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Contract Law in the Agri-Food Supply Chain

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CONTRACT LAW IN THE AGRI-FOOD SUPPLY CHAIN

*Bianca Gardella Tedeschi**

ABSTRACT

In Italy, contract law in the agri-food chain is regulated by law 27/2012 art. 62. The law polices Business-to-Business (“B2B”) contracts with the specific purpose of protecting producers. The 2012 law was enacted after an intense debate within the European Union (EU), following the 2008 crisis that saw a rise in agri-food prices. The law introduces a form of “commercial ethics” into the agri-food chain, as it defines and prohibits unfair business practices in this field. In 2019, the EU approved Directive EU 2019/633 that prohibits in every Member State unfair business practices that are harmful to producers. The paper will trace the interplay between national and European legislation on unfair trade practices in the agri-food supply chain in order to ascertain if they are adequate.

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I. FOOD SAFETY AND BARGAINING POWER IN THE AGRI-FOOD SUPPLY CHAIN

Italy is worldwide known for its high-quality agricultural products. Cheeses, wines, vegetables, pasta, and other delicacies are now readily available, both in Italy and abroad, in large-scale distribution and vicinity stores, as well as in e-shops. Consumers definitely enjoy the variety of specialties that are brought every day on their tables directly from the place of origin. Italian products are brought to us because, and thanks to, the food supply chain. The agri-food chain is by far the most important system able to

bring, from “farm to fork,”¹ agricultural and food products. The importance of regulations and policing the food supply chain is, therefore, very important for the different degrees by which food production and distribution affects everybody’s daily life. As we all buy food and beverages, we can potentially perceive flaws in the chain, both for fair prices and food safety.

A major pillar in the food supply chain is agriculture itself as it is characterized by a double concern. On the one hand, it is important to take care of the consumer’s interests and expectations in order to assure food safety and fair prices. On the other hand, it is imperative to protect food producers: these important players in the agri-food industries can be exploited, as we will see in due course, by retailers and distributors. They often become *the* weak party in the contractual relations that run along the agri-food supply chain, where competition among different producers is high and their market power low. Agriculture producers are weak in their relations with food processors and even weaker with the distribution, especially with large-scale retailers. To this, we can add that very often national producers may have to contrast competition coming from extra EU states, where costs, especially labor costs, are considerably lower and therefore the final product is considerably cheaper. An effective agri-food supply chain policing requires, then, that the added value in the chain rests with the producers and that contractual relations keep a good balance of power all along the chain links.

This paper will describe the main traits of the supply chain as highlighted in the EU surveys and the responses presented both at Italian and European levels to reach a fairer food supply chain. The last part of the paper will reflect on the adequacy of these legislative measures.

II. THE MAIN FEATURES OF THE FOOD CHAIN AT THE EUROPEAN LEVEL

The 2008 crisis was accompanied by a steep upsurge in food products’ prices. The occurrence stimulated the EU to look into the main features of the agri-food supply chain in order to understand why food products have

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¹ Directive 2019/633, of the European Parliament and of the Council of 17 April 2019 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain, 2019 O.J. (L 111) 59, 60.

been so deeply affected by the crisis. The results of several surveys depict a lively and, often times unfair, world.

The first paper issued by the Commission dates back to 2009 and consists of a Communication from the Commission to the Parliament. According to the Communication, the food chain is characterized by the high number of operators, active in the different stages of production, processing, marketing, distribution, and retail of agricultural and food products. The supply chain connects three important sectors of European economy, i.e., agriculture, food processing industry, and distribution.² According to this EU official document, the food supply chain in Europe accomplishes very well its task: “it delivers high-quality food products at affordable prices to European consumers, it ensures the safety and traceability of food products and it can pride itself on the ample supply of highly competitive innovative and traditional products.”³ As one important trait in the agri-food supply chain is the high number of participants before each product reaches the consumer, a number of market participants (producers, processors, retailers, etc.) add to its value and have an impact on the final price paid by the consumer. From the legal point of view, contract law is the major staple in the legal architecture of this important economic organization, as each link is formed by a discrete contract, all the way down from producer to consumer. As contract law is the tool that connects every single link of the chain, it is important to understand if it is used fairly by each participant and not modeled unfairly by the few that want to reap for themselves what has been sowed by others.

Issues related to equal bargaining power within the supply chain between agriculture producers and food operators have been tackled at UE and national levels. The importance of the agri-food supply chain for consumers and producers has moved European authorities to highlight its main characteristics in order to detect flaws or irregularities that need to be fixed through legislative or administrative measures. According to European Commission studies, the food supply chain is marked by several structural weaknesses that may affect every link of the chain, especially the first and the last link, the producers and the consumers. But not only them. Large scale retailers gained importance in the distribution system and wield considerable power along the chain. Moreover, the food supply chain is characterized by a multiplicity of actors: farmers, food processors, traders, wholesalers,

² *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Better Functioning Food Supply Chain in Europe*, at 2, COM (2009) 591 final (Oct. 28, 2009) [hereinafter *A Better Functioning Food Supply Chain in Europe*].

³ *Id.* at 4.

retailers, and finally consumers. These actors can be either large companies, or medium-size or small enterprises, or cooperatives, and can be simultaneously competitors, suppliers, or customers.⁴

[S]ignificant imbalances in bargaining power between contracting parties are a common occurrence. . . . [t]his asymmetry in bargaining power may lead to unfair trading practices, as larger and more powerful actors seek to impose contractual arrangements to their advantage. . . . Such practices may occur at every link of the chain and include, for example, late payments, unilateral changes in contracts, ad-hoc changes to contractual terms, upfront payments as entry fees to negotiations.⁵

Within the food chain, where the parties, whether buyers or suppliers, may exercise their market power, we can detect anti-competitive practices, such as cartels and resale price maintenance, to the detriment of the consumer.⁶ Furthermore, the food supply organization “suffers from a lack of price transparency and predictability,”⁷ and there are cases of excessive speculation on the commodity market. A characteristic of the food chain in Europe is that the chain is highly fragmented between Member States because of several economic and cultural differences among European citizens. “[H]ousehold incomes, preferences in taste, differences in the level of value-added tax or the share of local production”⁸ are important factors of heterogeneity and fragmentation in the chain.

Despite the fact that every link is a distinct contractual relation, the European Commission took a great step forward in 2002 when it decided that the food supply chain had to be considered a continuum and not only as formed by separate links. The relevant Act was EU Regulation 178/02, “laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.”⁹ According to Whereas 12 of EU 178/02:

[i]n order to ensure the safety of food, it is necessary to consider all aspects of the food production chain as a continuum from and including primary production and the

⁴ *Id.* at 5.

⁵ *Id.*

⁶ *Id.* at 6.

⁷ *Id.* at 8.

⁸ *Id.* at 10.

⁹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002.

production of animal feed up to and including sale or supply of food to the consumer because each element may have a potential impact on food safety.¹⁰

This piece of legislation understands the supply chain in the production, transformation, and distribution of food as a continuum, and not just phases and relative contracts disconnected the one from the other. While the Directive addresses issues and concerns related to food safety, it imposes duties on all the links in the chain, no matter how their contractual and economic power is within the chain. The succeeding interventions of the European Commission and European Parliament tackling imbalance of bargaining power in the agri-food supply chain are based on the same principle, that all the actors in the agri-food supply chain are on the same level.

III. THE AGRIFOOD SUPPLY CHAIN AT EUROPEAN LEVEL

The 2008 crisis brought a visible rise in food products that alerted the European Commission. “From mid-2007 to mid-2008, agricultural commodity prices rose sharply, which resulted in increased consumer food prices and higher inflation levels overall.”¹¹ When prices of any commodities came down to a level comparable to those reached before the price surge, consumer food prices were still increasing, and it was only in May 2009 that they started declining. The European Commission began to monitor the supply food chain, worried that “[those] changes have caused considerable hardship for agricultural producers and imply that [the] consumers are not getting a fair deal.”¹²

The European Commission made the first move in order to improve the bargaining power within the agri-food and make it fairer towards every weak party in 2009 with the Communication COM (2009) 591¹³ on “A better functioning food supply chain in Europe.” The main concern of the European Commission was the fluctuation of prices in the food industry, starting from the end of 2007 with a substantial increase in prices of food for consumers in

¹⁰ *Id.* at 12.

¹¹ *A Better Functioning Food Supply Chain in Europe*, *supra* note 2, at 2.

¹² *Id.* In December 2008, the Commission published a report on food prices in Europe that monitored the food price increases. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Food Prices in Europe*, COM (2008) 821 final (Dec. 9, 2008); Lina Bukeviciute, Adriaan Dierx, & Fabienne Ilzkovitz, *The Functioning of the Food Supply Chain and Its Effect on Food Prices in the European Union*, 47 EUR. ECON. OCCASIONAL PAPERS 1 (2009).

¹³ See *A Better Functioning Food Supply Chain in Europe*, *supra* note 2.

2008. The research conducted by the Commission highlighted that the highest increase of prices was determined by the rise in the prices of food processors and distribution distributors, and not in the selling price of farmers and food producers. In the words of the Commission:

[t]he discrepancies observed between commodity and consumer food price developments, together with the asymmetric response of food prices to commodity price fluctuations, relate in part to structural weaknesses in the system, such as the number of intermediaries operating along the chain and the competitive structure at certain steps of the chain.¹⁴

According to the European Commission, the price increase in the food chain is, therefore, not due to the rise in production costs but is related to imbalance of bargaining power and deceptive practices along different links of the chain. “Within the food supply chain, significant imbalances in bargaining power between contracting parties are a common occurrence and this issue was flagged as a serious concern by stakeholders.”¹⁵ The picture of the whys and hows of the imbalance is accurately described by the Commission:

This asymmetry in bargaining power may lead to unfair trading practices, as larger and more powerful actors seek to impose contractual arrangements to their advantage, either through better prices or through improved terms and conditions. Such practices may occur at every link of the chain and include, for example, late payments, unilateral changes in contracts, ad-hoc changes to contractual terms, upfront payments as entry fees to negotiations Within non-processed food supply chains, small farms and cooperatives often deal with larger buyers, be they producers, wholesalers or retailers. Within processed food supply chains, on the one hand small food processors are contracting with usually large retailers that are often their only channel for accessing the market. On the other hand, large multinational food producers may also have important bargaining power as they offer branded products that retailers cannot do without.¹⁶

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 5. These traits within the food supply chain have been detected as well by Joonkoo Lee, Gary Gereffi & Janet Beauvais, *Global Value Chains and Agrifood Standards: Challenges and*

The imbalance of power between contracting parties distorts competition and allows the EU to intervene for a redress of this distortion.

Contractual imbalances associated with unequal bargaining power have a negative impact on the competitiveness of the food supply chain as smaller but efficient actors may be obliged to operate under reduced profitability, limiting their ability and incentives to invest in improved product quality and innovation of production processes. A better awareness of contractual rights and stronger action against unfair contractual practices could contribute to preventing these drawbacks since actors with limited bargaining power suffer from a lack of information on their rights. Moreover, they may hesitate to contest contract clauses for fear of losing the contract altogether. There is thus a need to better understand, and examine in depth, contractual practices and their link to asymmetries in bargaining power within the food supply chain since, depending on each individual situation, they might lead to unfair and inefficient outcomes.¹⁷

A second issue detected by the Commission is the lack of transparency along the supply chain. This is due, according to the Communication, to the excessive speculation on commodity markets. According to other observers, the lack of transparency is connected in contracts between producers and food processors or distributors that are made according to old traditions, often oral, with a long-term trust relationship.¹⁸

The European Commission, therefore, in 2009 acknowledged the distortion of competition in the agri-food industry correlated to imbalance of bargaining power along the supply chain and the lack of transparency. This state of affairs asks for a study of contractual practices and possible predatory attitudes in some links of the chain. The Commission considers, therefore, that “action is needed to eliminate unfair contractual practices between business actors all along the food supply chain.”¹⁹

Possibilities for Smallholders in Developing Countries, 109 PROC. NAT’L ACAD. SCI. 12326, 12329 (2012).

¹⁷ *A Better Functioning Food Supply Chain in Europe*, *supra* note 2, at 5.

¹⁸ Gaetana Petriccione, *I contratti nella riforma della Pac 2014–2020*, AGRIREGIONIEUROPA (2016), <https://agregionieuropa.univpm.it/it/content/article/31/46/i-contratti-nella-riforma-della-pac-2014-2020>.

¹⁹ *A Better Functioning Food Supply Chain in Europe*, *supra* note 2, at 7. The relationship between food supply and competition law is very important and should not be overlooked. More on this topic by TOMASO FERRANDO & CLAUDIO LOMBARDI, FAIR TRADE ADVOC. OFFICE, EU COMPETITION LAW AND SUSTAINABILITY IN FOOD SYSTEM: ADDRESSING THE BROKEN LINKS (2019).

As the ability of different actors to exercise their market power depends both on the type of supply chain and the local market conditions, the European Commission declares that it will work closely with local competition agencies in order to eliminate unfair business practice, increase transparency, and design a less fragmented food supply chain.

IV. THE ITALIAN LAW ON AGRI-FOOD SUPPLY CHAIN CONTRACTS

The call for a fairer agri-food supply chain had a strong answer in Italy. Italian legislators adopted a legislation, the so-called “liberalization decree” (*decreto liberalizzazioni*), which legislates on market regulation.²⁰ Among many different topics on market regulation, the Act, at Article 62, addresses the issue of contracts, bargaining power, and unfair trade practices in the agri-food supply chain. The aim of the legislature has been to design a fairer market characterized by a distributed bargaining power and a ban on several practices, defined *per se* unfair.²¹

The article is applicable at every step of the food supply chain, except at the final link with the consumer because in Europe, consumer law is part of a different body of law.²²

²⁰ Decreto Legge n.1/2012 (art. 62) (converted into law by 24 Decreto Legge 24 Marzo 2012, n. 27) (It.).

²¹ D.L. n. 1/2012 (art. 62) (It.).

The text of the Decree reads as follows:

Disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari.

1. *I contratti che hanno ad oggetto la cessione dei prodotti agricoli e alimentari, ad eccezione di quelli conclusi con il consumatore finale, sono stipulati obbligatoriamente in forma scritta e indicano a pena di nullità la durata, le quantità e le caratteristiche del prodotto venduto, il prezzo, le modalità di consegna e di pagamento. I contratti devono essere informati a principi di trasparenza, correttezza, proporzionalità e reciproca corrispettività delle prestazioni, con riferimento ai beni forniti. La nullità del contratto può anche essere rilevata d'ufficio dal giudice.*

2. *Nelle relazioni commerciali tra operatori economici, ivi compresi i contratti che hanno ad oggetto la cessione dei beni di cui al comma 1, e' vietato: a) imporre direttamente o indirettamente condizioni di acquisto, di vendita o altre condizioni contrattuali ingiustificatamente gravose, nonché' condizioni extracontrattuali e retroattive; b) applicare condizioni oggettivamente diverse per prestazioni equivalenti; c) subordinare la conclusione, l'esecuzione dei contratti e la continuità e regolarità delle medesime relazioni commerciali alla esecuzione di prestazioni da parte dei contraenti che, per loro natura e secondo gli usi commerciali, non abbiano alcuna connessione con l'oggetto degli uni e delle altre; d) conseguire indebite prestazioni unilaterali, non giustificate dalla natura o dal contenuto delle relazioni commerciali; e) adottare ogni ulteriore condotta commerciale sleale che risulti tale anche tenendo conto del complesso delle relazioni commerciali che caratterizzano le condizioni di approvvigionamento.*

²² Alberto M. Benedetti & Francesca Bartolini, *La nuova disciplina dei contratti di cessione dei prodotti agricoli e agroalimentari*, 3 RIV. DIR. CIV. 641, 647 (2013); Raffaele Tommasini, *La nuova disciplina dei contratti per i prodotti agricoli e alimentari*, 6 RIV. DIR. AL. 1, 10 (2012).

Article 62 shall be applied every time that there is a significant imbalance of bargaining power between the parties. This pre-requisite is very interesting as it is the first time that under Italian law the imbalance is not rooted in some objective parameter, such as assets that the debtor can use to fulfill his/her obligations. There is no accounting index that may tell us objectively when we can affirm imbalance of bargaining power.²³ The interpreter is therefore obliged to analyze the effective relation that exists between the parties, and not just look for formal or economic imbalance.²⁴

In order to increase transparency in the supply chain, the rule imposes that all contracts should be drafted in writing. The written contract should indicate for how long the contract will be in force between the parties, quality and features of the traded goods, price, delivery options, and terms of payment. In this way, all traditional and non-clear contractual arrangements will be more accessible. The article imposes, as well, definite payment terms, which amount to thirty days for perishable goods and sixty days for nonperishable goods. The lack of these elements in the written form will make the contract null and void. In any case, in order not to tighten up, all of a sudden, the agriculture market, the law specifies that it is deemed to be in “written form” all the documents and other communication that are exchanged between the parties before the execution of the contract, provided that they contain all the elements required by Article 62.

Article 62 requires that every drafted contract should draw on principles of transparency, fairness, and proportionality of the performances. As it has been remarked, the law would like to introduce some sort of ethical standards within the agri-food supply chain.

At the same time, in order to reduce imbalance of contractual power, the Italian law enumerates a list of practices that all times have to be considered unfair. According to Article 62, always considered unfair are contracts which:

- a) directly or indirectly impose purchase conditions, sales or other contractual terms and conditions unjustifiable and extra-contractual and retroactive conditions;
- b) apply objectively different conditions for benefits equivalents;
- c) make the conclusion, performance of the contracts and the continuity and regularity of the same commercial relations to the performance of services by contractors who, for their nature and according to commercial usage, have no

²³ Mario Mauro, *Contratti della filiera agroalimentare: squilibri ed effettività dei rimedi*, PERSONA E MERCATO, Sept. 2016, at 17.

²⁴ E. Rook Basile, *La disciplina della cessione dei prodotti agricoli e agroalimentari fra neo-formalismo contrattuale e abuso del diritto*, in II STUDI IN ONORE DI LUIGI COSTATO 361 (2015).

connection whatsoever with each other's objects; d) achieving undue unilateral, unjustified benefits the nature or content of trade relations; e) adopt any further unfair commercial conduct which is such even taking into account all the relationships commercial conditions of supply.²⁵

The Italian law gives the National Competition Authority the duty to monitor the implementation of the law. It was clear that private law remedies were not called by the weaker party because of fear of retaliation, fear to be left out of the market, by the stronger party.²⁶ The "fear factor" clearly emerged in a subsequent survey conducted at the European level within the Green Paper, which converged in the Communication by the European Commission: "the weaker party in a commercial relationship in the food supply chain . . . often fears that initiating litigation may lead the stronger party to terminate the commercial relationship."²⁷ This is why it is deemed necessary to have public enforcement of this piece of legislation that imposes administrative sanctions on those who contravene one of these obligations, in addition to criminal sanctions, where the same conduct is also a crime. Parties are free to ask for private law remedies, in contract or in tort, if it is the case.

The aim of this legislation is to design an agri-food supply chain where many conducts will force actors to change their contracting "bad habits" and adopt a new "savoir faire," inspired by a different logic, one of fairness and cooperation. Actually, the main problem of this legislation is that we still do not know exactly if it has been implemented in real life, and for sure, we know that it has been hardly litigated.

V. AT THE EUROPEAN LEVEL, AGAIN

The many issues connected with food production and distribution were deemed fundamental at the European level. The European Union, therefore, decided not to leave the agri-food supply chain exclusively at Member States' regulations. In the subsequent years, thus, many moves have been made at European level. As it has been remarked by some scholars, Europe's actions

²⁵ D.L. n. 1/2012 (art. 62) (It.) (translation by the author).

²⁶ Mauro, *supra* note 23, at 23.

²⁷ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain*, at 7, COM (2014) 472 final (July 15, 2014).

for the improvement of the chain's performance have been incremental,²⁸ ranging from soft law to the recent Directive on unfair trading practices. This last part of the article will address specifically those actions that ended in the adoption of a directive against unfair trade practices for market sectors larger than the agri-food supply chain.

In this paper, we have already discussed the Commission Communication to Parliament in 2009. After those many remarks, it has been the turn of the Parliament to intervene in the debate. In 2012, the European Parliament, in plenary sitting, acknowledged the dysfunction of the food supply chain at every level, with great concerns for farmers and consumers.²⁹ The Parliament was concerned by the imbalance of power and unfair trade practice that affect the agri-food supply chain. In particular, the Parliament points at:

late payments, unilateral contract modifications, unfair contract terms, restricted access to the market, lack of information on price formation, uneven distribution of profit margins throughout the food chain, abuses of market power by suppliers or buyers, such as cartels and resale price maintenance, and buying alliances.³⁰

Parliament is concerned, as well, by the conditions of, respectively, consumers and farmers. Agricultural producers are threatened by the level of concentration of very large retailers as it results in growing imbalances of bargaining power, as they “are suffering a progressive loss of bargaining power vis-à-vis price levels along the value chain – from primary production, through processing to the final consumer.”³¹ The concern for consumers is just a few lines below: “farmers’ income problems are continuing to worsen and the prices paid by consumers for products is not reflected in the prices paid to farmers for their production,” and “balanced commercial relations would not only improve the functioning of the food supply chain, but also benefit farmers, through increased competitiveness, and ultimately also consumers.”³² In the Joint Motion, the Parliament calls on the Commission and Member States to address the problem of unfair distribution of profits within the food chain and calls on national and European competition

²⁸ Fabrizio Cafaggi & Paola Iamiceli, *Unfair Trading Practices in the Business-to-Business Retail Supply Chain: An Overview on EU Member States’ Legislation and Enforcement Mechanisms*, JOINT RSCH. CTR., EUR. COMM’N 1 (2018), <http://publications.jrc.ec.europa.eu/repository/handle/JRC112654>.

²⁹ Joint Motion for a Resolution, European Parliament Resolution on the Imbalances in the Food Supply Chain, EUR. PARL. DOC. RC-B7-0006/2012 (Jan. 18, 2012).

³⁰ *Id.* ¶ A.

³¹ *Id.* ¶ B.

³² *Id.* ¶¶ C, E.

authorities to take action against abusive buyer practices, as well as for a clear and objective definition of abusive and unfair practices.³³

The Parliament, therefore, draws a list of practices that raised concerns about the correct functioning of the supply chain. The list is rather detailed, though non-exhaustive, according to the Parliament Motion, and it is split between practices that make it difficult or more burdensome to have access to retailers and unfair contractual conditions or unilateral changes to contract terms. The Parliament urges the Commission to establish a framework for effectively policing these practices.³⁴

In 2013, the Commission answered the Parliament with a Green Paper on Unfair Trading Practices in Food and Non-Food Supply Chain.³⁵ The Green Paper does not involve consumers, as it aims at exclusively business-to-business practices. The consultation received 200 answers from a variety of stakeholders' categories. Both suppliers and buyers were represented.³⁶

Over the last two decades, the B2B [business-to-business] food and non-food supply chain has changed considerably for economic, social and demographic reasons. Increased concentration and vertical integration across Europe have led to structural changes in the B2B food and non-food supply chain. Various international retailer buying alliances have emerged seeking economies of scale in sourcing through greater buying power. The expansion of retailers' own brand has turned some merchants into direct competitor of their suppliers. A small number of relatively strong players in the supply chain appear to have considerable negotiating power.³⁷

The conclusion is crystal clear: "these factors may . . . lead to unfair trading practices (UTP)."

The definition of Unfair Trade Practices (UTP) in the field of supply chains is articulated.

UTPs are practices that grossly deviate from good commercial conduct and are contrary to good faith and fair

³³ *Id.* ¶¶ (H)5, (H)8.

³⁴ *Id.* ¶¶ (H)10, (H)11.

³⁵ *Commission Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, COM (2013) 37 final (Jan. 31, 2013).

³⁶ *Consultation on the Green Paper on Unfair Trading Practices in the Business-to-Business Food and Supply Chain in Europe*, EUR. COMM'N (Jan. 31, 2013).

³⁷ *Commission Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe*, *supra* note 35, at 1.

dealing. UTPs are typically imposed [in a] situation of imbalance by a stronger party on a weaker party and can exist from any side of the B2B relationship and at any stage in the supply chain.³⁸

The document stresses the importance of freedom of contract as a “cornerstone” of any relationship in the market economy, which is engendered when there is an imbalance of bargaining power that allows one of the parties to impose unilaterally on the weaker counterpart.

Such situations may arise . . . for agricultural producers, which often have a limited choice of business partners for the take-up of their production and which, due to the intrinsic characteristics of many goods, could be unable to store production for a longer period of time in order to obtain better buying terms.³⁹

Among UTP, the Green Paper lists failure to provide sufficient information about contract terms, demanding payments for goods or services that are of no value to the contractual parties, unilateral or retroactive changes of contract terms, as well payments for fictitious services. Unfair trade practice may occur at any stage of the formation of the contract, from negotiations to the performance of the contract. They can consist as well in retroactive contractual changes. Moreover, the inability to switch to another business partner and to terminate the existing relationship is a key factor in the development of unfair trade practice along the supply chain.

The outcome of the Green Paper consultation has been to provide a taxonomy of the UTPs, accepted and confirmed by stockholders. There are four main categories: “a trading partner’s retroactive misuse of unspecified, ambiguous or incomplete contract terms; a trading partner’s excessive and unpredictable transfer of costs or risks to its counterparty; a trading partner’s use of confidential information; the unfair termination or disruption of a commercial relationship.”⁴⁰ The effects of UTPs in the food supply chain are varied, including undue costs, lower than expected revenues, ability or willingness to fund investments, negative effects to access new markets on the side of the weaker party.

The consultation paper was fruitful: it was almost immediately translated in a Communication from the Commission to the Parliament, the

³⁸ *Id.* at 3.

³⁹ *Id.*

⁴⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Tackling Unfair Trading Practices in the Business-to-Business Food Supply Chain, supra note 27, at 5.*

Council, and other European bodies. The document stresses the necessity to tackle unfair trading practices,⁴¹ a problem well acknowledged by all stakeholders in the food supply chain.⁴²

The Communication by the Commission acknowledges the overall fairness and sustainability in the supply chain, but, nevertheless, acknowledges that the presence in the food supply chain by the stakeholders is lamented.

At the European level, however, the possibility of having a regulatory action or prescribing a single solution to address the issue of UTPs was discarded. Member States, therefore, have been invited to take any legislative or administrative step that can be of contrast to UTPs. The choice of leaving Member States free to choose their own means to fight UTPs is mainly due to the fact that the food supply chain is still very local and not integrated at the European level, and the legislation of every single Member State is still very much diverse on the side of B2B relationships. Every Member State answered the call, each one in its own way.⁴³ According to a detailed comparative study, “the legal landscape is rather diverse across the EU.”⁴⁴ The big majority of the Member States (twenty out of twenty-eight at the time) enacted some kinds of norms that address unfair trade practices in B2B relations. Among those that have introduced new rules, some have opted for legislation, some have opted for a pure self-regulatory option, and many have chosen a hybrid approach that combines legislation with self-regulation.⁴⁵

The final step has been the adoption at the European level of Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.⁴⁶ In order to have a better agricultural market and to combat imbalances in bargaining power in the agri-food supply chain, the Directive lists a number of practices that are considered *per se* unfair, mainly practices related to late payments and cancellation of orders, when imposed unilaterally by one contractual party to the other.

The Directive should be adopted by every Member State no later than May 2021 and then applied by November 2021. “As a majority of Member States already have national rules on unfair trading practices, albeit diverging rules,” the Directive states that

41 *Id.* at 2.

42 *Id.* at 3.

43 Cafaggi & Iamiceli, *supra* note 28, at 7.

44 *Id.*

45 *Id.*

46 Council Directive 2019/633, 2019 O.J. (L 111) 59 (EU).

Member States should not be precluded from maintaining or introducing in their territory stricter national rules that provide for a higher level of protection against unfair trading practices in business-to-business relationships in the agricultural and food supply chain, subject to the limits of Union law applicable to the functioning of the internal market, provided that such rules are proportionate.⁴⁷

One example of a stricter rule than the Directive would be the requirement of the written form in contracts along the supply chain.⁴⁸ As we saw, the Italian Article 62 deems null and void the contract if it is not written. The Directive on UTP does not require any particular form for the validity of the contract, even though at Whereas 23,⁴⁹ the Directive considers that “the use of written contracts in the agricultural and food supply chain may help to avoid certain unfair trading practices.” We still don’t know how Italy will adopt the Directive, but we may think that the requirement of the written contract may remain in Italian legislation. For the moment, this chapter of the saga still has to be written.

VI. CONCLUSIONS

The concerns about contract law in the agri-food supply chain are part of a wider picture in contract theory. From a theoretical point of view, indeed, the contractual “habits” along the agri-food supply chain can easily fit in Macaulay’s paradigm of “non-contractual relations in business,” where the quality of the relationship and the social sanctions are deemed more important than the remedies provided by the law.⁵⁰ But in this case, the “non-contractual relation” is an abusive one, as parties fear more the social sanctions of being thrown out of the market more than the exploitation from stronger parties. The studies from European bodies highlight this concern. The Italian experience can teach us more than we might think: the litigation on Article 62 has been totally irrelevant. We still do not know if it is because

⁴⁷ *Id.*, at 64 (39).

⁴⁸ BERT KEIRSBILCK & EVELYNE TERRY, UNFAIR TRADING PRACTICES IN THE FOOD SUPPLY CHAIN: IMPLICATIONS OF DIRECTIVE (EU) 2019/633 (2020).

⁴⁹ Council Directive 2019/633, 2019 O.J. (L 111) 59 (EU).

⁵⁰ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963). His theories about relational contracts are a major staple in contract law not only in the States. Cf. MARC AMSTUTZ & GUNTHER TEUBNER, NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION (2009); JEAN BRAUCHER, JOHN KIDWELL & WILLIAM C. WHITFORD, REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL (2013); DAVID CAMPBELL, HUGH COLLINS & JOHN WIGHTMAN, IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS (2003).

the law has been very well implemented or because the parties' fear of reporting unfair practices is stronger.

If we really want to assure a fairer life for every party in the supply chain, it is paramount that, besides implementing laws and directives, the authorities must exercise their power of inspection that is given to them, or weak parties will never be able to make themselves heard.