SMEs in the (Food) Global Value Chain

A European Private Law Perspective

María Paz de la Cuesta de los Mozos

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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I María Paz de la Cuesta de los Mozos certify that I am the author of the work 'SMEs in the (Food) Global Value Chain: A European Private Law Perspective' I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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I confirm that chapter 4 draws upon an earlier article I published in Marta Cantero, Hans W. Micklitz (eds.), The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes, Edward Elgar (forthcoming).

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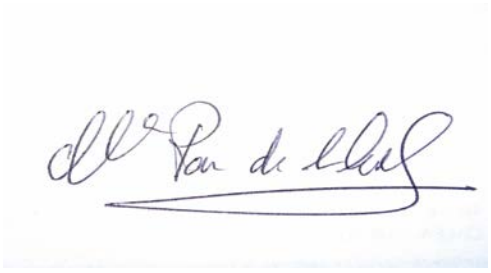

7 January 2020

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Abstract

This dissertation is about the approach of EU private law towards the regulation of fair trading practices along the global value chain and about the parallel development of SMEs as a new legal status. The thesis starts from the assumption that the transformation of the global economy into global supply chains has undermined traditional private laws as historically embodying the diverse cultural traditions and socioeconomic realities of the member states. These traditions portray the socioeconomic role of small businesses in various ways. However, the conventional schemas of national private laws struggle, both in their substance and enforcement dimensions, with the destabilizing effect brought about by the global chain. At the same time, the supply chain has provided leeway for innovative forms of private regulation by means of contract. The EU uses this leeway to manage persistent national differences in B2b trading practices. By means of co-regulation, the EU transforms national fair trading laws through three parallel mechanisms: the re-definition of SMEs as actors in the internal market; the establishment of new mechanisms for enforcement; the promotion of new substantive standards for trading practices.

The thesis takes the food sector as the blueprint for analysis. The global food chain unfolds potentially shocking effects on local traditions and ingredients. Policy makers, in Europe and abroad, struggle to mitigate the effects of supermarket-led supply chains on agricultural activities and food retail services. In B2b relationships, the lower-case b stands for small businesses in their market relations with bigger economic actors. Small agri-businesses and retailers embody the diversity of justice, economic and policy values across the different legal and socioeconomic traditions of European countries. This diversity is present in the different combinations of contract, competition and trading legislations that have historically shaped the role of SMEs as players in the market. Next to traditional approaches to SMEs, new modes of regulation through contract emerge and consolidate in the global chain. This transformation vests the EU with a new role in the governance of the food chain by means of co-regulation. By reflecting on the changing relationship between the traditional private laws of the member states and the new EU trading regulations for the food chain, this thesis sheds light on a new ‘experimentalist’ model of EU private law governance for the global economy.

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CHAPTER 1:

INTRODUCTION, RESEARCH QUESTION AND METHODOLOGY

This first chapter spells out the research question and the main argument that vertebrates this thesis (1). The chapter offers a preliminary overview of the contents and structure of the thesis, building on the idea of a private law perspective on the access of European SMEs to the global (food) value chain (2). It starts with some clarifications on the categories and concepts the thesis uses (3) and on methodological considerations that guide this dissertation (4). Finally, it offers a preliminary map of the fragmented regulatory landscape of B2b trading regulations in Europe (5), both at the national and at the EU levels.

1. INTRODUCTION: LAYING DOWN THE ARGUMENT

In between the consumer and the big corporation, businesses come in all sizes. Over the last ten years and more, the increasing awareness about the risks of an ever more global economy has shifted attention towards the small business sector across developed and developing economies. The turn of the millennium marked the start of SMEs global policies under the auspices of international fora.[1] In the European post-crisis scenario, small businesses have been promoted as key contributors to economic growth and job creation.[2] At the national level, the emerging political discourse tries to address the distress of the local small businessman. The global value chain is the scenario for modern SME policies, which aim at ensuring small stakeholders access through the chain to ever broader markets and benefits.[3] In this context, this thesis sets out to answer the following research question: what role has the EU played in the clash between the global value chain and European local business traditions; and how has the role of the EU contributed to the transformation of the traditional B2b legislations of its member states?

With the purpose of answering this question, the present work looks at the evolution of private law in Europe. This thesis suggests that, in the effort to promote the growth of the internal market, EU private law is quickly moving past the image of the European consumer to re-discover the small business as a key actor of private law. The move from consumers to customers and to SMEs happens as a question of degree. After all, from an economic perspective, there is little difference between the position of a consumer and a

[1] The landmark document of this trend is the 1st OECD SME Ministerial Conference on 'Enhancing the competitiveness of SMEs in the Global economy: Strategies and Policies' 14-15 June 2000, Bologna (Italy). This document set in motion the so-called Bologna Process, with the goal of monitoring and enhancing the performance of SMEs in global markets. The follow-up to this conference has resulted in regular OECD publications and reports on SMEs and entrepreneurship. See for example the OECD, SMEs, Entrepreneurship and Innovation, (OECD Publishing, 2010), available at https://doi.org/10.1787/9789264080355-en.

[2] In the EU, this new SME language has been around for some time. The publication of the European Commission, Think Small First: A Small Business Act for Europe, COM(2008) 394 final, was a turning point in this respect.

[3] The opportunities of participation in global chains, for businesses and nation states alike, are a key focus of attention in the Global Value Chain literature. Strategies for upgrading become a key political and economic issue for the global chain. See T. Sturgeon and G. Gereffi. 'Measuring success in the global economy: international trade, industrial upgrading, and business function outsourcing in global value chains' in C. Pietrobelli and Rasiah (eds.), Evidence-Based Development Economics (2012): 249-80; G. Gereffi and L. Joonkoo, 'Economic and social upgrading in global value chains and industrial clusters: Why governance matters' (2016) 133 Journal of Business Ethics 1, 25-38.

SME that concludes a contract with a multinational corporation.[4] A priori, some preliminary observations confirm the shift towards a SME private law. In 2014, the European Agency for Competitiveness and Innovation was renamed as the Executive Agency for Small and Medium Enterprises to channel financial support to the European small business sector.[5] Moreover, it has become common to find in the most recent European legislative initiatives scattered mentions to the impact of the proposed regulation or directive on SMEs. This has reached the point where references to the vital contribution of European SMEs to manufacturing, new technologies, retail and communication services have become a platitude in European policy making for the internal market.[6] Take as an example the new European rules on the sale of goods and the supply of digital content,[7] where the need for legal certainty and the reduction of transaction costs for SMEs are invoked as prominently as consumer protection in the recitals of the directives. An even more telling example is found in the words of Commissioner Elżbieta Bieńkowska on the occasion of the Parliament's agreement to the new rules on digital platforms, when she declared that 'our new rules are especially designed with the millions of SMEs in mind, which constitute the economic backbone of the EU. Many of them do not have the bargaining muscle to enter into a dispute with a big platform, but with these new rules they have a new safety net and will no longer worry about being randomly kicked off a platform, or intransparent ranking in search results.'[8]

This shift of attention towards SMEs is bound to leave its mark in EU private law. After all, the private law traditions of EU member states originally developed as part of local socioeconomic contexts in which small traders were the norm. This understanding of B2b laws comes to nuance the common belief that B2B contractual relationships remained

[4] H-W. Micklitz, 'The consumer: marketised, fragmentized, constitutionalized', in Leczykiewicz, Dorota, and Stephen Weatherill (eds). The images of the consumer in EU law: legislation, free movement and competition law (Bloomsbury Publishing 2016), 21-42, 33.
[5] Commission Decision 2013/771/EU, of 17 December 2013, establishing the 'Executive Agency for Small and Medium-sized Enterprises' and repealing Decisions 2004/20/EC and 2007/372/EC, OJ L 341/73.
[6] The tone, followed by impact assessments of market-related legislative instruments, is illustrated by Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 - 2020) and repealing Decision No 1639/2006/EC, OJ L 347/33.
[7] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, OJ L 136/28, and Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136/1.
[8] European Commission, Press Release, Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices, 14 February 2019, available at http://europa.eu/rapid/press-release_IP-19-1168_en.htm

governed by classical notions of freedom of contract and corrective justice and that they were left largely untouched by the advent of the 'social', which found expression instead in labor and consumer laws. The diverse development of fair trading and B2b regulations in Europe shows that this is only partly true. Rules on B2b were at the core of the 'social' question in 19th century European nations. They shaped industrial relations by delimiting the role of national guilds and associations of small traders. To this day, many of these rules are at the center of the difference between continental and Anglo-Saxon market economies. The rules on B2b, and not on B2c, are therefore the focus of this dissertation.

The argument of the thesis goes as follows: the transformation of the global economy into global value chains undermines the traditional categories of these national private laws – in enforcement and substance - which have historically embodied the diverse cultural traditions and socioeconomic realities of European small businesses. Despite its destabilizing effect, the global value chain has also provided leeway for innovative forms of private regulation by means of contract. This new room for maneuver has allowed the EU to manage persistent differences across national private laws by recourse to co-regulation.[9] To buttress its innovative co-regulatory approach to B2b trading practices, the EU makes use of three parallel mechanisms: first, it has created a new category for SMEs as key actors of the internal market; second, it has introduced innovative institutional mechanisms to coordinate the enforcement (and standard-setting) of private rules in a cross-border scenario; third and final, it has introduced new substantive standards for B2b trading practices that go beyond national rules of corrective justice and open the door to concerns about the sustainability and transparency of global trading relations.[10]

[9] The way this thesis understands co-regulation is further developed in Chapter 4. This understanding is influenced by the definitions co-regulation that can be found, among others, in F. Cafaggi, Fabrizio and A. Renda, 'Public and private regulation: mapping the labyrinth' (2012) DQ, 16; E. Svilpaite, 'Legal Evaluation of the Selected New Modes of Governance: The Conceptualization of Self-and Co-Regulation in the European Union Legal Framework' (University of Basel, NEWGOV, 2007); L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9 Electronic Journal of Comparative Law 1 (http://www.ejcl.org/91/art91-3.html).

[10] These three major topics (actors, enforcement, substance) enter into a dialogue. In the literature, one could think of a dialogue between three types of contributions: The role of SMEs in EU private law is the subject matter of M. Loos and I. Samoy. The position of small and medium-sized enterprises in European contract law (Cambridge Intersentia, 2014); the role of standard-setting and enforcement is the subject matter of F. Cafaggi, Enforcement of transnational regulation: ensuring compliance in a global world. (Edward Elgar Publishing, 2012); the substantive and procedural concepts of fairness are the subject matter in T. Wilhelmsson, 'Varieties of welfarism in European contract law' (2004) 10 European law journal 6, 712-733.

2. THE STRUCTURE OF THE THESIS: GVCs, SMES, ENFORCEMENT AND SUBSTANCE OF TRADING LAWS

The argument described above is developed in three steps that discuss, first, the conceptual framework of the thesis; second, the threefold transformation of private law; and finally, the role of the EU as the facilitator of transformation in relation with the traditional private laws of the member states.

The first part thus presents the conceptual framework for the thesis. This framework is made by the intersection between the concept of the global value chain and EU private law governance. The global value chain is presented as the setting for the transforming process undergone by private law in Europe. Moreover, transnational supply chains have been essentially supported by the EU as a means to establishing the internal market.[11] Still, the evolution of the global economy over the last decades has brought about a radical change to market relations and to the role of the EU. The global chain connects the economic activities of countless countries and actors across the world. It opens up access to global markets and acts as a vehicle for 'cross-border flows of goods, investment, technology, services, technicians, managers and capital'.[12] As it unbundles, the global supply chain has given rise to new strands of research in the economic, political and legal literature. Building on transaction-cost economics and theories of industrial organization, the supply chain, in its different versions, has emerged as an analytical tool that sheds light on the mechanisms of cooperation of the global economy against the growing fragmentation of production and the increased dispersion of economic activities across geographical boundaries. From a legal perspective, it is regrettable that supply chains have remained understudied for a long time. Only relatively recently, legal scholars have found in supply chains a new paradigm to address anew the puzzling questions posed by transnational market relations. Some of these questions will show up in the pages of this thesis: the unilateral use of power against economically dependent SMEs, the territorial limitations of conventional market legislations or the fragmentation of enforcement. First

[11] See R. E. Baldwin, 'Global Supply Chains: Why They Emerged, Why They Matter, and Where They are Going' (CEPR Discussion Paper No. DP9103), 20. Available at SSRN: https://ssrn.com/abstract=2153484:'The European Economic Community (as the EU was known at the time) similarly sought much deeper disciplines. This, however, was not aimed at underpinning existing, complex cross-border activity. It was aimed at creating it. The European founders viewed an ever closer economic integration as the only sure-fire means of avoiding another European war.'
[12] Ibid 20.

and foremost, however, the fundamental issue raised by the supply chain, and the keystone of this thesis, is the emergence and consolidation of contracts as a tool for regulation.[13]

Sector-wise, the food supply chain serves as the main blueprint for the present analysis. In a way, one can safely say that food and drinks have always been at the heart of European integration. Before integrated telecommunications and digital markets, the free circulation of goods was claimed for beer,[14] liquors[15] or cheese.[16] The special nature of food, both as a commodity and as a fundamental right, makes the food chain a paradigmatic example of the governance of global trade.[17] The unfolding of the potentially shocking effects of the world economy on local traditions (and ingredients) becomes most visible here.[18] Concerns over the effects of the dispersion of supply, the increasing consolidation of retail activities, and the high volatility of the price of certain food products on suppliers and consumers alike have kept policy makers in the agro-food sector quite busy.[19] In the European context,[20] some of these issues have played a significant part in the reformulation of a Common Agricultural Policy (CAP). As the CAP transitions into a more market-oriented approach under the discipline of the WTO and

[13] These topics – European governance, regulatory contracts and supply chains – come together in the work of Fabrizio Cafaggi and Paola Iamiceli. A specially interesting contribution is 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach' in K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015), 343.

[14] C-234/89, of 28 February 1991, Delimitis, EU:C:1991:91.

[15] C-120/78, of 20 February 1979, Rewe-Zentral, EU:C:1979:42.

[16] C-132/05, 26 February 2008, Commission/Allemagne (Parmesan cheese), EU:C:2008:117.

[17] The literature on the global value chain has indeed produced many contributions on the question of food. For example, G. Gereffi and J. Lee, 'A global value chain approach to food safety and quality standards' (Working Paper Series, Duke University, 2009); S. Henson, and T. Reardon 'Private agri-food standards: Implications for food policy and the agri-food system' (2005) 30 Food policy 3, 241-253; P. Gibbon, 'Value-chain governance, public regulation and entry barriers in the global fresh fruit and vegetable chain into the EU' (2003) 21 Development Policy Review 5-6, 615-625.

[18] The financial and food crisis of 2008 were closely intertwined. On the financialisation of food and agricultural markets, see for an example J. Ghosh, 'The unnatural coupling: Food and global finance' (2010) 10 Journal of Agrarian Change 1, 72-86.

[19] These concerns are present in the work of different organisations. For example, the OECD reflected on the competition structure of agricultural markets in its 2013 Roundtable on Competition Issues and Agriculture. The documents discussed in the roundtable are available here: http://www.oecd.org/daf/competition/competition-issues-in-food-chain.htm In Europe, the ECN published in 2012 a Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector , especially at 14-15.

[20] For an overarching perspective on the political and legal implications of previous CAP reforms, see G. Anania et al, 'The Political Economy of the 2014-2020 Common Agricultural Policy: An Imperfect Storm' (CEPS Paperback, 17 August 2015).

under the rise of cross-compliance,[21] contracts have increasingly become a central instrument for the regulation of agricultural trading relations.[22] For these reasons, transnational agri-food chains have become a central topic for discussions over the future B2b unfair trading regulations.

The second part of the thesis deals with the transformations operated by the supply chain on the relationship between traditional laws and the parallel emergence of a new model of EU fair trading regulations. The transformation is threefold. The first transformation of the EU co-regulatory approach has consisted in the introduction of a new actor in the dramatis personae of private law: small and medium enterprises (SMEs). SMEs become the new actors or addressees of EU private laws. Traditionally, the different definitions of 'smallness' across Europe have been linked to different forms of organizing industrial and market relations. The different combinations of contract, competition and trading legislations across European states have historically shaped the role of SMEs as players in the market. For this reason, small agri-businesses and traditional grocer's shops have been portrayed as the embodiment of different justice, economic and policy values that are defended as intrinsically linked to the legal and socioeconomic traditions of European countries. In the food sector, these traditions are linked to the organization of property rights in the civil codes, the role and function of producers' associations and trading unions or the importance of geographical indications of origin. Vis-à-vis the national differences in the understanding of 'smallness', the EU has actively promoted new trading regulations concerning B2b trading practices. In this sense, the lower-case b stands for small businesses in their market relations with bigger economic actors.[23] This has been especially true after the economic crisis, where new financial and market instruments have been put in place to address the needs of European SMEs against the negative effects

[21] K. P. Purnhagen and P. Feindt, 'A principles-based approach to the internal agricultural market' (2017) 42 European Law Review 5, 722-736.
[22] The topic has been very much discussed in the French literature. See J. B, Danel, G. P. Malpel and P. H. Texier, 'Rapport sur la contractualisation dans le secteur agricole'. (2012) Conseil général de l'alimentation, de l'agriculture et des espaces ruraux. A French perspective on contractualisation: C. Del Cont, 'Filières agroalimentaires et contrat: l'expérience française de contractualisation des relations commerciales agricoles' (2012) Rivista di diritto alimentare 4, 1-28.
[23] I borrow the expression from Neil Walker, 'Big'C'or small'c'?' (2006) 12 European Law Journal 1, 12-14.

of globalization.[24] SMEs have become in many places the new measure of the 'social', but what is exactly a small business is still up to contestation.[25]

The second transformation relates to enforcement. Indeed, enforcement has taken a predominant place in the approach of the EU to trading regulations even over substance. A reason for this is that the cross-border dimension of the chain requires new mechanisms of coordination and new procedural rules. In this regard, the EU, and especially the Commission, has actively promoted the establishment of ADR mechanisms and simultaneously supported the reinforcement of national agencies. New modes of ex ante private enforcement such as compliance with private standards of fair trade gain ground. Ex post conflict management within Europeanized regulatory agencies and courts is complemented through different modes of alternative dispute resolution, such as arbitration and mediation, which sometimes are also managed by regulatory agencies. These new instruments challenge the traditional account of law-making and dispute resolution under which member states safeguarded their prerogatives in the realm of private law. At the same time, the EU finds in the new modes of enforcement innovative avenues to exercise its influence on national private laws. This may result in a certain degree of competence-creep, where the influence of the EU is canalized through contracts, which are the building blocks of the new standard-setting processes and enforcement mechanisms.[26] Co-regulation in the supply chain permits the EU to reinforce its role in the governance of the food chain.

[24] The financial aid to SMEs is organized under the COSME programme. Access to finance is also promoted through financial activities like crowdfunding, business angels, etc. The issue of access to finance has received a lot of attention from economists. Legal scholars have also paid attention to the regulatory aspects of these issues. A recent example can be found in J. Armour and L. Enriques, 'The promise and perils of crowdfunding: Between corporate finance and consumer contracts' (2018) 81 The Modern Law Review 1, 51-84.

[25] From a private law perspective, there are different opinions on the role of SMEs. Some authors have expressed favorable views towards extending consumer protection to SMEs. See M. Hesselink, 'SMEs in European Contract Law, Background Note for the European Parliament on the Position of Small and Medium-Sized Enterprises (SMEs) in a Future Common Frame of Reference (CFR) and in the Review of the Consumer Law Acquis' (Centre for the Study of European Contract Law Working Paper 2007/03). Other authors are contrary to such an extension. See J. Stuyck, 'Do We Need 'Consumer Protection'for Small Businesses at the EU Level?, in P. Purnhagen and P. Rott (eds.), Varieties of European Economic Law and Regulation (Springer, 2014),. 359-370.

[26] The expression of building block is used by K. H. Eller, 'Private Governance of Global Value Chains from within: Lessons from and for Transnational Law' (2017) 8 Transnational Legal Theory 3, 296–329, 297.

There is a third transformation, because what is true for enforcement is equally true for the substance of trading regulations. The substance is defined here by the requirements and categories through which private law has traditionally assessed the fairness of contractual relations: be it by means of definitions of good faith or fair dealing, by means of the control over non-negotiated or standard contract terms, or by the establishment of mandatory rules linked to legally protected statuses such as that of consumer, employee, tenant, or even SME. These instruments reflect different approaches to the fairness of private relationships. In B2b relations, the 'fairness control' of contractual relations seems to have been traditionally marked by formal and corrective approaches that focus on the balance between the rights and obligations of the parties to the contract.[27] However, the changing reality of enforcement is also linked to a new substantive approach to B2b trading relations.[28] The precedence of enforcement over substance has been clear in the strategy of the Commission, but this also means that sectorial codes of conduct and standard form contracts, linked to compliance and mediation mechanisms,[29] become a new source of fairness rules in the supply chain. It is only in a second moment that the EU has agreed to set down a list of minimum rules on the substantive aspects of B2b fair trading. These rules are aimed at ensuring the access of SMEs to the food chain, and therefore, to the internal market. But on top of them, the EU encourages the private and public sector to get involved in co-regulatory forms of standard-setting and enforcement to face increasing concerns over the transparency and sustainability of global food trade.

Finally, the thesis takes a look at the role played by the EU in this threefold transformation and at its relationship with national private laws. This means understanding what the consequences are of the EU turning its regulatory attention towards contracts and global supply chains. This makes it necessary to rethink the standing of the EU in front of both the diverse private law heritages of its member states and the cross-border reality of

[27] T. Wilhelmsson and C. Willett, 'Unfair terms and standard form contracts.', in I. Ramsay, G. Howells, and T.Wilhelmsson, Handbook of Research on International Consumer Law, (2018), 139.

[28]Another manner of expressing this link is to say that regulation by contract transforms the regulation of contracts. This expression appears in P. Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts' (2014) 35 Recht Der Werkelijkheid 3, 80 who takes it from P. Zumbansen, 'The Law of Society: Governance through Contract' (2007) 14 Indiana Journal of Global Legal Studies 2, 2.

[29] On the issue of compliance, see P. Verbruggen 'Private regulatory standards in commercial contracts : questions of compliance' and M. Namysłowska, 'Monitoring compliance with contracts and regulations : between private and public law' in R. Brownsword, R. A. J. van Gestel, and H. W. Micklitz, (eds.) Contract and regulation : a handbook on new methods of law making in private law. (Edward Elgar Publishing, 2017).

modern trade. At first sight, it is difficult to find a single-thread of coherence in the approach of the EU to B2b relations. On the one hand, the EU has traditionally protected national leeway by formally allowing stricter antitrust rules on unilateral conduct and by excluding B2B from the harmonization of commercial practices. Its harmonizing efforts on B2B relations have been restricted to piecemeal legislative interventions like late payments of agency contracts. On the other hand, the consumerist approach of both competition law and the case law of the European Court of Justice (ECJ) on the free movement of goods have had a seemingly de-regulatory impact on national trading regulations with the objective of protecting the needs of the internal market over unjustified limitations and restraints of trade. This puts national fair trading regulations between a rock and a hard place. On top of this, the global value chain adds a new layer to an already complex regulatory environment. To understand the role played by the EU, it is important to see that, precisely because the EU is not tied by the heritage and traditions of national private laws, it enjoys broader room for flexibility to experiment with its regulatory answer.[30] Hence, the role of the EU can be seen as providing a space to experiment, a laboratory, where it behaves, sometimes as a buffer, sometimes as a catalyst, between the impact of global chains and national private laws. In this new framework of fair trading, this thesis sheds light on the role that traditional private laws and national courts are called to play in a European experimentalist system, whether as safety valves or as closure mechanisms.[31]

3. CATEGORIES AND CONCEPTS

The global value chain provides the title and starting point of this thesis as it represents the economic reality of 21st century trade. The global value chain comprises the vast majority of international trade throughout a dense net of interconnected commercial contracts that link producers, distributors and consumers across the globe and which determine the possibilities of access to global markets. Terminologically speaking, there are differences between the concepts of supply chain, value chain or commodity chain – to mention but a few instances -. When not specifically explained, the thesis will use the

[30] This idea of the EU's leeway to experiment is inspired in Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?', (2016) 22 European Law Journal 662, 669.

[31] This idea appears as that of ultimum remedium in V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspectiv', (Tilburg PL Working Paper Series No 05/2017) 12.

concepts of supply chain and value chain interchangeably. Regardless of the specific term used, the global chain serves as the conceptual framework of this thesis. Building on the increasing body of legal research on the global value chain, this dissertation starts by acknowledging the central place that the law occupies in the configuration of the value chain.[32] In this sense, it follows the authors of the Research Manifesto on the Role of Law in the Global Value Chain and recognizes the law to be the vehicle through which value is generated and distributed across jurisdictions and the vehicle through which modern trade is governed and coordinated.[33] This makes legal analysis essential to map the geography of chains, the distribution of power and to answer pressing questions on issues of global governance.[34] The specific contribution of this thesis is in providing a new layer to the legal analysis of the value chain by focusing on the EU, whose role in the governance of the chain has often remained underexplored. A European perspective on the global value chain shows that the global value chain appears especially connected to the project of the internal market.[35] This connection, which delineates the research question, also determines the choice of terminology and categories, the methodological tools and the focus on a cross-country comparison.

In analyzing the role of SMEs in the global value chain, the present thesis deals with matters that fall somewhere in between competition, contract and fair trading laws. The meaning of these categories, while widely used by scholars, is not always clear. It is therefore necessary to clarify from the start whatever is meant by them in the context of the present thesis. In order to facilitate any subsequent discussion, the following section sheds light on the terminological and conceptual choices that guide the present work. First, it clarifies the use of categories such as private law and European private law, by putting them in connection to the categories of fair trading, competition law and international private law. Second, this section on methodology will further elaborate on what is meant by experimentalist governance in relation to European private law. Finally, it will elaborate on the categories of actors, substance and procedure that structure the rest of the thesis.

[32] Especially, after the Research Manifesto signed by a number of authors on 'The role of law in global value chains: a research manifesto' (2016) 4 London Review of International Law 1, 57-79.
[33] Ibid 61.
[34] Ibid 63 ff.
[35] R. E. Baldwin, 'Global Supply Chains: Why They Emerged', 20.

3.1. EUROPEAN PRIVATE LAW, COMPETITION AND FAIR TRADING

It seems adequate to start with the definition of private law.[36] Conventionally, private law is generally understood as that part of the legal system that provides the framework for the legal relationships between individuals. As such, private law is defined in opposition to public law, which deals instead with the relationships between citizens and the state.[37] Additionally, private law can also be understood as being an integral part of economic law.[38] From this perspective, it becomes necessary to distinguish between 'traditional private law' and 'regulatory private law'. The former is used to refer to the private law of the common law and to the private law of the great codifications. The latter is used to refer to the kind of private law that develops in Europe from the 19th century onwards in connection to the rise of the regulatory state, the welfare state and, finally, in connection to the establishment of the internal market.

To fully capture the difference between traditional and regulatory private law, a 'methodological premise' needs to be made explicit.[39] This premise refers to the necessary co-relation between the substance and the procedure of private law, insofar as 'in the field of private law, the production process and the final product, i.e. the substantive rules, are linked in significant ways'.[40] This means that substantive rules of private law – in fields such as contract, tort or property – are necessarily influenced by the institutional setting in which they develop, and in which private parties, legislatures and courts interact with each other.

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[36] In the Anglosaxon world, see P. Cane, 'The anatomy of private law theory: A 25th anniversary essay' (2005) 25 Oxford Journal of Legal Studies 2, 203-217; B. Zipursky, 'Philosophy of private law', in J. Coleman and S. Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, (OUP, 2002); S. M. Waddams, Dimensions of private law: Categories and concepts in anglo-american legal reasoning, (Cambridge University Press, 2003); In France, C. Atias, 'L'Influence des doctrines dans l'élaboration du Code civil' (2009) 1 Histoire de la justice, 107-120; in Spain, F. De Castro, Derecho civil de España, (Inst. de estudios politicos, 1952).

[37] W. Lucy, Philosophy of private law, (Oxford University Press, 2007), 14 ff. He describes here three classical approaches to the definition of private law. One would be based on remedies, underlining the compensantory nature of private law; another one is based on the state argument, defining private law by its relationship to the state; finally, other approaches would be based on the 'normative argument', defining law as the realm of individual project permit.

[38] H-W Micklitz, 'The Transformation of Private Law Through Competition' (2016) 22 European Law Journal 627, 628, citing H. D. Assmann, G. Brüggemeier, D. Hart, C. Joerges 'Zivilrecht als Teil des Wirtschaftsrechts', in Wirtschaftsrecht als Kritik des Privatrechts, (Athenäum Verlag, 1980).

[39] F. Cafaggi, The Institutional framework of European private law, (OUP, 2006), 1.

[40] Ibid.

From this perspective, attention to the institutional setting was relatively less important for traditional private law. In part, this was a consequence of the (perceived) stability of those institutions.[41] In this way, traditional private law came to be used as a 'shorthand' for the substantive rules of 'tort law, contract law, the law of unjust enrichment or restitution, and the law of real or personal property'.[42] The place of family law in this list is a different issue that will not be dealt with here.[43] As long as the substantive norms of private law were kept relatively simple and hierarchically organized, they required no other institutional structure than the judiciary.[44] In this context, private law was characterized by ex-post, remedial and market-based arrangements relying primarily upon the courts for their implementation.[45]

By the end of the 19th century, the rise of the regulatory state and the increasing number of cross-border commercial and personal relations came to question the stability of the institutional setting of traditional private laws. Simultaneously, the role and interpretation of private autonomy was being questioned. A new manner of understanding private law emerged which shifted the attention towards the institutional frame of private law relations. Regulation gained ground vis-à-vis traditional private laws, and private law became increasingly instrumentalised to steer markets towards competitiveness or distributive goals.[46] Regulatory private law – purposive, sectorial and reliant upon specific remedial arrangements – came to designate the private law that is used to further wider social welfare or economic goals.[47]

The European integration project has added a new layer to the problematic relationship between traditional private law and its regulatory counterpart. The institutional structure of the European Union is characterized by diversity and instability. Unlike in the member states, the foundations and boundaries of private law are not well-defined at the European level.[48] In private law, the *acquis communautaire* has for a long time been identified with

[41] Ibid.
[42] W. Lucy, 'Philosophy of private law', 14.
[43] A-H. Neidhardt, The transformation of European private international law: a genealogy of the family anomaly, (European University Institute, 2018).
[44] F. Cafaggi, 'The institutional framework', 5.
[45] F. Cafaggi and H. Muir Watt, The regulatory function of European private law, (Edward Elgar Publishing, 2009), X.
[46] Ibid XII-XIII.
[47] Ibid.
[48] F. Cafaggi, 'The institutional framework', 2.

the consumer law directives of the EU so that by the end of the 20th century, European contract law was made up, first and foremost, of consumer law.[49] This EU consumer law existed side by side with the traditional private law of the member states. This European consumer law of the late 20th century brought about a change of paradigm with respect national consumer contract law. The (consumer) contract law of the EU did not respond anymore to the needs of social protection, which provided legitimation for the regulation of the consumer contract law of the member states. EU consumer law responded to the logic of the internal market. This logic would extend the scope of private law in the EU because EU private law could now be found at the heart of the regulation of the recently liberalized sectors of the internal market, such as telecom and energy, but also of the financial sector (and now also transnational value chains).[50] This change of paradigm questions the relationship between private law and other subject matters located at the boundaries of traditional private laws. These other legal disciplines - like competition law, fair trading laws and even private international law - were traditionally linked to the ordering of the marketplace, but were kept separate - both conceptually and in practice - from contract law in the schemas of traditional private law. The boundaries, however, are blurring.

Unlike contract law, competition law was always 'a major area of policy since the inception of the European Communities'.[51] Competition law in the EU is the legal discipline in charge of the control over anticompetitive agreements, abuse of dominance and state aid. The control of mergers can also be added to this list. How competition law and private law relate to each other depends a lot on how the goals of competition law are understood.[52] In this regard, there is certain consensus in the literature that the definition of the goals of competition law in Europe owes a great deal to the Ordoliberal school.[53]

[49] J. Smits, The making of European Private Law, (Intersentia, 2002), 13; N. Reich, 'European Consumer Law and Its relationship to Private Law', (1995) 3 European Review of Private Law, 207, 313. H. W. Micklitz, 'The concept of competitive contract law' (2004) 23 Penn St. Int'l L. Rev., 549, 550.
[50] Exploring the topic in-depth: H.-W. Micklitz, Y. Svetiev and G. Comparato (eds.), 'European Regulatory Private Law—The Paradigm Tested', (2014, 4 EUI Working Paper).
[51] A. Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization of Private Law', in F. Cafaggi, The Institutional framework of European private law, (OUP, 2006), 245-270, 259.
[52] I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', UCL CLES Working Paper Series, 3/2013, 2. See footnotes 2 and 3 in this paper for more references.
[53] See especially D. Gerber, Law and competition in twentieth century Europe: protecting Prometheus, (Oxford University Press, 1998), 264. From a critical perspective, see P. Akman, and H.Kassim, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) 48 Journal of Common Market Studies 1, 111-132, 126.

Under its influence, competition law came to be understood as belonging to the system of administrative law and resting mostly on ex ante public enforcement through administrative authorities.[54] This administrative nature sets it apart from contract law but the classification of competition law under the banner of public law has always been controversial.[55] As a matter of fact, the 'modernization' of EU competition law in the 2000s has questioned anew the relationship between competition law and private law in the EU.[56] This relationship presents at least three litigious fronts. First, there is the question of the interaction between the consumer welfare standard of competition law and the image of the consumer in European private law. This debate is especially important for the interpretation of the concept of the consumer in the Unfair Commercial Practices Directive.[57] Second, the promotion of the private enforcement of competition law narrows down the differences between competition law enforcement and private law enforcement. It also poses important questions for competition and contract law scholarship, like the contract law consequences of anticompetitive agreements (the 'Euro-defense'),[58] or the role of bargaining imbalances in competition law.[59] This question and others had to be addressed by the CJEU in Courage and will be dealt with later in this thesis.[60] Last but not least, the relationship between competition law and contract takes on a new dimension in the 'modernized' approach to vertical agreements.[61] For example,

[54] D. Gerber, Global competition law, markets and globalization., (Oxford University Press, 2010), 161. The strong administrative character of EU competition law would be in contrast to the American model of antitrust, which would remain predominantly judge-made. Ibid., 124.
[55] D. Gerber, 'Protecting Prometheus', 39-40.
[56] D. Gerber, 'Global competition law', 187. The modernization of EU competition law would have a twofold dimension. Procedurally, the modernization of competition law was intended to adapt the enforcement of competition law to the adhesion of Eastern European member states. This would be achieved by the decentralization of enforcement power. Substantively, the modernization of competition law required a uniform theoretical approach to problematizing the market. This approach would be found in Chicago law and economics.
[57] A. Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization', 261; K. Cseres, Competition law and consumer protection, (Kluwer Law International, 2005).
[58] Article 101(2) TFEU provides for the nullity of the anticompetitive agreement. This nullity can be used in civil proceedings both as a sword, requesting the court to declare the anticompetitive agreement void, or as a defense, against the claimant that intends to enforce the agreement. A. Di Gio, 'Contract and Restitution Law and the Private Enforcement of EC Competition Law' (2009) 2 World Competition 201.
[59] I. Lianos, C. Lombardi. 'Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?.' UCL CLES Research Paper Series (2016).
[60] See Chapter 5.
[61] A. Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization', 262; The current most important piece of legislation in this regard is the ommission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VEBER), OJ L 102/1. In 2019, the European Commission has launched a process of evaluation of these rules. Among other things, the object of this evaluation is to check the effectiveness of the current framework to respond to the challenges of modern online distribution. The documents of this consultation can be consulted at:

articles 4 and 5 VEBER[62] provide two lists of prohibited contractual practices related to price-fixing and territorial and customer restrictions to distribution agreements.[63] These hardcore-restrictions have a direct impact in contract law because, as a list of prohibited terms, they delimit the content of the contracts of commercial agents in the supply chain. These three points of connection between contracts and competition law are especially important for the development of European private law for the global value chain and online distribution. It will be shown in this thesis that the potential overlap between the new UTPD, on the hand, and competition law, on the other hand, will require future efforts to ensure the coherence of the two approaches.[64]

The relationship between private law and fair trading is another point of debate. Fair trading laws as a subject-matter have been conventionally considered a patchwork field.[65] In general, national fair trading laws include rules that relate to a wide range of trade practices: 'deceptive advertising, passing off, counterfeit of non-protected product concepts and configurations, trade secret protections, interference with contractual relations of all kinds (distribution systems, client or labor relations), disparagement of competitors, predatory practices (sales below cost, discrimination, tie-ins, boycotts, etc.)'.[66] The goals of these rules are diverse, including the defense of competitors, consumers and the general public. This variety of objectives is also reflected in the different terminology given to this body of rules, sometimes called fair trading law, other

https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en#about-this-consultation

[62] Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VEBER), OJ L 102/1.

[63] A. Albors-Llorens, 'Consumer Law, Competition Law and the Europeanization', 262; H. W. Micklitz, 'Competitive contract law', 561.

[64] V. Daskalova, 'The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?' (2019) 10 Journal of European Competition Law & Practice 5, 281-296; S. Abdollah Dehdashti, 'B2B unfair trade practices and EU competition law' (2018) 14 European Competition Journal 2, 3, 305-341. The same concerns exist for the new regulation on B2b relations in online platforms. See C. Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond' (2018) 7 Journal of European Consumer and Market Law 6, 222; P. Iamiceli, 'Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity' (2019) 15 European Review of Contract Law 4, 392-420; M. Dolmans, T. Pesch. 'Should we disrupt antitrust law?' (2019) 5 Competition Law & Policy Debate 2, 71-86.

[65] A.B. Engelbrekt, Fair trading law in flux?: national legacies, institutional choice and the process of Europeanisation. Stockholms universitet, 2003, 69.

[66] H. Ullrich, Anti-unfair competition law and anti-trust law : a continental conundrum?, EUI Working Paper Law 2005/01, 3.

times unfair competition.[67] The problem is that this diversity has obscured the complex relationship of fair trading legislations to private law. Some of the most discussed issues in this respect have been the conceptualization of the civil or criminal nature of its rules, the type of sanctions they are associated with or the degree of liability imposed on infringers.[68] The specific features of national fair trading laws are closely connected to the historical origins of these norms. Historically, the expansion of fair trading legislations in 19th century Europe served the purpose of filling in the regulatory void left by the end of the guilds and the growth of industrialization.[69] In France and in other places, fair trading legislations developed from tort law.[70] They were understood as an integral part of private law providing businesses with the right to sue their competitors 'for impairment of their capacity to compete'.[71] Rooted in a longer tradition than antitrust rules,[72] they also became a forerunner to the development of competition law theories.[73] However, by the middle of the 20th century, the development of competition law and the establishment of the internal market put national fair trading legislations under increasing de-regulatory pressure.[74] As they stand today, modern national fair trading legislations regulate commercial communications to consumers but also distribution arrangements and relationships between competitors. The latter will be the focus of this thesis, even if it is not always easy to tell the difference between rules aimed at the protection of smaller competitors and those aimed exclusively at the protection of consumers. For example, while rules on promotional sales can be justified on both grounds,[75] rules prohibiting sales below cost and other predatory practices are more directly connected to the protection of the interests of suppliers and smaller competitors.[76]

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[67] G. Howells, H-W. Micklitz, T. Wilhelmsson (eds.), European fair trading law: the unfair commercial practices directive, (Ashgate Publishing Company, 2006), 2.
[68] Some important studies have offered a comparative perspective on the field. For example, V.I.E.W. Study on the Feasibility of a General Legislative Framework on Fair Trading, Institut für Europaisches Wirtschafts und Verbraucherrecht (2000); R. Schulze, H. Schulte- Nölke, Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, June 2003; BIICL, Unfair Commercial Practices – An analysis of the existing national rules, including case law, on unfair commercial practices between business and consumers in the New Member States and the possible resulting internal market barrier.
[69] D. Gerber, 'Protecting Prometheus', 37.
[70] H. Ullrich, 'A continental conundrum?', 3.
[71] D. Gerber, 'Protecting Prometheus', 38.
[72] H. Ullrich, 'A continental conundrum?', 3.
[73] D. Gerber, 'Protecting Prometheus', 38.
[74] H. Ullrich, 'A continental conundrum?', 5.
[75] J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', (2005) 52 Common Market Law Review, 3, 721.
[76] H. Ullrich, 'A continental conundrum?', 30.

In order to complete this introduction into what is meant by European private law in the context of this thesis, some final words need to be said about the relationship between European private law and private international law or conflicts of laws. It is well-known that the modern understanding of private international law finds its roots in the work of 19th century scholars, among which von Savigny has had decisive influence in the continental (civilian) understandings of this category. Building on this heritage, private international law has been classically linked to private law as a technical and procedural discipline which is put in charge of allocating conflicts across jurisdictions. It deals with the determination of the 'competent court, applicable law, and status of foreign judgments in transnational settings',[77] on the assumption that the application of certain rational rules – connecting factors – will determine the 'natural' site to which a private law relationship belongs. In the EU, private international law has become a growing field of EU law. From this perspective, the European instruments of private international law – especially Brussels I, Rome I and Rome II – are said to be part of European private law. However, the role they play at the European level is different from the role conflict of laws plays in relation to traditional private laws. In the EU, private international law takes on a different dimension as an alternative to the substantive harmonization of the private law of the member states.[78] In other words, private international law is understood as a 'tool of multi-level governance' for the preservation of the regulatory diversity of national private laws and for the avoidance of regulatory races-to-the-bottom.[79]

3.2. EXPERIMENTALIST GOVERNANCE AND EUROPEAN PRIVATE LAW

The need for governance in the multi-level and multi-faceted structures of European private law connects with the idea of European private law as a laboratory.[80] Different paradigms are at fight at the core of European private law: the traditional and the regulatory, the social and competitive, the general and sectorial, the national and the transnational -. This fight or competition can be understood as regulatory competition

[77] H. Muir Watt; D. P. Fernández Arroyo, Private international law and global governance. Oxford: Oxford University Press (2015), 1.
[78] Ibid.
[79] F. Cafaggi, H. M. Watt, Making European private law : governance design (Edward Elgar, 2008), 15.
[80] H-W. Micklitz, 'The Transformation of Private Law Through Competition' (2016) 22 European Law Journal 5, 627-643, 643.

between national private laws,[81] but it can also be interpreted as the competition between different paradigms present within European private law itself: the private law of the internal market and competition, the private law of the banking union or the private law of the digital market.[82] To these, it may be even possible to add the private law of the global value chain. To account for the co-existence of different paradigms in European private law, private law scholars have borrowed the idea of experimentalist governance.[83] The EU is portrayed as a laboratory where the transformation of the state and its impact on private law is examined through a trial and error approach.

The idea of experimentalist governance comes from political science, especially from the work of Sabel and Zeitlin.[84] For these authors, experimentalism 'describes a set of practices involving open participation by a variety of entities (public or private), lack of formal hierarchy within governance arrangements, and extensive deliberation throughout the process of decision making and implementation'.[85] Experimentalism needs to operate in a multi-level framework and it presents a set of four constitutive elements:[86]

> 1) the definition of framework goals and metrics by some combination of central and local units with the participation of relevant stakeholders;
>
> 2) a certain degree of autonomy for local units (private actors and member states) to decide on the implementation of the framework goals;

[81] S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 European Law Journal 4, 440-454.
[82] H-W. Micklitz, 'The Transformation of Private Law Through Competition' (2016) 22 European Law Journal 5, 627-643, 643.
[83] Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?', (2016) 22 European Law Journal 662; Hans. Mak. Bartl. H-W. Micklitz, 'The Transformation of Private Law Through Competition' (2016) 22 European Law Journal 5, 627-643; M. Bartl, 'Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political' (2015) 21 European Law Journal 5, 572; V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective', (Tilburg PL Working Paper Series No 05/2017).
[84] C. F. Sabel and J. Zeitlin, 'Experimentalism in the EU: Common Ground and Persistent Differences,' (2012) 6 Regulation & Governance 3, 410–26; C. F. Sabel and J. Zeitlin, 'Learning from difference: The new architecture of experimentalist governance in the EU' (2008) 14 European Law Journal 3, 271
[85] G. de Búrca, R.O. Keohane and C. Sabel, 'New Modes of Pluralist Global Governance', (2013) 45 NYU Journal of International Law and Politics 723, 738.
[86] C. F. Sabel and J. Zeitlin, 'Experimentalist Governance', in D. Levi-Faur (ed.), The Oxford handbook of governance, (Oxford University Press, 2012). 169-183, 170.

3) the existence of report obligations from the local units and the establishment of a peer-review system;

4) the provisional and revisable nature of the goals, metrics and decision-making procedures.

For experimentalist governance to work, certain conditions need to be met.[87] Among these conditions, strategic uncertainty and the multi-polar distribution of power are the most important. The former refers to 'the situation where the parties face urgent problems, but know that their preferred problem-solving strategies fail, and therefore are willing to engage in joint, deliberative - potentially preference changing - investigation of possible solutions'.[88] The latter refers to any policy field where no single actor has the capacity to impose her own preferred solution without taking into account the views of others.[89]

As a governance structure, experimentalism has been proposed in different European policy areas, from healthcare to competition to environmental law.[90] A priori, private law could seem fit for the operability of experimentalist governance too.[91] Translated into European private law, experimentalism provides private law in the EU with a governance structure which is different both from harmonization and from regulatory competition,[92] and which arguably fits with the governance structure provided for by the combination of private international law and minimum harmonization of certain areas.[93] Seen as a governance strategy for European private law, experimentalism has been defended as a mechanism that allows for the mutual adjustment and hybridization of EU and local interests in a work-in-progress manner.[94] However, experimentalism has also been opposed as a theory that lacks normative content of its own, and which therefore contributes to crystalizing pre-existing inequalities and to reinforcing the influence of the most powerful actors in the marketplace over the substance of private law rules.[95]

[87] Ibid.
[88] Ibid 180.
[89] Ibid 178.
[90] Ibid 171.
[91] V. Mak, 'Who Does What in European Private Law', 15.
[92] Ibid.
[93] F. Cafaggi, H. M. Watt, Making European private law : governance design (Edward Elgar, 2008), 14.
[94] See Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?', (2016) 22 European Law Journal 659.
[95] Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', (2015) 21 European Law Journal 572.

In reality, this debate goes back to question the methodological premise with which this section started: the co-relation between the substance and the procedure of private law. The way this relationship is understood in the present thesis will be the object of the following section. What can be said at this stage is that, in a globalized world, procedure, or attention to the institutional setting of private law, gains ground vis-à-vis attention to the content and substance of its norms. The wider the net is cast the more difficult it will be to capture common substantive rules.[96] The real question arises as to whether it is possible to identify some overarching substantive element in the cross-border reality of European private law. In other words, is there a set of goals that provide minimum requirements on the content and substance of European private laws? Indeed, Vanessa Mak sees in the norms on consumer protection the *ultimum remedium* of European private law, one that would act as a limit or safety net within a modified experimentalist governance model that ensures the respect to a common minimum denominator of consumer protection. Whether this interpretation is right or not, the rest of the present thesis can be read as a theoretical and practical exercise aimed at ascertaining whether the approach of the EU to the regulation of contracts in the global value chain fits within the model of experimentalist governance. Consequently, this includes ascertaining whether the goals of consumer protection as a potential *ultimum remedium* in European private law extend beyond the traditional definition of the consumer to cover SMEs along global value chains.

3.3. ACTORS, SUBSTANCE AND ENFORCEMENT

Much of the thesis is built on the distinction of three categories – legal actors, enforcement, and substance -. However, the meaning of these terms may be ambiguous. For this reason, it is important to spell out from the beginning what is meant by them.

The idea of a legal actor is relatively straightforward. It refers to the addressees of the rules. In the 19th century civil codes, the addressee of the rules is the person. This was the inheritance of the French revolution. The rise of the social in the 20th century legal language replaced the neutral legal subject of the civil code with new statuses[97]– the

[96] V. Mak, 'Who Does What in European Private Law', 10.

[97] This idea appears already in the Third Globalisation of D. Kennedy, 'Three globalizations of law and legal thought', in D. Trubek and A. Santos, The new law and economic development: a critical appraisal (Cambridge, 2006): 19, 66. I have taken it from the work of H. W. Micklitz, as in The Politics of Justice in

worker, the consumer, the tenant. A categorical status provides a formal and closed definition of who is addressed by the rules. These statuses are often based on a presumption about the bargaining power of certain social categories. This thesis discusses the process that has led to the definition of SMEs as a new legal status of private law.

In terms of enforcement, the thesis discusses how the global value chain challenges the role of national courts. The global value chain multiplies the sites of enforcement.[98] In lieu of courts, commercial disputes are often resolved by arbitration tribunals or mediators. Administrative authorities in Europe gain ground as the watchdogs of B2b and B2B laws. The functions of enforcement change too. Companies are required to anticipate the management of conflicts through internal mechanisms to demonstrate compliance with new public and private-made standards. The transformation of enforcement bears an 'institutional procedural dimension',[99] whereby collective actors, like producer and traders associations and NGOs, gain a new role in the making and enforcement of B2b trading practices.

In substantive terms, the thesis focuses on the kind of requirements that are imposed on the content of B2b contracts in the global value chain. These requirements define the rights of SMEs against their trading partners in B2b relations. The requirements on B2b relations are traditionally defined by various means, like the use of mandatory rules or general clauses of good faith in contract laws, information obligations or black lists of prohibited practices. Other trading rules establish limits to certain types of promotional activities or selling practices that can in principle be considered detrimental to the interests of smaller competitors. Next to these rules, to be found in commercial codes or sectorial legislations, the global value chain opens new room for traders to collectively define the content of their contracts through codes of conduct or collective standard contracts. These codes also determine the transparency and sustainability requirements of trading relations and add a new layer to the substantive requirements of B2b regulations.

European Private Law Social Justice, Access Justice, Societal Justice, (Cambridge University Press, 2018) 221.

[98] This fits with the perspective proposed by V. Mak, 'Who Does What in European Private Law ', 15.

[99] H. W. Micklitz, The Politics of Justice, 17.

The defining difference between enforcement and substantive categories, dealt with in chapters 4 and 5 respectively, is a complex issue. Generally speaking, the notion of substance is used in this thesis to refer to the content of the contract and to the legal requirements that shape it. The notion of enforcement refers to the means by which compliance with the contract is ensured. Of course, the two dimensions are necessarily interconnected, because *ubi ius, ibi remedium*.[100] In this respect, the categories used Van Gerven are very clarifying: 'the concept of right refers (…) to a legal position which a person recognized as such by the law – thus a legal 'subject' (hence the name 'subjective' right) – may have and which in its normal state can be enforced by that person against (some or all) others before a court of law by means of one or more remedies, those are classes of action, intended to make good infringements of the rights concerned, in accordance with procedures governing the exercise of such classes of action and intended to make the remedy concerned operational.'[101] However, things get more complex when enforcement sites multiply and where courts lose the hegemony of enforcement. This is as a consequence of the multiplication of conflicts between legal orders in the context of globalization and global value chains. Managing these conflicts requires new mechanisms of coordination, and coordination requires new procedures.[102] In the context of B2b trading regulations, the need for coordination has first driven the transformation of enforcement towards compliance. This is why the approach of the EU to trading practices is one primarily based on enforcement. Only after understanding the new architecture of enforcement, it is possible to look at the new layers added to the substantive requirements of B2b contracts with respect to balancing and transparency considerations.

4. SOME PRELIMINARY METHODOLOGICAL CONSIDERATION

4.1. AN ECLECTIC METHODOLOGICAL TOOLKIT

The global value chain is a place of constant 'interplay of contractual factors and contractual relationships'.[103] In this interplay, the internal market appears as a new level

[100] W. Van Gerven, 'Of rights, remedies and procedures' (2000) 37 Common Market Law Review 3, 501-536, 503.
[101] Ibid. 502.
[102] H- W. Micklitz, 'The internal vs. the external dimension of European private law–a conceptual design and a research agenda' (2015 EUI Working Paper LAW 2015/35), 9.
[103] G.Bellantuono, 'Beyond Form And Substance In Multi-Level Contract Law' Paper presented in the Obligations IX Conference, Melbourne Law School, 8 (in file with the author). He presents as a test field the regulation of contracts by means of standards.

of its own. The design of an adequate methodological toolkit looks especially eclectic without making it any less rigorous.[104] This is because against the backdrop of the global value chain the regulation of contractual and trading practices is faced with 'goals, tools and actors located at different decision-making levels'.[105] Understanding this complex interplay requires a whole new set of strategies which borrow from different methodological traditions as needed. In this sense, eclecticism and flexibility do not represent a new methodological approach by themselves. Rather, they represent an intellectual commitment to overcome the limitations of separate methodological traditions.[106] This understanding of eclecticism is of course not necessarily new. Historically speaking, one could say that the point of every new methodology or theory is to overcome the pitfalls of the previous ones by combining their unique insights.[107] This was also the approach of Antonina Bakardjieva's Fair Trade in Flux,[108] which carried out a comparative exercise informed by institutional analysis, legal history and comparative jurisprudence.[109] Building on the insights of Komesar and North,[110] her work combined a focus on participation in decision making processes,[111] with historical institutionalism.[112] This combination seems particularly fit to identify situations where the issue of participation is especially difficult and to trace at the same time the processes of legal change. A similar approach is therefore useful to understand the processes of transformation in the regulation of legal relationships where there is a great degree of dispersion of small stake interests, like in the case of SMEs in the global value chain.[113] This approach places legal actors and rules against their wider intellectual and ideological background. It shifts attention from purely legal rules to forms of informal constraints,

[104] Ibid. With further references to R Sil and PJ Katzenstein, Beyond Paradigms: Analytic Eclecticism in the Study of World Politics (Palgrave, 2010); R Sil and PJ Katzenstein, 'Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms Across Research Traditions' (2010) 8(2) Perspectives on Politics 411.
[105] Bellantuono, 'Beyond Form and substance', p. 36
[106] Ibid 7.
[107] A. B. Engelbrekt, 'Toward an Institutional Approach to comparative economic law?', in A. B. Engelbrekt and J. Nergelius (eds.), New directions in comparative law. (Edward Elgar, 2009), 213.
[108] A. B. Engelbrekt, Fair trading law in flux? : national legacies, institutional choice and the process of Europeanisation. Stockholms universitet, 2003.
[109] Ibid. 214
[110] Especially: N. Komesar, Imperfect alternatives: choosing institutions in law, economics, and public policy (University of Chicago Press, 1994); D. C. North, Institutions, Institutional Change and Economic Performance. (New York: Cambridge Univ. Press, 1990).
[111] Engelbrekt, 'Fair trade in flux', 233.
[112] Ibid 234.
[113] Ibid 233.

which can include codes of conduct, norms of behavior, beliefs and ideologies all across the global value chain.

4.2. THE CHOICE OF A CROSS COUNTRY STUDY

Building on these considerations, this thesis purports to carry out a cross-country and cross-level comparison of B2b trading regulations in Europe. The pages that follow will compare the approaches of three European member states - France, Spain and the United Kingdom, especially the law of England – in face of an emerging EU fair trading discipline for the supply chain. This choice of countries is justified both by the deep and superficial divisions that exist between their regulatory approaches to fair trading. This comparative exercise, which showcases the diversity of agricultural, legal and cultural approaches that are affected by the global value chain, will nevertheless be complemented with references to other European countries whenever it is needed to advance the argument. In the same spirit, a purely legal perspective is complemented here and there by insights from political science and by statistical studies of the European SME landscape.

This comparative analysis is not limited to a functionalist comparison of the legal norms governing trading relations in the supply chain. As stated before, the analysis looks beyond the blackletter of the law to focus on the actors (national and European definitions of SMEs), enforcement institutions (as processes of participation) and substance of trading regulations (as fairness, sustainability or transparency). These categories are not seen necessarily as separate and independent but rather as mutually reinforcing each other, hence the need of eclecticism. For each of these categories, the thesis will contrast the two levels of the European integration: on the hand, the traditional instruments and tools of national private laws; on the other hand, the evolving European approach to B2b trading practices. In doing so, this comparative analysis reveals synergies and two-way interactions between the national, the European and the global levels. As such, this methodology will be useful to show the extent to which the EU has been capable of co-opting the global value chain to manage persistent national differences between national private laws.

5. THE FRAGMENTED REGULATORY SURFACE

Methodologically speaking, problem-solving functionalism becomes a necessary first step in order to identify the contractual problems to be solved.[114] In the context of this thesis, this approach translates into a preliminary look at the surface of unfair trading practices in Europe as a *tertium comparationis*. However, the question poses: what are unfair trading practices (UTPs)?

The European Commission used first the term UTP in its Green Paper of 2013.[115] In this text, the Commission used the concept of 'unfair trading practice' in parallel to the concept of 'unfair commercial practice'.[116] The choice of this terminology indicated both 'structural correspondence and substantive differences' with the definition of unfair commercial practices.[117] Unlike the latter, unfair trading practices are linked to business-to-business relations in 'vertical' relationships (along a supply chain), leaving aside 'horizontal' practices (between competitors) such as slavish imitation, industrial espionage, defamation and libel, etc.[118] The Green Paper was followed by the 2014 Communication of the Commission.[119] In this communication, the Commission provided a broad definition of UTPs as 'practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing, and are unilaterally imposed by one party on another'.[120] This definition was completed by the description of the main categories of UTPs: '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

[114] Bellantuono, 'Beyond form and substance', 37.
[115] European Commission, Green Paper on Unfair Trading Practices in the Business-To-Business Food and non- Food Supply Chain in Europe, 31 January 2013, COM(2013) 37 Final.
[116] European Commission, 31 January 2013, Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, COM (2013) 37 final.
[117] J. Glöckner, 'Unfair trading practices in the supply chain and the co-ordination of European contract, competition and unfair competition law in their reaction to disparities in bargaining power' (2917) 12 Journal of Intellectual Property Law & Practice 5, 416-43, 424. A similar opinion is expressed by L. Gonzalez Vaqué, 'Unfair Practices in the Food Supply Chain: A Cause for Concern in the European Union's Internal Market which Requires an Effective Harmonising Solution' (2014) 9 European Food and Feed Law Review 5, 293-301.
[118] Ibid.
[119] 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, COM (2014) 472 final.
[120] Ibid 1.

unfair termination or disruption of a commercial relationship.'[121] This definition, and this list of examples of UTPs, hardly do away with the uncertainty surrounding the concrete problematic of unfair trading or the instruments that are needed to tackle it.[122] As the legislative procedure advanced, the categories of UTPs have been further narrowed down. In this process, it has become clearer that the problem of UTPs has been conceptualised first and foremost as one relating to imbalances of bargaining power between big and smaller companies. Nevertheless, the notion of UTPs used by the European legislator is still open-textured and contestable. It does not provide a univocal answer to the type of concerns that it intends to address – is it lack of individual fairness, restrictions to competition or stability of agricultural markets? –. Nor does it explain how it fits into pre-existing systems at the national and European levels, where the traditional instruments to address B2b power imbalances reveal a rather fragmented landscape. In this landscape, the notion of UTPs stretches at the crossroads of antitrust, unfair competition and contract laws at the national and European level.[123]

5.1. REGULATING B2B RELATIONSHIPS IN NATIONAL LAWS

The present section offers a general overview of the state of the art regarding the regulation of UTPs at the national level. This general overview should not be read as a full-blown account of the national legislations on UTPs since a more detailed approach to the question will be fleshed out in the following chapters. At this stage, the idea is to understand how the fight against UTPs has been designed across three different countries and the type of legislation that has been developed for this purpose. This comparison shows that the regulation of B2b trading practices happens through a combination of competition and general contract law, mixed with fair trading laws, sectorial legislations and the potential extension of the prohibitions contained in European consumer law to non-consumers. This is especially the case with the rules on unfair commercial practices

[121] Ibid 3.2.
[122] R. Hilty, F. Henning-Bodewig and R. Podszun, Rupprecht, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law, Munich of 29 April 2013 on the Green Paper of the European Commission on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe Dated 31 January 2013, Com(2013) 37 Final.'(2013) 44 IIC - International Review of Intellectual Property and Competition Law, 701-709.
[123] The starting point of this study is the so-called Brugge study: A. Renda, F. Cafaggi, J. Pelkmans, P. Iamiceli, A. Correia de Brito, and F. B. Mustilli, Study on the legal framework covering business-to-business unfair trading practices in the retail supply chain, (European Commission, 2014).

of the 2005 Directive.[124] Given the different scope and purpose of these legislations, it is necessary to understand the way they relate to each other.

First, there is general contract law. This includes of course the contract law of the civil codes and the common law. In France and Spain, general contract law encompasses general clauses and principles which enable judges to police the content of B2b contractual relationships. For example, certain rules of the French Civil Code have been traditionally applicable to B2b relations, such as art. 1134, on la *force obligatoire du contrat* and good faith. Other rules - like articles 1137, 1147 and 1150 of the code civil - have also been used to impose different requirements for contractual obligations and contractual liability.[125] A similar thing happens in Spain, where the general principle of good faith of the Civil and Commercial Codes can be used to modulate B2b contractual relations (arts. 7, 1258 C.c.; art. 57 Co.c.). In contrast to France and Spain, the recourse to general principles like fair dealing and good faith are considered alien to the English legal culture and language.[126] The common law has traditionally developed some doctrines on incorporation, interpretation and consideration that could potentially be used to police the balance between commercial parties in B2b contracts. Among them, it is possible to mention the doctrines of mistake, misrepresentation, undue influence, unconscionability and economic duress.[127] However, their application in B2b contractual relations remains typically very limited.

Together with the contract law of the codes and the common law, the statutory development of contract law under the influence of EU consumer law has had an important impact on national approaches to B2b relations. One of the most relevant examples is the regulation of standard terms. In France, the control of standard terms does not only exist in B2c relations because the French legislator incorporated into the Commercial code a rule on contracts resulting from significant bargaining imbalances as

[124] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market OJ L 149/22 (UCPD).
[125] In the case of French contract law, it is important to bear in mind the recent reform of the French code of obligations. On the impact of the reform, see J. Cartwright, B. Fauvarque-Cosson, S. Whittaker, La réécriture du code civil: le droit français des contrats après la réforme de 2016, Droit Comparé et Européen 29 (Societé de Législation Comparée, (2018).
[126] Famously, G. Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergencies' (1998) 61 The Modern Law Review 1, 11-32.
[127] J. L. Tomé Féteira Dias Santos, The interplay between European and national competition law after regulation 1/2003 : 'United (should) we stand?' (Wolters Kluwer, 2016), see chapter on England.

part of the regulation of restrictive commercial practices. With the reform of the civil code in 2016, the French legislator has introduced in the civil code a new article on significant bargaining imbalances in B2c and B2b non-negotiated contracts.[128] In Spain, the control of standard terms applies both to B2b and B2C relations, even if subject to different transparency requirements.[129] In England, the Unfair Contract Terms Act contains general rules that are applicable to B2B and B2C relations, but these are limited to certain exclusion clauses considered to be unfair or disproportionate.

In the second place, there are other rules on commercial practices and fair trading at the national level that stand side by side with contract law rules. These rules on commercial practices and fair trading are quite context-dependent and reflect the idiosyncrasies of national legal systems.[130] This makes their classification quite difficult. In continental Europe, they have been typically considered as part of private law and as an emanation of the law on torts.[131] One of the difficulties in their classification derives from the fact that, across different countries, the rules on fair trading may have predominantly a consumer-focused approach, a competitor-focused approach, or a combination of both. For the purposes of the present thesis, the comparison of fair trading legislations is narrowed down to those rules regulating relations between competitors.[132] In some cases, the competitor-focused approach of the legislation is clear. This is the case, for example, of rules on predatory pricing.[133] The classification becomes more difficult with regard to rules on commercial communications, which can refer to communications addressed at competitors (especially, legislation on misleading advertising) or at consumers (like rules on promotional sales). In the latter case, rules on promotional sales are often justified by national legislators on the need to protect consumers but also on the need to protect

[128] A new modification of the rule has been introduced with the Loi du 20 avril 2018, ratifiant l'ordonnance n°2016-131 du 10 février 2016, which excludes the content and the price of a contract from the potential control of bargaining imbalances in non-negotiated contracts.
[129] This is the case of Spain with the Ley de Condiciones Generales de la Contratación, de 13 de abril de 1998. This is also the case with the article 117 du Code civil, in force since 2016, on significative bargaining imbalances in B2c and B2b non-negotiated contracts. A new modification of the rule has been introduced with the Loi du 20 avril 2018, ratifiant l'ordonnance n°2016-131 du 10 février 2016, which excludes the content and the price of a contract from the potential control of bargaining imbalances in non-negotiated contracts.
[130] See Introduction to F. Henning-Bodewig, Unfair competition law: European Union and member states. (Kluwer Law International, 2006).
[131] H. Ullrich, 'A continental conundrum?', 3; D. Gerber, 'Protecting Prometheus', 38.
[132] Which are permitted under Regulation 1/2003 insofar as they have 'a different objective' to that of competition law.
[133] For H. Ullrich, 'A continental conundrum?', 3, these are called distribution relations.

smaller competitors.[134] In light of this, the present comparison of fair trading legislations will be limited to French national rules against restrictive practices, to Spanish legislation on the retail sector and the food chain, and to the development of sectorial statutory codes of conduct on B2b relations in England. Last but not least, it is important to consider in this regard whether national legislators have extended the scope of the Unfair Commercial Practices Directive to B2b relations.

In France, the most important rules to police B2b trading relations are contained in the Commercial Code under the title of restrictive practices. They mostly refer to conditions for the validity of the contract (pre-contractual duties and contract terms) and to the regulation of certain contractual practices in the retail sector.[135] In Spain, trading rules have a sectorial and functional approach, addressing commercial practices in the retail and advertising sector and the food supply chain.[136] In England, again, there is no general provision of trading rules applicable to B2b relationships.[137] This does not mean that there is no protection at all to small businesses under English rules. The typical English approach to B2b trading remains piecemeal and fragmented. The regulation of B2b trading relationships in England is more often achieved through specific sectorial interventions and private regulatory mechanisms. Over the last decade, some noteworthy examples of regulatory instruments extending protection to B2b contracts have been made available in the financial sector[138], the energy sector[139], the food chain[140] and in the pub sector.[141]

[134] See the analysis of the case law on the UCPD in J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', (2005) 52 Common Market Law Review, 3, 721.
[135] The French commercial code thus regulates abuse of economic dependence (Art. L. 420-2 al. 2); contracts for distribution, franchise and dealership (Art. L. 330-3); invoices, contractual contents and information duties (Art. L. 441-3); the B2b sales contract (L. 441-6); sale and supply contracts between suppliers and retailers including formal requirements for the conclusion of the contract (Art. L. 441-7); sales below cost (Art. L. 442-2); minimum prices for resale (Art. L. 442-5) and so –called 'restrictive practices' (Art. L. 442-6, titre IV, livre IV).
[136] Especially, Ley 7/1996, de 15 de enero, de ordenación del comercio minorista and Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria.
[137] These findings are confirmed by the comparative exercise carried out by the Bruges Study. See Table 7, at 291.
[138] Financial Services Act 2012.
[139] The powers of the Office of Gas and Electricity Markets are contemplated in the Gas Act 1986, Electricity Act 1989, Utilities Act 2000, Competition Act 1998 and Enterprise Act 2002.
[140] Groceries Code Adjudicator Act 2013.
[141] Small Business, Enterprise and Employment Act 2015

As regards the implementation of the Unfair Commercial Practices Directive (UCPD) 2005/29/EC to non-consumers,[142] France and Spain have partially extended the scope of the Directive to B2b relations. This has not been the case in English law. In France, the rules of the Directive were implemented into the Consumer Code.[143] The choice of the French legislator was to extend the scope of the rules on commercial practices to businesses –not specifying their size – but only in relation to misleading practices.[144] Similarly, the UCPD was also implemented into the Spanish consumer legislation.[145] The choice of the Spanish legislator was not to extend the lists of prohibited practices to B2b relations. Consequently, only the general clause of unfairness is applicable to B2b relations without differentiating by size of the business. In the case of both France and Spain, the extension of the scope of the Directive to b2b relations has been partial. However, the parallel development of rules on B2b practices in France and Spain evidences that national legislators regarded commercial practices (B2C) as linked to trading practices (B2B). For example, by virtue of the French *Loi de Modernisation de l'Economie (LME)*, the French legislator modified the regime applicable to b2c and b2b commercial practices under both the consumer and commercial codes. It is very telling that one Chapter of this legal act introduces important modifications on the applicable regime to B2b practices in the commercial code, under the title of 'Improving the development of SMEs'. In Spain, this 'blurring effect' between B2b and B2c is also present on the legislation against unfair commercial practices.[146] For example, the Spanish legislation on '*competencia desleal'* regulates simultaneously misleading practices in B2c and B2b scenarios and abuses of economic dependence. One of the latest modifications of this legislation has happened in 2018.[147] This new piece of legislation addresses in a patchwork manner different issues, including the regulation of electricity markets, the regulation of sales below cost, the regime on franchises or the regulation on the food chain. Again, the recitals to this text mention, explicitly, the need to promote and support the development of SMEs in the market.

[142] See Recital 6 of the 2005 UCPD.
[143] Loi no 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs (loi chattel) and the LOI no 2008-776 du 4 août 2008 de modernisation de l'économie.
[144] (Art. L120-1 (removed) and L. 121-1 and 121-1-1).
[145] Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios and Ley 29/2009, de 30 de diciembre, por la que se modifica el régimen legal de la competencia desleal y de la publicidad para la mejora de la protección de los consumidores y usuarios.
[146] Ley 3/1991 de Competencia Desleal, de 10 de enero
[147] Real Decreto-ley 20/2018, de 7 de diciembre, de medidas urgentes para el impulso de la competitividad económica en el sector de la industria y el comercio en España.

Third, national competition law also overlaps with the regulation of UTPs, especially in relation to the regulation of abuses of economic dependence and in relation to the private enforcement of competition law.[148] Regarding the former, some member states have made use of the leeway allowed by Regulation 1/2003 to extend the notion of abuse beyond situations of dominance.[149] This has been the case of France – in a way, also of Spain -, even if the effectiveness of these rules remains disputed. In France, the French rule on abuses of economic dependence was moved by the legislator from the regulation against restrictive practices (*le petit droit de la concurrence*) to the section of the commercial code dealing with competition law properly speaking (*le grand droit de la concurrence*).[150] This article, which is enforced by the competition authority, requires for its application to prove the effects of the conduct on the market. This assessment is based on four cumulative criteria: (i) notoriety of the supplier's brand; (ii) importance of the supplier's market share; (iii) significance of the supplier's market share in the sales figures of the company in question, provided this market share is not the result of a deliberate choice by the corporate customer; (iv) difficulty for the company to find other suppliers of equivalent products.[151] Given the difficulty of proving these requirements and given the overlap between this article and rules on restrictive practices, the effectiveness of this rule has been very limited in practice. A similar thing happens in Spain. In this country, the abuse of economic dependence is currently regulated under art. 16.2. of the Act against Unfair Competition 3/1991[152]. Before that, abuses of economic dependence had a double regulation under competition law and unfair competition law. However, the Spanish legislator eliminated any reference to 'the abusive exploitation of economically dependent client or supplier' from competition law with the Competition Act 2007.

[148] Mergers is a fundamental part of competition law with a huge impact on the development of the SME sector. However, it remains out of the scope of the present analysis. The reason for this is that the focus of the present thesis is on the regulation of UTPs and on the overlaps between competition and private law. This makes classical the competition rules on anticompetitive agreements and abuse of dominance more interesting for the present analysis, insofar as they concern supply and distribution contracts in the supply chain.

[149] I have not included in my comparative exercise countries like Germany and Italy, whose experience in the control of abuses of economic dependence is very different. Some general observations can be found in the Brugge Study. For Italy, see also G. Colangelo, L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata (Giappichelli, 2004): see also P. Kellezi, 'Abuse below the threshold of dominance? Market power, market dominance, and abuse of economic dependence' in Mark-Oliver Mackenrodt, Beatriz Conde Gallego, Stefan Enchelmaier (eds.), Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?, MPI Studies on Intellectual Property, Competition and Tax Law (Springer, 2008), pp. 69-71.

[150] Article 420-2 Code de commerce.

[151] L. Nollet, 'France: Anticompetitive Practices', (2003) 24 European Competition Law Review, 7, 116-117.

[152] Ley 3/1991 de Competencia Desleal, de 10 de enero.

Nowadays, the application of art. 16.2 of the Unfair Competition Act requires proving the existence of a situation of economic dependence and evidence of its 'exploitation'. In the very few cases where the courts have applied this article, they have assimilated it to the concept of abuse in competition law.[153] Like in France, this restrictive interpretation has limited the practical effectiveness of this disposition. Together with national provisions on abuses of economic dependence, the development of mechanisms for the private enforcement of competition law have had an important impact on approaches to UTPs in B2b contractual relations. Following Courage,[154] the development of procedural mechanisms providing for the private enforcement of competition law is key to fully understand the regulation of B2b trading practices. This relationship between competition and private law through enforcement will be brought up at a later stage in this thesis.[155]

5.2.REGULATING B2B RELATIONSHIPS IN THE EU

At the EU level,[156] a first look at the surface of contract law reveals the predominant image of the consumer as the dominant status of private law in the second half of the 20st century. This European consumer is defined as the natural person who acts for purposes outside his or her trade or profession.[157] Any extension of the concept to non-natural persons has been rejected by the ECJ with the result that SMEs and other businesses are kept out of this definition.[158] However, this strict definition of the consumer does not

[153] J. Massaguer, 'La explotación de una situación de dependencia económica como acto de competencia desleal' in Estudios de Derecho mercantil en homenaje al profesor Manuel Broseta Pont, Vol.2 (Tirant Lo Blanch, 1995), fn 66; J. Massaguer, 'Artículo 16. Discriminación' in Comentario a la Ley de competencia desleal (Civitas, 1999), fn 66; M Zabaleta, La explotación de una situación de dependencia económica como supuesto de competencia desleal (Marcial Pons, 2002) , 234.

[154] Decision of the ECJ, 20 September 2001, Courage et Crehan, C-453/99, EU:C:2001:465. This case concerning the validity of beer-ties and pubs has had great influence in the development of a right to competition damages but also on the approach to abuses of power below dominance.

[155] See Chapter 5.

[156] E. Hondius, 'The Notion of Consumer: European Union versus Member States' (2006) 28 Sydney L. Rev., 1, 89; P. Nebbia, Unfair Contract Terms in European Law: A Study in comparative and EC Law, (Hart Publishing, 2007) 69-93. It is also useful to consult, among others, N. Reich, H.W. Micklitz, P. Rott, K. Tonner, European consumer law, (Intersentia, 2014); G. Howells, T. Wilhelmsson, EC consumer law, (Ashgate, 1997), 2; J. Devenney, M. Kenny, European consumer protection: theory and practice, (Cambridge University Press, 2012), 123-142; H. W. Micklitz, J. Stuyck, E. Terryn, Cases, materials and text on consumer law, (Hart, 2010).

[157] Art. 2.1 of the Directive 2011/83/EU on consumer rights defines consumer as 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession' (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64).

[158] C-541/99 et C-542/99, 22 novembre 2001, Cape et Idealservice MN RE, EU:C:2001:625.

preclude member states from extending consumer protection beyond its narrow limits.[159] For example, according to the directive 2011/83/EU, 'Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises'.[160]

This is just another example of how the evolution of private law rules at the national and European levels leads to more and more attempts at escaping the straightjacket of the consumer.[161] At the EU level, this escape-effect has materialised in the concept of customer, first, and the SME, later.[162] These two concepts go beyond the approach taken in the regulation of specific types of B2b relationships like Directive 1986/653 on Commercial Agents and the Late Payments Directive 2011/7/EU. Rather, it is closer to the concept of customer as developed for the regulated markets and for the provision of certain services.[163]

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[159] As a matter of fact, 'Even if EU law tends more and more towards maximum harmonisation of the substantive rules, the same cannot be said with regard to the determination of the personal scope', in H. W. Micklitz, 'Do consumers and businesses need a new architecture of consumer law?: a thought-provoking impulse' (EUI working papers 2012/23).

[160] Recital 13 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304/64.

[161] In this sense, B. Schüller, 'The definition of consumers in EU law', in J. Devenney, M. Kenny (eds.), European consumer protection, 127-128. Here, Schüller points out to the inconsistencies of the EU consumer approach. It is not in the economic rationale where we find the arguments to narrowly define consumers. It is in the political discourse where we find the reasons for limitation, for which consumer law becomes an instrument of European citizenship. For him, the shift from the economic to the political dissolves the connection between the economic and legal reasoning, which leads to even greater differences between the EU approach and that of its member states, whose consumer laws develop in accordance with the socio-economic environment in which their legal systems are embedded.

[162] This discussion is closely connected to the plea for a 'movable concept of consumer' made by H.W. Micklitz 'A new architecture', 72. With regard to the concept of consumer, he calls for a double change: the extension of the definition to include the smallest of SMEs and the realignment of the 'upper layer' of consumer law with the structural meaning of 'vulnerability'.

[163] Some examples: the (General) Services Directive, 2006/123/EC, the Information Society Services (E-Commerce) Directive, 2000/31/EC, The Investment Services Directives (Mifid), 2004/39/EC and 2006/73/EC, The Payment Services Directive, 2015/2366, Directive 2009/72/EC on electricity, and Directive 2003/55/EC on natural gas. Even before, the Directive 1990/315/EEC on package holidays referred to travellers and not to consumers (now replaced by Directive (EU) 2015/2302). These are the ones listed by V. Roppo, 'From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?' (2009) 5 European Review of Contract Law 3, 304–349. For him, the protection of the customer

Together with EU rules for the regulated sectors, EU competition law has also contributed to shaping the notion of SMEs in the internal market. A first way of doing this is through the European Commission's *de minimis notices*. These are the instruments used by the Commission to exclude the application of certain competition prohibitions for small companies.[164] The concept of SMEs as smaller competitors in need of protection from monopolist power is at the heart of competition policy debates in other ways too.[165] In Europe, it has been present in the definition of abuse of dominance, merger control and state aid. For the moment, it is sufficient to say here that the mainstream understanding of competition law does not regard it as the appropriate instrument to solve the issues posed by power imbalances in B2b trading relationships, at least not when this imbalance has no effect on the overall functioning of the market.[166] This leaves the regulation of all trading relationships that stay below the thresholds of dominance out of EU competition law.[167]

Finally, the European approach to B2b relationships is completed by the EU legislation on commercial and trading practices. The very terminology used by the Commission is indicative of the separate development between B2c relations, labelled as commercial practices, and B2b relations, labelled as trading practices. So far, the focus of the EU has been on b2c relations. Attempts at a regulation of B2b trading practices have met with strong political resistance once and again. Until now, the most important instrument on B2b trading practices has been the Misleading Advertising Directive.[168] However, the legal developments of the last ten years show that something is changing. The change is clear with the Unfair Trading Practices Directive for the Food Supply Chain.[169] This document is the result of more than ten years of work. It has been adopted on the basis of

reflects the trend towards a the protection of the weaker party in asymmetric contracts, in which the customer is an outsider to the main

[164] There is an ongoing PhD project at the EUI on the question of de minimis requirements in competition developed by Alexandre Ruiz Feases.

[165] Especially meaningful is E. M. Fox, 'We protect competition, you protect competitors' (2003) 26 World Competition 2, 149-165.

[166] The issue was the object of the ASCOLA 2015 Conference, celebrated in Tokyo.

[167] This exclusion is confirmed in article 3 Regulation 1/2003. This was thoroughly studied by Féteira, 'The interplay'. See also Fair Trade Advocacy Office, EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links, February 2019, Brussels.

[168] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising , OJ L 376/21

[169] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111/59.

agricultural competences, but its broad scope suggests a certain degree of competence creep, since it regulates also relations involving non-agricultural suppliers.[170] As such, the directive and the preparatory work leading to it will be at the core of the analysis. The final text was finally approved before Christmas 2018 in a involving the 2019 elections to the European Parliament, not only with regard to Brexit, have certainly contributed to unblock the proposal much to the dismay of European retailers.

In principle, the directive is without prejudice to national contract laws. It limits itself to establishing a black list of prohibited practices and a grey list of potentially unfair practices. It requires member states to establish national enforcement authorities with minimum investigation and sanctioning powers. Despite its apparently non-contractual nature, the most important prohibitions of the Directive relate to the inclusion of unfair terms in contracts with weaker suppliers. It confirms the blurring line between contracts and commercial practices.[171] It is the first time the EU manages to establish such a general instrument of B2b fair trading that attempts at re-defining the meaning of relational weakness beyond the consumer. Even if focused on food, it may introduce a model for the regulation of practices in supply chains. However, for the time being, its provisions address mostly bilateral relations. The implementation and future developments of the directive will need to take into account the effects of certain practices on the whole of the chain.[172]

[170] H. Schebesta et al. 'Unfair Trading Practices in the Food Chain: Regulating Right?' (Wageningen Working Papers in Law and Governance 2018/13).
[171] Decision of the ECJ, 15 march 2012, Pereničová et Perenič, C-453/10, EU:C:2012:144. A comment on the decision can be found in H-W. Micklitz, 'A common approach to the enforcement of unfair commercial practices and unfair contract terms', in W. van Woom, A. Garde and O. Akseli (eds), The European unfair commercial practices directive : impact, enforcement strategies and national legal systems, (Ashgate, 2014) 173-202.
[172] On the relation between the new directive, private regulation and the effects of trading practices on distributional and exclusionary effects on the chain, see F. Cafaggi, Fabrizio and P. Iamiceli, Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive (forthcoming).

CHAPTER 2

GLOBAL VALUE CHAINS IN EUROPEAN PRIVATE LAW

This chapter presents the conceptual framework of this thesis. It builds on the intersection between the supply chain and European Private Law. This intersection has allowed the expansion and consolidation of SMEs in the EU as key political and economic actors of globalisation. The following pages will explore the economic, legal and political dimensions of the supply chain from the perspective of the European Union (1). Economically, (2) the chapter outlines the origins and evolution of the concept of supply or value chain as a key component of modern global trade. It focuses on the transformation of food chains and its impact on the European agri-food sector as a blueprint for analysis; (3) legally, the chapter deals with the undermining effects of the supply chain on well-established categories of traditional private law and with the attempts by the legal literature to cope with this new reality; (4) politically, the chapter argues that the supply chain has provided the EU with an innovative mechanism for the management of persistent national differences in the regulation of business-to-businesses trading practices. To conclude (5), the chapter links the role of the EU in the governance of the chain with the transformation of the actors, substance and enforcement of EU B2b trading law.

1. INTRODUCTION

The global value chain channels modern day globalization. The value chains of multinational corporations represent most of today's global trade.[1] The interaction between chains and the law cannot be ignored. This requires recognizing the intimate connection that exists between transnational governance in the supply chain and the legal local context. The purpose of this chapter is precisely to enquire into the interaction that exists between the law and the supply chain from the perspective of EU private law. This means, on the one hand, enquiring into the role that the EU has played in shaping and managing transnational chains. On the other hand, it also means enquiring into the way in which this process has impacted, and continues to impact, the private laws of member states. The assumption behind this enquiry is that no quest into global law, including global chains as the expression thereof, can be entirely global in the sense of being everywhere and anywhere.[2] Any such enquiry needs to be guided by a 'localizing' effort, seeing in global value chains a set of 'transboundary networks and entities connecting multiple local and national processes and actors'.[3] The global chain is used here to transform the vague concept of globalization in connection to the everyday reality of local actors in concrete places and to the reality of the European SMEs that interact in the chain. This European focus on the global value chain complements the work of the existing legal literature on the global chain. The focus of this literature is on global and transnational law issues.[4] This legal literature on the global chain addresses most of its concerns at the relationship between MNCs and suppliers in developing countries. Its primary focus is on the impact of the chain in terms of labor rights, environmental, health and safety

[1]WTO, The future of world trade: How digital technologies are transforming global commerce (World Trade Report, 2018), 19 available at https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf. Further, '[i]t is estimated that the 500 largest multinationals now account for nearly 70 percent of global trade.' A. Sydor, 'Editor's Overview', in Foreign Affairs And International Trade Canada, Global Value Chains: Impacts And Implications 1, 2 (2011).

[2] See introductory chapter to H. Lindahl, Authority and the Globalisation of Inclusion and Exclusion. (Cambridge University Press, 2018).

[3] S. Sassen, A Sociology of Globalization (W.W. Norton, 2007), 4-7.

[4] Some exceptions are noteworthy. The work of Fabrizio Cafaggi and others on transnational private regulation has been marked by an interest in the development of the EU private law. Some examples: P. Verbruggen, 'Does Co-Regulation Strengthen EU Legitimacy?' (2009) 15 European Law Journal 4, 425-441; F. Cafaggi and P. Iamiceli, 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach,' in K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015); F. Cafaggi, 'Private regulation in European private law', in A. Hartkamp, M. Hesselink, E. Hondius, C. Mak, C. du Perron (eds.), Towards A European Civil Code, (Wolters Kluwer, 2011).

concerns. It pays comparatively little attention to the European context of private law. This focus tends to homogenize the reality of European businesses. It misses the diversity of economic realities and national traditions - including legal traditions - that exist in the European Union. The scarce attention dedicated to the EU law and global value chains is even more surprising looking at the work of the European Commission over the last decade in relation to modern trading practices, especially in the food sector but also in digital services.[5] With the purpose of filling in this gap, this thesis aims at exploring the interaction between the governance of EU (private) law and the global value chain. In order to do so, it looks at the economic, legal and political meanings of the supply chain and at their relevance for EU private law.

Economically, the cross-border reality of international trade has resulted in a relatively new organization of the global economy. In today's world, manufacturers, wholesalers, distributors and retailers operate in far-reaching and complex transnational networks that link them to each other and to the final consumer. In this scenario, the concept of chain has bloomed across diverse fields of research from international business management to sociology. The food sector has become a favorite field of this research. Driven by new technologies, by the consolidation of retailing activities and the volatility of commodity prices, the agricultural and food industries have gone through a rapid transformation. On the consumer side, concerns for the sustainability of food systems have highlighted the important role of small economic actors in local settings. In a rapidly changing context, the European Union is forced to re-think its role in global food markets in the quest to strike the right balance between the competitiveness of European agricultural markets and the diversity of its agricultural, and even culinary, traditions.

The legal dimension of the supply chain has been progressively acknowledged by the scholarship. The global chain is presented as a reality that destabilizes the pillars of traditional private laws. The chasm between the cross-border dynamics of global supply chains and the substantive and enforcement categories of national private laws becomes more and more evident. At the same time, the legal reception of 'chains' emphasizes the regulatory role of contracts as building blocks of transnational governance. The

[5] C. Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond' (2018) 7 Journal of European Consumer and Market Law 6, 222-233.

consolidation of the regulatory contract questions the reach of classical notions of contract theory as much as state-bound notions of jurisdiction.

Politically, the supply chain has become an increasingly powerful tool in the formulation of international policies addressed at multinationals. The supply chain addresses issues of power distribution between the public and the private sector; between the developed and the developing economies; between 'the big and the small' actors of global trade. However, not so much attention has been devoted by value chains scholars to the EU involvement with European SMEs in the food (and non-food) supply chain. This thesis sheds light on how the supply chain has been transformed, in the European context, into an instrument of governance through which to manage persistent national differences across the traditional private laws of the Member States in relation to B2b relations. Sidestepping as far as possible the politically-charged discourse of the harmonization of private law, the EU spurs the supply chain to re-define the reallocation of roles between the EU and the traditional private laws of its Member States in the management of trading practices.

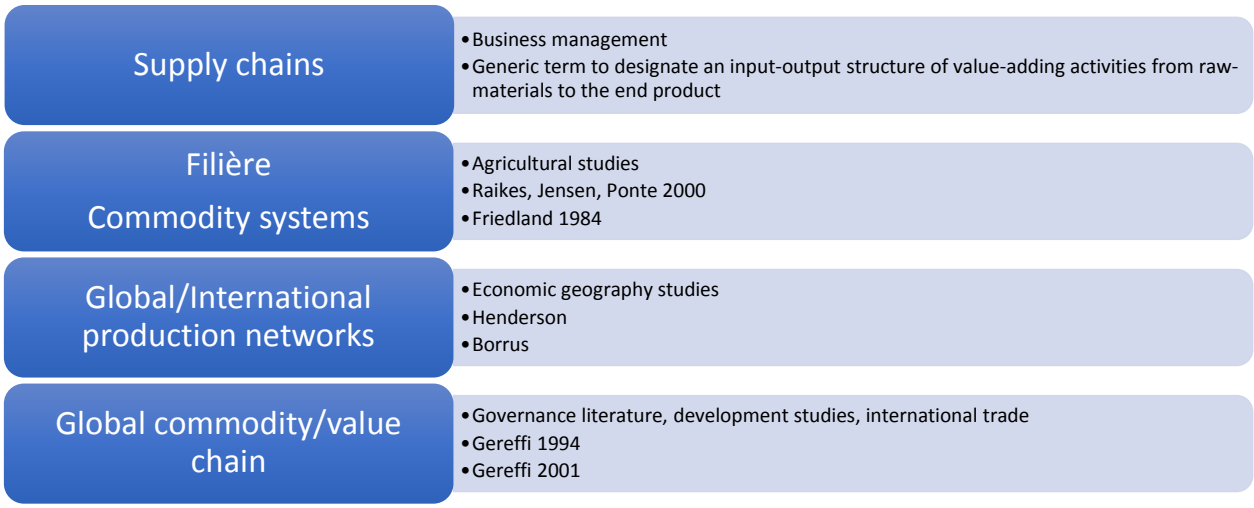
2. THE ECONOMIC DIMENSION OF THE CHAIN: A FOCUS ON FOOD

Representing up to 80% of global trade,[6] global supply chains can well be considered the anchor of modern international trade.[7] The global chain dominates transnational commercial exchanges in a context marked by the liberalization of barriers to trade and the rapid technological advances which spur the economy towards increasingly global and fragmented commercial relationships.[8] In this scenario, the supply chain becomes the link and cement between apparently fragmented and disperse economic realities in the global arena and between the businesses and consumers that interact within it.

[6] UNCTAD, 'Global Value Chains and Development: Investment and Value Added Trade in the Global Economy', (UN Doc UNCTAD/DIAE/1, 2013), iii.
[7] K. B. Sobel-Read, 'Global Value Chains: A Framework for Analysis' (2014) 5 Transnational Legal Theory 3, 364-407, 368.
[8] The Global Value Chain literature takes this description of globalization from R. Feenstra, 'Integration of Trade and Disintegration of Production in the Global Economy', (1998) 12 Journal of Economic Perspectives, 4, 31–50. See G. Gereffi, J. Humphrey and T. Sturgeon, 'The governance of global value chains' (2005) 12 Review of international political economy 1, 78-104, 80.

The concept of the supply chain was coined in parallel to the increasing fragmentation that characterized globalization processes in the 1980s.[9] The term was first used by international businesses scholars to shed light on the processes by which a corporation decides to keep certain activities in-house and to outsource or relocate others. In this sense, the definition of chain was that of 'the processes by which technology is combined with material and labor inputs, and then processed inputs are assembled, marketed and distributed'.[10] According to this definition, the chain becomes the underlying matrix that links the intermediate processes of global manufacturing, distribution and retail of goods. The concept of chain would gain new ground across different streams of research. A plethora of partially overlapping definitions mushroomed over international business management reviews and journals of economics and sociology.[11] One of the earliest examples of chains in the business literature was the one of the supply chain. Originally coined in the literature on business management,[12] it has nowadays become a more neutral term to generically designate a firm's economic choice on the 'input-output structures of value-adding activities from raw-materials to the end product'.[13] In agricultural studies, similar concepts to that of chain were developed by the French filière approach.[14] Other approaches to chains were developed by the literature on commodity systems,[15] and also by the literature on economic geography[16] and on global and international production networks.[17]

[9] For a similar perspective on the history of GVCs, see C. Cutler, 'Private Transnational Governance in Global Value Chains' in C. Cutler and T. Dietz (eds.), The politics of private transnational governance by contract (Routledge, 2017), 79.
[10] B. Kogut, 'Designing global Strategies: Comparative and Competitive Value- Added Chains' (1985) 26 Sloan Management Review 4, 15–28, 15. Another early definition was that one of M. E. Porter, 'How information gives you competitive advantage' (1985) 63 Harvard Business Review 4, 149-160.
[11] For an overview, see J. Lee, 'Global commodity chains and global value chains' The International Studies Encyclopaedia, Wiley-Blackwell, Oxford (2010): 2987-3006.
[12] Some definitions of supply chain in business management can be found in J. T. Mentzer et al, 'Defining supply chain management' (2001) 22 Journal of Business logistics 2, 1-25; D. J. Ketchen, and G. T. M. Hult, 'Bridging organization theory and supply chain management: The case of best value supply chains' (2007) 25 Journal of Operations Management 2, 573-580.
[13] G. Gereffi, in N. J. Smelser and R. Swedberg (eds). The handbook of economic sociology. (Princeton university press, 2010): 166.
[14] P. Raikes, M. F. Jensenand S. Ponte, 'Global commodity chain analysis and the French filière approach: comparison and critique' (2000) 29 Economy and society 3, 390-417.
[15] W. H. Friedland, 'Commodity systems analysis: an approach to the sociology of agriculture', in Research in rural sociology and development (Emerald, 1984).
[16] J. Henderson et al. 'Global production networks and the analysis of economic development' (2002) 9 Review of international political economy 3, 436-464.
[17] M. Borrus, D. Ernst, and S. Haggard, 'Introduction: Cross Border Production Networks and the Industrial Integration of the Asia-Pacific Region', in M. Borrus, D. Ernst, and S. Haggard (eds.), International production networks in Asia: rivalry or riches (Routledge, 2000): 1-30.



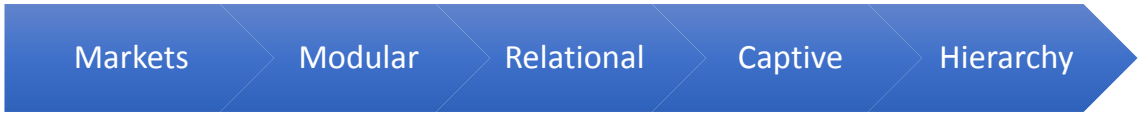
The current dominant version of the global value chain originates in the literature on global commodity chains of the 1990s.[18] In the 2000s, commodity chains developed into value chains.[19] This term has now come to dominate most of the terminological discussion.[20] According to one of the most commonly cited definitions, the global value chain 'describes the full range of activities that are required to bring a product or service from conception, through the intermediary phases of production (involving a combination of physical transformation and the input of various producer services), delivery to final consumers, and final disposal after use.'[21] The difference between the value chain and its predecessors, like commodity chains, is that the global value chain does not focus on product alone, but on value. It investigates 'the role of value creation, value differentiation, and value capture in a coordinated process of production, distribution and retail.'[22] The capture of value becomes essential to understand the transformation of the global political economy that the chain itself brings about.[23] The GVC model, building

[18] G. Gereffi, and M. Korzeniewicz. Commodity chains and global capitalism. (1994) ABC-CLIO, 149.
[19] G. Gereffi, and R. Kaplinsky, (eds). The value of value chains: spreading the gains from globalisation 32 (Institute of Development Studies, 2001).
[20] See K. B. Sobel-Read, 'Global Value Chains', 357, n. 6. He takes this assertion from J. Humphrey and H. Schmitz, 'Inter-Firm Relationships in Global Value Chains: Trends in Chain Governance and their Policy Implications', (2008) 1 International Journal of Technological Learning, Innovation and Development, 258, 261-262.
[21] R. Kaplinsky, 'Spreading the Gains from Globalization: What Can Be Learned from Value-Chain Analysis?' (2004) Probs. Econ. Transition 74, 80.
[22] S. Barrientos et al., 'Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World', (2011) 150 INT'L LAB. Rev. 319, 321.
[23] K. B. Sobel-Read; G.Anderson; J. Salminen, 'Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity' (2018) 93 Tul. L. Rev. 1, 8

on the work of transaction cost economics[24] and production networks,[25] sets out to explore the grey space that exists between markets and hierarchies. The starting point of their quest lies at the realization of the profound changes that have occurred at the interaction between the two poles of economic activity. The market can no longer be considered the uncontested framework of corporate activity. Rather, the power and size of corporate activity is now shaping and framing an increasingly share of the global market via its value chains.[26] Moreover, the power position of states and corporations depends on their role in the global value chain.[27]

Consequently, the GVC model becomes a unique analytical model to understand current forms of globalisation. It purports to offer a holistic and dynamic approach to issues of organization, governance and power. In doing so, it has transformed the chain into the new basic unit of analysis. The interactions between the nodes and levels of the chain, which are defined by the degree of coordination and power asymmetries between the economic players, determine the type of chain configuration.[28] In between markets and hierarchies, the chain can adopt three types of configurations depending on the ability to codify complex transactions and the degree of economic dependence between chain actors. These types of chains are the captive, relational and modular ones.

Typology of chains between markets and hierarchies in GVC literature: From low to high degree of explicit coordination and power asymmetry:



[24] O. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations (1979) 22 Journal of Law and Economics, 233–61.
[25] M. Borrus, D. Ernst, and S. Haggard (eds.), International production networks in Asia: rivalry or riches (Routledge, 2000).
[26] K. B. Sobel-Read, 'Global Value Chains', 367-368. He illustrates this assertion with the example of the South African merger between Walmart and Massmart: 'To be sure, it seems perhaps unexceptional—indeed, commonsensical—that Walmart, because of its remarkable market power, would be able to source given products at lower prices than Massmart could on its own. But it is, however, here that the revolution manifests itself: if the free market were primary then Massmart would have already been able to obtain the given goods from the global market at those lowest prices.'
[27] G. Gereffi, 'A Global Value Chain Perspective on Industrial Policy and Development in Emerging Markets' (2013) 24 DuKE J. COWe. & INT'L L. 433, 441.
[28] According to the GVC model, the interactions between chain actors are determined by three main variables: the complexity of transactions, the capacity to codify them, and the capabilities in the supply-base. See G. Gereffi, J. Humphrey and T. Sturgeon, 'The governance of global value chains' (2005) 12 Review of international political economy 1, 78, 85.

The captive chain becomes the obvious choice to look at issues of power imbalance.[29] This is because the closer the chain gets to a hierarchical configuration, the bigger the risk of abuses of economic dependence against weaker economic actors, often small businesses. Whether the captive chain is a type of chain in itself or rather a deformation of modular and relational chains is debatable. The same goes for the possible existence of unfair trading practices in non-captive chains. Regardless of this, the governance of (captive) chains requires that the lead firm have the capacity to ensure fair trading conditions and an equitable distribution of value.[30] This makes the inclusion and participation of small stakeholders in the supply chain a central aspect of the GVC research,[31] which focuses on the potential negative effects of tighter coordination along the chain on smaller suppliers. The need for systemic efficiency, the increasing need for differentiation in highly competitive markets and the need for timely responses to reputational concerns are driving the chain towards tighter forms of coordination.[32] This trend towards coordination takes place through the multiplication of private standards and certification regimes that put mounting pressure on suppliers to consolidate in order to take advantage of greater economies of scale and to face the costs of standardization. With the consolidation of the chain, the distributional effects of supply chain governance on its weaker links becomes a major challenge for developed and developing economies as the chain squeezes out smaller players.[33]

The global food chain is a blueprint for this analysis. Since the beginning of the 2000s, the consequences of increasing buyer power for the functioning of food systems have become a major issue.[34] The higher level of buyer power and retail concentration is

[29] From an antitrust perspective, see I. Lianos and C. Lombardi. 'Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?' (CLES Research Paper Series, 2016).
[30] G. Gereffi and K. Fernandez-Stark, Global Value Chain Analysis: A Primer, (Duke Center on Globalization, Governance & Competitiveness, 2016): 11.
[31] The question of inclusion is often discusses by the GVC literature under the notion of 'upgrading', which is defined as the process of improving the ability of a firm or an economy to move to a more profitable and/or technologically sophisticated capital- and skill-intensive economic niche . G. Gereffi, 'International trade and industrial upgrading in the apparel commodity chain' (1999) 48 Journal of international economics 1, 37-70, 51-52.
[32] This idea is developed by K. B. Sobel-Read, 'Global Value Chains', 387. He sees the main driver of the transformation of chains towards increased consolidation in the need of the chain for systemic efficiency, this is, in the need to maximize its possibilities of extracting rents.
[33] J. Lee, G. Gereffi, and J. Beauvais, 'Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries' (2012) 109 Proceedings of the National Academy of Sciences, 31, 12326-12331.
[34] R. Clarke (ed.), Buyer power and competition in European food retailing, 10 (Edward Elgar Publishing, 2002).

considered to be facilitated by the liberalization of barriers to trade, the increase of foreign investment and the fast development of new technologies. These changes permit the multiplication of cross-border links in the food chain. Today, most European consumers can find fresh fruits and vegetables on a year-round basis at their local supermarkets and once exotic products such as avocados, baobab oil or chia seeds have become staples of the modern household. The progressive globalization of food chains has been accompanied by the consolidation of modern retail firms, shifting value towards the big supermarket chains. Small retailing and food markets have become in many places a tourist attraction,[35] but this is only a very small part of the profound transformation that has been going on in the production and consumption of food over the last two decades.[36] To respond to these changes, emerging social movements express their support for locally produced food and small retailing shops.[37] Some of these movements relate to the survival of local communities in global markets, of culinary traditions and idiosyncrasies, or of the diversity of the planet's ecosystems.[38] They also relate to other pressing challenges of the food landscape of the 21st century: achieving food security, fighting malnutrition and obesity, reducing food waste, ensuring the survival of small rural communities, mitigating the effects of climate change, and protecting the world's environmental and cultural diversity.[39]

In response to the challenge of modern food systems, the value chain literature has produced invaluable research on the structures and functioning of global food chains. It has helped to underline the complexity and diversity of food chains and it has also identified some key trends in the evolution of global food markets, which are marked by increasing globalization and the growing tendency towards consolidation and

[35] Mercato Centrale in Florence and Rome, La Boqueria in Barcelona, San Miguel in Madrid are just a few examples of the new role of local producers' markets in major touristic destinations.
[36] The GVC literature has produced a significant amount of work on food chains. See especially G. Gereffi and L. Joonkoo, 'A global value chain approach to food safety and quality standards' (Working Paper Series, Duke University, 2009).
[37] An example is Carlo Petrini's slow food movement. www.slowfood.com
[38] The cultural values carried by food chains have become the object of increasing attention over the last years linked to grassroots movements such as the Italian Slow Food movement. This cultural dimension has been recently studied form a legal perspective in A. Isoni, M. Troisi, and M. Pierri, (eds). Food Diversity Between Rights, Duties and Autonomies: Legal Perspectives for a Scientific, Cultural and Social Debate on the Right to Food and Agroecology. Vol. 2. (Springer, 2018).
[39] FAO, The future of food and agriculture: Trends and challenges, 2017, available at http://www.fao.org/3/a-i6583e.pdf

specialization.[40] According to the studies on food global chains, these trends have contributed to the accumulation of value and power in the lower links of the food supply chain.[41] This shift has created the potential for abuses of buyer power in the hands of retailers and food supermarkets.[42] Supermarkets are in a position of leadership, where they enjoy broad discretion to cut costs and impose stringent requirements up the chain on processors, exporters and farmers. At the same time, the intensification of price-based competition has shifted attention towards product- and quality-based differentiation in order to achieve further competitive advantages against competitors. This requires higher levels of coordination throughout the chain to ensure traceability and the implementation of quality standards. Altogether, these changes have resulted in a complex scenario for the food sector where multiple governance structures co-exist. These multiple structures portray mixed degrees of consolidation, longer and shorter models of supply chain, and more or less opportunities for the inclusion of small businesses depending on the type of chain and food product involved.

From a European perspective, the transformation of food production and consumption has profoundly impacted European agriculture and local retail. This transformation has had a major impact in the context of the CAP and competition law, where it has spurred an ongoing discussion on the future of its Common Agricultural Policy (CAP) as it struggles to ensure sustainable options, to meet changing consumer demands and to ensure the livelihood of European farmers and rural communities. The CAP, deeply rooted in the European integration project, has progressively shifted from a system of direct intervention towards a more market-based approach.[43] This shift is considered

[40] See J. Lee, G. Gereffi, and J. Beauvais, 'Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries' (2012) 109 Proceedings of the National Academy of Sciences, 31, 12326.

[41] This is sometimes called the Walmart effect. Using the merger between Walmart and Massmart in South Africa, Sobel-Read illustrates the revolution operated by the supply chain. The South African Competition Authority cleared the merger on the understanding that the operation would bring about lower prices for Massmart, since it could now have access to Walmart's supply chain. The consequences of this reasoning and enormous: 'But here again, if Walmart is defining the price, then Walmart is defining the market (…) Walmart's power is greater than that of that market.' See K. B. Sobel-Read, 'Global Value Chains', 368.

[42] For a complete overview on the issue of buyer power in food retailing, see R. Clarke, (ed.) Buyer power and competition in European food retailing, 10 (Edward Elgar Publishing, 2002).

[43] The CAP has always been surrounded by controversy because of interventionist stance. In the 1990s, the Commission put an end to intervention prices. The European price would thus provide a minimum benchmark and would only be activated in case of food crisis. In 2007, the system of minimum prices was abandoned for good. This was due to the new WTO discipline and the liberalization of agricultural markets. The focus of attention shifted towards direct payments to farmers which became progressively decoupled. For an analysis of the transforming CAP from the perspective of standardization and supply chains, see K.

positive to achieve a more modern and competitive European food sector. However, it has also underlined the need for innovative tools capable of mitigating the effects of price volatility and the negative impact resulting from widespread power imbalances in European farming and food retail. As the CAP progressively transforms, the correct functioning of food supply chains and the protection of small agro-food businesses against power imbalances has become a major topic of discussion at the European level.[44] In this discussion, led by the Commission, contracts and private law have emerged as key instruments for the new regulatory approach.[45] The new economic reality of modern food chains has boosted the instrumentalization of private law in the quest to achieve a mix of complex objectives: the competitiveness of the European food sector and the sustainable future of a diverse European agriculture. The publication of Directive 633/2019, justified on the Treaty article dedicated to the common organization of agricultural markets and agricultural policy (art. 43(2)), crystallizes this approach.

3. THE LEGAL DIMENSION

The global value chain model defines the regulatory environment that shapes business transactions in the global market. This environment seemingly consists of overlapping combinations of commercial contracts, certified labels, codes of conduct and quality and safety standards. Against this complex setting, legal scholarship has struggled to find an answer to a pressing question: what role is there left for the law?[46] Law has been said to lag behind the cross-cutting nature of the supply chain as a vector for the elaboration and

P. Purnhagen and P. Feindt, 'A principles-based approach to the internal agricultural market' (2017) 42 European Law Review 5, 722-736.

[44] In 2008, the crisis of the food sector led the Commission to establish a High-Level Group on the Competitiveness of the Agro-Food Industry by Decision 2008/359/EC (1) of 28 April 2008. Much of their discussion has focused on the correct functioning of the food supply chain. Also in competition law, strengthening the bargaining power of agricultural producers vis-à-vis retailers has become a concern for the European Commission. On the topic of agriculture and competition, see the analysis of P. Chauve, A. Parera, and A. Renckens, 'Agriculture, Food and Competition Law: Moving the Borders' (2014) 5 Journal of European Competition Law & Practice 5, 304-313.

[45] Under the influence of the French doctrine, this movement towards the instrumentalization of contracts in the food chain is called 'contractualisation'. European Commission's Agricultural Markets Task Force, 'Enhancing the position of farmers in the supply chain', November 2016, 34, available at https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf. See also: L. Russo, 'Contracts in the agri-food supply chain within the framework of the new Common Agricultural Policy', (2015) 13 Revista electrónica del Departamento de Derecho de la Universidad de La Rioja, REDUR, 177-206; C. Del Cont, 'Filières agroalimentaires et contrat: l'expérience française de contractualisation des relations commerciales agricoles' (2012) 4 Rivista di diritto alimentare, 1-28.

[46] The IGLP Law and Global Production Working Group, The role of law in global value chains: a research manifesto (2016) 4 London Review of International Law 1, 57–79.

enforcement of rules in the modern economy. Within the chain, contracts emerge and consolidate as key regulatory instruments of a cross-border scenario. Against this background, the effectiveness of traditional legal categories is put into question.

The transformation of the economy into global value chains has undermined the validity of legal categories once thought universal. The conventional mechanisms of traditional (private) laws seem insufficient to cope with the complexity of global and disperse regulatory powers. The acknowledgement of their undoing has spread across legal scholarship.[47] Examples abound that attempt at deconstructing the vertical and horizontal classical divisions of the law in response to the challenges of globalisation: the blurring of the public/private divide,[48] the 'schism' of international law, [49] the thinning line between contracts and corporations,[50] antitrust and private law,[51] contracts and commercial practices[52], and the very same concepts of regulation and compliance.[53] By cutting across established legal compartments, the global value chain has made it necessary to re-think the legal landscape once more.[54]

Two main issues are at stake in the global value chain: regulatory contracts and transnational enforcement. The rise of the regulatory contract has been parallel to the increasing awareness about the limits of conventional legal notions of sovereignty and jurisdiction as expressed in private (international) law. A new governance design is called

[47] In this sense, K. E. Eller, 'Private governance of global value chains from within: lessons from and for transnational law' (2017) 8 Transnational Legal Theory 3, 296-329, 301: 'And while the limited conceptual inventory of modern society did not inhibit a novel recombination and evolution of its social structures, its self-description has become more and more an empty shell.'

[48] H. W. Micklitz, and D.Patterson., 'From the nation state to the market: the evolution of EU private law' (EUI Working Papers LAW no 2012/15) .

[49] H. M. Watt, 'Private international law beyond the schism' (2011) 2 Transnational legal theory 3, 347-428.

[50] S. Grundmann, F. Cafaggi and G. Vettori, The organizational contract: from exchange to long-term network cooperation in European contract law (Routledge, 2016).

[51] H. W. Micklitz, 'The concept of competitive contract law' (2004) 23 Penn St. Int'l L. Rev., 549.

[52] M. Durovic, European law on unfair commercial practices and contract law (Bloomsbury Publishing, 2016).

[53] M. Namysłowska, 'Monitoring compliance with contracts and regulations : between private and public law' in R. Brownsword, R. A. J. van ,Gestel, H. W. Micklitz, (eds.) Contract and regulation : a handbook on new methods of law making in private law (Edward Elgar Publishing, 2017).

[54] There are many prominent schools dealing with the reconstruction of the new legal and regulatory landscape. Some of them belong to studies on transnational theory, like G. Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed), Global Law Without a State (Dartmouth Pub Co, 1996) 3–28;others to regulatory theory, like J. Braithwaite, P. Drahos, Global business regulation (CUP, 2000); others combine the two in transnational private regulation, F. Cafaggi, 'The regulatory functions of transnational commercial contracts: new architectures' (2013) 36 Fordham Int'l LJ , 1557.

for.[55] Firstly, (3.1.) this section analyses the development of theories of contract governance as a way to cope with the challenges brought by the chain on traditional notions of contract law, where the notion of privity occupies a central role. Secondly, (3.2.) it considers the evolution of legal concepts of territoriality and analyses the role played by conventional instruments of international private law in relation to cross-border contracting practices.

3.1. THE REGULATORY CONTRACT

In the regulatory conundrum of the global value chain, contracts have emerged and consolidated as building blocks of transnational regulation.[56] Accounting for the regulatory function of contracts requires in turn considerable effort to align classical contract theory with the new realities of international commerce. Ever since the 1980s, the legal literature has reflected on how contract moves away from the spot arms-length model of contracts underpinning civil codes. Modern transactions frequently involve multiple parties and happen in a net of interconnected exchanges, which undermine basic tenets of contract law like the privity of contracts.[57] Modern contracts between businesses extend and repeat over the span of years and often occur in a climate of uncertainty about future outcomes. To account for this, insights from economics and sociology have been brought into the law of contracts. Theories on braiding,[58] networks,[59] incomplete,[60] relational,[61] long-term,[62] and organizational[63] contracts have been put forward to account for modern contracting practices. While these theories are useful to reflect certain aspects

[55] See especially the introduction to F. Cafaggi, H. M. Watt, Making European private law : governance design (Edward Elgar, 2008).
[56] K. H. Eller, 'Private Governance of Global Value Chains' 297.
[57] Privity has been a key concern of global legal scholars working on the global value chain. See K. B. Sobel-Read; G.Anderson; J. Salminen, 'Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity' (2018) 93 Tul. L. Rev. 1, 8. See symposium organized by Science Po, June 2019.
[58] R. J. Gilson, C. F Sabel and R. E. Scott, 'Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine' (2010) 110 Columbia Law Review 1377, 1387;
[59] G. Teubner, Networks as connected contracts: edited with an introduction by Hugh Collins (Bloomsbury Publishing, 2011).
[60] I. Ayres and R. Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale Law Journal 87.
[61] E Speidel, 'The Characteristics and Challenges of Relational Contracts' (2000) 94 Northwestern University Law Review 823, 831, 838.
[62] J. P Esser, 'Institutionalizing Industry: The Changing Forms of Contract' (1996) 21 Law & Social Inquiry 593, 626.
[63] S. Grundmann, F. Cafaggi and G. Vettori, The organizational contract: from exchange to long-term network cooperation in European contract law (Routledge, 2016).

of the reality of contracting in the supply chain, they lack the eye-birds view of the global value chain model.[64] To overcome the isolation of these different approaches to contract, the theory of contract governance brings together contract theory and governance research.[65] The legal parallel to the global value chain is contract governance. Its purpose is to offer a holistic and comprehensive approach to the functioning of the marketplace.[66] Contract governance thus rejects a one-size-fits-all approach and underlines the need to adopt a broad perspective into the different levels and actors of standard-setting and standard-implementation that exist in a given 'institutional matrix'.[67] This perspective makes it receptive to the reality of global value chains as the relevant institutional matrix for the regulating of B2b contractual relations.[68]

Under the framework of contract governance, the supply chain is no longer simply understood as a type of vertical network characterized by the linking of connected contracts.[69] Its increasing importance in global trade has transformed it into an all-encompassing scenario in which to analyze the hornets' nest of regulation in the transnational arena. In this framework, contract becomes the elementary unit of the regulatory toolbox: 'contracts are used for the adoption of standards by single firms and groups of businesses, for labels licensing, to monitor compliance, for the enforcement of (contractual) duties to comply with standards and licensing rules. Different types of contracts are used to design standards, monitor compliance, and enforce regulatory obligations'.[70]

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[64] On the 'shortcomings' of existing theories, see K. B. Sobel-Read, 'Global Value Chains', 398-400.
[65] K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015), 4
[66] Ibid.
[67] Ibid 3, which takes this definition as a starting point for its discussion on governance. The original source is O. Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations', (1979) 22 Journal of Law and Economics, 233–61, 239.
[68] See F. Cafaggi and P. Iamiceli, 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach' in K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015), 343.
[69] See Fabrizio Cagaffi's classification in F. Cafaggi, 'Contractual networks and the small business act: towards European principles?' (2008) 4 European Review of Contract Law 4, 493-539. In this article, he classifies networks into vertical and horizontal depending on whether they operate within one phase or across multiple phases of economic activity. The distinction is relativized when the supply chain becomes the encompassing framework of analysis. See F. Cafaggi, 'The regulatory functions of transnational commercial contracts: new architectures' (2013) 36 Fordham Int'l LJ , 1557.
[70] F. Cafaggi and P. Iamiceli, 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach' in K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015), 343, 345.

The idea of regulatory contracts has been taken up by the legal literature on transnational private regulation and on European private law. In the field of transnational private regulation, contract governance is used to explain the emergence of compliance, third-party certification regimes and the role of contracts in the design of CSR policies for the protection of the environment, labor and social rights.[71] This literature also addresses the claims for legitimacy and for the safeguard of public interests coming from chain governance and the contribution of legal systems to the ongoing process of globalization.[72] In the field of EU private law, contracts have also been put at the heart of EU regulatory private law.[73] This approach has also been used to enquire into the legitimacy of EU law making for the internal market. Contracts are instrumentalised for the establishment of an internal market[74] and for the goals of European integration.[75] Contracts, as the ultimate expression of private autonomy, become a regulatory instrument of themselves under the lenses of ERPL.[76] This has been clear in the regulation of the liberalized economic sectors of telecom and energy and in the development of EU consumer law and distribution contracts. This approach surpasses in a way the discussion on privity in contract law because it assumes the interdependence between contract and the rest of the market. The result has taken the shape, in a certain sense, of 'competitive

[71] On food, P. Verbruggen, T. Havinga, Hybridization of food governance : trends, types and results. (Edward Elgar Publishing, 2017). On sports, A. Duval, 'Lex Sportiva: A Playground for Transnational Law' (2019) 19 European Law Journal 822. A. Beckers, 'Corporate codes of conduct and contract law: a doctrinal and normative perspective',in R. Brownsword, R. A. J. van Gestel, and H. W. Micklitz, (eds.) Contract and regulation : a handbook on new methods of law making in private law. (Edward Elgar Publishing, 2017).

[72] K. H. Eller, 'Private Governance of Global Value Chains', [14]. The author approaches this legal reception of the chain from the perspective of transnational law. He distinguishes two phases in its evolution which he calls their first and second modernity. The second modernity of transnational law would be led by the objective of building the legitimate basis for transnational legal forms. This is what he calls 'reflexive' transnational law, building on Teubner's work in G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law & Society Review 239.

[73] H.-W. Micklitz, Y. Svetiev and G. Comparato (eds.), 'European Regulatory Private Law—The Paradigm Tested', (2014, 4 EUIWorking Paper), 69-97, available at http://cadmus.eui.eu/bitstream/handle/1814/31137/LAW_2014_04_ERPL_ 07corr.pdf?sequence=3.

[74] G. Comparato and H.-W. Micklitz, 'Regulated autonomy between market freedoms and fundamental rights in the case law of the CJEU', in U. Bernitz, X. Groussot and F. Schulyok (eds.), General Principles of EU Law and European Private Law (Kluwer, 2013), at 121-154.

[75] See also H. Collins, 'Governance implications of the changing character of private law', in F. Cafaggi, H. M. Watt, Making European private law : governance design. (Edward Elgar, 2008), 286.

[76] See G. Comparato and H. W. Micklitz, 'Regulated autonomy', 121.

contract law'.[77] It is a concept of contracts that relativizes the separation between competition and private law, but also between private law and standardization.[78]

This thesis suggests that the EU has extended this approach, whatever the name we call it, to a European mode of governance of the supply chain. If one prefers it, the supply chain has become the new testing field for EU private law. It goes beyond regulated markets of energy, electricity, transport, etc. The supply chain allows the EU to overcome its own 'silo approach' because it provides the European legislator with a transversal instrument.[79] The EU can make use of contracts to regulate the conditions of access to the supply chain, and therefore, to the internal market. Under this European supply chain umbrella, discussions on privity and other notions of traditional private law become less relevant. This is precisely because contracts are not seen as separate from the broader regulation of markets or from competition. At the same time, this allows a new concept of B2b fair trade to emerge which forces national private laws to adapt to the new requirements of the global value chain.

3.2. THE LIMITS TO (EXTRA)-TERRITORIALITY AND THE CONFLICTS APPROACH

The rise of the regulatory contract happens in the transnational scenario of the supply chain where contracts travel across national borders on a daily basis. The cross-border dimension of the chain challenges the traditional notions of spatiality which assert the authority of national legal systems in relation to a territory.[80] The challenging effect of the chain becomes fully evident in the approach of private international law to the global value chain. The discipline of private international law, or conflicts law, builds on the basis of 19th century concepts of state sovereignty. The increasing awareness over the limitations of traditional categories of conflicts law in the face of the emerging structures and processes of law-making and law-enforcement beyond the borders of states has given

[77] H. W. Micklitz, 'Competive contract law' 549.
[78] Exploring the relationship between self-regulation by means of standard terms and competition, see M. R. Patterson, 'Standardization of Standard-Form Contracts: Competition and Contract Implications' (2010) 52 Wm. & Mary L. Rev. 327.
[79] This goes in line with M W Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 European Law Journal 5, 681-695, 682.
[80] See introductory chapter to H. Lindahl, Authority and the Globalisation of Inclusion and Exclusion. (Cambridge University Press, 2018)

rise to re-foundational efforts within the very discipline.[81] This critical perspective on private international law shows that its conventional categories have become somewhat 'blinded'.[82] The existing tools of private international law offer unsatisfactory responses to the sheer length and diversity of the actors in the global supply chain. Moreover, they have allowed contracts and private standard terms to freely circulate along the supply chain. They potentially allow dominant economic players to delimit the participation and access to global markets after their own economic interests.

In Europe, the system of private international law applicable to the governance of the supply chain is scattered across the Regulation Brussels I,[83] on matters of jurisdiction, and Regulations Rome I[84] and Rome II,[85] on matters of applicable law in contractual and extra-contractual matters respectively. It is true that contractual networks are not new for European private international law.[86] For example, Regulation Rome I contains specific rules on applicable law to franchising and distribution contracts, which are two typical examples of chain relations. However, it is also true that these rules are based on the model of bilateral contracts, limiting their capacity to account for the inter-connected reality of the chain.[87] For the most part, the categorical separation of jurisdiction, contracts and tort impedes a uniform approach to trading relationships in the supply chain.[88] The danger stemming from this approach is that the chain becomes fragmented

[81] R. Wai, 'Transnational liftoff and juridicial touchdown: the regulatory function of private international law in an era of globalization' (2001) 40 Colum. J. Transnat'l L. 209.
[82] H. M. Watt, 'Private international law beyond the schism' (2011) 2 Transnational legal theory 3, 347, 392.
[83] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 20 December 2012, OJ L 351/1.
[84] Regulation 593/2008 593/2008 , on the law applicable to contractual obligations,17 June 2008, OJ L 10/22.
[85] Regulation 864/2007, on the law applicable to non-contractual obligations, 31 July 2007, OJ L 199/40.
[86] For accounts on the relationship between Private International Law and contractual networks, see: F Cafaggi and S Clavel, 'Interfirm Networks across Europe: A Private International Law Perspective' in F Cafaggi (ed), Contractual Networks, Inter-Firm Cooperation and Economic Growth, (Edward Elgar, 2011) 201; H. M. Watt, 'Governing Networks: A Global Challenge for Private International Law' (2015) 22 Maastricht Journal of European and Comparative Law 352; U. Grušić, 'Contractual networks in European private international law' (2016) 65 International & Comparative Law Quarterly 3, 581-614.
[87] The law applicable to contracts of distribution and franchise is that of the habitual residence of the distributor or franchisee (art. 4.1.). This connecting factor was justified to protect the 'weaker economic interest'. However, it has been criticized for ignoring the broader context of interdependency in which the relationship occurs. See U. Grušić, 'Contractual networks', 596-598.
[88] See the example given by S. Clavel in the Brugge Study, at 84ff. She refers here to a ruling on the determination of the jurisdiction competent to judge on the unfair termination of a contract under article L. 442-6 I 5° of the French commercial code. The French Cour de cassation treated the question as one of extra-contractual liability, asserting the authority of French courts over the relationship.

across potentially contradictory rules that contravene its need for coordination and cooperation. This may create blind spots for abuses of economic power.

Under the European framework of private international law, contractual parties enjoy broad room to choose the competent courts and the applicable law to their contractual and extra-contractual relations. This broad room for private autonomy is countered by the establishment of safeguards for the protection of weaker parties, especially, the consumer.[89] Out of b2c relations, protection for other non-consumer weak contractual parties is more restricted.[90] When discussing the applicable law to business-to-business contracts, the European judiciary has recognised the overriding character of national rules for the protection of contractual agents.[91] However, in the absence of a similar European mandate or of a national statutory provision that explicitly recognizes the overriding nature of national or European rules protecting other type of businesses, the level of protection will be left in the hands of the national judge.[92] Perhaps something worth noting here is that the new Directive on UTPs in the food chain refers, explicitly, to the internationally mandatory character of its rules.[93] It remains to be seen whether this provision will allow national judges to extend the consumer-like safeguard on applicable law to SMEs in the food chain.

As an alternative to the existing approach of PIL on applicable law on relationships in global value chains, an effects-based approach has been suggested.[94] This approach permits to assert the authority of the state enforcement authorities over behaviour occurring beyond its borders, insofar as it produces its effects in the national market. This approach is already present in the enforcement of antitrust. The effects-doctrine can be

[89] See article 17 of Brussels I and article 6 of Rome I.
[90] G. Cordero-Moss, International commercial contracts: applicable sources and enforceability. (Cambridge University Press, 2014), 194.
[91] In Case C-381/98, 9 November 2000, Ingmar, EU:C:2000:605, where the ECJ defended the possibility of displacing the applicable law as chosen by the parties – which in the case was the law of the state of California - in favour of the English law transposing the Agency Directive because of the fundamental character of the contract of agency for the functioning of the internal market. In Case C- 184/12, Unamar, ECLI:EU:C:2013:663, the Court discussed an intra-European conflict, leaving open the possibility for national courts to grant 'overriding character' to those national rules that exceeded the minimum protection of the Directive.
[92] G. Cordero-Moss, Giuditta. International commercial contracts: applicable sources and enforceability. (Cambridge University Press, 2014), 194.
[93] Article 3.2. of the Directive.
[94] On the history of the effects-based approach in competition law, see Chapter 3 in D. Gerber, Global competition: law, markets, and globalization (Oxford University Press, 2010).

effective as a tool for extraterritoriality only as long as the state enjoys considerable leverage in global markets. However, it is not bullet-proof. Its effectiveness is reduced by the limitation of investigation powers in cross-border scenarios and by the reduced incentives of private parties to seek redress in national courts. The main challenge remains to promote private enforcement against foreign antitrust abuses.[95] The debate over transnational enforcement has also been central to the new UTPD and its potential extension to non-European SMEs.[96]

It is questionable whether private international law can overcome these limitations. The main problem of the conflicts approach is that its technical nature imposes a high level of complexity on the governance of commercial and trading practices. The complex interaction between the different instruments on jurisdiction and applicable law to contractual and extra-contractual matters, and on top of this, to antitrust rules, makes things even worse. This complexity is illustrated by the approach of the ECJ to two cases on the use of standard terms regarding the choice of jurisdiction over disputes stemming from a contract. The decisions of the court also illustrate the difference between consumers as weaker parties and businesses in a situation of economic dependence.

In the b2c context, the decision of the court in Konsumenteninformation v Amazon illustrates the complex technicalities of the private international law approach.[97] This case concerned the applicable law to an injunction brought up by an Austrian consumer organisation against the alleged use of unfair terms by Amazon Luxembourg. The contested term consisted of the attribution of competence over the interpretation of the contract to courts of the state of Luxembourg. In this case, the ECJ determined that the applicable law to the injunction is determined by article 6(1) of Rome II, this is, the

[95] D. Gerber, 'Competitive harm in global supply chains: assessing current responses and identifying potential future responses' (2017) 6 Journal of Antitrust Enforcement 1, 5, 19, where he explores the possibilities of private enforcement of competition law to empower the victims of antitrust violations against transnational cartels.

[96] According to the final text of the Directive (art. 1), all suppliers are covered by the Directive regardless of their country of establishment. Suppliers can address their complaints to the enforcement authorities of their place of establishment or, alternatively, to the enforcement authority of the country where the buyer is established. However, recital 30 notes that 'in terms of enforcement, filing a complaint with the enforcement authority of the Member State in which the buyer is established might be more effective'.

[97] C-191/15 Verein für Konsumenteninformation v Amazon EU Sàrl, 28 July 2016, ECLI:EU:C:2016:612. For a commentary on the decisión see G. Rühl, 'A. Court of Justice The unfairness of choice-of-law clauses, or: The (unclear) relationship between Article 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive: VKI v. Amazon' (2018) 55 Common Market Law Review 1, 201-224.

applicable law is that of the country where the general interests of consumers are affected. Meanwhile, the law applicable to the assessment of the fairness of the term is to be determined according to Rome I. The consequence of the decision was to require Amazon to inform consumers, in its T&C, that 'If you are a consumer and have your habitual residence in the EU, you additionally enjoy the protection afforded to you by mandatory provisions of the law of your country of residence. We both agree to submit to the non-exclusive jurisdiction of the courts of the district of Luxembourg City, which means that you may bring a claim to enforce your consumer protection rights in connection with these Conditions of Use in Luxembourg or in the EU country in which you live'.[98]

In the b2b context, [99] this interpretation can be contrasted to the decision of the Court in Apple.[100] This decision concerned a claim for damages for an antitrust violation brought against Apple Sales International by an authorised reseller in France. The main point under dispute was the validity of a term submitting the contract and its interpretation to the jurisdiction of Irish courts under Irish law. It is worth noting that the reseller brought the action in France under the French rules on unfair competition, and more specifically, under the French rule on abuse of economic dependence. The Court interpreted that the abuse of a dominant position under art. 102 TFEU (and extensively, of abuse of economic dependence) does materialise in the contract. Therefore, the standard term attributing jurisdiction over the corresponding relationship cannot be regarded as surprising for the other party. The jurisdiction clause was therefore upheld. The court departed in this decision from its previous ruling on CDC Hydrogen Peroxide,[101] in a case concerning an illegal cartel (art. 101 TFEU). Here, the court had considered that a similar jurisdiction clause could not be regarded as stemming from the contract because the party that had

[98] See Amazon T&C, https://www.amazon.co.uk/gp/help/customer/display.html?ie=UTF8&nodeId=1040616&ref_=ox_spc_condition_of_use#

[99] On a similar case, see J. Basedow, 'Exclusive choice-of-court agreements as a derogation from imperative norms', (Max Planck Private Law Research Paper No. 14/1, 2013) 15-31. In this work, he refers to the decision of the French Cour de cassation upholding the forum selection clause of a distribution contract against the decision of the lower court invalidating the choice on the basis of French public economic policy.

[100] Case C-595/17, 24 October 2018, Apple, EU:C:2018:854.

[101] C-352/13, 21 may 2015, CDC Hydrogen Peroxide, EU:C:2015:335.

suffered the loss was not aware of the existence of the unlawful cartel at the moment it concluded the contract.[102]

Beyond the B2b and b2b differences, the problem of the technical discussions of private international law is that they obscure the reality of adjudication and enforcement in the supply chain. At the end of the day, the correct application of Rome I and Rome II, even the correct application of the effects-based doctrine, depends on the capacity of national courts and administrative authorities to rise against global forms of power and on the capacity of private actors to have access to the enforcement system. However, courts have been largely absent from dispute-resolution in cross-border relations.[103] This tendency seems to accentuate even more within the very structures of the supply chain. In lieu of courts, administrative agencies such as competition authorities or consumer agencies are gaining more importance in enforcement. The public bodies increasingly engage with private actors in the design of mixed governance approaches. Public administrations have encouraged the establishment of out-of-court enforcement mechanisms and favor the move towards the internalization of conflict within the chain. In b2b relations, arbitration and mediation are a default practice, when not directly mandatory. The awards of arbitral tribunals are submitted only rarely to (public) review. [104] New forms of cooperation and consultation are also gaining greater ground through chain-wide codes of conduct and certified labels for sustainable contracting.

In contrast to the conflict approach, the notion of 'platforms' has been suggested as an alternative method of dealing with divergent national rules and enforcement sites in a transnational context.[105] The idea of platforms provides an enforcement-based take on EU regulatory experimentalism because it takes account of the emerging networks of regulatory and enforcement agencies developing across Europe. This perspective allows for a much richer picture of the transnational landscape, because it looks beyond national courts and assumes the differentiation (or specialization) of normative regimes and their

[102] For a comment on the case law, see M. Sousa Ferro, 'Apple (C-595/17): ECJ on Jurisdiction Clauses and Private Enforcement: 'Multinationals, Go Ahead and Abuse Your Distributors'?' (2018) Competition Policy International.
[103] R J Gilson, C F Sabel and R E Scott, 'Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contract Forms' (2013) 88 New York University Law Review 170, 175.
[104] H. M. Watt, 'Private International Law's Shadow Contribution to the Question of Informal Transnational Authority' (2018) 25 Indiana Journal of Global Legal Studies 1, 37-60, 45.
[105] Y. Svetiev, 'European Regulatory Private Law: From Conflicts to Platforms', in Purnhagen, P. Rott (Eds.), Varieties of European Economic Law and Regulation (Springer, 2014), 659.

reliance on new institutional forms. From the point of view of the supply chain, it offers a promising perspective to understand the mediating role that the EU has played in between global chains and national legal systems. This raises important political questions that go beyond the regulatory role of contracts and the function of private law in the transnational context. They refer directly to the experiment of EU private law in b2b relations.[106]

4. THE POLITICAL DIMENSION: THE GVC AND EUROPEAN INTEGRATION IN B2B MATTERS

The global value chain bears also a political dimension. This political dimension emerges because the global value chain takes issue with the distribution of value and power across suppliers, retailers and consumers, which is directly projected on the distribution of value and power across states, multinational corporations and small stakeholders. The access of small stakeholders to the global value chain becomes a key element in the design of development policies in organizations like the World Bank or the International Monetary Fund.[107] In other words, the geographical and economic distribution of value across the chain becomes a key element of modern political economy.

At the European level, the global value chain is also central to understand the politics of the EU in the governance design of B2b trading relations for the internal market.[108] The GVC offers the EU an innovative mechanism to venture into the governance of the politically-charged field of B2b fair trading legislations and, consequently, into the politics of European SMEs.[109] National trading regulations on B2b relationships are embedded in the political and socioeconomic traditions of member states. Moreover, they

[106] Y.Svetiev, 'Private Law and the Visible Hand of EU Regulation', (EUI Working Paper MWP 2013/01), 15.
[107] Examples are many: OECD, Enhancing the Role of SMEs in Global Value Chains (2008), available at https://www.oecd.org/publications/enhancing-the-role-of-smes-in-global-value-chains-9789264051034-en.htm; OECD, World Bank, Joint Report on Inclusive Global Value Chains: Policy Options for Small and Medium Enterprises and Low-Income Countries (2015), available at https://www.oecd.org/publications/inclusive-global-value-chains-9789264249677-en.htm; WTO Report, Levelling the trading field for SMEs 2016, available at https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf ; UNIDO, Integrating SMEs in Global Value Chains (2001), available at https://www.unido.org/doc/4865.
[108] On the notion of governance design for EU private law, see Cafaggi, F. and H. M. Watt, Making European private law : governance design, (Edward Elgar 2008).
[109] F. Cafaggi, 'Contractual networks and the small business act: towards European principles?' (2008) 4 European Review of Contract Law 4, 493-539.

illustrate the persistent divergences in the understanding of the social which are usually taken to separate continental and Anglo-Saxon-style market systems.[110] Historical differences in the approaches, goals and tools for fair trading are defended as the expression of the 'distinctive ideological preferences and enforcement design' of European member states.[111] In the imaginary of European private lawyers, rules on B2b contracts and trading relations are often portrayed as the kernel of national private laws and even as a place of resistance against growing European intervention.[112]

The entrenchment of differences across national approaches to B2b contracting and trading practices has traditionally been seen as an obstacle to the approximation of European legislation beyond the consumer. This was already the case with the Ulmer report in the 1960s. This report had been prepared with an eye to the potential harmonization of national trading practices into an EU-wide instrument.[113] Mostly focused on relationships between competitors, the Ulmer report represented the market-building approach of those years.[114] It had to deal with the different existing approaches of member states to B2b relationships, whereby 'some member states openly regarded the law on unfair competition as an effective instrument for ensuring protection of the mittelstand. In contrast, in countries like Great Britain the very idea of granting privileges to certain economic groups through private law was perceived as fundamentally wrong and foreign to the English legal and political system.'[115] The lack of political agreement on the objectives of fair trading regulations prevented the Ulmer report from going any further.

Once the Ulmer report reached a dead-end, the EU's approach to B2b relations has to be understood as the result of the combination of negative and positive integration. This 'double-headed approach' resulted in the separate evolution of instruments on B2b and

[110] P. A. Hall, D. Soskice, Varieties of Capitalism (Oxford University Press, 2001).
[111] A. B. Engelbrekt, 'Fair trading law in flux', 363.
[112] R Condon, 'From 'the law of A and B' to productive learning at the interfaces of contract', in RBrownsword, R A J van Gestel and H-W Micklitz's (eds.), Contract and Regulation: A Handbook on New Methods of Law Making in Private Law (Edgar Elgar, 2017), 178, footnote 36.
[113] E. Ulmer, ed. Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft: Gutachten, erstattet im Auftrag der Kommission der Europäischen Wirtschaftsgemeinschaft. Vol. 1. Beck, 1965.
[114] A. B. Engelbrekt, 'Fair trading law in flux', 368. She distinguishes two phases in the evolution of commercial practices in Europe between market building and market correcting. The transition to the second phase is provoked by the development of protective consumer law.
[115] Ibid. 385.

b2c relationships in the EU.[116] National fair trading rules were left behind by the upcoming wave of consumerism that positioned the consumer in a central position in the making of the internal market.[117]

Negative integration put national trading legislations under mounting de-regulatory pressure. The rule of reason expressed in the seminal judgements of Cassis de Dijon and Dassonville required member states to demonstrate that 'all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra community trade'[118] were necessary and proportionate to achieve the objectives of consumer protection, the protection of the health and safety of persons, and the fairness of commercial relations.[119] Among these 'mandatory requirements',[120] the case law of the ECJ proved that consumer protection remained the most important. In contrast, the protection of fairness in commercial relations was never as critical. The case law of the ECJ only refers to it in connection with consumer protection in some few cases relating to sales promotions and trading practices.[121] Only in a few cases dealing with intellectual property, the fairness of commercial relations managed to stand as an autonomous mandatory requirement.[122]

The de-regulatory pressure on national rules on sales promotions and other trading practices was mitigated with the decision of the court in Keck, 'so long as those provisions (on selling arrangements) apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing

[116] I take the name of 'double-headed approach' from H. Unberath and A. Johnston, 'The double-headed approach of the ECJ concerning consumer protection' (2007) 44(5) Common Market Law Review, 1237-1284.
[117] The consumerist turn is already expressed in the Council Resolution, 14 april 1975, on a preliminary programme on the European Economic Community for a Consumer Protection and Information Policy, OJ 1975, C 92/1.
[118] Case 8/74, 11 july 1974, Dassonville, EU:C:1974:82
[119] Case C-120/78, 20 February 1979, Rewe-Zentral (cassis de Dijon), EU:C:1979:42
[120] J. Stuyck, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or Beyond the Intenral Market?', (2000) 37 Common Market Law Review 367, 389.
[121] Case 286/8, 15 December 1982, Oosthoek's Uitgeversmaatschappij, EU:C:1982:438 : 'the possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one MS to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic and imported products without distinction'. This was confirmed in Case C-362/88, 7 March 1990, GB-INNO-BM, EU:C:1990:102.
[122] J. Stuyck, 'Addressing unfair commercial practices in business-to-business relations in the internal market', (Briefing Paper IP/A/IMCO/NT/2010-18, 2010), 22. Available at: http://www.europarl.europa.eu/RegData/etudes/note/join/2011/457364/IPOL-IMCO_NT(2011)457364_EN.pdf

of domestic products and those from other Member states.'[123] In this manner, Keck allowed the French legislator to maintain the prohibition on sales below costs by excluding non-discriminatory selling arrangements from the scope of the free movement provisions of the treaty. As a result of Keck, the court permitted relative leeway for member states to maintain certain restrictions resulting from national trading laws and national rules on sales promotions aimed, from the perspective of the internal logic of the member state, at preserving the fairness of commercial relations and at curtailing the growing power of modern retail.[124]

In parallel, the de-regulatory effect of the rule of reason was being supplemented by the harmonization of consumer rules. This appears already clearly in the Commission's response to the ruling of the court in Cassis, where it is affirmed that 'the Commission's work of harmonization will henceforth have to be directed mainly at national laws having an impact on the functioning of the common market where barriers to trade to be removed arise from national provisions which are admissible under the criteria set out by the Court'.[125] Some years later, the European Single Market Act would confirm this approach, which made European consumer legislation and the making of the internal market dependent on each other.[126] The road to follow was that of 'piecemeal harmonization of specific regulatory issues' of consumer law.[127]

The dynamics of negative and positive integration resulted in the separate evolution of B2b and B2c laws in the EU.[128] However, the evolution of European contract law would remain intrinsically linked to the evolution of the *consumer acquis*. For the EU, the Commission's Communication on European Contract Law of 2001 signaled the beginning of a new phase in the EU's private law.[129] As Hugh Beale explains, the goal of

[123] Keck and Mithouard [1993] ECR I-6097, para. 16.
[124] It is worth mentioning that the modernization of enforcement in competition law would also guarantee this safeguard for national rules on commercial practices. This safeguard is contained in article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1. For an analysis of the relationship between commercial practices and competition law, see B. Keirsbilck, The new European law of unfair commercial practices and competition law, (Hart, 2011).
[125] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), of 3 October 1980, OJ C-256/2.
[126] Single European Act, 29 June 1987,(OJ L 169/1).
[127] A.B. Engelbrekt, 'Fair trade in flux', 387.
[128] M. Namysłowska, 'To B2C or Not to B2C. Some Reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective' (2013) 36 Journal of consumer policy 3, 329-342.
[129] COM(2001) 398 final

encouraging cross-border trade by removing the barriers faced by businesses resulted, in practice, in moving towards the full harmonization of consumer law and to the establishment of some sort of on optional instrument of contract law. This optional instrument would also extend the European protective device of consumer law to B2b relations involving SMEs.[130]

With the 2003 Action plan on a more coherent contract law[131] and the 2004 document on a Way forward for European contract law and the revision of the acquis,[132] the Commission proposed the creation of a Common Frame of Reference (CFR). This CFR, to be developed jointly by the Acquis Group and the von Bar Group,[133] would serve as the basis for improving the existing *acquis communautaire* and perhaps as a basis for future legislation, or even an optional instrument. This approach was called the toolbox approach, the ultimate objective of which remained somewhat obscure. At the same time, the publication of the Review of the Consumer Acquis signaled the Commission's change of approach and its re-focusing on the maximum harmonization of consumer law.[134] The turning point for the CFR came with the transfer of the project from DG SANCO to DG JUST in 2009 and with the appointment of Commissioner Viviane Reding, who was an active supporter of the project. Under her mandate, the optional instrument became the proposal for a Common European Sales Law in 2011. This proposal would also cover B2b relations involving SMEs.[135] As it is well-known, the proposal got stuck in the negotiations. The opposition of the UK, Germany and France in the Council provoked the project to derail. In 2014, the proposal for a CESL was abandoned for good by the new Juncker's Commission. The attention, meanwhile, seemed to shift towards 'unleashing the potential of the single digital market'.[136]

However, it would not be entirely true to think that the EU's attention to B2b relations disappeared with the CESL. Another story can be read in the image of the 'customer' in

[130] H. Beale, 'The story of EU contract law – from 2001 to 2014', in Twigg-Flesner C. (ed.), Research Handbook on EU Consumer and Contract Law, (Edward Elgar Publishing, 2016) 431, 432-433.
[131] COM/2003/0068 final
[132] COM/2004/0651 final
[133] The two were part of a broader network of scholars that had been working in the previous decade on the Europeanisation of contract law. This network included, among others, the Common Core Group, the Spier/Koziol group, the Gandolfi group or the Social Justice group.
[134] COM(2006) 744 final
[135] For the story of the preparatory documents and the working style, see H. Beale, 'The story of EU contract law', 438 ff.
[136] Communication on a digital Single Market Strategy for Europe - COM(2015) 192 final.

the regulated sectors and in the move towards maximum harmonization in consumer law.[137] The Unfair Commercial Practices Directive, a maximum harmonization directive itself, is a useful starting point to illustrate this.[138] On the one hand, the broad reading of the meaning of commercial practice under the UCPD permitted the ECJ to use the directive to strike down national provisions on sales promotions that would have been permitted under Keck.[139] A recent example is the decision of the court on the Spanish prohibition of sales below cost.[140] This suggests that the maximum harmonization of consumer law potentially brought about the further de-regulation of national b2b trading rules even beyond Keck. On the other hand, the UCPD also hinted at the possibility of extending its provisions to certain businesses like SMEs,[141] and as a matter of fact, some member states did.[142] A way to understand the twofold impact of the directive on b2b relations is to look at the image of the consumer that presides over the European law on commercial practices. This is the average consumer, 'the rational economic actor' leading cross-border trade in the internal market, and not the consumer in a weaker bargaining position who is protected by national consumer protection laws or the law on unfair terms.[143] Under the lenses of commercial practices, the line between the average consumer and SMEs becomes a matter of degree,[144] and consequently, the long-standing division between consumers and businesses becomes more and more blurred.[145] The interest in B2b relationships had not really gone. Rather, it had changed places from contract to commercial (or trading) practices.

[137] COM(2006) 744 final.
[138] Directive of the European Parliament and of the Council, 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149/22, (UCPD).
[139] B. Keirsbilck, 'Pre-emption of National Prohibitions of Sale Below Cost: Some Reflections on EU Law between the Past and the Future.' In W. van Boom, A. Garde, and O. Akseli, (eds.), The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems, (Ashgate, 2014): 45; J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', (2005) 52 Common Market Law Review, 3, 721-752.
[140] Case C 295/16, 19 October 2017, Europamur Alimentacion SA, ECLI:EU:C:2017:782
[141] See recital 8 of the directive: 'it (the directive) also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.'
[142] For a survey, see the Brugge study.
[143] H. W. Micklitz and N. Reich, 'The court and sleeping beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 3, 771-808.
[144] Micklitz, 'A New Architecture', 27.
[145] For a thorough analysis of this transformation, see M. Durovic, European law on unfair commercial practices and contract law. (Bloomsbury Publishing, 2016) (especially at p. 196)

The impulse needed to materialize the Europeanization of commercial practices beyond the consumer eventually came with the project on unfair trading practices in the food and non-food supply chain.[146] In 2009, a resolution of the European Parliament called on the Commission to extend the scope of the UCPD to B2b.[147] For a number of reasons, the initiative especially resonated in the agro-food sector. Building on the work of the High-Level Group on the Competitiveness of the Agro-Food Industry[148] and on the Commission's Communication for A Better Functioning Food Supply Chain,[149] a Green Paper on Unfair Trading Practices in the Food and Non-Food Supply Chain was published in 2014.[150] This is about the same time the proposal for a CESL was withdrawn and five years before the Commission published its proposal for a directive on unfair trading practices against SMEs in the food chain.[151]

5. THE GLOBAL VALUE CHAIN AND THE EU

One reading of the re-awakening of the interest in European SMEs is that it is a consequence of the economic recession and the need to boost economic growth.[152] Undoubtedly, SMEs have become more and more important for EU private law ever since the idea of an optional instrument was first put on the table. When the political unfeasibility of a general contractual instrument for b2b and b2c became evident, the EU did not give up on the need to ensure the participation of small companies in the internal market. Fair trading, once thought eclipsed by consumer law, has made a comeback in the 21st century. However, this comeback takes place in a context very different from the one envisioned in the original Ulmer report. The global value chain is the new scenario for fair trading. In this context, the small business, as the ideal image of the middleman, becomes a key political and social actor for the internal market in a globalized economy.

[146] ibid
[147] European Parliament Resolution, 13 January 2009, on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising (2008/2114(INI).
[148] Created by the European Commission's Decision 2008/359/EC (1) of 28 April 2008.
[149] COM(2009) 591, of 28 October 2009.
[150] European Commission, Green Paper on Unfair Trading Practices in the Business-To-Business Food and non- Food Supply Chain in Europe, 31 January 2013, COM(2013) 37 Final.
[151] Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018)173, o 12 April 2018.
[152] See the Introduction to R. Brownsword, R A J van Gestel and H-W Micklitz (eds.), Contract and Regulation: A Handbook on New Methods of Law Making in Private Law (Edgar Elgar, 2017), 9.

The next chapters describe the role played by the EU in the governance of trading practices in the supply chain and its relation to national private laws. The focus on the global value chain comes to nuance the common criticism that the 'dismantling' of national systems of private law to the detriment of the social has been exclusively driven by the logic of European market integration.[153] Rather, a big part of this transformation is driven from the outside. When considering the context of the EU, the important point to bear in mind is that the supply chain also provides EU private law with an innovative governance tool. The EU has found in the supply chain an instrument to achieve a task that has been until now politically unfeasible. In a field like B2b trading, where states have zealously guarded their prerogatives and where traditional regulatory means, and harmonization, have proved insufficient, the EU uses private regulation throughout the chain as a leverage to achieve its own regulatory goals.[154] The chain becomes a horizontal instrument of governance that goes beyond the regulatory silos of liberalized markets. Consequently, the role of the EU goes beyond the simple approximation of national texts on business trading. The EU is acting as a coordinator of 'the diverging regulatory contexts'[155] that the supply chain has pitched against each other. The EU can play this role because it lacks a private law tradition of its own. It does not owe allegiance to a civil code and it is not entrenched in a legal tradition. This allows the EU to experiment with its own regulatory response. In a way, the chain provides a transversal laboratory for European experimentalism.

[153] Y. Svetiev, Private Law and the Visible Hand of EU Regulation (EUI Working Paper MWP 2013/01), 1.
[154] M Mataija, 'EU internal market law and codes of conduct', in R. Brownsword, R A J van Gestel and H-W Micklitz (eds.), Contract and Regulation: A Handbook on New Methods of Law Making in Private Law (Edgar Elgar, 2017), 138, 152.
[155] A.B. Engelbrekt, 'Fair trade in flux', 363.

CHAPTER 3

FROM THE AVERAGE CONSUMER TO SMEs

This chapter sheds light on the process by which small businesses (SMEs) are emerging as a key actor of European private law (1). The statistical diversity of European SMEs makes it difficult to coin a categorical definition of small businesses in legal terms in the image of consumers or workers (2). For this reason, this chapter starts with a review of the different economic and political meanings that have been attached to small businesses in the 20th century (3). The diversity remains an obstacle for an EU-wide private law definition of the small business (4). To understand the possibility of such a definition in private law, it is necessary to understand the economic, policy and justice rationale that may justify the differentiation of SMEs (4.1), in relation to the legal definitions of economic power (4.2) and to the fragmentation of private law into statuses (4.3). Finally, this chapter contrasts the parameters used by member states to approach issues of size (5) with the European approach to B2b fair trading, which results from the evolution of the law on the European average consumer (6).

1. SMALL BUSINESSES: WHAT'S IN A NAME?

In Europe, small businesses are defined by reference to staff headcounts and financial ceilings.[1] According to the officially established parameters, the category of micro, small and medium-sized enterprises (SMEs) includes firms with less than 250 employees and with an annual turnover below EUR 50 million and/or an annual balance sheet total below EUR 43 million.[2] This formalistic definition accounts only partially for the diverse reality of European SMEs. Against this diverse backdrop, the feasibility of a private law definition for SMEs is questioned. However, this thesis suggests that the EU is making use of the value chain to introduce a new definition of SMEs into the language of private law. In legal terms, this entails the introduction of a SME category in the image of the consumer into the new regulations of fair trading practices.

The starting point is a look at the data of European small companies. The figures show a diverse landscape. The characteristics and features of small businesses vary across countries and even regions. The differences in the size, number and role of SMEs are often perceived as part of the cultural and socio-legal traditions of member states. This is even more true in the case of agricultural and food businesses. At the global level, a comparison between the definitions of small business shows even more clearly the limits of the concept.[3]

In light of this diversity, it seems plausible to say that the contours of a SME definition have been traditionally determined by economic and political choices.[4] In exploring the origins of the political engagement with SMEs, this chapter shows how the definition of SMEs makes them particularly sensitive to the priorities of political actors. In the global

[1] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC, OJ L 124/36. This definition is currently under revision. See European Commission, Consultation Strategy, of 20th October 2017. Available in: https://ec.europa.eu/docsroom/documents/26982/attachments/1/translations/en/renditions/native

[2] Article 2 of the Recommendation 2003/361/EC.

[3] In the US, the definition of SME varies by sector, according to the standards of the North American Industry Classification System. In the manufacturing sector, an American SME can employ up to 500 workers. In retail services, an American small business is one that employs less than 100 workers. Source: SBE – Table of small business size standards, available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf China also uses sectorial definitions. A Chinese small business in the retail sector is one that employs up to 300 workers. In the heavy industry, a Chinese small business can employ up to 1000 workers. Source: National Bureau of Statistics of China, available at http://www.stats.gov.cn/english/ClassificationsMethods/Classifications/200210/t20021016_72367.html

[4] See the Introduction to C. Dannreuther, The political economy of the small firm, (Routledge, 2013).

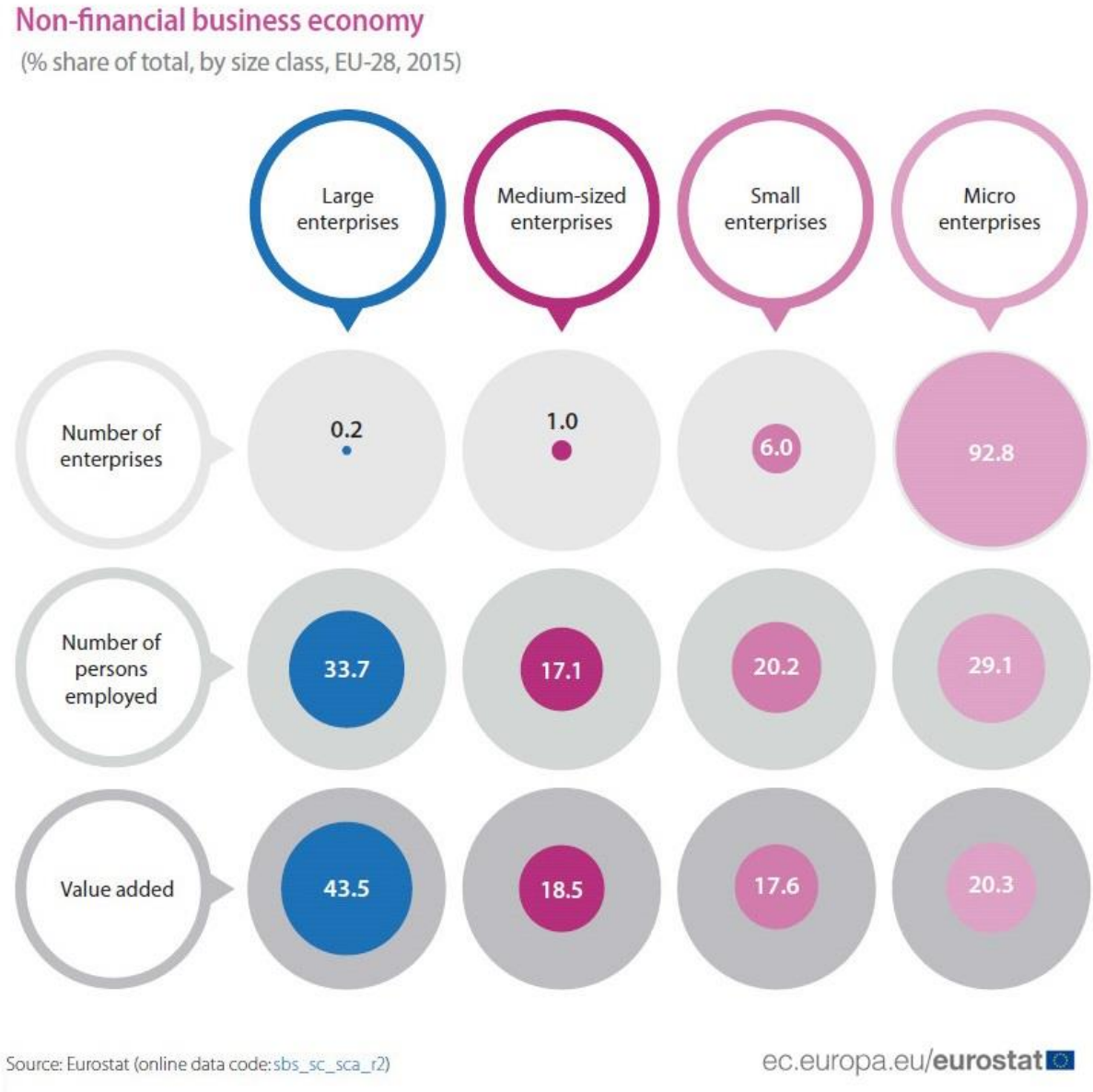
scenario, states and international organizations engage with SMEs to define 'inclusive' conditions for participation in global value chains. In doing so, SMEs are used to address the economic concerns of local communities. The 'upgrading' and participation of SMEs in global markets has become a key aspect of the supply chain governance.

The central idea of this chapter is the manner in which the political meaning of SMEs translates into legal terms. This translation is not done without difficulty. The heterogeneity of small companies is an obstacle to categorically define a whole class of businesses as 'weaker contractual parties' in the image of consumers. The definition of a SME depends necessarily on the rationale – economic, political, justice - that justifies its differentiation, the legal approach to differences of economic power and the degree of fragmentation of private law into statuses. Across Europe, member states have traditionally addressed power imbalances through general principles of their private laws. The particularities of SMEs have usually been apprehended through different parameters scattered in contract, competition and fair trading legislations. These parameters do not always explicitly define the SME but they have contributed to shaping a definition for the SMEs in the marketplace. They do so by recourse to general principles of good faith, by establishing market shares thresholds and sometimes by introducing in private law a quasi-presumption of imbalance against the big distribution. At the level of the EU, the recent works of the Commission on the regulation of business-to-business trading practices have attempted a step-approach to issues of power imbalance and business size. The underlying thread is that, because the supply chain cuts across well-established categories, the previously clear-cut distinction between the average consumer and the small businessman in the internal market is eliminated.

2. SOME STATISTICS ON EUROPEAN SMEs

European SMEs represent more than 99% of the businesses operating in the European Union. This categorical affirmation opens, time and again, the numerous documents prepared by the European Commission for SMEs over the last decade. Some of these instruments also include a number of legislative proposals directly touching upon the regulation of private law relations. But behind this figure, the reality of European SMEs is incredibly diverse. There are small coffee shops, tailors, manufactures of automated vehicles, farmers, convenience stores, multi-brand fashion retailers, app developers, book

shops, franchisees and restaurants. Given this sheer variety and the diverse social and economic roles played by SMEs, who could say anything universal about the European small business?



The European Commission publishes yearly statistical reports on the performance of European SMEs in the non-financial sector.[5] These reports tend to shed some light on the on the evolution of the European SME landscape and on the relative importance of SMEs across the European south and north. For example, these reports reveal that the number of microenterprises (companies employing less than 10 persons) is particularly important in Southern Europe, in countries like Spain, Portugal, Greece and Italy. In terms of the contribution of SMEs to the workforce, SMEs seem to be especially important in countries like Greece, Malta, Lithuania, Estonia, Latvia, and also Bulgaria, where they represent more than two thirds of the workforce employed in the non-financial business economy. In Romania, Sweden, Germany, Denmark, Finland and the UK, SMEs employ less than two thirds of the national workforce for the non-financial business sector. The structure of employment in the UK is very different form the one displayed by other member states, where SMEs account only for 53% of the workforce, ten percentage points below Finland, the second lowest rate.[6]

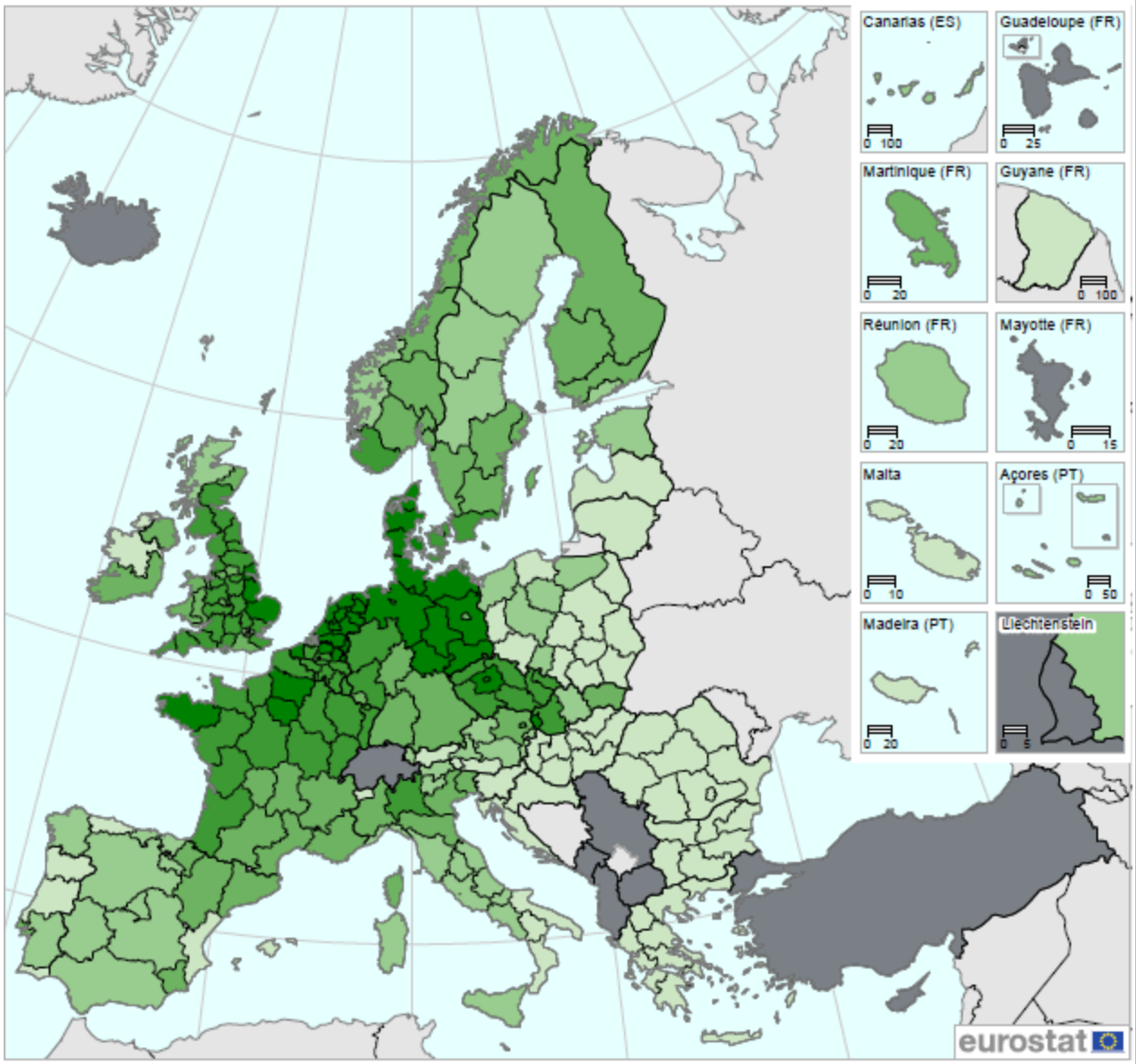
Other interesting statistics are the ones concerning the agricultural and food sector.[7] The following map shows variations in the economic size of farms, measured with reference to their standard output. These figures reflect differences in geography and natural resources but also in relation to ownership regimes. In general, countries with a bigger number of economically 'small' farms are characterized by a strong presence of subsistence and family farms. Bigger farms are linked to corporate ownership or cooperatives. The map shows that Romania and Poland are characterized by the presence of smaller farms. Instead, a high proportion of farms in the Benelux region are large farms.

[5] European Commission, Annual Report on SMEs 2017-2018, available at https://ec.europa.eu/docsroom/documents/32601/attachments/1/translations/en/renditions/native

[6] Source: Eurostat 's structural business statistics. Especially, https://ec.europa.eu/eurostat/statistics-explained/pdfscache/10100.pdf

[7] European Commission, Agriculture, forestry and fishery statistics — 2015 edition, available at https://ec.europa.eu/eurostat/en/web/products-statistical-books/-/KS-FK-15-101

Map 1: Average economic size of farm holdings, by NUTS 2 regions, 2013
(thousand EUR)



Administrative boundaries: © EuroGeographics © UN-FAO © Turkstat
Cartography: Eurostat — GISCO, 03/2016

EU-28 = 30.5

- < 25
- 25 – < 50
- 50 – < 100
- 100 – < 200
- >= 200
- Data not available

0 200 400 600 800 km

Note: all German regions, NUTS 1; Slovenia, national data; London (UKI), NUTS 1.
Source: Eurostat (online data code: ef_kvecsleg)

2. THE ECONOMICS AND POLITICS OF 'SMALLNESS': A GLOBAL VALUE CHAIN FOCUS

National divergences can be explained by different reasons like national economic structures or national preferences for family-owned businesses. In the agricultural and food sector, there are many variables that influence the number and size of SMEs across European member states, from geography and climate to history, including the eating habits and preferences of European populations. This complexity clearly advises against overstating the significance of the differences between European small companies. In spite of this, the construction of nationalistic and protectionist political discourses has in part contributed to over-emphasize the differences and uniqueness of local SMEs in the post-crisis economy. In a way, the consequences of the economic crisis have also facilitated the re-birth of the interest on SMEs and have made possible the emergence of the new discourses on 'fair trade'. In the last American electoral campaign and in the first months of Trump's presidency, the discourses of the President have been especially addressed at American SMEs.[8] Europeans have also witnessed the consolidation of SMEs, in the food and non-food sector, as key actors for the shaping of discourses on the economy. In the UK, beer has been starchily defended through legislation in defense of the cultural and community value of the great British pub, 'not on grounds of competition, but on grounds of fairness'.[9] In other food matters, Italy has played a prominent role in demanding the protection of national culinary and agricultural traditions. So much so that the right-wing governing party in Lombardia has passed new legislation requiring the *agriturismi* in the region to sell exclusively regional wine and fish.[10]

Political discourses can use the concept of SME to promote diverse goals because the concept of SMEs is a malleable one. It is malleable because it refers to a heterogeneous and evasive economic reality. The diversity of small businesses is such that no single

[8] Businesses are confident in Trump's economy – but challenges still loom, The Guardian, 9 September 2018, available at https://www.theguardian.com/business/2018/sep/09/trump-economy-small-business-challenges

[9] Department for Business, Innovation & Skills , Pub Companies and Tenants – A Government Consultation, April 2013, paras. 9 -10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363475/13-718-pub-companies-and-tenants-consultation.pdf

[10] See the amendment to the Legge Regionale n. 31/2008, in materia di agricoltura, foreste, pesca e sviluppo rurale, passed on 11 June 2019. See the Press Release of the regional government at https://www.regione.lombardia.it/wps/portal/istituzionale/HP/lombardia-notizie/DettaglioNews/2019/06-giugno/10-16/rolfi-agriturismi-approvata-legge/rolfi-agriturismi-approvata-legge

definition of SMEs can be considered to bear universal validity.[11] The different definitions of SMEs, together with the national discourses built around them, show the permeability of the concept to the priorities of policy makers. Usually, the definition of SME is contingent on the economic context and the characteristics of a given sector. Official definitions are fabricated by reference to the number of employees, the annual turnover, the financial capacity of the company or other quantitative parameters. These parameters are not enough to account for the heterogeneity that persists behind a broad artificial delimitation of 'smallness'. The contours of the SME continue to depend, first and foremost, on the economic and political priorities that inspire its definition.[12]

In order to fully understand the political significance of SMEs one should go much more back in time to the origins of the concept of SME. The idea of 'smallness' in businesses shows up for the first time as an economic and political construction of the late 19th century. It is only as a consequence of industrialization and the emergence of the modern corporation that the contours of SMEs could be first drawn. Already in its origins, the concept of SME was used as a vehicle to voice specific social concerns against the perceived threat of industrialization and an emerging consumer society. Small companies were not necessarily a concrete and identifiable economic concept. They embodied a political notion that could be instrumentalised to express a certain ideology about the functioning of the market. Because of this, 'SMEs policy is rarely solely about SMEs'. This made SMEs a necessary element in the shaping of the national marketplace and the centre of key political compromises of states even to the extent that SMEs contributed in a great part to defining the 'social question' in 20th century European states.[13] The different treatment of small companies, corporations and guilds under diverse European legislations served to mark the different evolution of the regulatory models of continental and Anglo-Saxon market economies.[14]

[11] Torrès and Julien, 'Specificity and denaturing of small business'm (2005) 23 International Small Business Journal, 4, 355-377; and A. Bagnasco and C. Sabel. Small and medium-size enterprises (Pinter, 1995).
[12] C. Dannreuther has studied the political meaning of SMEs for the EU. See especially C. Dannreuther, 'A Zeal for a Zeal? SME Policy and the Political Economy of the EU' (2007) 5 Comparative European Politics 4, 377-399; C. Dannreuther, 'EU SME policy: On the edge of governance' (CESifo Forum. Vol. 8. No. 2. München: ifo Institut für Wirtschaftsforschung an der Universität München, 2007).
[13] See Dannreuther, 'A zeal', 378.
[14] See Dannreuther, 'SME policy', 2.

Once industrialisation introduced awareness about the size of businesses, the definition of SMEs would become contingent on the context and objectives pursued by the policies targeting the small company.[15] It was up to economic and political discourses after the industrial revolution to put some flesh on the bones of SMEs in absence of a universal definition. This malleability meant that the language of 'small businesses' could be historically used to conjure many different visions and myths.[16] Against the steady rise of the modern corporation in the 20th century, the scale and size of the economic activity gained a new meaning. In the period between the wars, religious organisations,[17] politicians and economists alike started to voice concerns over the survival of smaller economic agents and local communities against the Brave New World of the 'giant' corporation.[18]

After the II World War, modern SMEs policies began to take shape as a key element in the design of market relations and antitrust rules. In the second half of the 20th century, small businesses were used to express both a conservative perspective of the economic relations as much as an alternative model to capitalism. In the fifties and sixties, the conservative concept of small companies was reflected in American antitrust policies, namely in the Robinson-Patman Act. In the landmark antitrust case of Brown Shoes, the American Supreme Court held that 'Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.'[19] In Europe, the protection of smaller competitors figured prominently in the works of Ordoliberal scholars.[20] In the 1970s, the

[15] In the words of the European Commission: 'the question of the appropriate definition of SMEs is meaningful only in the context of a specific measure for which it is considered necessary to separate one category of enterprises from others for reasons of their 'size'. The criteria adopted for making this distinction necessarily depend on the aim pursued'. See European Commission, 29 April 1992, Report to the Council on the Definition of SMEs, SEC (92) 351 final.

[16] On the myths of the concept of SME and a critical perspective into SME economics, see A. A. Gibb, 'SME policy, academic research and the growth of ignorance, mythical concepts, myths, assumptions, rituals and confusions' (2000) 18 International Small Business Journal 3, 13-35.

[17] The Rerum Novarum encyclical contained several important points for the development of a SME policy in the call for a more even distribution of property rights. Nowadays, this is reflected in the Compendium of the Social Doctrine, n. 315: 'The decentralization of production, which assigns to smaller companies several tasks previously undertaken by larger production interests, gives vitality and new energy to the area of small and medium-sized businesses.'

[18] Illustrating this fear, Aldous Huxley depicted Henry Ford as the god of his Brave New World (London, 1932).

[19] Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962). In footnote 28; ''

[20] W. Röpke, Civitas humana : Grundfragen der Gesellschafts- und Wirtschaftsreform , (Paul Haupt, 1949), pp. 257-258; Eucken, Grundsätze der Wirtschaftspolitik , (Francke, 1952), p. 334, 336. For an oveorview

energy crisis and incipient globalizing trends gave a new meaning to 'smallness', which became a catchword for an alternative economic model mindful of the environmental and the human dimension of production. One of the most important exponents of this trend termed this 'economics as if people mattered' or Budhist economics.[21]

In the 1980s, a new version of SMEs policies emerged. The contours of SMEs were drawn in relation to the promotion of entrepreneurship and the free market.[22] With the development of these new SME policies, small businesses became an emerging topic of economic research. In 1988, the Journal of Small Business Economics published its first issue. The objective of this publication was 'to better understand why firms come in different sizes, how and why firm behavior varies with size, what determines the formation, growth, and dissolution of small firms, the role of small firms in the introduction of new products and the evolution of industries, and the dynamic relations among small firms and macroeconomic variables such as output and employment'.[23]

In today's scenario, globalization has given SMEs a new meaning. In this way, SMEs policies and SME definitions reveal the political and economic stance of political actors in the new economic global arena.[24] With the increasing importance of value chains for global trade, the upgrading and inclusion of smaller actors along the chain has become a key topic of research in the development literature. International organizations make the engagement of local small businesses in economic activities a priority. The launch by the OECD of the Bologna process in 2000 signalled the new global interest on SMEs as drivers of economic growth.[25] Other international fora have followed suit, like the World Bank, the IMF or the WTO.[26] Most notably, in the global value chain literature, the

of the impact of ordoliberalism on EU competition law, see P. Behrens, 'The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU', (Discussion Paper, No. 7/15, Europa-Kolleg Hamburg, Institute for European Integration).

[21] E. F. Schumacher, Small is Beautiful, (1973).

[22] R. A. McCain, The economics of small business : an introductory survey (World Scientific Publishing Co. Pte. Ltd, 2018), especially at 1-20.

[23] W. A. Brock and D. S. Evans 'Small business economics', (1989) 1 Small business economics 1, 7-20, 7.

[24] See C. Dannreuther, 'A zeal', p. 379.

[25] It is possible to consult the documents associated with this process in the following link: http://www.oecd.org/cfe/smes/bolognaprocess.htm

[26] World Bank, The SME banking knowledge guide, (Washington, DC, 2009). Available at http://documents.worldbank.org/curated/en/567141468331461240/The-SME-banking-knowledge-guide; IMF, B. Öztürk and M. Mrkaic, 'SMEs' Access to Finance in the Euro Area: What Helps or Hampers?', (IMF Working Paper No. 14/78); World Trade Report, Levelling the trading field for SMEs, 2016, available at https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf

concept of 'upgrading' and inclusiveness of chains for SMEs and smallholders has focused a great part of discussions on trade and development policies with an eye to promoting sustainable and social economic growth in developing economies.[27]

In Europe, the evolution of the EU SMEs policy has been intrinsically connected to the development of the internal market and to the idea of a 'social' Europe. It is no coincidence that in 1982 the first European Parliament ever to be elected launched the first European Year of the SME. Four years later, the Commission released the first EU SME Action Programme. Ever since, SMEs have gained more and more importance and pragmatism as a policy vehicle for the Union. In its evolution, SME policy has very much focused on matters of public policy. The priorities of SMEs instruments focus on the access to finance of small companies, the simplification of taxes and administrative and regulatory burdens and on facilitating public aid to the internationalisation of SMEs.[28] The last milestone of this evolution was the launch of the review of the Small Business Act.[29] For Dannreuther, the post-Lisbon efforts of the EU to define and engage with European small companies are necessary to understand the social aspirations of the European market project. The speech of the new Commission's president at the European Parliament reflects very well this idea. After bringing up the disruptive developments challenging the wellbeing of the European society and the need for a response based on multilateralism and fair trade as the 'European way', she went to mention again SMEs: '*the backbone of our economies: the small and medium-sized enterprises. They are innovative, they are entrepreneurial, they are flexible and agile, they create jobs, they provide vocational training to our youth. But they can only do all this if they have access to capital everywhere in this huge Single market. Let's get rid of all the barriers. Let's open the door. Let's finally complete the Capital Markets Union. Our SMEs deserve it.*'[30]

[27] J. Lee, G. Gereffi, and J. Beauvais, 'Global value chains and agrifood standards: Challenges and possibilities for smallholders in developing countries' (2012) 109 Proceedings of the National Academy of Sciences, 31, 12326-12331.
[28] Four pillars of the new SME Policy: European Commisison, Communication Think Small First, a Small Business Act for Europe, COM(2008) 394 final
[29] European Commission, Communication on the review of the Small Business Act for Europe, COM(2011) 78 final
[30] Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, 16 July 2019, available at http://europa.eu/rapid/press-release_SPEECH-19-4230_en.htm

Under this all-encompassing definition of SMEs based on statistical data, the policy priorities of the EU have been shaping SMEs a new actor of the internal market. EU SMEs policy represents the social compromise of the internal market under the constraints of global value chains.[31] This new priority leaves an inevitable print in the making of EU private law.

3. SMEs: FROM POLICY-MAKING TO PRIVATE LAW

The main difficulty at hand lies in translating the eminently political definition of SMEs into the language of private law. This task is made ever more difficult by the sheer diversity of small businesses across Europe. Given the heterogeneous nature of SMEs, the feasibility of a private law definition of 'the small business' raises some fundamental questions about the nature of private law. The struggle is not necessarily new. Consumers and workers, now practically undisputed categories of the private law of the 20th century, were only the name of a heterogeneous category of legal subjects some time ago.[32] At the heart of the definition of any private law status, there are three basic notions that need to be clarified: 3.1.) the economic, policy and justice rationales for protection; 3.2.) the problematics of legally framing issues of 'contractual weakness'; and finally, 3.3.) the fragmentation of private law into status.

3.1. THE ECONOMIC, POLICY AND JUSTICE RATIONALES FOR PROTECTION

Freedom of contract and private autonomy are the foundational tenets of 19th century private law in Europe.[33] Any limitation to this foundational freedom needs to be justified

[31] Dannreuther, 'A zeal', p 379.

[32] For the discussion on the fragmentation of the legal subject, see H. W. Micklitz, 'Do consumers and businesses need a new architecture of consumer law?: a thought-provoking impulse', EUI working papers 2012/23 2012. For a response, see: E. Hondius, 'Against a New Architecture of Consumer Law—A Traditional View', in Purnhagen, P. Rott et al (eds.) Varieties of European Economic Law and Regulation, (Springer, 2014), 599-610.

[33] The issue has been examined many times and from different perspectives. In common law, it was the subject of the famous work P. S. Atiyah. The rise and fall of freedom of contract, 61, (Clarendon Press, 1979). In Spain, one of the most influential authors was F. de Castro, 'Notas sobre las limitaciones intrínsecas de la autonomía de la voluntad', (1982) 35 Anuario de derecho civil 4, 987-1086; in France, R. Savatier, Les Metamorphoses economiques et sociales du droit prive d'aujourd'hui (1959), pp. 5-6; a different view on the philosophical origins of private autonomy is expressed by J. Gordley, Foundations of private law: property, tort, contract, unjust enrichment. (OUP Oxford, 2006). For a recent exploration onto

on solid arguments. The key concern here relates to the justice, economic, and policy rationales that provide the legal basis for interfering with the private autonomy of parties presumed to be on an equal footing. In this regard, the debate on the evolution of consumer protection, in Europe and beyond, provides a useful starting point to understand the various legal approaches to the protections of supposedly weaker parties in private law relations. It can be used as a starting point because the same justice, economic and policy arguments that have historically guided the development of consumer (protection) law are potentially extensible to SMEs.[34]

The justice category is certainly not an easy one. It can refer to several things. In terms of corrective justice, the protection of consumers expresses the idea that the balance between the obligations of the individual consumer and those of the business needs to be restored. In terms of distributive justice, the notion of imbalance becomes an expression of the social and of the distribution of power across different groups in society, including consumers vis-à-vis big firms. Economics has also provided important arguments for the protection of consumers. The notion of information asymmetries and a market for lemons justify the protection of consumers through the creation of information duties,[35] the most prominent regulatory tool in the development of EU consumer law.[36] Information economics considers the consumer to be a rational choice-maker. This assumption is questioned by behavioral economics, which looks at the emotional biases and shortcuts that determine the behavior of consumers in real life. In this sense, behavioral law and economics have become an important source for the modernization of consumer law.[37] Finally, the protection of the consumer is also justified in policy terms. This means that

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the meaning of autonomy, see the work of H. Dagan, 'Autonomy, Pluralism, and Contract Law Theory.' (2013) 76 Law & Contemp. Probs. 76, 19.

[34] Among the authors that have defended the possibility of extending consumer protection to SMEs, see notably M. Hesselink, 'Towards a sharp distinction between b2b and b2c? On consumer, commercial and general contract law after the Consumer Rights Directive' (2010) 18 European Review of Private Law 1, 57-102; J. G. Klijnsma, SMEs in European Contract Law: A Rawlsian Perspective, Centre for the Study of European Contract Law Working Paper, 2010/05); M. Namysłowska, 'To B2C or Not to B2C. Some Reflections on the Regulation of Unfair Commercial Practices from a Polish Perspective' (2013) 36 Journal of consumer policy 3, 329-342.

[35] Famously, see G. A. Akerlof, 'The Market For' Lemons': Quality Uncertainty And The Market Mechanism' (1970) 84 The Quarterly Journal of Economics 83, 488-500. In relation to the extension of this rationale to B2b relations, see H. Schulte-Nölke, 'No Market for 'Lemons': On the Reasons for a Judicial Unfairness Test for B2B Contracts', (2015) 23 European Review of Private Law 2, 195-216.

[36] S. Grundmann, 'Information, party autonomy and economic agents in European contract law', (2002) 39 Common Market Law Review 2, 269-393.

[37] G. Howells, 'The potential and limits of consumer empowerment by information' (2005) 32 Journal of Law and Society 3, 349-370.

consumer law is instrumentalised to achieve objectives that go beyond the mere protection of consumers. This connects to the extended argument that EU consumer law has been a fundamental instrument in the establishment of the internal market, or the internal market society.[38]

The question that follows from here is whether the arguments that justify consumer protection can be extended to SMEs. In the legal literature, the feasibility of this extension is subject to debate. For some authors, insofar as SMEs can find themselves in any of the situations described above, the protection of SMEs presents itself as a question of legal coherence and of justice.[39] Other authors remain skeptical.[40] In their view, the extension of consumer rules to businesses lacks empirical and political support and, eventually, it would become a cumbersome burden to trading relations and would act ultimately against the interests of consumers. All in all, it will always be possible to find SMEs that behave like consumers and others that do not. It is even possible to find consumers that do not behave like consumers! To understand the question of protection in private law, it is necessary to also understand the difficulties of a legal definition of power and the consequences that stem from the creation of legal statuses.

3.2.THE LEGAL DEFINITION OF WEAKNESS, POWER AND IMBALANCE

The previous reflection connects directly with the problem of providing a legal definition of the concept of weakness, insofar as both the consumer and the worker are considered to be 'weaker parties'. Weakness is a disputed legal category, to say the least, if a legal category at all. The way weakness works in consumer law is not by means of a definition or an analysis of a power relation but by means of a structural presumption. And the same can be said of labor laws.[41] The notion of power – and the Janus notion of weakness – is not a legal concept. The closest to a definition of power in legal terms is found in the

[38] H.W. Micklitz, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic ' (EUI Working Paper 2012); M. Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', (2007) 15 European Review of Private Law, 323; M. Bartl, 'Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political' (2015) 21 European Law Journal 5, 572-598.
[39] M. Hesselink, 'Towards a sharp distinction'; J. Klijnsma, 'A Rawlsian Perspective'.
[40] M. Heidemann, 'European Private Law at the Crossroads', (2012) 4 European Review of Private Law, 1119 - 1138; L. A. Dimatteo, 'The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC', (CISG vs. Regional Sales Law Unification: With a Focus on the Common European Sales Law, 2012): 25-55,38; J. Stuyck, 'Do We Need 'Consumer Protection''.
[41] Hans Micklitz discusses at length the issue of weakness in 'The politics of justice', 2018, esp. 329.

antitrust concept of dominance. In the practice of competition law, a market share of 50%, sometimes less, provides the threshold of dominance. Below these percentages, however, the concept of weakness/power remains pretty much in the dark. For example, the EU law on regulated markets talks of 'significant market power'.[42] In worker and consumer relations, the ECJ has often referred to 'imbalance of power'.[43] The court does not define the threshold or measure of imbalance. It presumes the weakness of the consumer and the worker. Furthermore, in the case law of the court, imbalance and discrimination are often interlinked.[44]

The closest the ECJ has got to shed some light on the measure of imbalance was in its decision in Courage.[45] The dispute concerned the counter-claim for damages of a pub-owner against the brewer and landlord of the pub on the basis of a competition infringement stemming from the tie-in clauses of the distribution contracts. English law prevented a party to the anticompetitive agreement to claim for damages. The court was asked to consider the relevance of the relative bargaining power of the parties. The decision of the court in this case underlined the idea that, in the practice of b2b trading relations below the threshold of dominance, whether a contractual party is indeed weak can only be determined in the specific context of their contractual relation.[46] The freedom to negotiate the terms of the contract and the availability of legal remedies to which the court referred are both defined by the broader supply chain:

'It is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.'

[42] Ibid 330.
[43] C-255/97, 11 May 1999, Pfeiffer, EU:C:1999:240; C-240/98 à C-244/98, 27 June 2000, Océano Grupo Editorial v Salvat Editores, EU:C:2000:346
[44] C-394/11, 31 January 2013, Belov, EU:C:2013:48
[45] C-453/99, 20 September 2001, Courage v Crehan, EU:C:2001:465
[46] Hans Micklitz, 'The politics of justice', 324.

3.3.THE FRAGMENTATION OF PRIVATE LAW INTO STATUS

The ideal notion of the generality of the law as enshrined by the French revolution has not kept pace with the successive revolutions of society. The approach of 20th century private law to the issue of weakness has been mediatized by the creation of legal statuses. Every big social transformation has brought about a new status. The industrial revolution introduced the status of the worker. The consumer society brought in the status of the consumer. Both the worker and the consumer have become the paradigms of the weaker party. In labor and consumer relations, weakness can be structurally presumed. Before this transformation of the legal mindset typical of the 20th century, general clauses of good faith and fair dealing permitted courts to modulate the response of the law in view of the circumstances of the case. The development of consumer law has made these general clauses to lose part of their flexibility.[47] The application of stricter rules and controls over private autonomy is now mediatized by status. Status refers not to the neutral legal subject of the 19th century civil codes but to the functional role played by a group in the market.[48] Status is the expression of a social identity and the lingua franca of the third globalization.[49] In this sense, SMEs represent a new status for businesses in the context of modern global and digital trade.

The new economic and social reality has contributed to the creation of new statuses. The success of the consumer has been followed by its own decline and fall. It has become further fragmentized into prosumers and business customers. Ultimately, the consumer has opened the leeway to the concept of SMEs. The consequence is the further fragmentation of private law and society into compartmentalized identities. This fragmentation creates a reaction in both the law and the society. From the perspective of private law, fragmentation raises the issue of legal coherence. The concern here is that status-based protection artificially separates contracts according to the identity of the contracting party, even if there is not much difference between a savvy consumer and an old-fashioned craftsman or farmer. In reaction to this fragmentation, some authors have pleaded for a new concept of asymmetric contracts or even for relational-based approach

[47] This argument is put forward by P. Brulez, 'Creating a Consumer Law for Professionals: Radical Innovation or Consolidation of National Practices?', in M. Loos and I. Samoy (eds.), The Position of SMEs in European Contract Law, (Intersentia, 2013).
[48] Hans Micklitz, 'The politics of justice', 336
[49] D. Kennedy, 'Three globalizations'.

to contract regulation.[50] The idea is to come back to the generality of the legal rule, which discriminates contracts not on the basis of the identity of the contractor but on the basis of the contracting technology. Protection would be granted when contracts are not the result of individual negotiation. The identity of the contractor could still be taken into account, but only in a later moment. But fragmentation also impacts society. From this perspective, the status of the consumer has become diluted in the complexities of today's economic and social reality. The economic crisis has made it possible to uncover new statuses for the 21st century. The development of the consumer society aided by globalization and standardization has put increasing pressure on local and regional identities and on the local business sector. On top of this, digitalization through internet platforms and new internet giants has become an additional threat to local production and retailing. In this context, weakness shows new and more complex faces.[51] It is no longer possible to simply talk of David against Goliath. There are many Davids and maybe a bunch of Goliaths.

4. SMALL BUSINESSES IN THE MEMBER STATES

No comprehensive definition of SMEs for the purposes of regulating trading practices between businesses exists at the member state level.[52] This does not mean that SMEs do not find - or that they have never found - any sort of legal recognition. Rather, the question of size has been traditionally apprehended by recourse to other parameters. These parameters are scattered across contract, competition and fair trading legislations. The different combinations of regulatory responses against B2b abuses reflect the regulatory choices - and their historical evolution - of the traditional laws of member states. Scholars have also seen in the different approaches to B2b trading rules the different manners in which states choose to frame the social dimension of the marketplace.[53] Since the time of codifications, the social and market function of small businesses is revealed against the extent to which the size of a business can be taken into account under these classical

[50] V. Roppo, 'Asymmetric Contracts'; G. Vettori, 'Contract without numbers and without adjectives. Beyond the consumer and the weak enterprise.', (2013) 9 European Review of Contract Law 3, 221-248; F. Cafaggi, 'From a status to a transaction-based approach? Institutional design in European contract law', (2013) 50 Common Market Law Review 1, 311-329.
[51] H. Micklitz, 'The politics of justice', 226.
[52] M. Hesselink, 'Background Note' , 5.
[53] H. Rösler, 'Protection of the Weaker Party in European Contract law: standardized and individual inferiority in Multi-level Private law' (2010) 18 European Review of Private Law 4, 729-756, p 735.

parameters. The evolution of legal approaches to the question of business size can be broken into three main stages: the classical and individual approach to weakness, the development of national fair trading legislations, and the creation of competition rules against the exploitation of economic dependence.

Under classical contract laws, differences in size could be accounted for by recourse to the general clauses of civil codes. These clauses were often theorized as the inner boundaries of private autonomy or a sort of self-limitation.[54] With the purpose of ensuring effective freedom of contract, they provided national courts with an instrument to even out de facto power imbalances.[55] In civil law systems, this moderating role was carried out by clauses such as good faith, rebus sic stantibus clauses or the concept of cause. In the common law system, the moderating role was achieved by recourse to derivations of equity,[56] and briefly, by the development of the short-lived doctrine of inequality of bargaining power which was shaped against the broader context of the reception of EU consumer rules.[57] This goes to show that the traditional approach to bargaining imbalances was based on individualizing rules which could account in some circumstances for size differences but which did not define 'smallness'. The 20th century categorical approach to protection – with the consolidation of labor and consumer law - limited the flexibility of courts to address individual weaknesses by recourse to general principles.[58] As a consequence, national competition law and modern trading legislations developed (not always in the same direction) to account for those types of weaknesses that could not be accounted by existing statuses. Imbalances stemming from differences in size between businesses were thus covered by competition and fair trading rules. In parallel to these developments, a legal definition of smallness starts to emerge.

[54] In Spain, F. de Castro, 'Notas'; in France, J. P. Chazal.' Justice contractuelle', in L. Cadiet, Dictionnaire de la justice, (PUF, 2004), 1-12.; in the UK, M. J. Trebilcock, 'The doctrine of inequality of bargaining power: Post-Benthamite economics in the House of Lords' (1976) 26 U. Toronto LJ, 359; S. Thal, 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness', (1988) 17 Oxford J. Legal Stud. 8; H. Beale, 'Inequality of Bargaining Power (Book Review)' (1986) 6 Oxford J. Legal Stud. 1.
[55] H. Rösler, 'Protection of the Weaker Party', 730.
[56] For comparative perspectives on rules against 'economic dependence' in the UK, Germany and France, see Féteira, 'The interplay'.
[57] A. Phang, 'The Natural Law Foundations of Lord Denning's Thought and Work' (1999) 14 Denning Lj, 159, 520.
[58] See P. Brulez, 'A consumer law for professionals', 52: 'But by translating them into detailed hard consumer legislation, and by combining this approach with a categorical approach to the consumer notion, the legislator has stripped these norms of their flexibility'.

In continental Europe, the protection of smaller competitors was typically channeled through unfair trading legislations.[59] These rules include provisions against sales below cost, rebates, slotting allowances, opening hours and other retail practices which are considered detrimental to smaller competitors. Some of these rules bear a long tradition as a central element of national legislations on fair trading, where they were intended to fill in the regulatory gap left by the disappearance of the guilds.[60] In the time of industrialization, they became a central tool to achieve the protection of the small and medium-sized industry in some European member states.[61] They abound in the food and drink sector, regulating the distribution and labelling conditions of certain products, from Cassis, ham, noodles and beer. However, these rules did not define who is to be included under the definition of the small business. They achieved their protective purposes by indirect means, targeting the surface of retail outlets, the time and modes of promotional sales, the marketing conditions of a product and even its position on the shelves of a market. It has been relatively recently that some countries have incorporated a separate legal status for SMEs in the style of consumers. This trend is especially evident in national regulations of sales below cost, insofar as they illustrate how the political notion of SMEs finds its way into the regulation of B2b private law relationships. In the case of France, the so-called Loi Galland became a central piece in the protection of SMEs in commercial relations.[62] By virtue of this legal reform, the French legislator introduced the concept of 'abusively low prices' in the commercial code with the purpose of curtailing the growing power of the retail sector.[63] About the same time, the legal importance of SMEs came to be acknowledged by the Spanish legislator in the Spanish Retail Act, where sales below

[59] Article 3.3 Regulation 1/2003.
[60] D. Gerber, 'Protecting Prometheus', 31-32.
[61] See on the topic, F. Henning-Bodewig, Unfair competition law : European Union and member states. (Kluwer Law International, 2006), 1-13; R. De Vrey, Towards a European unfair competition law : a clash between legal families : a comparative study of English, German and Dutch law in light of existing European and international legal instruments, Leiden, Martinus Nijhoff, 2006; H. Ulrich, 'Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?', (EUI Law Working Paper No. 2005/01), 42. On the French droit de la petite concurrence or law against restrictive practices, see L. Vogel, Droit de la négociation commerciale, (LawLex, 2009), 393ff.
[62] Loi nº 96-588 du 1er juillet 1996 sur la loyauté et l'équilibre des relations commerciales
[63] S. Guillaume, Le petit et le moyen patronat dans la nation française, de Pinay à Raffarin, 1944-2004, Presses Univ de Bordeaux, 2004, 153. According to her, there are three pieces of French legislation that testidy to the success of transforming the concept of SME into a legal one. These are the so-called Loi Madelin (Loi n°94-126 du 11 février 1994 relative à l'initiative et à l'entreprise individuelle), Loi Galland (Loi nº 96-588 du 1er juillet 1996 sur la loyauté et l'équilibre des relations commerciales) and Loi Raffarin (La loi n° 96-603 du 5 juillet 1996 relative au développement et à la promotion du commerce et de l'artisanat). Among them, the Loi Galland is the most relevant for the regulation of UTPs.

cost and other types of promotional sales are regulated.[64] In the UK, the concept of SMEs has not been associated to the regulation of B2b relationships until later. A landmark piece of legislation in this direction is the Small Business, Enterprise and Employment Act 2015. Among other things, it requires large companies to report on their payment policies and performance towards suppliers. It also provides for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owning businesses with their tied pub tenants.

Finally, competition law has also contributed to the legal definition of SMEs. In some member states, competition law was extended to cover situations of economic dependence. To account for these legal differences in the approach to dominance, article 3 of Regulation 1/2003 allows stricter controls of unilateral power below the threshold of dominance and national rules that pursue different objectives than EU competition law.[65] These rules address the types of imbalances faced by small business vis-à-vis bigger economic powers. Unlike mainstream antitrust rules, national rules on economic dependence do not look at market shares as the main proxy for size and economic power. They intend to measure situations of economic dependence or relative power below the thresholds dominance.[66] These rules do not provide for a separate legal category for SMEs either. Rather, smallness is equated to dependence. In determining the existence of dependence, these rules allow to calculate the percentage that a given contractual relationship represents in the revenue of the supposedly dependent party. Alternatively, they also permit to look at the existence of switching costs or at the existence of a disproportionate distribution of the contractual costs between the parties. For the purposes

[64] The recitals of the Spanish Retail Act (Ley 7/1996, de 15 de enero, de ordenación del comercio minorista) state: 'The new norms are aimed at laying down the rules of the game in the retail sector, regulating new contractual figures. They have also been intended to modernize the structure of the Spanish market and to correct the imbalance between big and small retailers by ensuring free and fair competition'.

[65] For a comparative approach, see M. Bakhoum, 'Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance', paper presented in the ASCOLA Conference on Abuse Regulation in Competition Law: Past, Present and Future, (2015).

[66] In antitrust analysis, market power is measured by calculating the position of an undertaking in the market, the position of its competitors, the limits to expansion and entry in the market, and the existence of countervailing buyer power (See R. Whish and D. Bailey, Competition law (Oxford University Press, 2015), 26. Guidance and enforcement priorities art 102 para 12). Market shares are used to define thresholds of intervention. In doing so, they have drawn the boundaries of the position of SMEs as victims or perpetrators of competition law violations. For example, the Commission's de minimis notice exempts certain agreements between competitors whose market shares are too small to significantly affect the market [Number 8 of de minimis 2014 Notice.] In a similar vein, a market share over 40% can be enough to justify the finding of a dominant position. Over 50%, dominance will be presumed. [R. Whish and D. Bailey, Competition law (Oxford University Press, 2015), p. 48-49]

of the present analysis, what matters is that national rules on economic dependence can be interpreted as mostly aimed at providing the competition law for SMEs. In this sense, EU competition law would be competent for the 'big cases' and national rules for 'small cases', leaving competition policy regarding small industry in the hands of national legislators.[67]

5. SMES IN EU PRIVATE LAW

The evolution of SMEs in EU private law has two clearly differentiated stages. In a first moment, SMEs stems from the slow and quiet transformation of the average consumer into the business customer of the regulated sectors, but also of clients of travel agencies or passengers of airline companies. In a second moment, SMEs as such enter into the language of private law. The CESL was the first legislative proposal to include special rules for SMEs. After its failure, the UTPD represents the new approach to the definition of size in EU private law.

5.1. FROM THE AVERAGE CONSUMER TO CUSTOMERS, PROSUMERS AND SMES

Ever since the 1970s, the private law acquis of the European Union came to be identified with the consumer acquis.[68] By means of negative integration, the Court of Justice contributed to the elimination of barriers to the free circulation of goods. By means of positive integration, the EU secondary legislation was developed primarily with a consumerist focus. In this context, the regulation of B2b and B2c relationships followed radically different paths. National fair trading legislations were put under the increasing

[67] See in this sense, Ullrich 'Continental Conundrum', 7. He includes a very interesting reference to the German case in footnote 11. He explains that section 20 (2) (3) (4) of the GWB was originally intended to protect any business from the abusive exercise of relation power. Once it fulfilled its original mission of opening up the distribution system to non-specialised retailers, it was modified to protect, exclusively, SMEs: 'Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an unfair manner' (art. 20 (3) GWB).

[68] M.B.M. Loos, 'The Influence of European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization' (2007) 15 European Review of Private Law 4, 515; H.-W. Micklitz, 'The Principles of European Contract Law and the Protection of the Weaker Party' (2004) 27 Journal of Consumer Policy 3, 340; D. Staudenmayer, 'The Place of Consumer Contract Law Within the Process on European Contract Law' 27 (2004) Journal of Consumer Policy 3, 279.

de-regulatory thrust of the Court of Justice and consumer law developed into the law of the average consumer.

However, the very evolution of EU consumer law would end up challenging the long-standing division between b2b and b2c relationships in EU private law. The story has often been told. In the ECJ's case law on free circulation of goods, the consumer became the average consumer: a reasonably well-informed, observant and circumspect market citizen, whose behavior is to be measured against its social, cultural and linguistic factors as (restrictively) interpreted by the European Court of Justice.[69] The 'average consumer' became a key political actor of the internal market to strike down any national provision that went beyond what was necessary to protect consumers. The average consumer became an EU-wide benchmark to measure the behavior of the consumer against the diverse landscape of the member states.[70] By equating the consumer with the rational and circumspect market actor, EU consumer law also planted the seeds for the creation of a SME status. The law of the average consumer could easily become the law for the small merchant.

At the turn of the millennium,[71] the Commission spurred the interest in a general instrument of contract law applicable to B2b relationships involving SMEs.[72] The story has been told elsewhere.[73] With considerable effort and almost after a decade in between,[74] a DCFR was transformed into a proposal for a CESL. This was a key step in

[69] Recital 18 of the UCPD.

[70] Weatherill, 'Who is the average consumer', in Weatherill and Bernitz (eds), The regulation of unfair commercial practices under the EC directive 2005/29, (Bloomsbury Publishing, 2017) 135, where he defines the average consumer as 'an attempt to navigate a course between the rich diversity of actual consumer behaviour and the need for an operational benchmark'.

[71] H. W. Micklitz, 'Failure or Ideological Preconceptions? Thoughts on Two Grand Projects: the European Constitution and the European Civil Code' (EUI Working Papers 2010/04); C. Twigg-Flesner, The Europeanisation of contract law: current controversies in law. (Routledge-Cavendish, 2013); p. 151 ff.

[72] Communication from the Commission to the Council and the European Parliament 'On European Contract Law' of July 11, 2001: COM(2001) 398 final. Recitals 30 and 31 discuss the cost of cross-border transactions for both consumers and SMEs, which are put on the same standing. Recital 50 refers to the role of trade associations and standard contracts to help SMEs overcome these costs.

[73] See chapter 2 section 2 for more references.

[74] Some documents useful to understand the mental framework of private law in the EU in 2002 are the following. A sector of the academia signed the Study Group on Social Justice in European Private Law that published its manifesto in 2004. This group was concerned with the limits of a technical and market-biased instrument of EU private law: 'Social Justice in European Contract Law: a Manifesto' (2004) 16 European Law Journal, 653-674; when the appointment of commissioner Reding signaled the development of an optional instrument to be worked out of the DCFR, a group of authors started reflecting on the way forward for EU private law: H. W. Micklitz and F.Cafaggi (eds.) European private law after the common frame of reference (Edward Elgar Publishing, 2010); The parallel reshuffle of EU consumer law and the turn towards

the development of a private law definition of SMEs, which was already present in the 2010 Green Paper on Policy Options for progress towards a European contract law for consumers and businesses.[75] Many have read this document as the Commission's attempt to adapt the DCFR to the policy needs of the internal market.[76] In this document, the Commission picked up on the idea of the costs of cross-border transactions on European consumers and SMEs as an obstacle for the full realization of the internal market, which appear mixed with concerns over bargaining imbalances.[77] In 2011,[78] the final proposal for a CESL contained for the first time a set of rules that would be applicable to B2b sale contracts involving SMEs, which were defined on the basis of the numerical definition of the 2003 Commission's recommendation. [79]

The proposal got stuck in the negotiations at the Council and was definitely withdrawn in 2014. It would be however mistaken to think that this meant the end of any EU interest in B2b relations. The seed for change was to be found instead in the law regarding the customer of regulated markets and in a maximum harmonization approach to consumer law. From this perspective, the Directive on unfair commercial practices held the key to the future development of a European fair trade regulating contract and commercial practices in b2c and b2b relations.[80] This potential could be inferred from the recitals of the Directive. Here, it affirmed that 'there are other commercial practices which, although not harming consumers , may hurt… business customers ', and that 'the Commission should carefully examine the need for Community action…beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects'.[81] Moreover, the Directive allowed member states to extend the application of its rules –

maximum harmonization were also critically assessed, as in H.-W. Micklitz and N. Reich, 'Crónica de una muerte anunciada: the Commission proposal for a directive on consumer rights' (2009) 46 Common Market Law Review 2, 473.

[75] COM/2010/0348 final

[76] K. Gutman, 'The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competence in Light of the Proposed Options' (2011) 7 European Review of Contract Law 2 , 151-172.

[77] COM(2008) 394 final. Section 3.2.

[78] See the speech of Commissioner for Justice Viviane Reding of 23 February 2010, giving priority to the development of the optional instrument.

[79] See the opinions, among others, of S. Whittaker, 'The optional instrument of European contract law and freedom of contract' (2011) 7 European Review of Contract Law 3, 371-398; G. Alpa, The proposed common European sales law : the lawyers' view. (Sellier European Law Publishers, 2013); M. Lehman, Common European Sales Law meets reality, (Sellier, 2015); J. Plaza Penadés, European perspectives on the common European sales law, (Springer, 2015).

[80] M. Durovic, European law on unfair commercial practices and contract law, (Bloomsbury Publishing, 2016), 25.

[81] Recital 8 and 13 of the UCPD.

including the black list of prohibited practices – to unfair commercial practices harming certain non-consumers, such as start-ups, SMEs or NGOs.[82] As a matter of fact, some member states used the implementation of the directive to extend the control over unfair commercial practices to SMEs or microenterprises.[83]

The economic crisis provided the opportunity to move from consumer law to the law of the small business. This conceptual jump appears very clearly in the Small Business Act for Europe.[84] Here SMEs appear already imbued of a private law status.[85] After recognizing the central role of SMEs for the development of the internal market and the creation of employment, the SBA underlines the need to 'develop a legal and business environment supportive to timely payment in commercial transactions'[86] and 'to help SMEs participate in global supply chains'.[87]

5.2.SMES: PLATFORMS AND SUPPLY CHAINS

Despite the failure of the Common European Sales Law, the interest in B2b relations had not disappeared from the Commission's radar. Rather, the interest in B2b matters has been shaped on the basis of the average consumer in commercial practices and developed into a new concept of SMEs, after going through customers and prosumers first.[88] Especially, the private law definition of SMEs has flourished in the context of global value chains with the proposal for a directive on unfair trading practices. The parliamentary debates and the legislative process leading to the adoption of the Directive 633/2019/EU prove the controversial nature of this definition and the difficulties of reaching an agreement. The original proposal presented by the Commission was limited to B2b relations with SMEs-suppliers. The definition of SME of the proposal was based on the definition of SME from the 2003 Commission's Recommendation. The European Parliament extended the scope of the proposal to all businesses in a situation of economic dependence. The final scope of the directive is broader than originally envisaged by the

[82] M. Durovic, 'European law on UCP, 25.
[83] For a comparative perspective across member states, see Table 7 in 'The Brugge Study', at 291.
[84] F. Cafaggi, 'Contractual networks and the small business act: towards European principles?' (2008) 4 European Review of Contract Law 4, 493-539.
[85] COM(2008) 394 final.
[86] Principle vi of the Small Business Act.
[87] Principle vii of the Small Business Act.
[88] See Proposal for a Regulation on the internal market for electricity, COM/2016/0861 final/2 - 2016/0379 (COD).

Commission. It includes farmers, their organisations, and other suppliers downstream in the chain. The scope is extended to cover SMEs as well as mid-range enterprises, manufactures or distributors, with a turnover of up to € 350 M.

The most innovative part of the Directive is that it uses an innovative 'step approach' to issues of size and economic power. It uses a scale of turnover figures to calculate the differences in bargaining power between two contracting partners. In this way, a micro-farmer with less that € 2 M turnover is protected against buyers with a turnover exceeding € 2 M. Small suppliers with a turnover exceeding € 2 M but below € 10 M are protected against buyers with a turnover higher that € 10 M. This innovative system can be praised in that it acknowledges the relational nature of power and bargaining imbalances. After all, it is aimed at protecting suppliers from economically stronger buyers. However, it still relies on limited proxies of economic power. It also misses the broader context of the chain, because the role and position of an economic actor in the chain, and not only its turnover, does influence its power.[89] What remains to be seen is whether this approach can be operative in practice. The success of the approach can be doubted since the directive imposes on trading partners the embarrassing obligation of enquiring into the turnover figures not only of their counterparty, but also of the financial group of which they may be members.[90]

All in all, the evolution of EU trading regulations may be understood as a continuation of the transformation of the average consumer.[91] SMEs do not provide the personal scope of the UTPD Directive as the Commission's proposal originally envisaged. However, they remain at the center of the new rules. SMEs emerge as key actors of the supply chains to support economic growth in the post-crisis internal market, where the differences between the businessman and the trader become minimal. The approximation of the two concepts continues to challenge the coherence of the legal system and the generalist aspirations of the law. The global supply chain has uncovered more nuanced situations of weakness. This has also permitted the EU to advance a new understanding of fair trading

[89] A telling example is the conflict between Volkswagen and its suppliers in the summer of 2016. The weaker party turn out to have the winning hand. See https://www.theguardian.com/business/2016/aug/22/volkswagen-supplier-clash-stops-manufacturing-at-six-plants

[90] This criticism is already in J. Stuyck, 'Do We Need 'Consumer Protection''.

[91] In this sense, H. W. Micklitz, 'A New Architecture'.

for the purposes of the internal market. Ultimately, the supply chain has brought about a new compromise in the approach to weaker parties, which is also reflected in the transforming enforcement and substantive dimensions of B2b fair trading law.

CHAPTER 4

THE NEW ENFORCEMENT OF FAIR TRADING LAWS

This chapter introduces the idea of an enforcement-based model for the regulation of B2b trading practices in the EU (1). This enforcement-based model stems from the need to ensure the participation of SMEs in the governance of global value chains (2). It connects this idea with the increasing importance of contract governance in the chain (3). From the perspective of the EU, it argues that the EU spurs contract governance to gain more influence in the management of B2b regulations across Europe. Its encouragement of the coordination between private and public modes of enforcement responds to experimentalist features (4). This model of B2b trading practices connect with four key trends: the changing role of civil courts (4.1.); the anticipation of enforcement (4.2.); the internalization of enforcement (4.3.) and its agentification (4.4.). These transformations are somehow present in the enforcement model proposed by the UTPD (5).

1. AN ENFORCEMENT-BASED MODEL OF B2B TRADING PRACTICES

This chapter looks at the enforcement design of B2b trading practices in the supply chain. It sheds light on the role played by the EU in the transformation of its enforcement mechanisms, starting from the premise that the cross-border scenario of the supply chain puts the effective enforcement of B2b trading rules at the center of the debate. The importance of effective enforcement is such that it determines an enforcement-based model for the regulation of B2b trading rules. Enforcement considerations have taken precedence over substantive issues of B2b fair trading practices in the chain and this is why this thesis considers the substance of trading practices only after discussing their enforcement.

Enforcement has been the spearhead of the Commission's approach to B2b trading practices in the supply chain. In a first moment, the Commission has very clearly encouraged the development of private codes of conduct and arbitration and mediation mechanisms in the supply chain. An example of this is the setting up of the Supply Chain Initiative with the explicit support of the European Commission, which established a mediation mechanism at the EU level between suppliers and buyers. But in parallel to encouraging private regulatory initiatives and ADR mechanisms, the Commission has also presided over the re-design of the public agencies of the member states in charge of the monitoring and enforcement of B2b trading rules. This re-design has considerably increased the investigation powers of enforcement agencies permitting anonymous and collective complaints from affected suppliers. As the Commission invited member states to update their enforcement strategies in response to the challenges of the food supply chain, it also remained reticent to propose any minimum substantive rules on trading practices. Even now that, in a second moment, the EU has passed its directive on UTPs in the food chain and established a list of prohibited practices, enforcement remains central to the EU's approach to UTPs. The new directive establishes a series of minimum requirements on national enforcement authorities and allows member states considerable leeway to develop alternative arbitration and mediation mechanisms. Acknowledging the co-existence of different types of enforcement regimes requires tighter coordination. In response to this, the new directive establishes certain reporting duties on the national agencies to facilitate the coordination of enforcement activities at the national level and

calls for annual meetings between enforcement authorities presided by the Commission.[1] An interesting thing to note from the perspective of EU private law is the fact that the directive submits the fight against UTPs in the B2b food supply chain to the principles of effectiveness, proportionality and dissuasiveness. These principles, known in consumer law, have the potential of limiting the procedural autonomy of member states to ensure the effectiveness of enforcement.[2] In a way, this can be read as a spillover from b2c to b2b relations and, as a matter of fact, many precepts found in European consumer law reappear now with the UTPD. Still, enforcement of B2b rules has its own challenges. One thing that is clear is that the coordination of enforcement mechanisms – between national authorities but also with ADR mechanisms - is a central issue for the EU.[3] Central to the need for coordination is the need for the design of adequate remedies and enforcement mechanisms that are mindful of the dynamics of the supply chain.

To elaborate on these ideas, the rest of the chapter presents in some detail the enforcement challenges posed by the global value chain. This challenge is especially connected to the participation costs faced by SMEs in relation to enforcement. In the supply chain, these costs connect to the idea of the fear factor, which is defined as the reluctance of SMEs to bring up a case against a bully trading partner. The chapter discusses next how in the absence of effective enforcement mechanisms in the transnational context, contracts consolidate as building blocks of chain governance.[4] They provide for private codes of conduct, fair trade labels, certification regimes, etc. The discussion on contract governance is then looked at from a European perspective. The examples of many member states show that the shift towards private regulation has been accompanied by the expansion of the role of public agencies. Many national authorities have been given a key role in the monitoring of B2b fair trading practices, even providing a platform for mediation in private conflicts. These transformations have been assumed and sometimes actively promoted by the EU. The EU steers enforcement towards a co-regulatory system that encourages the complementarity between public-private agents, emphasizes the

[1] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111/59 (UTPD).
[2] See especially the article by P. Iamiceli, 'Unfair Practices In Business-To Consumer And Business-To-Business Contracts: A Private Enforcement Perspective' (2017) Rivista Da Faculdade De Direito Da UFMG, 335-388.
[3] See article 8 UTPD.
[4] K. H. Eller, 'Private Governance of Global Value Chains'.

collective dimension of chain governance through the promotion of producers and traders' associations; and insists on the need for coordination in the cross-border scenario. These three features seem to go well with the European experiment. The full-blown consequences of the new co-regulatory model are illustrated by the four trends leading the transformation of enforcement. The changing role of courts is complemented here by the anticipation, internalization and agentification of enforcement. When discussing these trends, this chapter will put the emphasis on the 'catalyzing' role played by the EU.[5]

2. THE KEY CHALLENGE: ACHIEVING PARTICIPATION AGAINST THE FEAR FACTOR

The recognition of small businesses as a private law actor is not without consequences for the enforcement of B2b laws on trading practices. The novel legal status of SMEs raises the issue about their organization and participation in the governance of fair trading laws.[6] The issue is well-known in the regulation of commercial practices in b2c relations, where improving the conditions for consumer collective redress has been one of the priorities of the Commission since the 2000s.[7] Moreover, collective redress in consumer law has also been at the center of the stage for the legal literature.[8] While the issues faced by SMEs are different than those faced by consumers, there is some common ground. The claims of SMEs – like those of consumers - are many and small and they are scattered across the market. This may become an obstacle for SMEs when it comes to bring up individual claims in front of national courts in relation to their contracts with more powerful trading partners. In the governance design of B2b trading practices, the organization of SME's interests becomes then a priority. As a result, this priority lends an enforcement-based perspective to the EU approach to B2b trading practices, as was already pointed to by the authors of the Bruges study.[9]

[5] The idea of the EU as a catalyst appears in H. W. Micklitz 'The politics of Justice', 386.
[6] Participation is used here in the context of institutional choice, see N. K. Komesar, Imperfect alternatives: choosing institutions in law, economics, and public policy, (University of Chicago Press, 1994), especially at 123 ff.
[7] See, for example, the Consumer Policy Strategy 2007-2013 – COM(2007) 99 final;
[8] F. Cafaggi and H. W. Micklitz 'Collective enforcement of consumer law: a framework for comparative assessment' (2008) 16 European Review of Private Law 3, 391-425; F. Cafaggi and H. W. Micklitz, New frontiers of consumer protection: the interplay between private and public enforcement (Intersentia, 2009); H. W. Micklitz and G. Saumier, Enforcement and Effectiveness of Consumer Law, (Springer, 2018).
[9] See Recommendation 5 of the Bruges Study, at 120.

The issue of SMEs' participation through enforcement mechanisms is exacerbated in the global chain. This is because the global value chain multiplies the sites of enforcement and fragments even more the stakes of SMEs across national borders. From a participation-centered approach,[10] the cross-border nature of the chain increases the costs of information and organization faced by the SMEs that seek redress against a bully trading partner. In the language of the supply chain, the obstacles faced by SMEs to enforce their contractual rights are connected to the so-called fear factor.[11] The fear factor is defined as the reluctance of weaker parties to file up a case against their counterpart out of fear of retaliation measures. The sources of fear partially differ from the enforcement costs faced by consumers in b2c relations. In a b2b scenario, fear implies the existence of specific investments and high switching costs on the dependent party.[12] Meanwhile, the main investment for the consumer in a b2c scenario is the price paid for the service or product. For the consumer, the switching costs to find another seller mostly relate to the opportunity costs of finding alternatives often already existing in the market, even if not always.[13] When unaddressed, the fear factor will prevent a firm in a situation of economic dependence from initiating judicial proceedings or from bringing up a case against their trading partner. For these reasons, the strategies to overcome the fear factor have played a central role in the enforcement debate regarding EU B2b regulations in the supply chain, underlining the need of independent enforcement, collective claims and anonymous complaints.[14]

As fear and uncertainty intensify in cross-border situations, it creates a major obstacle to the effectiveness of enforcement. These obstacles are especially relevant in the case of judicial enforcement of B2b trade laws.[15] A reason for this is that the costs of participation and organization in the judicial process are especially high in comparison with other enforcement alternatives.[16] Traditional judicial mechanisms, blinded by instruments and categories that were created for national markets, including their definition of standing rights, are unable to cope with the transnational dimension of supply chains that render

[10] N. Komesar, 'Imperfect alternative', 128.
[11] Bruges Study, 28.
[12] Discussing the different legal approaches to the definition of dependence, I. Lianos and C. Lombardi. 'Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?' (CLES Research Paper Series, 2016), 15.
[13] P. Iamiceli, 'Unfair Practices', 376.
[14] See the Bruges Study, 28.
[15] ibid 119.
[16] N. Komesar, 'Imperfect alternative', 128.

smaller economic actors even more vulnerable to the fear factor.[17] In other words, transnational contracting along the chain makes the conventional instruments of national court-systems less effective. As a result, parties that were already reluctant to access courts are even more discouraged to do so. The role of national courts to review the legitimate use of contract power is undermined in the presence of structural weaknesses, economic dependence and power imbalances in the food chain.[18]

3. ENFORCEMENT THROUGH CONTRACT GOVERNANCE IN GVCs

However, avoiding courts means avoiding the political process in which courts are embedded.[19] It creates the risk of depolitising or 'neutralizing' power imbalances under the umbrella of freedom of contract in the supply chain.[20] This realization has been parallel to the shift towards contract governance.[21] In the absence of adequate transnational governmental tools, contracts gain a key role in legitimizing the functioning of the global value chain.[22] They allow the economic actors involved in the chain to limit risks inherent in global trade and to respond to the preferences of consumers and to the reputational concerns of multinational corporations.[23] The consequence of this is that the

[17] This has been called 'domestic blinders'. See David J Gerber, 'Competitive harm in global supply chains: assessing current responses and identifying potential future responses.' (2017) 6.1 Journal of Antitrust Enforcement, 5, 19.

[18] A Beckers, Regulating corporate regulators through contract law? - The case of corporate social responsibility codes of conduct' (EUI Working Papers MWP 2016/12).

[19] ibid 27.

[20] On the neutralizing idea, P. Zumbansen, 'The Law of Society: Governance through Contract' (2007) 14 Indiana Journal of Global Legal Studies 2, 208.

[21] K. Riesenhuber, S. Grundmann, and F. Möslein (eds.), Contract Governance: Dimensions in Law and Interdisciplinary Research (OUP Oxford, 2015); D and M. Kurkchiyan, 'Corporate social responsibility through contractual control? Global supply chains and 'other-regulation'', in: D. McBarnet, A. Voiculescu & T. Campbell (eds.), The New Corporate Accountability: Corporate Social Responsibility and the Law, (Cambridge: Cambridge University Press 2007), 59-92; M. Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', (2007) 54 UCLA Law Review 4), 913-970; L.W. Lin, 'Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example', (2009) 57 American Journal of Comparative Law 3, 711-744; F. Cafaggi, 'The regulatory functions of transnational commercial contracts: new architectures' (2013) 36 Fordham Int'l LJ , 1557-1618; M. Vandenbergh, 'Private Environmental Governance', (2013) 99 Cornell Law Review 128-199; K. P. Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) 11 Nordic Journal of Commercial Law 1, 1-30; P. Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts' (2014) 35 Recht Der Werkelijkheid 3, 80.

[22] P. Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts' (2014) 35 Recht Der Werkelijkheid 3, 80, 91, where he refers to the work of J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation & Governance 2, 137-164.

[23] For in-depth accounts of the emergence of contract governance, see D. Fuchs and A. Kalfagianni, 'The Causes and Consequences of Private Food Governance', (2010) 12 Business and Politics 3, 12; R. Locke, F. Qin and A. Brause, 'Does Monitoring Improve Labor Standards? Lessons from Nike' (2007) 61

supply chain shifts towards a new governance design where contracts emerge as regulatory building blocks.[24] Contracts are instrumentalized in the supply chain to provide for participatory rights and for mechanisms of compliance.[25] The enforcement picture consequently stretches quite a lot beyond national courts.

Multinational corporations at the lead of the supply chain make use of innovative contracting techniques to regulate and implement social, safety and environmental standards along cross-border supply chains. Contracts are used 'to adopt standards, to license the use of labels, to monitor compliance and to enforce contractual obligations'.[26] Entire supply chains are regulated by means of contract.[27] Contract governance is at the same time often accompanied by alternative dispute resolution mechanisms and certification regimes based on private labels.[28] Moreover, contract governance establishes new interactions with public agencies to regulate relations between private parties, where public agencies act as enforcers of private regulation and even as mediators in private relations.[29] Ultimately, because enforcement in the supply chain engages rule-makers in a regulatory dialogue that transforms the content and effectiveness of the regulatory process, the long-standing division between standard-setting and enforcement becomes more and more blurred in the global chain.[30]

The food supply chain has very often been used as a testing field for these transformations. It is indeed at the crossroads of many types of regulatory concerns: environmental concerns regarding, for example, the indiscriminate use of pesticides and

Industrial and Labor Relations Review 1, 3-31, 8; L. Fulponi, 'Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries', (2006) 31 Food Policy 1, 7-8; M. Vandenbergh, The New Wal-Mart Effect:, 921; F. Mayer and G. Gereffi, 'Regulation and Economic Globalization: Prospects and Limits of Private Governance',(2010) 12 Business and Politics 3, 1-25, 4.

[24] A. C. Cutler and T. Dietz, The politics of private transnational governance by contract (Routledge, 2017).

[25] P. Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts' (2014) 35 Recht Der Werkelijkheid 3, 80, 91.

[26] F. Cafaggi, P. Iamiceli, 'Private Regulation and Industrial Organization: Contractual Governance and the Network Approach', in K. Riesenhuber, S. Grundmann, y F. Möslein (eds.), Contract governance: dimensions in law and interdisciplinary research, (OUP Oxford, 2015), 344.

[27] Verbruggen, 'Regulatory governance by Contract', 82.

[28] For example, an overview of new forms of compliance for the food sector, can be found in P. Verbruggen, T. Havinga, Hybridization of food governance : trends, types and results. (Edward Elgar Publishing, 2017)

[29] H. Dagan and R. Kreitner, The Other Half of Regulatory Theory (Working Paper, November 10, 2018), available at SSRN: https://ssrn.com/abstract=3031886

[30] C. Hood, H. Rothstein, and R. Baldwin, The government of risk: Understanding risk regulation regimes, (OUP, 2001); F. Cafaggi, Enforcement of transnational regulation: ensuring compliance in a global world. (Edward Elgar Publishing, 2012), 1-40, especially 8 and 33. See also the contribution by C. Scott, 'Non Judicial Enforcement of Transnational Private Regulation', in F. Cafaggi, Enforcement of transnational regulation: ensuring compliance in a global world. (Edward Elgar Publishing, 2012), 147.

fertilizers; social concerns regarding the impact of the chain on the labor conditions of workers of developing countries; or concerns about animal welfare and the breeding conditions of poultry and cattle.[31] There is an emerging concern that is central for the present thesis. It relates precisely to the distributional consequences on small stakeholders of increasing regulatory intensity on the chain via contracts. These concerns mostly regard the shift of the costs of coordination and standardization on smallholders both from developed and developing countries.[32]

4. THE EU MODEL OF ENFORCEMENT: EXPERIMENTALISM AND CO-REGULATION

The next question is about how the enforcement design of B2b trading practices can address the distributional concerns brought about by the consolidation of contract governance in the supply chain. The global value chain puts increasing pressure on the judicial enforcement model of member states. The role of courts in the regulation of B2b trading practices in cross-border settings is being transformed, appearing second or third to out-of-court dispute resolution mechanisms. Where the enforcement categories of traditional private laws are limited, the supply chain offers the European legislator new opportunities to experiment. The EU can take advantage of the new spaces for enforcement because it is not tied by its own legal tradition. In other words, the EU has free hands to innovate. In this manner, the supply chain allows the EU to experiment with a governance response in spite of its limited and fragmented competences in B2b contracts.[33] Through private regulation and coordination, the EU manages long-standing differences in the approach to B2b trading practices.

[31] On standards for the production of chicken, see J. Mulder, Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness, (Bloomsbury Publishing, 2018), 131.

[32] The concern over the distributional consequences of private regulation in the food supply chain has been taken up by international organisations. See Codex Alimentarius Commission, 'Consideration of the Impact of Private Standards, Joint FAO/WTO Food Standards Programme', Report presented at 33rd Session Geneva, 5-9 July 2010 (CX/CAC 10/33/13), p. 21-22. For a legal perspective on the distributional consequences of private regulation, see F. Cafaggi and K. Pistor 'Regulatory capabilities: A normative framework for assessing the distributional effects of regulation' (2015) 9 Regulation & Governance 2, 95-107.

[33] On the use of private regulatory instruments to achieve harmonization, see H.Collins, Governance implications for the European Union of the changing character of private law, in F. Cafaggi, H. M. Watt, Making European private law : governance design (Edward Elgar, 2008), 269-288, especially 271.

The supply chain allows the EU to overcome its own competence limitations. While the competences of the EU in agricultural matters and even in competition law are well defined, this is not the case with trading practices, especially in B2b matters. For example, the competences of the EU in agricultural matters have permitted the EU to require framework contracts in agricultural sectors like the sugar market, and even to extend this requirement to other sectors. When it comes to competition law, the EU has been able to promote and encourage the private enforcement of antitrust. Private enforcement of competition law allows traders in the situation of Crehan to apply for damages against their stronger counterparty.[34] Competition and agricultural policy have also permitted the EU to promote the role of collective organizations of agricultural producers as the means to combat imbalances of power in the food chain. However, in the realm of pure B2b contractual and trading practices, the competences of the EU are weaker. The strategy of the EU here has therefore been different. The work of the Commission has been to spur regulation through contract. In agricultural matters, the work of the Commission's High Level Groups has favored multi-stakeholder dialogues for the development of codes of conduct in the chain and for the establishment of mediation platforms for the resolution of disputes. This is certainly connected to the idea of achieving harmonization of trading practices by means of private standards.[35] Where this was not perceived as sufficient, the EU has invited member states to revise their enforcement strategies. This has opened leeway for member states to strengthen the supervision and enforcement powers of their public agencies. The intervention of the Commission reaches all the way up to retail services. In a way, the work of the Commission here has been 'softer', perhaps because here there is no CAP to back up its regulatory activities. An example of the Commission's policies with regard to small retailing activities is the publication of a program addressed at local governments to share best practices in the encouragement of small retail.[36]

[34] C-453/99, 20 September 2001, Courage et Crehan, EU:C:2001:465

[35] On the relationship between private regulation and EU private law, see F. Cafaggi, 'Private regulation in European private law', in A. Hartkamp, M. Hesselink, E. Hondius, C. Mak, C. du Perron (eds.), Towards A European Civil Code, (Wolters Kluwer, 2011); For a recent reflection on their relationship, see M Mataija, 'EU internal market law and codes of conduct', in R. Brownsword, R A J van Gestel and H-W Micklitz (eds.), Contract and Regulation: A Handbook on New Methods of Law Making in Private Law (Edgar Elgar, 2017), 138, 152.

[36] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A European retail sector fit for the 21st century, COM/2018/219 final.

Where it lacked clear competences, the Commission has co-opted the supply chain to manage the transformations of enforcement in B2b trading relationships. In doing so, the EU has drawn the contours of a co-regulatory enforcement approach. This approach is defined by three main features: the complementarity between public and private enforcement; the emphasis on the collective dimension of B2b disputes; and the need for cooperation in a cross-border landscape.

First, complementarity becomes evident with the co-existence of ADR mechanisms, courts and enforcement agencies. The roles played by the different mechanisms vary from country to country. The last frontier of complementarity (like the authors of the Bruges study called it) is the public enforcement of private regulation. The British code Adjudicator is a telling example. Complementarity acts like the 'gorilla in the closet'. When the independence and legitimacy of private mediators is questioned, the presence of a public enforcer provides a credible threat, and this has a positive impact on the effectiveness of private regulation.[37]

Second, collective actors become key power players in the governance of the chain. Where excessive fragmentation is perceived as an obstacle of effective enforcement, supply chains are invited to reorganize and balance out bargaining power differences within the limits of competition law. To overcome the fear factor, associations of producers and traders are invited as key stakeholders to the negotiation of collective standard contracts and codes of conduct and to their mechanisms for implementation. Collective actors participate like this in mediation platforms, and in some cases, collective actors are granted standing before national courts.

Third, coordination becomes a key element in the emerging governance design. This implies addressing cross-border conflicts as the rule and not as the exception. The coordination of enforcement has mainly translated in the idea of a transnational network of enforcers.[38] This network provides a space for the exchange of best practices and to

[37] On the meaning and conditions for complementarity, see P.Verbruggen, 'Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation', (2013) 7. Regulation & Governance 4, 512, 524. For a consumer law perspective: F. Cafaggi 'Towards Collaborative Governance of European Remedial and Procedural Law?' (2018) 19Theoretical Inquiries in Law 1, 235-260

[38] Y. Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?' in Charles F. Sabel, and Jonathan Zeitlin (eds.) Experimentalist governance in the European Union: towards a new architecture. (OUP 2010) 76.

coordinate enforcement priorities. The creation of this network seems to be complemented with new rules facilitating weaker traders to choose the authority of enforcement. In a way, these rules are parallel to the consumer safeguards in private international law because they allow suppliers to address their complaint both to the agency of the country where the supplier is established or that of the buyer (Art.5).

The way to fully apprehend these features of the EU's co-regulatory framework is to look at the four major trends leading the transformation of enforcement in B2b trading practices across member states. The four trends relate to the changing role of national courts and to the anticipation, internalization and agentification of enforcement. These trends illustrate how difficult is to determine who innovated and who followed who in the re-design of enforcement. They also illustrate the role that the EU was playing behind the scenes. Another thing that the trends show is that the transformation of enforcement has been an iterative process. The multiple reforms and working papers of the last years suggest a trial and error approach. This reinforces the idea that the EU provides a space of experimentation.[39]

4.1. THE CHANGING ROLE OF NATIONAL COURTS

Courts are no longer considered central pieces of the enforcement system in B2b relations. There are different explanations as to why the supply chain exacerbates this. This chapter has already referred extensively to the so-called fear factor, which refers to the reluctance of a party in a situation of economic dependence to file a claim against a bully counterpart.[40] Fear links to the participation-centered approach of Komesar's approach because it adds to the costs of the judicial procedure.[41] Fear creates an obstacle to the representation and organization of the claims of SMEs scattered across the supply chain.

The decreasing importance of courts in the enforcement of B2b regulations in the supply chain has been also considered under the lenses of private international law. The autonomy-enhancing nature of private international laws has contributed to the

[39] C. F. Sabel and J. Zeitlin, 'Experimentalism in the EU: Common Ground and Persistent Differences,' (2012) 6 Regulation & Governance 3, 410
[40] The Bruges Study, 119.
[41] N. Komesar, 'Imperfect alternative', 123.

transnational liftoff of commercial disputes.[42] The effect of private international law on the regulation of commercial relations of the chain has been to further fragment the supply chain.[43] The result is that the role of courts is questioned as a central pillar of the legal system 'in which the acceptance of global regulatory processes needs to be debated and decided'.[44] In-court adjudication of commercial disputes is seen as only playing a minimum role,[45] or at least a transformed one.[46] From this perspective, the role of courts becomes more and more limited. National courts should defer to the 'contextualizing' arrangements of private parties and limit their interventions only when necessary to police the risk of opportunism.[47]

On top of the existing normative accounts on the role of courts, empirical studies suggest that a clear majority of B2b disputes do not reach courts.[48] Where cases used to find their way into court proceedings and then casebooks,[49] today courts are largely absent from the reality of supply chain adjudication.[50] The bulk of enforcement happens through ADR mechanisms, and not even.[51] Only in few instances national courts have given proof of their readiness to challenge arbitral awards.[52] The fact that these examples are not

[42] R. Wai, 'Transnational liftoff and juridicial touchdown: the regulatory function of private international law in an era of globalization' (2001) 40 Colum. J. Transnat'l L. 209.
[43] F Cafaggi and S Clavel, 'Interfirm Networks across Europe: A Private International Law Perspective' in F Cafaggi (ed), Contractual Networks, Inter-Firm Cooperation and Economic Growth, (Edward Elgar, 2011) 201; U. Grušić, 'Contractual networks in European private international law' (2016) 65 International & Comparative Law Quarterly 3, 581-614.
[44] A Beckers, Regulating corporate regulators through contract law? - The case of corporate social responsibility codes of conduct' (EUI Working Papers MWP 2016/12). 29.
[45] See P. Zumbansen, 'The Law of Society: Governance through Contract' (2007) 14 Indiana Journal of Global Legal Studies 2,, 192. The author decries what he dubs a neo-formalist attack on courts. He sees these attacks on works such as J.P. Dawson, 'Economic Duress-An Essay in Perspective' (1947) 45 MICH. L. REv. 253, 265, 289 ('It is evident that courts have neither the equipment nor the materials for resolving the basic conflicts of modern society over the distribution of the social product and the limits to be set to the use, or misuse, of economic power.'). Other references he uses are R. E. Scott and G. G. Triantis, 'Anticipating Litigation in Contract Design' (2006) 115 Yale L.J. 814, 878-79; R. E. Scott, 'The Case for Formalism in Relational Contract' (2000) 94 Nw. U. L. REv. 847, 848; E. A. Posner, Law and Social Norms (Harvard University Press, 2000), 148-146.
[46] R J Gilson, C F Sabel and R E Scott, 'Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contract Forms' (2013) 88 New York University Law Review 170.
[47] Ibid 179
[48] C. R. Drahozal, 'Empirical Findings on International Arbitration: An Overview', in T. Schulz, F. Ortino (eds.), Oxford Handbook on International Arbitration (Forthcoming). Available at SSRN: https://ssrn.com/abstract=2888552 or http://dx.doi.org/10.2139/ssrn.2888552
[49] C. L. Knapp, 'Taking contracts private: The quiet revolution in Contract Law' (2002) 71 Fordham L. Rev. 71 , 761, 762.
[50] A Beckers, 'Regulating Corporate Regulators', 29.
[51] J. Nolan-Haley, 'Mediation: the new arbitration' (2012) 17 Harv. Negot. L. Rev., 61.
[52] It has been called to my attention that the Spanish arbitration community has been taken aback by a series of court decisions invalidating arbitral awards on the grounds of public policy. These cases concerned B2b financial contracts. The court considered that the bank had infringed its information duties and justified its

numerous suggests that more weight is given to the attractiveness of a legal system as a seat of arbitration in international commercial disputes.[53]

Some national courts are better prepared than others to face the challenges posed by the supply chain on the governance of B2b trading practices. The degree of readiness depends on the availability of mechanisms for collective action, insofar as collective actions can accumulate the claims of scattered economic actors like consumers and SMEs. The question of collective actions in Europe received much attention in the 2000s in the context of the Commission's attempts at revamping European consumer law as well as in the context modernizing the enforcement of competition law by means of collective redress.[54] The many comparative studies produced at the time agreed on the impact that legal culture and tradition have on the diverse models of collective redress. These national models have been relatively protected from European influence by virtue of the principle of the procedural autonomy of the member states. Many of these differences across them concern the articulation of individual and collective interests, which are reflected in different combinations of representative action, group action (opt-in and opt-out), model cases or US style class-action.[55] Many member states have upgraded their national models of collective action over the last decades to improve the enforcement of consumer law. Generally speaking, few national models have made collective action available for SMEs in B2b relations.[56] For the purpose of the present thesis, the key question is therefore whether national legislators have extended collective standing rights to associations of professionals, producers and traders.

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decision on the protection of the weaker party as a consequence of the principle of good faith. Effectively, the decisions extend consumer protection on financial contracts to SMEs: Sentencia del Tribunal Superior de Justicia de Madrid de 28 de enero de 2015, STSJ M 1286/2015.

[53] H. M. Watt, ''Party Autonomy' in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 6 EUR. REV. CONT. L. 250, 268.

[54]Final Report - An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings (The Stuyck Study), 2007, available at http://www.eurofinas.org/uploads/documents/policies/OTHER%20POLICY%20ISSUES/comparative_report_en.pdf ; F. Cafaggi, H-W. Micklitz (Eds.), New Frontiers of Consumer Protection: The Interplay Between Private and Public Enforcement, (Intersentia, 2009); Finally, the reports of the The Global Class Action Exchange, available at http://globalclassactions.stanford.edu

[55] F. Cafaggi, H-W. Micklitz, 'New frontier of consumer protection', 414-420.

[56] Raising the vailability of collective action for SMEs, see European Commission's Press Release, Speech by Joaquín Almunia on Common standards for group claims across the EU, University of Valladolid, 15 October 2010, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_10_554

In France, the introduction of collective actions was the object of an ambitious project aimed at the codification of the consumer law,[57] but the original plan failed. The French consumer code did include an article on *'action en representation'* but this provision never played a real role in practice, in part because of the high risk faced by consumer associations in starting the litigation. The French legislator tackled anew the little success of the *action en representation* in 2014. As part of the measures introduced by the Loi Hammon,[58] the French legislator introduced an opt-in model of group actions similar to that adopted by other member states.[59] At the same time, the French legislator made a type of collective action available for certain associations of professionals. This extension did not provide associations of professionals in the agricultural sector with an opt-in group action, as the one introduced by the loi Hammon, but with an *action en representation* similar to the one of the old *code de la consommation*.[60] The 2014 reform provided French associations of producers with their own *action en representation*, allowing them to appear in court in representation of at least one of the associated producers.[61] However, this *action en representation* is only available after the mediation of the French Agricultural Ministry or of the arbitration provided for by the standard contract has failed. To this day, collective litigation in the B2b food supply chain remains extremely rare.[62]

Spain introduced collective actions shortly after its democratic transition. The inspiration in the classical French model is evidenced by reference to the protection of diffuse and collective interests of consumers. (LEC art 6, number 7 and 8).[63] Together with the more traditional representative action (art. 6-7LEC), later consumer legislation introduced group actions for the defense of the 'general interests' of consumers. Consequently, consumer associations have been given standing to bring before court injunction actions against traders that are in breach of the norms of commercial practices. Simultaneously, standing is extended to associations of producers. In this manner, Spanish 'unfair

[57] F. Cafaggi, H-W. Micklitz, 'New frontier of consumer protection', 414-420.
[58] Loi nº 2014-344 du 17 mars 2014 relative à la consommation.
[59] F. Cafaggi, H-W. Micklitz, 'New frontier of consumer protection', 438ff.
[60] Loi n° 2014-1170 du 13 octobre 2014 d'avenir pour l' agriculture.
[61] See article L. 551-1, Code rural et de la pêche maritime.
[62] One example of a 'collective action' in the food sector was the case started in 2015 against Lactalis by the Fédération nationale des producteurs de lait (FNPL), closed on the 23 of February 2016 in virtue of confidential settlement reached between Lactalis and the Organisation de producteurs Normandie Centre.
[63] Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

competition' legislation enables producers to join forces against abuses of economic dependence.[64]

In the UK, mechanisms of collective action include Group Litigation Orders and representative claims.[65] Collective action before courts has been quite frequent in relation to personal injury, environmental damages and pension disputes. More recently, collective action has become important against regulatory breaches, as in the financial sector or air transport sector. In contrast, it is more difficult to find cases of collective action in B2b disputes in a supply chain. Notwithstanding this, it is interesting to note that the Consumer Rights Act of 2015 has introduced an opt-out complaint model before the CAT for breaches of competition law, which is available for SMEs and consumers.[66]

One of the main obstacles faced by judicial enforcement is its little flexibility and the lack of guarantees of confidentiality. Some member states have traditionally responded to this deficiency by increasing the role played by the public sector in judicial enforcement. France is a case on point insofar as the French public administration is traditionally considered legitimated to act in defense of the public interest, which includes consumer protection but also unfair trading practices.[67] This has become a central piece in the enforcement of unfair trading norms in France, where the judiciary is instrumentalised by the public administration in the fight against the restrictive practices of the retail sector.[68] Illustrating this, it is relevant to note how the French legislator allows the Direction Générale de la Concurrence, de la Consommation et de la Répression des Frauds

[64] Article 33 Ley 3/1991 de Competencia Desleal, de 10 de enero, which transposes the Directive 2005/29/EC, 11 May 2005, concerning unfair business-to-consumer commercial practices (OJ L 149) and Directive 2006/144/EC, 12 December 2006, concerning misleading and comparative advertising (OJ L 376).

[65] R. Mulheron, The class action in common law legal systems: a comparative perspective, (Bloomsbury Publishing, 2004); R. Mulheron, 'Reform of collective redress in England and Wales' (Civil Justice Council, 2008); For an updated review of group actions in the UK from a practitioners' perspective, see D. Grave, Class Actions in England and Wales – Key Practical Challenges, (Thomson Reuters, 2018).

[66] This action reflected the findings of the Report of the Civil Justice Council, Improving Access through collective actions – Developing a more effective and efficient procedure for collective actions, May 2010. Available at https://www.judiciary.uk/publications/cjc-improving-access-justice-consumers/

[67] F. R. Baumgartner, 'Public interest groups in France and the United States' (1996) 9 Governance 1, 1-22, 9.

[68] As part of this enforcement design, the courts responsible for enforcement are also centralized by Décret n° 2009-1384 du 11 novembre 2009 relatif à la spécialisation des juridictions en matière de contestations de nationalité et de pratiques restrictives de concurrence. In accordance with this rule, the competence over restrictive practices corresponds exclusively to the commercial courts of Bordeaux, Lille, Lyon, Marseille, Nanterre, Nancy, Paris, Rennes and Fort de France. The exclusive jurisdiction to decide on appeal belongs to the Paris Appellate court.

(DGCCRF) of the French Ministry of Economy to intervene in private relations in defense of the public economic order. The intervention of the government is not uncontroversial, and it has received considerable criticism with regard to its effects on the right to access justice of the business parties. From a constitutional perspective, the French food retailer Leclerc contested the legitimacy of the public intervention in replacement of individual claimants.[69] However, the French constitutional court has given green light to the intervention of the DGCCRF in application of art. 442-6 of the French Commercial Code (*pratiques restrictives*). Accordingly, the intervention of French courts in B2b relationships is directly triggered by the government administration. This publicized dimension of B2b disputes over 'restrictive practices' is further intensified in the design of the remedies. When courts intervene at the request of the DGCCRF, they can issue an injunction and impose a 'civil fine' of up to €5 million at the request of the DGCCRF to prevent further irregular behavior from the party at fault.[70]

The changing role of national courts provides an important example of the phenomena taking place in the enforcement of trading rules. Some of these changes are actively encouraged by the EU institutions and especially by the Commission. For example, the CAP has been essential to reinforce the role of collective actors as key power players in the enforcement of transnational food supply chains. Additionally, the EU has encouraged the modernization of administrative enforcement which is potentially more open to other forms of collective participation and representation.

4.2.THE ANTICIPATION OF ENFORCEMENT

Anticipation refers to the set of enforcement strategies that bring forward the resolution of conflicts. These strategies open considerable leeway for the gradation and escalation of the regulatory response. They often take on a collective dimension that encourages the participation of smaller stakeholders in the drafting of standard terms and in their

[69] The nature of the DGCCRF's action has been constitutionally contested. See Arrêt de la Cour de Cassation, du 8 juillet 2008; Décision du Conseil Constitutionnel n° 2011-126 QPC du 13 mai 2011, Système U et autres; Décision de la Cour Européene des Droits de l'homme du 17 janvier 2012. The case concerned a dispute over the relationship between Leclerc and its suppliers. Leclerc claimed that the action of the DGCCRF violated its procedural rights. The decisions nevertheless confirmed the public character of the Ministry's action in defense of the public order.

[70] For a complete picture of the French regime on restrictive practices in terms of its substantive and institutional transformation, see the French PhD thesis by A. Fortunato, Clauses et pratiques restrictives de concurrence, (2016, Université de Lille).

implementation. In practice, anticipation takes the form of standardization and mediation mechanisms. They can be seen alternatively as a mechanism to prevent 'litigation through negotiation'.[71] The EU has played here a significant role in the standardization of agricultural contracts, and to a lesser extent, of contracts in the retail sector. The shift towards standardization has been accompanied by an increased interest in mediation. The support of the EU to the establishment of mediation mechanisms was exemplified in Directive 2008/52/EC on mediation in civil and commercial matters,[72] but mediation may be seen as belonging to the next step of the transformation of enforcement ('negotiation within litigation').[73] Consequently, mediating mechanisms will be dealt with in the next section dealing with the internalization of enforcement. The present section will mostly focus on three phenomena that illustrate the rise of negotiations as a form of litigation management, i.e. the anticipation of enforcement. These phenomena refer to the establishment of framework contracts in agricultural markets, to the European Commission's involvement in the creation of codes of conduct in relation to commercial relationships between supermarkets and their suppliers and, finally, the recent development of purely private strategies on fair trading with SMEs by food retailers.

The background for this section is given by the phenomenon of contractual standardization, which is closely linked to the governance of cross-border supply chains. It becomes manifest in the development of international contracting guides,[74] standards for the commercialization of agricultural products,[75] or in the relative success of private labels on fair trade.[76] The development of private standards has permitted the EU to intervene in the management of B2b trading relations. In the agricultural sector, the EU has clearly promoted the use of framework contracts in specific sectors and has also permitted member states to extend the requirement of written from contracts to other sectors.[77] This support for private regulation in the form of standard contracts has been

[71] F. Cafaggi, H-W. Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16 European Review of Private Law, 3, 391–425, 397.
[72] Especially, after the transposition of the European Directive 2008/52/EC, 21 May 2008, on certain aspects of mediation in civil and commercial matters, OJ L 136/3
[73] F. Cafaggi, H-W. Micklitz, 'Collective Enforcement', 397.
[74] See FAO, UNIDROIT and IFAD, Legal Guide on Contract Farming, (Rome 2015). Available at http://www.fao.org/3/a-i4756e.pdf; ISO 20400:2017, Sustainable Procurement – Guidelines; OECD, Guidelines for Multinational Enterprises on Responsible Business Conduct, 2011.
[75] https://www.unece.org/leginstr/agri.html
[76] http://www.fairtrade.org.uk/
[77] B. Velazquez, B. Buffaria, Policy measures and bargaining power along the food chain, a review to help assessing the way ahead (2016) 71 Rivista di Economia Agraria/Italian Review of Agricultural Economics,

more timid with regard to trading practices involving retailers. One reason for this is that the competences of the EU in the retailing services sector are more limited. This has not stopped the EU, especially through the Commission, to actively support the development of an EU-wide code of conduct on trading practices in the food supply chain that has taken the shape of a Supply Chain Initiative.

In agricultural markets, framework contracts were already in place under the 2006 CMO Regulation for some agricultural products (sugar, milk).[78] Framework contracts are standard contracts negotiated by national sectorial associations in representation of the different levels of the supply chain. Since 2013, member states are permitted to require written-form contracts in other sectors.[79] In the case of Spain and France, the two countries have both made use of this possibility under the figure of 'contratos tipo'[80] and 'accords-cadre', respectively, for various agricultural sectors.[81] Where written-contracts are rendered compulsory, at the initiative of producers or of the government, the French and Spanish legislation imposes on associations of producers and their buyers the obligation to enter into a sectorial 'framework' contract. The objective of these collectively-negotiated standard-contracts is to promote better coordination within the chain, countervail the bargaining power of buyers and promote the stability and transparency of food markets.[82] They are negotiated by associations of producers and traders under the supervision of the government. They can act as a firewall against unfair trading practices by balancing out bargaining power differences between suppliers and retailers. They usually include their own mediation mechanisms and arbitration clauses.

1, 31-38. L. Cacchiarelli, D. Cavicchioli and A. Sorrentino 'Has the Force awak ened? Producer Organizations, supply concentration and buyer power in Fruit and Vegetable sector' (2016) Paper prepared for the 153 EAAE meeting on New dimensions of market power and bargaining in the agri-food sector: organisations, policies and models, Gaeta, Italy, June 9-10.

[78] Article 125 of the Regulation (EU) No 1308/2013, 17 December 2013, establishing a common organization of the markets in agricultural products (CMO), OJ L 347/67

[79] Article 168 of the Single CMO 2013 Regulation

[80] Ley 2/2000, de 7 de enero, reguladora de los contratos tipo de productos agroalimentarios, and developed by Real Decreto 686/2000, de 12 de mayo.

[81] Article L. 631-24 of the Code rural et de la pêche maritime

[82] For a comparative perspective of standard-contracts for food-supply in the EU context, see European Commission's Agricultural Markets Task Force, 'Enhancing the position of farmers in the supply chain', November 2016, 34.

In the case of France, the definite impulse towards the 'contractualisation' of the agricultural sector was given by the so-called Loi Sapin 2.[83] Where written contracts are rendered compulsory, the new law imposes on the associations of producers the obligation to enter into a 'contrat-cadre' with their buyers. The French legislator has also determined minimum requirements on the content of these contracts. In this manner, the 'contrat-cadre' needs to include references to the total volumes to be produced and the volumes to be delivered, as well as the distribution of such volumes among the members of the producers' association. They shall also specify their own regulatory and organizational framework, especially with regard to the form and modalities of periodical negotiations. The contract shall also specify the modalities to manage excess supply. Most importantly, the contract needs to specify the modalities for price determination, which shall be made necessarily by reference to public indexes.

In Spain, the so-called 'contratos tipos' were already regulated by the legislator before Spain's accession to the EU.[84] With accession to the EU, it was necessary to adapt the legislation on 'contratos tipos' to the new European discipline on the common agricultural markets. In practice, the main consequence of this change was to reduce the role of the public administration in the negotiation of these contracts. Like in France, the Spanish legislator currently specifies some minimum requirements on the content of these contratos-tipo,[85] including the identification of the contracting parties, its temporal validity, the object of the contract – especially the type of product, the volumes and the time and place for the delivery -, the modalities of payment and the dispute-resolution mechanisms.[86] Regarding the latter, these 'contratos-tipos' foresee the establishment of 'comisiones de seguimiento' which have no equivalent in the French model.[87] These are entities, endowed with legal personality by the legislator, in charge of monitoring the well-functioning of the framework contract and providing for mediation and arbitration mechanisms in case of conflict.

[83] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.
[84] Ley 19/1982, de 26 de mayo, sobre contratación de productos agrarios.
[85] Ley 2/2000, de 7 de enero, reguladora de los contratos tipo de productos agroalimentarios.
[86] Article 3 Ley 2/2000.
[87] A list of current contratos tipos is available at:
https://www.mapa.gob.es/es/alimentacion/temas/interprofesionales-y-contratos-agroalimentarios-tipo-/contratos-tipo-agroalimentarios/

In the UK, the development of this type of standard contracts has been typically more limited. Beyond the sugar sector, rivate codes of conduct have been developed to act as framework contracts only in specific sectors, like the dairy industry.[88] Unlike in France and Spain, these codes are not officially sanctioned by the government, so they remain as pure private regulation. However, recent attempts at passing a new Agricultural Bill are evidence that this may change after Brexit.[89] The project of an Agricultural Bill contains a whole section dedicated to the regulation of fairness in agricultural relations. According to the project, the Secretary of State will be granted the power to regulate contractual relationships between farmers and their first purchasers (which, as will be seen later, are excluded from the scope of application of the Groceries Code). Specifically, the project of bill explicitly recognizes the possibility of enacting sector-specific statutory codes where voluntary codes prove insufficient, especially in the dairy sector. This sector-specific statutory codes would be capable of requiring, as in France and Spain, the existence of written-contracts. Additionally, they would be capable of including other obligations shaping the commercial relationship between the two parties.

One of the problems of these agricultural standard contracts is that the retail sector of the chain has not participated in their negotiation. Given the key role played by modern retail in the food chain, their absence represents a big gap in the approach towards fair trading practices along the chain. This gap has prompted the development of codes of conduct addressing certain unfair retail practices in the food supply chain. The UK has been a forerunner in the establishment of codes of conduct regulating the relationship between suppliers and supermarkets. Spain followed suit. In France, early attempts at private regulation met with some resistance. The next section will study in more detail the development of codes of conduct at the national level as an example of the internalization and agentification of disputes. The remainder of the present section will instead look at the role of the European Commission in the promotion of private regulation for the food chain. This is taken to illustrate the central role of negotiations, and the participation of stakeholders, for the anticipation of enforcement against unfair trading practices.

Indeed, the establishment of private/public codes of conduct has received the consistent support of the European Commission over the last decade. This support has been an

[88] Dairy Industry – Code of Best Practice on Contractual Relations, 2012.
[89] Agricultural Bill 2019-2020.

essential part of the efforts of the Commission's High Level Group[90] and the Commission's High Level Forum for the correct functioning of the food supply chain.[91] As part of their negotiation efforts, these working groups brought together representatives of the food industry, member states and civil society to engage in a multi-stakeholder dialogue on the causes, origins and strategies regarding the fight against trading practices in the food supply chain. One of the results of this dialogue was the creation of a list of good practices for the food supply chain.[92] The creation of this list was also a response to the Commission's earlier proposal of developing a set of EU-wide voluntary standard terms[93]. The establishment of this list was significant for two main reasons. First, it served as an inspiration for the reforms of trading rules happening at the member state level. The most significant case is certainly the Italian one, where the list of unfair trading practices was incorporated into the legislation.[94] Second, the list was developed into the EU wide Supply Chain Initiative. As a matter of fact, in January 2013 the HLF endowed the Principles with a new governance structure to be known as the Supply Chain Initiative (SCI).[95] This initiative brought together EU level associations representing the interests of the food and drink industry, food brands, retailers, SMEs and agricultural traders. It was complemented with the creation of a governance group to monitor the evolution of the SCI and promote its implementation at the national level. The main feature of the SCI was to incorporate a voluntary registration system that offered the original seven signatories an alternative mechanism for the resolution of their disputes. However, the SCI lacked the support of key stakeholders like farmers and meat processors who remained unconvinced of the independence and transparency of the dispute resolution system. To overcome this limitation, member states were invited by the European Commission to reinforce the role of public agencies in a move towards 'agentification'.

Together with officially sponsored standardization processes, it is possible to find an increasing number of purely private initiatives chaired by the some of the most important food retailers across Europe. In this regard, the promotion of tripartite arrangements

[90] Commission Decision of 28 April 2008 (2008/359/EC).
[91] Commission Decision of 30 July 2010, OJ C 210/4.
[92] Vertical Relationships in the Food Supply Chain: Principles of Good Practice: http://www.supplychaininitiative.eu/sites/default/files/b2b_principles_of_good_practice_in_the_food_supply_chain.pdf
[93] Commission Decision of 30 July 2010, OJ C 210/4. P 7
[94] See Brugge Study 58.
[95] http://www.supplychaininitiative.eu/

(between producers, processors and retailers) has been welcome as a way to achieve more inclusive contracts with regard to local SMEs. These initiatives respond to the increasing interest of consumers on short supply chains and locally sourced products. This type of arrangement allows farmers to recover the costs of production and retailers to market their products under specific quality conditions.[96] This quality conditions address the inclusiveness and sustainability of the supply chain through the support to local SMEs. Some of these initiatives also emphasize the country origin of the products as a distinctive of their quality, like a retail-made indication of geographical origin. Eataly, for example, presents itself by saying that: 'Our goal is to introduce a new way of distributing high quality agricultural products, inspired by leitmotifs such as sustainability, responsibility and sharing (…) Eataly wants to communicate faces, production methods and stories of people and companies who make the best Italian high quality food and wine. Eataly's brand was born by aggregating a number of small companies operating in the food and wine compartment (…) Since its first opening, Eataly has been able to offer the best artisan products at reasonable prices by creating a direct relation between producers and distributors, and focusing on sustainability, responsibility and sharing'.[97] Carrefour France has also promoted a campaign on Le Savoir-Faire Française, stating that: 'In total, more than 300 food products sold by Carrefour have been produced in France, including all of our water labels, milk, beef, pork, poultry and hamburgers. All of our ready-made pork and beef products – fresh or frozen – are made with French meat. By relying on French companies, we guarantee the quality of our products and support French production'.[98]

4.3. THE INTERNALIZATION OF ENFORCEMENT OR THE RISE OF COMPLIANCE

Anticipation goes hand in hand with the internalization of enforcement. Internalization is used here as a synonym for compliance. It refers to the strategies through which the addressees of the norms assume the responsibility for their implementation, be it by creating independent internal departments within companies and organizations, or else,

[96] European Commission's Agricultural Markets Task Force, Enhancing the position of farmers in the supply chain, Brussels, November 2016. In this study, they mention the German Initiative Tierwohl. Other examples would be Carrefour beef scheme, or the French brand Le Porcilin.
[97] https://www.eataly.net/eu_en/who-we-are/about-eataly/
[98] https://www.carrefour.fr/marques/les-produits-carrefour/engagements/savoir-faire-francais

by outsourcing it to third parties through certification regimes.[99] The rise of compliance is not exclusive of the food sector. It has become especially important in sectors like banking and data protection. In food, compliance has been very important in the enforcement of safety and quality standards.[100] This section reflects on its extension to fair trading relations in the food supply chain. In developing the idea of internalization, special attention is going to be given to the evolution of codes of conduct at the national level and the parallel establishment of internal and public mediation mechanisms. On the one hand, the development of these codes shows the trend towards introducing and creating internal mediation systems which are integrated into the organization of the retailer. These internal mediators act like customer services for suppliers. On the other hand, it will be shown that internal mediation is sometimes complemented by publically-administered mediation systems or by publically-managed arbitration.

Over the last decade, the development of the Commission-sponsored Food Supply Chain initiative at the national level has been used as an opportunity to impose new compliance rules on retailers. In many national models, the development of codes of conduct for retailers has been accompanied by the imposition on retailers of the obligation to designate internal compliance officers to deal with the complaints of their suppliers. For those cases in which the internal handling of complaints is not sufficient to resolve the dispute between two trading parties, most of these codes provide for the establishment of different ADR mechanism. Among this, the figure of public mediators and arbitrators is becoming especially important.

One of the first and most important examples has been the British Code Adjudicator. It is important because its model has had a huge influence in the whole work of the Commission and of the HLF. The early development of the groceries code in the UK is explained by the particularities of the English approach to B2b trading practices. In this regard, the development of private regulation takes place in face of the more limited role of English courts to adjudicate in B2b disputes over unfair practices and the lack of a

[99] See P. Verbruggen 'Private regulatory standards in commercial contracts : questions of compliance', and M. Namysłowska, 'Monitoring compliance with contracts and regulations : between private and public law', in R. Brownsword, R. A. J. van Gestel, and H. W. Micklitz, (eds.) Contract and regulation : a handbook on new methods of law making in private law. (Edward Elgar Publishing, 2017.

[100] An exhaustive research on the matter in P. Verbruggen, T. Havinga, Hybridization of food governance : trends, types and results. (Edward Elgar Publishing, 2017).

specific competition rule addressed at abuses of economic dependence. As a consequence, the regulation of B2b trading practices here has been traditionally characterized by a clear preference for private regulation. In a way, these features of the English system repeat at the European level, where the enforcement of European legislation depends on national courts and where no provision on abuses of economic dependence exists. This may in part explain the influence that the English experience with the Code has had on the development of the new UTPD in the EU.

The origins of the Groceries Code are found in the rapid and intense development of modern retail chains in the UK, which raised many concerns about abuses of buyer power in the 1990s. Between 1999 and 2008, unfair trading practices were the object of several market studies carried out by the old Office of Fair Trade and the Competition Commission (OFT).[101] Following these studies, the creation of a private code of conduct among the main British food retailers was signed in 2001 in the form of the Supermarkets Code.[102] The reports on the performance of the code revealed the skepticism of agricultural producers towards its effectiveness. New pressures and enquiries led to a new market investigation. In 2008, the Competition Commission recommended the creation of a new Grocery Supply Chain Code of Practice (GSCOP) and the establishment of an ombudsman to monitor its effective implementation. The most important change came in 2013,[103] when the government provided the code with statutory footing making it compulsory on the ten biggest British supermarkets.[104] The institutional design of the Adjudicator and its functions will be deal with in the next section. Here the focus is on the contribution of the code and of the adjudicator to the establishment of mediation mechanisms. From this perspective, it is interesting to note that, under the Code, supermarkets commit to creating an internal office to deal with the complaints of their (direct)[105] suppliers. These are called the Code Compliance Officers (CCOs) which are not part of the buying teams of the supermarkets. They are the contact point of

[101] Office of Fair Trading, Competition in retailing (1997); Competition Commission, Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom Cm 4842 October 2000; Office of Fair Trading, The grocery Market: The OFT's reasons for making a reference to the Competition Commission (2006); Competition Commission, Final Report – Groceries Market Investigation, 2008.
[102] The Supermarket Code of Practice, October 2001.
[103] Groceries Code Adjudicator Act 2013.
[104] Tesco, Co-op, Sainsbury's, Marks and Spencer, Asda, Lidl, Morrisons, Aldi, Waitrose and Iceland.
[105] The limitation to direct suppliers was one of the complaints of British farmers. The extension of protection to other suppliers has been an important factor to obtain the support of British farmers to the UTPD.

supermarkets with suppliers and have the obligation of informing suppliers about their rights under the Code. In case of a dispute between one of these retail chains and a supplier, the supplier can bring a complaint to the respective CCO, who is required to find an adequate solution in a given timeframe. The role of the CCO is to find a satisfying solution for the supplier. CCOs are also required to keep the Adjudicator informed of their activities. To this end, CCOs meet quarterly with the Adjudicator to inform her about their activities and about the measures they have taken to improve their relations with suppliers. Only when these informal mechanisms have proved unsuccessful and warnings and recommendations have been ignored, suppliers may start arbitration proceedings with the Adjudicator.[106]

In Spain, mediation was already part of the governance design of contratos-tipos. Their scope, however, is limited to contracts between producers and first purchasers of agricultural products. In the case of commercial relations between suppliers and supermarkets, the English example has proved very influential in the development of a code of conduct in Spain. In 2009, the food industry and the retail sector agreed on a code of conduct on good trading practices. Initially, this code lacked an independent and effective implementation system which made suppliers see it as an ineffective regulatory instrument. In response to this perceived lack of effectiveness, the new Spanish legislation on the food chain established a list of prohibited practices to be sanctioned by a public organism. It thus created the AICA, which has been granted important sanctioning and investigation powers for the governance of the food chain (see next section). Contrary to the English case, administrative enforcement has been more important when dealing with disputes in the food chain. Mediation mechanisms are actively promoted but their role and functions have been developed in a fragmented manner.

Despite the increasing importance of AICA, the Spanish government continued to express its support to private initiatives and it encouraged stakeholders to re-launch the retail code of conduct. Under the new code, the signatories of the code commit to establishing an internal mediator to manage the relations with suppliers – el Defensor del proveedor –. This figure is similar to the English CCOs but their functions have been less developed. When internal mediation fails, signatories to the Code of conduct agree to submit their

[106] Article 2 Groceries Supply Code Adjudicator Act.

disputes to the mediation and arbitration mechanisms provided for by the code. On the one hand, commercial partners may stipulate in their contract an obligation to submit their disputes to any of the mediation mechanisms recognized by the Spanish legislator.[107] The creation of these public mediation systems for the food chain has been slow depend on the support of regional governments.[108] In this way, some regional administrations proved very active in establishing a mediation and arbitration mechanism with the support of local and regional chambers of commerce and traders' associations to mediate in disputes arising within the food supply chain. In 2019 and with the support of the Ministry of Agriculture, new rules on arbitration and mediation procedures in the food chain have been published in March 2019.[109] On the other hand, the 2013 Food Chain Act opened the door to a national mediation mechanism within the ministry of agriculture for collective disputes over the Code. This is the Comissión de Seguimiento, an administrative body which is composed by representatives of producers, the processing industry and retailers. Its function is to monitor the correct implementation of the code. It has been in functioning since 2017 and, among other things, it is responsible for hearing collective complaints with regard to the practices of the code of conduct. If a supermarket is found to engage in unfair trading practices, the Comisión de Seguimiento will publish an opinion declaring the practices of the supermarket contrary to the code. However, these provisions have not been further developed by the rules establishing the creation of the Comisión de Seguimineto and its role remains very limited in practice.

In France, the development of compliance and mediation approaches has been slower. A possible explanation for this is the stronger role that the public administration has traditionally played from the beginning in the fight against restrictive practices through the DGCCRF. The first shift towards internalization came with the proposal for the creation of a public mediation system. Originally, this function was to be carried out by the CEPC (Commission d'examen de pratiques restrictives), which was established as a public consultation body on unfair trading practices in 2000.[110] However, the proposal

[107] Ley 5/2012, de mediación de asuntos civiles y mercantiles.
[108] This fragmented approach has been confirmed by the Spanish constitutional court, in Sentencia 66/2017, de 25 de mayo de 2017.
[109] These rules have been developed by the Chamber of Commerce of Valencia and the European Association of Arbitration.
[110] J.-Y. Le Déaut, Rapport d'information n°2072 sur l'évolution de la distribution, 11 January 2000, Présidence de l'Assemblée Nationale, available at http://www.assemblee-nationale.fr/rap-info/i2072-1.asp. Accessed 10 September 2018.

to transform the CEOC into a public mediator failed. Instead, the CEPC was given a different role: to act as a public consultation body composed by representatives of the administration, the private sector and academia. Even if it lacked any competence for the resolution of conflicts, its role has been very important because its recommendations carry considerable weight in the decisions of courts. The next section provides more information on its functioning and composition. Despite this first failure of establishing a system of public mediation, the idea of a public mediation platform in France was recovered with the creation of the Médiateur Inter-entreprise and a Médiateur des marches publics.[111] The two have merged into the Médiateur des entreprises in 2016.[112] This médiateur acts a public network of mediators for the whole industry (not only food), and it is integrated by civil servants, academics and representatives of the industry. This network of mediators operates on the basis of a code of conduct approved in 2010.[113] . The code is called Charte des Relations Fournisseurs Responsables. It includes ten principles of good commercial conduct, similar to the ones present in the SCI. In 2013, the Charte was transformed into a label on responsible supply.[114] Companies participating in the label agree to adhere to an independent system of certification. [115] In this case, compliance is outsourced to four auditing companies. The scope of this label is not limited to food, even if it is complemented with a specific label on the food sector. The most interesting part is that the development of this label had a direct influence of the creation of an ISO standard on sustainable supply with the support of the French government.

Together with a general framework against UTPS, France also counts with special agencies and mediators for agricultural markets. For example, the food sector has developed its own specialized system of public mediation dependent on the Ministry of Agriculture and its own label.[116] The minister of agriculture nominates a Médiateur des

[111] Conclusions des États Généraux de l'Industrie, 4 mars 2010, available at http://www.cgpme.fr/upload/docs/10-03-04Dossier_de_presse_EGI.pdf. Accessed 10 September 2018.
[112] See Décret du 14 janvier 2016 portant à la nomination du médiateur des entreprises.
[113] At the same time, the French label has been the basis for the publication of ISO 26000, an international guideline for sustainable procurement.
[114] The label can be consulted in http://www.rfar.fr/label-relations-fournisseurs-achats-responsables/. Accessed 10 September 2018.
[115] Until 2010, the agreed certifiers are AFNOR Certification, ASEA, Bureau Veritas Certification, ICMS, RSE France and SGS ICS, by virtue of an agreement between the governmental Médiateur and the representatives of the industry through their Conseil National des Achats.
[116] It can be consulted at http://www.rfar.fr/fili%C3%A8re-agroalimentaire/

relations commerciales agricoles,[117] who is responsible for negotiating with supermarkets the adherence to the label. One of the obligations contained in the label relates precisely to the establishment of internal mediation mechanisms to solve disputes with suppliers, -these mediators are informally known as Monsieur PME -.[118] They are appointed by virtue of an agreement between the public mediator and the respective supermarket. Recourse to the mediation provided for by the Médiateur des relations commerciales agricoles is made compulsory as a condition to bring a commercial complaint before court, unless the parties have agreed on a different mediation or arbitration mechanism.

4.4. THE AGENTIFICATION OF ENFORCEMENT

The anticipation and internalization of enforcement by recourse to contracts has been carried out in parallel to the reinforcement of the role public agencies. This has been seen as an opportunity to provide guarantees of independent enforcement in relation to private regulatory initiatives and to ensure the transparency of price-formation along the supply chain. This trend fully expresses the complementary character of the enforcement of B2b trading practices rules. Again, the role of the Commission has been one of support and promotion. In a first moment, the Commission, through the HLF, allowed for considerable leeway for member states to restructure their public authorities in accordance with their own national context. Some member states reacted by strengthening the sanctioning and investigation powers of their administrative agencies. In other cases, some member states extended and redefined the functions of these agencies to allow a greater space for the escalation of their regulatory response. In this sense, agencies like the British Code Adjudicator or the Spanish AICA can mediate or arbitrate private disputes and act in defense on transparency in the food supply chain. With the publication of the proposal for an UTPD, the Commission seemed to be building in this national experience by imposing certain minimum conditions with regard to the enforcement powers of national authorities and without prejudice to the establishment of

[117] The role of this mediator has been reinforced with the Loi n° 2018-938 du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous.

[118] See Circulaire du Ministère de L'Agriculture et de L'Alimentation, 8 Décembre 2017, Réseau des médiateurs internes, available at: http://agriculture.gouv.fr/telecharger/88211?token=59aee4f5a85c973d949224d67f23db32. Accessed 10 September 2018.

mediation and arbitration mechanisms. Like this, the new rules on UTPs seemed to confirm the need for complementarity in their enforcement.

The present section looks at the evolution of these agencies in the member states, with a focus on their structure and composition, their functions and their procedures. It will be shown that countries like France and Spain have created several agencies over the last years which are put in charge of complementary functions. In these countries, there is a central agency which is endowed with broad investigation and sanctioning powers. This agency carries out the bulk of ex-post modalities of enforcement. At the same time, other agencies have been established to carry out monitoring and reporting functions on the food supply chain. The case of the UK is slightly different in this respect. Even if the Groceries Code Adjudicator has also the power to investigate and sanction supermarkets, most of its activities have centered around reporting on and mediating in the relations between supermarkets and their suppliers. The differences shown by the evolving role of traditional agricultural marketing boards – under the discipline of competition law - across the three countries is also considered here as they have traditionally played an important role in contributing to the transparency of market conditions.

In the case of France, the enforcement framework against unfair trading practices has been traditionally marked by a very strong public character. The evolution of public agencies and bodies in the governance of trading relations has resulted in a complex scenario, where different agencies and bodies carry out complementary– but potentially overlapping – functions. This public framework for enforcement is divided in a general branch and a sectorial one, specialized on agricultural products. The two most important agencies within the general branch are the DGCCRF and the CEPC. They share the power to carry out investigations and receive complaints. The DGCCRF can also intervene by starting a judicial procedure or by directly sanctioning certain practices, such as delayed payments. Additionally, the French competition authority has also the power to carry out investigations on restrictive practices. Together with this general branch of enforcement, the French government has reinforced the presence of public authorities in agricultural markets. In this sectorial branch, the French government has created the public mediator for agricultural relations and a public observatory of agricultural prices.

The DGCCRF is without doubt the central piece in the enforcement of the French legislation on restrictive practices. Its origins go back in time to the reform of the national competition system of 1986.[119] With this reform, the DGCCRF became a key agent in the French enforcement environment with a double role: on the one hand, it acts as a public prosecutor in B2b trading disputes; on the other hand, it can directly investigate and sanction certain practices – delayed payments, especially – as a public enforcer. In its capacity as 'public prosecutor', the DGCCRF is authorized to bring up cases in court over the existence of 'restrictive practices'. It will initiate judicial proceedings of its own accord, be it on the basis of previously defined priorities or at the request of the CEPC and the national competition authority. In its investigations, it is authorized to receive confidential claims from private parties, including collective associations of producers and traders. The action of the DGCCRF before the courts is defined autonomously from the contractual relationship between the two parties because the DGCCRF is understood to act in defense of the public economic order. The object of its action is multiple: it can introduce an injunction against the buyers to refrain from using restrictive practices in their commercial relations; it can also serve to obtain a declaration of nullity of the illicit contractual terms and the restitution of the transferred values; finally, it can also serve to request that the Court impose a civil fine on the infringer of up to €5M.[120] As a direct public enforcer, its sanctioning powers have been continuously reinforced over the years, especially against delayed payments and other 'unfair' practices.[121] In these cases, it is authorized to directly impose important administrative fines on retailers.

The role of the DGCCRF is complemented by that of the CEPC.[122] The figure of the Commission D'Examen des Practiques Commerciales (CEPC) was first introduced in 2001 with the mission of carrying out independent consultations on the incidence of B2b UTPs across different sectors. Due to its eclectic composition, it has been considered to be an 'autorité de régulation profesionelle'.[123] The members of this Commission are

[119] Ord. n°86-1243 du 1er décembre 1986 relative à la liberté des prix et à la concurrence.
[120] Art. 442-4-I Code de Commerce (as modified by Ordonnance n°2019-359 du 24 avril 2019 - art. 2).
[121] Some of the most important reforms have been the ones carried out by loi n°96-588 du 1er juillet 1996 sur la loyauté et l'équilibre des relations comerciales; Ord. n°2000-912 du 18 septembre 2000 relative à la partie législative du Code de commerce; Loi n°2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques; Loi n°2005-882 du 2 août 2005 en faveur des petites et moyennes entreprises; Loi n°2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs; Loi n°2008-776 du 4 août 2008 de modernisation de l'économie; Loi n°2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche; Loi n°2014-344 du 17 mars 2014 relative à la consommation.
[122] Regulated in art. 440-1 Code de Commerce.
[123] D. Guevel, 'Quelques aspects de la loi «NRE» en matière de concurrence' (2002) 30 Gaz. Pal.

representatives of the French senate and parliament, the judiciary, the public administration, academia and the private sector.[124] The main function of the CEPC is to issue opinions and recommendations over every issue regarding commercial practices. It does so at the request of courts, administrative bodies, and private parties, including professional organizations. It can also act on its own initiative. As part of its mission, the CEPC counts with ample investigation powers. It can access documents of a commercial or advertising nature, confidential bills and contracts, and it can receive confidential complaints from suppliers. Together with this consultation function, the CEPC also acts as an observatory of commercial practices and is responsible for the elaboration of an annual public report on enforcement activities against UTPs. In exercise of this function, it publishes every year a detailed analysis of the number and type of infractions sanctioned in civil, criminal and administrative proceedings.[125]

The general branch of public enforcement against restrictive practices is complemented by other sectorial bodies. In the case of agricultural markets, it is worth mentioning two agencies contributing to the transparency of agricultural markets. The previous section already dealt with the figure of the 'Médiateur des relations commerciales agricoles'. Together with its role as public mediator, its reports and publications are also intended to contribute to the transparency of agricultural markets. In this capacity, it has recently established an Observatory of Commercial Practices, which builds on the activities of a group work constituted by the public mediator and the main representatives of the agricultural sector in France.

In the agricultural market, it is also important to mention the role of the *Observatoire de la Formation des Prix et des Marges de Produits Agricoles*.[126] The *Observatoire* acts as a consultative public body attached to the Ministry of Agriculture.[127] It plays an important role in relation to the transparent formation of prices in agricultural markets, where it

[124] Loi n°2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques.
[125] The CEPC is assisted in this task by the DGCCRF, which makes available a yearly report of its activities. Also, it counts with the collaboration of academic staff in the University of Montpellier, which publishes a report concerning the decisions reached on commercial practices by civil and commercial courts. University of Montpellier et DGCCRF, Études de jurisprudence, Available at: https://www.economie.gouv.fr/cepc/etudes-jurisprudence
[126] Created by loi n°2010-874 du 27 juillet 2010 de modernisation de l'agriculture et de la pêche (LMAP).
[127] Its regulation is contained in arts L682-1 and L 621-8 of the Rural Code.

builds on the work of FranceAgriMer. FranceAgriMer is an institution created in 2009.[128] It brings together different inter-professional associations of French agricultural producers in the effort to re-organize French food supply chains. It completes the picture of the French agencies contributing to the governance of the chain. As regards its nature, it is considered a public body *'à gouvernance professionelle'* not attached to any specific ministry. Its main organs are made up of representatives of the industry, even if the French government maintains a certain presence. Among its functions, it manages the European agricultural guarantee funds, it encourages exports and publishes reports on the functioning of food supply chains, including on the evolution of food prices.

In Spain, the role of the administration in the fight against unfair trading practices has been traditionally more limited. This is evidenced by the fact that the creation of a public agency with competences over the food supply chain happened relatively late. Until the introduction of the new legislation on the food supply chain in 2013, the most important enforcement activities were the ones carried out by regional agencies in relation to the legislation on the retail sector. This legislation mainly prosecutes payment delays and certain forms of sales promotions, such as sales below cost.[129] Its scope is therefore much more limited in comparison to the French commercial code. However, increasing concerns over UTPs in the food supply chain questioned the effectiveness of this system which was too much dependent on the political priorities of regional governments. In response to these concerns, the Spanish legislature passed a state-wide legislation on the food supply chain in 2013.[130] The main objective of this legislation was to tackle the lack of administrative and judicial enforcement by reinforcing the rules against unfair trading practices and creating a centralized agency in charge of enforcement. Consequently, the new law established an exhaustive list of prohibited UTPs against SMEs in the chain and created a new agency for enforcement purposes within the Ministry of Agriculture, the Agencia para la Información y Control Alimentarios (AICA). This agency is put in charge

[128] Ordonnance nº 2009-325 du 25 mars 2009 créant l'Établissement national des produits de l'agriculture et de la mer (FranceAgriMer) et l'Agence de Services et de Paiement.
[129] The Spanish general prohibition on sales below cost has been declared contrary to EU law on unfair comercial practices. See Case C-295/16, 19 October 2017, Europamur Alimentacion SA, ECLI:EU:C:2017:782. Consequently, this rule has been modified by R.D.-ley 20/2018, de 7 de diciembre, de medidas urgentes para el impulso de la competitividad económica en el sector de la industria y el comercio en España.
[130] Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria.

of the investigation and sanction of unfair trading practices in the food supply chain. In this manner, the AICA is authorized to receive confidential complaints from suppliers and from their associations. It can also initiate administrative proceedings of its own accord. In case an infringement is found, its fines can reach € 1 million. Together with its activities in the investigation and sanction of UTPs, the AICA has been trusted with an important reporting function. In this capacity, it publishes yearly reports of its activities and comparative studies on the evolution of UTP enforcement across Europe. Moreover, it is also responsible for managing a market observatory for specific products (milk, oil and wine), with the objective of managing the available information on these markets concerning origin, volumes, destinations, excess supply, etc.). As a matter of fact, this observatory pre-existed the creation of AICA so it provided an institutional basis for the new activities of AICA when this is created. Following a complaint by the Catalan government, the Constitutional court has limited the territorial scope of the enforcement powers of AICA, which are to be shared with regional authorities for the food chain.[131]

Together with AICA, there other public bodies entrusted with reporting on different aspects of agricultural markets. Here it is possible to find national and regional 'observatorios de precios', which provide information on the evolution of prices of different agricultural sectors. This is the case of the national 'Observatorio de precios de los Alimentos',[132] which was transformed into the new Observatorio de la Cadena Alimentaria in 2013. It is composed by representatives of the administration and of all sectors of the industry. Among its functions, it publishes periodical reports on the evolution of prices of different agricultural markets. In a way, this observatories can be compared to the French observatoire. Like in France, they depend to a great extent on the work of the so-called lonjas or alóndigas, which function like inter-professional associations of producers that provide support for wholesale food markets. These bodies are attached to regional and provincial chambers of commerce and are composed by representatives of the different levels of specific supply chains (inter-professional associations). Contrary to what happens in France, they continue to function independently from regional governments and have not been integrated into a centralized

[131] STC 66/2017, de 1 de julio.
[132] Established by Real Decreto 509/2000, de 14 de abril, por el que se crea el Observatorio de Precios de los alimentos.

administrative institution. To this day, they play an important role in relation to the transparency of price formation in agricultural markets.

The British case offers further illustration of the emerging role of public agencies, albeit within a very different institutional framework. The case of the Groceries Code Adjudicator stands out because its role has been conceived as closer to that of a mediator and advisor in B2b practices. While it can act as an arbitrator, its work reflects a more collaborative approach in relation to the retailers bound by the Code. In the first place, the Adjudicator can launch investigations when it suspects that a retailer may be in breach of its obligations under the Code. So far, the Adjudicator has only launched two major investigations against Tesco and Co-op. Like other public agencies, the Adjudicator can receive confidential claims from suppliers and it can require retailers to supply documents and any relevant information. If the Adjudicator finds a breach of the Code, it can opt between three different courses of action. First, it can make recommendations for the retailer and require the retailer to present an implementation plan. Second, it can require certain information to be published. Third, since 2015, it can impose financial penalties on the retailer.[133] To this day, the Adjudicator has issued no fines. However, it can require retailers to finance the cost of the investigation.[134]

Additionally, the Adjudicator can act as an arbitrator in disputes between suppliers and retailers.[135] If a supplier wishes to start an arbitration procedure, they need to escalate their dispute through the Code Compliance Officer. This means that the supplier needs to address its complaint at the Code Compliance Officer (CCO) – or internal mediator - of the respective retailer. If the retailer and supplier are unable to solve their dispute within a given timeframe, the supplier may request arbitration from the Adjudicator. In this case, the Adjudicator is required to arbitrate or to appoint an arbitrator. In the case of retailers, the route to arbitration is different. Retailers will be only capable to request arbitration if a clause in this sense exists in the supply contract. In this case, the Adjudicator is not

[133] The GCA power to fine a retailer up to 1% of its UK turnover came into force on 6 April 2015.
[134] Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/511676/GCA_Statutory_Guidance_updated_March_2016.pdf
[135] GCA Arbitration Policy, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708679/GCA_Arbitration_Policy_January_2017.pdf

obliged to intervene as an arbitrator. According to its 2018/2019 report, the Adjudicator had closed only two arbitration by June 2019.[136]

In general, the Adjudicator will support a more informal and collaborative approach towards disputes. This system reflects the preference for an enforcement system susceptible of earlier and broader gradation in comparison to the systems in force in France and Spain. As a result, the bulk of the Adjudicator's activities is addressed at improving the transparency and fairness of trading practices along the supply chain. To this effect, it publishes numerous case studies and guides on good commercial practices which are the result of its conversations with suppliers and retailers. It also carries out training sessions for suppliers, in the UK and abroad,[137] to improve their reliance on the code. It publishes its reports on its website and has its own YouTube channel.

A final word can be added on the Agriculture and Horticulture Development Board (AHDB) in England. This board is a levy board funded by farmers and producers with the status of a non-departmental public body. It was created by virtue of the Natural Environment and Rural Communities Act 2006 by bringing together similar pre-existing organizations that were also levy-funded. Another name for this type of institutions are quangos (quasi-autonomous non-governmental organisations). Like in France or Spain, they play an important role in the dissemination of information regarding the prices and trading conditions of agricultural markets.

5. ENFORCEMENT UNDER THE UTPD

The four transformations of enforcement that have been described above – collective judicial enforcement, anticipation, internalization and agentification – are very much like the transformations occurring in other policy fields.[138] The case of consumer law

[136] GCA Annual Report and Accounts 2018/2019, available at https://www.gov.uk/government/publications/2018-to-2019-gca-annual-report-and-accounts/gca-annual-report-and-accounts-20182019

[137] A word on overseas suppliers. The effectiveness of the code in cross-border relations depends on the retailers communicating their rights under the code to suppliers. The report of the adjudicator suggests that the level of awareness is low among overseas suppliers. For this reason, the Adjudicator has committed to organizing meetings with overseas suppliers. To this day, the Adjudicator has met once with with Spanish fruit exporters of the region of Murcia (fruits and vegetables) represented by Proexport.

[138] A complete account of the ongoing transformation of private law is described in H-W. Micklitz, A. Wechsler, eds. The Transformation of Enforcement: European Economic Law in a Global Perspective (Bloomsbury Publishing, 2016).

enforcement in the EU has been paradigmatic in this sense. Over the last twenty years, the EU legislator has progressively gained new competences in the design of enforcement of EU consumer law through the regulation of European injunctions and the establishment of a network of public enforcers. This evolution has been usually understood as the response of the EU legislator to the limitation of its enforcement powers under the principle of procedural autonomy of the member states. In what follows, the present section will trace in general lines the evolution of enforcement in EU consumer law. Special attention is given to the establishment of a network of public agencies aimed at coordinating enforcement in cross-border disputes. The exercise shows the extent to which the experience of consumer law enforcement has inspired the design of the new UTPD. The elements of the enforcement design provided for by the new directive will be analyzed in turn.

5.1.THE BACKGROUND OF EU CONSUMER LAW ENFORCEMENT

According to the conventional approach to the enforcement of consumer law, the rights of European consumers are defined by EU law and the available remedies are determined by national law. The disconnect between substantive and remedial aspects of EU consumer law is a consequence of the principle of procedural autonomy.[139] However, this situation would soon raise concerns over the effectiveness of the legislative reforms introduced by EU consumer law. In the face of the fragmented patchwork of national enforcement strategies, the EU legislator has followed different strategies to constrain the procedural autonomy of member states. As a consequence, the evolution of enforcement in consumer law has happened in three main fronts: the interest in collective enforcement, the harmonization of injunctions at the European level and the coordination of agencies in cross-border disputes. Each of these fronts will be briefly dealt with in the following lines insofar as they shed light on the enforcement design provided for by the new UTPD. Special attention will be given to the establishment of instruments for the resolution of cross-border disputes.

[139] F. Cafaggi and P. Iamiceli, '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' (2017) 25 European Review of Private Law 3, 575.

First, the need for collective action in B2b cross-border disputes is very much linked to the availability of group actions in European consumer law. With the support of EU institutions, there has been a steady trend towards the collectivization of consumer disputes over the last decades.[140] The situation of collective redress, however, varies a lot from country to country and there are questions about the effectiveness of a cross-border collective redress mechanism. The last step in this field has been the New Deal for Consumers.[141] How has this trend influence the Commission's approach to the governance of B2b practices? As the European Commission revises its approach to the enforcement of consumer law, the UTPD has come to underline the importance of collective action in B2b disputes by allowing associations of producers and suppliers to submit complaints at the request of its members and in the interest of those producers and suppliers (art. 5.2). In this respect, it is a step towards the further collectivization of B2b disputes which goes in parallel to the promotion of producers' associations under the CMO regime (see chapter 5).

Second, another issue to bear in mind in the enforcement design of B2c or B2b rules is the availability of European remedies. In this respect, injunctions in EU consumer law are the only remedy considered to be harmonized at the EU level.[142] Since Directive 84/450/ECC on Misleading Advertising, injunctions are at the core of consumer law enforcement. They are present in two major fields of EU consumer law, including unfair commercial practices (UCPD 2005) and unfair terms (UCTD 1996). The main features of the European injunction mechanism were first harmonized with Directive 98/27/EC, now replaced by Directive 2009/22/EC. Contrary to injunctions, damages or the sanction of contractual invalidity continue to be mostly regulated at the level of member states. This assertion, of course, needs to be nuanced. On the one hand, the Directive on damages in antitrust has introduced some common rules in the field of private enforcement of

[140] See, in general, the concluding chapter in F. Cafaggi and H. W. Micklitz, New frontiers of consumer protection: the interplay between private and public enforcement (Intersentia, 2009).
[141] Communication from the Commission, A New Deal for Consumers, COM/2018/0183 final. As part of this plan, the Commission presented two proposals. One on a European Representative Action (Proposal for a Directive on representative actions for the protection of the collective interests of consumers, COM/2018/0184 final - 2018/089 (COD)). The other one on better enforcement and modernization (COM/2018/0185 final - 2018/090 (COD)). The latter one has been recently adopted as Directive (EU) 2019/2161, as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328/7.
[142] F. Cafaggi and H. W. Micklitz, New frontiers of consumer protection: the interplay between private and public enforcement (Intersentia, 2009), 414ff.

competition law.[143] On the other hand, despite the predominance of the national legislator and judiciary in the design of remedies in consumer law, the scholarship has pointed out how the principles of effectiveness, proportionality and dissuasiveness as interpreted by the CJEU have considerably contributed to curtail the procedural autonomy of member states.[144] Consequently, the judicial dialogue between national courts and the CJEU also shapes the 'configuration, choice and functions of civil remedies' in consumer law.

Finally, one of the concerns in the enforcement of consumer law has been its cross-border dimension. The response to the lack of cross-border enforcement of consumer law has been linked to the increasing role of the administration.[145] Regulation 2006/2004 on trans-border cooperation in consumer law, now replaced by Regulation 2017/2394,[146] was a milestone in this direction[147] It establishes a network of European authorities in charge of the enforcement of consumer law. This regulation develops the investigation powers of national authorities responsible for the enforcement of consumer law. These include on-site inspections and access to documents. The regulation also imposes on the members of the networks a series of obligations of mutual assistance through liaison offices, including the exchange of information, requests for cross-border enforcement and the duty to coordinate market surveillance and enforcement activities. It also foresees the creation of a database to be managed by the Commission on enforcement activities.

5.2.ENFORCEMENT DESIGN UNDER THE UTPD

Many of the elements that have shaped the enforcement of consumer law in the EU over the last decades reappear in the discussion of enforcement in the food supply chain. This

[143] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.
[144] F. Cafaggi and P. Iamiceli, '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' (2017) 25 European Review of Private Law 3, 575.
[145] F. Cafaggi and H. W. Micklitz, New frontiers of consumer protection: the interplay between private and public enforcement (Intersentia, 2009), 414ff.
[146] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws OJ L 345/1.
[147] It was preceded by Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166/51. The purpose of this Directive was mainly to promote private enforcement of consumer law through consumer associations. Its success in facilitating cross-border litigation was nevertheless limited, in part due to the underdevelopment of consumer organizations at the time.

can be shown by the analysis of the structure of the UTPD with regard to the enforcement of unfair trading practices law. In this regard, the enforcement design of the directive is marked by the following elements: the definition of enforcement authorities, the definitions of minimum standards for their functioning, the design of remedies under the directive, the introduction of collective and confidential complaints, the establishment of a cross-border cooperation instrument and complementarity with ADR instruments.

Article 4 of the UTPD requires member states to designate one or more competent enforcement authority and to inform the Commission of their choice. If the member state opts for establishing more than one enforcement authority within its territory, it needs to designate a contact point to ensure cooperation with the Commission and other national authorities. The nature of these enforcement authorities is broadly defined as any 'national, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law'.[148]

The UTPD establishes a series of minimum requirements regarding the powers of national competent authorities. First, they are endowed with important investigation powers (art. 6). These powers include their capacity to initiate investigations of their own accord or on the basis of a complaint; the power to require businesses to provide all necessary information; and the power to carry out unannounced on-site inspections (art. 6.1.a and art. 6.1.b). Second, they can also impose sanctions on infringers, including fines and other equally effective penalties and interim measures (art. 6.1.d). Third, they have the power to publish its decisions finding and infringement or ordering the infringer to put an end to the prohibited practice (art. 6.1.f).

As regards the remedies introduced by the UTPD against UTPs, the directive endows national competent authorities with the power to take decisions finding an infringement and requiring the buyer to bring the prohibited trading practice to an end (art. 6.1.c). Unlike the Parliament's amendments to the original proposal, the final directive does not refer to the possibility of the enforcement authority to arrange for compensation of damages when the complainant is confidential. In this regard, the Directive is closer to

[148] Article 2 UTPD.

the enforcement dispositions of the UCPD than to the remedies provided for by the UCTD. The former allowed member states to opt between an order of cessation or an order of prohibition against unfair commercial practices (art. 11.2). According to the latter, member states were required to ensure that unfair terms are non-binding on consumers. However, non-bindingness is not a remedy under the UTPD. Finally, the directive reminds that the enforcement measures of the national authorities shall be subject to the principles of effectiveness, proportionality and dissuasiveness (art. 6.II).

Additionally, the enforcement activities of national competent authorities will be complementary to ADR mechanisms. In this regard, the Directive allows member states to promote the use of mediation as a mechanism to solve disputes in the food supply chain.

One of the most innovative elements of the new Directive is its approach to the complaints to be introduced before the national competent authorities (art. 5). First, the directive establishes the principle to determine the competent jurisdiction (art. 5.1): complaints can be introduced before the competent authority of the country where the supplier or the buyer are established. The competent authority will be the one to receive the complaint. Second, the Directive allows for the use of collective complaints, either by associations of suppliers, producers and their organizations at the request of one or more of their members, or else, by associations with a legitimate interest in the protection of suppliers, at the request of at least a supplier and in the interest of this supplier (art. 5.2). Third, the directive introduces a series of rules regarding the confidentiality of the complaints. Member states shall take all necessary measures to ensure the anonymity of the complainant and of the information that the complainant identifies as especially sensitive (art. 5.3).

Another important element introduced by the UTPD is the enforcement design of unfair trading laws in B2b relations is the establishment of cooperation obligations across national competent authorities. According to the text of the proposal amended by the Parliament, cooperation was to be coordinated by means of a full-blown European enforcement network in the image of the one existing in consumer enforcement or

European competition law.[149] More specifically, the text of the Parliament included rules regarding the composition and functions of this Network. It would have been composed by representatives of the competent authorities and the Commission and it would have involved relevant stakeholders in its discussions. Among its functions, the text of the Parliament included the celebration of regular meetings for the exchange of information, the elaboration of guidelines and the organization of training sessions for market players. However, the final text has opted for the introduction of less formal cooperation duties. Instead, the current directive briefly states the cooperation duties across the competent authorities (Art. (8.1)). These duties include the celebration of yearly meetings and the elaboration of annual reports. During these meetings, national authorities are expected to exchange information on best practices, new cases and developments, as well as on the implementing measures they have taken. On the basis of this information, they may adopt recommendations to improve the consistent implementation of the Directive (art. 8.2.). Finally, the Commission will manage a website to facilitate the exchange of information and the contact duties of national competent authorities (Art. 8.3).

The analysis of the main elements of the Directive with regard to enforcement suggest that the text of the UTPD has been very much inspired by Regulation 2006/2004. In some respects, it includes certain novelties. This is especially the case for the detail with which the confidentiality of complaints is regulated. The explanation for this can be found in the importance that discussions over the fear factor have had during the whole legislative process leading to the UTPD. In other aspects, the UTPD does not go as far as Regulation 2006/2004. Evidence of this is the little development of the cooperation duties of national competent authorities. Nevertheless, it is clear that the UTPD builds on the experience of the EU legislator with the cross-border enforcement of consumer law. In a way, this brings the UTPD even more away from a substantive approach to B2b unfair trading practices. This is also shown in the choice of remedies. The UTPD provides for the establishment of an injunction against unfair trading practices. This is even if, as it will be shown in the next section, many of the UTPs listed by the directive bear more resemblance to the list of unfair contract terms under the UCTD. However, the UTPD does not provide for the non-bindingness of unfair terms in B2b relations. Ultimately, these aspects reinforce the idea that the regulation of UTPs in the EU has followed more

[149] Y. Svetiev, 'The EU's Private Law in the Regulated Sectors: Competitive Market Handmaiden or Institutional Platform?' (2016) 22 European Law Journal 659.

of an enforcement-based approach to B2b trading relations, which fits with the importance of procedural aspects in the cross-border reality of supply chains. It remains to be seen how the predominance of enforcement affects the capacity of the CJEU to flesh out the principles of effectiveness, proportionality and dissuasiveness in the regulation of B2b practices. This would require a certain degree of judicial activism which is at odds with the trend towards internalization and agentification embodied by the Directive.

Some final words to conclude this chapter. The publication of the UTPD does not put an end to the experiment in the governance of trading relations in the food chain. Rather, it reinforces the constitutive elements necessary for the experiment to continue by creating a new space for recursive deliberation within the European network of enforcers. In some way, this network is to continue the work of the Commission's High Level Groups that led to the modernization of national regulatory frameworks on UTPs. However, experimentalism poses other risks as a governance instrument in private law. Its functionalist problem-solving approach hides the political and redistributive reality of regulation.[150] Seen from this perspective, a model of governance that lacks its own substantive content brings about the risk of reinforcing previously existing inequalities. In the case of B2b relations these are inequalities between big retailers vis-a-vis their suppliers and smaller competitors. For this reason,[151] it is worth considering next what the content of the new unfair trading practices in the EU is. The key question is whether the enforcement-based model of UTPs, with its experimentalist features, provides for the possibility of 'substantive deliberation' with the purpose of guaranteeing certain safeguards in favor of weaker economic players (*ultimum remedium*).[152]

[150] M. Bartl, 'Internal market rationality: In the way of re-imagining the future' (2018) 24 European Law Journal' 1, 99-115, 113.
[151] V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective' (Tilburg Law School Legal Studies Research Paper Series No. 8/2017), 14.
[152] ibid 12.

CHAPTER 5

THE SUBSTANTIVE DIMENSION OF B2B FAIR TRADING

In this chapter, I reflect on the impact of the evolving institutional framework on the substance of B2b trading regulations. The key issue is whether an enforcement-based implies a radical substantive change of approach to the regulation of trading practices in the supply chain. In this sense, substance comes after procedure. (1). First, this chapter will look at the national approaches to power imbalances in B2b contracts (2), across France (2.1), the UK (2.2.) and Spain (2.3.). Second, it will look at the emerging European model of business law (3). This model emerges from competition law (3.1.) and also from the notion of fairness as developed in EU private law (3.2.). The last section of the chapter deals with the Unfair Trading Practices Directive as the last landmark of European business law (4).

1. FROM ENFORCEMENT TO SUBSTANCE: A SAFETY VALVE?

Experimentalist governance is consistent with the enforcement-based model of EU B2b trading rules. It allows the EU to address the problems of decision-making in the context of the global value chain, which is marked by the fundamental lack of agreement about the goals of regulation (uncertainty) and by the multiplicity of standard-setting and enforcement levels (polyarchy).[1] Experimentalism captures well the features of the EU's approach to B2b trading practices, which has been marked by its attention to enforcement and its relative disregard for the need to establish substantive rules at the EU level. However, acknowledging the experimental features of the EU's approach to B2b trading practices does not do away with the issue of determining how the experimental architecture favors a specific substantive approach to B2b practices. More especially, it is still necessary to ask whether the EU's enforcement approach to B2b trading practices is capable of providing a safety valve for the system (*ultimum remedium).*[2]

Substance here refers to the requirements that trading regulations, in general, impose on the content of B2b trading practices and contracts. From the perspective of the present analysis, it is important to draw a difference between those rules that target directly the content of bilateral contractual relationships from those other rules that target the effects of a contract on the market, imposing indirect requirements on the content of the contracts. These differences traditionally follow the distinction between contractual and competition approaches to B2b trading relations. Traditionally, national private laws on B2b relationships address the rights of parties to a bilateral contract and provide them with a specific set of remedies to be realized through the enforcement procedures in place. These rights are expressed in multiple ways in national legislations, be it through a general clause of fair dealing in contract law or through a list of information duties or lists of specific prohibited practices in national legislation on commercial practices. At the same time, some of these rules have a procedural nature and address the conditions to be met for the conclusion of the contract; other rules address the content of the contract in terms of the values it should express, like the type of balance to be achieved between the

[1] C. F. Sabel and J. Zeitlin, 'Learning from difference: The new architecture of experimentalist governance in the EU' (2008) 14 European Law Journal 3, 271, esp. at 280, 305.
[2] V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective', (Tilburg PL Working Paper Series No 05/2017), 12.

rights and obligations of the parties.[3] Additionally, other systems permit enforcement authorities to police the content of B2b contracts in relation to their effects on the market. For example, these rules may result in specific time or quantity limitations to exclusivity agreements in bilateral contracts. Every legal system offers a different mix of these rules. The different combinations and the preference for certain types of rules over others express the national preferences which are embedded in the private laws of member states.[4]

This chapter looks first at the substantive approach of national regulations of fair trading and then at the specifics of the EU's approach. At the national level, the regulation of substantive issues of B2b trading rules is scattered across competition, trading and contract legislations. For explanatory reasons, this chapter will distinguish three ideal models of trading rules according to the preference expressed by the national system for general contract rules, competition or commercial practices over the rest. In this manner, the French system is presented as one mostly based on B2b commercial practices; the Spanish one as one dependent on general contract law; and the English one, as one dominated by concepts of competition. When it comes to the EU, the development of EU consumer law has cast a shadow over the substantive approach to B2b trading practices. In spite of this, the legal literature has identified a specifically European approach to B2b relationships whose central rules are primarily found in competition rules on vertical relationships.[5] Beyond the rules on vertical agreements, the development of EU consumer law has also facilitated many spillovers from consumer law onto B2b practices. This brings into EU b2b law a more contractual approach. The recent UTPD has become the most important example of this. The question is to what extent the new UTPD represents a new trading regime intended for the global value chain.

[3] From the perspective of consumer law, see T- Willhelmsson and C. Willett, 'Unfair terms and standard form contracts', in I. Ramsay, G. Howells, T. Willhelmsson (eds.), Hansbook of Research on International Consumer Law (2018), 139, 154.
[4] See again from the perspective of consumer law, T. Willhelmsson, 'Varieties of welfarism in European contract law' (2004) 10 European law journal 6, 712-733.
[5] H. W. Micklitz, 'Competitive Contract Law'.

2. THE SUBSTANTIVE APPROACHES TO B2B FAIR TRADING IN THE MEMBER STATES

The regulation of B2b contracts in traditional private laws is achieved through different mechanisms.[6] These mechanisms contribute to defining the rights and obligations of parties in B2b trading relations. For example, some legal systems impose information duties with the purpose of policing the conditions for informed consent when a consumer of a SME is a party to the contract. Other legal systems rely on general clauses of fairness which permit national courts to police the balance between the rights and responsibilities of the parties to a b2b contract. Other countries have also coined a definition of abuse of economic dependence to grant some sort of protection to the weaker party. The different approaches used in the member states reflect national preferences and idiosyncrasies. The preference for a given mechanism or combination varies with the different national contexts.[7] At the same time, these variations are connected to the economic, distributive or social concerns that inform the core of national private law traditions.[8]

These mechanisms are scattered across the different legal bodies governing market behavior, be it competition, commercial practices or contract legislations. Member states usually opt for a combination of the three, where one of the approaches bears special importance in comparison to the other two. Under the three different regimes, national approaches to B2b trading practices are focused either on the content of the bilateral contractual relation or on the effects of the contract on the market. The supply chain dimension is not explicitly acknowledged. This preference for one or the other is shown by the kind of rules that will be most often invoked in B2b conflicts. Based on the predominance of a particular approach, this section distinguishes three models of 'fair trading'.[9] The French model is presented as focused on commercial practices; the Spanish

[6] P. Verbruggen, Enforcing transnational private regulation : a comparative analysis of advertising and food safety. (Edward Elgar, 2014), 80. He gives an example: information duties to achieve the protection of consumers.

[7] G. Comparato, Nationalism and Private Law in Europe, vol. Vol. 45 (Modern Studies in European Law, 2014).

[8] R Condon, 'From 'the law of A and B' to productive learning at the interfaces of contract', in R. Brownsword, R A J van Gestel and H W Micklitz's (eds.), Contract and Regulation: A Handbook on New Methods of Law Making in Private Law (Edgar Elgar, 2017), 178.

[9] The idea of distinguishing models for academic purposes is also present in T. Wilhelmsson, Thomas and C. Willett, 'Unfair terms and standard form contracts.', in I. Ramsay, G. Howells, and T.Wilhelmsson, Handbook of Research on International Consumer Law, (2018), 139,144. While they distinguish a series of models for b2c relationships, they already point out to their possible extension to b2b situations.

one as focused on general contract law; and the English one as focused on competition. Each of these entails different types of rules. For example, a model based on commercial practices is often accompanied by a list of prohibited practices, while a model focus on contract can combine a general clause of good faith or fair dealing with norms on the modes of concluding a contract. At the same time, the different models are also accompanied by partial and overlapping definitions of abuse – i.e. abuse of economic dependence, abuse of dominance, abuse of bargaining power, etc. –. This comparison will prove useful to trace the impact of EU consumer and competition laws on national models of B2b trading regulations.

2.1. FRANCE: COMMERCIAL DISTRIBUTION PRACTICES

The regulation against unfair trading practices in France is mostly based on the prohibition of the French commercial code against 'restrictive practices', which was contained until recently in art. 442-6 CCom.[10] The nature of this article is contested.[11] To better understand its substantive implications, it is important to look at the origins of its rules which are found at the intersection between French competition law and general contract law.[12] French competition law develops from the reform of 1986.[13] This reform put an end to the highly interventionist system that was previously in place.[14] The context in which the reform took place was that of the development of modern distribution systems. The increasing rates of concentration in the retail sector had an important impact on the traditional balance between industry and trade.[15] With the 1986 reform, the French legislator addressed these concerns by introducing a rule against abuses of economic

[10] After the first draft of this thesis was finished, the articles of the Commercial Code on restrictive practices have been modified by Ordonnance n° 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées. One of the main changes has been to reduce the list of 13 unfair practices to the three practices that have been the most important for the development of the case law on UTPs in France. These are, namely, the obtention of manifestly disproportionate advantages, the creation of a situation of economic imbalance and the 'brutal' termination of contracts. References to the old article 442-6 CCom now need to be understood as references to article 442-1 CCom.

[11] Feteira, 'The interplay', 165. Further references: M. Deschamps and R. Poésy, 'Les jeux de procédures en droit français des pratiques anticoncurrentielles' (2013) 27 Revue internationale de droit économique 4, 569-578; C. Lachieze, 'La rupture des relations commerciales à la croisée du droit commun et du droit de la concurrence' (2004) 17 Revue juridique de l'Ouest 4, 457-472.

[12] Feteira, 'The interplay', 173 (and further references in his footnote 203).

[13] Ordonnance no. 86-1243

[14] D. Gerber, Law and competition in twentieth century Europe: protecting Prometheus, (Oxford university Press, 1998), 189-194. Feteira, ' The inteperlay', 165.

[15] Feteira, ' The interplay', 164.

dependence (art. 420-2). The focus of this rule was on the protection of suppliers against a consolidating retail sector.[16] However, the influence of EU competition law limited the effectiveness of the rule because the approach of the French competition authority was dominated by strictly defined market parameters.[17] In practice, this meant that proving the existence of economic dependence required proving the impact of the suspected behavior on the market.[18] The market-oriented interpretation of the provision ended up thwarting its capacity to serve as an instrument for the control of contractual balance in the supply chain.[19] The goal of preserving contractual balance was left to general rules of private law.[20] Indeed, French civil courts made use of these general principles to police the contractual balance of B2b relations. For example, some decisions by French courts on B2b contracts relied on the doctrine 'vice de consentment' contained in article 1112 of the Code Civil.[21] The notion of 'cause', contained in the former article 1131 Code Civil, was also an important source for the regulation of B2b commercial relationships.[22] However, this approach based on the civil code was limited to very specific contexts and especially to the control of exclusion clauses.

In contrast to this limitation, European consumer law would become an important source of modernization for the rules on trading practices. Indeed, article 442-6 of the Commercial Code (now article 442-1 CCom) has become the equivalent in business matters of the provisions on unfair practices of the Consumer Code. Many authors have seen in this article a compromise solution that entails the 'civilization' and 'judicialization' of economic dependence.[23] These contributions underline the consumerist approach of the rule, insofar as it translates the consumer notion of unequal bargaining into B2b trading relations.[24] This interpretation seems to find confirmation in

[16] C. L de Leyssac, PME et regles de protection du marché, (CREDA, 2009), 55
[17] Decision in Cora. No. 93-D-21 of 8 june 1993
[18] Feteira,'The interplay',166-176; for further references see his footnote 201.
[19] ibid 166-176. More references in his footnote 206.
[20] I. Poesy, 'Ordre concurrentiel et abus de dépendance économique', in Ullrich/Rainelli/Boy (eds): L'ordre concurrentiel. Mélanges en l'honneur d'Antoine Pirovano, 620 (Frison Roche, 2003), 620. More references in Feteira,'The interplay', footnote 203).
[21] Cour de Cassation: Civ. 1ère, 30 mai 2000, Bull. n° 169 (cassation au visa des art. 2052 et 2053 c. civ.); Civ. 1ère, 3 avril 2002, Bull. n° 108, cassation au visa de l'art. 1112 c. civ..
[22] Chronopost, Cour de cassation, Arrêt nº 261 du 22 octobre 1996; Faurecia, Cour de Cassation, Arrêt n° 732 du 29 juin 2010. Both decisions concerned exclusion clauses. The exclusion of liability needs to be proportionate to the obligations of the party.
[23] For references, see Feteira, 'The interplay', 174.
[24] L. Vogel, Droit de la négociation commerciale, (LawLex, 2009), 393ff, for a relation of cases. Other interesting perspectives in F. Marty and P. Reis, 'Une approche critique du contrôle de l´exercice des pouvoirs privés économiques par l´abus de dépendance économique'(2013), RIDE; Le droit commun des

the doctrine of the French Conseil Constitutionnel, which upheld the constitutionality of article 442-6 by defending its equivalence to the definition of significant imbalance in consumer law.[25] Moreover, the French rules against restrictive practices go even beyond what is permitted by the consumer code. For example, the French judiciary has permitted the control of sales below cost on the basis of the Commercial code,[26] even when such a control is expressly forbidden by the Consumer Code and by the case law of the ECJ on the UCPD.[27] The parallel evolution of commercial and consumer rules in separate codes led to a far-reaching reform of the French code civil.[28] It is significant that the reform of the *code des obligations* in 2016 incorporated a norm on non-negotiated contracts according to which 'dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite'.[29]

Article 442-6 of the Commercial code contained a list of thirteen prohibited practices that grant the supplier the right to obtain reparation from the buyer. Some of these practices consist of requiring payments from the supplier that are not related to any commercial service, such as payments to finance the promotional sales of the retailers or discounts to equal the offers of competitors. Other prohibited practices consist of refusing to confirm in writing the terms of a supply agreement; threatening with the termination of the contract in order to obtain better conditions regarding the payment delay, the price of the goods, etc.; unilaterally and without any previous notice terminating the contract; forcing the supplier to violate the exclusivity agreements of its distribution chain; and creating a significant imbalance. The latter concept of significant imbalance has been developed by the French judiciary. Together with the concept of 'abrupt termination' (442-6-I-5) and 'disproportionate advantages' (442-6-I-3), the rule on significant imbalance (442-6-I-2) CCo) is the most commonly applied by courts with regard to b2b relations in the supply

contrats à l'épreuve du droit spécial de la consommation: renouvellement ou subsitution? F. Bérenger, preface de C. Atias, 2 vols. LGDJ, París, 2007

[25] Conseil constitutionnel du 13 janvier 2011 (n° 2010-85 QPC) when considering whether the lack of a clear definition of imbalance in the commercial code was contrary to the principle of prospectivity.

[26] Decision of the Cour de cassation, of 25 January 2017, insofar as the similarities bewteen consumer and commercial legislation « n'excluent pas qu'il puisse exister entre elles des différences de régime tenant aux objectifs poursuivis par le législateur dans chacun de ces domaines ».

[27] Case C 295/16, 19 October 2017, Europamur Alimentacion SA, ECLI:EU:C:2017:782

[28] Ordonnance n° 2016-131 du 10 févr. 2016, in force since 1st October 2016.

[29] Art 1117 CC. On the process of reform of the French civil code and its interaction with (European) consumer law, see D. Mazeaud, Le droit européen des contrats et ses influences sur le droit français (2010) 6 European Review of Contract Law, 1, 1-24.

chain.[30] For this reason, they are the only three practices that have been kept in the new version of the commercial code. The idea of 'significant imbalance' is usually expressed in the following terms:

> *'Dependence may be appreciated when the inclusion of the disputed terms in a standard form contract has not been preceded by their effective negotiation. Contractual obligations can be understood to produce a situation of significant imbalance when they are not reciprocal or when they are excessively disproportionate. The contractual terms are to be assessed in the context of the contractual relation, regardless of their effects.'*[31] *(CA Paris, 19 April 2017, n° 15/24221).*

This formula contains a three-step test based on the concept of a stable commercial relationship; the existence of 'dependence'; and the creation of a significant contractual imbalance. The notion of a stable commercial relationship introduces in French civil law the concept of long-term contracts. According to the French case law, there is a long-term contract when the existence of a stable relationship implies the desire of the parties to cooperate and to develop long-term relations in the context of a common project, regardless of the existence or not of a written commitment.[32] The stability of the relationship is inferred from both objective and subjective elements. On the one hand, it requires a prolonged, regular, durable and significant relationship.[33] On the other hand, it

[30] University of Montpellier et DGCCRF, Études de jurisprudence, Available at: https://www.economie.gouv.fr/cepc/etudes-jurisprudence

[31] Translated by the author. Original in French: L'insertion de clauses dans une convention type ou un contrat d'adhésion qui ne donne lieu à aucune négociation effective des clauses litigieuses peut constituer (la soumission ou la tentative de soumission). L'existence d'obligations créant un déséquilibre significatif peut notamment se déduire d'une absence totale de réciprocité ou de contrepartie à une obligation, ou encore d'une disproportion importante entre les obligations respectives des parties. Les clauses sont appréciées dans leur contexte, au regard de l'économie du contrat et in concreto. La preuve d'un rééquilibrage du contrat par une autre clause incombe à l'entreprise mise en cause, sans que l'on puisse considérer qu'il y a alors inversion de la charge de la preuve. Enfin, les effets des pratiques n'ont pas à être pris en compte ou recherchés » (Cour d'appel (Court of appeal) – CA- Paris, 19 April 2017, n° 15/24221 ; 21 June 2017, n° 15/18784 ; CA Paris, 8 February 2017, n° 15/021070).

[32] (CA Paris, 27 September 2017, n° 16/00671) . This case concerned a website rental contract. The court considered that a lease or rental contract for a fixed term cannot be considered as a stable commercial relationship.

[33] These criteria have also been developed by the case law on sudden termination. For example, (CA Paris, 18 January 2017, n° 14/08437). A duration of one month or one year and half would not be considered enough for a long-term relationship to exist: (CA Paris, 23 June 2017, n° 15/14400); CA Paris, 4 January 2017, n° 14/12979). A relationship of 17 years is clearly stable: CA Paris, 28 June 2017, n° 14/26044 .

also requires that the victim of the prohibited practice could trust on the continuity of the relationship.[34] The concept of 'soumission' or dependence is more complex. It seems to allude to the existence of effective room for the negotiation of the disputed terms.[35] The assessment of this circumstance is not consistent. Generally, French judges refer to the degree of standardization of the contract terms or to the degree of reciprocity between the obligations of the parties. The most important part of their assessment seems to be found in the notion of 'rapport de force déséquilibré'. This notion includes references to broader market conditions. The courts will assume the lack of balance when there is no competitor that can offer similar or technical conditions. In these cases, the retailer is considered an unavoidable trading partner (intérmédiaire incontournable). The definition of a trading partner as unavoidable will be often analyzed with reference to its market share and its lead position in the sector. Other times, French judges will take on a more restricted approach,[36] underlining the need to measure the size of the supplier in turnover terms and its countervailing power.

As a matter of fact, the case law on restrictive practices reflects a strong presumption of imbalance that plays against the 'big distribution'. This becomes even more clear if put in relation to the enforcement model of the rules, in which the administration plays a central role. The reports of the CEPC on significant imbalance show that the findings of civil courts vary a lot depending on identity of the plaintiff. There are greater chances of a positive finding of imbalance when the case is initiated at the request of the public administration against the big distribution. In cases initiated by private parties, a majority of judicial decisions have rejected the existence of imbalance. When the cases do not involve the big distribution and are not brought up by the administration, the practical relevance of the rule on significant imbalance is minimal. For example, in a significant number of decisions concerning financial contracts, the court considered that the situation of dependence had not been proved by the plaintiff and consequently there was no room to apply the rule, even if the facts could be argued to justify the finding of imbalance.[37]

[34] For example, (CA Paris, 18 January 2017, n° 14/08437).; (CA Paris, Ministre c/…, 27 Septembre 2017, n° 16/00671). Both cases concerned a case of sudden termination where the stable character of the commercial relationship was contested.
[35] (Cass. com, …c/ Ministre, 26 April 2017, n° 15-27.865)
[36] (CA Paris, Ministre c/… 20 December 2017, n° 2009F00727). But also in report Montpellier 2017. P. 51
[37] University of Montpellier et DGCCRF, Études de jurisprudence, Available at: https://www.economie.gouv.fr/cepc/etudes-jurisprudence. Especially, see Bilan des décisions judiciaires(période du 1er janvier au 31 décembre 2017), p. 52.

The resulting image shows a much publicized idea of trading relations. National courts are instrumentalised by the DGCCRF to police trading relations involving the big supermarkets. The control of B2b contracts responds to the strategy of the government and not to the initiative of private parties. Even if the rule permits in principle individual parties to obtain reparation for the losses incurred, judicial practice suggests that restrictive practices become more important as an instrument in the hands of the government to intervene in the organization of marketing and retailing activities in France. The recent case against Amazon can be seen as an example of this approach.[38]

2.2. ENGLAND: A COMPETITION LAW APPROACH

The main feature of the English legal system is that, unlike France or Spain, there is neither specific legislation on fair trading practices nor a specific provision against abuses of economic dependence in competition law. Intervention in B2b relations is seen as a distant possibility.[39] The common-law doctrines of economic duress, undue influence or unconscionability are interpreted restrictively as to impede, in general terms, the revision of B2b contractual relations. English courts have rejected the possibility of including in common law a doctrine on abuses of bargaining power,[40] as it was proposed by Lord Denning in Lloyds Bank Ltd. V Bundy[41]. Famously, Lord Denning understood that it would be possible to intervene in a contract resting on grossly inadequate consideration.[42] In his words: *'Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair (...), when his bargaining power is grievously impaired*

[38] University of Montpellier et DGCCRF, Études de jurisprudence, Available at: https://www.economie.gouv.fr/cepc/etudes-jurisprudence. Especially, Voir le bilan des sanctions prononcées en 2018 par la DGCCRF en matière de violation des délais de paiement entre professionnels. In contrast, see Cour d'appel, Paris, 14 juin 2018, n°17/07253.

[39] See in general: Feteira, 'The interplay', 195, citing E. Peel and G. H. Treitel, The law of contract. London (Sweet & Maxwell, 2007.) 386ff; M. P. Furmston, G. C. Cheshire, and C. H. S. Fifoot. Cheshire, Fifoot and Furmston's law of contract. (Oxford university press, 2012),386ff; Chitty on contracts, (Sweet & Maxwell, 2008)..

[40] M. P. Furmston, G. C. Cheshire, and C. H. S. Fifoot. Cheshire, Fifoot and Furmston's law of contract. (Oxford university press, 2012), 392.

[41] Lloyds Bank Lted v Bundy [1974] EWCA Civ 8.

[42] Feteira, 'The interplay', 195. More references in his footnote 305. M. P. Furmston, G. C. Cheshire, and C. H. S. Fifoot. Cheshire, Fifoot and Furmston's law of contract. (Oxford university press, 2012),93-97. J. Cartwright, Unequal bargaining: a study of vitiating factors in the formation of contracts. (Clarendon Press, 1991).

by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other'.

Instead, the possibility of rebalancing private bargains in b2b relations is considered a political decision. As such, it corresponds to the legislator and not to the courts. This results in a piecemeal approach where statutory interventions introduce specific and limited boundaries to the content of B2b contracts. The most general statutory limitations to the content of contracts are found in the Unfair Contract Terms Act of 1977. These provisions establish certain controls on exclusion clauses for both B2b and B2c contracts. The introduction of the Consumer Regulations transposed in England EU consumer law, marking the separate evolution of B2b and B2c regulations. This does not mean that the influence of consumer law in the approach to b2b relations was inexistent. The influence of EU law can be seen in the report on the regulation of unfair terms in England and Wales prepared by the Law Commissions in the early 2000s. In the published final report, the Law Commissions proposed to extend the protection against unfair terms to contracts involving vulnerable SMEs. Despite the initial interest in the proposal, these provisions found no way into the Consumer Rights Act of 2015. The approach to the regulation of B2b trading practices in England remained fragmented. The legislator has limited its interventions to certain sectors with the purpose of delimiting the content of trading relations that involve SMEs. In some sectors, some SMEs are granted protection from unfair practices and unfair terms under an ombudsman scheme. Nowadays, this approach can be found in the food chain,[43] the pub sector,[44] finance,[45] and energy.[46] More importantly, this approach has greatly influenced the development of EU law on these sectors, like in the food chain.

When not applying statutory law, English courts will abstain from restricting the free exercise of bargaining power between business parties.[47] This makes the control over the content of trading practices dominated by the language of free trade and competition law.

[43] Groceries Code Adjudicator Act 2013
[44] Pubs Code Regulations 2016
[45] Extending protection also to bigger SMEs, see the Policy Statement 18/21 of the Finance Conduct Authority on the access of SMEs to the Financial Ombusman Services.
[46] Energy Regulations and the OFGEM scheme:
[47] Pao On v Lau Yiu Long [1980] AC 614; National Westminster Bank plc v Morgan [1985] AC 686; Lord Brightman in Hart v. O'Connor [1985] AC 1000: 'Equity will not relieve a party from a contract on the ground that there is contractual imbalance not amounting to unconscionable dealing'.

Traditionally, this understanding of B2b relations fits with the common-law doctrine of restraint of trade. Considered a forerunner of antirust rules, this doctrine was sometimes applied to exclusivity clauses and could determine their invalidity and unenforceability. These exclusivity clauses were considered in restraint of trade when the party had unreasonably agreed to restraining its freedom of contract in order not to trade with other persons that are not party to the contract.[48] This reasonability of the restraint could only be justified in attention to three elements: the interests of the parties, the general interest, and the circumstances in which the contract was celebrated.[49] In practice,[50] the scope of this doctrine was also thwarted by the reticence of English courts to examine the adequacy of consideration.[51] In theory, restraint of trade could be used to challenge the legality of a contract which has been concluded against the interests of the party with weaker bargaining power.[52] However, the actual test deployed in the case law seemed to be more concerned with the effects of the bargain on the public interest than with the proportionality between the obligations of the two parties.[53]

With the development EU competition law, the analysis of the public interest under the doctrine on restraint of trade ended up being diluted under the parameters of article 101 of the TFEU.[54] This means that the control of B2b abuses will only happen within the more limited thresholds of competition. In Courage, [55] the ECJ suggested the possibility of granting damages to the party to an anticompetitive contract which found itself in a situation of weaker bargaining power. The case concerned a tie-in agreement between an English pub owner and a brewery. While the case paved the way to the private enforcement of competition law, English courts ended up rejecting the claim for damages

[48] Petrofina (Great Britain) Ltd v Martin [1966] Ch 146, per Diplock LJ. Feteira p 198
[49] Nordenfelt v. The Maxim Nordenfelt Guns & Ammunition Co [1894] AC 535.
[50] Restraint of trade has mostly been applied to cases of post-contractual employment obligations and sales of goodwill contracts, but occasionally it has also applied in cases involving exclusive agreements in distribution contracts, such as in Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd, [1968] AC 269.
[51] Feteira, 'The interplay', 199.
52 Panayioutu and Others v. Sony Music Entertainment (UK) Ltd]1994] 1 All ER 755; A Schroeader Music Publishing Co. Ltd. v. Macaulay [1974] 1 W.L.R. (Feteira, 'The interplay', 199).
[53] Feteira, 'The interplay', in footnote 200, where he quotes Lord Pearce in Esso Petroleum: 'There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held reasonable and enforceable?'. See also H. Morris Ltd. V. Saxelby [1916] 1 AC 688, HL.
[54] Days Medical Aids Limited v. Pihsiang Machinery Manufacturing Co. Ltd. [2004] EWHC 4. Critical of this limiting approach M. C. Lucey, EC Competition Policy: Emasculating the Common Law Doctrine of the Restraint of Trade?, (2007) 3 European Review of Private Law, 419.
[55] C-453/99, 20 September 2001, Courage et Crehan, EU:C:2001:465. (see section 3.1.)

of Mr Crehan. The final decision of the House of Lords read: [56] *'In my judgment (…) it was the beer ties, and not other factors, which caused the failure of his [Crehan's] business, but (…) the beer ties in the Inntrepreneur leases did not infringe article 81. It follows that Mr Crehan's claim for damages fails. What I say now will be no consolation to him, but he does not fail on any ground for which he could be said to have been personally responsible. He fails because of complex and difficult issues of EC law at a high level, and nothing that he did or failed to do in relation to The Cock Inn and The Phoenix influences those issues at all'.*

The competition law approach to B2b trading practices has meant that when the competition authority suspects that the behaviour of a party may be detrimental to the correct functioning of the market,[57] the Competition and Markets Authority (CMA)[58] has the power to initiate market studies if it considers that the enforcement of competition or consumer law is inappropriate. Such market studies can also be addressed against non-dominant firms.[59] The result of the studies can be many, including the recommendation of private regulatory measures or statutory interventions. As a matter of fact, the studies carried out by the former OFT and CC in the food retail sector led to the creation of the Groceries Code and ultimately to the creation of the Adjudicator in the food supply chain. The Code contains a general clause of fair dealing and provides for a list of fifteen potentially unfair trading practices, which are complementary to the obligation of buyers to provide clear and unambiguous information in their supply contracts.[60] The monitoring activity of the Code Adjudicator is essential to flesh out the substantive content of this list. According to the last report of the Code Adjudicator, top issues being currently monitored are promotions, delays in payments and forecasting.[61] By monitoring these

[56] Crehan v Inntrepreneur Pub Company (CPC) & Anor, Court of Appeal - Chancery Division, June 26, 2003, [2003] EWHC 1510 (Ch).
[57] Sections 131 et seq. Enterprise Act 2002.
[58] Enterprise and Regulatory Reform Act 2013, merging the OFT and the Competition Commission.
[59] Feteira, 'The interplay', 188. More references in R. Whish and D. Bailey. Competition law. (Oxford University Press 2009), at 77 and 439.
[60] The list of practices includes: Variation of Supply Agreements and terms of supply; Changes to supply chain procedures; No delay in Payments; No obligation to contribute to marketing costs; No Payments for shrinkage; Payments for Wastage; Limited circumstances for Payments as a condition of being a Supplier; Compensation for forecasting errors; No tying of third party goods and services for Payment; No Payments for better positioning of goods unless in relation to Promotions; Contributions to Promotions; Due care to be taken when ordering for Promotions; No unjustified payment for consumer complaints; Duties in relation to De-listing.
[61] GCA Annual Report and Accounts 2018/2019, available at https://www.gov.uk/government/publications/2018-to-2019-gca-annual-report-and-accounts/gca-annual-report-and-accounts-20182019

issues through its periodical meetings with suppliers and retailers, the Adjudicator sets the standard of good commercial practices to be met by retailers. As part of its monitoring activities, the Adjudicator issues statements on best practices and elaborates a monitoring plan as part of which retailers need to communicate to the Adjudicator the measures that have been taken to address the issue. An example of this can be found in the Adjudicator's statement regarding forecasting.[62] Forecasting errors are an issue in food supply chains because they lead to changes on the orders placed with the supplier, to excess production or shortages. In its statement, the adjudicator provides guidance to retailers on how to ensure compliance with the code. In this way, the Adjudicator has understood that 'the due care test is unlikely to be capable of being met by a retailer that provided no way for a supplier to contribute to the forecasting process, whether collaboratively in reaching agreed volumes to be ordered or by ensuring suppliers can raise questions and queries if a forecast seems to them to be inaccurate or to have resulted in an excessive order.' Equally, 'blanket exclusions of compensation for errors' will be considered 'unlikely to be compliant with the Code, both in terms of risk sharing and, depending on the facts, due care in preparation of the forecast'.

2.3. SPAIN: GENERAL CONTRACT LAW

In Spain, general contract law represents the mainstream approach towards the regulation of unfair trading practices in b2b relations. The importance of general contract law can be in part explained by the distribution of enforcement competences between the regional and state levels. The fragmentation of the enforcement activities of competition and trading legislations across regional administrative authorities impede a uniform approach to the issues posed by the buyer power of supermarkets. In contrast, the role of the Supreme Court in contract matters has shown the readiness of Spanish courts to intervene in B2b relations, especially in those in sectors more affected by the economic crisis.

The importance of contract law in B2b relations is also related to the lack of an effective rule on abuses of economic dependence. In the 2000s, the definition of economic

[62] GCA, Best practice statement: Forecasting and promotions, 25 June 2018, available at https://www.gov.uk/government/publications/gca-forecasting-and-promotions-best-practice-statement/gca-best-practice-statementforecasting-and-promotions-including-taking-due-care-when-ordering-for-promotions

dependence gave rise to an intense academic and legislative debate.[63] Economic dependence was regulated both under antitrust rules and fair trading legislations. This double regulation was criticised for amounting to double jeopardy. What really happened in practice was that the decisional practice of the Spanish Competition Authority minimised the risk of overlap by imposing a restrictive interpretation of dependence. In other words, the finding of economic dependence was conditioned on the evidence of the effects of the practice on the market.[64] This situation provoked the removal of the rule on economic dependence from the Spanish antirust legislation in 2007. Abuse of economic dependence remained regulated under the legislation on fair trading. Its enforcement has been weak and its connection to competition law contested.[65] Spanish courts have maintained that the purpose of the rule is to ensure the correct functioning of competitive and efficient markets.[66] Its application therefore requires a situation of market dominance paired with the existence of economic dependence, as measured by the lack of alternative equivalent traders. The difference between this rule and the antitrust legislation is understood as one of mere degree.[67]

The approach to the regulation of B2b trading practices has been instead dominated by general contract law. This has favoured a broad interpretation of the principle of good faith, in part facilitated by the general scope –b2b and b2c - of the Spanish legislation against standard terms.[68] Indeed, civil courts have proved especially active in the control over unfair B2b trading practices. Both in the food and non-food sector, the interpretative rule contra proferentem (art. 1256 C.c.) and the general duty of good faith (art. 7 C.c.) have been used to upset standard form contracts celebrated under a perceived situation of imbalance.[69] However, this extensive interpretation has been reserved to certain economic sectors. Unfair practices in the food supply chain have rarely reached Spanish higher courts. For this reason, the development of a sectorial law on food, together with the reinforcement of a central enforcement authority, has been central in the Spanish

[63] F.D. Estella, 'Las complicadas relaciones entre la ley de defensa de la competencia y la ley de competencia desleal' (2001) 213 Gaceta Jurídica de la Unión Europea y de la competencia, 11-28.
[64] In this sense, Resolución del Tribunal de Defensa de la Competencia (Decision of the former competition authority) of 3 June 2003, ASISA.
[65] STS (decision of the Supreme Court) 481/2012, of 26 July; STS 75/2012, of 29 February; STS 35/2012, of 14 February.
[66] STS 481/2012, of 26 July, para 9.
[67] STS 75/2012, of 29 February, para. 3
[68] Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación.
[69] Sentencia AP Murcia (decision of the provincial court) 348/2011, of 8 june 2011.

approach to B2b trading practices.[70] Among the practices prohibited by the Food Chain Act 12/13, the prohibition of unilateral modifications to the contract and variation of payment agreements is the most important. This prohibition is closely linked to the requirement of written contracts.[71] The substantive content of these rules are better understood in light of the case law of Spanish courts on the application of general principles of contract law to B2b practices.

The broad reading of good faith has been more evident in some of the sectors most affected by the economic crisis, like the banking and construction sector. The decisional practice on B2b relationships has mostly focused on mortgage contracts, swaps and derivative contracts and delayed payments in supply contracts. This case law has given rise to a doctrinal and judicial debate over the possible extension of consumer protection rules to SMEs and traders in other economic sectors.[72]

In the case of mortgage contracts,[73] Spanish courts have been asked to decide on the possibility of declaring void the 'floor clauses' included in contracts celebrated with small businesses and professionals. The court has repeatedly excluded the possibility of extending the 'abuse test' of consumer law to b2b relations. Instead, standard terms in B2b contracts are controlled under a less strict 'inclusion control' that guarantees the transparency and clarity of the contract terms, which are also subject to the general provisions of the civil code. With this interpretation, the Tribunal Supremo has left the door open to intervene in B2b contracts celebrated against the requirement of good faith. The requirement of good faith would allow the court to control any contract term that stems from a significant imbalance in the bargaining positions of the parties. Such an imbalance would exist when the terms are contrary to the reasonable expectations of the

[70] La Ley 12/2013,of 2 August, de medidas para mejorar el funcionamiento de la cadena alimentaria (for the better functioning of the food supply chain).
[71] The Food Chain Act 12/2013 lists three practices as abusive: unilateral changes to the supply contract and variations to payment arrangements; illegal dissemination of sensitive trade information; and misleading practices with regard to food brands (arts. 12, 13 and 14).
[72] Critical perspective in A. Serrano de Nicolás – J. Sánchez García, 'Una imprescindible revisión para las PYMES de la doctrina del TS sobre los controles de incorporación y transparencia en la contratación seriada con condiciones generales (2016) Revista de Derecho v lex, 143; B. Saenz de Jubera Higuero 'Cláusulas suelo en préstamos con no consumidores: control de transparencia vs. buena fe' (2016) 3 Revista de Derecho Civil 4, 69-102; S. Cámara Lapuente, 'Experiencias españolas en el (reducido) ámbito de control de las cláusulas en los contratos entre empresarios' in Standardisierte Verträge-zwischen Privatautonomie und rechtlicher Kontrolle (Nomos Verlagsgesellschaft mbH & Co. KG, 2017).
[73] STS 41/2017, of 20 January 2017; STS 367/2016, of 3 June.

customer in view of the object and function of the contract.[74] On several occasions the court has refused to extend protection in b2b contracts because the existence of such bargaining imbalance had not been sufficiently proved.[75] However, the court has not specified how the evidence of imbalance could be produced. Instead, it has interpreted that it is not the role of courts to create a new category of protected contractors – a tertium genus - where the legislator has not done so.[76] It remains to be seen whether the slow recognition of SMEs as actors of private law will permit this change to happen.

This interpretation is broadened in the case law on derivative contracts and delayed payments. In the case of swap contracts involving SMEs as retail clients,[77] the Supreme Court has developed the scope of the information duties under the MIFID regulations,[78] implemented in the Spanish Ley del Mercado de Valores.[79] In its interpretation, the Tribunal Supremo has considered this information duty as a natural consequence of the principle of good faith (ex art. 7 C.c.). The court considers the principle of good faith to be part of the European cultural and economic order, with explicit reference to the PECL.[80] The lack of adequate information provokes defective consent (art. 1266 C.c.). Defective consent equals to a sufficiently relevant mistake on the essential characteristics of the contract that could not be avoided despite the diligence observed by the client.[81] For the court, the mistake is a consequence of the information asymmetries that exist in the markets for derivatives.[82]

In the case of supply contracts in the construction sector,[83] the court has also supported an extensive interpretation of the 'abuse test' in b2b relationships. These decisions concerned the legality of a contractual term that delayed payment beyond the mandatory

[74] 'Aquellas que modifican subrepticiamente el contenido que el adherente había podido representarse como pactado conforme a la propia naturaleza y funcionalidad del contrato', STS 367/2016, of 3 June, para 5.1.
[75] Ibid. Para. 6.
[76] Ibid. Para. 4.4
[77] STS 840/2013, of 20 January 2014 y 559/2015, of 27 Ocober; STS 6/2019, of 10 January 2019; STS 683/2012, of 21 November , and 626/2013, of 29 October.
[78] See article 4 for the definitions of retail client and professional client in Directive2014/65/EU , of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349
[79] Real Decreto Legislativo 4/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Mercado de Valores.
[80] STS 840/2013, of 20 January, para. 6
[81] Ibid. para. 11.
[82] Ibid.
[83] STS 688/2016, of 23 November ; STS 318/201, of 19 May.

limits imposed by the Spanish legislation.[84] However, the court also argued that, even if the contracts had respected the mandatory limit, it was still possible to control the abusive character of the payment term. This is because in the opinion of the court, the purpose of the 'abuse test' under the late payments rules is to protect the 'weak party'. In the case of supply contracts in the construction sector, the supplier is a weak party because it cannot defend its own interests on an equal footing.[85] This case law shows the impact of consumer law in general contract law, to the extent that the principle of transparency is said to emerge as a central principle of private law and a consequence of good faith.[86]

3. A NEW EU FAIR TRADING LAW

The EU's functional approach to trading practices makes it difficult to identify a single thread in the approach to the substantive regulation of B2b trading practices. While it may be relatively easy to account for the emergence of a co-regulatory approach to norm-enforcement, it is much more difficult to account for the influence that the enforcement-based approach to B2b practices has on the substance of the applicable regulations. Because it is less readily visible, it remains to a great extent an open question.[87] The idea of a 'competitive contract law' may hint as to where to start.[88]

This idea of competitive contract law was coined in the early 2000s to identify the trends that were present in the EU's approach to private law relations, both in b2c and b2b matters. This contract law is considered *competitive* because its object is to 'allow effective competition between suppliers in the Internal Market.'[89] At the time it was coined, the idea of a competitive contract law mostly addressed the state of the art in EU consumer law in the 2000s. However, it also pointed out to the emergence of a European 'business law'. In this regard, it is true that the EU's legislative interventions on B2B matters were rather limited. The most important instruments in this field were the agency and late payments directive. Nevertheless, the idea of competitive contract law suggested

[84] Ley 3/2004, de 29 de diciembre, por la que se establecen medidas de lucha contra la morosidad en las operaciones comerciales (against late payments).
[85] STS 686/2016, of 23 November, para. 5.
[86] F. J. Orduña Moreno, R. Guillén Catalán (eds.), C. Sánchez Martín, La transparencia como valor del cambio social: su alcance constitucional y normativo: Concreción técnica de la figura y doctrina jurisprudencial aplicable en el ámbito de la contratación, (Aranzadi 2018).
[87] F. Cafaggi 'Self-regulation in European contract law' (2007) 1 Eur. J. Legal Stud. 1, 163, 28.
[88] H. W. Micklitz, 'A competitive contract law'.
[89] H. W. Micklitz, 'A competitive contract law', 555.

that a broader European law on B2b practices was being developed together with b2c law. The regulation of vertical agreements through block exemptions in competition law was probably the most important manifestation of the EU's approach to business relations, and therefore, of a European business law.[90] In this sense, the regulation of block exemptions in EU competition law includes a list of hardcore restrictions that are outlawed from the internal market. In terms of a European business law, hardcore restrictions could be in principle assimilated to the blacks lists of the UCTD, and even read as unfair terms in B2b relations. This is so because even if they fall under the category of competition law, the block exemptions determine the content of private law relationships by imposing certain limits on the contracts between sellers and distributors.[91]

After the idea of 'competitive contract law' was first coined, the development of commercial practices law with the UCPD added a new layer to the analysis. This layer comes as a consequence of the increasingly marked differentiation between B2c and B2c relationships that was introduced by the UCPD. This differentiation had an impact in the way the regulation of commercial practices and contract law interact. [92] According to the recitals of the UCPD, the 2005 Directive was 'without prejudice to Community and national rules on contract law'.[93] Reality has nevertheless nuanced this assertion of the European legislator. In this regard, the literature often points out to the decision of the CJEU in Pereničová.[94] One of the most important elements in the judgement of the Court was to consider that the use of unfair terms in contracts with consumers could be regarded as an example of an unfair commercial practice.[95] This judgement came to relativize the division between the law of unfair terms and the law of commercial practices. The development of a European B2b trading law, which the European legislator left as an open question in 2005, would be a step further in the same direction.[96]

[90] K. Riesenhuber, 'A competitive contract law?', in P. Purnhagen and P. Rott (eds.), Varieties of European Economic Law and Regulation (Springer, 2014), 105.
[91] H. W. Micklitz, 'A competitive contract law', 574.
[92]Ibid 566.
[93] Recital 9 of the UCPD.
[94] C-453/10, 15 march 2012, Pereničová et Perenič, EU:C:2012:144
[95] H. W. Micklitz and N. Reich, 'AGB-Recht und UWG - (endlich) ein Ende des Kästchendenkens nach EuGH Pereničová und Invitel?' (2012) Europäisches Wirtschafts- & Steuerrecht, 257-264
[96] H. W. Micklitz, 'A competitive contract law', 566; P. Iamiceli, 'Unfair commercial Practices', 349

Here is where the analysis of the UTPD for the food supply chain comes in. The purpose of the following sections will be to look for the substance of a specifically EU's approach to B2b trading practices. On the one hand, this requires looking at the approach of competition law to B2b power relationships in agricultural markets and vertical agreements. On the other hand, it also requires looking at the standards of fairness that exist in European private law and their extension to B2b trading practices by means of the UTPD.

3.1.THE IMPACT OF COMPETITION LAW ON B2B TRADING PRACTICES

In general terms, competition law approaches business relations through the concept of market power. It provides thresholds of market power for the application of its rules. If an undertaking is 'dominant',[97] competition law imposes on it an obligation of 'special responsibility' not to allow their conduct to impair competition in the market.[98] This will restrict the capacity of dominant firms to engage with certain commercial practices that may foreclose their competitors, such as including certain discount schemes in their contracts or rebates. Out of situations of dominance, competition law will apply other market power thresholds to determine the content of contracts of certain firms in vertical relations (VEBER).[99] For example, it establishes temporal and quantitative limitations to exclusivity clauses in vertical agreements.

Below the official thresholds of market power, competition law still needs to tackle other types of bargaining imbalance. When it does so, it provides a benchmark to assess trading practices in B2b relations. The purpose of the present section is to offer an analysis of the approach of competition law to bargaining imbalances. In this regard, it will first analyze the approach of competition law to imbalances in agricultural markets. Secondly, it will focus on the approach to bargaining imbalances in distribution relations, taking Courage as a paradigmatic example of this approach.

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[97] For an overview on the concepts of abuse in competition law, see P. Akman, The concept of abuse in EU competition law : law and economic approaches. (Hart, 2012); P. L. Parcu, G. ,Monti, M. Botta, (eds.), Abuse of dominance in EU competition law : emerging trends. (Edward Elgar Publishing 2017); for an international perspective, see F. Di Porto, R. Podszun, Abusive practices in competition law. (Edward Elgar Pub., 2018).

[98] C-322/8, 9 November 1983, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, ECLI:EU:C:1983:313, para. 57.

[99] H. Micklitz, 'Competitive Contract Law', 555.

Bargaining imbalances have been at the core of the competition law approach to agricultural markets. The balance between the market power of agricultural producers and the consolidating retail sector has been a key issue in the successive reforms of the Common Agricultural Policy (CAP).[100] As the CAP transitions from direct price intervention towards a market-oriented approach, the issue has gained increasing relevance.[101] The withdrawal of intervention prices was followed by the brainstorming of new strategies aimed at strengthening the power of agricultural producers vis-à-vis the retail sector. The 2013 Common Market Organisation (CMO) Regulation introduced limited competition derogations for certain collective actors in specific food sectors with the purpose of reducing power imbalances between producers and buyers. This solution was already present in the Milk Package's regime on contractualisation and collective bargaining.[102] Under this framework, producer organizations (POs), associations of producer organizations (APOs) and inter-branch organizations of certain agricultural sectors can apply for public recognition in order to be exempted from certain competition requirements. [103] The competition consequence of this is that the contracts they collectively negotiate– for joint distribution, transportation, promotion, organization of quality controls, waste management, procurement of inputs, etc.- will not be examined under competition rules as long as they do not go beyond certain market thresholds. The justification for these exemptions is found in the need to concentrate supply, to facilitate the placing of certain products in the market and to optimize production costs.[104] This makes collectively-negotiated contracts one of the key regulatory tools of agricultural markets within the limits of competition law, strictly interpreted by the ECJ.

[100] I. Garzon, Reforming the Common Agricultural Policy (Palgrave Macmillan, 2006), 215; J Loyat and Y Petit, La politique agricole commune (PAC). Une politique en mutation (La documentation française, 2008), 206.

[101] Communication on the CAP towards 2020, 'Meeting the Food, Natural Resources and Territorial Challenges of the Future', COM(2010) 672 final. In the words of the Communication : 'whereas farmers are receiving a steadily decreasing share of the value added generated by the food supply chain and whereas a properly functioning food supply chain and measures to improve the bargaining position of producers are necessary prerequisites to ensure that farmers obtain a fair return for their produce'.

[102] Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector, OJ L 94/38

[103] Articles 169-171. Regulation 1208/2013 [2013] OJ L347/671.

[104] The application and enforcement of the CMOs has been problematic. The 2013 CMO tried to harmonise some of this enforcement practice in line with competition enforcement. In 2015, the commission issued guidelines clarifying the application of antitrust rules in the agricultural sector (Commission Guidelines on joint selling of olive oil, beef and veal, and arable crops, November 2915). The ECJ issued a decision in a preliminary ruling on the French endives cartel: C-671/15 - APVE, ECLI:EU:C:2017:860. The reform of the CMO in 2018 extends the scope of the derogations across all sectors.

Bargaining imbalance was also a key element in the decision of the ECJ in Courage. In general terms, bargaining imbalance does not determine per se the existence of an anticompetitive abuse of power. This does not mean, however, that bargaining imbalances are of no consequence in competition law. In the case of concerted practices, the existence of a clear imbalance will justify the reduction of the fine to be imposed on the weaker party.[105] The importance of the landmark case of Courage is that the ECJ admitted the possibility of granting damages to the party in a weaker position to recover the losses suffered as a consequence of an anticompetitive agreement.[106] The elements of the case were the following. Mr. Crehan was an English pub-tenant. Courage, the owner of the pub, supplied beer to Mr. Crehan under an exclusivity pact or tie-in agreement. When sued by Courage because of outstanding payments, Mr. Crehan brought up a counter claim for damages on the basis of the prejudice caused by the anticompetitive tie-in clause. The English legislation precluded Mr. Crehan from claiming for damages stemming from a breach of competition in which he had participated, but the ECJ held that: *'In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him'.*[107]

This decision was fundamental for the development of private enforcement of competition law in the EU. It highlighted the necessary connection that exists between

[105] Decisions of the Commisison on Hasselblad 82/367/EEC [1982] OJ L 94/7, Case IV/25.757; BMW Belgium NV and Belgian BMW dealers, 78/155/ECC [1978] OJ L 46/33 Case IV/29.146 ; Kawasaki 79/68/EEC [1979] OJ L 16, Case IV/29.430. In Commission Decision's in John Deere 85/79/EEC [1985] OJ L 35, Case IV/30.809, para. 42: 'Dealers which accept contracts containing export bans are also guilty of an infringement and, if the agreements are not notified, they also are liable for fines. However, the contractual export bans in this case are contained in pre-printed standard contracts; clearly, therefore, the dealers had not taken the initiative to have the bans included in their contracts and had largely ignored them. Moreover, this is the first such case in the agricultural machinery sector. The Commission feels it appropriate, therefore, not to impose a fine on the dealers in this case'.
[106] C-453/99, 20 September 2001, Courage et Crehan, EU:C:2001:465.
[107] Paragraphs 32 and 33.

competition law and private law.[108] The subsequent decision of English courts rejecting Mr. Crehan's application for damages is even more telling of the complexities in which this relationship is imbued.[109] The final decision of the Lords evidenced once again the resistance of a member state to transform the substance of their B2b trading rules.[110] This resistance would burden the EU's attempt at harmonizing private enforcement of competition law. The final debate, culminating in Directive 104/2014,[111] left out the substantive reflection on the private law consequences of competition infringements.[112] It is interesting to observe how the debate has been partially resurrected in the context of the global value chain. With regard to American antitrust, some authors have seen in the private enforcement of competition a much needed alternative to tackle competition abuses and unfair trade in a transnational context.[113]

3.2. STANDARDS OF FAIRNESS IN EUROPEAN PRIVATE LAW

Not only competition law is concerned with the 'strength of the bargaining positions' of the parties in a commercial relation. Most importantly, the relative bargaining positions of two trading partners' links to the applicable substantive standard of fairness. In this regard, it is necessary to look into the standard(s) of fairness in European private law. The question is therefore whether their concept(s) of fairness – and their relationship to good faith -have had any influence in the elaboration of the Unfair Trading Practices Directive

[108] The decision on courage blurs the distinction between competition law and private law, but also between tort and contract. On the tort side of Courage, N. Reich, 'The 'Courage' Doctrine: encouraging or discouraging compensation for antitrust Injuries?', (2005) 42 Common Market Law Review 35 et seq, 39. On the contractual dimension, see J. Stuyck Case: ECJ – Courage v Crehan (2005) 1 European Review of Contract Law 2, 228-245, 238, where he says: 'Many implementing provisions of Article 81 EC (such as black listed clauses in block exemption regulations) are purely contractual, ie they do not envis- age the violation of Article 81 EC absent an agreement (eg a 'concerted prac- tice').Courage shows that actions for damages by parties to a contract violating the competition rules put into question the divide between contract and tort.'

[109] R. Nazzini, M. Andenas, 'Awarding Damages for Breach of Competition Law in English Courts–Crehan in the Court of Appeal' (2006) 17 European Business Law Review 4, 1191-1210.

[110] Reference to page before

[111] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.

[112] An overview of the evolution of private enforcement of competition in the EU can be found in P. L. Parcu, G. ,Monti, M. Botta, (eds.), Abuse of dominance in EU competition law : emerging trends. (Edward Elgar Publishing 2017), 1-15.

[113] The rationale behind this proposal is that private parties are considered to have more incentives than competition authorities to denounce foreign anticompetitive conduct. The problem is that where the interests of the parties are diffuse, the effectiveness of private enforcement may still be questioned. This argument is put forward by David J Gerber, 'Competitive harm in global supply chains: assessing current responses and identifying potential future responses.' (2017) 6.1 Journal of Antitrust Enforcement, 5

in B2b relations in the food supply chain. In answering this question, it is important to bear in mind that, as it has been shown in different parts of this thesis, the interpretation of the principle of good faith, and its connection to fairness, varies a lot across member states. Particularly, English law is strongly opposed to the necessity of such a principle for the regulation of trading practices.[114] The fragmented approach to good faith across national private laws has resulted in the complex evolution of standards of fairness in EU private law.[115]

This evolution has happened, first and foremost, through EU consumer law. The overall guiding argument has conventionally been that, by means of consumer law, the European legislator has developed an autonomous concept of good faith which is not necessarily equivalent to the principle of good faith as defined by national laws. The most important instruments in this regard are the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive in b2c relations. To begin with, the standard of fairness contained in the Unfair Contract Terms Directive is limited to 'non-individually negotiated contractual terms' (art. 3). A contractual term which has not been individually negotiated is unfair when it is contrary to the requirement of good faith. The Directive links the assessment of good faith to the creation of a situation of 'significant imbalance in the parties' rights and obligations' under the contract to the detriment of the consumer.[116] The case law of the CJEU in the field of consumer contract law has confirmed that, as regards their bargaining power (and their level of knowledge), consumers are considered to be the weaker party.[117] This is different from general

[114] For the discussion on the meaning of good faith across European jurisdictions, see R Zimmermann and S Whittaker Good Faith in European Contract Law (Cambridge University Press 2000); H Beale, 'General Clauses and Specific Rules in the Principles of European Contract Law: The 'Good Faith' Clause' in S Grundman and D Mazeaud (eds), General Clauses and Standards in European Contract Law (Kluwer Law International 2006), 205-218 ; G Teubner, 'Legal Irritants: Good faith in British Kaw or How Unifying Law Ends up in new Divergences' (1998) 61 MLR 11 ; R Brownsword Contract Law: Themes for the Twenty-First Century (Butterworths 2000), 30.

[115] In his analysis of good faith under the UCTD and the UCPD, M. Durovic points out to how the lack of agreement over the meaning of good faith explains the lack of a general standard of fairness in unfair terms legislation. This lack of agreement would also explain the particular way in which the general clause of the UCPD is drafted, establishing a negative duty not to behave unfairly. M. Durovic, 'European law on UCP', 1122 ff.

[116] This is confirmed by the preamble of the Directive, where it is stated that 'in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer'.

[117] See, inter alia, Case C-618/10, 14 June 2012, Banco Español de Credito SA and Joaquin Calderon Camino ECLI:EU:C:2012:349, para 39; Case C-415/11, 14 March 2013, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164, para 44; Case C-280/13, 30

(traditional) contract law, where parties are presumed equal. Furthermore, the ECJ has provided important guidance as to the meaning of good faith in European terms in its case law on the UCTD.[118] While the Court leaves the ultimate interpretation of a contractual term as 'unfair' in the hands of national courts,[119] it also provides for clarification on what shall be understood as fairness in consumer unfair terms. For example, in Aziz, the Court said that an unfair term will be considered contrary to the requirement of good faith 'whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations'.[120] In Aziz, the Court also provided for the interpretation of 'significant imbalance', so that national courts need to look at the position that the consumer would have under national law in absence of the presumed unfair contract term.[121]

Unlike the Unfair Contract Terms Directive, the UCPD does not include in its text any direct reference to the unequal bargaining power of the parties, the relative strength of their bargaining positions or the imbalance between their rights and obligations. Rather, its approach to fairness is based on a three-step approach:[122] the list of prohibited practices, the definition of aggressive and misleading practice, [123] and the general clause. According to the general clause of the UCPD, a commercial practice is unfair when it is contrary to the requirements of professional diligence and when it materially or potentially distorts the economic behavior' of consumers. Here, the European legislator introduces the general principle of good faith as one of the elements of the requirements

April 2014, Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera ECLI:EU:C:2014:279, para 32.

[118] H. W. Micklitz and N. Reich, 'The court and sleeping beauty: The revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 3, 771.

[119] In line with Case C-237/02 Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter, ECLI:EU:C:2004:209.

[120] Case C-415/11, 14 March 2013, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164 para 69. Cases C-537/12 and C-116/13, 14 November 2013, Banco Popular Español SA v Maria Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez (C-537/12) Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume (C-116/13), ECLI:EU:C:2013:759, para 66.

[121] Case C-415/11, 14 March 2013, Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) ECLI:EU:C:2013:164 , para 68.

[122] M. Durovic, 'European law on UCP', 112 ff.

[123] In connecting the definition of aggressive practice to the notion of undue influence (art. 8), the Directive indirectly links the test of aggressiveness with the exploitation by the trader of a situation of power in relation to the consumer (art. 2.1.j). The text of the directive relates the exploitation of a 'situation of power' to the limitation of the capacity of the consumer to make an informed choice.

of professional diligence (art. 2(1)(h)).[124] It has been said that the most revolutionary aspect of the UCPD were to introduce a general duty to trade fairly across all of European private law.[125] This is a consequence of the broad definition of unfair commercial practice under the Directive, which includes the widest possible range of behaviors originating from a trader and which are addressed at the promotion, sale or supply of their products to consumers.[126] Consequently, the duty to trade fairly would apply to all consumer law, both regarding unfair terms and commercial practices, 'but only as a duty of the trader due to the unequal relationship between consumer and trader'.[127]

In contrast to consumer law, there would be another meaning of the duty of good faith – and consequently a different standard of fairness – in B2b relations.[128] In b2c relations, the duty of good faith is imposed on the trader when dealing with consumers. In b2b relations, the duty of good faith would be applicable to both parties. The directive of commercial agency would be an evidence of this.[129] Equally, this difference was acknowledged by the CFR, which contained a two-tiered system of fairness, a tight one for b2c and a flexible one for b2b relations.[130] The Proposal for a CESL too indicated that the concrete requirements imposed by the duty of good faith depend on the relative level of expertise of the parties and shall thus be substantially different depending whether it applies on a contract between two traders or on a consumer contract where one party is a consumer and the other is a trader.[131]

4. SUBSTANCE IN THE UNFAIR TRADING PRACTICES DIRECTIVE

Moving forward, the question is whether the new European instruments on B2b relations add any other element to this analysis. These instruments include the Regulation on Fair

[124] For Durovic, the meaning of good faith under the UCPD would be the same as under the case law relating to the UCTD: M. Durovic, 'European law on UCP', 161.
[125] Ibid.
[126] Case C-540/08, 9 November 2010, Mediaprint Zeitungs- und Zeitschriftenverlag v Österreich-Zeitungsverlag GmbH ECLI:EU:C:2010:660, para 40; Case C-391/12, 17 October 2013, RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH ECLI:EU:C:2013:669, para 17; Order in Case C-288/10, 30 June 2011, Wamo BVBA v JBC NV and Modemakers Fashion NV, ECLI:EU:C:2011:443, para 30.
[127] M. Durovic, 'European law on UCP', 112.
[128] Ibid.
[129] Article 3 and 4 of Directive 86/653/EEC on commercial agency
[130] M. Hesselink, 'Towards a sharp distinction', 63-64.
[131] Recital 31 of the proposed Optional Instrument.

Trade in Digital Platforms and the UTPD.[132] They represent parallel attempts to respond to the impact of digital global chains and platforms, like the ones led by Amazon, on SMEs. The following lines will be focused on the UTPD. The different elements of the directive will be analyzed in turn. This includes: 1) the definition of unfair trading practice: a general clause?; 2) the lists of prohibited practices; 3) the transparency obligation

- The definition of UTPD: a general clause?

Article 1 of the UTPD defines the concept of UTPs. UTPs are 'practices that grossly deviate from good commercial conduct, that are contrary to good faith and fair dealing and that are unilaterally imposed by one trading partner on another.' The directive does not provide for a definition of 'good faith and fair dealing', which was nevertheless defined by the proposal for a CESL. According to it, 'good faith and fair dealing means a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question'.[133] In the CESL, the duty of good faith and fair dealing was at the basis of all B2c and B2b relations (art. 2). However, this duty translated into different requirements depending on the B2b or B2c nature of the contractual relationship. In the case of b2c contract terms, the obligation of good faith and fair dealing was connected to a duty of transparency (art. 82) and to the creation of a situation of 'significant imbalance' (Art. 83). None of these elements were part of the requirements of the duty of good faith and fair dealing in B2b relations (art. 86). Instead, a contract term in a B2b context is only unfair if a) it has not been individually negotiated; b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

This provision provides the most direct inspiration for article 1 of the UTPD and tells it apart from the UCTD and the UCPD. References to the imbalance of power relations in the chain are kept out of the articles of the Directive, even if they appear across the

[132] C. Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond' (2018) 7 Journal of European Consumer and Market Law 6, 222-233.
[133] M Mekki, 'Good faith and fair dealing in the DCFR' (2008) 4 European Review of Contract Law 338, 371. This paper explores the origins and meaning of this double concept, which was defined succinctly as Standard of conduct and subjective condition.

recitals. For example, the recitals of the Directive say that an UTP may consist of 'an unjustified and disproportionate transfer of economic risk from one trading partner to another'; or 'a significant imbalance of rights and obligations on one trading partner'.[134] The EU legislator avoids to extend the same concept of good faith in consumer (contract) law to B2b relations. This is further evidenced by the fact that the definition of economic dependence has been removed from the final text of the directive. In the negotiation of the text, the European Parliament introduced a definition of economic dependence as a 'relationship between a supplier and a buyer with different strength of bargaining power, in which the supplier is dependent on the buyer because of the buyer's reputation, its market share, the absence of sufficient alternative sales possibilities or because the total sum for which the supplier invoiced the buyer accounts for a significant amount of the supplier's turnover'.[135]

This definition could be read as the attempt at defining a situation of 'significant imbalance' in a B2b context. Instead, dependence is incorporated into the step-by-step definition of the subjective scope of the directive. This notion of dependence follows a relational approach, because it is put in the context of turnover differences between trading practices. Smallness continues to play a role in the general framework of the directive, because the legislator still recognizes that 'unfair trading practices are particularly harmful for small and medium-sized enterprises (SMEs) in the agricultural and food supply chain'.[136] The explanation for this is that by extending the scope of the Directive to certain non-SMEs, the legislator intends to avoid passing on the costs of UTPs on first suppliers to agricultural producers. This also means that the Directive avoids the ultimate step of identifying SMEs with contractual parties in a weaker bargaining position in the image of consumers. A different problem is whether this definition is capable of reflecting the reality of imbalances in relation to specific supply

[134] See Recital 1 of the Directive.
[135] European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, (COM(2018)0173 – C8-0139/2018 – 2018/0082(COD)), available at http://www.europarl.europa.eu/doceo/document/A-8-2018-0309_EN.html?redirect
[136] See Recital 9 of the Directive.

chain structures or whether it narrows down the regulatory potential of the Directive to bilateral relationships.[137]

- The lists of prohibited practices

Together with the general definition of UTPs, the Directive provides two lists. The first one contains ten practices that are to be prohibited in any case. The second list contains six practices that will be prohibited when they have not been included in the contract in a clear and unambiguous manner.

The ten black-listed practices are:

1- Payments later than 30 days for perishable agricultural and food products
2- Payments later than 60 days for other products
3- Short – notice cancellations of perishable agri-food products
4- Unilateral contract changes by the buyer
5- Payments not related to a specific transaction
6- Risk of loss and deterioration transferred to the supplier
7- Refusal of a written confirmation of a supply agreement by the buyer, despite request by the supplier
8- Misuse of trade secrets by the buyer
9- Commercial retaliation by the buyer
10- Transferring the cost of examining customer complaints to the supplier

[137] F. Cafaggi and P. Iamiceli, 'The New Directive on Unfair Trading Practices (UTPs) in Agri-Food Supply chains' (forthcoming), especially at 14. They suggest that member states could modify this rule and define imbalance in relation to the structure of the chain.

The grey list:

1- Return of unsold products
2- Payment of the supplier for stocking, display and listing
3- Payment of the supplier for promotion
4- Payment of the supplier for marketing
5- Payment of the supplier for advertising
6- Payment of the supplier for staff of the buyer, fitting out premises

The original proposal contained a more reduced list of practices, but the Parliament did manage to include more. The practices contained in the final text reflect those practices that the preparatory studies had identified as the most pervasive and that most member states have already regulated at the national level, be it in their legislations or through sectorial codes of conduct. The two most important aspects in relation to the lists are 1) whether they should be classified as unfair 'practices' or as unfair 'terms'; and 2) whether they really bring about a supply chain approach to B2b contractual relationships.

The title of the directive on 'unfair trading practices' is clearly aimed at establishing a certain parallelism with the directive on 'unfair commercial practices'. However, the scope of the two directives in relation to the life of the respective contractual relations is very different. It is true that the unfair commercial practices directive covers the whole duration of the contractual relationship between a trader and a consumer as it applies 'before, during and after a commercial transaction in relation to a product'.[138] But it is still true that the lists of unfair commercial practices are much more focused on the pre-contractual phase of the commercial relation, where the interests of consumers are more vulnerable. This will be especially the case when the trader presents misleading information to induce the consumer into the contract. In contrast, the practices enumerated by the UTPD are much more focused on the ongoing relation between the two traders and even in the post-contractual phase. It is here where businesses face a

[138] Art. 1 UCPD.

higher risk of losing a specific investment.[139] The prohibited practices contained by the UTPD refer to the short-cancellation of an order by the buyer, the unilateral modification of the contract, late payments and the imposition of a series of payments and other obligations that produce an imbalance between the rights and obligations of the parties such as the obligation to pay for the promotions, marketing and advertising activities of the buyer. In this sense, they are much closer to the list of the unfair terms directive, which forbids, for example, terms 'enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice' (Annex - 1(g)); or terms 'enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract' (Annex - 1(j)). A consequence of this is that, where consumer law enables the consumer to terminate a contract that does not fulfill its purpose, the supplier is given the chance to protect himself against unfair termination.

A second issue in relation to the unfair trading practices listed by the UTPD is whether they really reflect a supply chain approach to B2b relationships, or whether they are anchored in the bilateral model of traditional contract laws. In this regard, Fabrizio Cafaggi and Paola Iamiceli have suggested that the real difference will be made by the authorities in charge of applying and interpreting the Directive.[140] According to them, there is a difference between isolated and systemic UTPs building on the GVC literature. Isolated UTPs do not have effects between the bilateral relationship of the parties. Systemic UTPs are those capable of provoking distributional (shift of cost or risk between chain units) or exclusionary (preventing access to a whole sector of the chain) effects on the chain. For example, the abrupt cancelation of an order or the last-minute modification of quality standards may result in excluding some suppliers from the chain. Payment delays, promotional and marketing fees, or the return of unsold products have distributional effects on the chain too, because they can be passed-on to previous suppliers. In their view, private initiatives may be more open to acknowledge the specific chain dimension of UTPs than the list of practices provided for by the Directive.

[139] P. Iamiceli 'Unfair commercial Practices', 349.
[140] F. Cafaggi and P. Iamiceli, 'The New Directive on Unfair Trading Practices (UTPs) in Agri-Food Supply chains' (forthcoming), especially at 12. They directly quote recital 7 of the directive: 'In particular, 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 organizations 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'.

- Information duties

Finally, it is necessary to consider the duty of information that the UTPD introduces in B2b relations. In this sense, the UTPD says that the practices included in the grey list will be prohibited unless they have 'been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer' (Art. 3.2).

Generally speaking, the duty of information is one of the most important regulatory instruments of European private law. As such, requirements on the clarity of the languages of contracts are well known to anyone familiar with consumer law.[141] However, these requirements have been usually defined in consumer law by reference to the use of 'plan and intelligible language'.[142] The term 'unambiguous' is new in this context. It is similar to the one used by the EU legislator on the Regulation of Fairness in Platforms-to-Customers Relations.[143] It has been suggested that the reference to 'unambiguous terms' has been intended to distinguish it from the 'interpretative baggage' associated to the UCTD.[144] This baggage is connected to two important elements. First, the UCTD links the duty of transparency to the rule of interpretation *contra stipulatorem*. Second, the CJEU has interpreted the duty to provide 'clear and intelligible' information as going beyond 'formal and grammatical intelligibleness' to include the 'requirement that a consumer must be able to assess the economic consequences of that term.'[145] Consequently, unambiguous terms would limit the scope of the transparency obligation to simple formal and grammatical intelligibleness and would not be linked to the obligation of interpreting the contract in favor of the affected supplier.

What are the main conclusions to be taken from the substance of the new Directive? The first thing that needs to be underlined is that the practices that the Directive enlists are closer to unfair terms than to unfair commercial practices. And yet, the analysis of the

[141] T Wilhelmsson and C Twigg-Flesner, 'Pre-contractual Information Duties in the Acquis Communautaire', (2006) 2 European Review of Contract Law 441
[142] Art.5 of the Unfair Contract Terms Directive (93/13/EEC).
[143] This same terminology appeared in the proposal for a CESL in relation to contracts concluded by electronic means (art. 25.2 of the Proposal).
[144] C. Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms Transparency, Fairness and Beyond' (2018) 7 Journal of European Consumer and Market Law 6, 222, 226.
[145] Ibid. Where he refers to the decisión of the CJEU in Case C-26/13, 30 April 2014, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt ECLI:EU:C:2014:282paras.[73]-[75].

elements of the new Directive clearly show that the European legislator has made the deliberate choice of avoiding using language of consumer unfair terms law. Hence the innovative terminology: the reference to fair dealing, to unambiguous language and to fair trading practices. As a result, the definition of unfair trading practice, the lists of unfair trading practices and the statement of transparency obligations are all made as to maintain the difference in the intensity of the requirements of good faith between B2b and B2c relationships. The removal from the main text of any definition of economic dependence would seem to go in the same direction. A way to look at it is to say that the new Directive transforms the rules of unfair terms into the language of commercial practices. This has consequences on the extent to which the European legislator harmonizes any minimum requirements imposed on the content of B2b contractual relations. It is true that some practices are prohibited in any case, but most of these practices are already outlawed by rules on late payments and by the rules against unfair trading practices developed at the national level. In this way, the minimum requirements of the Directive that matter are the ones that are already covered at the national level. What the Directive really does is to provide for minimum requirements of enforcement that should facilitate the fight against UTPs in a transnational context. In this cross-border scenario, the substantive requirements of 'fair dealing' in B2b relations will be mostly those determined by the development of codes of conduct or the elaboration of lists of best practices by national authorities.

CHAPTER 6

CONCLUSIONS

1. THE ROLE OF THE EU IN THE FOOD CHAIN AND BEYOND
2. THE THREE TRANSFORMATIONS OF ACTORS, ENFORCEMENT AND SUBSTANCE IN THE GVC: A SUMMARY
3. THE NEW UTPD: WHAT IS IT AND WHAT IS IT NOT
   - 3.1. BRINGING IN THE SUPPLY CHAIN DIMENSION
   - 3.2. THE SPILLOVER EFFECT
   - 3.3. THE LABORATORY OF THE FOOD SUPPLY CHAIN
4. MOVING BEYOND FOOD
5. UTPS IN THE BROADER POLITICAL CONTEXT

The purpose of this chapter is to offer some closing considerations in the form of conclusions (1). The chapter sums up the main findings of the thesis: the triple transformation of (un)fair trading law through the re-definition of its actors, institutions and substance (2). It then reflects on the changes introduced by the new Directive and the manner in which they impact on the relationship between EU private law and national private law traditions (3). This includes an analysis of the global value chain dimension in the new UTPD (3.1.), of the spillover effect into B2b relations (3.2.) and of the experimentalist approach to private law in the EU (3.3.). Finally (4), the chapter connects the thesis to the broader European and global context. And to the possibility of using the UTPD as a model for other product markets. The thesis closes (5) by putting new questions on the table. These questions should be read in light of the political uncertainty of Brexit, the future of trade relations and the possibility of extending the emerging model of (un)fair trading beyond food.

1. THE ROLE OF THE EU IN THE FOOD CHAIN AND BEYOND

This thesis has shown the triple transformation of fair trading law in Europe across the global value chain. This transformation has changed the actors, the enforcement and the substance of fair trading law. The categories of traditional private law do not coincide with the emerging EU categories of trading practices. While this thesis has thoroughly described the differences between the two, there remains, however, a pending question. If the EU has made use of the leeway provided by the supply chain to manage persistent differences in the regulation of B2b trading practices, what type of relation does the EU establish with the private laws of the member states and how to label its role? In answering this question, this closing chapter connects the transformation undergone by fair trading legislations to the question of the governance design of EU private law in the context of global value chains.

Considering the above, these conclusions are structured across three main topics. First, the conclusions look back to the main findings of the previous chapters summing them up. This section follows the same order used so far, considering the transformation of the actors, enforcement and substance of fair trading. On a second moment, the conclusions take stock of the findings of the thesis and reflect on the type of relationship that the EU establishes with the private law traditions of the member states through the new directive on unfair trading practices. In order to do so, the conclusions will address three big questions which surround the new Directive: the value chain dimension of the Directive, the spillover effect from B2c to B2b and the idea of experimentalist governance in European private law.

The idea of an experimentalist design fits, at first sight, the multi-level and open-ended nature of governance in the supply chain. Experimentalism, however, is also often objected to as another form of market-biased governance. The idea of experimentalism as a problem-solving and procedural mechanism is said to hide the political choices of regulation and casts a shadow on the existing allocation of responsibilities. However, European experimentalist is also the response of the EU to a genuinely model of regulation that goes beyond the state. To avoid the pitfalls of experimentalism and to preserve its merits, much more thought needs to be dedicated to the transparent allocation

of roles between the EU and its member states. These roles are complementary and not alternative. For example, compliance mechanisms and mediation are effective tools to manage less serious breaches. The bigger the sociopolitical implications of a dispute, the closer it should be to national courts.

Finally, this concluding chapter tries to collect some other odds and ends scattered across the thesis. In doing so, this chapter measures the thesis against the broader political horizon of Europe and international trade. This requires looking beyond food to explore the possibility of extending the new fair trading model to other supply chains, whether fashion of mobile phones. Not many answers may be possible now but maybe it can show the direction of future research. Also, this final chapter connects fair trading laws with the uncertain political situation the EU is living. Inside, there is Brexit. Outside, there are trade wars looming. These are now imponderables but the transformation of EU fair trading law in the food global value chain may contain some food for thought. Even if some of these changes are still incipient, they point out to a new understanding of private law for the global scenario.

2. THE THREE TRANSFORMATIONS OF ACTORS, ENFORCEMENT AND SUBSTANCE IN THE GVC: A SUMMARY

The global value chain has been the starting point for this dissertation. Global value chains are an unavoidable reality of the economy in the 21st century. They are the highway of modern global trade. One look around us is enough to stumble across them: the components of a laptop, the fabric of our clothes, etc.. The objects of everyday life connect the consumer to faraway places through an intricate net of inter-connected contracts between retailers, distributors, importer-exporters, factories and farms. The functioning of these cross-border supply chains is not without effect on the geographies and cultural traditions that they cut across. They impact on local realities and challenge well-established assumptions of economic, legal and political nature.

This thesis has looked at global value chains from the perspective of private law in the European Union. This thesis has argued that the legal instruments used by the EU in the governance of the chain do not correspond to the traditional categories of national private laws, if only because the EU has not been awarded any direct competence on the matter.

However, this deficiency is also the main advantage of the EU. The EU is in a vantage position to face the legal challenges of the global value chain, precisely because it is not bound by a legal tradition or by established legal categories that it needs to uphold: contract v. trading practices; trading practices v. competition; competition v. contract, etc. The competences and goals of the EU, as defined by the treaties, do not correspond to the legal categories and legal structures of member states. This gives the EU the opportunity to experiment with its own regulatory responses. For this reason, it is not entirely accurate to think that the sole role the EU has played has been to de-regulate national trading legislations and push for more and more market. Quite the opposite, the challenges and pressures of the global value chain impact on the EU as much as on the member states. But because the EU has relatively more room to innovate, it can act as a mediator between the global chain and the national contexts of its member states: it catalyzes the transformation through co-regulation with the purpose of managing national differences in the approach to a cross-border B2b supply chains. This transformation has, first and foremost, affected the actors, enforcement and substance of fair trading legislation.

- Actors: Traditional private laws rest on the notion of the legal person with full private autonomy, whereby all legal persons are presumed to be equal before the law. This ideal is questioned by the rise of the regulatory state, which leads to the definition of protected legal satuses: the worker, the consumer, the tenant, etc. Small businesses do receive certain protection – through contract, competition law safe harbours and fair trading regulations, but they are not usually defined as a legally protected status in the same way that consumers and workers are. Definitions of SMEs exist, but their applicability is limited to the definition of the benefitiaries of certain public programmes to promote access to finance or simplify red-tape. With the evolution of European private law, SMEs evolve from the law of the average consumer.[1] They represent the reality of 99% of the businesses operating in the European Union, which are neither weak like a consumer nor strong like Amazon. The growing importance of SMEs in European private law comes to cement the fragmentation of the consumer into the vulnerable, the weak and the average, into the customer and the prosumer. When

[1] H-W. Micklitz, 'The consumer: marketised, fragmentized, constitutionalized', in Leczykiewicz, Dorota, and Stephen Weatherill (eds). The images of the consumer in EU law: legislation, free movement and competition law (Bloomsbury Publishing 2016), 21-42.

the idea of a general instrument of EU private law reached a stalemate, SMEs appeared on the scene next to the European consumer as an addressee of European norms. The idea behind a private law definition of SMEs is that divergences of B2b rules impacted negatively on the confidence of SMEs in the internal market. This idea was very clear in the proposal for a CESL. However, the private law definition of SMEs also responds to the recognition of a more relational approach to weakness. In this sense, the definition of SMEs struggles in between the two poles, the protective and the internal market one. This struggle is ultimately reflected in the text of the new Directive on UTPs.

- Enforcement: the recognition of SMEs is necessarily accompanied by the recognition of their participation and the recognition of their organization rights in the governance of global chains. This has determined an enforcement-based approach to the new regulations on fair trading. Substance takes a second position in the quest to design a governance framework for B2b cross-border relationships. This enforcement-based approach of the new Directive builds around three basic tenets: the interaction between public and private authorities in enforcement, the importance of collective action and the need for coordination in a cross-border scenario. These three elements explain the four major trends seen in the enforcement of trading practices in the food chain. As the role of national judges becomes more and more limited in the cross-border supply chain, enforcement is anticipated, internalized and agentified. The management of B2b conflicts is brought forward to the stage of norm-making.[2] It facilitates a forum for the normative dialogue between supply and retail, which results in fair trading labels, codes of conduct and collective standard contracts; internalization or compliance means that enforcement becomes a matter internal to the necessities of business management.[3] This results in the creation of independent compliance departments within the organization of big retailers or in the outsourcing of compliance checks to external auditors. Finally, agentification refers to the establishment of a network of European agencies under the coordination of the Commission. These

[2] F. Cafaggi, 'The regulatory functions of transnational commercial contracts: new architectures' (2013) 36 Fordham Int'l LJ , 1557

[3] M. Namysłowska, 'Monitoring compliance with contracts and regulations : between private and public law' in R. Brownsword, R. A. J. van Gestel, and H. W. Micklitz, (eds.) Contract and regulation : a handbook on new methods of law making in private law. (Edward Elgar Publishing, 2017.

agencies act as watchdogs of fair trading, guarantors of transparency and mediators between businesses.

- Substance: the substance of the emerging fair trading law is harder to pin down. Unlike with European rules on consumers, European rules relating to B2b private relations have been rare. This does not mean that the EU has not contributed at all to defining the content of B2b contracts. As a matter of fact, competition law, which regulates key aspects of vertical relations and of collective negotiation in agricultural markets, has also defined the European approach to the substantive regulation of b2b contracts. This approach has been reshaped in the context of the global value chain with the publication of the UTPD. From the perspective of contractual relations, the UTPD defines what a fair trading practice is: practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing, and are unilaterally imposed by the stronger party on the weaker one. The directive provides also a black list and grey list of prohibited practices together with a set of information duties to be respected by the stronger party in their dealings with weaker trading partners. These practices do not only cover aspects relating to the pre-contractual phase of the contract and to the communications between traders. The Misleading Advertising Directive does that. This directive regulates the ongoing contractual relation and the post-contractual phase. Despite its name, the UTPD regulates issues directly relating to contractual terms. In establishing the definition of UTP, the lists of prohibited practices and the transparency requirements on B2b contracts, the European legislator has used an innovative language. By doing this, the Directive maintains the difference between B2c and B2b approaches in the internal market. This means that the consequences of bargaining imbalances in B2b relations do not necessarily have the same meaning as in European B2c laws. In connection to this innovative language, the Directive establishes a list of practices to be prohibited in any case, but these practices were already covered by national systems for the most part. The Directive is without prejudice to more stringent rules at the national level. Its main contribution is to offer some common rules to facilitate cross-border enforcement in the supply chain. By incorporating these prohibited practices into an EU instrument, the EU instrumentalises the protection of weaker parties to ensure the access of SMEs to the global chain and to the internal market.

However, it also opens the door to incorporating a specific supply chain perspective into the regulation of B2b practices. This perspective implies putting the accent on the relations that link consumers, retailers and suppliers across the value chain.

3. THE NEW UTPD: WHAT IS IT AND WHAT IS IT NOT

After this summary of the findings of the thesis, it is important to reflect on what they can teach us about the relationship between European private law and the traditional private laws of the member states. In this context, this section brings up three basic ideas to help understand the meaning of the new UTPD against the background of the present comparative study and against the background of the global value chain. First, this section addresses the relationship between the new Directive and the global value chain. In particular, it is important to ascertain to which extent the new UTPD uses a global value chain approach to issues of bargaining imbalances in global markets. Second, this section will also reflect on the extent to which the evolution of consumer law has had a spillover effect on national private law traditions for B2b relationships. From this perspective, the UTPD can be seen as an instrument through which the European legislator extends its competences to B2b contractual relationships in the internal market. Finally, this section analyses the new UTPD under the lenses of experimentalist governance in European private law.

3.1. BRINGING IN THE SUPPLY CHAIN DIMENSION

The analysis of the emerging European rules on B2b trading practices, and especially of the UTPD, reveals a two-tiered system in relation to the awareness of the 'supply chain' dimension. The first tier is directly expressed in the lists of prohibited practices introduced by the UTPD. On a first reading, the lists mostly address the bilateral relation between the supplier and the buyer that falls within the turnover-based delimitation of imbalance. From this perspective, it is reasonable to wonder whether the new Directive really introduces a value chain approach or whether it is stuck with a classical approach to bilateral contractual relationships. Accounting for the supply chain dimension of unfair trading practices means recognizing the degree to which power relations are defined not only by turnover differences between two trading partners, but also by the typology of chain which is determined by factors like the type of product, the geographical

distribution of suppliers, their contractual and non-contractual relations to sub-suppliers and certifiers, etc. In this sense, it has been suggested that it will be the responsibility of the national enforcement authorities and of private initiatives to introduce the global value chain approach in their assessment of trading practices.[4] The real question for these authorities would be whether the practices included in the UTPD's lists refer to "isolated" or "systemic" UTPs. The difference builds on the GVC literature, so that systemic UTPs, unlike "isolated" or bilateral practices, are those capable of provoking distributional or exclusionary effects on the chain. For example, because they shift costs and risks across chain units (distributional effect) or because they prevent access to the chain to a whole class of economic actors (exclusionary effect). In this manner, the abrupt cancelation of an order or the last-minute modification of quality standards may result in excluding some suppliers from the chain. Payment delays, promotional and marketing fees, or the return of unsold products have also distributional effects on the chain, because they can be passed-on to previous suppliers.

In this way, the second tier of the UTPD connects with the co-regulatory model of trading practices.[5] The supply chain dimension is grasped through enforcement and not so much through substantive requirements because it requires that remedies be adapted to the shape and modality of the chain. By underlining the coordination between traditional approaches to B2b relations and private regulation in the chain, the EU invites private regulatory initiatives to contribute to the definition of fairness and sustainability in the supply chain and to provide for adequate remedies depending on the type of supply chain at hand. This complementarity seems to be recognized by the work that Fabrizio Cafaggi and Paola Iamiceli have carried out for the Joint Research Center of the European Commission.[6] As an example, they mention the Supply Chain Initiative:[7] "contracting

[4] F. Cafaggi and P. Iamiceli, 'The New Directive on Unfair Trading Practices (UTPs) in Agri-Food Supply chains' (forthcoming), especially at 12. They directly quote recital 7 of the directive: "In particular, 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 organizations 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".

[5] C. Pavillon, 'Private Standards of Fairness in European Contract Law' (2014) 10 European Review of Contract Law 1.

[6] F. Cafaggi and P. Iamiceli, Unfair trading practices, (JRC Report 2018), available at http://publications.jrc.ec.europa.eu/repository/handle/JRC112654

[7] F. Cafaggi and P. Iamiceli, 'The New Directive on Unfair Trading Practices (UTPs) in Agri-Food Supply chains' (forthcoming), 15.

parties should always take into account consumer interests and the *overall sustainability of the supply chain in their B2b relations*. Contracting parties should ensure maximum efficiency and optimization of resources in the distribution of goods *throughout the supply chain".*[8] From the perspective of EU private law in general, this opens space for further reflection. Beyond ensuring the access of SMEs to the supply chain, the new B2b fair trading model insists on the responsibility of all actors in the chain, including suppliers, retailers and consumers, to respond for the sustainability and fairness of the supply chain.[9]

3.2. THE SPILLOVER EFFECT

The second-tier of the UTPD is very much connected to the idea that the EU legislator uses the value chain to extend its competences into the management of national differences in B2b trading regulations. In this sense, this thesis has shown the evolution of national private law approaches to B2b relations and to the protection of SME. In civil law countries like France and Spain, the classical approach to B2b private law relations is through the use of general clauses such as the clause of good faith or the old French concept of 'cause du contrat'. In English law, the use of general clauses is much more limited. While the doctrines of duress and undue influence could in principle be applicable to B2b relations, English judges tend to avoid any interference with private bargains. However, the evolution of EU consumer law would bring important changes to national private laws. One of these changes is reflected in the tendency towards extending B2c instruments to B2b relations. In France and Spain, the partial extension of the scope of the UCPD to businesses is an example of this. In English law, this extension has been clearer in sectorial legislations on energy and telecom. This transformation has been studied under the concept of spillovers from consumer law to national private law traditions,[10] which open a door for the competence-creep of the EU into national private law traditions.

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[8] See Principles of Good Practice, available at https://www.supplychaininitiative.eu/sites/default/files/b2b_principles_of_good_practice_in_the_food_supply_chain.pdf

[9] Ultimately, there is a link to what H. Micklitz has termed "societal" justice, as the model of EU law that brings to the fore the relationship between different members of society, from supply to consumers. See H. W. Micklitz 'The politics of Justice', 390.

[10] A. Johnston, 'Spillovers from EU law into national law: unintended consequences for private law relationship', in D Leczykiewicz and S Weatherill (eds.), The involvement of EU law in Private law relationships, (Hart, 2013); M. Durovic, 'European law on UCP', 119; M.B.M. Loos, 'The Influence of

Here is where the new UTPD comes in. The UTPD illustrates how the supply chain has brought about a broader role for the EU's intervention in private law matters. There are indeed some important spillover effects from EU consumer law into b2b practices but also some marked differences in relation to the law of commercial practices with consumers. Unlike commercial practices in b2c, the concept of trading practices in b2b relations impacts the regulation of contract terms in a manner which was explicitly excluded by the 2005 UCPD. It is true that decisions like the one in Periconova contributed to blur this distinction, but the blurring effect is even more intense in the case of b2b matters. This is true even if the directive is, of course, without prejudice of national contract and competition laws. From this perspective, the emerging European rules on trading practices in the food supply chain can also be read as the EU's attempt to fill in a gap in its own competence portfolio in the governance of private law.[11] There is some competence creep in relation to national frameworks on B2b matters.

However, the real change is not in the substantive approach of the UTPD to B2b relationships but in its enforcement design. To better understand this, compare the new Directive to the evolution of enforcement in consumer law. The consumer law directives start from the premise that the definition of the rights of consumers is a matter of EU law. Conversely, the definition of the remedies it is for the national legislators to decide. This was at least the conventional approach to consumer law enforcement until the administrative and judicial changes of the last decade arrived.[12] As part of this transformation, the EU legislator tries to reinforce its competences in matters of enforcement in cross-border context. In contrast, the substantive competences of EU law in the regulation of B2b trading practices are much more fragmented. The difficulties faced by EU-made general contract law instruments, such as the DCFR and the Optional Instrument, testify to the problems of managing national differences in the approach to B2b relations. With the new UTPD, the European legislator has made sure to use a language which maintains the difference between B2b and B2c relationships. However, the EU legislator also makes use of the new enforcement agencies to manage these national differences in cross-border supply chains. From this perspective, the UTPD

European Consumer Law on General Contract Law and the Need for Spontaneous Harmonization' (2007) 15 European Review of Private Law 4, 515.

[11] P. Iamiceli 'Unfair commercial Practices', 349.

[12] F. Cafaggi and P. Iamiceli, 'The impact of a triad', 575.

provides for a minimum standard of national enforcement institutions where a substantive standard across national legislations is much harder to reach. The novelty is not only that there is a certain spillover from consumer law into B2b practices but also that there is a spillover along the 'policy-cycle' – from the stage of norm-setting to the stage of enforcement -.[13] This apparent paradox re-affirms the intuition of this thesis that enforcement comes first in the EU's approach to UTPs and connects again to the idea of B2b UTPs as an experimentation field.

3.3.THE LABORATORY OF THE FOOD SUPPLY CHAIN

The threefold transformation of trading practices in the B2b supply chain re-defines the type of relationship existing between the EU and its member states with regard to a core part of private law. The nature of this relationship is determined by the allocation of roles and responsibilities across the global value chain, including the EU, the member states and the private sector. The three represent the different levels of decision-making. With the UTPD, the EU has agreed to define some minimum rules on B2b contract relations. This is already an achievement that seemed out of the table after the withdrawal of the CESL. The new rules do not provide an additional system from which business parties can choose from, like the CESL intended to do. The UTPD is explicitly without prejudice of more stringent national requirements. The EU, however, provides some minimum rules regarding the management of disputes. These rules put the accent on the collective and anonymous character of complaints and on the possibility of imposing pecuniary sanctions on infringers. Beyond these rules, member states are responsible for ensuring effective enforcement 'in the fight against UTPS'.

The UTPD illustrates an enforcement-based approach to B2b trading relations. The most important role of the EU has not been to define unfair trading practices. As a matter of fact, lists were already part of EU-sponsored private initiatives, like the Supply Chain Initiative. Moreover, many member states incorporated the lists into their legislation. The main role of the EU has been instead to promote an enforcement-based model based on

[13] M. Scholten, D. Scholten. 'From regulation to enforcement in the EU policy cycle: a new type of functional spillover?' (2017) 55 Journal of Common Market Studies 4, 925-942; M. Scholten, 'Mind the trend! Enforcement of EU law has been moving to 'Brussels'', (2017) 24 Journal of European Public Policy 9, 1348-1366.

the anticipation, internalization and agentification of enforcement. In this regard, the UTPD came to confirm a transformation that was already taking place at the invitation of the Commission. The result of the transformation is that the civil courts of member states compete with national administrative agencies, with private certifiers and with ADR mechanisms to ensure fair trading conditions for SMEs. The question is therefore who does what in the global value chain. Self-regulation and mediation are fast and efficient ways of dealing with run-of-the-mill complaints. Administrative agencies and courts provide a safety net for more sensitive disputes. Here, a word on national courts as closure mechanisms is needed.[14] Courts provide a safety-net capable of ensuring a minimum protection to those weak parties that escape the logic of the supply chain and the internal market. From this perspective, general courts are the escape valve of traditional private laws because courts are potentially present in all the levels of fair trade regulation, including member states, the EU and the supply chain. They still play a key role to formulate and transmit normative changes across all the three levels and they can be a source of democratic participation in the governance of the supply chain. This role, however, presupposes that the participation and organization costs of accessing courts are dealt with. It especially requires affordable litigation which is accessible to weaker parties, also through their collective representatives, and it requires further reflection on the interaction of collective litigation with the rights of individuals.

The enforcement-based approach raises the question of how the EU approaches the divergences and fragmentation across member states and across national enforcement mechanisms. Experimentalism becomes central in this regard. It is possible to think that the EU uses the changing nature of enforcement as a way to expand its own competences in private law; this is, for the purposes of competence creep. But the focus on enforcement also illustrates an experimental approach towards private law. Experimentalist governance has long been discussed by political science in public regulatory fields. The process leading up to the UTPD can also be seen as an experiment in response to the uncertainty and polyarchy of the global value chain. The two conditions to experiment are present in the chain. There is uncertainty, because there is a fundamental lack of agreement between the goals of regulation and between producerism and consumerist ideologies; there is polyarchy because the cross-border nature of the chain does not permit

[14] V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective', (Tilburg PL Working Paper Series No 05/2017)

any single voice to impose a top-down solution on the rest. Experimentalism manifests in a recursive process of decision-making, which allows for multi-stakeholder dialogue, cooperation and recurrent revision. In many ways, the regulation of unfair trading practices in the chain shows experimentalist features: the collective establishment of framework goals, the autonomy of lower-level units in decision-making, the establishment of reporting duties and peer-review and the regular revision of the goals, metrics and procedures on account of the implementation experience. For example, the work of the High Level Forum for the Food Supply Chain could be read as an experimental mechanism, insofar as the European Commission in collaboration with the Members States and stakeholders should establish a European forum that will address the relationships among the players in the food chain, and in particular between producers/processors/distributors. The same could be said about the relationship of the Supply Chain Initiative with the national sister platforms and even with national legislations. This collaboration multiplies the influences across different levels. The previous chapters contain multiple examples which show how the fair trading and contract laws of member states have been influenced by the development of EU consumer contract law. In France, this European influence has provoked the 'consumerization' of the Code Commercial. In Spain, EU consumer law has contributed to develop a judicial and doctrinal principle of transparency as a fundamental component of good faith. In the UK, the impact of consumer law justified the proposal of the Law Commissions of England and Wales to extend protection to certain SMEs, which has been achieved in certain sectors through statutory provisions. The influences also travel in the opposite direction. In the case of the new EU unfair trading practices directive, the institutional model adopted by the directive is directly inspired by the English experience and the Groceries Code Adjudicator.

The UTPD can continue the experiment as long as there is minimum harmonization. As a matter of fact, the directive shows the intention of the Commission to continue to act as a coordinator of national enforcement models, to facilitate the exchange of best practices and enforcement priorities and to foster private regulatory initiatives. However, experimentalism is also looked down upon with suspicion. Its functional and procedural approaches reject, at first sight, any normative content. Under a pretended problem-solving nature, it hides fundamental power imbalances and a bias towards the market. The question is then if experimentalism in the global value chain also allows for the

possibility of substantive deliberation and the establishment of safeguards of last resource.[15] It is here that should be noted that the idea of substantive deliberation implies that member states, the EU and the private sector (including producers, traders and consumer organizations) accept their shared responsibility for guaranteeing a minimum of protection to SMEs in the global value chain. In a world of shared responsibilities, traditional private laws of member states should continue to offer protection to the social reality of SMEs in the national market. The EU should assume responsibility for ensuring access beyond the boundaries of the state. Ensuring access means breaking down the barriers faced by SMEs to participate in the chain, strengthening their position in the multi-governance order and creating an institutional framework that can cope with the global pressure of the chain.[16] The emerging European framework on B2b trading practices is a step in this direction insofar as it underlines the need to implicate and connect suppliers, retailers and consumers, beyond their bilateral contractual relationships, in the governance of the chain.

There is a temptation that needs to be avoided. The emerging fair trading model cannot be simply seen as the European consumer law of the 2000s upgraded. It is true that the spillover between consumer and B2b relations is evident in many aspects. The definition of SMEs in EU private law represents the further fragmentation of the consumer. The very structure of the UTPD, with its general clause, its black lists and its enforcement dispositions, is very much inspired by the UCPD. Many of the arguments that have guided the discussion on the future of EU consumer law repeat for businesses in the global value chain: the need for collective action, the design of public interest litigation, or the argument between minimum and maximum harmonization. After all, history often repeats itself. However, it is not possible to ignore that the social function and market role of SMEs is different from the one of consumers. As a matter of fact, the UTPD addresses suppliers, which are exactly at the other side of the chain. This realization rings well with the well-known discussion about producerism v. consumerism.[17] The costs of ensuring cheaper and quicker goods to consumers come at a cost for the supply side of food and for the environment. Whether equilibrium between the two is possible depends on the

[15] V. Mak, 'Who Does What in European Private Law – and How Is It Done? An Experimentalist Perspective', (Tilburg PL Working Paper Series No 05/2017)
[16] H. W. Micklitz, 'Polics of Justice', 391
[17] J. Q. Whitman, 'Consumerism versus producerism: A study in comparative law' (2007) 1 Yale Law Journal 3, 117-340.

extent to which the emerging fair trading model is capable of engaging everyone in the supply chain for the achievement of sustainable and fair trading relations.[18]

4. MOVING BEYOND FOOD

Food has been the blueprint of this thesis. Food has also been the focus of the EU initiative of unfair trading practices. However, the original proposal addressed both the food and non-food supply chain. The subsequent reduction of its scope can be traced back to a number of reasons and especially to the stronger legal basis for an agricultural directive. The articles of the Treaty dedicated to agriculture provided a safer legal basis to intervene in the food supply chain because European agriculture has been an important part of integration since the beginning. In this way, the development of the fair trading proposal could be done within the framework of the reform of the CAP for the period post-2020. Nevertheless, the final text of the directive goes well beyond the agricultural competences of the Commission. Its scope extends not only to farmers but to other suppliers of food products down in the chain.[19] It makes the UTPD much more of a private law instrument than a tool for agricultural policy. For this reason, it is worth considering whether its rules can find any bearing beyond food chains.

There are many candidates for this extension. I am now thinking particularly of the textile and fashion chain. Fashion and food follow a common thread that starts at the *Primum vivere, deinde philosophari.* Over the last twenty years, fashion retailers like Inditex and H&M have imposed a model of fast-fashion in the same way food companies had previously imposed the ready-made and the fast food model of eating. The wardrobes of consumers transform into fridges. Clothes are not simply worn anymore; they are consumed, hoarded and disposed of. Fast fashion retailers can have a new collection in the market every two weeks. Traditional fashion establishments have been trying to catch up by adjusting prices and production. For fashionistas, this means going from two seasons a year to more than 10 capsule and cruisere collections per year. National legislations on sales promotions have become more flexible to allow for almost constant

[18] J. Mulder, Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness, (Bloomsbury Publishing, 2018), 131.
[19] H. Schebesta et al. 'Unfair Trading Practices in the Food Chain: Regulating Right?' (Wageningen Working Papers in Law and Governance 2018/13).

sale seasons with the purpose of providing local producers and retailers with a quantum of relief and a break from global competition and digitalization and to get rid of their stocks. This model of production is the object of well-deserved criticism. Disasters like that one of the Rana Plaza in Bangladesh have shown the true cost of fashion in terms of human lives. At the same time, European capitals like London, Paris and Milan struggle to keep their position as the capital of the elegant world. European governments launch campaigns to defend the label of made in Europe, even if made in Europe means often that the sole of a Louboutin was glued in Alicante. The Queen is invited to the fashion shows of London. The Macrons organize a soirée at the presidential palace for the most important Parisian designers. The rest of Europe struggles to keep its manufacturing and retail sector alive and competitive. In the manufacturing side, the EU invites and promotes the creation of high-tech and high-quality fashion clusters. In the retail side, it publishes guides of best practices to keep medium-sized cities and their local shops on the map. At the same time, there is a strong civil society movement that struggles to humanize the fashion machinery. The price-based model of competition requires retailers to find new strategies to differentiate themselves. This translates into fair trade labels, a growing interest in re-used and vintage fashion and even in campaigns for conscious consumption sponsored by the main fast-fashion retailers. This requires tighter forms of coordination across the chain, and so, the same problems of the food chain repeat. Even the unpredictability of climate affects the benefit margins of fashion brands. These considerations make it worth considering whether the European fair trade model for the food chain has any future beyond food, regardless of needed adjustments, and whether it can engage civil society in ensuring sustainable models of production.

5. UTPS IN THE BROADER POLITICAL CONTEXT

In the last few years, unfair trading has come back in fashion both in the external and internal relations of the European Union. Externally, the interest in fair trade has not only given rise to private fair trade labels and civil society movements. It has also become associated with a certain protectionist stance in global trade. An example comes from Trump's threats of a trade war. Food and agriculture has also been the target of American protectionism. One of the first victims of this war was the Spanish olive sector, accused by the California olive industry of unfair trading. Globally speaking, there is a new form of food nationalism.

Within the EU, the role of European SMEs in the internal market is also receiving renewed attention. In competition law, mergers in the European industry are one of the battlefields for the protection of European SMEs. In Europe, there is also the puzzle of Brexit. It becomes a very interesting topic from the perspective of EU private law. Indeed, the legislative proposal for a UTPD provides a beautiful example of its paradoxes. On the one hand, Euroscepticism is fed both on accusations against the market bias of the EU to the detriment of social protection and on accusations against European heavy and unnecessary regulatory interventions. Still, the adoption of the UTPD has received the full support of British farmers' associations and of British conservative MEPs. Paolo de Castro, the rapporteur for the file, publically recognized the importance of the English support to pass the initiative at the last minute. English farming groups supported the initiative because passing the new legislation before Brexit would be a way of extending the material and personal scope of the existing English framework on unfair trading practices, which is currently limited to the most important supermarkets in their relations with their direct suppliers. At the same time, English conservative MEPs have praised the directive for taking inspiration in the British Code Adjudicator. The institutional design of the directive is clearly inspired in the British experience, even if the definition of unfair trading practices as *practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed on one party by the stronger counterparty* can create some confusion. This example goes to show that the mutual influences between the EU and its member states are hardly irreversible. Even if not explicitly recognized, the EU has transformed the expectations of English consumers and farmers as for the type of protection they can expect. The support of English conservative MEPs illustrates the paradox of wanting EU protection without the EU.

The impact that Brexit will have and the political future of Europe are imponderables. Also, they are beyond the purposes of this thesis. Still much work remains to be done. For example, one limitation of this thesis is not including in the comparison a broader selection of European experiences. There is Germany missing, one of the giants of fair trading law; the Netherlands, the number one food exporter in the world; and Eastern European countries, who carry in their shoulders a very different legal experience; and even Italy, which is a beacon of the slow food movement. This thesis however has proved is that the merging EU fair trading model initiates a new phase of European private law. Even if incipient, it contains the seeds of a European private law governance model that

involves European society beyond the market. In this model, responsibility for fair trading and sustainability is shared across all the levels impacted by global value chains. These include the EU and its member states, but also businesses and civil society.

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