, or actually does carry out, certain acts of commercial retaliation<sup>58</sup>.

During its passage through Parliament and thereafter, the provisions in Section 29 of the Agriculture Act 2020 have encountered a number of criticisms. First, the Secretary of State has been conferred with enabling powers in relation to fair dealing, as opposed to being placed under a

<sup>55</sup> Agriculture Act 2020, s. 29(7). It has been highlighted that these obligations might be employed to reduce food waste in accordance with Government policy, addressing such circumstances as the cancellation of orders for perishable products without notice: see, for example, C. BRADSHAW, *England's Fresh Approach to Food Waste: Problem Frames in the Resources and Waste Strategy*, in *Legal Studies*, (40(2)) 2020, pp. 321-343; and L. Russo, *Food Waste and Unfair Commercial Practices*, in *CEDR Journal of Rural Law*, (7(2)) 2021, pp. 21-26.

<sup>56</sup> Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, [2019] OJ L 111/59.

<sup>57</sup> The prohibition in respect of payment for advertising is not, however, applicable under Directive (EU) 2019/633 where this has «been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer»: *ibid*, Article 3(2).

<sup>58</sup> *Ibid*, Article 3(1)(h) (although such a provision is contemplated in the *Explanatory Notes* which accompanied the Agriculture Act 2020: para. 250).

duty<sup>59</sup>, notwithstanding attempts in Parliament to secure such a duty by amendment to the Agriculture Bill (2019-2021)<sup>60</sup>. In this regard, a comparison can be made with Directive (EU) 2019/633, the United Kingdom regulatory framework being less robust in that, while (as has been seen) both regimes require further action to secure full implementation, under Directive (EU) 2019/633 national transposition is mandatory, but in the United Kingdom the next stage is at the discretion of the Secretary of State.

Secondly, it has been heralded that the enabling powers will not be exercised where the commercial arrangements fall within the remit of the Groceries Code Adjudicator<sup>61</sup>. And, during the passage of the Agriculture Bill (2019-2021) through Parliament, the Government expressly resisted calls to extend the remit of the Groceries Code Adjudicator so as to cover also the fair dealing provisions<sup>62</sup>. Such an extension would have the capacity to promote a joined-up regime<sup>63</sup>, as well as tapping into the pre-existing relevant expertise of the Groceries Code Adjudicator<sup>64</sup>. Indeed, during the course of Parliamentary debate, many speakers specifically advocated that the office of the Groceries Code Adjudicator should carry out enforcement of the new statutory codes, Lord Curry of Kirkharle seeing it as «the logical home for this function»<sup>65</sup>. Again the Government response was that consultation should occur before taking forward the detailed implementation of any enforcement regime, with indication of a possible role for the Rural Payments Agency (whose primary responsibility

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<sup>59</sup> For criticism of this lack of a duty, see, for example, Sustain, *Agriculture Bill Briefing - Fair Dealing Obligations Clause 27* (available at: [https://www.sustainweb.org/resources/files/other\\_docs/FairDealingClauseAgricultureBillbriefing.pdf](https://www.sustainweb.org/resources/files/other_docs/FairDealingClauseAgricultureBillbriefing.pdf)).

<sup>60</sup> See, for example, Hansard, 16 July 2020, House of Lords Debates, Vol. 804, No. 90, Col. 1806 (Lord Granchester).

<sup>61</sup> See, for example, DEFRA, *Agriculture Bill: Explanatory Notes: HL Bill 112-EN* (available at: [5801112en.pdf](https://www.parliament.uk/resources/5801112en.pdf) (parliament.uk)), para. 244.

<sup>62</sup> Hansard, 16 July 2020, House of Lords Debates, Vol. 804, No. 90, Col. 1823 (Lord Gardiner of Kimble, Parliamentary Under-Secretary of State, DEFRA).

<sup>63</sup> See, for example, C. BRADSHAW and M. CARDWELL, Written Evidence submitted to the House of Commons Environment, Food and Rural Affairs Committee for the purposes of its inquiry into *COVID-19 and food supply*, First Report of Session 2019-21, HC 263 (available at: <https://committees.parliament.uk/writtenevidence/4157/pdf/>).

<sup>64</sup> Hansard, 16 July 2020, House of Lords Debates, Vol. 804, No. 90, Col. 1811 (Baroness McIntosh of Pickering).

<sup>65</sup> See Hansard, 16 July 2020, House of Lords Debates, Vol. 804, No. 90, Col. 1813; and see also, for example, Col. 1811 (Baroness McIntosh of Pickering).



has been the administration of farm support)<sup>66</sup>.

Section 29 of the Agriculture Act 2020 does nonetheless incorporate an amendment which was widely advocated, namely that its ambit should be extended beyond just «first purchasers». More precisely, the original Agriculture Bill (2017-2019) provided that any relevant regulations should only «impose obligations on the first purchasers of agricultural products in relation to contracts they make for the purchase of agricultural products from producers»<sup>67</sup>. By contrast, as has been seen, Section 29(1)(a) of the legislation as subsequently enacted refers to «imposing obligations on business purchasers of agricultural products in relation to contracts they make for the purchase of agricultural products from qualifying sellers». Accordingly, there is no limitation to first purchasers (so long as the purchaser is a business purchaser), with reference to purchase from «producers» also being replaced by reference to purchase from «qualifying sellers»<sup>68</sup>. In this respect, it may be observed that the Explanatory Notes accompanying the later Agriculture Bill (2019-2021) expressly stated that the definition of «qualifying seller» extends to «a person carrying on an agricultural activity for the production, or in connection with the production, of the product» and that «[t]his category of qualifying sellers is intended to capture farmers and other primary producers»<sup>69</sup>.

#### 4. Conclusion

What would seem more than tolerably clear is that imbalance of bargaining power in the United Kingdom agri-food supply chain has presented a range of persistent challenges whose resolution remains to

<sup>66</sup> See, for example, letter from Lord Gardiner of Kimble (12 August 2020) (available at: [Agriculture\\_Bill\\_Committee\\_Day\\_4.pdf](#) (parliament.uk)).

<sup>67</sup> See <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0266/18266.pdf?msckid=30468a95d04b11eca32a7022023c7704> (Clause 25(2)). This Bill fell owing to the dissolution of Parliament in 2019.

<sup>68</sup> For commentary, see L. PETETIN-V. GRAVEY-B. MOORE, *Green Brexit: Setting the Bar for a Green Brexit in Food and Farming*, Soil Association, Bristol, 2019 (available at: [SoilAssociationFull.pdf](#) (brexitenvironment.co.uk)), p. 22; and Welsh Parliament, *UK Agriculture Bill 2019-21: Bill Summary* (9 July 2020) (available at: [july-2020-update-eng.pdf](#) (senedd.wales)), p. 8.

<sup>69</sup> DEFRA, *Agriculture Bill: Explanatory Notes: HL Bill 112-EN* (available at: [5801112en.pdf](#) (parliament.uk)), para. 246.



be achieved. And the food crisis following the invasion of Ukraine has definitely thrown these challenges into even sharper relief. By way of response, as has been seen, the Government has undertaken a range of initiatives over a number of years, with greater latitude to craft a bespoke national regime becoming available following Brexit. Yet, at present, the development of the governance framework remains work in progress, although the Agriculture Act 2020 does notably provide the Secretary of State with enabling powers to impose «hard law» obligations through regulations, as opposed to relying on voluntary codes of practice. Indeed, as has been seen, the explanatory notes to the Agriculture Bill (2019-2021) expressly acknowledged that any statutory obligations would «initially be introduced in the sectors where voluntary codes have been unable to significantly improve contractual relationships (for example dairy)»<sup>70</sup>.

In this context, two overarching trends may also be identified. First, with particular reference to the role of the Groceries Code Adjudicator, there has been heavy focus on competition law and the rights of consumers. As highlighted by Anna Soubry MP, the driving force behind reform has been the work of the Competition Commission and the investigation which it carried out leading to the 2008 Final Report; and, in her words, «once again the clue is in the name and the history: it was all about unfair competition»<sup>71</sup>. It may also be reiterated that the 2008 Final Report was clear that it was not addressing the future of UK farming and self-sufficiency in food as this was not a competition issue, looking instead to the ultimate effect on consumers of grocery retailers transferring excessive risk and unexpected costs to their suppliers<sup>72</sup>. And a similar predominant competition law paradigm was found when the Government undertook its statutory review to gain evidence on how the Groceries Code Adjudicator had performed its statutory obligations for the period from 1 April 2019 to 31 March 2022: a question for all relevant parties was the potential advantages of transferring its functions to the Competition and Markets Authority (the successor to the Competition Commission), in order to increase efficiency, effectiveness and economy in exercise of public functions<sup>73</sup>. Interestingly, responses were not in favour of

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<sup>70</sup> *Ibid*, para. 250.

<sup>71</sup> Hansard, 17 November 2015, House of Commons Debates, Vol. 602, No. 70, Col. 160WH. See also generally A. Bowman et al., *The End of the Experiment? From Competition to the Foundational Economy*, Manchester University Press, 2014, Chapter 3.

<sup>72</sup> Competition Commission (above n. 15), pp. 6-7.

<sup>73</sup> Department for Business, Energy & Industrial Strategy, *Groceries Code Adjudicator: Statutory Review – Consultation* (2022) (available at: <https://assets.publishing.service.gov>).

merger and the decision was taken not to proceed with such an initiative, recognition being given to the importance of the GSCOP and Groceries Code Adjudicator in ensuring fairness across the United Kingdom agri-food supply chain.<sup>74</sup> Moreover, it was also decided that the resource issues affecting the Groceries Code Adjudicator should be addressed (although through assistance from the Competition and Markets Authority as opposed to fully independently)<sup>75</sup>.

Instead of tight focus on the consumer, there may be benefit in adopting a more holistic approach where the interests of farmers and other stakeholders in the agri-food supply chain are accorded greater weight. And there are good grounds for holding that the long-term interests of consumers are likewise better served by ensuring that there is prosperity across all links in the chain, so leading to consistent delivery of agricultural products to the market. Significantly, there would now seem to be greater acknowledgement of this in not only Section 29 of the Agriculture Act 2020, but also the *Government Food Strategy* issued in June 2022, which advocates that any interventions in commercial relationships to prevent unfair trading practices should be «designed to ensure farm businesses can engage in smart business planning and risk management, supporting a competitive and resilient sector that delivers benefits for producers, consumers, and taxpayers» – the interests of consumers being explicitly accompanied by those of producers and taxpayers<sup>76</sup>. At the same time, prioritising the consumer would seem to be a somewhat more complex

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uk/government/uploads/system/uploads/attachment\_data/file/1091889/gca-statutory-review-consultation-2019-2022.pdf), p.14. Further questions were: the potential disadvantages of such an action; the potential advantages of transfer to another public body; and whether it was still necessary to have a Groceries Code Adjudicator to enforce the GSCOP. It may also be noted that the Competition and Markets Authority is stepping up ongoing work into competition in the groceries sector in consequence of cost of living pressures: *CMA Update on Action to Help Contain Cost of Living Pressures* (15 May 2023) (available at: <https://www.gov.uk/government/news/cma-update-on-action-to-help-contain-cost-of-living-pressures>).

<sup>74</sup> DEFRA, *An Update Following the UK Farm to Fork Summit Held at 10 Downing Street on 16 May 2023* (16 May 2023) (available at: <https://www.gov.uk/government/publications/outcomes-from-the-uk-farm-to-fork-summit/an-update-following-the-uk-farm-to-fork-summit-held-at-10-downing-street-on-16-may-2023#:~:text=At%20the%20UK%20Farm%20to%20Fork%20Summit%20we%20confirmed%3A,should%20the%20demand%20be%20proven.>).

<sup>75</sup> *Ibid.*

<sup>76</sup> DEFRA, *Government Food Strategy*, DEFRA, London, 2022 (available at: [Government food strategy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)), p. 16.

matter than simply creating a regulatory environment to foster low prices on the shelves of supermarkets. Rather, there is evidence that supermarkets are themselves alert to consumer reservations over imbalance in the agri-food supply chain and that they have acted on these reservations for reputational purposes: thus, as has been seen, they have been prepared to enter into contracts where producers receive prices based upon the cost of production (rather than being exposed to the full vagaries of market forces); and they have even been prepared to increase prices so as to secure a better return for farmers (as revealed in *Tesco Stores Ltd v Office of Fair Trading*)<sup>77</sup>.

Secondly, the development of governance in this arena has been characterised by a relatively slow pace. As indicated, the Competition Commission produced its Final Report in 2008, yet the Groceries Code Adjudicator Act did not reach the statute book until 2013. Further, it has also been seen that financial penalties were not available to the Groceries Code Adjudicator until the Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015 came into force on 6 April 2015. And the pace did not quicken materially as an immediate consequence of Brexit. The first substantial move to be made after the 2016 Referendum was the issue in February 2018 of the consultation document, *Health and Harmony: the Future for Food, Farming and the Environment in a Green Brexit*, which foresaw formal codes of practice both strengthening the integrity of the supply chain and ensuring that farmers were treated fairly, accompanied by continued championing of the role of the Groceries Code Adjudicator<sup>78</sup>. Since then, although the Agriculture Act 2020 has provided the Secretary of State with an enabling power to make regulations for the purpose of promoting fair dealing in the agricultural sector, no regulations have yet been enacted. A consultation exercise undertaken in the dairy sector during 2020 revealed the need to move to a statutory basis, but anticipated further engagement with industry to develop the standards which are to be included<sup>79</sup>, and the relevant standards are still to emerge.

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<sup>77</sup> See generally T. LANG, *Feeding Britain: Our Food Problems and How to Fix Them*, Pelican, United Kingdom, 2020, p. 204.

<sup>78</sup> DEFRA, *Health and Harmony: the Future for Food, Farming and the Environment in a Green Brexit*, Cm 9577 (2018) (available at: [future-farming-environment-consultation-document.pdf](https://future-farming-environment-consultation-document.pdf) (publishing.service.gov.uk)), p. 58.

<sup>79</sup> DEFRA Press Release, *New Code of Conduct to Ensure a Fairer Dairy Supply Chain* (3 February 2021) (available at: <https://www.gov.uk/government/news/new-code-of-conduct-to-ensure-a-fairer-dairy-supply-chain>). A matter of some interest is that replacement of the dairy voluntary code with a statutory one will be contrary to the

Similarly, consultation on contractual practices in the pig sector resulted in commitment by Government in April 2023 to commence working on the development of regulations for pig contracts, expressly making use of the enabling power under Section 29 of the Agriculture Act 2020, with these regulations to ensure that written contracts are used between all producers and their buyers<sup>80</sup>. Again, however, there is to be close liaison with industry to explore any other provisions which should be required under the contracts<sup>81</sup>; and, while there must be wisdom in such an inclusive approach, there is again the potential for delayed implementation. That said, ongoing challenges faced by the United Kingdom agri-food supply chain are now both increasing the speed of the legislative process and broadening its scope. In particular, the Farm to Fork Summit of 16 May 2023 saw Government commitment to lay the dairy sector regulations before Parliament in 2023 and re-commitment to start working on the pig sector regulations; and similar reviews of the egg and horticulture sectors are to commence in autumn 2023<sup>82</sup>. For farmers faced by immediate and pressing contractual difficulties, these developments will be most welcome.

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recommendation of the House of Commons Environment, Food and Rural Affairs Committee, and also to the views of Farmers for Action, their preferences being rather for flexibility: House of Commons Environment, Food and Rural Affairs Committee, *Dairy prices*, Fifth Report of Session 2014–15, HC 817, paras. 29–30. For further consideration as to whether there should be a voluntary or mandatory code, see S. COE-E. DOWNING, *The Agriculture Bill (2017–2019)* (House of Commons Library Briefing Paper, Number CBP 8405, 25 October 2018) (available at: <https://researchbriefings.files.parliament.uk/documents/CBP-8405/CBP-8405.pdf>), pp. 69–70.

<sup>80</sup> DEFRA, *Consultation Outcome: Summary of Responses and UK Government Response* (updated 6 April 2023) (available at: <https://www.gov.uk/government/consultations/contractual-practice-in-the-uk-pig-sector/outcome/summary-of-responses-and-uk-government-response>).

<sup>81</sup> *Ibid.*

<sup>82</sup> DEFRA (above n. 74).

The volume analyses the regulation of contractual relationships between the various players involved in the agri-food chain in the light of Directive (EU) 2019/633 «on unfair trading practices in business-to-business relationships in the agricultural and food supply chain» and its implementation by the Member States. The Directive constitutes a piece of the overall regulation of the agri-food market and intersects with other EU and national disciplines. In this perspective, in the first part of the volume the regulation of contractual relationships in the agri-food chain is framed in the context of the Common Agricultural Policy and competition law, highlighting also the connections with other relevant profiles of market regulation. In its second part, the analysis focuses on the implementation of Directive 2019/633 into the Member States, emphasizing the strengths and weaknesses of the changed European and national regulatory framework.

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