European Commission

JRC TECHNICAL REPORTS

Unfair trading practices in the food supply chain

A literature review on methodologies, impacts and regulatory aspects

Authors (in alphabetical order):
Jan Fałkowski, Claude Ménard, Richard J. Sexton, Johan Swinnen and Senne Vandevelde

Editors: Federica Di Marcantonio and Pavel Ciaian

2017

Joint Research Centre

EUR 28791 EN

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

JRC Science Hub
https://ec.europa.eu/jrc

JRC108394

EUR 28791 EN

PDF ISBN 978-92-79-73831-9 ISSN 1831-9424 doi:10.2760/800

Luxembourg: Publications Office of the European Union, 2017

How to cite this report: Fałkowski, J., C. Ménard, R.J. Sexton, J. Swinnen and S. Vandevelde (Authors), Marcantonio, F. Di and P. Ciaian (Editors) (2017), *Unfair trading practices in the food supply chain: A literature review on methodologies, impacts and regulatory aspects*, European Commission, Joint Research Centre.

Contents

Acknowledgments 2
Abbreviations 3
1. Introduction *Federica Di Marcantonio and Pavel Ciaian* 4
2. Unfair trade practices in the food supply chain: defining the problem and the policy issues *Richard J. Sexton* 6
2.1. Introduction 6
2.2. Defining B2B UTP in the food supply chain 7
2.3. Methodological approaches to analyse the occurrence and impact of UTPs 10
2.4. Economic principles regarding B2B UTP 12
2.5. Challenges in setting policies to regulate and remedy UTPs 14
2.6. Conclusions 16
2.7. References 17
3. The economic aspects of unfair trading practices: measurement and indicators *Jan Fałkowski* 20
3.1. Introduction 20
3.2. Economic impacts of UTPs on farmers 21
3.3. UTP's impact on consumers 27
3.4. Conclusions and policy implications 33
3.5. References 34
4. Regulating UTPs: diversity versus harmonisation of Member State rules *Johan Swinnen and Senne Vandevelde* 39
4.1. Introduction 39
4.2. Conceptual framework of EU harmonisation 40
4.3. A classification and ranking of UTP regulatory frameworks in Member States 42
4.4. Effectiveness of Member State regulations 45
4.5. Current status at EU level 50
4.6. EU Harmonisation of UTP rules 52
4.7. Conclusion 56
4.8. References 57
5. Unfair trading practices — the way forward *Johan Swinnen and Senne Vandevelde* 60
5.1. Introduction 60
5.2. Regulating UTPs: diversity versus harmonisation 60
5.3. Enforcing UTPs in agrifood supply chains 62
5.4. Monitoring UTPs for supporting better regulations: What is the information we need? What information do we miss? 63
5.5. References 65
6. Summary and conclusions: the many challenges of unfair trading practices in food supply chain systems *Claude Ménard* 67
6.1. Introduction 67
6.2. Preliminary remarks 68
6.3. Conceptual clarification 70
6.4. What consequences of UTPs thus understood? 75
6.5. Policy-making: what did we learn? 81
6.6. References 85

Acknowledgments

This report has been prepared by the JRC editorial team comprising Federica Di Marcantonio and Pavel Ciaian. We would like to thank Bruno Buffaria (HoU), Oliver Sitar, Fabien Santini from DG-AGRI for their close collaboration in the realisation of the workshop and in their valuable comments and further inputs to this report. We thank Giampiero Genovese, Head of Economics of Agriculture Unit, for his continuing support and additional input to the production of this report.

We would like to thank all participants who readily gave their experiences and expertise on the unfair trade practices and food supply chains presented and discussed during the course of the workshop: Richard J. Sexton (University of California), Matthew Gorton (Newcastle University Business School), Fred Lemke (Vlerick Business School), Fahd Alfarsi (Newcastle University Business School), Jan Fałkowski (University of Warsaw), Liesbeth Dries (Wageningen University and Research), Carlo Russo (University of Cassino and Lazio Meridionale), Alessandro Sorrentino (University of Tuscia), Luisa Menapace (Technical University of Munich), Johan Swinnen (KU Leuven), Senne Vandevelde (KU Leuven), Fabrizio Cafaggi (European University Institute), Paola Iamiceli (University of Trento) and Claude Menard (Université de Paris).

Finally we would like to thank Richard J. Sexton (University of California), Jan Fałkowski (University of Warsaw), Johan Swinnen and Senne Vandevelde (KU Leuven) and Claude Ménard (Université de Paris), for acting as rapporteurs and their contribution to respective synthesis reports towards the production and overall realisation of this JRC technical report.

Abbreviations

AMTF	Agricultural Markets Task Force
B2B	business-to-business
CAP	common agricultural policy
EU	European Union
GCA	Groceries Code Adjudicator
JRC	Joint Research Centre
MS	Member State(s)
PSA	Packers and Stockyards Act
USDA	US Department of Agriculture
UTPs	unfair trade practices

1. Introduction

Federica Di Marcantonio and Pavel Ciaian

Joint Research Centre, European Commission, Seville, Spain

This report constitutes a compilation of the principal issues raised by the speakers at the workshop jointly organised by the Directorate-General for Agriculture and Rural Development and Joint Research Centre on 'Unfair trading practices in the food supply chain' held in Brussels between 17-18 July 2017.

The retail and processing segments of food supply chains have witnessed an increasing concentration across Member States (MS) and at global level. A direct consequence of these changes is the bargaining power imbalances in trade relations between the actors in the chain, potentially leading to unfair trade practices (UTPs). UTPs may occur in particular when weak parties have no real alternative to the commercial relation at hand; when one of the parties depends on its counterparts due to factors such as technology and know-how; when one of the parties can exploit informational advantages to the detriment of the other party; in case of incomplete contracts, which leaves room for strategic behaviour during the course of the negotiation, execution and finalisation of a contractual relationship.

The European Commission started to discuss UTPs as a potential problem in the food supply chain already in 2009. In 2013, the European Commission adopted the European Retail Action Plan and a Green Paper on unfair trading practices in the business-to-business (B2B) food and non-food supply chain ([1]). The Green Paper makes an initial assessment of the problems posed by UTPs in B2B relationships along the food and non-food supply chain, including the issue of efficient enforcement of existing national rules and the resulting impact on the single market.

The European Commission defines UTPs as practices that 'grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another' (European Commission, 2014). The European Commission also acknowledged that UTPs are quite common and may have harmful effects, especially on small and medium-sized enterprises in food supply chains.

The workshop brought together international experts in the field of economic and political sciences, who have authored work of relevance for commercial practices in the food supply chains with a view to discuss the available scientific literature on methodologies, impacts and regulatory aspects of UTPs. The workshop discussions addressed the following four topics, and the present report summarises the presentations on them:

([1]) http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0036
http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX %3A52013DC0037

1. the strengths and weaknesses of methodologies applied in the literature to analyse UTPs;
2. the empirical evidence on the socioeconomic impacts of UTPs;
3. the regulatory aspects and enforcement costs of UTPs;
4. the way forward to better understand UTPs in food supply chains.

The production of this report, following the completion of the workshop, has been the responsibility of the JRC. This task has been facilitated through collaboration with five internationally recognised experts: Richard J. Sexton, University of California, United States (Chapter 2); Jan Fałkowski, University of Warsaw, Poland (Chapter 3); Johan Swinnen and Senne Vandevelde, KU Leuven, Belgium (Chapters 4 and 5); and Claude Ménard, Université de Paris, France (Chapter 6), acting as rapporteurs for each of the workshop's four technical sessions, whose efforts in capturing the principal issues raised by the presentations in their respective sessions has been instrumental towards realisation of this report. This report does not pretend to represent a thorough and comprehensive review of scientific literature on the topic concerned. The scientific output expressed does not imply a policy position of the European Commission. Neither the European Commission nor any person acting on behalf of the Commission is responsible for the use that might be made of the information contained in this publication.

2. Unfair trade practices in the food supply chain: defining the problem and the policy issues

Richard J. Sexton

Department of Agricultural and Resource Economics, University of California

2.1. Introduction

The European Commission defines business-to-business (B2B) unfair trade practices (UTP) as 'practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another (European Commission, 2016)'. Such practices in the food supply chain have become a significant concern within the European Community, and have been investigated by several European work groups and taskforces in the past few years. In one recent survey, 96 % of suppliers in the EU food chain reported that they had been subjected to at least one form of UTP (European Commission, 2014).

The common focus of discussions regarding UTPs is farmer interactions with their downstream buyers. The concern is that increasing concentration and consolidation among food manufacturers and retailers has reduced potential trading partners for many farmers to only one or a few. These settings may create significant imbalances of bargaining power in the food supply chain between contracting parties and promote implementation of UTPs. In the words of the Agricultural Markets Task Force (AMTF) (2016): 'Such imbalances may encourage certain behavioural practices on the part of the stronger party in a given commercial relationship or transaction'.

UTPs between retailers and processors can also be important, and farmers themselves may also engage in UTPs, for example, by shirking on the quality of production as a way to reduce cost — the classic adverse selection problem (Swinnen and Vandeplas, 2010, 2011; Fałkowski, 2017). UTPs are widely believed to adversely impact market outcomes. A first consideration is regarding the distribution of welfare and the likelihood that a buyer-imposed UTP reduces supplier welfare and creates gains that are retained by market intermediaries and not transmitted forward to consumers (Gorton, Lemke, and Alfarsi (GLA) 2017).

In addition to concerns about equity within the supply chain, a further concern is that UTPs lead to inefficiency, create uncertainty and stifle innovation and investment (AMTF, 2016;

GLA, 2017). UTPs may drive firms to exit a market and/or inhibit the entry of firms (AMTF, 2016; GLA, 2017). Further, because of the network effects, implementation of UTPs may lead to more UTPs based on competitive pressure or establishment of industry norms.

This paper sets forth B2B practices that have been identified as UTPs by the various authors and commissions that have studied the issue. It next considers conceptual and empirical approaches for studying UTPs and generating evidence on the occurrence of UTPs. The paper next moves to setting forth economic principles to gird the discussion of UTPs before turning to the challenge of setting effective policies to address UTPs in the food supply chain.

2.2. Defining B2B UTP in the food supply chain

Considerable attention has been given to B2B UTP in recent years, especially within the European Union. Identification of UTP has been made more difficult by the fact that the economics literature does not provide a solid theoretical foundation for defining and analysing B2B UTPs (Sexton, 2017). Instead, the focus on unfair practices has been on anti-competitive practices among rivals at the same stage of the supply chain, or deceptive and unfair marketing practices towards customers.

An early effort to develop a list of UTPs was undertaken by several core members of the B2B Platform, as part of the Supply Chain Initiative (2011). These behaviours included:

- refusing to put specific terms in writing;
- imposing general terms and conditions that contain unfair clauses;
- unilaterally terminating a commercial relationship with no notice or unreasonably short notice or without objectively justified reason;
- contractual sanctions that are applied in a non-transparent manner and are disproportionate to damages suffered;
- sanctions imposed without any justification in the agreement or applicable law;
- non-contractual retroactive unilateral changes in the cost/price of products/services;
- withholding essential information/revealing sensitive information;
- transfer of unjustified or disproportionate risk to a contracting party;
- imposing a requirement to fund the cost of a promotion;
- preventing a contracting party from making legitimate marketing and promotional claims on their products;
- imposing listing (slotting) fees that are disproportionate to the risk incurred in stocking a new product;

— tying — imposing on a contracting party the purchase or supply of products or services tied to another set of products or services.

The European Commission conducted a rigorous investigation of B2B UTP in its 2013 Green Paper on the subject and identified the following categories of UTPs (European Commission, 2013):

— a trading partner's retroactive misuse of unspecified, ambiguous or incomplete contract terms;

— a trading partner's excessive and unpredictable transfer of costs and risks to its counterparty;

— a trading partner's use of confidential information;

— the unfair termination or disruption of a commercial relationship.

The AMTF (2016) provided a more succinct list of examples of practices that it considered to be unfair:

— unduly late payments (the EU late payments directive specifies maximum of 60 days);

— unfair shifting of business risk to the other party;

— unilateral or retroactive changes to contracts;

— unfair termination of contracts, including termination on short notice.

UTPs were further elaborated by the European Commission in a 2016 report to the European Parliament wherein the Commission set forth several behaviours that it regarded as inconsistent with good commercial practice (European Commission, 2016):

— one party unduly or unfairly shifting its own costs or risks to the other party;

— one party asking the other party for advantages or benefits without performing a service related to the advantage or benefit;

— retroactive or unilateral changes to a contract, unless the contract allows for it under fair conditions;

— unfair termination of a contractual relationship or unjustified threat of termination.

Most recently, GLA (2017) identified the following examples of UTPs based on a comprehensive review of supply chain literature:

— unexpected costs and deductions;
— delayed or no payment;
— frequent and unilateral changes in prices/compensation by the buyer;
— bundling of purchases with additional services by a retail buyer;
— requiring the supplier to pay for shrinkage at the retail level (which may include thefts of the product);

- unfair use of information including failure to respect confidentiality;
- imposition of territorial supply constraints.

Sexton (2017) noted that another way to think of UTP is to define their converse, namely what would be considered good business practices. The Supply Chain Initiative project (2011) set forth a list of such practices that included the following:

- use of written agreements;
- no unilateral changes in contract terms;
- confidential information is not be revealed or misused;
- all parties bear their own risk;
- agreements are complied with;
- no use of threats to obtain unjustified advantage.

Based upon his analysis of the work of these prior bodies, Sexton (2017) identified the following four consensus categories of B2B UTP:

- excessive shifting of risks;
- unilateral changes in contract terms;
- unfair termination of contracts or commercial relationships, including abrupt termination and termination without justification;
- unfair shifting of costs and levying of charges.

However, in evaluating the prior work to define and identify B2B UTP, Sexton (2017) noted that many of the indicated practices were imprecisely and ambiguously defined. In some instances, the behaviours identified as exemplary of UTPs include the term 'unfair' itself or contain other similarly ambiguous terms such as 'excessive,' 'unpredictable,' 'unduly,' and 'unjustified.' Sexton (2017) suggested that this ambiguity makes it difficult to promulgate regulations to proscribe UTPs, and for firms to know if specific practices would be considered UTPs. He further expressed the concern that ambiguity in defining and clearly understanding what practices would be penalised under regulations imposed to proscribe UTPs would raise transactions costs and reduce the likelihood that mutually beneficial transactions would take place.

In contrast to the significant concerns about UTP within the EU, they have attracted relatively little attention elsewhere (Fałkowski, 2017; Sexton, 2017), raising the question of the degree to which UTPs are a universal phenomenon or limited to a few countries and regions. In the United States, focus on UTPs has largely been limited to the livestock industries, where a unique regulatory structure exists due to the passage in 1922 of the Packers and Stockyards Act (PSA). The PSA gives regulatory authority over the livestock

industries to the US Department of Agriculture (USDA) ([2]). In 2010, the USDA promulgated a set of regulations under the PSA intended to restrict contracting practices in the livestock industries. The proposed regulations did not speak specifically of UTPs but their clear purpose was to restrict contracting practices considered by the USDA to be unfair. They included:

— paying premiums or discounts on contracts without written justification for them;

— restricting tournament-style payment systems ([3]);

— limiting buyers' ability to require capital investments by suppliers ([4]).

In contrast, the policy concern in the US is about the market power of food-chain intermediaries as buyers of agricultural products and their ability to suppress prices to farmers, below the marginal value product of the farm input. Sexton (2017) noted that simply depressing the farm price below marginal value product as a consequence of monopsony or oligopsony power was not among the practices identified as a UTP in the aforementioned literature.

2.3. Methodological approaches to analyse the occurrence and impact of UTPs

The examples of UTP set forth in the prior section comprise a heterogeneous set of actions that occur at different stages of a transaction, making it difficult to develop a comprehensive and inclusive theory or model of UTPs in the supply chain (GLA, 2017). In their review of the literature regarding B2B UTP, GLA (2017) identified three main methodological approaches applied in the literature to analyse UTPs including: (i) transactions-cost economics (Weaver and Dickson, 1998, Bhattacharya et al., 2015), (ii) asymmetric power and bilateral deterrence theory (Kumar et al., 1995) ([5]), and (iii) relationship marketing (Morgan and Hunt, 1994).

The transactions-cost framework emphasises that frequency of exchange, uncertainty surrounding the exchange and asset specificity of a trading partner all influence the likelihood of UTP occurrence, with frequent exchanges and long-lived relationships making UTPs less likely, while uncertainty, asset specificity, and supplier lock-in make them more likely. GLA (2017) emphasised that, although asymmetric power and bilateral deterrence theory has not been extensively applied to the food supply chain, it provides useful lessons

([2]) Antitrust enforcement in the US is held jointly by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). These federal agencies retain authority over the livestock industries, so the authority exercised by the USDA via the PSA is in addition to the enforcement powers held by the DOJ and FTC.

([3]) Tournament payment systems base a farmer's pay on his/her performance relative to a group of peers. They have been used commonly in broiler contracts in the US.

([4]) These proposed regulations were highly controversial and to date not been implemented. In addition, some US states have attempted to implement legislation to restrict contracting practices in livestock industries. However, US courts have invalidated many of these regulations.

([5]) Other examples of this framework include Benton and Maloni (2005), Hingley (2005), Nyaga et al. (2013), Maglaras et al. (2015), and Cuevas et al. (2015).

to better understand UTPs. Likelihood of UTPs is reduced when transacting parties have symmetric bargaining power. Imbalances of power reduce the impediments to the more powerful firm acting opportunistically by implementing UTPs.

The third methodological framework, relationship marketing, is based on the seminal work of Morgan and Hunt (1994) and draws inspiration from transactions cost economics and power theories. UTPs result in reduced relationship commitment because suppliers believe they cannot trust their trading partners.

Empirical methodologies

In general, there are substantial gaps in the academic literature on UTPs in food supply chains, making the scale of the problem difficult to assess. Based on their review of literature, GLA (2017) cited a lack of verified evidence on (i) occurrence of most types of UTPs, (ii) prevalence of UTPs in transnational settings, (iii) whether UTPs are more common in the food supply chain than in other sectors such as construction, and (iv) the impacts on producers and consumers of specific laws designed to curtail the use of UTPs.

Although the source of information on most reported UTPs is suppliers themselves, GLA (2017) suggests that one reason for the paucity of evidence is suppliers' reluctance to report UTPs for fear of retaliation or delisting by buyers. They identify four main empirical approaches to investigate possible cases of UTPs in the food supply chain:

- interpretive methodologies based on interviews;
- surveys, either online, by phone, or face to face;
- case studies;
- modelling.

GLA (2017) regard interpretive methodologies as appropriate to understanding human motivations and interactions, but argue that the knowledge generated is socially situated and difficult to extrapolate to other contexts. Generalisability is also a key concern also with case studies. Surveys by contrast enable a cross-section of settings to be investigated and thus offer greater opportunity to generalise, but, when applied to analysis of UTPs, are inherently limited because typically only the perspective of one party to a transaction is recorded. GLA regard modelling as a methodology that can support investigations that cannot be addressed by the other methods, but warn that generalisation beyond the parameters specified in the model must be done cautiously.

GLA (2017) provide several examples drawn from the popular press or from the Groceries Code Adjudicator (GCA), of what were believed UTPs implemented by European grocery retailers. The GCA is an agency of the UK government put in place to investigate and adjudicate trade disputes involving food retailers in Britain. The examples include the following:

- retailer Holland and Barrett requiring suppliers to reduce costs by 5 % and contribute to the company's costs;

— Britain's Tesco being accused of delaying payment to suppliers as a way of enforcing leverage over them to accept harsher contract terms;
— retailer Aldi being accused of delaying payment to suppliers beyond the 30 days specified in the applicable law;
— Wm Morrison supermarkets requesting lump-sum retroactive payments from suppliers in violation of the UK's Groceries Code.

Gorton et al. (2015) represents one of the only econometric modelling studies directly relevant to UTPs. The authors studied the determinants of buyer trustworthiness (and thus, inverse likelihood of buyers engaging in UTPs) for the Armenian dairy sector. This study set forth several hypotheses regarding the determinants of trustworthiness. It was predicted to be a positive function of (i) the number of commercial buyers, (ii) the ease of farmers' costs of switching among buyers, (iii) the size of the supplier, and (iv) the supplier's membership in a marketing cooperative. Hypothesised to be negatively related to buyer trustworthiness was (v) buyers' ease of switching among suppliers. In terms of outcomes, buyers' trustworthiness was hypothesised to be positively related to suppliers' (i) satisfaction, (ii) production volume, and (iii) product quality. Results of their econometric analysis found support for each of the hypotheses.

2.4. Economic principles regarding B2B UTP

Sexton (2017) proposes the broad principle that economic agents participating in a transaction have the incentive to pursue two goals: first, to maximise the gains associated with the transaction (i.e. the size of the pie) and, second, to capture as large a share of the gains from that transaction as possible. This second objective could be moderated by long-term considerations, in particular concern about the financial viability of a valued trading partner (e.g., Crespi, Saitone, and Sexton, 2012). These two goals could conflict with each other in the sense that a trading partner's actions to increase its share of the surplus associated with a transaction could decrease the magnitude of the surplus (Sexton, 2017). This latter point is, of course, a key concern regarding UTPs.

Sexton (2017) questions why trading partners would engage in practices that reduce efficiencies and attenuate trading partners' incentives to make investments, given that such actions reduce the gains to a transaction. As noted, one answer could be that the UTP enables the trading partner to capture a larger share of the diminished surplus and gain a net advantage in the process. Sexton (2017), however, questions the likelihood of such occurrences, because the available contract pricing mechanisms would ordinarily enable the trading partner with a bargaining-power advantage to extract surplus to a transaction without imposing UTPs that diminish the surplus associated with the transaction ([6]).

([6]) For example, this may occur with two-part tariff pricing wherein a supplier is paid the marginal value product of her input to ensure the efficient rate of output and then economic surplus was extracted by an access fee, such as a slotting allowance. Similarly, a contract can specify that a supplier produce the rate of output that maximises the surplus associated with a transaction in return for

Two specific practices that are commonly included on lists of UTPs: unfair shifting of costs and transfers of risks to a trading partner serve to illustrate this point. If a cost is transferred to a party that is the less efficient bearer of that cost, it reduces the surplus to a transaction, and, accordingly, would not be done unless a trading partner had no other means to extract surplus from a transaction. As to risk bearing, a standard result in the principal-agent literature that the entity most capable of bearing risk (namely, the less risk-averse partner) should bear most or all of the risk to a transaction in order to maximise the surplus associated with the transaction (Sexton, 2017). The only qualifier to this result is that removing risk from a trading partner by guaranteeing a fixed payment may create incentive compatibility issues (Grossman and Hart, 1983).

Sexton (2017) also questions the conclusion of the AMTF that UTP could cause the exit of otherwise viable enterprises, asking whether it is in the best long-term interests of a business to drive its trading partners from the marketplace? Even if other suppliers could potentially take the place of suppliers who exited the market, they likely would not be as valuable as the original trading partners, and reputational effects from a firm's use of UTP would naturally make other firms reluctant to engage in trade with it. Such reputational effects can spill over, both downstream towards the final consumer and upstream towards suppliers (GLA, 2017).

Finally, Sexton (2017) challenged the belief that B2B UTPs were more likely to occur as a result of consolidation and rising concentration in the food chain. He argued that under certain market conditions, increasing concentration and consolidation results in more efficient outcomes and better results for farmers than loosely concentrated market structures (see for example Crespi, Saitone and Sexton, 2012; Sexton, 2013; Adjemien, Saitone and Sexton, 2016; Mérel and Sexton, 2017).

The key economic argument underlying this view is that buyer actions that diminish payoffs to farmers, whether through UTP or by paying prices below marginal value product, reduce the return on farmer investment below the level needed to insure the supplier's financial viability. The exit of suppliers, however, is detrimental to the long-run profit of the buyers, who themselves have substantial sunk investments and need to acquire farm product proximate to their processing and shipping facilities in order to operate them at efficient capacity ([7]). Similarly, buyers who produce differentiated products to sell downstream need to acquire farm-product input with quality characteristics suited to producing the desired final product. As procurement markets become more concentrated, buyers are better able to internalise the benefits of paying returns sufficient to insure the financial viability of their suppliers. This leads to the seemingly paradoxical result that more highly concentrated

a fixed payment that meets the supplier's participation constraint but transfers most of the transaction's surplus to the buyer (Sexton, 2017).

([7]) However, it might be argued that suppliers lost through engaging in UTPs or paying below-market prices can simply be replaced by other suppliers in a setting where there are many farmers and only a few buyers. Such arguments, however, presume that agricultural products and producers are homogeneous in respect to product quality, location of production, timing of production, etc. In modern agricultural markets, these presumptions are unlikely to be correct, so if preferred suppliers are driven from the market, it will likely be to the long-term detriment of the buyer.

procurement markets can be better for farmers, and UTPs, whatever the likelihood of them occurring in general, are *less* likely to occur as procurement markets become more concentrated.

2.5. Challenges in setting policies to regulate and remedy UTPs

Several challenges confront policy-makers and regulators in designing market interventions to limit UTPs and prescribing penalties for firms committing them. First is the difficulty already noted inherent in identifying UTPs. Actions that distribute market surplus in favour of one agent over another do not represent UTPs unless there is an inherent 'unfairness' in the action (Fałkowski, 2017). It is often difficult to distinguish UTPs from what might be considered normal competitive behaviour ([8]).

Also of concern is the manner in which firms and markets would react to policies and regulations that proscribe behaviour considered to represent UTP and how these responses could impact costs, prices and innovation in the supply chain (Fałkowski, 2017). Attempts to ban practices deemed as unfair could raise transactions costs and diminish the efficiency of production — a case of the cure possibly being worse than the disease (Sexton, 2017).

Further, stringent regulations to ban UTPs could cause the shifting of production to countries with less-stringent regulations. In addition, assistance factors (benefits in addition to price) often provided by downstream buyers to their agricultural product suppliers may be impacted by regulations of UTPs. Business relationships could disappear in instances where they were dependent on practices banned as UTPs (Fałkowski, 2017). All of these factors create uncertainty as to how regulations to limit or ban UTPs will impact the incomes of farmers, the intended primary beneficiary of the policies.

In essence, effective enforcement of UTP policies faces the challenge of limiting two types of errors: (i) failing to proscribe actions that do constitute welfare-reducing UTPs, i.e. too-lax enforcement or type I error; and (ii) proscribing practices or contract provisions that actually increase economic efficiency and social welfare — too rigid enforcement, or type II error. How to strike this proper balance represents an unanswered question in the literature, but in the views of Fałkowski (2017) and Sexton (2017), typical enforcement policies are likely to err in the direction of type II.

Various formal mechanisms might be used in addressing the problem of UTPs, including greater use of written contracts. It is widely believed that specifying agreements in writing through contracts represents an antidote for UTP and indeed written agreements are the first recommendation of good practices by the Supply Chain Initiative (2011). However,

([8]) Fałkowski (2017) offers the delay in payment to a supplier, something widely acknowledged to be a UTP, to illustrate the ambiguity in defining UTPs and establishing policies to prevent them. He noted three scenarios: (1) firm A (e.g., a processor) delays payment to firm B (e.g. a farmer) as a means of acquiring free credit; (2) firm A delays payment to firm B due to A's own financial stress; and (3) A delays payment to B because A has not been paid by its downstream buyer. Fałkowski noted that most people would regard (1) as a UTP, but that few would consider (3) as representing improper behaviour.

UTPs can still occur in the presence of contracts, which will inevitably be incomplete and imperfectly enforced (Fałkowski, 2017). Sexton (2017) makes a similar point in reporting on agricultural contracts in the United States, which in general are not highly detailed and are often just a page or two in length. Rather than attempt to specify all possible contract contingencies, a dispute-resolution mechanism, generally binding arbitration, is specified instead.

The difficulties in defining which B2B practices constitute UTPs instead of ordinary competitive behaviour intended to promote transaction efficiency led Sexton (2017) to recommend adoption of a 'rule of reason' regulatory approach, similar to the standard applied to much of US antitrust law. Proscribing behaviours that are efficiency enhancing will reduce the surplus to a transaction and likely harm both parties to it, making it imperative that regulatory bodies do not incorrectly identify such behaviours as UTPs.

Sexton (2017) proposed specific criteria for adjudicating a rule-of-reason standard. The first criterion would be whether the alleged action had a clear efficiency motivation. Second, investigatory bodies should examine if simpler means than the alleged UTP were available to the accused party to extract economic surplus, A third criterion is to ask if the business relationship in question is likely to be long term, with it being unlikely that a business would disrupt a long-term relationship by engaging in UTP (Sexton, 2017).

Other authors have emphasised the role of informal mechanism to reign in UTPs. Fałkowski (2017) poses the question of whether UTPs are a short-run phenomenon in the sense that they will be reduced or eliminated in the long-run by competitive pressures. If this were true, it would reduce the imperative to develop policies to regulate such behaviour and policies to encourage market entry could help reduce UTPs by facilitating competition (Fałkowski, 2017).

Both GLA (2017) and Fałkowski (2017) recognise the importance of network effects — the extent to which firms' actions are influenced by their competitors — in regulating the occurrence of UTPs. If UTPs yield a competitive advantage, rivals might be forced to follow suit to remain competitive ([9]). But in a similar manner, remedies to UTPs could also spread through a supply chain, thereby reducing enforcement costs.

Interpersonal relationships between buyers and sellers may also influence the incidence of UTPs (Fałkowski, 2017). Informal and long-lasting ties between buyers and sellers could mitigate the problem of UTPs and thus, such informal institutions can represent one answer to UTPs. ([10]) But little evidence had been brought to bear on this point. GLA (2017) note that many retailers specifically seek to avoid the occurrence of such relationships by frequently transferring buyers to different commodity groups.

([9]) Fałkowski (2017) analogised UTPs to technological innovations in that they create a competitive advantage for the first adopter and thereby effectively force rivals to follow suit.

([10]) This emphasis on long-term relationships is consistent with the claim of Sexton (2017) that UTPs are unlikely in situations when economic agents value the future and do not heavily discount future benefits and costs.

Similar to GLA (2017), Fałkowski (2017) argues that informal sanctions and social norms or 'community-based mechanisms' could be effective in restraining the use of UTPs, but there are several unanswered questions about how such mechanisms would work and what is needed for them to be most effective. The role of social norms is more important, the weaker the contract enforcement. A related point raised by Fałkowski (2017) is that public regulations of UTPs could in essence have a crowding-out effect wherein private actions by farmers to improve their bargaining power (e.g. through a marketing cooperative) are substituted by state action.

2.6. Conclusions

The issue of UTPs in the food supply chain has assumed considerable importance within the European Union, and the subject has been analysed extensively by the European Commission and task forces operating under its auspices. The concern is that UTPs are on the ascent in the food chain due to increasing concentration and consolidation among market intermediaries and, further, that their use will harm farmers and small-scale marketing firms operating in the food chain, cause market inefficiencies, curtail investment and, in the most severe cases, cause the exit of otherwise viable enterprises.

This paper hopes to contribute to this discussion through examining and evaluating the practices commonly considered to be UTPs and considering policy alternatives. In considering practices that have been designated as UTPs, the paper highlights a concern that the indicated actions are imprecisely and ambiguously defined, such that developing actionable policies to proscribe them would be very challenging. A further concern is that policies to limit UTPs could eliminate practices that enhance efficiency of transactions and thereby reduce the total surplus that can be divided between participants to the transaction. In the same sense, the concern that business arrangements will be branded as UTPs may cause firms to forego otherwise beneficial transactions. Thus, policies to address UTPs could have adverse unintended consequences in an environment where UTPs and their consequences are poorly understood.

This paper also highlighted conceptual and empirical approaches to studying UTPs, but also noted the paucity of evidence to date on the occurrence of UTPs in general and in particular within the food supply chain. The limited knowledge accumulated to date on UTPs despite the considerable public interest in the topic suggests the imperative for additional research be conducted on the topic.

In hoping to add to our knowledge base regarding UTPs, this paper has developed some of the underlying economics regarding UTPs and the settings in which they are more or less likely to occur. This analysis posed a challenge to the oft-held beliefs that UTPs that create market inefficiencies will be implemented and, moreover, are more likely to occur as industries become more highly concentrated.

Finally, the analysis concluded by addressing the policy challenges surrounding UTPs, given the difficulties in rigorously defining them and the paucity of conceptual and empirical evidence to provide a foundation for policy setting. Given these difficulties and the risk that policies can have unintended consequences that harm to the very parties intended to be beneficiaries of policies, it was suggested that any adjudication of UTPs should be conducted under a rule-of-reason criterion. Specific guidelines for implementing such an approach were suggested. The paper also raised the prospect that UTPs could be constrained through means other than direct regulation. Informal relationships, network effects, competitive market pressures, and long-run considerations may limit UTPs in the absence of formal regulations, with the fear being that formal regulations may 'crowd out' less formal means of addressing UTPs.

2.7. References

Adjemian, M., T.L. Saitone, and R.J. Sexton. (2016). A Framework to Analyze the Performance of Thinly Traded Agricultural Commodity Markets. *American Journal of Agricultural Economics* 98: 581-596.

Agricultural Markets Task Force. (2016). 'Enhancing the Position of Farmers in the Supply Chain.' Report of the Agricultural Markets Task Force, Brussels: European Commission.

Benton, W.C. and M. Maloni (2005). 'The influence of power driven buyer/seller relationships on supply chain satisfaction.' *Journal of Operations Management* 23: 1-22.

Bhattacharya, A., P.J. Singh, P.J. and A.A. Nand (2015). 'Antecedents of buyer opportunistic behavior in outsourcing relationships.' *International Journal of Production Economics* 166: 258-268.

Crespi, J.M., T.L. Saitone, and R.J. Sexton. 2012. Competition in U.S. Farm Product Markets: Do Long-Run Incentives Trump Short Run Market Power? *Applied Economic Perspectives and Policy* 34: 669-695.

Cuevas, J.M., S. Julkunen, and M. Gabrielsson (2015). 'Power symmetry and the development of trust in interdependent relationships: The mediating role of goal congruence.' *Industrial Marketing Management* 48: 149-159.

European Commission. (2013). 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe.' COM(2013) 37 Final, Brussels.

European Commission. (2014). 'Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain.' Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2014) 272 Final, Strasbourg.

European Commission. (2016). 'Report from the Commission to the European Parliament and the Council on Unfair Business-to-Business Practices in the Food Supply Chain.' COM(2016) 32 Final, Brussels.

Fałkowski, J. (2017). 'Unfair Trading Practices in the Food Supply Chain: What We Still Need to Know.' Paper presented at the workshop on '*Unfair Trading Practices in the Food Supply Chain,*' European Commission, Brussels 17-18 July 2017.

Gorton, M., R. Angell, L. Dries, V. Urutyan, E. Jackson, and J. White (2015). 'Power, buyer trustworthiness and supplier performance: Evidence from the Armenian dairy sector.' *Industrial Marketing Management* 50: 69-77.

Gorton, M., F. Lemke, and F. Alfarsi (2017). 'Methodological Framework: Review of Approaches Applied in the Literature to Analyse the Occurrence and Impact of UTPs.' Paper presented at the workshop on '*Unfair Trading Practices in the Food Supply Chain*', European Commission, Brussels 17-18 July 2017.

Grossman, S.J. and O.D. Hart. (1983). 'An Analysis of the Principal-Agent Problem.' *Econometrica* 51: 7-45.

Hingley, M.K. (2005). 'Power to all our friends? Living with imbalance in supplier-retailer relationships.' *Industrial Marketing Management* 34: 848-858.

Kumar, N., L.K. Scheer, and J.-B.E.M. Steenkamp (1995). 'The effects of perceived interdependence on dealer attitudes.' *Journal of Marketing Research* 32: 348-356.

Maglaras, G., M. Bourlakis, and C. Fotopoulos (2015). 'Power-imbalanced relationships in the dyadic food chain: An empirical investigation of retailers' commercial practices with suppliers.' *Industrial Marketing Management* 48:187-201.

Mérel, P. and R.J. Sexton. (2017). 'Buyer Power with Atomistic Upstream Entry: Can Downstream Consolidation Increase Production and Welfare?' *International Journal of Industrial Organization* 2017, in press.

Morgan, R.M. and S.D. Hunt (1994). 'The Commitment-Trust Theory of Relationship Marketing.' *Journal of Marketing* 58: 20-38.

Nyaga, G.N., D.F. Lynch, D. Marshall, and E. Ambrose (2013). 'Power asymmetry, adaptation and collaboration in dyadic relationships involving a powerful partner.' *Journal of Supply Chain Management* 49: 42-65.

Sexton, R.J. (2013). 'Market Power, Misconceptions, and Modern Agricultural Markets,' *American Journal of Agricultural Economics* 95: 209-219.

Sexton, R. (2017). 'The Unfair Trading Practices in the Food Supply Chain: Types of UTPs.' Paper presented at the workshop on '*Unfair Trading Practices in the Food Supply Chain,*' European Commission, Brussels 17-18 July 2017.

Swinnen, J. and A. Vandeplas. (2010). 'Market Power and Rents in Global Supply Chains.' *Agricultural Economics* 41: 109-120.

Swinnen, J. and A. Vandeplas. (2011). 'Rich Consumers and Poor Producers: Quality and Rent Distribution in Global Value Chains.' *Journal of Globalization and Development* 2: 1-28.

Supply Chain Initiative. (2011). 'Vertical Relationships in the Food Supply Chain: Principles of Good Practice, http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain (accessed July 2017).

Weaver, K.M. and P.H. Dickson (1998). 'Outcome quality of small- to medium- sized enterprise–based alliances.' *Journal of Business Venturing* 13: 505-522.

3. The economic aspects of unfair trading practices: measurement and indicators

Jan Fałkowski

Faculty of Economic Sciences, University of Warsaw

3.1. Introduction

Unfair trading practices (UTPs) have become an important reference point both in political debates as well as in academic research. Several concerns have been expressed that UTPs may result in outcomes which are undesirable from the point of view of the whole society (see for example, European Commission, 2014). In consequence, the presence of UTPs is often argued to be a good reason for government intervention and serves as a justification for some precautionary or remedial measures.

Clearly, many of the arguments that are used to support this view are difficult to refute. Moreover, very often they are in line with intuition. Yet, it should be emphasised that our understanding of the impact of UTPs is still very limited. As this chapter tries to illustrate, characterising and quantifying the effects of UTPs is not an easy task. This is in large part due to the fact that UTPs involve many nuances that frequently fall outside the existing definitions and therefore elude easy assessments. Further, UTPs may exert a profound influence on many (interrelated) aspects of the functioning of the agri-food supply chain. In addition, the likely effects (including those concerning the aggregate value added created in within-chain transactions or the distribution of gains from these transactions along the different levels of the supply chain) are non-trivial.

This chapter aims at summarising two presentations — Dries (2017) and Russo et al. (2017) — that provide key insights with respect to the theoretical and empirical works focusing on the impacts of UTPs in the agri-food supply chain. The former presentation is devoted to study the impacts of UTPs on farmers (Dries, 2017). The other presentation in turn, focuses on the impacts of UTPs on consumers (Russo et al., 2017).

Interestingly, even though the two presentations concentrate on different stages of the supply chain, they share several similarities. This is of importance, as it clearly shows that there are at least a couple of issues, often quite fundamental ones, that policy-makers/researchers will need to tackle no matter what stage of the agri-food supply chain they are concerned with. The most important common thread running through both

speeches related to the fact that our understanding of UTPs, notwithstanding the growing interest expressed by both policy-makers and researchers, is still very imperfect. One reason for that is that there are still many unknowns which have not been covered by the research. The other reason for why we have only limited knowledge on UTPs is that the evidence we do have does not allow us to draw unambiguous conclusions. The findings from the existing studies are very heterogeneous and not very robust.

While many reasons could be provided to account for that, it seems that the following problems play a key role. First, UTPs comprise very broad categories of practices and the existing definitions often do not provide a sharp delineation of what should be called UTPs and what should not. Second, UTPs are seldom used one by one and instead, they often turn up in a whole package. This makes it very challenging to establish what should be attributed to a specific practice and what might be driven by a different practice. We also have a very limited knowledge about potential synergy effects between these practices. Third, even practices which are commonly considered as UTPs are difficult to measure. What follows is that the available data are imperfect. This is because a lot of important information is private and companies involved in UTPs are not willing to reveal it. Therefore, there is an urgent need for increasing transparency within the agri-food supply chain. This would be of great importance for both policy-makers and researchers. Another recurring theme of both presentations is related to the fact that establishing causal relationships between UTPs and some observed effects is very difficult because of the presence of a great many confounding factors (endogenous changes in costs along the chain, seasonal variations, some exogenous shocks, etc.).

Below, we provide some further insights on these challenges and explain in more detail their origins and potential consequences. We also report basic findings from the literature on the (potential) impacts of UTPs. We first present the discussion on the impacts of UTPs on farmers. In the next step, we discuss the impacts of UTPs on consumers. The chapter ends with some concluding remarks.

3.2. Economic impacts of UTPs on farmers

Even though there has been a lot of research on agri-food supply chains, including many studies specifically focusing on farmers' relationships with representatives of downstream sectors (Reardon and Timmer, 2007; Swinnen, 2007), the evidence on the impacts of UTPs on farmers is mostly anecdotal and largely based on case studies. More systematic evidence instead is very limited.

That being said, two strands of the literature should be recognised which may provide some insights on the issue in question, at least in an indirect way. The first line of research aims at highlighting the process of price formation along the agri-food supply chain (Meyer and von Cramon-Taubadel, 2004; Vavra and Goodwin, 2005; Lloyd et al., 2006; Assefa et al., 2014;

Bakucs et al., 2014). The focus here is on improving our understanding of the nature of price movements along the various stages of the agri-food chain and to analyse the magnitude, direction and speed with which price movements are transmitted from farm to processing and retail levels or the other way around. When trying to explain the documented price behaviour, this type of study often refers to the issue of market power which is commonly linked to UTPs (see below). The latter, however, are not analysed explicitly. As a result, this line of research can be informative about the role of UTPs only in an indirect way. The second strand of the literature relates to the problem of delayed payments (see for example, Gow et al., 2000; Gorton and White, 2007). Given that delayed payments are often mentioned as an example of UTPs, these studies may provide more direct evidence on the influence of UTPs on farmers. What should be noted though is that delayed payments are only one among many practices considered as being unfair. Further, the question arises as to what extent the evidence from the existing studies exhaust the topic. Importantly, the received works rarely focus on the current situation in the EU and mostly draw on past experience from transition countries (Gow and Swinnen, 1998; Dries and Swinnen, 2004; 2010; Gorton and White, 2007; Dries et al., 2009). What follows is a question arises as to what extent the findings these studies provide reflect regularities that are specific only to the transition context and thus to what extent they can be generalised. These reservations need to be kept in mind when interpreting the existing evidence.

Typically, UTPs are associated with the way in which power is distributed along the agri-food supply chain. More specifically, an imbalanced distribution of power between parties involved in agri-food transactions is often mentioned as a crucial element which is behind UTPs or that creates the room for using UTPs (European Commission, 2014). The existing literature offers two distinct perspectives on the role of power in this context. On the one hand, the focus might be on the regulatory framework that provides rules which affect the level of competition in food markets (McCorriston, 2002; 2013). From this angle, the analysis is mainly concerned with competition-related issues and identifying the degree of market power of dominant players. In addition, a lot of attention has been paid to study the consequences that the presence of market power may potentially bring about not only for farmers, but also for consumer welfare as a whole (Sexton, 2013; Sexton and Lavoie, 2001; Sheldon and Sperling, 2003). Further, this perspective highlights how the governance of the agri-food supply chain could be potentially affected by changes in competition law.

On the other hand, the issue of power within the supply chain can be investigated from the bargaining power perspective. Here, the focus is not so much on the competition law and the presence of market power, but on the contracts that are signed between transacting parties. In line with this approach, the party that is to gain the most from being involved in a contract (measured by the difference between the value to be gained in the contract and the value to be gained outside the contract) is the weakest and has less bargaining power than the others. This perspective takes into account the fact that UTPs may not necessarily be related to the presence of market power. Indeed, various forms of unfair trading

practices may take place irrespectively of whether a given firm (or a limited number of firms) can exert market power or not (European Commission, 2014; Mc Corriston, 2013; Sexton, 2013).

While these two perspectives differ with regard to the emphasis they put on various aspects of the analysis, for both of them the key elements that create the potential for using UTPs are to some extent similar. This becomes clear when one recognises that both of these approaches point to the fact that parties characterised by inelastic supply, parties incurring high sunk costs, parties having high switching costs (i.e. high costs of finding an alternative contractor); parties facing high assets specificity (i.e. the situation in which the value of using a given asset outside the relationship is much lower than the value of using it within the relationship) may face high risks of being in the situation in which their contractors will abuse their position and use UTPs.

UTPs may happen at each stage of the agri-food chain. Further, their effects can be transmitted along the chain towards either downstream or upstream sectors. That being said, the focus in the literature is often on upstream suppliers. In this context, it is typically argued that UTPs may bring about potentially negative effects for farmers. Moreover, it is commonly believed that these negative consequences may take different forms and affect different aspects of farm decision-making processes. A particular emphasis is put on the following issues. Firstly, it is often argued that UTPs may importantly determine the way prices are negotiated and set. This obviously will translate into how farm revenues are shaped, as well as into costs that farmers need to incur. What follows is that UTPs may play an important role in determining farm profits. Secondly, it is suggested that UTPs may contribute to an increased market uncertainty. This in turn will impact farmers' investment decisions and therefore limit the room for innovations. As a result, at the aggregate level, this will influence the competitiveness of the sector as a whole. Further, by affecting production decisions, UTPs may also potentially lead to exits of some suppliers. In this context, it is commonly assumed that small-scale farmers are most vulnerable to this unfavourable outcome.

These arguments obviously call for an adequate regulatory framework that would help to address these negative aspects. In this respect, one typically refers to formal rules that would provide correct incentives, in order to discourage transacting parties from using UTPs. What needs to be stressed though is that there is relatively little quantitative evidence that would allow for verifying whether the assumed negative consequences mentioned above indeed take place. There is equally little knowledge about the (likely) effects of potential (legal) responses to UTPs. For example, it is not clear whether regulations designed to fight against UTPs would not create new problems and inefficiencies. An additional issue is that even in the presence of the regulatory framework correctly identifying UTPs, transacting parties may not be willing to take advantage of it being afraid of losing long-term relationships with their contractors. What follows is that even though there might exist good reasons for state intervention, caution should be

exercised before assuming that what we propose in response to UTPs will lead to the intended effects.

The existing evidence on the impacts of UTPs on farmers is largely anecdotal and is based on some cases in which farmers have been exposed to UTPs. Lack of systematic evidence in this respect is largely driven by two issues. One of them relates to the problem of measurement. Indeed, it is very difficult to measure precisely the phenomenon under study and identify how to use the available data to exactly capture the impact of a given UTP. This is well illustrated with the example of studies using price data. The latter are relatively easily available and of reasonably good quality. What follows is one can try to establish relatively robust evidence on price movements along the agri-food chain. Yet, we are still far from understanding what drives the observed patterns of price adjustments and why (Bakucs et al., 2014). This also clearly indicates the second key point which explains the lack of systematic evidence on the impacts of UTPs, namely the problem of attribution. As there are many confounding factors, it is very challenging to pinpoint the extent to which a given phenomenon (for example, farm exits) is due to UTPs or rather due to some other things happening (for example, specific state regulations or idiosyncratic risks faced by an individual or by a group of farm households).

Studies focusing on price formation typically try to identify the share that farmers have in total expenditures on food or alternatively the share that they have in the total value added created in food production. According to the existing evidence provided for the US (based on the data from USDA Economic Research Service), in 2015 this share amounted to 15.6 % and has been decreasing over recent decades. Some perceive this as evidence supporting the claim that the position of farmers in the agri-food supply chain has been deteriorating. Yet, the question remains whether this development is not due to other factors taking place. If, for example, food is more and more processed, the declining share of farmers in the value added is not that surprising.

Other studies focusing on the processes of price formation are devoted to the issue of price transmission. Overall, it is expected that price movements threatening the margin of firms being able to exert market power are transmitted faster than price movements that improve it. This seems to be consistent with patterns of price behaviour at different stages of the agri-food supply chain which could have been observed during the recent financial crisis. According to the data from Eurostat spanning the period (January 2007-July 2009), agricultural commodity prices reacted more strongly and more quickly to what has been happening in the aftermath of financial crisis than prices at the other stages of the agri-food supply chain. The reaction of processor prices and retail prices instead was more gradual and weaker. Similar observations arise when one looks at the evolution of prices measured for different stages of the agri-food supply chain over the longer horizon. As indicated by the analysis undertaken by the Organisation for Economic Cooperation and Development (OECD) and the Food and Agriculture Organisation (FAO) in the period 2004-2014, agricultural commodity prices tend to be characterised by stronger volatility than consumer

prices (OECD/FAO, 2015; OECD, 2015). What is also often found in the literature is that the pass-through of price increases is different from the pass-through of price decreases.

Further, the existing results suggest that the magnitude and speed of price transmission varies considerably across sectors, stages of the agri-food supply chain and countries (Perekhozhuk et al., 2017). The results also depend on whether we look at processed or unprocessed products, whether we look at private label products or 'national brand' types of products or whether we look at sales during the high season or sales during the low season, whether we look at products that are supplied more or less over the whole year and so on (see, for example, Loy et al., 2015). What follows is that drawing any general conclusions about patterns of price behaviour within the agri-food supply chain is very difficult. Moreover, it is also not clear at all to what extent we can attribute the observed asymmetries in price transmission to the abuse of market power (imbalances in bargaining power). This is because unequal distribution of bargaining power does not need to equate with the behaviour leading to asymmetric price transmission (McCorriston, 2002; Sexton, 2013; Bakucs et al., 2014). In addition, there are also alternative explanations which may account for incomplete and/or asymmetric pass-through of prices. These explanations draw on, for example, the so-called menu costs (i.e. costs occurring with the re-pricing and adoption of a new pricing strategy), the so-called search costs (consumers may have problems with finding information on prices, thus giving retailers the room to use asymmetric price transmission to maximise their profits) or the presence of government intervention (Meyer and von Cramon-Taubadel, 2004). Overall then, while the existing findings may be indicative of some problems related to the way price changes are transmitted in the agri-food supply chain, they should not be automatically viewed as proof of the presence of UTPs or an imbalanced distribution of bargaining power. Further, the problems with establishing firm conclusions from these studies seem to additionally suggest that the focus in the research and policy should be broader and involve not only transactions between given parties, but try to look at the supply chain as a whole. This is because transactions within the supply chain are interdependent and therefore focusing on single transactions may lead us to overlook important interactions and effects appearing in the other stages of the agri-food supply chain.

As far as the studies into the effect of delayed payments are concerned, here the literature seems to be more unanimous. That said, as already mentioned, the existing evidence is mostly for a specific context of transition countries. These were countries characterised by several disruptions affecting the functioning of local agri-food markets (Rozelle and Swinnen, 2004). Therefore, the findings from this literature relate to the environment in which farmers' relationships with sectors downstream from them were much different than the one we currently observe in most of the EU Member States. That being said, this literature unanimously point to the fact that delayed payments from farmers' contractors do have a negative impact on investments undertaken at the farm and farm output. On the other hand, it should be noted that there is also evidence showing that some processors

tried to establish long-term relationships with farmers so as to give them more incentives to increase investments at the farm and thus increase their productivity and output levels (Dries and Swinnen, 2004; Dries et al., 2009; Swinnen, 2007). These actions involved processors trying to rebuild their reputation and trustworthiness by paying on time and providing their suppliers with various assistance programmes (see, for example, Gow et al., 2000). As several examples indicate, this had a very profound and quite rapid positive effect on both investment decisions and output at the farm level. What should also be noted is that there are several studies indicating that the assistance programmes mentioned above are not limited to large-scale producers and powerful downstream companies engage in transactions also with relatively small farm producers (see for example, Swinnen, 2007 and citations therein). Further, there are also some studies finding that powerful downstream companies are involved in activities which aim to make farm production practices more economically and socially sustainable and to better respond to consumer demand. In this light, unequal distribution of bargaining power does not need to lead to small farmers' exclusion from the market, nor to their marginalisation. Obviously, there is a need for further research to better understand under which conditions this optimistic scenario may take place.

The literature concerned with the issue of imbalance in the distribution of bargaining power within the agri-food supply chain also provides interesting insights with respect to tools that may help farmers to improve, at least to some extent, their position and countervail the power of processors and/or retailers. Through that, they may also be expected to indirectly address some concerns related to UTPs. One potential way to achieve that is through establishing producer groups/producer organisations. The rationale behind it is that acting together should contribute to strengthening farmers' relatively weak position in the food supply chain by allowing them to exploit economies of scale in producing and marketing their output (Menard, 2007). In line with this view, there exists some evidence indicating that producer groups may help farmers to reduce costs of contracting with third parties and reduce costs of organising transactions between many small farmers and a main contractor (Bijman et al., 2012; Hendrikse and Bijman, 2002).

In this context, several other issues which might be of interest to policy-makers could be mentioned. First, qualitative evidence shows that horizontal cooperation between farmers, even though it may be viewed as a tool which is likely to strengthen farmers' bargaining power vis-à-vis their contractors, is sometimes initiated by downstream firms. While at first this may look counter-intuitive, the rationale behind it could be presented as follows. Encouraging farmers to act together allows downstream firms to reduce costs related to organising transactions with their suppliers. Importantly, this may also help downstream firms to better control the quality of supplies. To see this, one may note that instead of getting involved in tedious negotiations with each and every supplier, downstream firms negotiate all the quality standards with the cooperative and the outcome of the negotiations is then binding to all cooperative members. Thanks to this, downstream firms

save on transaction costs and these savings apparently may exceed potential losses related to the fact that farmers are paid higher prices, due to their increased bargaining power. In relation to that, two further issues could be mentioned. One of them relates to free-riding which arises when the price provided to farmers as an outcome of negotiations between farmers' cooperative (association) and a downstream firm applies also to those farmers who are not members of the cooperative. The second problem relates to adverse selection and stems from the fact that a cooperative often gathers heterogeneous producers as far as the quality of their product is concerned. In that case, the likely scenario is that low-quality producers will drive high-quality producers out of the market.

Another potential tool to increase farmers' bargaining power, and thus to indirectly decrease their vulnerability to UTPs, is to make their product unique on the market. Indeed, there is some evidence indicating that farmers producing niche products allow their contractors (be it retailers or processors) to use these supplies in order to distinguish themselves from their competitors. An example of such niche products may include Protected Designation of Origin (PDO) products. Another example of how the countervailing power of downstream segments of the agri-food supply chain can be achieved relates to technological innovations applied at the farm level, which allow farmers to offer high-quality products and to deliver them throughout the year.

3.3. UTP's impact on consumers

When trying to capture the impact of UTPs on consumer welfare the main challenges largely overlap with the ones mentioned in relation to capturing the impact of UTPs on farmers. Three of them seem to be the most important. First, UTPs are a collective name for very heterogeneous practices which may include, for example, transferring additional risks or costs onto a contractor, terminating the relationship without having justified reasons for doing so, receiving benefits without providing adequate services in return, or introducing retroactive changes to the contract (European Commisison, 2014). What follows is that it is difficult to find a study focusing on the impact of UTPs as a whole. Instead, most of the studies focus on a specific measure which is often considered to qualify as UTP. Further, most of the existing papers investigate the impact of a given business-to-business practice regardless of whether it is fair or unfair.

The second challenge relates to the fact that there is no consensus among researchers regarding the impacts of UTPs on consumers. The results obtained up to this date are conditional on the assumptions taken, market conditions analysed and available data.

The data required for analysing the issue in question constitute the third important challenge. These are typically private information which firms do not want to share. As a result, a majority of papers trying to explain various impacts that UTPs may have on

consumers is theoretical. In contrast, there are very few studies that would bring these different theories to empirical testing.

The main empirical approaches adopted by studies investigating the effects of UTPs on consumers can be classified as follows. The first takes advantage of various types of micro data, such as: the scanner data, home scan, new product databases (Villas-Boas, 2007; Bonnet and Dubois, 2015; Richards and Patterson, 2004 or Sudhir and Rao, 2006). These data are applied to econometric analysis, which is aimed at estimating some of the unobserved private information usually concerning pricing behaviour of a given firm or firms from a specific sector. While this method can provide very valuable insights on, for example, using two-part tariffs, it neglects other forms of UTPs which may be present and which have some consequences for consumers. The other limitation of these kinds of studies is that they are heavily dependent on assumptions regarding the industry structure or the cost function of firms included in the analysis.

The second empirical approach to study the impact of UTPs on consumers is based on using surveys among firms/managers (Bloom et al., 2000; Rao and Mahi, 2003; Sudhir and Rao, 2006). This approach covers a number of important issues related to the impacts of UTPs. Yet, collecting these kinds of data can be problematic, as managers responding to the questionnaire may be reluctant to reveal some of the information relevant from the researchers' point of view. Further, this kind of data often allows for qualitative analysis rather than for quantitative analysis. What follows is that the question arises to what extent the results from studies using this approach can be generalised to a broader context and to what extent they can be used to highlight some details of the mechanisms behind the observed phenomena.

The third approach used in studies interested in identifying the impact of UTPs on consumers is to take advantage of highly aggregated data to illustrate general tendencies and confront them with the developed theories (Klein and Wright, 2007; Hamilton, 2003; Sullivan, 1997). While these studies offer good tools to explore some of the issues and allow for creating some stylised facts, they provide a very week tool for inference.

The fourth approach which seems the most appropriate to study the issue in question is based on store-level data and on actual shelf data, in particular (Wright, 2007). These data provide an opportunity to use econometric tools which enables estimating the causal relationship between the analysed phenomena. Yet, what should be stressed is that getting access to this kind of data is very difficult as they include sensitive information. Further, they are often limited to a particular store (chain at best) which means that they can show little about general trends and overall picture.

The fifth and final approach used in empirical studies interested in finding out what are the impacts of UTPs on consumers is a case study approach (Federal Trade Commission, 2003; Bronsteen et al., 2005). It allows for an in-depth analysis, but again the question arises whether it can be used for making general inferences.

The investigation of the specific effect that UTPs may have on consumers can be based on three alternative strategies. One is to focus on changes in consumer welfare in the situation when we move from fair to unfair practices. A change in consumer welfare can be approximated by the changes in prices that consumers pay for a certain bundle of their preferred products or by the changes in the quantities they can afford. Another strategy is to look at how using UTPs affects the variety of goods which are available on the market. Thirdly, one can investigate how moving from fair to unfair practices affects quality and safety of products that consumers can purchase. Alternatively, instead of looking at the introduction of UTPs — which might be difficult to observe — one can investigate the impacts of changes in intensity with which a given practice is used.

When trying to establish the impact of UTPs on consumer welfare, one can, for example, attempt to find out what share of benefits created by using UTPs by one or the other business partner is transmitted towards consumers. An often investigated practice in this context is the so-called reverse margin practice, which bundles the purchase of goods by buyers with some additional services which buyers offer to suppliers for a charge (e.g. listing fees, slotting allowances, negotiation fees, participation to quality programmes, new store opening etc.; for other definitional issues see also European Commission, 2014). Three aspects seem to be crucial here. The first one concerns the extent to which these reverse margin practices allow the transfer of risks incurred by buyers on suppliers (or, to put it in a slightly different way, to what extent reverse margin practices allow buyers to use supplier's money to compensate for certain risks that buyers incur). The second issue concerns the extent to which reverse margin practices allow the transfer of costs from buyers to suppliers. Finally, the third issue concerns the extent to which these practices allow buyers to extract a greater share from the surplus created in the relationship with a supplier. The Green paper prepared by the European Commission (European Commission, 2013) considers these practices to be unfair if the charge for these additional services is disproportionate to their value or to the risks incurred or if these practices are not transparent.

UTPs' impact on consumer surplus

The literature on the relationship between reverse margin practices and consumer surplus is inconclusive. Importantly, this relates to both theoretical studies as well as to empirical works. While a number of papers find that reverse margin practices reduce consumer welfare (Rennhoff, 2008; Chambolle and Christin, 2017; Shaffer, 1991; 2005; Marx and Shaffer, 2004; 2007; 2010; Bloom et al., 2000), others find an ambiguous effect (Foros et al., 2009; Innes and Hamilton, 2012; Miklós-Thal et al., 2011) and yet another set of studies points to a positive impact (Hamilton, 2003; Wright, 2007; Sullivan, 1997; Bronsteen et al., 2005; Wang et al., 2012).

The theoretical arguments behind these studies can be summarised as follows. A straightforward argument suggesting a negative impact of reverse margin practices on

consumer welfare is that suppliers need to cover the costs of the additional services they are charged for and this may imply an increase in prices. Some studies also provide theoretical models suggesting that reverse margin practices enable collusion among buyers and thus contribute to strengthening oligopoly power which in turn has a detrimental effect on consumer welfare (Piccolo and Miklós-Thal, 2012; Gilo and Yehezkel, 2015). On the other hand, some other theoretical models indicate that if buyers do not use their oligopsony power towards suppliers, then reverse margin practices may result in suppliers producing larger quantities. The latter result in turn is beneficial for consumers. The key factor to drive these different outcomes is the degree of competition between buyers (Hamilton, 2003). The higher the oligopoly power of buyers towards consumers, the higher the probability that reverse margin practices will decrease consumer welfare.

As far as the impact of retroactive changes to the contract and unjustified termination of the commercial relationship on consumer welfare is concerned, the following points seem to be worth noting. Similar to what was said above about the impact of reverse margin practice, one of the crucial parameters that decides whether consumers gain from retroactive changes/unjustified termination of the contract between buyers and suppliers is the degree of oligopoly power of the buyers (Weyl and Fabinger, 2013). Again, the higher the oligopoly power of the buyers, the lower the share of benefits gained from suppliers through UTPs, which is transmitted to consumers. In this context, it might be worth mentioning however that this conclusion is not that obvious, if we consider the situation in which only some buyers use UTPs, whereas others do not (Inderst and Valletti, 2011). If there is no close substitute for the product under investigation and buyers face competitive pressure from each other, we may have the so-called waterbed effect, i.e. the situation in which pushing down prices through UTPs may result in higher prices for consumers across all buyers. This is because more favourable conditions for more powerful buyers (those using UTPs) may lead to worse conditions for their less powerful competitors, as suppliers may want to price discriminate among them. In this case, consumer welfare would be deteriorated. If, in turn, close substitutes for a product under investigation exist, its suppliers have no incentives to price discriminate among the buyers and an increase in consumer welfare might be expected.

UTPs' impact on product variety

After briefly reviewing the evidence on the impact of UTPs on consumer welfare, it seems worth reviewing the existing studies and analysing the relationship between UTPs and product variety and innovation. One aspect which is relatively often researched in this context again concerns the impact of reverse margin practice. As before, however, the existing literature does not lead to unambiguous conclusions. Some papers indicate that reverse margin practices lead to a wider assortment (Innes and Hamilton, 2012; Hristakeva, 2016; Sullivan, 1997), others show no clear relationship (Rey and Whinston, 2013; Wright, 2007; Baake and von Schlippenbach, 2014), whereas yet other papers suggest that reverse

margin practices result in narrower assortment and less varieties (Marx and Shaffer, 2007; 2010; Bloom et al., 2000; Rao and Mahi, 2003).

On theoretical grounds, one can account for the negative relationship (i.e. reverse margin practice reducing assortment size) by recalling that shelf space in retailers' outlets is limited. What follows is that, assuming this shelf space is in demand among suppliers, reverse margin practices may act as an auction to select those suppliers that are willing to make the greatest concessions to retailers (or, to put it differently, to accept the highest charges for additional services) and thanks to this, to extract the highest rents possible (Marx and Shaffer, 2007; 2010). What may be additionally noted is that this scenario is particularly disadvantageous for small-scale producers, as they are the ones who cannot afford high bids (Shaffer, 2005). On the other hand, and this is the argument to explain why reverse margin practices may increase the assortment size, consumers' utility increases with the number of varieties offered on the market. While reverse margin practices increase retailers' prices, they also increase retailers' benefits from attracting marginal customers to their store. Increasing variety on offer helps to assure that customers are still willing to come to the store, notwithstanding the higher prices they have to pay (Innes and Hamilton, 2013). An interesting perspective on these issues is highlighted by Baake and von Schlippenbach (2014) who emphasise that the key parameters which are decisive for the ultimate effect of reverse margin practices on assortment size are retailers' bargaining power and the degree of substitutability between suppliers' products. High retailers' bargaining power and close substitutability between suppliers' products lead to a narrower assortment. In contrast, low retailers' bargaining power and lack of substitutability between suppliers' product leads to a larger assortment.

UTPs' impact on innovation

As regards the impact of reverse margin practices on innovation, the story is similar to the one explaining the impact of UTPs on assortment. One difference is that here we also need to take into account another dimension, namely the one related to risks which always accompany the introduction of a new product on the market. However, as before, in this case, the existing literature is inconclusive. Some papers suggest a positive relationship (i.e. reverse margin practices favouring innovation) (Sullivan, 1997; Klein and Wright, 2007; Richards and Patterson, 2004), whereas others suggest no clear relationship (Bloom et al., 2000) and yet another studies suggest a negative relationship (Chambolle and Christin, 2017; Shaffer, 1991).

Theoretical arguments which are used to support these results can be summarised as follows. A positive relationship between reverse margin practices and innovation can be explained by arguing that reverse margin practices compensate retailers with the risks associated with making shelf space available for new products. In addition, reverse margin practices act as a sort of screening-signalling mechanism. On the one hand, the charges related to these practices will be accepted only by those suppliers who are sure that their

innovation will be successful. On the other hand, consumers can also be sure that what they see on the shelf is a successful innovation. As far as the negative relationship between reverse margin practices and innovation is concerned, it can be supported by the following argument. These practices increase the costs of innovation and require a sizeable capital, especially for relatively small innovators. Further, these are sunk costs for a specific transaction. This in turn increases suppliers' vulnerability to unfair termination of the commercial relationship or retroactive changes to the contract and allows retailers to extract a higher share of surplus created by a given transaction. It might be noted however that Inderst and Wey (2007) argue for the opposite, i.e. that higher bargaining power of retailers and a threat of termination of the contract may encourage innovation as, under these circumstances, these are precisely the innovative products which allow suppliers to strengthen their financial situation.

UTPs' impact on quality and safety

Yet another issue considered in the literature devoted to impacts of UTPs concerns their effect on quality and safety of products purchased by consumers. That said, it should be noted that the literature on this issue is still very limited and mostly theoretical. Some of the studies adopt a broader view and investigate the impact of bargaining power on food quality and safety (Battigalli et al., 2007). Given the interest of this report, particularly interesting is the paper by Yehezkel (2014). This study argues that reverse margin practices, and slotting allowances in particular, provide suppliers with an incentive to quality testing and to provide products of high quality.

A related strand of the literature deals with food safety and food quality standards and tries to understand how these standards affect the governance of agri-food supply chains (Fulponi, 2006; Russo et al., 2014). One of the findings coming out of this literature which may be relevant to UTPs is that the latter seem to be highly interdependent. This means that it is rarely the case that a specific UTP is used in isolation. Instead, it occurs much more frequently that the whole package of UTPs is in place. This is of importance for the following reasons. Let us consider again reverse margin practices and recognise that they are a type of upfront payment made by suppliers to buyers (and therefore sunk costs incurred by one party to enter the transaction) and assume that there is also a threat of unfair termination of the contract by the buyer. If the contract is terminated, then the supplier cannot recover its sunk costs. In this context, the supplier has a strong incentive to comply with the conditions made by the buyer. This in turn may result in the so-called separating equilibrium in which only those suppliers that are certain to fulfil these conditions, i.e. those that are more efficient, will enter the relationship with the buyer. Less efficient suppliers will not enter the transaction, being afraid of buyers terminating the contract, without giving the suppliers a chance to recover their sunk costs. What follows is that the simultaneous presence of reverse margin practices and a threat of unfair termination of the contract give the buyer the opportunity to exert a strong control over their supply chain (ensuring that suppliers are efficient and meet the standards set by the buyer without being monitored). In

theory, if the standards relate to food quality and safety, then interdependence of UTPs may be in line with the interest of consumers. In practice however, everything depends on whether the buyer finds it profitable to introduce these particular standards.

Summing up, the literature is far from having a consensus on the impacts of UTPs on consumers. The magnitude and the sign of the effect seem to depend on several contingent factors. Holding all other things constant, UTPs may be expected to harm consumers if buyers have oligopoly power, products are undifferentiated and consumers exhibit low demand for variety. In contrast to several models dealing with market power, which often present both suppliers and consumers willing to limit the market power of the buyers, the literature on UTPs clearly shows that often the interests of suppliers and consumers may not be aligned with each other. While in some cases UTPs may be harmful for suppliers (farmers), they may be beneficial for consumers. This is important as it suggests that no matter what policy towards UTPs will be adopted, it will have to weigh the interests of one group against the interests of the other group.

3.4. Conclusions and policy implications

Even though there exist a number of good arguments for why UTPs may bring about negative consequences for various agents operating at different stages of the agri-food supply chain, the empirical evidence in this respect is very limited. Moreover, the scant evidence we do have is not unambiguous. Further, as the example of various opinions on slotting allowances clearly shows, we are still far from reaching a consensus on which practices should be considered as 'unfair' and which practices should be seen as an acceptable tool to increase one's chances to win the competition. What follows is that further research is needed to provide more insights into the issue in question and to see to what extent the concerns, which are often formulated both in political and academic circles about UTPs and their impacts, can be substantiated.

A related but distinct point is the following. Notwithstanding the fact that politicians and various decision-makers are under strong pressure to fight against UTPs, it should be emphasised that there are also many unknowns with respect to the effects of potential government responses aiming to address the assumed inefficiencies resulting from UTPs. As a result, any policy intervention in this area should be taken with caution. Further, before making the decision about optimal policy towards UTPs, it seems important to remember that something which is considered 'unfair' does not need to be inefficient, and vice versa.

It should also be noted that while fighting against UTPs may improve the situation of agents at a particular stage of the agri-food supply chain (for example, by contributing to lower prices for consumers) it may, at the same time, make governing transactions within the chain more difficult. This suggests that policy-makers concerned with UTPs should look at them, taking into account the whole supply chain and not only its specific elements or

relationships between particular agents. This discussion also clearly shows that policy goals behind any intervention addressing problems related to UTPs need to be well specified (as UTPs involve many contrasting interests), internally consistent with each other and transparent.

In this context, two other important questions arise. The first relates to whether we should opt for general rules regarding UTPs or to look into each and every individual case separately. From the consumers' perspective, the latter approach seems to be preferable. Yet, if we take a broader perspective (including the whole society) then the case-by-case approach might not be very effective, as it has to assume that in each case the harmed party will be able to sue the harming party. In addition, there is huge uncertainty with respect to the outcome of each litigation. The second question in turn relates to whether we should opt for EU or Member States regulation (see also Swinnen, 2017 in this volume). As an argument in favour of the former alternative, one could recall the 'waterbed effect' argument. If countries differ in terms of their attitude towards UTPs and suppliers can discriminate between different markets, then consumers in countries with stricter regulations on UTPs will suffer. The probability of the so-called 'forum shopping' will also add complexity to this picture.

3.5. References

Assefa, T., Meuwissen, M. and Oude Lansink A. (2014). 'Price Volatility Transmission in Food Supply Chains: A Literature Review', *Agribusiness*, 31(1), 3-13.

Baake, P., and von Schlippenbach, V. (2014). 'The Impact of Upfront Payments on Assortment Decisions in Retailing'. *Review of Industrial Organization*, 44(1), 95-111.

Bakucs, Z., Fałkowski, J. and Fertő, I. (2014). 'Does Market Structure Influence Price Transmission in the Agro-food Sector? A Meta-analysis Perspective'. *Journal of Agricultural Economics*, 65(1), 1-25.

Battigalli, P., Fumagalli, C., and Polo, M. (2007). 'Buyer power and quality improvements'. *Research in Economics*, 61(2), 45-61.

Bijman, J., Iliopoulos, C., Poppe, K.J., Gijselinckx, C., Hagedorn, K., Hanisch, M., Hendrikse, G.W.J., Kühl, R., Ollila, P., Pyykkönen, P., Sangen, G. van der (2012). *Support for Farmers' Cooperatives*, Wageningen: Wageningen UR.

Bloom, P.N., Gundlach, G.T., and Cannon, J.P. (2000). 'Slotting allowances and fees: Schools of thought and the views of practicing managers'. *Journal of Marketing*, 64(2), 92-108.

Bonnet, C. and Dubois, P. (2015). Identifying Two Part Tariff Contracts with Buyer Power: Empirical Estimation on Food Retailing. TSE Working Paper 15-575.

Bonnet, C., Dubois, P., Klapper, D. and Villas-Boas, S. (2013). 'Empirical Evidence on the Role of Nonlinear Wholesale Pricing and Vertical Restraints on Cost Pass-Through,' *The Review of Economics and Statistics*, 95(2), 500-515.

Bronsteen, P., Elzinga, K. G., and Mills, D. E. (2005). 'Price competition and slotting allowances'. *The Antitrust Bulletin*, *50*(2), 267-284.

Chambolle, C., and Christin, C. (2017). 'New Product Introduction and Slotting Fees.' Available at https://halshs.archives-ouvertes.fr/hal-01458949/document

Dries, L. (2017). 'The economic impact of unfair trading practices on upstream suppliers (farmers).' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Dries, L. and Swinnen, J.F.M. (2004). 'Foreign Direct Investment, Vertical Integration, and Local Suppliers: Evidence from the Polish Dairy Sector', *World Development*, 32(9), 1525-1544.

Dries, L. and Swinnen, J.F.M. (2010). 'The Impact of Interfirm Relationships on Investment: Evidence from the Polish Dairy Sector', *Food Policy*, 35, 121-129.

Dries, L., Germenji, E., Noev, N. and Swinnen, J.F.M. (2009). 'Farmers, Vertical Coordination, and the Restructuring of Dairy Supply Chains in Central and Eastern Europe', *World Development*, 37(11), 1742- 1758.

European Commission (2013). *Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*, COM/2013/037.

European Commission (2014). *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain.* Report prepared for the European Commission, DG Internal Market, DG MARKT/2012/049/E.

Federal Trade Commission (2003). *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories*. Available at: https://www.ftc.gov/sites/default/files/documents/reports/use-slotting-allowances-retail-grocery-industry/slottingallowancerpt031114.pdf

Foros, Ø., Kind, H. J., and Sand, J. Y. (2009). 'Slotting allowances and manufacturers' retail sales effort.' *Southern Economic Journal*, *76*(1), 266-282.

Fulponi, L. (2006). 'Private voluntary standards in the food system: The perspective of major food retailers in OECD countries.' *Food policy*, *31*(1), 1-13.

Gilo, D., and Yehezkel, Y. (2015). 'Dynamic downstream collusion with secret vertical contracts.' Available at https://iwww.tau.ac.il/~yehezkel/R_Yaron %20Yehezkel %20David %20Gilo %20Dynamic %20vertical %20relations_paper3.pdf

Gorton, M. and White, J. (2007). 'Transformation and contracting in the supply chains of the former soviet union: evidence from Armenia, Georgia, Moldova, Russia and Ukraine', in Swinnen, J.F.M. (Ed.), *Global Supply Chains, Standards and the Poor*, CABI, Oxon, 175-187.

Gow, H.R. and Swinnen, J.F.M. (1998). 'Up- and downstream restructuring, foreign direct investment, and hold-up problems in agricultural transition', *European Review of Agricultural Economics,* 25(3), 331- 350.

Gow, H.R., Streeter, D.H. and Swinnen, J.F.M. (2000). 'How private contract enforcement mechanisms can succeed where public institutions fail: the case of Juhocukor a.s.', *Agricultural Economics,* 23(3), 253-265.

Hamilton, S.F. (2003). 'Slotting allowances as a facilitating practice by food processors in wholesale grocery markets: profitability and welfare effects'. *American Journal of Agricultural Economics*, *85*(4), 797-813.

Hendrikse, G.W.J. and Bijman, J. (2002). 'On the emergence of new growers' associations: self-selection versus countervailing power'. *European Review of Agricultural Economics,* 29(2), 255–269.

Hristakeva, S. (2016). 'How Do Vertical Contracts Affect Product Availability? An Empirical Study of the Grocery Industry'. Available at http://hristakeva.com/files/Hristakeva_JMP.pdf

Inderst, R. and Valletti, T.M. (2011). 'Buyer power and the 'waterbed effect'.' *Journal of Industrial Economics*, 59(1), 1-20.

Inderst, R. and Wey, C. (2007). 'Buyer power and supplier incentives.' *European Economic Review*, 51(3), 647-667.

Innes, R. and Hamilton, S.F. (2012). 'Slotting Allowances and Product Variety in Oligopoly Markets.' Available at http://www.tse-fr.eu/sites/default/files/medias/doc/conf/iofood/IOFOOD2012/stephen_hamilton.pdf

Innes, R. and Hamilton, S. F. (2013). 'Slotting allowances under supermarket oligopoly'. *American Journal of Agricultural Economics*, 95(5), 1216-1222.

Klein, B. and Wright, J. D. (2007). 'The economics of slotting contracts.' *The Journal of Law and Economics*, 50(3), 421-454.

Loy J.P., Holm, T., Steinhagen, C. and Glauben, T. (2015). 'Cost pass-through in differentiated product markets: a disaggregated study for milk and butter', *European Review of Agricultural Economics,* 42(3), 441-471.

Lloyd, T.A., McCorriston, S., Morgan, C.W. and Rayner, A.J. (2006). 'Food scares, market power and price transmission: the UK BSE crisis', *European Review of Agricultural Economics*, 33(2), 119-147.

Marx, L.M. and Shaffer, G. (2004). 'Slotting allowances and scarce shelf space.' *Marketing Science*, 22(2), 198-230.

Marx, L.M. and Shaffer, G. (2007). 'Upfront payments and exclusion in downstream markets.' *The RAND Journal of Economics*, 38(3), 823-843.

Marx, L.M. and Shaffer, G. (2010). 'Slotting allowances and scarce shelf space.' *Journal of Economics and Management Strategy*, 19(3), 575-603.

McCorriston, S. (2002). 'Why should imperfect competition matter to agricultural economists?', *European Review of Agricultural Economics*, 29, 349–371.

McCorriston, S. (2013). *Competition in the Food Chain*. Background Paper for the OECD Competition Roundtable in Paris (October, 2013).

Menard, C. (2007). Cooperatives: Hierarchies or Hybrids? In: K. Karantininis and J. Nilsson (eds.) *Vertical Markets and Cooperative Hierarchies*. Springer, 1–17.

Meyer, J. and von Cramon-Taubadel, S. (2004). 'Asymmetric Price Transmission: A survey', *Journal of Agricultural Economics,* 55(3): 581-611.

Miklós-Thal, J., Rey, P., and Vergé, T. (2011). 'Buyer power and intrabrand coordination.' *Journal of the European Economic Association*, 9(4), 721-741.

OECD (2015). *Food Price Formation*. 7th Food Chain Analysis Network Meeting. available at: https://www.oecd.org/site/agrfcn/meetings/agrfcn-7-food-price-formation-paper-october-2015.pdf

OECD/FAO (2015). *OECD-FAO Agricultural Outlook 2015*, OECD Publishing, Paris, DOI: http://dx.doi.org/10.1787/agr_outlook-2015-en.

Perekhozhuk, O., Glauben, T., Teuber, R. and Grings, M. (2017). 'Approaches and methods for Econometric Analysis of Market Power: Survey and Empirical Comparison', *Journal of Economic Surveys,* 31(1), 303-325.

Piccolo, S., and Miklós-Thal, J. (2012). 'Colluding through suppliers'. *The RAND Journal of Economics*, 43(3), 492-513.

Rao, A. R. and Mahi, H. (2003). 'The price of launching a new product: Empirical evidence on factors affecting the relative magnitude of slotting allowances'. *Marketing Science*, 22(2), 246-268.

Reardon, T. and Timmer, C.P. (2007). 'Transformation of markets for agricultural output in developing countries since 1950: how have things changed?', in Evenson, R., Pingali, P. and Shulz, T.P. (Eds), *Handbook of Agricultural Economics: Agricultural Development*, Vol. 3, Elsevier, 2807-2855.

Rennhoff, A. (2008). 'Paying for shelf space: An investigation of merchandising allowances in the grocery industry'. *Journal of Agricultural and Food Industrial Organization*, 6(1), 1233.

Rey, P. and Whinston, M. D. (2013). 'Does retailer power lead to exclusion?'. *The RAND Journal of Economics*, 44(1), 75-81.

Richards, T. J. and Patterson, P. M. (2004). 'Slotting allowances as real options: an alternative explanation'. *The Journal of Business*, 77(4), 675-696.

Rozelle, S. and Swinnen, J.F.M. (2004). 'Success and failure of reform: insights from the transition of agriculture', *Journal of Economic Literature,* 42(2), 404-456.

Russo, C., Sorrentino, A. and Menapace, L. (2017). 'The impact of UTPs on consumers: review of empirical studies.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Russo, C., Perito, M. A., and Di Fonzo, A. (2014). 'Using private food safety standards to manage complexity: a moral hazard perspective'. *Agricultural Economics Review*, 15(2), 113-125.

Sexton, R.J. (2013). 'Market power, misconceptions, and modern agricultural markets'. *American Journal of Agricultural Economics*, 95(2), 209–219.

Sexton, R.J. and Lavoie, N. (2001). Food processing and distribution: An industrial organization approach, In: Gardner, B., Rausser, G. (Eds.), *Handbook of Agricultural Economics, Elsevier Science B.V.*, Amsterdam, Holland, 863–923.

Shaffer, G. (1991). 'Slotting allowances and resale price maintenance: a comparison of facilitating practices'. *The RAND Journal of Economics*, 22(1), 120-135.

Shaffer, G. (2005). 'Slotting allowances and optimal product variety'. *The BE Journal of Economic Analysis and Policy*, 5(1), Article 3.

Sheldon, I. and Sperling, R. (2003). 'Estimating the extent of imperfect competition in the food industry: what have we learned?', *Journal of Agricultural Economics,* 54, 89–110.

Sudhir, K., and Rao, V.R. (2006). 'Do slotting allowances enhance efficiency or hinder competition?'. *Journal of Marketing Research*, 43(2), 137-155.

Sullivan, M.W. (1997). 'Slotting allowances and the market for new products'. *The Journal of Law and Economics*, 40(2), 461-494.

Swinnen, J.F.M. (Ed.) (2007). *Global Supply Chains, Standards and the Poor*, CABI, Oxon.

Vavra, P. and Goodwin, B.K. (2005). 'Analysis of Price Transmission Along the Food Chain', OECD Food, Agriculture and Fisheries Working Papers, No 3, OECD.

Villas-Boas, S. (2007). 'Vertical relationships between manufacturers and retailers: Inference with limited data'. *The Review of Economic Studies*, 74(2), 625-652.

Wang, Y. Y., Lau, H. S., and Wang, J. C. (2012). 'Defending and improving the 'slotting fee': how it can benefit all the stakeholders dealing with a newsvendor product with price and effort-dependent demand'. *Journal of the Operational Research Society*, 63(12), 1731-1751.

Weyl, G. and Fabinger, M. (2013). 'Pass-Through as an Economic Tool: Principle of Incidence under Imperfect Competition', *Journal of Political Economy*, 121(3), 528-583.

Wright, J. D. (2007). 'Slotting contracts and consumer welfare'. *Antitrust Law Journal*, 74(2), 439-472.

Yehezkel, Y. (2014). 'Slotting contracts and consumer welfare'. *Journal of Industrial Economics*, 62, 309-345.

4. Regulating UTPs: diversity versus harmonisation of Member State rules

Johan Swinnen and Senne Vandevelde

LICOS, KU Leuven

4.1. Introduction

UTPs are defined by the European Commission (2013) as 'practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing and which are typically imposed in a situation of imbalance by a stronger party on a weaker one and can exist from any side of the B2B relationship and at any stage in the supply chain'. UTPs include, among other things, unilateral changes to existing contracts, unauthorised late payments and the refusal to negotiate a contract. Many of these practices are illegal under existing rules of contract and civil law. Yet the discussion on UTPs has intensified considerably among food chain actors and policy-makers alike in recent years, leading to a surge in specific UTP legislation. A big argument in favour of specific rules on UTPs is the so-called 'fear factor', which prevents victims of UTPs to take action through fear of losing their business altogether. One can imagine that this factor is even more acute in situations of extreme imbalance in market power between buyers and suppliers, as is often the case in the food supply chain.

This note provides an overview of the regulatory environment within which UTPs currently operate. Most notably, apart from a voluntary framework, there is no specific European legislation on the issue. As such, the regulation of UTPs is almost completely left to the Member States. Most of them have some sort of legislation in place, but the modalities and the stringency of those rules varies widely across countries. Therefore, this note contains the following sections. First, we discuss some conceptual issues related to EU harmonisation in general, arriving at a cost-benefit framework. Second, we introduce a classification and a ranking of the different Member States in terms of the stringency of their treatment of UTPs. In the third section, we briefly consider the effectiveness of the UTP regulation by looking at some countries' regulations in more depth. In the fourth section, we look at the UTP rules at the European level while the fifth section uses all of these different elements to apply the conceptual framework to the specific issue of UTPs. Finally, this note concludes by offering a tentative recommendation which aims to take into account most of the arguments presented.

4.2. Conceptual framework of EU harmonisation

In light of the already extensive efforts to investigate the usefulness of EU-wide UTP regulation and in the anticipation of a more rigorous impact assessment, this note aims to take a step back and provide a more general economic conceptual framework, as well as some of the more detailed arguments for or against harmonisation of UTP rules.

From the outset, it is clear that harmonisation at the EU level of any type of regulation (not just UTP regulation) will have costs and benefits. The analysis of the costs and benefits of the optimal level of regulation has a long tradition in the economic literature, going back to Tiebout (1956), who argued that local authorities are best placed to enact and implement regulation when citizens are mobile between the different localities. The reasoning behind this is that people will choose those states or communities that offer the services that best correspond to their preferences. His argument offers a logical explanation for the variety of legal systems (as shown in the previous sections) that exist today. Of course, Tiebout's model only works when certain, rather restrictive, conditions are met. Citizens have to be equally informed about regulation everywhere, people have to be completely mobile and regulation in one place cannot have repercussions for people living somewhere else. Whatever its limitations, Tiebout's work allows and forces us to think about decentralisation of regulation as the default state of the world. The question regulators should then ask themselves is not what should be decentralised, but rather what should be centralised (or harmonised). This is what is sometimes referred to as 'bottom-up federalism' and has also to some extent been embraced by the European lawmakers through the subsidiarity principle which has been in effect since the Maastricht Treaty (1992). The principle says that higher levels of government should not perform tasks that can be performed better by a lower level of government. For every different issue, it is thus up to the regulator to trade off the benefits and costs of the harmonisation of regulation. Below, we provide an overview of four benefits and three costs that should always be considered when analysing harmonisation.

The first benefit of harmonisation is that it allows for the **regulation of transboundary phenomena**. Within the European Union, given the size and proximity of the different Member States, this is of course an important argument. Indeed, one would be hard-pressed to find regulatory issues that do not have any cross-border implications. However, several scholars have warned against using the transboundary nature as such as an argument for harmonisation (see for example, Faure, 2001). After all, domestic laws can be applied externally or can be enforced through cross-border monitoring.

The second benefit of harmonisation is that it is a step in the direction of a more complete **common market**, whereby competition takes place under the same conditions. Whereas this is more a political argument, it is intimately related to the economic argument of

preventing a **'race-to-the-bottom'** in regulation between countries. This argument says that competition between jurisdictions will incentivise the creation of rules that are welfare-decreasing, in which case firms could decide to relocate to those countries with the most lenient rules. Likewise, companies supplying firms in countries with lax rules would be at a disadvantage (because they would be more open to abusive practices) versus companies supplying firms in countries with more stringent rules, even if those suppliers are located in the same country. This could be considered as unfair competition.

A third benefit of harmonisation is related to **economies of scale in administration** (Faure, 2001). The argument here is that one (EU) administration to implement and enforce a certain issue will always be cheaper than 28 different Member State administrations. However, as the case with competition law has shown, having something regulated at European level does not necessarily mean that there will be no national authorities anymore (each country still has its national competition authority).

A final, somewhat related, benefit of harmonisation is **transaction cost savings**. Under uniform Community rules, firms and citizens must not spend on information costs. They do not have to inform themselves about differences in the substantive law of the EU Member States and the way in which these rules are enforced (Van den Bergh, 1998). These transaction cost savings may be very important for firms that are active in interstate commerce. Uniform rules also help to maintain economies of scale in production and distribution arrangements. If diversity in rules prohibits firms from using the same production and marketing techniques in larger areas, scale economies may be lost. This could potentially have ramifications for consumers as well: if suppliers are unable or afraid to be operating in different markets due to this legal uncertainty or variety, they might never achieve the necessary scale to be able to engage in meaningful research and development operations, thus depriving consumers of innovations and potentially lower prices for certain goods (Renda et al., 2014).

Of course, as with most policy decisions, harmonisation also has costs. The first cost of harmonisation concerns the cost of **deviating from every community's or every country's social optimum**. In every country, all the actors in the economy (firms, government, consumers …) have preferences with regard to most types of regulation. As such, in every economy, there exists a socially optimal level of regulation which accurately trades off the costs and benefits within that economy. This need not coincide with the political optimum which in turn depends on the bargaining and lobbying power of the different actors. In any case, whenever there is harmonisation of regulation between different economies, the outcome will be a weighted average of the different countries' social (or political) optimum. As such, this harmonisation cost for any single economy can be accurately represented as the difference between the level of harmonised regulation and the social optimum of that country. This means that sometimes 'divergent legal rules are better able to satisfy heterogeneous preferences of a large population and may thus contribute to increased welfare in the European internal market' (Van den Bergh, 1998). It is worth noting that

without any changes to the actors' preferences, this harmonisation cost will have to be incurred every year, rather than once.

There is also the issue of **switching costs**, which in this context refers to the costs incurred by administrations when they switch from one set of rules to another. As shown by Carbonara and Parisi (2007), switching costs are always an impediment to legal harmonisation. They can be considered here as a one-period instantiation for authorities of the harmonisation costs already described in the previous paragraph.

Finally, as with any policy decision, harmonisation can lead to **over-regulation**. This is intimately related to the politics of harmonisation. In addition to the deviation to a country's social optimum, the political environment in the EU might be such that the policy that is eventually obtained deviates even more from the socially optimum point. Over the course of the process of European integration, there is ample evidence that European policy-makers have opted to adopt the most stringent legislation among the different Member States. For instance, in the so-called 'Chocolate war', European legislators eventually landed close to the (rather stringent) French policy (Meloni and Swinnen, 2016). The same is true for the European wine policy, with European wines not being allowed to be produced from imported grapes (Meloni and Swinnen, 2014).

4.3. A classification and ranking of UTP regulatory frameworks in Member States

In 2016, the European Commission published a report (COM(2016) 32 final) on unfair business-to-business trading practices in the food supply chain. In addition to detailing the issue of UTPs itself and offering a description of the early experiences with the Supply Chain Initiative, the report mainly focuses on the different ways in which EU Member States have undertaken action to combat UTPs. In particular, the report makes a broad distinction between three different categories of Member States: those without any UTP legislation, those with only a voluntary platform and those with dedicated UTP legislation in place.

Member States without Regulation

Not many countries remain without any form of dedicated UTP legislation or voluntary framework in the EU. Five Member States are classified in that category: Denmark, Luxembourg, Malta, Poland and Sweden. This list has been growing increasingly thin over the past couple of years as more and more countries have decided to introduce some form of legislation. In the countries where no specific regulation exists, the law prevents many of the practices that have been classified as UTPs and as such, victims of UTPs always have the option to take their counterparties to court under general legal rules.

Member States with voluntary platforms

There are four countries with only a voluntary platform: Belgium, the Netherlands, Finland, Estonia, with Belgium being the country having the longest exposure among them (since 2010). In fact, the Belgian initiative has served at least in part as inspiration for the EU-wide Supply Chain Initiative (SCI), which in turn is what most platforms in other countries were modelled after. The initiatives have all been established with the aim of bringing together the different actors in the food value chain and resolving issues with UTPs internally. Furthermore, all participants are expected to sign a declaration detailing a list of UTPs that should be avoided and the rules of procedure of the platform. Voluntary platforms have obvious limitations with regard to enforcement. They have been operating with mixed success: while the Belgian platform has been in operation for quite some time now and is widely reported to have had positive impacts, the Finnish platform was abandoned by the national farmers' union after only one and a half years' existence.

Member States with UTP regulation

The final category comprises 20 Member States who have, in some way or another, introduced or amended legislation with the specific aim of targeting UTPs in the food sector. 15 out of those 20 countries have introduced regulation in the past 6 years while others have changed their already existing regulations. Others are considering introducing new rules in the months and years to come. It is thus clear that a true regulatory push has been materialising in recent times.

Differences in type of legislation and coverage

If we were to look only at the typology introduced by the Commission, it would seem as if the legislation on UTPs is converging across Member States. While this may be true to an extent, the typology masks considerable further heterogeneity in the treatment of UTPs. In this section we will first provide a slightly more detailed classification of the different regulatory frameworks in the EU and we will continue to refine it until we arrive at a tentative ranking of EU countries in terms of the stringency with which UTPs are treated. For that reason, we provide a more detailed classification along two dimensions, which more accurately captures the underlying differences.

First, we classify countries' regimes according to the coverage of UTPs in their legislation or initiatives. More specifically, we look at a research study conducted by CEPS (Renda et al., 2014) and categorise a country as one with low coverage if the number of UTPs covered does not exceed six (out of a list of 11 UTPs, which can be found in the Annex). A country is considered to have high coverage if more than six UTPs are explicitly or implicitly mentioned in their legislation or initiatives.

The second dimension along which Member States are classified, pertains to the type of legislation used. A distinction is made between four categories: countries without any (explicit) regulation with regards to UTPs (as in the previous section), countries with only a voluntary, self-regulatory initiative (again, as in the previous section), countries which have

decided to adapt or extend existing regulation to account for UTPs (which usually involves modifications to the country's competition laws) and finally countries which have introduced specific legislation and agencies to tackle UTPs. We try to be exhaustive in composing this classification: if a country has both specific legislation and a voluntary initiative, it is categorised as having specific legislation since we consider this to be the more stringent of the two.

Coverage/Legal treatment	None	Private	Stretched existing legislation	Specific legislation
Low	Denmark Luxembourg Malta Poland Sweden	Belgium Estonia Netherlands	Cyprus Finland Germany	Bulgaria Ireland Latvia Portugal Spain
High	/	/	Austria Greece	Croatia Czech Republic France Hungary Italy Lithuania Slovenia Romania Slovakia United Kingdom

Table 1. Evidence of regulatory fragmentation in UTP regulation

Table 1 summarises the results of this first classification exercise. There is considerable regulatory fragmentation across the EU Member States. While the problem of UTPs is universal (as demonstrated by several surveys among food market participants), Member States have decided to legislate the issue in divergent ways. Some have even come to the conclusion that existing laws and regulations are already sufficient to tackle the issue. There is a positive correlation between more specific legislation and the number of UTPs covered.

While this classification already offers a good idea of the UTP regulatory landscape in the EU, further distinctions can and should be made. For instance, within the category of countries that have introduced specific legislation, different enforcement models of those rules are being used. For instance, countries like France and the UK have created dedicated agencies to go after those that break the UTP rules. In the next section, we offer examples of such cases. In all countries with dedicated enforcement mechanisms, the agencies have so-called *ex-officio* powers, which means they are authorised to open, conduct and conclude their own investigation into UTP infractions. Furthermore, most (but not all) enforcement agencies allow victims of UTPs to lodge confidential complaints, which is aimed at

addressing the 'fear factor'. In the other countries with specific legislation, enforcement is usually conducted by the competition authorities or by the civil court system, which are considered here as less stringent than dedicated enforcement. We also consider whether or not a Member State has a voluntary platform or code on UTPs (in addition to legislation). When taking these further distinctions into account, we can construct a ranking of countries in terms of the stringency with which they deal with UTPs. This ranking is shown in Table 2, with all the criteria that have been considered for constructing it.

Rank	Country	Legal treatment	Enforcement			Coverage (%)	Private code
			Authority	*Ex officio*	Confidentiality		
1	Croatia	Specific	Dedicated	Yes	Yes	91	Yes
2	France	Specific	Dedicated	Yes	Yes	73	Yes
3	United Kingdom	Specific	Dedicated	Yes	Yes	73	Yes
4	Hungary	Specific	Dedicated	Yes	Yes	55	No
5	Spain	Specific	Dedicated	Yes	Yes	27	Yes
6	Romania	Specific	Dedicated	Yes	No	64	No
7	Slovakia	Specific	Dedicated	Yes	No	55	No
8	Portugal	Specific	Dedicated	Yes	No	18	Yes
9	Slovenia	Specific	Competition	Yes	Yes	91	Yes
10	Czech Republic	Specific	Competition	Yes	Yes	64	Yes
11	Lithuania	Specific	Competition	Yes	Yes	55	Yes
12	Latvia	Specific	Competition	Yes	Yes	45	Yes
13	Italy	Specific	Competition	Yes	No	100	No
14	Bulgaria	Specific	Competition	Yes	No	18	Yes
15	Ireland	Specific	Competition	No	No	55	No
16	Germany	Stretched	Competition	Yes	Yes	45	Yes
17	Cyprus	Stretched	Competition	No	Yes	45	No
18	Austria	Stretched	Competition	No	No	55	No
19	Finland	Stretched	Competition	No	No	18	Yes
20	Greece	Stretched	Court	No	No	55	No
21	Belgium	Voluntary	Court	No	No	36	Yes
22	Estonia	Voluntary	Court	No	No	36	Yes
23	Netherlands	Voluntary	Court	No	No	36	Yes
24	Sweden	None	Court	No	No	0	Yes/No
25	Poland	None	Court	No	No	0	Yes/No
26	Malta	None	Court	No	No	0	No
27	Luxembourg	None	Court	No	No	0	No
28	Denmark	None	Court	No	No	0	No

Table 2. Ranking of EU Member States in terms of the stringency of their UTP regulatory framework

4.4. Effectiveness of Member State regulations

The ranking shown in Table 2 is a measure of the stringency of a Member State's UTP regulatory framework. It should not be considered as a measure for the effectiveness with which the problem of UTPs is being addressed within a certain Member State. A country low

in the ranking could be more effective in preventing and combating UTPs than even the highest country on the list. Indeed, as we will show here, Belgium for instance, ranked only 21st on our ranking, yet has been rather successful in dealing with UTPs by keeping all the actors in the chain involved in its voluntary framework. Additionally, in Figure 1 it is shown that there is no clear correlation between the stringency of a country's regulation and its effectiveness.

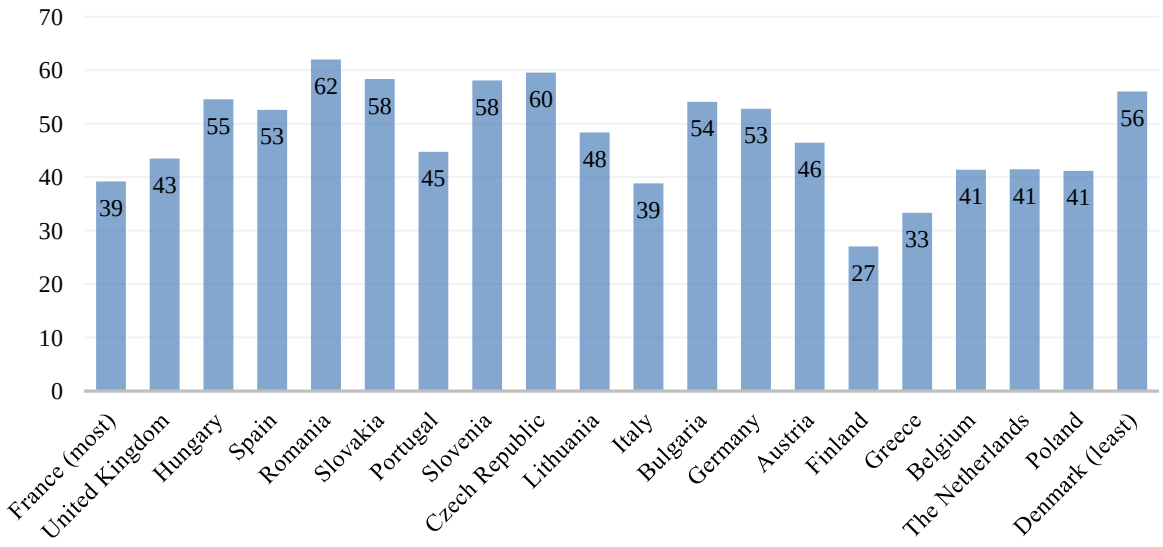

Figure 1. Perceived occurrence (in %) of UTPs by Member State, ranked from most stringent to least stringent UTP regulatory framework (*Source*: Gentile et al., 2016 and own calculations)

To have a closer look at the effectiveness of UTP regulations, it is worth focusing our attention on a couple of notable case studies. After all, as the previous sections have shown, there is considerable regulatory diversity in the treatment of UTPs between the different EU Member States. We will look more closely at five countries, each coming from a different side of the regulatory spectrum: France; the UK; Germany; Belgium and Denmark. We will briefly consider each country's history in dealing with UTPs and discuss the different reasons why administrations have decided to legislate this issue in such diverse ways. At the end of this section, we will distil the main takeaways from these case studies.

France

In Table 2, France is among the highest ranked countries in terms of the stringency of their approach in dealing with UTPs. Other countries, such as Croatia, the UK, Hungary and Spain are comparable in terms of the instruments and methods used but, in our opinion, France

has one of the most comprehensive and dense set of measures and agencies all working to address the issue of UTPs.

The most important piece of legislation governing the problem of UTPs is the 'Droit des pratiques restrictives' which is a part of the commercial code (Renda et al., 2014). It is specifically aimed at dealing with unfair practices in vertical relations. In addition, UTPs sometimes are the subject of investigations in the context of competition law (specifically those articles referring to the abuse of economic dependence) and there are specific regulations (and references) included in the 2010 law on the modernisation of the agricultural and fishing sectors. Finally, France is not only relying on public legislation to combat UTPs, it has also recently started using private and/or voluntary initiatives to complement the public portfolio of rules. The French authorities have even developed a label, called 'Relations fournisseur responsables', which is awarded to companies who engage in sustainable and responsible relationships with their suppliers. A 'Médiateur inter-entreprises' deals with mediation in case of conflict regarding commercial relations across sectors.

The French system is not only far-reaching in terms of legislation, but also in terms of enforcement. Most importantly, the 'Direction générale de la Concurrence, de la Consummation et de la Répression des Fraudes' (DGCCRF), which reports to the Ministry of Economy, can initiate its own investigations, receive confidential complaints from suppliers and, if needed, refer cases to the criminal courts, which in turn have the authority to impose criminal sanctions like fines and imprisonment. Additionally, the Ministry has the power to engage in structural injunctions, forcing a company to sell off assets to competitors in case of wrongdoing.

United Kingdom

The genesis of the UK's experience with UTPs in the food sector can be traced back to 2001 when the Competition Commission first decided to investigate the groceries retailing sector. Following this investigation, a code of practice was introduced to govern the relations between the major supermarkets in the UK and their suppliers, called the 'Supermarket Code of Practice'. The success of this voluntary initiative was limited since the number of complaints by suppliers kept on rising. Eventually, the Competition Commission decided to launch a second investigation in 2008.

While that second report concluded there was no evidence of abuse by retailers vis-à-vis consumers, it expressed concern about some practices that had an impact on upstream suppliers. For that reason, it called for the creation of a Groceries Supply Code of Practice (GSCOP) and of an Ombudsman to enforce such a code. The Code was eventually created in 2009 and the role of Ombudsman was to be performed by a so-called Groceries Code Adjudicator (GCA), which started its operations in 2013. The GCA only oversees the relationships between the 10 biggest retailers in the UK (each with an annual turnover of more than GBP 1 billion) and their direct suppliers. It has the power to launch its own

investigations into violations of the code by retailers, but also to mediate between retailer and supplier at the supplier's request. Recently, the GCA has also obtained the power to impose significant financial penalties on retailers who are in violation of the GSCOP (up to 1 % of annual turnover).

Germany

In contrast with France, Germany has not decided to create new and specific rules with respect to UTPs, but rather to stretch their already existing competition law, unfair competition law and contract law. In particular, three pieces of legislation play an important role in legislating UTPs: the Act Against Unfair Competition, the Act Against Restraints of Competition and the German Civil Code (Renda et al., 2014). They often overlap and perform complementary roles in the combat against UTPs. To show how the German authorities have stretched their existing legislation to address UTPs, it is worth considering the Act Against Unfair Competition, which at first was only applicable to the relations between companies and their end consumers, but was then extended to also include the relationships between companies and their suppliers.

In terms of enforcement, only those practices addressed by competition law can be subject to confidential complaints and *ex officio* investigations as only the national competition authority has the ability to do so.

In addition, a voluntary platform was also established in 2013 by four organisations which together represent the entire food supply chain. The platform is aimed at implementing and enforcing the principles of the European Supply Chain Initiative and also offers a dispute-resolution tool to its subscribers. The dispute resolution mechanism relies on mediation, arbitration and even in some cases, expert opinions.

Belgium

Belgium is the country with the longest experience in having a voluntary scheme to combat UTPs. The scheme was established in the context of the so-called 'Agro Food Chain Consultation', which brings together representatives of all the different stages in the agricultural value chain, from farmers and input suppliers over processors, to retailers. The Agro Food Chain Consultation started its operations in 2009 and the code of conduct for fair relationships between suppliers and purchasers was signed in the subsequent year (Agro Food Chain Consultation, 2010). It has been in operation since that time and in contrast with comparable schemes in other countries (for instance, Finland), it is generally considered to be a success, proven by the continued involvement of the farmers' unions and the fact that the Belgian model was used as a blueprint for the EU-wide Supply Chain Initiative.

The code applies to all links within the food chain and while many of the principles of good practices are about UTPs, the code also contains stipulations on the sustainable development of the chain (defined as finding a good balance between 'society', 'environment' and 'economy'), the careful handling of food products and the sourcing of

local produce where possible. As such, the philosophy behind the code of conduct is much broader than comparable instruments in other countries. In choosing such a broad scope of the Agro Food Chain Consultation, its architects intended to avoid turning the voluntary scheme into a zero-sum game between suppliers and retailers, which is often the case when the discussion is only about UTPs. The code also offers multiple possibilities for dispute settlement between the different parties. Both individual and aggregated complaints are welcomed and dealt with by the committee that oversees the activities related to the code of conduct. The aggregated dispute settlement mechanism can also be initiated by any of the committee members, which means that farmers can for instance complain with their union, who in turn raises the issues within the context of the Agro Food Chain Consultation. This removes at least some of the hurdles associated with the 'fear factor'.

Denmark

With all the countries discussed so far having undertaken steps to go against UTPs, it is useful to consider a case of a country where no regulation or voluntary framework has been introduced. This is the case for Denmark, even though its retail sector is among the most concentrated in the EU. The argument of the Danish authorities is specified in their response to the European Commission's (2013) Green Paper on UTPs (Danish Ministry of Industry Business and Financial Affairs, 2014). They claim that most of the issues presented in the Green Paper are already adequately addressed by their competition and marketing laws. In particular, they refer to the Danish Marketing Practices Act (which is a part of unfair competition law and was an implementation of the EU Directive on Unfair Commercial Practices), the Danish Competition Act (national competition law) and the Danish Contract Act (Renda et al., 2014). For those issues that are not covered, they fear that additional legislation might endanger the carefully struck balance between contractual freedoms and the protection of the weaker parties in an agreement. Moreover, the Danish authorities also believe that the agreed trade terms are followed in most trade relationships. In other words, they are of the opinion that UTPs in contractual relations are the exception rather than the rule.

Further, when it comes to addressing the 'fear factor', the Danish government suggests that making confidential complaints and *ex officio* investigations possible might encroach on the stronger party's (in most cases the retailer's) right to a fair trial.

Takeaways from case studies

From these different case studies, a number of takeaways can be distilled which could be useful for any form of legislation that might be introduced at the EU level in the future. The same of course applies to those countries that have not yet introduced any UTP-specific legislation or those thinking about making adjustments to their current framework.

First of all, as shown in the Belgian case, it is a good idea to widen the scope of the discussions on UTPs. The signatories of the Belgian initiative deliberately engaged in talks

about trying to enlarge the value of the agricultural sector as a whole, while considering the issue of UTPs as an important part of the discussion. They realised that it is easier to talk about dividing a pie when the size of that pie is growing. It has ensured that the farmers' organisations have stayed on board and thus partly explains the success of the Belgian initiative. At the European level, the legislators might translate this Belgian experience by including the discussion on UTPs in the general discussions on the CAP or by enlarging the scope of the SCI, rather than continuing to consider it as a separate issue.

Second, the 'fear factor' is absolutely key when it comes to introducing effective legislation to deal with UTPs. This is clear in the context of each case study we have considered, but especially for the UK. One of the main reasons the original voluntary framework was unsuccessful was the lack of a mechanism which allowed for confidential complaints and *ex officio* investigations. Only when that possibility was introduced with the GCA, the perception of the framework changed considerably. One could even argue the 'fear factor' is the main reason why countries decide to explicitly legislate UTPs in the first place. After all, many of the transgressions that are considered to be UTPs, such as changing contract terms, are already illegal under existing law and can thus be tried in front of the court. However, this does not mean it is strictly necessary to introduce public legislation to address the fear factor. The example of Belgium for instance has shown that voluntary initiatives (when they succeed in keeping the suppliers' representatives on board) can also provide ways to make suppliers less afraid to raise issues related to UTPs with their buyers. In any case, whatever legislation the European Commission decides to introduce it will have to take the 'fear factor' into account more than the current SCI is doing (Gentile et al., 2016).

Lastly, with the important caveat the 'fear factor' being adequately addressed, existing legislation already possesses many tools to deal with the problem of UTPs. This is especially clear when considering the example of Germany where no new laws were created to deal with this issue. Moreover, as mentioned before, many UTPs are by definition illegal (consider, for instance the case of Denmark), so they must be included somewhere in the existing legislative frameworks of almost every EU Member State. What this takeaway means for the European context is that legislators should first consider whether there are no laws or initiatives that already exist which could be stretched to also be applicable to UTPs. For instance, one immediately thinks about the harmonised consumer protection in the unfair commercial practices directive (Directive 2005/29/EC) which could quite readily be extended to the protection of suppliers against UTPs.

4.5. Current status at EU level

There are currently no specific rules at the EU level governing UTPs. This does not mean, however that the question of harmonisation has not been the subject of much debate at the European level. Already in 2009, the European Commission started to consider UTPs as a

potential problem in the food supply chain. Against the backdrop of global food price spikes, it published a communication on the 'Better functioning of the food supply chain in Europe' (COM(2009) 591), mentioning UTPs for the first time. One year later, in 2010, the decision was taken to establish the 'High-level forum for a better functioning food supply chain' (Decision 2010/C 210/03), which eventually resulted in the principles of good practice (2011) and the creation of the voluntary Supply Chain Initiative (2013). The work of the High-level forum is set to continue until at least 2019 (Decision 2015/C 179/03). In 2013, the Commission also published a Green Paper on this UTP (European Commission, 2013). All these efforts culminated in another report by the European Commission in 2016 (COM(2016) 32 final), which outlines the regulatory efforts against UTPs so far and the plans for the future.

The report discusses, among other things, the performance of the SCI and finds generally satisfactory results, even though it also calls for its strengthening. With regard to additional regulatory efforts, the Commission has stated that it will continue to monitor any new developments and opportunities. Several actors already expressed their dissatisfaction with this outcome, with especially the European Parliament being particularly in favour of more stringent and explicit regulations at the EU level (see the European Parliament resolution of 7 June 2016 on unfair trading practices in the food supply chain). After another round of consultations in 2016, spearheaded by the Agricultural Markets Task Force, set up by the Directorate-General Agriculture and Rural Development, the Commission has recently (20 June 2017) decided to launch an impact assessment with the possibility of UTP rules being implemented in the first half of 2018.

Supply Chain Initiative

The Supply Chain Initiative (SCI) has been in operation since 2013 and has been launched as a consequence of the findings of the High-Level forum for a better functioning food supply chain of the European Commission. Already in 2011, the Principles of Good Practice around which the SCI is built, were adopted by 11 EU level signatory organizations coming from all stages of the food supply chain, including the biggest EU farmers' union Copa Cogeca. However, when the SCI itself was created, several signatory organisations, most notably Copa Cogeca, refused to further engage in the direction the EU governance of the issue of UTPs was headed (Gentile et al., 2016). These organisations were of the opinion that a purely voluntary framework would not be sufficient in reducing the problems associated with UTPs. Companies are free to register with the SCI after which they have to follow a set of steps before their registration becomes official. Dispute resolution mechanisms are also provided: both bilateral and aggregated disputes can be handled.

Other pieces of legislation

The rest of the current legal framework at EU level only provides very general rules (mainly in relation to competition law) and these rules are rarely applicable to the UTPs as defined by the European Commission. The most relevant pieces of EU-level legislation which are

commonly recognized as potentially addressing UTPs are the following: Articles 101 and 102 TFEU (which respectively focus on unfair practices in horizontal competition and on abuses of dominant positions, which almost never holds in the food chain); the Unfair Commercial Practices Directive 2005/29/EC (which contains regulation focused on the relationship between firms and consumers); Directive 93/13/EC On Unfair Terms in Consumer Contracts (also only applicable to relationships between firms and consumers); and the Consumer Protection Cooperation Regulation 2006/2004/EC (which coordinates consumer protection efforts across Member State borders). None of these regulations include specific UTP provisions but they could possibly serve as the basis for any future efforts to regulate UTPs at the EU level.

4.6. EU Harmonisation of UTP rules

With the different elements now in place, we can apply the conceptual framework from Section 2 to the specific issue of UTPs. We will go over each of the benefits and costs one by one and see to which extent they are relevant in the context of UTPs

First, with regards to the **regulation of transboundary phenomena**, an indication can be found in Gentile et al. (2016), whose survey shows that 27 % of perceived UTPs have occurred between companies located in different countries. While this finding alone is by no means sufficient as an argument for EU-wide regulation (and confirms the need for more independent research), it is clear that UTPs are not confined within the borders of any EU Member State.

Second, as shown in the previous sections, there is considerable divergence in types of UTP regulations between the different Member States. Without any form of EU-wide UTP legislation, this effectively means that the location (often of the company applying UTPs) determines the stringency of UTP legislation as well as its enforcement (Vaqué, 2014). It is not unthinkable that this could lead to situations of regulatory arbitrage. However, it should also be noted that instead of a **race-to-the-bottom** in UTP regulation between countries, it seems that there has been more of a race-to-the-top with more and more Member States introducing stringent regulation in this field.

Third, we have shown that in the different Member States, there are currently several administrations that concern themselves full-time with the problem of UTPs (just think about the example of the GCA in the UK). Needless to say, each of these agencies cost money to the taxpayers and if these resources could somehow be (more) centralized at the European level, there is an opportunity for **economies of scale in administration**.

For the last benefit of EU harmonisation, namely **transaction cost savings**, it is unclear how big they could potentially be in the context of UTPs, especially given the fact that most UTPs are already illegal in the different areas of the law. The savings will be largest for the victims of UTPs who may not know which practices should be considered as a UTP and which are

part of the normal course of action in contract negotiations. Removing this hurdle could potentially make suppliers more confident in using the legal system against their buyers, thus reducing the 'fear factor'.

Turning to the costs of EU harmonisation, it is clear that if the regulatory frameworks in the different Member States are an accurate representation of the social optima in those countries, the **harmonisation costs** of EU regulation will be considerable. This is definitely true for countries which do not have any specific UTP regulation (as is the case for Denmark), but also for countries with more stringent regulation (like France), which normally will have to implement the EU rules as well (depending if it is decided to only introduce minimum regulation or regulation fixed at a certain level).

The same is true for **switching costs**, which in the case of UTPs could be interpreted as the cost of switching from one set of UTP rules to an EU-wide set of rules. This would inflict considerable costs on all Member States, but especially on those without an applicable legal framework (for instance, Denmark). Given that these countries were unwilling to introduce rules in the first place, these switching costs might make it even harder to find a consensus among all Member States.

Finally, as mentioned before, there is indeed a real danger of **over-regulation** in the case of UTPs as has been demonstrated by the race-to-the-top that has been building up in the recent decade and has mainly been driven by political deliberations rather than hard evidence.

In conclusion, one could argue that most costs and benefits (apart from the race-to-the-bottom argument) are applicable in the case of UTPs. Their relative importance will necessarily depend on further research and consultations.

Other arguments

While we believe that this conceptual framework should form the basis of any impact assessment of harmonisation at the EU level, there are several other, more specific, arguments that have been used for the case of UTPs. Here, we provide an overview of the most important ones.

First of all, the question whether UTPs should be regulated at an EU level of course crucially hinges on the fact whether UTPs themselves represent a problem worth regulating with specific means (rather than the general legislation that already exists). In other words, it is absolutely necessary to find out whether or not UTPs actually represent a market failure that merits correction. While the number of Member States having already legislated UTPs in a specific manner (see previous sections) would seem to suggest that this is indeed the case, there is surprisingly little sound empirical research done on this topic. The research that is often cited in this respect comprises two surveys by Dedicated Research, one on behalf of CIAA (the European association of the food and drink industry) and AIM (the European Brands Association) and one on behalf of Copa Cogeca. In the former, mainly

intermediary actors across different industries were surveyed and the results indicated that no less than 96 % of respondents had been exposed to UTPs of some form in the past year, costing them about 0.5 % of turnover on average (Dedicated Research, 2011). The latter survey, which focused more on farmers and on farmer cooperatives, found that UTP-related costs amounted to about 2 % of annual costs for that group. A more impartial study, which was ordered by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and was performed by Areté, showed that around 47 % of respondents (in a sample that comprises actors from all stages of the food supply chain) had experienced UTPs in the past five years, of which about one third eventually resulted in a dispute (Gentile et al., 2016). So, while this last study is already considerably less outspoken in its conclusions than the first two cited studies (possibly because of the increase in regulation with respect to UTPs between the different studies), it would seem that, at first sight, UTPs do indeed represent a significant problem for both farmers and intermediaries in the food sector. Of course, this data is all self-reported, so it is clear that more research is required to fully and independently answer this question. All in all, the current base of research on the issue is insufficient to show that: (1) UTPs represent an issue worth legislating at scale; and (2) EU-level legislation would represent an added value vis-à-vis the already existing rules at the level of the Member State. In fact, it has been shown extensively that buyer's strong or even dominant position would not necessarily translate into abuse of that market power (Dobson et al., 2000; McCorriston, 2002; Sexton, 2013).

Second, while most countries and most actors in the food supply chain agree on the general definition of UTPs, there is considerable heterogeneity in which practices Member States consider as UTPs. This is evident from the difference in coverage as shown in Tables 1 and 2. Moreover, there is also still considerable debate about what should be considered as unfair in the food supply chain. Supermarkets, for instance, complain that fairness should not mean that their prices should always cover the farmers' production costs (EU Food Law, 2017). A European framework of harmonised definitions and descriptions of unfair trading practices would surely help to reduce these levels of heterogeneity and uncertainty (which is of course related to the transaction cost savings argument).

Third, the case studies have demonstrated that the 'fear factor' is a fundamental part of the equation when thinking about legislating UTPs. One way of keeping complaints as anonymous as possible for as long as possible would be to aggregate them. If one were to create a European mechanism whereby individual complaints against a certain company with suppliers in different Member States could be aggregated this would be an effective way to deal with the 'fear factor'. Seeing that the number of official complaints per year in each Member State is quite limited (Renda et al., 2014), it cannot be deemed infeasible to handle all of them at the European level by a centralised adjudicator.

Fourth, so far the discussion has focused mainly on European companies, both at the side of the buyer and the supplier. However, many companies that engage in UTPs also conduct business with companies and farmers located outside of the European Union, many of them

in the developing world (Fair Trade Advocacy Office, 2017). Arguably, the problem of UTPs is even more severe for those suppliers. For instance, suppliers in developing countries often only have one large-scale buyer in their immediate vicinity, which only exacerbates the issue of the 'fear factor'. And even if they should decide to press charges against their buyer, the complex regulatory landscape in the EU is almost impossible to decipher for any single supplier. A harmonized set of rules and enforcement mechanisms at the EU level would make it much easier for suppliers outside of Europe to complain about and take action against UTPs inflicted on them by European buyers (higher transaction cost savings).

Sixth, in the past few years, several legal scholars have raised objections to new EU-wide legislation on the topic. For instance, the Max Planck Institute has, in its response to the 2013 Green Paper, argued that while it is true that there is considerable fragmentation in the way UTPs are treated now, introducing specific EU regulation would create a different type of fragmentation, namely that of EU regulation itself (Hilty, Henning-Bodewig and Podszun, 2013). More specifically, if the EU were to create specific regulation of B2B practices, this would add to an already complex set of rules governing competition, making the overall system incoherent. Moreover, the Institute also urges the European lawmakers to take into account the fact that new EU rules would somehow have to be embedded within the different legal traditions of the Member States. And, as shown in the previous sections, it is unclear at this point where in the national legislations those rules would have to find their place. Finally, more generally, the Institute is concerned new specific regulations on B2B contracts would, at least for some practices, be in conflict with the freedom to conclude contracts between private actors. All in all, the authors consider voluntary initiatives combined with more effective settlement procedures to be the better option in dealing with the issue of UTPs.

In a similar vein, Glöckner (2017) argues that EU regulation is already sufficiently dense and, when thinking about regulating UTPs, lawmakers should consider as much as possible making amendments to already existing rules, rather than creating new ones. More specifically, he believes that a simple extension of the Unfair Terms Directive (93/13/EEC) towards B2B contracts might be sufficient. After all, this directive has already been integrated into the different national legal systems and as such it would not even be up to the EU legislator to take action. He also warns against an overly restrictive focus on the food supply chain when designing new European rules. After all, the principle of equal treatment dictates that UTP rules should be universally applicable.

A final legal argument that can be made relates to the different legal traditions in the Member States. These systems have been evolving over decades and sometimes even centuries, which is clear from the fact that in those places where they are regulated, UTPs are part of different branches of the law (see Section 4 for instance). Often, these provisions have been fit in the national systems so as to only minimally disturb the existing overall balance in the law. In this context, it seems unlikely that a one-size-fits-all approach at the EU-level would be the most efficient way in legislating the issue of UTPs.

A final argument against specific EU rules on UTPs is related to the already existing Supply Chain Initiative. While the experience with the SCI has not been overwhelmingly positive so far among the actors of the food supply chain (Gentile et al., 2016), it has not been in operation long enough to fully evaluate its effectiveness. If EU regulation on UTPs was introduced now, it would effectively render the SCI superfluous. However, with some minor adjustments to its governance and its process, it could still remain the basis of the EU UTP approach. For that to happen, it is of course crucial that the European farming representatives come back on board. Further, new specific EU rules on UTPs would not only have an impact on the SCI, but also on those national voluntary initiatives that have achieved relative success, such as the one in Belgium.

4.7. Conclusion

This note has attempted to provide a broad overview of the regulatory aspects which are relevant for the issue of UTPs. First of all, we have developed a conceptual cost-benefit framework for EU harmonisation. Second, we have demonstrated that the regulatory landscape in the EU is considerably fragmented which might present a problem for any harmonisation effort on the part of the European authorities. Third, we have looked at several case studies from which a couple of interesting takeaways could be distilled. Finally, we have considered all the existing arguments in favour and against specific regulation on UTPs at the EU level by applying the conceptual framework.

In anticipation of the results of the European Commission's impact assessment, we can tentatively give some advice to the European lawmakers. However, any meaningful conclusion is seriously hampered by the lack of rigorous research into the issue of UTPs. In general, we believe there is simply too little evidence to unambiguously conclude that specific regulation against UTPs is warranted at all, let alone at the EU level. That being said, there is clearly an impetus towards legislation of this issue and there are indeed a couple of areas where EU rules could have a role to play. First, clearly define UTPs and provide an exhaustive list of what can be considered as such. Second, establish a European adjudicator (modelled after the GCA in the UK), which can receive confidential complaints from across the Union, aggregate them and then refer them to appropriate national authority, where the necessary action and sanctions will be taken. This should not only address the 'fear factor', but also preserve the regulatory heterogeneity and different legal traditions across the Member States. After all, it seems that the rules to regulate UTPs, or at least the most blatant ones, do already exist at the level of the Member States. Therefore, we believe it would be sufficient to address the 'fear factor'. Finally, we argue that the SCI should be preserved, but not as an organisation primarily focused on UTPs, but more as a platform in which the actors from across the food supply chain come together to discuss growth opportunities. This should foster more coordination and cooperation vertically and make UTPs only one of the discussion points. The SCI should also continue to work together with

national authorities on sharpening their definitions of UTPs or guiding the development of any voluntary initiatives that are being created or that already exist.

4.8. References

Agro Food Chain Consultation. (2010). Code of Conduct for fair relationships between suppliers and purchasers in the agro-food chain.

Carbonara, E., & Parisi, F. (2007). The paradox of legal harmonization. *Public Choice*, *132*, 367–400. http://doi.org/10.1007/s11127-007-9162-0

Danish Ministry of Industry Business and Financial Affairs. (2014). *Reply to Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*.

Dedicated Research. (2011). *CIAA — AIM Survey on Unfair Commercial Practices in Europe*.

Dobson, P., Clarke, R., Davies, S., & Waterson, M. (2000). *Buyer Power and Its Impact on Competition in the Food Retail Distribution Sector of the European Union*.

EU Food Law. (2017). Analysis: Could EU legislation fix 'unfair relationships' in food supply chain?

European Commission. (2013). *Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-food Supply Chain in Europe*.

European Commission. (2016). *Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain*.

Fair Trade Advocacy Office. (2017). EU process on Unfair Trading Practices (UTPs) must not forget about non-EU producers. Retrieved from http://www.fairtrade-advocacy.org/subscribe-newsletter/157-newsletters-articles/967-eu-process-on-unfair-trading-practices-utps-must-not-forget-about-non-eu-producers

Faure, M. (2001). Regulatory Competition vs Harmonization in EU Environmental Law. In D. C. Esty & G. Damien (Eds.), *Regulatory Competition and Economic Integration* (pp. 263–286).

Gentile, E., Bruni, M., Berisio, S., Gentile, M., Bradley, D., Christodoulou, M., … Thorsted Hamann, K. (2016). *Monitoring of the implementation of principles of good practice in vertical relationships in the food supply chain*.

Glöckner, J. (2017). 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. *Journal of Intellectual Property Law & Practice*, *12*(5), 416–434. http://doi.org/10.1093/jiplp/jpx035

Hilty, R. M., Henning-Bodewig, F., & Podszun, R. (2013). 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 date. *International Review of Intellectual Property and Competition Law*.

McCorriston, S. (2002). Why should imperfect competition matter to agricultural economists ? *European Review of Agricultural Economics*, *29*(3), 349–371.

Meloni, G., & Swinnen, J. (2014). The Rise and Fall of the World's Largest Wine Exporter — And Its Institutional Legacy. *Journal of Wine Economics*, *9*(1), 3–33. http://doi.org/10.1017/jwe.2014.3

Meloni, G., & Swinnen, J. F. M. (2016). Chocolate Regulations. In M. Squicciarini & J. F. M. Swinnen (Eds.), *The Economics of Chocolate*. Oxford University Press.

Renda, A., Cafaggi, F., Pelkmans, J., Iamicelli, P., Correia de Brito, A., Mustilli, F., & Bebber, L. (2014). *Study on the Legal Framework Covering Business-to-business Unfair Trading Practices in the Retail Supply Chain*.

Sexton, R. J. (2013). Market power, misconceptions, and modern agricultural markets. In *American Journal of Agricultural Economics* (Vol. 95, pp. 209–219). http://doi.org/10.1093/ajae/aas102

Tiebout, C. M. (1956). A Pure Theory of Local Expenditures. *The Journal of Political Economy*, *64*(5), 416–424.

Van den Bergh, R. (1998). Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law. *Maastricht Journal of European and Comparative Law*, *5*(2), 129–152.

Vaqué, L. G. (2014). Unfair Practices in the Food Supply Chain: A Cause for Concern in the European Union's Internal Market which Requires an Effective Harmonising Solution. *European Food and Feed Law Review*, *9*(5), 293–302.

Annex: List of UTPs (*Source*: Renda et al., 2014)

1. Lack of clarity in contract offer
2. Lack of written contract
3. Abuse of economic dependence*
4. Liability disclaimers
5. Unilateral modification clauses
6. Terms unreasonably imposing or shifting risks
7. Unfair use of confidential information
8. Unfair use of confidential information after contract expiry
9. Unfair breaking off of negotiation
10. Unfair contract termination
11. Refusal to negotiate

* Abuse of economic dependence can be invoked to tackle also other UTPs included in the Green Paper, such as *i.a.* retroactive contract changes, unilateral modification clauses, terms unreasonably imposing or shifting risks, and the unfair use of confidential information during the contractual relationship.

5. Unfair trading practices — the way forward

Johan Swinnen and Senne Vandevelde

LICOS, KU Leuven

5.1. Introduction

Regulating unfair trading practices (UTPs) in food supply chains is a challenging task reinforced by the complexity of the governance structure and functioning of the food supply chains (e.g. domestic supply chains *versus* EU supply chains *versus* global chains; large net of vertical and horizontal interdependences between players along the chain). The complexity of food chains requires a careful empirical and conceptual evaluation on the importance of UTPs and whether there is need for regulatory intervention and in what form. However, once UTPs are deemed to be a problem, the first key challenge for policy-makers is to understand whether there is a need for MS level regulation or an EU-wide approach. Naturally, curtail in this respect is to evaluate the benefits and costs of EU harmonisation of UTP regulations. The second key challenge is how to ensure the effectiveness of the UTP regulations. This involves putting in place an effective enforcement mechanism and monitoring system for UTPs to ensure that the regulatory objectives are achieved.

The aim of this report is to shed some light on these regulatory aspects of UTPs. More specifically, it summarises the regulatory aspects of UTPs, both in their current form and what they could look like in the future. These regulatory aspects are considered both from an economic and from a legal angle. Note that this report does not analyse specific measures to address UTPs but provides an overall assessment of policy framework for regulating UTPs. The report is based on presentations of Swinnen and Vandevelde (2017), Cafaggi and Iamicelli (2017) and Iamicelli and Cafaggi (2017).

5.2. Regulating UTPs: diversity versus harmonisation

In recent years, there has been a surge in UTP regulation in the different EU Member States. ([11]) However, so far, no specific EU legislation has been implemented apart from a voluntary framework. Swinnen and Vandevelde (2017) offer a general conceptual framework of EU Harmonisation, before discussing the different UTP regulations and their

([11]) This first section summarises the more elaborate analysis and discussion in Swinnen & Vandevelde (2017), which is added to this report.

effectiveness at the Member State level, compare them to the current state of EU level UTP legislation and finally apply the conceptual framework to the specific case of UTPs.

The conceptual framework details the (economic) benefits and costs associated with harmonisation of regulation, thus using decentralisation as the natural state of the world (see, for instance, Tiebout, 1956).

There are four different potential benefits of harmonisation.

- The first benefit of harmonisation is that it allows for the **regulation of transboundary phenomena**. Within the European Union, given the size and proximity of the different Member States, this is of course an important argument.
- The second benefit of harmonisation is that it is a step in the direction of a more complete **common market**, whereby competition takes place under the same conditions. Whereas this is more a political argument, it is intimately related to the economic argument of preventing a **'race-to-the-bottom'** in regulation between countries.
- A third benefit of harmonisation is related to **economies of scale in administration** (Faure 2001).
- A final, somewhat related, benefit of harmonisation is **transaction cost savings**. Under uniform Community rules firms and citizens must not spend on information costs. They do not have to inform themselves about differences in the substantive law of the EU Member States and the way in which these rules are enforced (Van den Bergh 1998).

Additionally, there are two types of costs associated with harmonisation:

- The most important cost associated with harmonisation is **under- or over-regulation**, or, in other words, deviating from a country's social optimum.
- In addition to deviations from each country's social optimum, harmonisation also involves **switching costs**, which are the (administrative) costs incurred when switching from one set of rules to another.

The presence of these costs and benefits will depend to a large extent on the variation of MS regulations and how these rules have been absorbed by the different actors along the food value chain. As a result, Swinnen and Vandevelde (2017) develop a ranking of the UTP regulations in the different MS, using a set of seven criteria related to the legal treatment of UTPs, how those rules are enforced and which types of UTPs are covered by the legislation (see Table 2 in previous chapter). As can be seen in the table, there is considerable regulatory fragmentation of UTP regulation across the EU.

It is important to note that the ranking represents a measure of the stringency of the different UTP approaches, but that this is not necessarily correlated with their effectiveness, as is evident from Figure 1 (see previous chapter).

Swinnen and Vandevelde (2017) make a comparison of the MS legislations with the regulation currently in place at the EU level, most notably the voluntary Supply Chain Initiative (SCI). They find that it has only been able to achieve limited success, mainly due to the lack of support from some important actors along the food value chain (e.g. Copa Cogeca).

Further, when applying the conceptual framework of harmonisation to the specific case of UTPs, it is clear that each of the different costs and benefits are relevant to some extent. However, it is difficult to precisely measure their relative importance.

Finally, a detailed analysis of several MS regulatory frameworks (France, Germany, the United Kingdom, Belgium and Denmark) suggests: (a) that it is worthwhile to broaden the scope beyond UTPs; (b) that the so-called fear factor is key; and (c) that it is often sufficient to adapt existing legislation to deal with the issue of UTPs.

In conclusion, the regulatory landscape in the EU with respect to UTPs is considerably fragmented. The conceptual framework presented could form a basis for the discussions of EU harmonisation of UTP rules.

5.3. Enforcing UTPs in agrifood supply chains

Once it is decided that UTPs represent a problem worth regulating, the question remains how those rules should best be enforced and monitored and by whom. These questions are addressed by Cafaggi and Iamicelli (2017) and Iamicelli and Cafaggi (2017).

Crucially, they argue that, for the purpose of enforcement and monitoring of UTPs, value chains should be the unit of analysis in order to fully address causes and consequences of UTPs taking into account interdependences of contractual and non-contractual relationships along the chain. Further, the lack of a precise legal definition of a value chain ensures that any geographical level (be it domestic, EU-wide or global) can be covered using the value chain as the mode of analysis. Of course, in the case of global value chains and UTPs, EU-officials have to contemplate whether they want to take on a role as global regulators, which inherently is a (development) policy question.

Cafaggi and Iamicelli (2017) go on to focus on the different enforcement mechanisms that can be used to tackle UTPs. In particular, they make a distinction between private (through voluntary codes or independent dispute resolution mechanisms for instance), judicial (the court) and administrative enforcement (the government or so-called administrative independent authorities). They argue that there are clear complementarities between these different forms of enforcement and that any UTP enforcement strategy will necessarily combine elements of each.

The extent to which this complementarity manifests itself depends on three dimensions: the incentives of compliance, the costs of compliance and the nature of remedies and sanctions.

With regards to the costs of compliance, it is important to consider who will pay the cost of detecting compliance and the cost of non-compliance. Particularly, there exist three different logics across the different types of enforcement mechanisms. In the case of administrative enforcement, the administration pays while in the case of judicial enforcement, those costs are typically borne by the producers (the farmers). Deciding who pays not only has important distributional consequences, but will also have ramifications for the effectiveness of the enforcement itself. The same applies to the type of remedies and sanctions used. More and more, lines are blurring between public and private actors in terms of the sanctions and remedies they use. A hybridisation of enforcement mechanisms is taking place. Public actors start to adopt reputational sanctions (for instance, blacklists) while private actors add legal means to reputational tools to increase the deterrence effect of their sanctions.

Cafaggi and Iamicelli (2017) are in favour of a so-called enforcement triangle in which there exists no hierarchy from a legal perspective between the three different enforcement mechanisms (judicial, private and administrative enforcement). However, there should be room for temporal priorities, depending on the situation. For instance, it could be decided that private enforcement is given priority (e.g. arbitration), but that if it does not work, enforcement will be implemented by the judicial or administrative authorities. The evidence collected at the private stage (for instance, by the Supply Chain Initiative) could then be used by the public enforcement mechanisms. Those temporal priorities again depend on different drivers such as costs, the fear factor and the effectiveness of enforcement at the different levels.

The same triangle also applies to sanctions. In particular, Cafaggi and Iamicelli (2017) argue that fines should be coordinated across the different levels of enforcement in order to avoid duplication. The same is true for other (reputational) instruments like black lists. In short, there should be coordination across all instruments and not only fines.

Finally, Cafaggi and Iamicelli (2017) comment on the blurring distinction between monitoring compliance (ex-ante) and enforcement mechanisms (ex post). This is explored further in the next section.

5.4. Monitoring UTPs for supporting better regulations: What is the information we need? What information do we miss?

Iamicelli and Cafaggi (2017) argue that the purpose of monitoring of UTPs in food value chains is twofold. It is a tool for enforcement of the rules concerning UTPs (see previous section), but it is also a broader tool for governance of supply chains (ensuring coordination). While the former used to belong to the domain of the public sector and the latter to the domain of the private sector, both goals have become increasingly interconnected, regardless of which actor performs which function. For instance, monitoring

over the contractual and organizational changes determined along the chain (at national and supra-national level) by the adoption of a new safety control system is now increasingly implemented at the legislative or the administrative level (see, for instance, *La Charte et le Label Relations Fournisseur Responsables*, a voluntary scheme created and monitored by the French government).

The question of who shall monitor in turn depends on the objectives of monitoring. Monitoring for enforcement was usually conducted by 'external' players to the value chain (like government) and monitoring for governance by the (private) value chain actors themselves, this distinction is becoming less and less useful. Another possible divide could be made between first-party (the business under scrutiny), second-party (that business' counterparty like a client or a supplier) and third-party monitoring (independent agencies or the government). Here again, hybridisation occurs: when addressing enforcement, legislation often encourages the use of codes of conduct and, likewise, compliance assurance schemes are often run by independent third parties. An example in the UTP context can be found in analysing the Supply Chain Initiative (SCI). While it was conceived as a voluntary scheme, its code of conduct has now been adopted as legislation in multiple EU Member States. One thing to keep in mind when considering this complementarity is that monitoring run by public authorities often suffers from having their scope limited to the national dimension. As such, Iamicelli and Cafaggi (2017) conclude that the coordination between public and private monitoring systems requires the coordination at the supranational level as well.

Iamicelli and Cafaggi (2017) also identify two ways of monitoring: complaint-based or through a continuous assessment process. Due to the risk of retaliation, complaint-based monitoring is highly prejudiced by the victim's reluctance to suffer the consequences of an open complaint, occurring whenever the enforcement procedure may not end with an amicable solution (the 'fear factor'). While the possibility of aggregated complaints may partially reduce this prejudice, Iamicelli and Cafaggi (2017) advocate a move towards continuous assessment procedures. Possible tools for continuous assessment include certification schemes, labels and scorecards. They are aimed at following the on-going business activity and ensuring the proper compliance regardless of the emergence of a dispute or the existence of a specific complaint while at the same time trying to foster coordination and cooperation between the actors involved. Some of the major challenges facing this mode of monitoring are the allocation of the procedural costs and the assessment of the effectiveness of the monitoring.

In terms of the object of monitoring (i.e. what to monitor), Iamicelli and Cafaggi (2017) suggest a holistic and contextual approach. They consider the contract between different actors as only one of the elements to be monitored and find that the actual conducts (behaviours) are even more important. This also means that all phases of trading relations should be subject to monitoring and that the identification of what is considered to be fair

or unfair may shift from one context to the other. The assessment of the concrete impacts of infringements should form an integral part of monitoring UTPs.

Finally, Iamicelli and Cafaggi (2017) advocate the use of one particular form of monitoring UTPs, namely scorecards. It is a proposal in the domain of voluntary schemes and privately regulated initiatives. However, the methodology may also be applied to monitoring schemes run by public authorities, although the scope and effects of investigatory and sanctioning powers may be different in this case. The scorecard methodology would depend crucially on the identification of critical points in business decision-making. These could entail the choice of a new supplier, drafting a model contract, choosing a new set of standards, etcetera. Next, those practices and procedures should be identified to ensure a fair balance in the relations with consumers and suppliers with respect to each critical point. For each of these practices and procedures, an actionable metric or modular description should be created distinguishing between major and minor measures depending on the critical point. These metrics then form the basis of the scorecard. Of course, each scorecard should be developed taking into consideration the contextual factors such as the structure and the geographical dimension of the supply chain and the size of the different chain participants. Procedures should be ensured to be used effectively and an enforcement procedure should be embedded in the scorecard methodology, possibly comprising warning procedures, 'comply or explain' rules and/or penalty schemes. Finally, the scorecard should be open to self-evaluation by all chain participants.

Iamicelli and Cafaggi (2017) conclude by saying that there remain several open issues to be resolved surrounding their scorecard proposal (should public authorities be involved, who will get the benefits, who will pay for it, how does a scorecard address the fear factor, etc.), but that this could form the basis of a new way forward both in monitoring and enforcing UTP rules.

5.5. References

Cafaggi, F. and P. Iamicelli (2017). 'Enforcing UTP in agrifood supply chains.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Faure, Michael. (2001). 'Regulatory Competition vs Harmonization in EU Environmental Law.' In *Regulatory Competition and Economic Integration*, edited by Daniel C Esty and Géradin Damien, 263–86.

Iamicelli, P. and F. Cafaggi (2017). 'Monitoring UTPs for supporting better regulations: What is the information we need? What information do we miss?.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Swinnen and Vandevelde (2017). 'Regulating UTPs: Diversity versus harmonization.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Tiebout, Charles M. (1956). 'A Pure Theory of Local Expenditures.' *Journal of Political Economy* 64 (5): 416–24.

Van den Bergh, Roger. (1998). 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law.' *Maastricht Journal of European and Comparative Law* 5 (2): 129–52.

6. Summary and conclusions: the many challenges of unfair trading practices in food supply chain systems

Claude Ménard

Centre d'Economie de la Sorbonne, Université de Paris (Panthéon-Sorbonne) ([12])

6.1. Introduction

Unfair trading practices in food supply chain systems have increasingly attracted the attention of European policy-makers over the last years. Numerous official documents, notably the European Parliament Resolution on imbalances in the food supply chain of 19. January 2012, the Green Paper 'On unfair trading practices in the business-to-business food and non-food supply chain in Europe' issued by the European Commission in 2013, and several other documents partially listed at the end of this contribution as well as numerous reports to the European Commission, for example the report delivered by the Agricultural Markets Task Force (EC, 2016b), illustrate this recent awareness for a long neglected issue.

There are many reasons that may explain this shift of attention from business-to-consumers (B2C) considerations (see Directive EU-2005) to business-to-business (B2B) concerns. In the European context, three of them deserve special mention:

— socioeconomic turmoil in specific sub-sectors, namely dairy milk and pig meat, which were partially attributed to unfair trading practices by some parties (mainly retailers) due to 'imbalances of power';
— concentration among retailers that fed this perception. According to recent data (European Commission, 2014a, p. 40) the top 3 retailers have above 30 % of shares in food markets in all EU members, with the exception of five countries. This concentration has also created dependency of suppliers on this small number of buyers. According to a study for the Spanish Competition Authority, in that country 40 % of the revenues of suppliers in the grocery supply chain was generated by only three retailers in 2010 (EC, 2014b: 11);
— Globalisation of the same retailers. Within the European Union, 'Cross-border trade between EU Member States now accounts for about 20 % of total food

([12]) Correspondence: claude.menard@univ-paris1.fr. This report owes much to the lively and fruitful discussions with the participants to the symposium on *Unfair Trading Practices in the Food Supply Chain* held in Brussels, 17-18 July 2017. I have a special debt with Bruno Buffaria, Pavel Ciaian, and Federica Di-Marcantonio for their comments and suggestions on a first draft of this paper.

and beverage production in the EU and at least 70 % of the total exports of agri-food products of EU Member States are destined to other EU Member States' (European Commission, 2014b). Moreover, many top retailers have developed far beyond EU borders. For example, Carrefour operates in more than 40 countries, from China to Latin America and has developed complex chains of suppliers to meet the variations in demand from these differentiated consumers.

The transfer of attention from B2C to B2B has also involved substantial changes in focus, from extended protection of consumers (initially mostly targeting misleading advertising — see Directive 2005) to a much broader set of issues primarily related to relationships among partners and, when it comes to the agri-food sector, among the different links in the supply chain systems, as well illustrated by several contributions to this symposium on *Unfair trading practices in the food supply chain.*

This paper builds on the supports provided by contributors to this symposium and on the interventions of participants, complemented by references to recent documents issued by or delivered to the European Union authorities and that were part of the background to the symposium. The resulting synthesis is organised as follows. The next section introduces some preliminary remarks about the difficulties of the topic. The third section takes advantage of the different contributions to delineate the issues at stake when exploring UTPs in supply chain systems. The fourth section discusses some impact of UTPs and various modalities to deal with their consequences, as partially explored in the symposium. The last section addresses some policy issues, drawing lessons from these presentations and discussions and suggesting possible directions to go further.

6.2. Preliminary remarks

The limited knowledge available so far about supply chains, their characteristics, their governance, and how these properties would provide a particularly favourable compost for unfair trading practices is mentioned in several official documents (e.g., in EC, 2014b, 2016b) and has been pointed out by almost all participants. Let's quote a few. According to Gorton et al. ([13]), 'the scale of problem is difficult to assess fully', and we lack indicators and cross-national evidence that would support robust conclusions. Indeed, 'No general conclusions can be drawn regarding the effect of power imbalances in the chain and price transmission asymmetries' (Dries), and there is 'No consensus about the impact of UTPs on consumers', for example regarding the impact of reverse margin practices and the role of middlemen (Russo et al.). Reviewing empirical studies on these issues, Russo et al. even show that there are diverging and even opposite results. And when it comes to regulatory

([13]) From now on, all references to names without a date refer to contributions made in the symposium and listed at the end of this report.

measures, 'relatively little is known about instruments we should use to overcome problems related to UTPs' (Fałkowski), which may partially explain the skepticism of Sexton regarding the introduction of specific regulation. Part of the problem is coming from the 'Heterogeneity in what is considered as a UTP' (Swinnen and Vandevelde).

In this context, it is difficult to draw conclusive recommendations for policy-makers. For example, Sexton endorses a quite radical position, basically arguing that consolidation is our future and that we should move away from our obsession with the lack of competition resulting from concentration on the retailers' side and the negative impact it would have on farmers since large retailers strategically depend on their suppliers with respect to quality, quantity, and timing of deliveries. But Gorton et al. conclude in the opposite direction, stating that 'Buyers are more trustworthy where there is greater competition in the buyer's market.'

All in all, there was a general consensus that '… more research is needed' (Swinnen and Vandevelde). This awareness of the limited results on which we can build sound analyses and relevant policy recommendations at this point is not surprising if we consider:

- the complexity and variety of arrangements grouped under the label 'supply chain';
- the diversity of transactions that are processed in these different organisational structures;
- the increasingly transnational nature of the activities of supply chain systems so that they are exposed to natural conditions and institutional rules of the game that vary considerably along the chain (EC, 2014a: 42 sq.).

What does not help to evolve in this fog is the difficulty that so many economists and policy-makers have to grasp the exact nature of supply chain systems (for a discussion, see Ménard 2013; 2018). For example, the task force on agricultural markets proposed the following concept in its recent report (EC, 2016a, par. 29, P 14):

> 'The supply chain can be seen as a series of consecutive markets involving input providers and producers, then producers and processors, then processors and wholesalers/traders and finally wholesalers/traders and retailers.'

In the view of our discussions, this is plainly wrong: it presumes that there is a price mechanism operating independently and sequentially on the different markets of the supply chain, thus evacuating the central issue of the governance along the chain, which is at the core of most of these arrangements and that makes the pricing issue so sensitive. And indeed, this difficulty is implicitly acknowledged a few lines later when it is mentioned that: 'The consecutive markets are inter-linked and depend on each other,' a statement that of course would require a quite substantially different approach than one considering each 'market' in isolation.

One important result of the contributions to the symposium is that they introduced productive discussions among participants about the nature of the phenomena under review and pointed out the need for a better conceptualisation of the issues at stake. I now turn to some aspects of what we have learned or what in my view could be fruitfully developed in that perspective.

6.3. Conceptual clarification

When it comes to the issue of 'Unfair trading practices in food supply chain', almost all terms are raising definitional problems and, behind the semantic aspect, problems of rigorously identifying what we are tackling, which is of course essential for establishing appropriate policies. Almost all contributors faced these problems and provided useful insights. Let us turn to some of them sequentially.

What are UTPs?

The European Commission has provided a definition of 'unfair trading practices', cited explicitly by Cafaggi and Iamiceli (2017a) but that provided the background to most interventions. *Communication Com (2014) 472 Final* considered that: 'UTPs can broadly be defined as practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.' (EC, 2014b). This definition provides a large umbrella under which can be found a bundle of very different problems.

Sexton took a challenging position with respect to this European Commission approach, arguing that 'there is no agreement on what actions constitute unfair trading practices; definitions and examples are often tautological or contain terms that are vague and not actionable.' The conclusion derived from his position is that trading practices in supply chain are identical to those in other business arrangements, so that the usual competition rules and laws should prevail. The underlying assumption is of course that supply chain systems do not differ from other organizational solutions, a point to be discussed below.

Before doing so, let's first come back to the general question of 'unfair trading practices', whatever the organizational arrangement chosen. As many interventions suggested, clarifying the terms and dimensions involved may help making progress on the issues at stake.

Trading practices

When referring to trading practices, we are actually dealing with the classical economic problem of the conditions that may challenge the proper exercise of competition, with a focus on efficiency. The assumption is that under appropriate market conditions the resulting allocation of resources is beneficial to all parties to the transactions. The problem is that 'imbalance of bargaining power is always present in contractual negotiations' (EC,

2014a: 25). Competition policies precisely intend to deal with this issue, which throws doubts about the need for specific considerations and regulatory measures regarding supply chain.

An interesting point made by Bruno Buffaria in his introduction to the symposium is that although this imbalance is a frequent component of commercial practices, generating uncertainties among traders that would not exist otherwise, some of these uncertainties might be specific to, or more consequential in supply chain (see also EC, 2016b: 12). Beside uncertainties endogenous to all transactions ('commercial practices'), other sources of uncertainties may indeed play a particular role in the development of asymmetries among transactors in supply chain. Some are embedded in the very nature of these organizational arrangements. In one of its most extensive document about unfair trading practices in supply chain, the European Commission noted that 'Recent studies show that contractual practices in the retail sector strongly depend on the governance of the supply chain.' (EC, 2014a: 42). Indeed, a key issue in supply chain is that governance is spread over different partners located at different nodes in the chain, partners that must cooperate while being simultaneously competitors (Ménard, 2013). Moreover, exogenous sources of uncertainties can amplify imbalance among parties to a supply chain as well as among supply chains that operate and compete in the same sector. For example, imbalance can be accentuated by institutional factors, as when disparities among regulation across Member States introduce biases in B2B parties (EU, 2005, 2016a; Swinnen and Vandevelde). Other sources of imbalance can be rooted in technological (e.g., diffusion of innovations) or environmental factors (weather, climate, soil), aspects that are barely mentioned in official documents (but see EC, 2014a, Chapter 1 for a reference to the role of technology) and, unfortunately, were almost totally absent from our discussion.

In sum, **a first lesson** from the symposium is that there are many different sources of 'imbalance of bargaining power', with a resulting diversity of outcome (Gorton et al.). There is the need to better understand this diversity and to take it into consideration in order to draw adequate policies, avoiding the 'one-size-fits-all' syndrome (EC, 2014a).

Unfair practices

The key question for the purpose of the symposium was of course to determine whether such sources of asymmetries are generating unfair practices. Unfairness is a difficult concept to define. As already mentioned, in the economic context under review the European Commission refers to UTPs as 'practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.' (EC, 2014b: 2). The relative vagueness of the concept may explain the paucity of economic literature on B2B unfair trading practices (Sexton). Using a set of keywords (unfair, fairness, justice, power, among others), Gorton et al. (2017) were able to identify only 45 papers that significantly relate to the topic. As we will see below, none is very conclusive about the existence and actual impact of UTPs.

Numerous examples provided by contributors and participants fall in one or the other categories of unfair practices introduced in the Green Paper (EC, 2013) and refined or commented in several documents that followed. In its 'Communication' on *Tackling unfair trading practices in the business-to-business food supply chain,* the European Commission summarized 'the main categories of UTPs' as follow (EC, 2014b: 5):

— a trading partner's retroactive misuse of unspecified, ambiguous or incomplete contract terms;

— a trading partner's excessive and unpredictable transfer of costs or risks to its counterparty;

— a trading partner's use of confidential information;

— the unfair termination or disruption of a commercial relationship.'

An additional item is introduced in the same document, 'Territorial supply constraints,' as when suppliers are dependent on local markets and the dominant retailers operating in their area, which is often the case with fresh products. Variations or complements have also been introduced in official documents (see particularly EC, 2014a, chap. 1; EC, 2016b) with interesting interpretations, for example the idea that many of these misconducts and their impact on one partner can be understood as imposing 'switching costs', equivalent to creating barriers to entry, particularly if transaction-specific investments have been made on one side of the relationship (Williamson, 1985; Gorton et al.), or if one party depends on technology or know-how of the other, or if substantial part of its sales depends on one buyer, or if the holder of a reputed brand impose sunk costs on the party that intend to use this brand (EC, 2014a, chap. 1). There is also some emphasis in many documents on the so-called 'fear factor', coming out of repeated transactions with the same partner and the fear to damage the relationship, which leads to non-action from the victim of the abuse, making this mischief particularly difficult to reveal and assess.

In the symposium, several contributors illustrated these different categories with examples (Sexton; Gorton et al.; Russo et al.) and some added complements, e.g. Gorton et al. who emphasized the potential role of crisis that may push a powerful partner towards unfair practices to compensate 'sudden loss in profitability' or the possible transfer on one partner of risks associated to specific investments *à la* Williamson; or Dries who explored the possible role of asymmetric price transmission. A very interesting reinterpretation was submitted by Cafaggi and Iamiceli (2017a) who listed unfair practices according to the time at which they interfere in a commercial relation. They propose to look at the unfair practices at: (1) the time of access to the relation (equivalent to entry fees and barriers); (2) the pre-contractual phase, for example when one party provides misleading information during the negotiation; (3) the time when clauses are determined, with the introduction of unfair clauses; (4) the moment of execution of the contract, as when payments are unduly delayed; (5) the possibility of unfair termination or disruption; and (6) the post-contractual

phase, as when one party unduly uses confidential information. What is interesting in that 'timing' of unfair practices is that they may command different policies and may require to be monitored through different institutional arrangements.

However, as pointed out upfront by Sexton in his opening contribution, all examples listed tend to remain relatively descriptive, without providing a well-defined path towards a much needed theory that would allow dealing with two unanswered questions:

> (1) How much do these unfair practices differ from the usual strategic behaviour in B2B businesses (an issue also mentioned by Fałkowski)? Surprisingly, few contributors emphasised or discussed the possible role of 'concentration' and 'consolidation', which are measurable factors and potentially the main sources of this 'imbalance of bargaining power' that would encourage behavioural practices leading to inefficiencies and negative impact on operators, typically small farmers, who would otherwise be commercially viable (EC, 2016b).
>
> (2) And what about the very idea of 'unfairness'? How far can we go in restricting ourselves to a purely economic approach to a phenomenon that clearly refers also to other dimensions?

Unfairness

Indeed, all of the above presume that UTPs matter because they distort 'economic practices', therefore impacting essentially the efficiency of market arrangements and the resulting allocation of resources. But there is more to 'unfairness'. As emphasised by Fałkowski, 'unfair' is also about **perception**, which refers to social norms and values. This point of view is in contrast with the position of Sexton who recommends sticking to an economic approach according to which there are only 'two goals in any commercial relationship: (i) maximise the total value (surplus) from the relationship; (ii) obtain as large of a share of that surplus as you can.'

However, focusing exclusively on these goals raises two questions: (1) Can we really analyse adequately UTPs if we limit ourselves to this approach? (2) Can we ignore the socioeconomic impact UTPs can have through their effect on redistribution? Most contributors to the symposium, as well as participants, more or less explicitly agreed that beside efficiency issues strictly speaking, there is also the effectiveness dimension to take on board, which exceeds the pure allocation effect and introduces the political economy of UTPs. In that respect, the debates were consistent with a position developed in a report to European Commission by the *Agricultural Markets Task Force*, which stated that: 'The future of the CAP and the farming sector depend on societal support. Today's consumers are interested in safe and sustainable agricultural production which also does justice to local traditions. Classical market mechanisms do not provide adequate incentives to ensure sustainable production' (EC-2016b: 11). Although the statement focuses on the end point of

the supply chain (consumers), it could easily be extended to the 'societal support' needed from and for other links in the supply chain.

There are sound economic motives to take redistribution effects and their perception on board, whether this perception is right or wrong. The very small 'farm share in the food dollar' noted by Dries is a typical example of a source of such perception. Perception of unfairness can have significant impact on costs. We know since the pioneering study of cash posters in the 1930s and the lessons that Akerlof (1982) drawn from this experiment that perception of market conditions has an impact on behaviour and performance, what Fałkowski calls 'network effects' and that I would prefer to identify as 'spillover effects'. But political transaction costs are also involved, that is: the costs of building sustainable political coalitions to support effective public policies by creating a perception of 'fairness'.

Indeed, beside their role in guaranteeing or trying to restore 'the right conditions' for markets to run smoothly (Sexton), economic policies are also about keeping or restoring socioeconomic cohesion, which may facilitate coordination and improve performance along the supply chain.

A second important lesson of the symposium is therefore that 'perception', rooted in social norms, values and beliefs must be taken into account if a policy is to be effective.

What are supply chains?

Part of the difficulties in defining and implementing such policies may come from our deficient knowledge of what a supply chain is and how it works. As noted in the introduction, the definition of supply chain as a sequence of relatively autonomous and well-delineated markets is misleading. Supply chains exist precisely because coordinating exclusively (or even primarily) through the price mechanism is not satisfying. And symmetrically, consolidation, typically vertical integration, is not always the appropriate answer to the efficient organization of transactions, as we have learned from transaction costs economics (Gorton et al.; Swinnen and Vandervelde). For example, are concentration and consolidation the most efficient solutions for dealing with situations that are multi-dimensional, as with the role of multi-function in agriculture?

One important lesson from transaction cost economics is that there are organizational alternative to integration within a firm and to pure market arrangements, organizational solutions that recent literature often identifies as 'hybrids' (for surveys see Ménard, 2004, 2013). Supply chain in the vertical sequence bringing food from producers to consumers, or franchising in the horizontal arrangements developed in distribution are epitomized illustrations of such alternative arrangements.

Most participants to the symposium, with the possible exception of a few, apparently assumed the existence and legitimacy (from an economic point of view) of such non-standard organisational arrangements. However, beside a few references to transaction cost economics, there were few analyses of the nature and diversity of these arrangements.

A third lesson here is that beside the acknowledgement of the 'heterogeneity in what is considered as a UTP' (Swinnen and Vandevelde), we need to know much more about the logic and heterogeneity of supply chain systems in which such unfair practices are embedded and that could be curbed if adequate policies are drawn and implemented.

6.4. What consequences of UTPs thus understood?

Notwithstanding these gaps and flaws in our knowledge of supply chain, the symposium provided numerous useful insights on the room these arrangements open to UTPs as well as on the various institutional modalities through which UTPs can be dealt with. I hereafter summarise these two aspects, the impact of UTPs and their regulation and/or monitoring, thus paving the way to indications on policy challenges and lessons that can be derived from the different angles chosen by our contributors or raised in the discussions.

What effect on whom?

Through the variety of contributions to the symposium, different facets of UTPs were pointed out with their potential impact on actors, namely: farmers, consumers, and other stakeholders; but also on market structures, on different segments of supply chains and other organisational arrangements, and on the society as a whole. **A fourth lesson from the symposium** is that we need to look at these different categories through different lenses since the impact varies and the methodology to analyse it may require different tools, as the short survey of various methodological approaches by Gorton et al. suggested.

Most presentations focused on the impact of UTPs on farmers, a major concern in Europe (but apparently not that much in the US, according to Sexton). Indeed, many contributions relied explicitly or implicitly on a two players' game approach, with retailers on one side and farmers on the other. However, the attention mostly went one way, looking at the impact on farmers of concentration on the retailing side. There is of course much concern about the 'crowding-out effect' (Fałkowski), that is: the dramatic reduction in the number of farmers in the EU, although it was argued in the discussions that this evolution would have happened even under fair trade, due to productivity gains and technological changes. Whether or not UTPs played a role in this evolution, eliminating farmers that would have otherwise been able to pursue normal activities remains an issue. Beside this potential impact, other effects were mentioned, on investments, incentives, and productivity, with the argument that unfair practices have a negative impact on each of these variables (EC, 2014b). For example, in their fierce competition among each other, retailers might introduce incentives that push farmers towards unfair practices, e.g. diluting milk with water if price is based on volume or artificially increasing fat in pork if price is based on fat content.

However, a supply chain involves more than two players, and the impact of UTPs exceeds that on farmers. Cafaggi and Iamiceli (2017a) accurately argued that we want to understand

the possible distortions and biases in the entire chain of transactions linking interdependent actors, which is the central characteristic of supply chain. In the same vein, Fałkowski noted that UTPs can also affect the relationships between retailers and processors, or may have their origin in farmers' behaviour as well.

In that respect, it is important to consider the potential impact of UTPs downward (on markets) and upward (on the general organisation of activities in agriculture). Downward, different contributors and participants mentioned the consequences of UTPs on competition, with the combination of accelerated exit of suppliers (see above) and the development of barriers at entry for potential competitors, the high concentration among retailers benefiting the dominant strategies of those in place. Other consequences have been suggested on the quality of information and products, although empirical studies on these aspects are far from conclusive (Russo et al.).

Indeed, one of the most challenging contributions with respect to downward effects might have been that of Russo et al. on the impact of UTPs on consumers. They examined several papers that intended to measure the effect of UTP on consumers through numerous variables (on consumers' welfare through effects on prices and quantity; on quality; on food safety). In all cases there were at best ambiguous results: the studies diverged significantly in their theoretical predictions as well as in their empirical content, because the results depend so much on assumptions made about market structure, industry conduct, and model parameters. This is confirmed by Dries who examined price transmission in supply chain systems. However, there was some consensus in the discussions that overall, competition among retailers play a positive role, that is, a role favourable to consumers, so that high concentration should be a concern (but this was challenged by Sexton who argued that it is loose oligopsonies that cause problems).

Another interesting aspect discussed in the symposium was about the potential effect of UTPs on the organization of the sector. First, it was mentioned that UTPs can have a 'network' (or spillover) effect (Fałkowski), due to the very nature of this mode of organization, diffusing good or bad practices through one specific chain as well as among other supply chains. Second, UTPs might play a role in dramatically influencing the balance of power and the modalities of organization in the sector. There was an underlying and vigorous debate here, between those considering that concentration and consolidation among retailers is a 'natural' movement in the context of technological change and globalization (Sexton) and those who emphasized lessons from recent developments in organization theory according to which there is not one single way to efficiently organize transactions (Ménard, 2004; 2013). If similar transactions can be organised in alternative arrangements that perform similarly well, then there might be value in policies that maintain competition among these alternatives, e.g., securing the role of producers' organisations, cooperatives, etc. It was also argued in the discussion that competition among alternative organizational solutions may be a good thing for economic growth, so

that it might be important for policy-makers to maintain conditions of a levelled field in that respect.

This seems to have been part of the argument behind the reform of common agricultural policy (CAP) from 2013, with the acceptance and even encouragement for farmers to get organized so as to restore symmetry among parties in the supply chain (EC, 2013b; 2016b: 6). There was agreement among participants that there is an increasing interdependence among the different 'nodes' in supply chains, that is: between buyers (retailers), suppliers (farmers), as well as processors, but that this movement has been accompanied by a shift towards the dominance of retailers. Hence the question raised in this context of the debate mentioned above: is consolidation, ultimately leading to quasi-integration and allowing retailers to impose their own conditions to all other nodes, the best way to organize activities in agriculture? If so, a provocative argument would be that this evolution may end in a 'privately planned economy', with a tiny group of retailers planning the entire chain and, in last resort, the entire agricultural activity at least in some sub-sectors? Is there not some economic as well as social value, in the long run, in the coexistence of alternative organizational arrangements to such concentration (e.g., cooperatives)? And if so is there a need for regulation to provide institutional support in this direction? Or are the 'Rules of Reason in anti-trust law' — US style — enough to handle this situation, as argued by Sexton?

Behind this discussion about the appropriate organisation of agriculture and agricultural markets, there is the issue of the impact of UTPs on all stakeholders and the society as a whole. Economists capture this aspect through welfare effects. Unfortunately, as already mentioned concerning the contribution from Russo et al., the effects of concentration and consolidation of retailers on the development of UTPs and on welfare are not obvious at all. This lack of conclusive results leaves room for diverging positions. For example, Sexton challenged the existence of these effects. The point he made is that when retailers are a few and are involved in tough competition against each other, they become very dependent on the reliability of their suppliers, so that they have incentives to implement fair contracts with farmers. In a similar vein, he challenged the idea of a negative effect of concentration and consolidation on exit of small farmers. He argued that it is not so since the renunciation of so many small farmers means that only those with good performance survive, which should be socially beneficial.

Clearly most of these issues remain open. It is so partially because of the many methodological problems that researchers face when it comes to identifying UTPs and measuring their impact (Gorton et al.). We need more robust economic results. **A fifth lesson** of the symposium is therefore that on the one hand a better characterization of supply chain systems and of their diversity is required; and on the other hand, that there is the need for rigorous comparative assessment of the differences and respective performance of alternative modalities of governance (for example, comparing supply chain led by retailers with those led by cooperatives or by producers' organisations).

How to deal with these issues?

Because of our limited knowledge about supply chains and their impact, the usual question about the role of regulation becomes even more acute. Following the tradition developed in industrial organisation, which is largely based on the standard representation of integrated firms competing against each other, Sexton questioned the need for a regulation of supply chain. In his view the so-called 'rule of reason in US antitrust law,' relying upon general laws and courts in charge of their implementation should do the job ([14]). He also argues that the need to integrate asymmetries of information among parties to a supply chain can be done through the development of contracts (a position also shared by some European Commission reports — e.g. EC, 2014a, 2016a), with conflicts handled under existing contract/commercial law.

However, this position does not fully solve two main issues raised by unfair trading practices (and not only in supply chains). First, if the different nodes of supply chain correspond to relatively autonomous markets, as it has been argued (EC, 2016b), how can (incomplete) contracts overcome asymmetries in market power better than the standard price mechanism? How come that the price mechanism does not do the job? Second, what about the transaction costs of establishing contracts detailed enough to face these asymmetries and to prevent or solve conflicts among parties without introducing rigidities that would hampered the much needed adaptation in a rapidly changing world?

Moreover, if it is acknowledged that most contracts are incomplete (EC, 2013b:6), a position increasingly shared among economists after the path breaking contributions of Williamson (1985, Chapter 3) and Hart and Moore (1988), what mechanisms ([15]) of governance can fill the blanks? The task force on markets in agriculture submitted a distinction 'between contracts between individual primary producers and their respective trading partners and contracts which are negotiated by producers collectively with their downstream partner(s)' (EC, 2016b: 34). This distinction might be useful in other aspects (e.g. to better understand the role of collective organisations), but it can hardly provide an answer to the problems of incompleteness and its connection to the asymmetries between retailers and farmers, particularly when it comes to 'individual contracts,' notwithstanding the possible exception of some very large corporate farms to which Sexton seems to refer in support of his arguments against regulation.

These issues of asymmetries in information and bargaining power and the door they open to UTPs remind us that economic activities are social constructs (Fałkowski). There is no such a thing as a 'natural market'. All markets and all organisations result from social choices, embedded in guiding rules that require institutional devices to be implemented.

([14]) For a critical view, see Joskow (2002).

([15]) In this paper, 'mechanisms' are understood as the procedures through which coordination and monitoring are processed, and 'devices' as the organisms through which mechanisms operate. For example, a regulation is a mechanism; a regulatory agency is a device.

This is why, notwithstanding the variety of forms they take, there are regulatory authorities monitoring agriculture everywhere in the world, whatever the political regime.

What regulation, under what form?

Indeed, with a few exceptions (e.g., Sexton), there was a general agreement in the symposium, synthesized by Cafaggi and Iamiceli (2017a) that regulatory authorities and other monitoring devices are needed to enforce rules concerning UTPs, preventing their harmful consequences, following-up complaints etc., and that this requires most of the time such devices to be external to the direct players of the game. Some 'regulatory' tools might be provided from inside, through the governance of supply chains, for example product safety control systems operated by the chain 'leader' or through the instalment of forms of audit internal to the chain. However, the need for regulation and arbitration external to the parties remain quite universal in agriculture because of its impact on health and, in last resort, on the survival of human beings. As a result, we find most of the time what Cafaggi and Iamiceli call 'contamination' between public monitoring ('enforcement' in their vocabulary) and private one ('governance').

Several 'regulatory' alternatives were considered in different contributions, among which competition laws and the role of courts emphasized by Sexton are only one form and one that often imposes too high transaction costs. Other arrangements exist, that range from purely private to entirely public. One form that has received recent attention from the European Commission is purely private (European Commission, 2016b). The Supply Chain Initiative (SCI) is based on entirely voluntary participation. Developed initially in Belgium with some success, it is tentatively implemented in a handful of countries, with mix results so far, particularly because by nature the initiative suffers from the absence of credible enforcement mechanism ([16]).

This may explain the evolution in UK from private initiatives to a more formal institution, the UK Groceries Code Adjudicator, which mainly relies on reputational effect through the capacity of the Adjudicator to investigate and publicize unfair practices (Gorton et al.), thus operating in a sense as a semi-public certification device. It is also a formal solution in that it is backed by a legal framework and the existence of efficient courts. Another and possibly complementary option that has been recently favoured by the European Commission is monitoring market failure through contracts, a solution that play an important role (although often overstated) in the US (MacDonald and Korb, 2011; Ménard, 2018) and that Sexton seemed to view as a second best. However, as noticed by the European Commission (2014a: 30), contracts need to be enforced through access to the judiciary at reasonable cost, a condition not at all obvious and that makes contracts more than a purely private solution to UTPs. Less formal, at least from a legal point of view, but susceptible of

([16]) The SCI was formally initiated in November 2011. Its first significant contribution was a set of 'Principles of good practices' issued in Sept 2013 (see European Commission, 2016b). National platforms are already established (in Belgium) or emerging (as of November 2015: in Finland, Germany and the Netherlands). For a survey of the contrasted results of SCI, see European Commission, 2016b: 9 et seq.

disciplining parties is the possible role of community-based management to which Fałkowski alluded, although no specific example has been provided with respect to UTPs in agriculture (but one could argue that the Supply Chain Initiative partially falls into this category). In a similar vein, Dries mentioned the possible role of cooperation as a way to monitor unfair practices and, above all, to improve existing positive practices. She gives the example of powerful retailers cooperating with upstream suppliers to introduce innovation, improve production practices, and better respond to consumers' demand.

The sixth and fundamental lesson here is that we must acknowledge that there are alternative modalities of 'regulation' to monitor relationships among the 'nodes' in supply chains. There is a **related lesson** however, which is that each of these modalities involves significant transaction costs, so that valuing one solution rather than another one should be assessed by taking these costs into consideration. Most policy-makers and even economists do not seem to be even aware of this issue. At best, there are vague references to the need to assess costs and benefits of regulatory modalities in a comparative way. It is a pity that this ignorance or 'benign neglect' of an issue clearly deserving in-depth investigation still persists.

Looking at regulatory devices from a different perspective

A major difficulty in assessing alternative modalities of regulation in a comparative way comes from their deep institutional embeddedness. Although progress has been made in the analysis of institutions and their impact on regulatory issues (see North, 1990; Levy and Spiller, 1994; Laffont, 2005; and many others), finding ways to compare institutional arrangements, not to speak of evaluating them, remains an important task on the agenda of economists and social scientists. Several contributors and discussants pointed out this issue. One possible step in that respect can be through a better identification of the different institutional layers to which different modalities of monitoring and regulation belong, thus easing the development of rigorous comparative analyses.

Indeed, 'institutions' are a bit like supply chains in that they rely on different 'nodes' or layers. Most discussions on regulation have so far focused on two layers: the macro-institutional level at which rules of the game are decided (e.g., European Parliament–Council–Commission; this is the level on which Sexton's view of regulation focuses), and the micro-level at which actors operate within these rules (typically the level at which parties to supply chains interact). However, as argued by Cafaggi and Iamiceli (2017a, b), most regulatory arrangements are hybrids: they are embedded in legal rules defined at the macro-level, and they involve forms of participation of actors operating at the micro-level.

This reasoning can be push further. It can be argued (and there is some analogy with organisation theory here) that these 'hybrid' institutions form a category of their own, providing the missing link between the general rules (macro-level) and the level of actors who must organize their transactions within these rules. It has been suggested to identify this intermediate institutional layer as that of 'meso-institutions' (Ménard, 2008, 2014). The

British 'Groceries code adjudicator' illustrates: its responsibilities are embedded in the legal 'Grocery supply code of practice' and it monitors possible unfair practices in groceries supply chains through a reputation mechanism, mainly by identifying and publicising good and bad practices (Gorton et al.; EC, 2014a). Using reputation as a monitoring instrument also plays a role in dealing with the so-called 'fear factor', the fear to lose future business transactions that often prevents farmers (or other victims of UTPs) to complain (Swinnen and Vandevelde; EC, 2014a,b).

The case of the Adjudicator is only an illustration of the various institutional mechanisms of regulation that correspond to 'meso-institutions'. Actually, most presentations and discussions in the symposium focused on this intermediate level, the key role of which has been pointed out by the task force on agricultural markets that noted that: 'Member States have appointed different national enforcement authorities to address UTPs. This is sometimes the national competition authority and in other cases a dedicated body, such as a national ministry, a national food agency, or a national anti-fraud agency.' (EC, 2016b: 6). The importance of this intermediate layer in translating the general rules into specific ones and in enforcing these rules has been emphasised by Cafaggi and Iamiceli (2017a). It is likely at this level that many sources of efficiency (or inefficiency) originate. A **seventh lesson** from the symposium is that we need to better understand, characterise, and assess the comparative costs and benefits of these alternative meso-institutions.

6.5. Policy-making: what did we learn?

This short summary of the contributions to this rich symposium raises the central issue for policy-makers: how can UTPs be monitored at the lowest possible cost so as to reduce, if not eliminate, their impact on the efficiency and effectiveness of agricultural markets? This is clearly the most difficult part to deal with in this synthesis of our discussion.

In his contribution, Sexton mentioned that Europeans seem much more concerned than Americans by UTPs in supply chain systems. That might be path dependent and not relevant only for Europeans. Although there remains a very large number of small farms in the US, in many major subsectors the actual production at the farm level and processing at the transformation level are highly concentrated (e.g. sugar beets, dairy products, livestock such as poultry or hogs — See MacDonald and Korb, 2011; and USDA, 2012), so that there is some symmetry between producers, processors, and retailers. By contrast, in Europe as in other parts of the world (Africa, Asia), production is much more dispersed while retailing and distribution is often highly concentrated. This may make supply chains a much more relevant issue and the risk of unfair practices a much more acute problem in those parts of the world ([17]).

([17]) However, one could argue that even in the US this may be changing: globalisation means that an increasing part of the products delivered to American consumers through large retailers comes from thousands of small producers dispersed over the world, so that coordination on quality, quantity, and timing of deliveries also becomes a major issue. The Nestlé model implemented to

Since the structural characteristics of supply chain in Europe, with high concentration of retailers and dispersed farmers, are likely going to remain quite the same for the foreseeable future, what lessons can be drawn from our discussion that are relevant for policy-makers?

All tools have their own limitation

One important lesson from the symposium is that there is no single tool that would provide the optimal solution to UTPs.

— Giving **access to information cannot do it all**. This solution is repeatedly mentioned in several European Commission reports on UTPs. Sexton's skepticism towards regulation rely on the assumption that 'Under the right market conditions …' ([18]), of which information is a key factor, self-regulation of markets will work. The problem is that appropriate information is scarce, difficult and costly to collect, and that processing the information already available faces the bounded capacity of agents and the distortions coming out of their 'perception'.

— Contracts cannot do it all. The increasing attention paid to contracts as a way to overcome UTPs might well have generated too high expectations. We have learned from contract theory as well as from empirical studies that contracts face limitations due to the conditions of negotiation (asymmetry in bargaining power) and the limits and costs of writing detailed contracts (collecting adequate information, establishing detailed clauses that can apply to a variety of situations, etc.). As a result, most contracts are incomplete. Moreover, detailed contracts may improve security for partners, but at the cost of introducing major rigidities, making adaptation to a changing environment particularly difficult (see EC, 2016b: 29).

— **Private codes of conduct cannot do it all**, as illustrated by the initial UK experience of a code of conduct that evolved towards the more formal institutional arrangement impersonated in the creation of an institutional 'Adjudicator'. Similarly, the Supply Chain Initiative faces the reluctance of key stakeholders to participate, particularly because of the lack of adequate mechanisms of enforcement of the rules agreed upon.

— **Formal public regulation cannot do it all** either. Critiques have well substantiated the many distortions and counterproductive biases it can introduce, so that 'countries need to be very cautious when considering regulations that are likely to make their agricultural sector less efficient' (Sexton). This risk is particularly high when goals assigned to regulatory authorities are socially-politically determined, leading to a 'benign neglect' for efficiency considerations, a significant risk in policy-

accompany the development of Nescafe is illustrative in that respect.

([18]) The exact quote is: 'Under the right market conditions, more highly concentrated procurement markets perform best and insure farmers a fair or competitive return on investment.' Based on this principle, Sexton derived several considerations about the occurrence and impact of UTPs.

making (an illustration could be the debatable recommendation to make collective negotiation mandatory — EC, 2016b: 39).

A lesson from these limitations could well be that a superior solution requires mixing different tools.

The need to know more

However, doing that in an appropriate way requires to acknowledge the variety of supply chain and of regulatory devices and to know their different properties and characteristics. As already pointed out in this summary of the symposium and in the various contributions and discussions on which it is built, we still have a very limited knowledge in that respect. There are important lessons here as well.

— We need to know better the diversity of supply chain systems, their characteristics, and their weight in the different subsectors of agriculture. Building a differentiated approach to capture this diversity and substantiating it with relevant data is central for an adequate regulation. A step in this direction could be *the implementation of an observatory of supply chain systems.*

— We need to better understand the variety of regulatory mechanisms and devices and to develop criteria to assess their comparative performance in relation to the type of activities (transactions) and the type of supply chains they intend (or pretend!) to monitor. Such developments require theoretical progress that might be encouraged by *creating appropriate research programmes at the EU level.*

— We need to take on board the two dimensions involved in UTPs: efficiency and effectiveness. Efficiency requires looking at alternative regulatory instruments through comparative lenses, for example comparatively assessing the risk that formal regulation raises transaction costs, reduces gains to trade, and prevents mutually beneficial agreements; versus the risk that relying exclusively on private initiatives remain good wishes without adequate tools to effectively enforce codes of conduct, thus opening room to opportunistic behaviour and social conflicts. This is precisely where effectiveness comes into the picture: it requires the implementation of rules favouring fairness and the perception it is so. *Building institutional devices that facilitate the development of consensus*, e.g., public forum involving the different stakeholders and relying on transparency in decision-making process and accountability in the implementation of rules might be important steps in this direction. Notwithstanding its limitation, the Supply Chain Initiative illustrates.

Still, some relevant lessons already

What we have learned already and what is now acknowledged by policy-makers is that there is a diversity of possible solutions, whether it concerns the organisational arrangements that can structure a chain of transactions, of which supply chain is a key component beside other arrangements such as vertical integration; or the institutional

arrangements that can guarantee a level playing field to parties involved. What we have also learned, although our knowledge in that respect remains very limited, is that each solution carries its own costs and limitations.

Finding the right equilibrium between these different solutions is and will remain very challenging. Policing and if possible preventing UTPs in supply chain must meet different goals, among which:

(a) maintaining a competitive agriculture in globalised markets;

(b) facing volatility (in prices, in quantities), sometimes accentuated by this globalisation, with its important socioeconomic consequences, particularly on small farmers;

(c) accepting that in the European context consolidation into huge corporate farms (which could restore some symmetry among parties in supply chains) will remain a very limited option, due to social, geographical, and economical constraints;

(d) keeping in mind the long-term perspective of supplying food to satisfy a growing and increasingly diversified demand, so that there is likely a future for diversified organizational arrangements and strategies in agriculture.

Some contributions to the symposium suggested that a solution could be **a policy-mix**, combining private, administrative, and judicial modalities of monitoring and enforcement (Cafaggi and Iamiceli, 2017b). A recent Communication of the European Commission seems to make a step in this direction when noting that 'The Green Paper consultation, accompanying studies and some of the most recent national initiatives suggest that a 'mixed approach', i.e. voluntary schemes complemented with credible and effective enforcement based on comparable principles, may be appropriate in addressing UTPs.' (EC, 2014b: 13). An alternative could be reactivating the 'Tinbergen principle' according to which different targets command different policy instruments, for example with respect to food supply chain choosing instruments aligned with the specificities of different subsectors, e.g., fresh products vs storable ones; etc.

In all cases, this is to admit that there is no *one-size-fits-all* solution and that some flexibility is in order. However, saying so also carries its own risk, the risk that policies fall into arbitrary measures, tailored according to specific interests.

Bruno Buffaria suggested that a reasonable solution might be a 'test and try' approach. In that respect, the European Union may offer a unique opportunity, thanks to its diversity. Swinnen and Vandevelde provided an interesting typology of the various regulations implemented by the different member-states of the EU. This diversity may allow developing a comparative approach to the costs and benefits of alternative solutions. However, this diversity has also its limits. As noted by Cafaggi and Iamiceli (2017a,b), monitoring UTPs must also take into account the increasingly transnational nature of supply chain systems in

Europe. *Assessing rigorously the existing practices and how they adapt to this evolution should be a priority*.

Many questions remain open which is no surprise. Among them: (1) What diversity is acceptable/manageable among Member States? (2) What status is desirable and implementable for small farmers in the long run? (3) How to maintain competing conditions at the organisational level? (4) What economic standards regarding agricultural practices and products can be compatible with social norms as diversified as those prevailing in the complex configuration of the European Union?

Clearly there is an open debate on these issues that perspire in the difficulty to reach clear-cut conclusions, particularly with respect to policy recommendations. Nevertheless, this symposium has shown that policy-makers do not start from scratch, that they can already benefit from some accumulated knowledge, and that there are relatively well-defined paths to be explored in order to find more suitable answers to the many challenges of unfair trading practices in food supply chain systems.

6.6. References

Akerlof, G. (1982). 'Labor Contracts as Partial Gift Exchange.' *The Quarterly Journal of Economics*. 97: 543-569.

Cafaggi, F., P. Iamiceli (2017a). 'Monitoring UTPs for supporting better regulations: what is the information we need? What information do we miss?' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Cafaggi, F., P. Iamiceli (2017b). 'Enforcing UTP in agrifood supply chains.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Dries, L. (2017). 'The economic impact of UTPs on upstream suppliers (farmers).' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

European Commission (2013a). *Final Report on 'Unfair Commercial Practices Directive (UCPD).* March 14, 2013. Com (2013) 139 Final.

European Commission (2013b) Green paper *On unfair trading practices in the business-to-business supply chain in Europe*. January 31st 2013. Com (2013) 37.

European Commission (2013c? Undated) *Summary response to the EC green paper*. 28 pages

European Commission (2014a). *Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain*. Final report prepared for the European Commission, DG Internal Market, 26 February 2014. DG MARKT/2012/049/E.

European Commission (2014b). *Tackling unfair trading practices in the business-to-business food supply chain*. Communication of the Commission, July 15. COM(2014) 472 final.

European Commission (2016a). *Report on unfair business-to-business trading practices in the food supply chain*. January 29 Com (2016) 32 Final.

European Commission (2016b). *Improving market outcomes: Enhancing the position of farmers in the supply chain*. Report of the Agricultural Markets Task Force, Brussels, November

European Union (2005). Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 ('Unfair Trading Practices'). *Official Journal of the European Union*, June 11, 2005, 149/22

Fałkowski, J. (2017). 'UTPs in the food supply chain: what we still need to know. Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain'', European Commission, Brussels 17-18 July 2017.

Gorton, M., F. Lemke, F. Alfarsi (2017). 'Methodological framework: review of approaches applied in the literature to analyse the occurrence and impact of UTPs.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Hart, O., J. Moore (1988). 'Incomplete Contracts and Renegotiation.' *Econometrica*. 56 (4): 755-785.

Joskow, P. (2002). 'Transaction Costs Economics, Antitrust Rules and Remedies.' *Journal of Law, Economics and Organizations*. 18 (1): 95-116.

Laffont, J.J. (2005). *Regulation and development*. Cambridge (UK): Cambridge University Press.

Levy, B., P. Spiller (1994). 'The Institutional Foundations of Regulatory Commitment.' *Journal of Law, Economics and Organization,* 9 (Fall): 201-246.

MacDonald, J., P. Korb (2011). *Agricultural Contracting Update: Contracts in 2008. / EIB-72 Economic Research Service / USDA, February 2011.*

Ménard, C. (2004). 'The Economics of Hybrid Organizations.' *Journal of Institutional and Theoretical Economics*, 160 (3): 345-376.

Ménard, C. (2008). 'Redesigning Public Utilities: the Key Role of Micro-institutions.' In J. Kornai, L. Mathyas and G. Roland (eds.), *Corruption, Development and Institutional Design*. London: Palgrave-MacMillan, chap. 10: 189-202.

Ménard, C. (2013). 'Hybrid Modes of Organization. Alliances, Joint Ventures, Networks, and Other 'Strange' Animals.' In R. Gibbons and J. Roberts (eds.), *The Handbook of Organizational Economics*, Princeton: Princeton University Press. Chapter 26: 1066-1108.

Ménard, C. (2014). 'Embedding Organizational Arrangements: Towards a General Model.' *Journal of Institutional Economics,* 10 (4): 567-589.

Ménard, C. (2018). ' Organization and governance in the agri-food sector: How can we capture their variety?' *Agribusiness: An International Journal*. 34 (…forthcoming)

North, D.C. (1990). *Institutions, Institutional Change, and Economic Performance*. Cambridge (UK): Cambridge University Press.

Russo, C., A. Sorrentino, L. Menapace (2017). 'The Impact of UTPs on consumers: review of empirical studies.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Sexton, R. (2017). 'Business-to-Business Unfair Trading Practices in the Food Supply Chain: What Are They? How Common Are They? And What Should We Do about Them?' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

Swinnen, J, S. Vandevelde (2017). 'Regulating UTPs: Diversity vs Harmonization.' Paper presented at the workshop on 'Unfair Trading Practices in the Food Supply Chain', European Commission, Brussels 17-18 July 2017.

USDA (2012). Farms with contracts by farm typology, Economic Research Service, Agricultural Resource Management Survey. https://www.agcensus.usda.gov/Publications/2012/Online/Typology/typology13.pdf

Williamson, O. E. (1985). *The Economic Institutions of Capitalism*. New York: The Free Press-Macmillan.

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

More information on the European Union is available on the internet (http://europa.eu).

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);
- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
  calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

  (*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

KJ-NA-28791-EN-N

JRC Mission

As the science and knowledge service of the European Commission, the Joint Research Centre's mission is to support EU policies with independent evidence throughout the whole policy cycle.

EU Science Hub
ec.europa.eu/jrc

@EU_ScienceHub

EU Science Hub - Joint Research Centre

Joint Research Centre

EU Science Hub

Publications Office

doi:10.2760/800

ISBN 978-92-79-73831-9