FERNANDO GÓMEZ POMAR
IGNACIO FERNÁNDEZ CHACÓN
(Directores)

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Autores

Alicia Agüero Ortiz
Mireia Artigot Golobardes
Nicolás Bárcena Suárez
Fabrizio Cafaggi
Sergio Cámara Lapuente
Herminia Campuzano Tomé
Matilde Cuena Casas
Ignacio Fernández Chacón
Tomás Gabriel García-Micó
Carlos Gómez Ligüerre
Fernando Gómez Pomar
Stefan Grundmann
Laura Herrerías Castro
Paola Iamiceli
Florencia Marotta-Wurgler
Rosa Milà Rafel
Antoni Rubí Puig
Pablo Salvador Coderch

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The limits of contract laws. The control of contractual power in trade practices and the preservation of freedom of contract within agrifood global supply chains

FABRIZIO CAFAGGI

Consiglio di Stato

PAOLA IAMICELI

Professor of Private Law
University of Trento[1]

SUMMARY: I. CHAIN CONTRACTING AND UNFAIR PRACTICES IN THE AGRI-FOOD SECTOR: CONTRACT LAWS AND BEYOND II. PRIVATE REGULATION OF CONTRACTS IN GLOBAL CHAINS 1. *The architecture of contracting and the role of unfair trade practices* 2. *Regulating contracting in global chains: the limits of contract laws* III. THE ABUSE OF CONTRACTUAL POWER WITHIN GLOBAL CHAINS AND THE LIMITS OF CONTRACT LAWS IV. REGULATING CHAIN CONTRACTING WITH THE RULES ON UTPS 1. *The distinctive features of systemic unfair practices in global value chains* 2. *UTPs, remedies and their relationship with contract terms* V. CONCLUSIONS VI. REFERENCES.

1. This paper, forthcoming in F. Gomez Pomar Ignacio Fernandez Chacon *Estudios de Derecho Contractual Europeo*, 2022, has been written in the context of a EU JRC project on Unfair trade practices in agri-food supply chain. Responsibility is only of the authors. We thank Matteo Ferrari and Marisaria Maugeri for useful conversations about some of the issues addressed in the paper.

I. CHAIN CONTRACTING AND UNFAIR PRACTICES IN THE AGRI-FOOD SECTOR: CONTRACT LAWS AND BEYOND

Global trade occurs primarily within global supply chains[2]. Trading in agri-food markets is not different in this regard, being global supply chains the main vehicle for trading food commodities and coordinating compliance with quality, safety, and sustainability standards «from farm to fork»[3]. Trade includes not only exchanges of goods and services but also of *know how, data* and technologies[4]. Trade practices define modes of contracting along the chain; not only they involve drafting contracts but often, and more importantly, also the application of contractual terms in global supply chains. Contemporary contract law and theory are still mainly focused on bilateral transactions, occurring in the market place[5]. They offer little insights on the regulation of contracting in a supply chain framework[6].

2. See GEREFFI, G. *et al*, «The governance of global value chains», RIPE 2005; Unctad, Global value chain and development, Investment and value added trade in the global economy, 2013, available at www.unctad.org.; GEREFFI, G., «Global value chains and development. Redefining the contours of 21st century capitalism», Cambridge University Press, 2018; PONTE, S., GEREFFI G., & RAJ-REICHERT, G. (Eds.), *Handbook on Global Value Chains*, Cheltenham: E. Elgar, 2019.
3. OECD (2020), «Global value chains in agriculture and food: A synthesis of OECD analysis», OECD Food, Agriculture and Fisheries Papers, No. 139, OECD Publishing, Paris, https://doi.org/10.1787/6e3993fa-en.
4. Broadening the content of exchange within global supply chains by including knowledge and market opportunities has consequence over the definition of bargaining power and the instruments to control its fair use.
5. See SCHWARTZ, A. & SCOTT, R. E., «Contract Theory and the Limits of Contract Law», 113 *Yale L.J.*, 541, 2003.
6. The focus on the bilateral transaction is not limited to contract law theorists but characterizes also a great part of the GVC literature. For an approach that distinguishes dyadic and collective framework see DALLAS, M. P., PONTE, S., & STURGEON, T. J., «Power in global value chains», *Review of International Political Economy, 26(4)*, 2019, p. 666-694. «Bargaining power in GVCs most frequently refers to firm-to-firm relations, and is the most common form of power found in the literature. This is partly because of the literature's original focus on linkages between "lead" firms in advanced economies and suppliers in developing countries (GEREFFI, G., 1994; GEREFFI, G. *et al*, 2005). In GVC governance theory, there is some variability in the arena of actors: unitary (internal to the firm) in the hierarchical form; strongly dyadic in the captive form; less so in the relational form, and weakening rapidly across the modular and market forms where the codification of the inter-firm linkage both enables and necessitates suppliers serving multiple lead firms (GEREFFI, G. *et al*, 2005)» and they continue «However, bargaining power can be founded upon other forms of power, with which it becomes layered and combined. This means that even though bargaining power is exerted directly between dyads of firms, power that is external to the dyad often helps to structure the particular linkage».

Contracting is a key dimension of chain's governance[7]. It contributes to regulating entry, exit, and modes of participation in the chain[8]. It is the result of a complex architecture, aiming at combining coordination and stability of contractual relationships over time. Contracts along chains are long- term, incomplete, and interdependent. Within supply chains there are often long-term contracts with yearly or even quarterly supply agreements, characterized by high flexibility to comply with the «just-in-time» system. Despite the standardization of contracting through General terms and conditions (GTCs), contracts are often incomplete for the uncertainty that, especially in agriculture, characterizes both quantity and quality. Through the coordination the chain leader can contribute to complete the contracts either by direct intervention or by fostering chain negotiations among parties that ensure uniformity[9]. Bargaining occurs at multiple levels within the chain requiring exploring the complexity of contracting architecture[10].

The main feature of contracts in global supply chains is their interdependence. In agri-food chains, such interdependence has become even more relevant due to increasing emphasis on chain compliance with transnational private safety and sustainability standards[11]. Contracts within a chain are functionally related to the pursuit of a single objective: the production and distribution of goods and services[12]. Such interdependence

7. For the definition of GVC governance see DALLAS, M. P., PONTE, S., & STURGEON, T. J., cit., p. 666-694. «*We define governance* as the actions, institutions and norms that shape the conditions for inclusion, exclusion and mode of participation in a value chain, which in turn determine the terms and location of value addition, distribution and capture». This definition partly builds on GEREFFI, G., HUMPHREY, J., & STURGEON, T., «The governance of global value chains», *Review of International Political Economy*, 12(1), 2005, p. 78-104. where governance theory focused on three key conditions (transactional complexity, codifiability of information and supplier capability) that structured how lead firms linked to suppliers.
8. Factors other than contracting and actors other than firms contribute to the regulation of entry and exit and the modes of participation. It is beyond the scope of this paper to provide a comprehensive analysis of these factors and actors.
9. On the distinction between value distributing and value creating negotiations within supply chain see CAFAGGI, F., «Contracting within the chain: distributional versus value creating negotiations», unpublished manuscript, on file with the author.
10. Contractual architecture defines the multilayer structure of contracting within global chains with the definition of the rules and practices. In particular it sets the balance between rules that every participant must comply with and rules that are applied if parties do not regulate their relationships otherwise (default).
11. We have developed a wider analysis on these dynamics in CAFAGGI, F. & IAMICELI, P., «Regulating contracting in global value chains. Institutional alternatives and their implications for transnational contract law», *European Review of Contract Law*, 2020, 16(1), p. 44 *seq*.
12. The exchanges including goods, service, know how, are instrumental to the production and distribution of the final good. Especially in agriculture the final price

calls for coordination in the design and implementation of the contracts[13]. In this context digitalization is providing a technological infrastructure to manage contractual interdependence and improve coordination[14]. Application of regulatory standards within contracts often involves risk management since parties may share risks and apportion gains and losses accordingly[15]. Risk management is based on coordination, and it has to be contractually regulated. It usually involves procurement divisions of the chain leaders and intermediaries like certifiers.

Coordination of design and implementation of contracting within global chains often results in the centralization of regulatory power under the control of the lead firm(s)[16]. Regulatory power of the lead firms include coercion, agenda-setting, preference-shaping, and social construction[17]. Coordination is to the benefits of all participants since it reduces transaction costs, creates network externalities, and contributes to control opportunistic behavior[18]. Decentralized contracting in global chains could be highly inefficient given the costs of coordination for a very high number of transactions. Not only centralized contracting warrants homogeneous design but it also uniforms contractual application with the necessary degree of variation to meet local specificities[19]. In global supply chains, centralized

determines, at least in part, the surplus to be shared by contracting parties along the chain.

13. Coordination of interdependence is important to address also shocks and unanticipated circumstances. COVID-19 provides a good example of the necessity to redefine the relationships within the supply chain and manage temporary suspensions of contracts with order cancellations.
14. This the role of precision agriculture that has radically modified the structure and content of exchanges increasing the role of data collection and processing.
15. This is particularly relevant in agri-food supply chains.
16. We refer to a single lead firm but often supply chains are governed by multiple leaders. The conceptual framework for multipolar governance has been provided by PONTE, S., & STURGEON, T., «Explaining governance in global value chains: A modular theory building effort», *Review of International Political Economy*, 21(1), 2014, p. 195-223.
17. These four dimensions of power are described and discussed by DALLAS, M. P., PONTE, S., & STURGEON, T. J., cit., p. 666-694.
18. Clearly the coordinating party must have sufficient information concerning the parties within the chain. An effective coordination system must be fed by information coming from the chain both at time of design and of implementation. This information should concern the riskiness of individual suppliers and their competitivness in the marketplace. Clearly the most relevant information channel concerns parties' choices related to non mandatory terms within GTCs. Surprisingly in an anecdotal survey we have found that chain leaders do not collect this information. They do not know how parties, within the chain, exercise their freedom of contract.
19. See KLAUSNER, M., «Corporations, Corporate Law, and Networks of Contracts», 81. *Va. L. Rev.* 757, 1995; KAHAN & KLAUSNER, «Standardization and innovation in

coordination of contractual architecture performs much better than decentralized contracting, with local procurement offices empowered with uniform instructions to apply the same method across the globe[20]. However, centralization can lead to abuse in contract design and or implementation.

Lead firms regulate both contracting and the determination of contractual content, including filling gaps when contracts are incomplete. Bargaining power influences who sets the contractual terms. Unequal distribution of bargaining power affects the terms, both price and non price, among multiple relationships within chain[21]. Lead firms can coerce participants in the chain to regulate the exchanges according to their rules by defining entry and exit criteria to access and stay in the chain[22]. The legal control over the exercise of this power requires instruments capable of affecting a large number of transactions at the same time.

There is a tension between the necessity to coordinate contracting and preserve uniformity, on the one hand, and the protection of freedom of contract for chain's participants, on the other hand[23]. This tension marks the boundaries between fair and unfair exercise of coordination power. The

corporate contracting or the "economics of boilerplate"», 83 *Va. L.R.*, 1997, p. 713-770, examining the network effects in boilerplates.

20. Centralized coordination operates in most global chains. The different structure of the chains proposed by Gereffi and others influence not the existence but the forms of coordination and the nature of the power.
21. For an analysis of bargaining power in contractual relationships see CHOI, A. & TRIANTIS, G., «The Effect of bargaining power on contract design», 98 *Va. L. R.*, 2012, p. 1665 ff., criticing the irrelevance proposition of conventional law economics reflected in SCHWARTZ, A. & SCOTT, R. E., cit., p. 541, 552-54. In this chapter not only we contend that bargaining power matters for contract design but we also claim that it profoundly affects contracting architecture along supply chains.
22. For the definition of coercive power in global chains see COE, N. M., & YEUNG, H. W. *Global production networks: Theorizing economic development in an interconnected world*, Oxford University Press, 2015, who define power as «the ability of one actor to affect the behavior of another actor in a manner contrary to the second actor's interests, [and] can also reflect the ability of one actor to resist an unwanted imposition by another actor» (p. 17). On the correlation between this definition and the classical account of Robert DAHL see DALLAS, M. P., PONTE, S., & STURGEON, T. J., cit.
23. On the relationship between private autonomy, asymmetric contractual power and private law instruments, see the conceptual framework provided by GÓMEZ POMAR, F. & ARTIGOT GOLOBARDES, M., «Private autonomy, weak parties and private law: views from law and economics», in VOGENAUER, S. & WEATHERILL, S. (Eds.), *General Principles of Law. European and Comparative Perspectives*, Bloomsbury, 2017, p. 307 ff. the Authors show that, on the one hand, the decentralised allocation of decisions over trade reflects the centrality of private autonomy in private law; on the other hand, they depart from the focus on the individual transaction as the reference unit of both trade and private autonomy. GÓMEZ and ARTIGOT distinguish between a macro and a micro level identifying for both level the role and limits of private law instruments.

chain leader can abuse of its power, bypassing the limits justified by the need of coordination, thereby unduly reducing parties' freedom of contract[24].

We suggest that current transnational and domestic contract laws present significant shortcomings to effectively regulate and coordinate many interconnected transactions within a global supply chain and to prevent the abuse by the private regulator when designing the chain's contractual architecture. Scrutinizing only the product (the final individual contract) and not also the process of contracting along the chain (who drafts the GTCs and how the compliance with contractual terms is ensured) through contract law, leaves an important part of the causes of unfairness outside the scope of the oversight. It is only by looking at the origins and the causes of the unfairness, often to be found outside the individual contractual relationship, that effective deterrence of power abuse can be achieved. The unit of analysis, related to the exercise of regulatory power, cannot be the individual transaction[25]. It must be the chain or, at least, a relevant part of the chain, since most of the contractual content is not determined by the parties to the contract but by the chain leader, technically a third party.

The legislative response for agri-food supply chains in Europe has been the regulation of contractual relationships through non-contractual instruments or through contractual instruments mainly tailored to bilateral relationships[26].

In relation to the agri-food sector, we shall, in particular, analyze the impact of unfair trade practice (UTP) regulation on contracting along the supply chain and its implications for contracts. UTP regulation can be used to preserve parties' freedom of contract within the limits of coordination required by the necessary contractual interdependence along the chain[27]. We shall consider not only the practices stemming from imposing unilaterally unfair contract terms but also those consisting in the

24. This limitation can result in the impositions of terms whose adoption is the precondition to access the chain or in preference-shaping concerning terms that parties would not otherwise have deployed.
25. This is a normative conclusion that should shape new national and transnational legislation on contracts and contracting.
26. This accounts for both domestic and EU legislation. For a comparative overview on the latter see CAFAGGI, F. & IAMICELI, P., *Unfair trading practices in the business-to-business retail supply chain*, Publications Office of the European Union, Luxembourg, 2018, JRC112654. On the approach taken by the EU legislator in the recently adopted Directive EU/633/2019, see CAFAGGI, F. & IAMICELI, P., «Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive», *European Review of Private Law*, 5-2019, p. 1075-1114.
27. Contractual interdependence is one dimension of the broader structure of inter-firm linkages that characterize relationships within global value chains.

determination of contractual content in global supply chains, and entry and exit regulation from the chain.

We propose to include the architecture of contracting in the category of trade practices to preserve parties' contractual freedom along the chain[28]. The use of GTCs to regulate contracting in a supply chain can be considered a trade practice for the purpose of applying UTP legislation[29]. The proposed expansion of UTP scope to the architecture of contracting in global chains allows scrutiny by the enforcer of the chain's contractual features that would be hard(er) to achieve with the application of the conventional contract law. We recommend that, in the implementation of EU directive 633/2019, contracting be included within the scope of application of UTP either with general clauses or with the prohibition of specific practices.

The paper focuses on agrifood supply chains but, in many respects, conclusions may be extended to other sectors. It proceeds as follows. In part II we provide a conceptual framework concerning the private regulation of contracts in global chains. In part III we describe how contract laws regulate contracting in global chains and highlight the weaknesses of contract laws both at domestic and transnational level. In part IV we analyze the substantive and institutional implications of regulating contracts through UTPs law with specific reference to enforcement. In part V we examine the complementarity between contract and UTP law. Concluding remarks follow.

II. PRIVATE REGULATION OF CONTRACTS IN GLOBAL CHAINS

1. THE ARCHITECTURE OF CONTRACTING AND THE ROLE OF UNFAIR TRADE PRACTICES

Power within chains is asymmetric and the chain leader(s) regulate the architecture of contracting. Trade practices concerning contracting are

28. In the Vertical relationships in the food supply chain: principles of good practice, the private code issued by the Private Food Initiative among the examples of unfair trade practice in agriculture was mentioned imposing general terms and conditions that impose unfair clauses. See Private Food Initiative available at https://www.supplychaininitiative.eu/. More recently in 2021 a EU Code of Conduct on Responsible Food Business and Marketing Practices was enacted with a special focus on inclusiveness and food sustainability; available at https://ec.europa.eu/food/system/files/2021-06/f2f_sfpd_coc_final_en.pdf.
29. In consumer law, the qualification of the use of GTCs as a practice subject to extra-contractual regimes (for the purpose of private international law) has been held by the Court of Justice in the *Amazon* case, C-191/15, 28 July 2016, see para. 39.

influenced by the existing distribution of power and the instruments to regulate contracting should address the control of the exercise of power.

Scholars of global value chains contend that «the analytic lens of GVCs has expanded, conceptualizations of power have implicitly proliferated, from dyads to collectives, from formal to informal, and from coercive to more subtle and unintentional»[30].

Power along the chain is distributed unevenly[31]. In the agri-food business the empirical research shows that retailers have more power than middlemen and middlemen more power than farmers[32]. Power distribution is however unstable and contingent[33]. The allocation of power may change, for example, depending on the predictions and the actual characteristics of harvesting[34]. Hence, the relative power of chain's participants is subject to change of conditions over time. However, despite these contingent differences the power of coordination remains in the hands of the chain leader(s). The instability may affect how the power is exercised rather than its share and ownership.

Trade practices concerning contracting can have a regulatory function. They regulate how parties should define the content of the contract on the basis of GTCs and supplier codes issued by the chain leader[35].

30. On power within global value chains see DALLAS, M. P., PONTE, S., & STURGEON, T. J., cit., p. 666-694. On bargaining power in contracts CHOI, A. & TRIANTIS, G., cit., p. 1674 ff.
31. See CAFAGGI, F. & IAMICELI, P., «Unfair Trading Practices in Food Supply Chains…», cit.
32. See FAO, OECD, EU Commission. OECD (2020-02-04), «Global value chains in agriculture and food: A synthesis of OECD analysis», OECD Food, Agriculture and Fisheries Papers, No. 139, OECD Publishing, Paris. http://dx.doi.org/10.1787/6e3993fa-en part. p. 11 ff. In agrifood the distribution of power varies according to the commodity.

    EU Directive 633/2019 recital:
33. See for a general overview DALLAS, M. P., PONTE, S., & STURGEON, T. J., cit., p. 666-694. In relation to agrifood see BONANNO, A., RUSSO, C. & MENAPACE, L., «Market power and bargaining in agrifood markets: A review of emerging topics and tools», *Agribusiness*, 34(1), 2018, p. 6 ff.
34. See European Commission (2020), *Pass-Through of Unfair Trading Practices in EU Food Supply Chains* (RUSSO, C., Ed.), available at https://publications.jrc.ec.europa.eu/repository/handle/JRC120994, at p. 137: «The relative negotiation power is driven by two main factors: product availability and irreversible production decisions. If the parties estimate that production will be abundant compared to the historical time series of demand, farmers must accept the middlemen's terms. Instead, if production is scarce, competition among middlemen may give farmers greater negotiation power».
35. In the recent past the process of drafting GTCs and supplier codes has changed with the increasing participation of stakeholders influencing parts of the rules and their implementation. See for a more general overview in relation to sustainability PONTE,

Contracting along the chain is regulated by multiple instruments. In addition to contract law, competition law also plays a role, regulating contracts along the chain affected by anticompetitive behavior resulting from agreements or abuse of dominant position[36]. The analysis that follows scrutinizes how unfair trade practices law can affect contracting and the determination of contractual content in global chains.

In order to carry this analysis we first need to explore how power is transmitted along a chain where players are numerous, distributed along several layers, and located in different parts of the world[37]. A trade practice related to contracting can involve many contracts and contractual relationships. Hence, by issuing GTCs and requiring compliance, the party who engages in the practice can have an impact on thousands of contracts without being in privity. Symmetrically, the legal regulation of the practices' unfairness can involve many contracts along the same chain; the prohibition of a practice will affect all the contracts that can be referred to the practice.

Trade practices related to contracting may limit parties' freedom of contract. This limitation can be in the parties' interest when contractual interdependence requires coordination, whose costs would be enormous were contracting along the chain fully decentralized. Requiring uniformity and compliance with transnational standards limits individual parties' autonomy but it might be a necessary price when production and distribution process are global and complex. However, centralized coordination power should not be unlimited and ought to be subject to control to avoid or mitigate unfair exercise[38].

S., *Business, Power and Sustainability in a World of Global Value Chains*, Bloomsbury, London 2019.
36. See ULLRICH, H., *Private Enforcement of the EU Rules on Competition – Nullity Neglected*, Max Planck Institute for Innovation and Competition, Research Paper, 2021/09.
37. In this chapter we focus on the relationships between the chain leader(s) and other firms participating in the chain. However, it is well established that the architecture of contracting and its implementation is influenced by many other actors in particular by those intermediaries that play a major role in shaping relationships and solve distributional conflicts along chains. See CAFAGGI, F., «Regulation through contracts: Supply-chain contracting and sustainability standards», *European Review of Contract Law*, Vol. 12, no. 3, 2016, p. 218-258.
38. In this paper we focus on external control through enforcement (below sec. IV) but chain's governance can complement enforcement by favoring participation of contracting parties to the design and implementation of the contractual architecture. This is the approach used by Dallas et al., Power in global value chains, cit. where they distinguish two main dimensions: transmission mechanisms –direct and diffuse; and arena of actors– dyads and collectives. Combined, these two dimensions yield four ideal types of power in GVC governance: bargaining, demonstrative, institutional and constitutive.

What is regulated by trade practices? Influence on contracting may concern *regulation of entry and exit* from the chain (termination of contract combined with the prohibition of entering new contracts with parties in the same chain, e.g. due to alleged violations or Suppliers Code or the like). It may also refer to *modifications of existing contracts* giving the power to a third party (the drafter of GTCs) to modify the content of terms in the contracts related to the chain. It may affect *post-contractual* obligations and practices, such as the infringement of trade secrets occurring after the expiry of the contract.

Unfair practices may influence contracting by unilaterally imposing on (third) parties the use of standard contracts or the use of specific terms and conditions that have to be integrated in every contract regulating relationships within the same chain. The practice can be considered unfair when the unilateral imposition exceeds the objectives of coordination and disproportionately reduces the freedom of contract of the parties contracting along the chain.

According to the UTP definition proposed by the European Commission «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». This definition has been reproduced in art. 1, Dir. EU/2019/633 concerning unfair trading practices in agri-food supply chains, when defining the Directive's objective rather than the concept of UTP[39]. When defining its scope of application, the Directive connects practices to contractual relations in article 1 and then refers to agreements between the supplier and the buyer. Clearly, it encompasses practices affecting also non-contractual relationships, even if the focus is on agreements between suppliers and buyers[40]. The Directive EU/2019/633 does not reproduce the distinction between misleading and aggressive practices but, for certain practices, that distinction could be used for the purpose of remedial choices at national level[41]. Whereas most of the practices addressed by the Directive may

39. See Dir. 633/2019, art. 1: With a view to combating practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another, this Directive establishes a minimum list of prohibited unfair trading practices in relations between buyers and suppliers in the agricultural and food supply chain and lays down minimum rules concerning the enforcement of those prohibitions and arrangements for coordination between enforcement authorities.
40. See, e.g., *ex* art. 3(1)(g), the reference to unfair practices consisting in the violation of business secrets under Dir. EU/2016/943, which certainly includes extra-contractual practices and secrets shared along the chain with sub-suppliers or other partners.
41. It is relevant whether the practice is aggressive or misleading especially when it refers to contracts, because, when the practice impacts on the making of the contract

be defined as «aggressive»[42], misleading practices may take place when the seller adopts GTCs including non-transparent regulation of practices in violation of art. 3(2), Dir., therefore lacking a clear and unambiguous regulation of those practices in the parties' agreement.

Despite the major focus of the EU/2019/633 Directive on practices occurring within a contractual relationship, UTP laws, including national legislations, include both contractual and non-contractual ones[43]. They usually focus on individual relationships without explicitly considering their impact on the other relationships within the chain, eg systemic effects. However, the practices usually encompass a large number of interconnected transactions along global chains and systemic consequences are very relevant.

Hence, UTPs can involve a single or multiple contractual relationships. In the latter case, UTPs can be enacted by one party against several parties along a chain or by multiple parties (infringers) against multiple parties (victims). This chapter explores the relationship between contract law and UTPs in relation to the practices affecting multiple contractual relationships. We focus on two dimensions: (1) when the definition of GTCs constitutes an unfair practice (2) when unfair contractual terms in the GTCs trigger unfair trade practices affecting multiple contractual relationships.

or on the agreement on specific terms, the national rules on contract or term invalidity may differ according to the characteristics of the practice, whether misleading or aggressive.
42. See, e.g., art. 3(1)(h), Dir.: «the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation».
43. This includes national legislation on unfair trading practices that pre-exist to the EU Directive. See, e.g., the definition of unfair commercial practices in the German Act Against Unfair Competition (UWG), aimed at protecting competitors, consumers and other market participants against unfair commercial practices; art. 2 UWG, defines a «Commercial practice» as «*any conduct by a person for the benefit of that person's or a third party's business* before, during, or after, the conclusion of a business transaction, which conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services» (emphasis added), or, again in German legislation, the prohibition of abuse of economic dependence by undertakings with relative or superior market power under art. 20, Restrictions of Competition Act, applicable to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficient and reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power).

Within chains there is a high degree of contractual standardization. We focus on trade practices related to standardized interconnected contracts rather than standardized unrelated contracts[44]. The degree of standardization depends on the specificity of GTCs. When GTCs are principle-based, parties along the chain have to specify with detailed rules the terms of the exchange. When GTCs are detailed, parties can reproduce the terms or modify them to adapt to local specificities. Some of these practices have limited effects to production or distribution; others have cascade effects and their repercussions affect the entire or significant parts of the chain.

2. REGULATING CONTRACTING IN GLOBAL CHAINS: THE LIMITS OF CONTRACT LAWS

The contemporary theory of contract suggests that contracts can be concluded within and between firms[45]. The two environments within which contracting occurs have been identified with firms and markets[46]. Later on, a third hybrid dimension has been recognized: networks[47].

These theories do not consider the specific features of contracting within supply chains. Based on the data concerning global trade, supply chains are the most important vehicle of global trade and, consequently, contracting in supply chains is the most used instrument of global trade[48].

44. In the case of connected contracts within a single chain the large number of standardized contracts are meant to regulate an integrated production process. In the case of unrelated standardized contracts, they regulate a large number of unrelated transactions with suppliers involved in different production processes or whose products or services are not chain specific.
45. See WILLIAMSON, O., «Transaction-Cost Economics: The Governance of Contractual Relations», *Journal of law economics*, 1979, Issue 22, pp. 233-261.
46. See COASE, R.H., «The Nature of the Firm», Economica, New Series, Vol. 4(16), 1937, p. 386-405 and WILLIAMSON, O., *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*, New York, 1975.
47. See POWELL, W. «Neither Market nor Hierarchy: Network Forms of Organization», *Research in Organizational Behavior*, 1990, p. 295-336 and MENARD, C., «Hybrid Modes of Organization, Alliances, Joint Ventures and Other "Strange'Animals"», *Handbook of Organizational Economics*, 2012, p. 1066-1108.
48. See OECD (2020), «Global value chains in agriculture and food: A synthesis of OECD analysis», OECD Food, Agriculture and Fisheries Papers, No. 139, OECD Publishing, Paris, https://doi.org/10.1787/6e3993fa-en."The traditional view of international trade is that each country produces goods and offers services that are exported as final products to consumers abroad. However, in today's global economy, this type of trade only represents around 30% of all trade in goods and services. In reality, about 70% of international trade today involves global value chains (GVCs), as services, raw materials, parts, and components cross borders – often numerous times. Once incorporated into final products they are shipped to consumers all over the world.

The focus of the paper is on regulating contracting in agri-food global supply chains.

Contracts between firms have both common and distinctive features[49]. Within supply chains contractual relationships tend to be stable and long term[50]. Among the various typologies, standardized and relational contracts represent the most recurring ones[51]. The architecture of contracting along global chains reflects very different dynamics from those taking place in markets, where spot or relational contracts are used. Current

Exports from one country to another often involve complex interactions among a variety of domestic and foreign suppliers. Even more than before, trade is determined by strategic decisions of firms to outsource, invest, and carry out activities wherever the necessary skills and materials are available at competitive cost and quality.

For example, a smart phone assembled in China might include graphic design elements from the United States, computer code from France, silicone chips from Singapore, and precious metals from Bolivia. Throughout this process, all countries involved retain some value and benefit from the export of the final product. But much of this value added throughout the international supply chain is invisible in traditional trade statistics, which attribute the full value of a good or service to the last country in the chain that finalised production".

See Unctad, Global value chain and development, Investment and value added trade in the global economy, 2013, available at www.unctad.org.

49. See KORNHAUSER, L. & MCLEOD, B., «Contracts between Legal Persons», *Handbook of Organizational Economics*, Princeton University Press, 2012.
50. There are differences depending on the position within the chain. See European Commission (2020), Pass-Through of Unfair Trading Practices in EU Food Supply Chains (RUSSO, C. Ed.), p. 131 ff. available at https://publications.jrc.ec.europa.eu/repository/handle/JRC120994, distinguishing between down and upstream industry «In the downstream industry, supply agreements regulate "shelf access" (They state the conditions that the middleman must meet in order to be considered a possible supplier by the retailer. Terms include (but are not limited to) lump sum payments such as slotting allowances or negotiation fees; adoption of specific quality standards; promotions; general terms of delivery (such as location, notice, packaging); take-back agreements; and quality enforcement. Usually, at this stage, retailers do not commit to minimum quantity purchases, and the entire demand risk is on the middlemen. Such agreements can be considered option contracts. The retailers gain the option to order from the middlemen, and they can decide whether to exercise it or not.

Supply agreements in the upstream market are production contracts, specifying quality standards, quality enforcement and quantity. Prices are determined at the end of the season when all production is sold to the consumers according to agreed-upon pricing rules (e.g., pay-per-quality schemes, timing of payments). Supply agreements in upstream markets are discretionary, and firms may decide to trade at harvest time directly». (p. 133-134).
51. See DAVIS, K., «The Role of Nonprofits in the Production of Boilerplate», in BEN-SHAHAR, O. (ed.), *Boilerplate: The Foundation of Market Contracts*, Cambridge University Press, 2007, p. 120-131 and KLAUSNER, M., «Governance Mechanism in Long-Term Contracts», in GRUNDMANN, S. (Ed.), *Contract Governance: Dimensions in Law and Interdisciplinary Research*, Oxford University Press, 2015, p. 218-234.

contract law is not very responsive to these distinctions since it is still primarily focused on bilateral isolated contractual relationships. This is not to say that mass contracting and standardized contracts are not relevant in the realm of business contracts[52]. But, at least for the purpose of contract theory, they are considered an exception rather than the rule[53]. In addition, mass business contracting is generally concerned with isolated contracts whereas in this paper we analyze functionally interconnected standardized contracts associated to a single and integrated production and distribution process[54].

The architecture of contracting in global supply chains is complex and encompasses multiple regulatory levels[55]. Contracting in supply chain is usually regulated by GTCs drafted by a chain leader and deployed by most parties participating in the activities of the chain[56]. This form of private regulation of contracting includes both production and distribution; it is necessary to achieve uniformity in transactions related to the same process. Uniformity is extremely important to ensure coordination of the various activities when transnational process and product standards have to be applied along the chain. Product or service standards concern quality and safety; although they focus on the final product or service, they may involve activities occurring in the upstream part of the chain, for example traceability. Process standards concerning the respect of environmental requirement aimed at achieving certification require all the parties along the chain to comply with the same standard and presuppose identical or similar contractual terms, as for example is the case for CO2 emissions or the use of fertilizers and pesticides in agrifood supply chains. But uniform GTCs are complemented by regional and local contractual regulations taking into account local specificities, usually designed by local procurement offices of transnational corporations in collaboration with legal counsels. For the

52. See the contributions in BEN-SHAHAR, O., *Boilerplate: The Foundation of Market Contracts*, cit.
53. See SCHWARTZ, A. & SCOTT, R., «Contract Theory and the Limits of Contract Law», *Yale Law Journal*, Vol. 113(3), 2003.
54. Usually the analysis focuses on how the producer of the final good deals with individual suppliers through standard contract forms. It does not address how the contractual chain develops between the first tier and the second and third tier suppliers. In particular it does not address the degree of freedom of contracts exists along the chain and the limitations imposed by the necessity to coordinate the production process.
55. See JENNEJOHN, M., «The architecture of Contractual Innovation», 59 *B.C. L.*, Rev. 71, 2018, and POSNER, EGGLESTON, E.A. K. & ZECKHAUSER, R., «The Design and Interpretation of Contracts: Why Complexity Matters», 95 *Northwestern University Law Review* 91, 2000.
56. See CAFAGGI, F., «Regulation through contracts…», cit., p. 218-258.

purpose of the analysis in this paper, we shall consider GTCs and supplier codes as the main regulatory tool for regulating contracts within chains[57].

Contracting with suppliers in global supply chains differs depending on the function and the product or service supplied. Hence, trade practices may differ depending upon the traded commodity but, even within the same trading commodity, for example coffee or kiwi, different trading practices may occur upstream and downstream[58]. The allocation of power may result in a limited unfair practice when the asymmetry of power is insufficient to impose that practice throughout the chain. UTPs may befall at different stages of the contractual relationship. They may occur at contract drafting, contract execution, contract termination or in the post contractual stage[59].

When the chain leader interacts with other large firms that provide inputs or services to the members of the chain (software, access to platforms managing technologies and know how) different organizational routes may be taken from the one just described. One possibility is the use of framework contracts between the two large enterprises. When, for example, large transnational corporations (retailers) deploy platforms to organize production and distribution, the platform is provided by a large corporation that may grant access to the suppliers of the retailer through third party beneficiary contracts. In this instance, usually ordinary GTCs do not apply between the two large corporations but, when negotiating terms between them, they also define the terms of the service contract for those who participate in the chain.

Control over contracting along the chain by the chain leader is usually exercised through non contractual instruments[60]. However, the chain leader may directly impose on its lead suppliers the use of GTCs in the process of contracting with subcontractors. This obligation warrants the chain leader control over the relationship between its own supply chain and the technology provider. But the main instruments of control are informal; that is where unfair trade practices become relevant.

57. Clearly both the sources and the instruments to regulate contracting go well beyond GTCs.
58. See European Commission (2020), Pass-Through of Unfair Trading Practices in EU Food Supply Chains (Russo ed.), p. 131 ff.
59. See DI MARCANTONIO, F., CIAIAN, P. & FALKOWSKI, J., cit., p. 877-903, at p. 879: «We try to distinguish between UTPs at different stages of the contract between the two parties. We can thus disentangle UTPs into those referring to specific terms included in the contract as well as to practices undertaken during contract execution or its termination».
60. In some GTCs the chain leader is granted inspection and compliance power even for contracts to which it is not part of.

As we said, when GTCs are deployed, the level of uniformity varies and the nature of the terms determines the potential degree of contractual variation along the chain[61]. There is a trade-off between the need of uniformity and the freedom of contract by parties within the chain. Parties' contractual freedom may be limited to achieve uniformity instrumental to govern contractual interdependence. These limitations have to be justified by the need of coordination and cannot be used to exercise unlimited control over the parties thereby unjustifiably limiting their contractual freedom.

Contract law regulates contracting among businesses on the basis of the principle of freedom of contract and respect of competition. As a means for regulating contracts along the chain, GTCs might distinguish between mandatory and default terms[62]. The mandatory terms have to be used by all parties, the default might be modified in individual transactions.

The choice between mandatory and default determines the level of control by the chain leader. The GTCs, by distinguishing between mandatory and default terms, can determine the ability of lead suppliers to modify the content of contracts locally and can cause cascade effects of these modifications in the relationships with the subcontractors. When the number and scope of mandatory terms within GTCs exceeds the objective of coordination there might be an unjustified limitation of contractual freedom of those participating in the trade within the chain. Often the content of unfair terms is determined by the architecture of contracting that is who and how regulate the content of the individual contracts along the chain.

Not only GCTs organize the exchange of goods and services along the chain but they also contribute to the distribution of contractual power[63]. In fact, even when dealing with the modes of exchanges and the allocation of tasks, risks and liabilities, many GCTs allocate contractual power along the chain. Hence not only GTCs depend on the existing allocation of contractual power but they also distribute power along the chain. Power is distributed by defining control over the production and distribution processes. Hence power is allocated when specific terms impose duties upon first-tier suppliers aiming at establishing quality or safety control over subsequent tiers, or at implementing procurement strategies in

61. See CAFAGGI, F. & IAMICELI, P., «Regulating contracting…», cit.
62. This distinction is usually referred to publicly provided terms but may be used also for privately provided terms.
63. We contend that the distribution of contractual power is not only a determinant of the architecture of contracting but also the effect of such architecture. Architectures with different combinations of mandatory and default rules result in a different re-distribution of power.

compliance with the standards imposed by the chain leader. Power is also allocated when termination rights are conferred upon one party whereas the other can only claim compensation in case of breach.

Power is also necessary to adjust the contractual terms in case of unforeseen circumstances. But this power, necessary to perform coordination, is not unlimited. The higher the interdependence along the chain, the higher the need for first-tier suppliers to adapt up-stream relationships to the changes occurring in the down-stream part of the chain[64]. Practices consisting in an abrupt modification of contract terms or an abrupt order cancellation may result from the design of duties and responsibilities defined in GCTs by the chain leader.

This is not to say that all GCTs requesting for chain compliance with standards may *per se* lead to unfair practices. Just on the contrary, chain compliance with quality, safety, sustainability standards may well be designed in a way that tasks, risks, powers, and liabilities are fairly allocated along the chain on those who may better bear the risks and the costs linked with the need for new investments or with any other supervening circumstances. However, in other cases, contractual design may allow or at least facilitate the occurrence of unfair trading practices. Examples include terms allowing for short notice order cancellation, unilateral contract changes, charges for services not related with the contract, return of unsold products, to name a few. Not only such clauses create the space for an abuse of powers therein assigned to a contract party (normally, the chain leader) but they also trigger, at least indirectly, the occurrence of similar practices along the chain when, e.g., a first-tier supplier shifts (part of) the effects of chain leader's practice upon an upstream supplier, regardless of whether similar powers (e.g. the power to unilaterally change the quality standards applicable to goods or services) are allocated in the upstream contract.

The Section III below will more deeply examine the role of contract law in policing unfair practices along the chain and its limitations. Before that at least two issues are worth highlighting in examining the instruments to control power with contract law: (1) whether and when a contract term may be considered unfair and, depending on applicable law, be set aside exactly because it enables or facilitates an unfair practice (unfair contract change, unfair termination, etc.); (2) whether such unfairness should be assessed taking into account its impact not only on the bilateral

64. RAJ-REICHERT, G., «The Role of Transnational first-tier Suppliers in GVC Governance», in PONTE, S., GEREFFI G. & RAJ-REICHERT, G. (Eds), *Handbook on Global Value Chains*, Edward Elgar, Cheltenham, 2019, p. 354-369.

relationship but also on the whole supply chain, accounting for possible «cascade effects» upon up-stream suppliers.

The first issue relates to a quite a sensitive aspect of contract law, being widely disputed whether contractual freedom may be limited through invalidity rules when the objective is to police parties' behaviour during contractual relationships or whether liability rules should be generally used for this purpose, restricting invalidity only to severe cases[65]. Invalidity of terms is a contract law instrument whereas liability rules are usually based on tort.

In fact, EU law has largely influenced national contract law in this respect, somehow broadening the role of invalidity (particularly partial invalidity) as a means for policing contractual unfairness and policing the exercise of contractual power by contract parties. This change has occurred more remarkably in consumer law than in business law. Indeed, e.g., the concept of consumer unfair terms is therein defined taking into account the *empowering effects* of such terms within the asymmetric consumer-business relationship: what matters, for the unfair term being set aside, is the mere possibility that the professional may exercise a contractual power causing a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, regardless of whether such power is concretely exercised[66]. Should this approach be extended to business-to-business relationships both at EU and national levels? These modifications would permit using contract laws to control the exercise of coordination power.

Interesting examples today emerge in a field different from food and agriculture, namely online intermediation services. Indeed, in the latter case a specific validity rule is applied to contract terms enabling service providers' decisions to suspend or terminate or impose any other kind of restriction upon the provision of their online intermediation services to business users, without these decisions being justified upon grounds specifically defined in the contract terms[67]. By contrast, Directive 2019/633 on UTPs in agrifood chain only incidentally deals with contract terms as enabling factors of unfair practices. It does so when imposing transparency requirements in the field of the so called grey practices. Indeed, in this case, the practice is allowed only to the extent that it is regulated in the contract through «clear and unambiguous terms».

65. This issue has been widely disputed among Italian scholars on the basis of quite a restrictive approach by the Corte di cassazione.
66. CJEU 21 April 2016, Radlinger, C-377/14.
67. Art. 3(1)(c), Dir. 2019/1150 on OIS.

Whereas the issue of contract terms' validity remains out of the scope of the Directive, some MSs consider invalid those contract terms, that either allow practices prohibited in the Directive's «black list» or violate the transparency requirements applicable to the «grey list»[68]. This national UTP legislation considers the *empowering* effects of unfair terms; it therefore expands the scope of UTP law to combat not only the concrete occurrence of practices but also, and well before, the use of terms that facilitate those practices. The Section III below will examine to what extent, and within which limitations, general contract law may provide some complementary instruments for reinforcing protection against UTP through unfair terms regulation.

The second issue above mentioned is even more challenging from the perspective of contract law. Indeed, the legal definition of unfairness, applicable to both terms and practices, is normally tailored within the bilateral dimension of the contract privity without due consideration for cascade effects along the chain. In this regard, the Directive 2019/633 on UTPs in agrifood chains shows an unprecedented consideration for the «cascade-effects» of UTPs along the chain. It distinguishes between direct and indirect impact of the practice[69]. The latter, however, does not either explicitly affect the definition of unfair practice, nor the definition of remedies[70].

Should the regulators and enforcers, starting with judges, go beyond the bilateral dimension of an unfair practice and take the cascade effects

68. See, e.g., the German law of transposition of the 2019/633/EU Directive; this law (Second Act amending the Agricultural Market Structure Act (now Act on strengthening agricultural organisations and supply chains) of 2 June 2021) not only prohibits unfair practices but also establishes that businesses may not effectively (or legitimately) agree on contract terms allowing for such practices (see part. § 23). § 22 refers to the Civil Codes provisions on invalidity (in particular § 134, § 138 and § 305 to § 310 of the Civil Code) and establishes that, when contractual provisions are invalid under this law, the rest of the contract remains valid and that, in order to replace invalid terms, the content of the contract shall be governed by the statutory provisions. Other transposition laws refer to invalidity as a remedy against unfair trading practices in agri-food chains (so for France and Hungary; see for an overview the recently adopted Report of the European Commission on the Directive's transposition, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A652%3AFIN&qid=1635346583274).
69. See Recital (7), Dir.: «such unfair trading practices are likely to have a negative impact on the living standards of the agricultural community. That impact is understood to be either direct, as it concerns agricultural producers and their organisations as suppliers, or indirect, through a cascading of the consequences of the unfair trading practices occurring in the agricultural and food supply chain in a manner that negatively affects the primary producers in that chain».
70. For a wider analysis on this finding see CAFAGGI, F. & IAMICELI, P., «Unfair Trading Practices in Food Supply Chains...», cit., p. 1075-1114 distinguishing between isolated and systemic effects of UTPs.

into account when deciding whether a party's decision has infringed the Directive's prohibitions? This approach would have relevant consequences whenever, e.g., a practice (e.g. unfair termination) generates minor consequences upon the direct counter-party (e.g. because it has alternative options on the market) but major consequences upon the upstream suppliers (for whom such options are missing). In fact, depending on applicable law, the first-tier supplier may lack protection against the chain leader, if the practice may not be deemed unfair against it, whereas upstream suppliers may lack protection against the chain leader, with whom they have no direct contractual relationship. Missing the chain dimension based on the cascade effects, the enforcement of UTPs' prohibitions would therefore lead to ineffective protection and under-deterrence.

III. THE ABUSE OF CONTRACTUAL POWER WITHIN GLOBAL CHAINS AND THE LIMITS OF CONTRACT LAWS

The analysis above has shown that relevant unfair practices in the agri-food chains may consist in the imposition of GTCs to chain's participants, aimed at an (unfair) allocation of power, value, risks and costs among them. In most cases, this *practice* may lead to the imposition of *unfair terms* (e.g. terms allowing for unfair contract change, unfair order cancelation, late payments, etc.). The previous section has examined how contract law allows to set aside these terms *just* because they facilitate the occurrence of unfair practices. In other cases, the imposition of GTCs influences the contractual architecture of the chain through terms that may not be deemed unfair as such (e.g. the imposition of sustainability standards along the chain), whereas unfair is the outcome generated by the practice related to the execution of those terms in relation to the allocation of costs[71] or that of opportunities like the access to the chain[72].

The unilateral definition of the contractual architecture by one or more chain leaders does not constitute an unfair practice *per se*. On the contrary, it may be an efficient and effective instrument to coordinate activities along the chain. It becomes unfair when it goes beyond the coordination,

71. E.g., the major costs of chain compliance with sustainability standards are posed upon a certain segment of the chain, whereas the profits gained by such compliance is mostly or exclusively appropriated by the chain leader.

72. E.g., the use of sustainability standards results in the exclusion of long term suppliers, in fact unable to comply with them, not enabled to improve their capacity to comply. The term introducing the sustainability standard and the obligation to comply is not unfair. The practice of excluding from the chain the supplier unable to comply for lack of resources might be considered unfair.

and it unjustifiably reduces freedom of contract, it unfairly extracts gains or unevenly allocates burdens and risks among chain's participants[73].

This Section will examine further to what extent and within which limitations contract law may provide instruments for reinforcing protection against UTPs in global supply chains. As mentioned UTPs may befall at different stages of the contractual relationship. They may occur at contract drafting, contract execution, contract termination or in the post contractual stage[74].

With multiple variations at national and supranational level, contract law plays a role in addressing the described practices. More than preventing the causes of the unfairness, it rather considers their effects, both in terms of the validity of legal acts (contracts, contract terms, contract changes, acts of withdrawal or termination) and of the damages within contractual or pre-contractual relationships. From a purely contractual perspective, the prohibition of unfair practices in pre-contractual and contractual relationships may be based upon the duty of good faith in all those legal systems deploying general clauses as a basis for pre-contractual and contractual liability: an approach which is much less common or totally absent in other systems, less inclined to rely on general clauses. In both cases, the mere violation of good faith may not be considered a sufficient ground for contract invalidity, whereas unfair terms may be the subject matter of general contract law or special-scope legislation within national private law.

The Section II above has provided some illustrations about the possible role of unfair contract terms regulation as a means for policing unfairness at an early stage, when unfair practices are enabled and facilitated by the definition of unfair terms in GTCs. It has also acknowledged that not all legal systems dispose of unfair terms legislation generally applicable to BtoB contracts along supply chains. Moreover, even where existing,

73. See European Commission (2020), *Pass-Through of Unfair Trading Practices in EU Food Supply Chains* (Russo et al.), cit., p. 25 seq: «the literature on different business practices, which may or may not constitute UTPs, is large. In this section, we discuss different contributions from the literature, organized into four widely recognized categories of UTPs: (i) the retroactive misuse of unspecified, ambiguous or incomplete contract terms; (ii) the excessive and unpredictable transfer of costs or risks of one trading partner to its counterparty; (iii) the misuse of confidential information; and (iv) the unfair termination or disruption of a commercial relationship». On the first category, mostly related with terms negotiation and renegotiation, the Authours observe: «conceptually and empirically, it is important to note that UTPs should always be considered in context. A given UTP might in some contexts be seen as detrimental to business, but in other contexts be a necessary and even desirable price to pay for maximizing the total value in a relationship». (Id., p. 30).

74. See Fn. 61.

unfair terms legislation presents relevant shortcomings. Particularly so, when referred to the use of general terms as a practice aimed at an unfair allocation of power and value along the supply chain. Being mostly aimed at setting aside unfair terms in specific contracts, its effectiveness largely depends on the weaker party's ability to oppose to the concrete terms' application, whereas in fact most rights based upon unfair terms are exercised by the stronger party, lacking that active opposition[75]. Moreover, as observed above, contract law defines an unfair term looking at the specific unbalance created in the bilateral relationship, failing to internalize the consequences along the supply chain, thereby generating an enforcement gap[76]. Even if this obstacle could be overcome, contract law often excludes the possibility that a claim against the chain leader may be brought by chain participants for imposing the use of unfair terms for lack of privity. Very often, the chain leader is not a party to the contract specifically affected by unfair terms whose origin is in the GTCs. Equally critical is the possibility to extend along the chain the effects of voidness of an unfair term declared in the GTCs or in the master contract downstream the chain (e.g. the contract between the chain leader and the first-tier supplier) and to therefore consider automatically void all contract terms integrated through the following the 'recommendations' of the chain leader[77].

Very similar shortcomings may be observed in those contract laws that provide for a «gross disparity rule», enabling to set aside or to adapt contracts in which one of the parties takes an excessive advantage over the other party[78]. Again, each single weaker party is expected to stand

75. Moving from the acknowledgment of this enforcement deficiency, the recent reform of the EU unfair terms directive in consumer protection aims at improving the effectiveness of previous legislation by complementing individual private enforcement with injunctive remedies in collective redress procedures (see Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC) and with administrative sanctions therefore combining private and public enforcement (see Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules).
76. See previous section.
77. Increasingly this possibility is recognized in competition law where the effects of contractual invalidity of the anticompetitive agreements bear consequences on the contracts between parties that were not included in the agreement. Invalidity of contracts is considered a remedy provided by competition rather than contract law. This difference has consequences in the scope of invalidity and the interests protected by the remedy. See Fn. 110 seq. and corresponding text.
78. See, e.g., under French Law, art. 1143, FCC, on duress consisting in exploiting the other party's state of dependence on him aimed at obtaining a manifestly excessive

up and claim for invalidity or adaptation of the contract, based on the specific asymmetry with its counterparty, regardless the influence of a chain leader on the chain architecture. The focus of contract laws is on the bilateral relationship rather than on the systemic effects generated by unfairness along the chain. Moreover, with variations across legal systems, these rules tend to require, as a ground for protection, the proof of a qualified weakness's exploitation, which may be only partially reflected in the contractual contents, as objectively assessed[79]. The exploitation is often related to the chain leader rather than the immediate counterparty often acting as agent of the chain leader. The preliminary conclusion is that unfair contract terms may be used to control the fair exercise of regulatory power when the term is the cause of unfairness but they do not work when the unfair term is the consequence of an unfair practice.

It is not by chance that, when the legislators wanted to address business-to-business unfair practices, they have first looked into areas different from contract law, namely torts, competition law and unfair competition. As an example, the doctrine of abuse of economic dependence has been developed as a spillover of competition law, then shaped, depending on legal traditions and other contextual elements, as a hybrid instrument, sometimes standing at the intersection between contracts, torts and competition law[80]. Looking at the intersection with competition law, the notion of economic dependence has been a better reference than the one of dominant position in order to police market unfairness[81]. At the same time, well beyond the contractual dimension, the same doctrine

advantage; in Germany § 138, BGB, on voidness of transactions contrary to public policy, including those by which a person exploits the position of constraint, inexperience or substantial weakness of will to obtain a pecuniary advantage in return for a service which is markedly disproportionate. Within instruments of soft law adopted at supranational level, see also, art. 4:109, PECL, on excessive benefit or unfair advantage; art. 3.2.7, Unidroit Principles, on Gross disparity.
79. See BEALE, H. *et al, Contract Law. Cases and Materials*, Hart Publ., 2019, p. 629 seq.
80. This is definitively the case for Italy, whereas in many EU countries this regulation has been introduced within the boundaries of competition law (see MAUGERI, M.R., *Subfornitura*, Annali, 2015, part. p. 787 seq). See, recently, the introduction of abuse of economic dependence in the Belgian Competition law (see BLOCKX, J., «Belgian Prohibition of Abuse of Economic Dependence Enters into Force», *Journal of European Competition Law & Practice*, 2021, Vol. 12, No. 4, p. 231 seq.).
81. This consideration has played a major role before the adoption of the Directive on UTPs in the agri-food sector, when scholars and policy makers have examined the limitations of competition law as a means to address BtoB UTPs. See RENDA, A., CAFAGGI, F. & PELKMANS, J., «Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain», European Commission, Council of Europe, *Directorate-General for the Internal Market and Services*, Publications Office, Bruxelles, 2014, p. 43 ff. DOI: 10.2780/91447.

has enabled to examine the power asymmetry between contract parties in light of the market structure, the party's alternative market options and its position within the chain[82]. Compared with pure contractual doctrines, the prohibition of abuse of economic dependence, as one of the backbones of modern UTP law, shows a specific attention to the market structure and the economic context in which the victim of the practice is embedded. Whether these rules specifically require to evaluate the impact of the abuse along the chain, is worth considering further[83].

The weaknesses of contract law in regulating the exercise of power in contracting can be compensated by the use of other legal instruments like unfair trade practices law, to which we turn.

IV. REGULATING CHAIN CONTRACTING WITH THE RULES ON UTPS

1. THE DISTINCTIVE FEATURES OF SYSTEMIC UNFAIR PRACTICES IN GLOBAL VALUE CHAINS

UTP regulation affects the use of contractual power and can modify both the contracting practices and the content of contracts within supply chains. It needs to account for the interdependence of contracts and the cascade effects of the practice[84]. E.g., the unilateral modification of contractual terms related to perishable goods and the allocation of risks are bound to have effects upstream along the chain.

82. See NATOLI, R., «L'abuso di dipendenza economica. Il contratto e il mercat», *Dig. Disc. Priv. sez. Comm.*, 2003 and MAUGERI, M.R., *Subfornitura*, Annali, 2015.
83. Again the reference to the caselaw of the Court of Justice may shed some light in this regard. See, e.g., CJEU 13 November 2019, C-2/2018, where the Court interprets the pre-existing Lithuanian law on UTPs in the light of the new Directive and provides criteria for assessing whether such legislation goes beyond the objective of preventing UTP; when doing so, it looks at the market structure as well as the lack of cooperative relationships among firms; see part. paras. 60 and 63.
84. This approach is well known to the Court of Justice when, e.g., assessing the consistency of national measures, purportedly taken to combat unfair practices harming suppliers and to prevent their effects along the chain, with the Common Market Regulation. See, e.g., CJEU, 11 March 2021, C-400/19, Commission v. Hungary, part. paras. 21 and 49 («the measure in question is not appropriate for securing attainment of the objective pursued, since the setting of profit margins on retail sales does not in any way guarantee that suppliers will derive an advantage from it»; «In this case, it should be noted, as the Commission has rightly observed, that that measure, which occurs in the final phase of the supply chain for agricultural and food products, namely sales to consumers, does not strengthen the bargaining power of producers or suppliers, which the Hungarian legislature regards as the weakest parties in the sale of their products to retailers»).

UTP regulation permits overcoming some of the problems concerning the weaknesses of contract law, since it can simultaneously affect a large number of interconnected transactions taking place within a supply chain[85].

Trade practices evoke a stable pattern of behavior that fits well with the organizational model of global supply chains. Usually, the distinction between practices within and outside chains is not explicitly regulated by legislation. We suggest that, compared to those occurring within isolated contracts, UTPs in global chains present specific features for the frequency of cascade effects and may deserve additional specific rules[86].

In previous work we have distinguished practices whose effects are limited to a single relationship and practices with systemic implications, involving a relevant part or the entire chain[87]. The former UTPs have been called isolated, the latter systemic. Within systemic, the pass-through effect of the UTP occurs[88]. When the effects of practices go beyond a single contract and involve a large number of interconnected transactions, effective enforcement has to address all the affected interconnected contracts. Hence, for example, the order to stop the practice should involve all the contracts that have implemented the unfair practice. A unilateral modification of a term by the chain leader in the GTCs deemed unfair may result in an injunction prohibiting the use of the modified terms in all the contracts applying those GTCs. As an *ex post* remedy, invalidity of terms in connected contracts affected by the practice may not achieve the same result.

To determine whether effects of the UTPs are systemic, the causal correlation between the practice and the contractual terms must be investigated. When the practice depends on GTCs whose use is imposed by the chain leader, there might be a presumption of a systemic effect. This presumption still leads to an inquiry concerning whether in fact the use of the term along the chain constitutes an unfair practice. Such an inquiry must

85. See, e.g., the preamble of the Spanish legislation, adopted before transposition of the current Directive; Law 12/2013, of August 2, on measures to improve the functioning of the food chain: «The proper functioning of the food chain is essential for ensure a sustainable added value for all operators that contributes to increase its global competitiveness and revert equally for the benefit of consumers. Therefore, it is essential to tackle this problem from a perspective of set that reaches all the agents that interrelate along the chain food in a way that guarantees market unity so that the sector agrifood can be fully developed and deploy its full potential». (unofficial translation).
86. See CAFAGGI, F. & IAMICELI, P., «Unfair Trading Practices in Food Supply Chains…», cit., p. 1075-1114.
87. See CAFAGGI, F. & IAMICELI, P., «Unfair Trading Practices in Food Supply Chains…», cit., p. 1075-1114.
88. See European Commission (2020), Pass-Through of Unfair Trading Practices in EU Food Supply Chains (RUSSO ed.), p. 131 ff.

determine whether the practice was in theory meant to influence contracting along the chain and whether it has, in fact, influenced the contractual terms and their implementation. In other words, it must determine whether the unfair term deployed in the contracts along the chain is identical or similar to the term defined by the GTCs and whether the exercise of the power to impose its use along the chain is unfair.

Unfair trade practices concerning contracting may depend not only on the existence but also on the application of terms and conditions. This is the case when, for example, a lead supplier within a supply chain applies the contractual terms to the subcontractors in ways that result in an unfair practice, regardless of the unfairness of GTCs. Hence, it might be the case that the the terms issued by the chain leader do not constitute an unfair practice as such, but their application by the lead supplier to the sub-suppliers results in an unfair practice. For example, the chain leader's procurement policy, reflected in the GTCs, may provide that lead suppliers ensure compliance with certain sustainable standards along the chain and leave the lead supplier free to choose the correct strategy to ensure this result. Based on this, lead suppliers may opt for a contractual architecture that fairly allocate tasks and costs of sustainability compliance along the (sub)chain, or may impose unfair conditions on sub-suppliers, e.g. shifting costs of sustainability–related checks falling outside the sub-supplier's capacity. The wider the discretion enjoyed by a chain participant, engaging in an unfair practice, the wider its liability unrelated to that of the chain leader. The more restrained the chain participant's options within the chain architecture drawn by the chain leader, the more limited will be its joint liability with the chain leader. The chain participant should be exempted, and the liability be exclusively charged on the chain leader if the former's alternative options were null or would have led it to suffer from unreasonable losses had he not engaged in the practice (showing direct or indirect coercion). Parties' choice along the chain is a relevant factor to determine whether a practice is joint and so is the liability[89]. In particular, whether there is an agency relationship between the chain leader and the first tier suppliers and the form it takes are relevant elements to be considered to define who the infringers are.

Systemic effects usually occur when there is a joint trade practice. UTP in global chains may depend exclusively on the chain leader or on the joint conducts of the chain leader and (some) lead suppliers and/or

89. See below, Fn. 94, on the criteria used by Italian caselaw to ascertain joint liability in unfair competition law, therein requesting a relation of interests between the parties (the acting one and the benefited one), not necessarily amounting to a specific unlawful agreement (*pactum sceleris*).

distributors[90]. The causal inquiry has to determine the role of parties other than the chain leader into the practice and its unfairness. Clearly it matters whether the supplier is a subsidiary of the chain leader, an exclusive supplier under contractual control of the chain leader or an independent supplier who supply multiple buyers. A parallel issue concerns the victims. The inquiry should investigate whether the practice impacts only on one party or on multiple parties.

At least two approaches may be used to carry the causal analysis about the unfairness of the practice. The difference is based on the distinction between design and implementation of the practice. One approach could suggest that the investigation over the existence of a UTP concerns the involvement of the relevant contractual party/ies into the design of the practice: for example, if the practice stems from GTCs, whether the supplier using those terms at the detriment of a subcontractor has participated in the drafting of GTCs. The other approach does not focus on direct or indirect participation in the design of the practice but rather on its implementation. According to the latter approach, it is sufficient that an enterprise deploys the terms to establish the engagement into an unfair practice.

The two approaches are not mutually exclusive; this explains why some legislation prohibits both the use of terms allowing for UTPs and the implementation of those terms and practices[91].

A joint practice implies the use of identical, similar or functionally connected contractual unfair terms replicating those in the GTCs. As seen above, UTPs concerning contracting may apply to GTCs and influence the practices of contracting along the chain determined by the use of terms and conditions designed by the chain leader. When there is a joint practice influencing contracting along the chain, the remedy (and the sanctions) should address all the participants in the practice.

Clearly, the allocation of regulatory power over contracting practices between the chain leader and the lead suppliers may affect the causal inquiry over the influence of the practice on contracting. If the lead

90. See, e.g., the case examined by the Italian Competition Authority under the national legislation on unfair practices in agri-food contracts in its decision no. 29679, 25 May 2021. The case relates to the imposition of supposedly unfair contract terms upon seedless grapes' producers by breeders acting through the intermediation of traders, as first-tier licensees over vine varieties' intellectual property rights. In fact, due to the market structure and the existence of viable alternative options for producers, the Authority has not found the requested power asymmetry, as a prerequisite for the application of national law. The case remains however relevant for the chain dimension through which the (allegedly) unfair practice has occurred.

91. So for the German legislation transposing the 2019/633/EU Directive, which however does not refer to joint UTPs.

suppliers contribute by modifying the content of the contract, then they are the same time rule-makers and rule-takers qualifying as active agents of the UTP. The concrete possibility to depart from a standard that in principle admits (or facilitates) an unfair practice should be also taken into account in cases in which a first-tier supplier merely rebuts the unfair practice upon the sub-supplier (e.g. imposing the same unfair discount practices) without being forced to do so under the contract with the chain leader. Whether a first-tier supplier is able to depart or not from the rules imposed by the chain leader via GTCs may depend not only on the allocation of power along the chain but also on the level of chain interdependence underlying the practice. For example, if the GTCs empower the chain leader to unfairly modify the quality standards inherent to a new production line with high technological interdependence along the chain, the first tier supplier will have limited or no power to depart from the imposed standards; since he is a rule taker, he should be considered a victim of the unfair practice rather than a co-responsible.

Whether the first-tier supplier benefits or not from the practice is another factor to qualify the unfair practice as joint (those who have promoted the practice and not being the simple instruments of its implementation)[92].

A parallel issue concerns the identification of victims of an unfair practice and the remedies that can be sought. The victims are those parties upon which fall the consequences of unfair terms and practices unilaterally imposed. The existence of multiple victims may be caused by a practice adopted either by a single party or, jointly, by multiple parties. In both instances there are systemic effects impacting directly or indirectly upon parties participating in the exchanges along the chain. When multiple victims are involved, they might either have the same interest and seek the same remedy or have different interests and seek different remedies.

92. See, e.g., in Italian case law, the criteria used by the court to assess whether unfair competition practices may involve joint liability or a distinct basis for liability under general tort law: Cass. 23.12.2015, n. 25921: «the existence of the tort of competition cannot be ruled out when the damaging act is carried out by a person (the so-called third party), who acts on behalf of a competitor of the damaged party, or in any case in connection with the same, since, in such a case, the third party must be held jointly and severally liable with the entrepreneur who benefited from his conduct. To this end, if the mere circumstance of the advantage given to the competing entrepreneur is insufficient, neither is it necessary that a *pactum sceleris* has been stipulated with the latter, the objective fact consisting in the existence of a relationship of interests between the author of the act and the advantaged entrepreneur being sufficient. It is only in the absence of such a link between the author of the damaging conduct and the competing entrepreneur that the third party may, on the other hand, be held liable under Article 2043 of the Civil Code» (unofficial translation).

Therefore, a supply chain approach to UTPs sheds light on the possible existence of joint practices enacted by more than one business along the chain as well as on the possible existence of multiple victims affected by the same UTPs. In this context, to identify who is liable and who is entitled to remedies is not an easy task for enforcers. Moreover, sometimes one does not exclude the other. Indeed, there might be instances where the lead suppliers are, at the same time, victims (of the chain leader unfair practice) and infringers (in relation to subcontractors along the chain).

2. UTPS, REMEDIES AND THEIR RELATIONSHIP WITH CONTRACT TERMS

This section examines the remedial toolkit added by UTP laws to control private regulatory power in global chains. While defining the scope of this analysis, it should not be forgotten that administrative enforcement introduced by Directive 2019/633/EU imposes penalties. Therefore, when a trade practice is qualified unfair a combination of administrative sanctions and civil remedies can be used. We shall limit the analysis to the remedial side and examine how the remedies provided by UTPs can be combined with those based on contract laws to control power in the definition and implementation of the contractual architecture of global chains.

When a UTP is found, the available remedial toolkit is mostly regulated by national laws[93]. Directive EU/2019/633 does not regulate remedies, leaving MSs' current regulation in place, focusing instead on administrative sanctions.

Within UTP laws, it is useful to distinguish between prospective and retrospective enforcement. Both forms of enforcement and the remedies included therein are subject to the proportionality principle. This principle is recalled by art. 6(1), Dir. EU/2019/633 together with the principles of effectiveness and dissuasiveness. Therein this «triad» is applied to sanctions, but more and more EU law and caselaw extend the same principles to civil remedies administered by courts in fields of application of EU law[94].

93. See Report from the Commission on the state of the transposition and implementation of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, 27 October 2021, COM/2021/652 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A652%3AFIN&qid=1635346583274.

94. See CAFAGGI, F. & IAMICELI, P., «The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions», *European Review of Private Law*, Vol. 25(3), 2017, p. 575-618.

Unlike conventional contract law remedies, prospective enforcement operates primarily through injunctions. Injunctions permit ordering a large number of contractual parties, belonging to the same chain, to stop a practice and the use of unfair terms at present and in the future. An injunction can also modify the contractual terms by prohibiting for the future the use of a term that results in an unfair practice, or whose application consists in an unfair practice and indicate the admissible content of the term and the practice. The injunction can target both the term in the GTCs and the terms in contracts concluded by participants in the chain. However, the injunction may target only the term within the individual contractual relationship but not the GTCs, when the unfairness is related to the application of the term in a specific relational context rather than to the term itself.

In case of systemic effects of the unfair practice, the injunction would be directed towards all the participants in the practice even if the role of players within the chain might differ, depending upon the distribution of contractual power. Beneficiaries of the injunctions are all the parties who are or can be in the future victims of the practice[95]. Actual harm is not required to seek the injunction. Parties can «benefit» from the injunction without having to prove actual harm from the practice. Hence, all those contractual parties who have been forced to use an unfair term may benefit from an injunction ordering to eliminate the term from the contract and possibly from the GTCs.

Retrospective enforcement is aimed at eliminating or mitigating the effects of the practice. It includes several remedies from invalidity to restitution and compensation linked to the practice. The remedial toolkit to retrospectively eliminate the effects of the practice ranges from a right to renegotiate, to a power to terminate the contract or to the invalidity of individual terms and, in extreme cases, of the entire contract. It is worth underlining that since the practice involves multiple contracts the remedies can also involve many contracts.

It should be underlined that in theory compensation is available but in practice, when the relationships are stable and long term, the remedy almost never consists in damages but it is aimed at correcting the effects of the practice[96].

The interdependence of contracts and contractual relationships makes collective enforcement a necessity, especially when the impact of the practice has systemic effects and goes beyond the individual contractual

95. For a parallel consideration on injunctions in consumer protection see CJEU 26 April 2012, Invitel, C-472/10.

96. CAFAGGI, F. & IAMICELI, P., «Contracting in global supply chains and cooperative remedies», *Uniform Law Review*, Vol. 20, 2015, p. 135-179.

relationship. If the practice allocates unfairly costs and benefits the end of the practice should result in a different allocation of those costs and benefits. Collective redress may be sought by associations or by individual actors seeking remedies like injunctions whose effects go beyond the individual victim[97]. But collective redress is not limited to prospective enforcement and can include retrospective enforcement.

Collective redress procedures allow to address these remedies more efficiently and effectively. Modes may vary depending on their prospective or retrospective nature. Collective redress certainly provides uniform instruments in prospective enforcement, whereas may require differentiation in retrospective enforcement. We strongly recommend the development of collective redress in order to make enforcement not only more effective but also less disruptive for the operation of the chain. Such evolution should operate at EU level, especially in relation to cross-border cases in intra-European global chains.

Invalidity and its relationship with injunction deserve special attention. Indeed, prohibition for the future does not necessarily result in invalidity for the past. Invalidity of individual terms is the remedy provided by national contract laws. In the case of UTP the issue is whether the enforcer can declare simultaneously the invalidity of all the terms/contracts affected by the practice[98].

When the practice consists in the adoption of a legal act (e.g., withdrawal from a supply contract, order cancellation, unilateral contract change, etc.), invalidity enables to set aside the effects of this act, shielding the victim from the consequences of the contractual abuse: the relationship is not terminated, the order is not cancelled, the contract is not modified. Hence, in most cases, invalidity entails correction. When the unfair practice is facilitated by a contract term allowing for it (e.g. a contract term

97. Collective redress has explicitly been regulated by the Italian legislative decree 198/2021 implementing EU directive 633/2019. Under the new statute multiple victims of the same or joint practices may seek collective redress consisting in injunctions against actions in breach of the requirements sanctioned by the transposing instrument pursuant to Articles 840-bis et seq. of the Code of Civil Procedure, regulating collective redress proceedings. More generally, the EU 2019/633 Directive provides that MSs shall empower association to lodge complaints in the interest of their members before the enforcing authority.

98. A similar issue has arisen in competition law for contracts that execute an anticompetitive agreement. The answer differences across MSs but there is some convergence towards partial invalidities of the terms directly connected to the agreement. See LAMADRID DE PABLO, A. & ORTIZ BLANCO, L., «Nullity/Voidness. An overview of EU and national case law», *e-Competitions*, N. 49199, 7 November 2019; e v. CAUFFMAN, C., «The impact of voidness for infringements of Article 101 TFEU on Linked Contracts», *European Competition Journal*, 2012, p. 95-122.

legitimizing unilateral contract changes), term invalidity neutralizes such power; if then this power is nevertheless exercised, as just seen, invalidity may set aside or void the (act of) unilateral change, again shielding the victim. In these cases, invalidity of contract terms allowing for UTPs can be declared when the unfair practice is a public order violation[99].

Unfair contract terms constituting a UTPs are normally subject to a regime of partial invalidity, while the rest of the contract remains valid[100]. Partial invalidity can be explained both in terms of effectiveness and proportionality of business protection; indeed, this remedy enables the weaker party to preserve the relationship while neutralizing the buyer's power to engage into the contested UTP. Even more importantly, partial invalidity reduces disruptive effects on the functioning of the chain leaving the relationship alive and operational. A separate issue is whether the invalid term should or may be replaced by means of application of legal provisions or by means of judicial intervention. This issue is linked with the question of contract modification.

Indeed, when contract terms allow or facilitate the adoption of UTPs (e.g. they allow for unfair order cancellation in relation with perishable products ex art. 3(1)(b), Dir.), an issue arises on whether the supplier may invoke a right to contract modifications (e.g. to establish that an advance notice of at least 30 or 40 days is needed). This is a stronger version of the right to renegotiate. It is technically a corrective measure where the injured parties ask for contractual modifications that would eliminate the unfairness and, at the same time, keep the contractual relationship working. Unilateral modification as a remedy sought by the injured party is usually not available under general contract law but may become available as a remedy against UTPs[101]. Whereas, in most cases, the mere non bindingness

99. See, in German contract law, § 138(1), BGB.

100. The German law transposing Directive 2019/633/EU expressly provides so see § 22(2), Act on strengthening agricultural organisations and supply chains (as modified by the transposition act on 2 June 2021). So for the Austrian legislation; see Sec. 5(c)(5), Federal Act to improve local supply and conditions of competition, as amended on 31 December 2021: «If a contract contains a commercial practice listed in Annex I or a commercial practice listed in Annex H, without it having been agreed in a clear and unambiguous manner in the supply agreement or in a follow-up agreement between the supplier and the buyer, those clauses shall be absolutely void. The validity of the remaining provisions of the contract shall not be affected».

101. The Directive 2019/633/EU is not explicit in this regard, only providing, as a minimum power for national enforcement authorities, the one to bring the practice to an end. See, however, in national transposition law, the German provision extending this power to the elimination of effects stemming from the practices; under § 28(1)(2), Second Act amending the Agricultural Market Structure Act of 2 June 2021, the Authority has the power to: «establish, after consulting the buyer, an infringement of any of the prohibitions laid down in § 23 sentence 2 in conjunction with § 11 to §

of contract terms allowing for UTPs suffices to neutralize the effects of such UTPs (i.e. the order cancelation remains without effect and so for a unilateral contract change under art. 3(1)(c), Dir.), seeking GTCs' modification as a judicial remedy would make enforcement more effective by explicitly signaling correction (i.e. the need for a specific advance notice) within the affected relationship and, possibly, along the whole chain.

The choice of remedies to eliminate the effects of unfair practices with systemic effects along the chain is worth further elaboration. In particular, the alternative between judicial integration of the contract and an order to the issuer of the GTCs to replace the unfair term according to the principles defined by the judge should be decided in favor of the latter. Direct judicial integration may present substantive and procedural shortcomings especially in cross border cases. The enforcer who ascertains the unfairness of the term (and related practice) can suggest or recommend how the term should be replaced if that is part of GTCs. But the final decision should be given to the parties.

The possibility of judicial replacement could, instead, be used when the void term has replaced a default rule. In this case the voidness of the term may result into the re-establishment of the legislative default. This possibility may cause problems when the contracts apply different national laws and default rules differ. In this case, again, instructing the issuer of GTCs with the principles that should drive the choice of the default may provide the best solution to ensure coordination along the chain with contracts regulated by different legal systems.

When the same practice involves multiple suppliers, coordinating remedies might make them more effective and dissuasive. E.g., the availability of collective injunctive procedures may prevent massive consequences along the whole chain affected by a single practice and therefore deprive the infringer of a large portion of profits otherwise available as a benefit from the practice. Likewise, collective procedures could ensure that the invalidity of a term or act, representing an unfair practice (e.g. a unilateral contract change), could involve all equivalent terms and acts used along the chain in the same circumstances[102]. If available, this coor-

21 and § 4 of the Protection of Trade Secrets Act and *make the necessary injunctions to remedy the infringement and prevent future infringements*» (emphasis added).

For an example under Italian law, see the decision no. 27991 of 12 November 2019, adopted by the National Competition Authority against a large seed producer that, among other practices, imposed unfair contract terms upon bread producer; together with maximum sanctions for all infringements, the Authority has ordered to refrain from such practice for the future.

102. Some legal systems distinguish between remedies that can stop or eliminate the effects of the practice and remedies that void the contract or the individual clause.

dination would also avoid conflicting results coming from uncoordinated individual actions and would facilitate a more effective protection against systemic unfair practices generating cascade effects along the chain.

In fact, whereas some national systems provide for collective injunctive procedures, due to simultaneously address multi-offensive infringements for the benefit of multiple victims, coordination of remedies in the field of invalidity is by far less common[103]. In this regard, the same Directive EU/2019/633 has missed an opportunity by not making any reference to civil remedies and to collective redress in particular[104].

Based on the current status of EU and national law, what can be expected is that injunctive remedies (well known to the Directive) will be applied in relation with the unfair adoption of GCTs with the purpose of preventing their future application in multiple relationships along the chain and the occurrence of UTPs based on that application. In addition to it, a coordination among separate enforcement proceedings may be envisaged. Indeed, moving from the declaration of unfairness of GTCs and of a certain unfair practice related to those, national laws should enable suppliers to rely on this ascertainment to derive all due consequences in respect of individual contract relationships, including invalidity of contract terms or separate legal acts (such as order cancelations and contract modifications).

The impact of remedies applied against an infringement of EU law upon related contractual relationships involving third parties has been already examined in the field of competition law[105]. In this area, the

The former can be sought by anybody with a legal interest, the latter only by the victim of the practice.

In France l'ordonnance du 24 avril 2019 (Ord. n.° 2019 359, 24 avr. 2019) states «Toute personne justifiant d'un intérêt peut demander à la juridiction saisie d'ordonner la cessation des pratiques mentionnées aux articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 et L. 442-8 ainsi que la réparation du préjudice subi. Seule la partie victime des pratiques prévues aux articles L. 442-1, L. 442-2, L. 442-3, L. 442-7 et L. 442-8 peut faire constater la nullité des clauses ou contrats illicites et demander la restitution des avantages indus».

103. A parallel development may be observed in the field of consumer protection, when national legal systems establish public registries due to list general terms and conditions deemed unfair by an enforcement authority and therefore prohibited not only for those whose infringement has been specifically ascertained by the enforcer but also by those using «equivalent» terms. For a case discussed by the CJEU in the field of contract unfair terms, see CJEU 21 December 2016, Biuro, C-119/15.
104. Nonetheless some MSs have taken the opportunity to regulate collective redress while implementing the directive. See Italian decree mentioned above, Fn 99.
105. LIBERTINI, M. & MAUGERI, M.R., «Infringements of Competition Law and Invalidity of Contracts», *European Review of Private Law 1(2)*, 2005, p. 250-272 and CAUFMANN, C., «The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts», *European Competition Journal*, 2012, p. 95-122.

Court of Justice has clearly admitted that parties to contracts linked to the one directly affected by the original infringement may claim damages[106] and even invalidity[107]. While national courts show different approaches when it comes, e.g., to the validity of consumer contracts influenced by anticompetitive agreements[108], scholars examine to what extent the use of civil remedies along the stream of related contracts may contribute to the effective application of EU law and to deter its infringements[109].

106. Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297.
107. Judgment of the Court (Fourth Chamber) of 14 December 1983, Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG., Case 319/82, where the Court holds that the automatic nullity decreed by article 85(2) of the EEC Treaty applies only to those contractual provisions which are incompatible with article 85(1) and the consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are to be determined by the national court according to its own law, not being a matter for Community Law.
108. See, e.g., in Italy, Cass. no. 24044/2019, concluding that from the nullity of the anticompetitive agreement either a total nullity or a partial nullity may derive with regard to the consumer contract affected by that agreement, depending on whether the parties would have concluded the contract despite the nullity of those specific clauses affected by the anticompetitive agreement. Similar conclusions are today expressed by the Joint Chambers of the same court in the case of a business-to-business surety contract reproducing terms provided by the national banking association and deemed in contrast with competition law by the Competition Authority. Indeed, the Court has established that «surety contracts following agreements that have been declared partially null and void by the Competition Authority (...) are partially null and void (...) in relation only to those clauses which reproduce those of the unilateral scheme constituting the prohibited agreement, unless a different intention of the parties can be inferred from the contract, or is otherwise proved» (It. Cass., Joint Chambers, 30 December 2021, no 41994, unofficial translation).
109. CAUFMANN, C., «The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts», cit. On this issue, see also the conclusions reached by LIBERTINI, M. & MAUGERI, M., building on French, German and Italian scholarship: «While acknowledging the need for a deeper account on this point, it is possible to assume that (at least within the system dealt with), where a clause objectively amounts alone to an abuse, its invalidity can be declared (due to the infringement of an imperative norm). On the other hand, where the clause, though part of an abusive strategy, is in itself insufficient to realise an abuse, it should be held valid. In other words, the remedy of nullity should apply where the single contract amounts, in itself, to breach of the imperative norm that prohibits the abuse. Where, on the contrary, the hindrance abuse is carried out through the combined effects of a series of contracts made by the dominant undertakings with third persons, the only contract law remedies available should be an injunction or damages, remedies which may be invoked by the competitors damaged by the abusive strategy. With regard to exploitation abuse, it is arguable that the abusive clause can be adjusted to the conditions virtually present in a competitive market (either through a substitution or through compensation for damages)». (LIBERTINI, M. & MAUGERI, M. R., «Infringements of Competition Law and Invalidity of Contracts», cit., p. 272).

In the field of unfair trading practices, a similar issue arises concerning the impact of UTPs in the relationship between the chain leader and the first-tier supplier in the upstream part of the chain. So, for example, when the unfair contract change is sanctioned against the chain leader and the latter is ordered to bring that practice to an end and to modify GCTs causing the unfairness of the practice.

Sub-suppliers should be entitled to seek equivalent remedies whenever that practice has generated cascade effects. Unlike contract law, where privity may prevent from seeking remedies against non-contractual partners, UTP regulation more frequently permits targeting the originator of the practice together with its vehicle (the lead supplier). Hence, joint liability can be found in the case of a practice, addressing the primary cause of the abuse of regulatory power.

Another distinctive feature of remedies for systemic UTPs regards the extent to which remedies should reflect the different impact of UTPs along the chain. Indeed, retrospective enforcement of UTPs in global chains may require differentiations of remedies along the chain when there are multiple victims. When the same practice bears effects on multiple contracts, it may happen that some contracts are more intensely affected than others. Depending on the intensity of the causal link between the practice and the contracts, remedies may vary. For example, if the buyer (chain leader) imposes unfair terms on the lead suppliers (e.g. terms allowing for abrupt order cancelation without advance notices) and the lead suppliers impose the same terms on the subcontractors, it might happen that the latter suffer larger harm than the former. To the extent that an unfair practice involves multiple parties the level of seriousness and the magnitude of harm might differ requiring a differentiated remedial strategy for the same practice.

Graduation of remedies according to the principle of proportionality should therefore be correlated to (1) the degree of contribution to the practice by every participant (having special regard to the alternative options available for the infringer and the profits made through the UTP) and to (2) the effects of the practice on the contractual relationships where injured parties are involved. As a result, it might happen that, when a UTP is found by the enforcer, contractual unfair terms are voided in some relationships (because, e.g., the advance notice for order cancelation is too short having regard to that specific relationship) whereas in others they stay in force (since the order cancelation is less prejudicial) but some type of compensation is needed to cover the costs shifted to the supplier, e.g., for the disposal of unsold products. Then, invalidity and restitution can be replaced by compensation.

In conclusion remedies under UTP laws can consider the collective dimension of harm and, at the same time, differ when the impact of the practice varies along the supply chain.

V. CONCLUSIONS

We have examined the architecture of contracting and the instruments to control the exercise and the abuse of private regulatory power along supply chains. The design of the contractual architecture and its implementation may cause significant unfairness in power distribution that can translate in misallocation of market opportunities, gains, and losses for chain participants.

Power is unevenly distributed among the multiple layers of the chain. In this regard, the distinction between rule-makers and rule-takers should be factored in. The distribution of power along the chain determines how contractual terms are defined and the ratio between mandatory and default rules within the GTCs[110].

The control of private regulatory power can protect freedom of contract and the space of choices by individual parties.

Control over the use of private regulatory power within global chains can be implemented through different mechanisms: governance and enforcement. In this chapter we have focused on the latter and examined the various available tools and their combination comparing contract laws and unfair trade practice laws, leaving competition law outside the picture.

We have suggested that current domestic and transnational contract laws present significant shortcomings and that unfair trade practice regulation can complement contract laws to ensure that private regulation of a large number of domestic and transnational contracts are regulated fairly and effectively. In particular, a supply chain approach to unfair commercial practices allows the control of the systemic effects they produce.

Contemporary contract laws focus mainly on the consequences of unfairness, whereas unfair practices look at the causes of unfairness determined by the exercise of power in defining GTCs. UTP regulation is particularly useful when the effects of practices are systemic and jointly

110. The distribution refers to the relationship between the chain leader and the other parties and to the relationship between the parties. It concerns how much regulatory power is left by the chain leader to the parties along the chain and how this power can be exercised.

carried by the chain leader and lead suppliers. Clearly contract remedies may suffer from underdeterrence when not complemented by UTP law and in particular by collective prospective enforcement.

While there is a correlation between the unfairness of the practice and that of the term, it might happen that the trade practice is fair and the term is unfair or *viceversa*. This conclusion is relevant when the originator of the term/practice and that of the term/practice differ. This is the case when the term is originated by the chain leader and the practice by a first tier supplier. Shifting the focus from terms to practices allows to analyse the systemic effects of the exercise of unilateral power.

The power to design the architecture of contracting has been the main focus of the analysis. GTCs definition and implementation represents a key feature of contracting in global chains. The distribution of power to define contractual terms in individual relationship is reflected in the nature of the trade practice and its potential unfairness. Clearly, wording in GTCs is important but not decisive. To establish whether a trade practice is fair is not sufficient that the terms are recommended instead or imposed on the chain participants. A factual inquiry is necessary to evaluate whether a legal recommendation becomes *de facto* an imposition. The inquiry should examine the degree of coercion and the real space for choice (freedom of contract) left by the chain leader to the parties within the chain. The wider the space of choice, for example by allowing modifications or integration and *ex post* consent to unilateral modifications, the fairer the practice. The practice should be considered unfair when the space of choice is null or too limited and such limitation cannot be justified by the need to coordinate contracting along the chain. Degree of fairness, private autonomy and the space of choice are clearly correlated.

The use of contract laws alone generates an enforcement gap.

The enforcement of UTPs along global chains may allow the control over the use of contractual power by chain leaders and lead suppliers to a greater extent than contract law.

We have distinguished between prospective and retrospective enforcement. The former prohibits conducts for the future, the latter eliminates the effects of past unlawful behavior. The former is mainly represented by injunctions, prohibiting the use of contractual terms and practices, and by commitments; the latter is represented by the invalidity of individual contractual terms allowing for UTPs along the chain that may result in partial or total invalidity, as well as by the non bindingness of unfair requests, unilateral changes, order cancelations during the contract execution, by the restitution of undue payments, charges or price reduction, and,

possibly, by compensation. Unlike conventional contract law, still mostly focused on retrospective enforcement, UTP law largely expands the scope of prospective collective enforcement.

Shifting from contractual terms to practices increases the relevance of collective enforcement and of the complementarity between retrospective and prospective enforcement. When the effects of UTPs are systemic, involving a large number of contractual and non-contractual interconnected relationships, collective enforcement provides coordination of remedies that should balance the provision of effective remedies and the preservation of the continuous operation of the chain.

UTPs regulation does not discriminate between contractual and non-contractual relationships even if remedies stemming from the violation may distinguish the claimants and the nature of remedies depending on whether they have a contractual relationship with the infringer. Remedies include the protection of both individual and collective interests. Sanctioning against UTPs focuses, instead, on the protection of the public interest.

Many UTPs regulate how contractual power is used when determining the contractual terms and conditions and their application along the chain. The elimination of the practice's effects may have serious impact on contracts and, as a result, on contracting. We contend that UTP regulation may affect contracting in global chains to an extent much larger than it is usually recognized. An order by the enforcer prohibiting unfair practices and the use of unfair terms concerning, for example, time of payment, consequences of delay, or underselling, may influence how the contractual and non-contractual relationships along the chain are organized. In other words it may impact on the architecture of contracting.

The interplay between contract and UTP law develops in the shadow of competition law that refers to dimensions of the same violations that are not captured by them. As it happens in consumer protection also in the field of BtoB there is an interaction between competition and unfair competition law where most legal systems locate UTPs.

These modes of enforcement can be exercised by a single authority or by multiple authorities including administrative, judicial, and private bodies: what we have labeled the enforcement triangle in previous work. However, the enforcement triangle faces significant limitations in transnational relationships where parties operate in different jurisdictions.

The difficulty is represented by the lack of global enforcers able to properly factor the effects of instruments' choice over relationships regulated by different and possibly divergent local laws. For this reason, cooperative

enforcement, that defines the principles but leaves to the parties within the chain the negotiations over the best remedies' choice, seems the most appropriate strategy. Unlike sanctions, where the administrative enforcer may reach out also to the other parts of the chain, the effectiveness of remedies is much more difficult without extraterritorial power of the enforcer. Hence, cooperative enforcement, partly delegated to internal negotiations within the chain, may work better than hierarchical, judicial or administrative, enforcement.

The enforcement of UTP legislation in global markets is definitively an underdeveloped field of interest in both current legislation and scholarly debate. More and more, administrative authorities and courts will be confronted with the need not only to cooperate for the ascertainment of infringements occurred in cross-border situations but also to coordinate their sanctioning and remedial responses to unfair practices having systemic effects along global value chains, in a way that enhances the effectiveness, proportionality and dissuasiveness of UTP law enforcement. The lessons learnt in the domain of contract and tort laws in transnational contexts will be an important starting point, to which major complements may be offered by a supply chain approach applied to both rules' definition and their enforcement.

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