British Institute of International and Comparative Law

Fair Relations in the Food Supply Chain

Establishing Effective European Enforcement Structures

Justine Stefanelli
Philip Marsden
April 2014

Table of Contents

1. INTRODUCTION

1.1 Context and Issues

In 2008 the European Commission established a High Level Group on Competitiveness of Agri-Food Industry, which endorsed 30 recommendations (the Roadmap) on characteristics of enforcement to stop unfair trading practices (UTPs) in the food supply chain.

The Roadmap was to be overseen by a new High Level Forum (HLF) of stakeholders, which included an expert group focused on business-to-business (B2B) contractual relationships. In 2011, the HLF "welcomed" the 'Vertical Relationships in the Food Supply Chain: Principles of Good Practice' developed by trade associations along the supply chain. At the same time, representatives of civil society organisations concerned about the international development impacts of food supply chains issued 'Recommendations to the EU High Level Forum for a Better Functioning Food Supply Chain in Relation to Business to Business Contractual Practices Expert Platform's Forthcoming Work Exploring "Code" Implementation Options'.

The trade associations representing business interests close to the retail end of the supply chain produced in June 2012, a 'Framework for the implementation and enforcement of the principles of good practice in vertical relations in the food supply chain'.[1] This voluntary framework is intended to implement and enforce the Principles of Good Practice and in September 2013 the 'Supply Chain Initiative' was set up to implement the Framework. Thirty companies across the EU have signed up to the Framework as of April 2014.

Meanwhile, in January 2013, the EU Commission issued a public consultation on how the functioning of the food and non-food retail supply chains might be improved, which included discussion on UTPs and the effectiveness of enforcement to date.[2] Responses to the consultation were published several months later indicating: **a) that UTPs were extensive in food supply chains, and b) that there was a gap in enforcement**.[3] A formal Commission response following on from the green paper as to how the European Commission will address the gap in enforcement of UTPs is anticipated before the end of 2014.

Member States have clearly been grappling with these issues for some time, and some of them have set up enforcement authorities or legal frameworks to deal specifically with these issues. Most recently, as part of a move to create the Competition and Consumer Protection Commission, Ireland has put forward a draft Bill which regulates in Part 6, the relationships between relevant grocery goods undertakings.[4]

Although the voluntary framework run by retailer trade associations and Food and Drink Europe is running, the Commission is still engaging in its consultation on UTPs in the Member States, due to widespread concerns about previous ineffectiveness of voluntary approaches in stopping profitable UTPs. Whether and to what extent the EU will become involved in regulating UTPs by businesses in the EU Member States is unclear. Although the EU has chosen to "welcome" the creation of a voluntary framework at the moment, the EU may use its powers to establish a more binding regulatory structure, whether predominantly national or additionally managed at the EU level, to stop the application of UTPs.

This paper is intended to provide the EU Commission with suggestions as to: (1) what are the ideal features that national enforcement bodies should possess, and (2) how national bodies might cooperate with each other and the Commission in regulating UTPs.

[1] 'The Framework' is available at: http://www.regjeringen.no/upload/LMD/Vedlegg/div/B2B_0407_Stakeholders30June12.pdf (accessed 08/04/14).
[2] 'Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37 final, 31/1/2013.
[3] More information on the consultation and the stakeholder contributions are available at: http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/index_en.htm (accessed 20/01/14).
[4] Ireland, Competition and Consumer Protection Bill 2014.

1.2 Overview of this Paper

In brief, this paper suggests that the **EU should give the Member States primary responsibility for enforcement against UTPs, according to principles and minimum procedures established at the EU level and under a framework managed at EU level**. To arrive at this conclusion, this paper first evaluates in Part 2 the role and operation of similar existing enforcement frameworks at the EU level. In Part 3, the paper discusses specific details regarding how enforcement should be conducted, looking at issues such as the scope of and access to the national enforcement mechanism, how to conduct investigations that respond to issues of supplier fear and enforcement tools that the national enforcement authorities might use to remedy UTPs. The paper then moves on in Part 4 to consider how the national enforcement authorities can work with each other and with the EU to enforce against UTPs. Part 5 follows by considering related legal and practical issues, such as the legal basis for EU action, funding, and any new mechanism's relationship with the current voluntary framework. Part 6 concludes by highlighting that the effectiveness of any enforcement mechanism depends to a great extent on its attention to practical detail, particularly in relation to protection of the anonymity and confidentiality of suppliers who complain about UTPs. It also provides an overview of key choices that the EU will have to make when deciding how best to approach enforcement.

1.3 Positive Characteristics of Enforcement to Stop Unfair Trading Practices (UTPs)

This paper follows an earlier study[5] on Models of Enforcement in Europe by the British Institute of International and Comparative Law (BIICL) which identified and evaluated existing enforcement mechanisms applied in European Union (EU) Member States, in relation to the grocery supply chain and other relevant sectors, and examined the feasibility of developing an EU-wide mechanism to improve trading relationships within food supply chains that serve the EU market.

Internal Market Commissioner Barnier set out in 2011 following four criteria for enforcement: (1) effectiveness across the whole of the food chain; (2) limited costs; (3) inclusion of a monitoring or audit aspect; and (4) transparency. The 2012 BIICL Models of Enforcement Report, built on these and examined law and practice in a number of EU and non-EU Member States in order to gain a more complete picture of how States were addressing imbalanced relations in the food supply chain in Europe. It was clear that UTPs were occurring because, in the short-term, it is more profitable for retailers to pass risk on to their suppliers. The report demonstrated that the Member States have employed several mechanisms to try and tackle the issue of UTPs, which differ according to the needs and legal traditions of the Member States. Although several of the Member States have chosen to deal with these issues through competition law, it was clear that the motivation behind competition law frameworks is to protect consumers, which is not directly applicable in the context of trading relationships.[6] Because of varied regulation of these issues, the Report recommended that the EU would be best placed to bring some consistency into this area, and to introduce a mechanism that effectively addresses these unfair trading practices.[7] To that end, the Report suggested several positive characteristics of enforcement that an EU-level mechanism should include,[8] and a number of options for enforcement.[9] Overall, the Report proposed that a successful mechanism would impose mandatory obligations subject to enforcement options that have teeth, such as the imposition of financial penalties. It also recommended that any enforcement mechanism should be **sector-specific, or** at least include a **specialised team** focused only on food supply chain issues within a more general body.

[5] BIICL (J Stefanelli and P Marsden), 'Models of Enforcement in Europe for Relations in the Food Supply Chain' (23 April 2012), available at http://www.biicl.org/files/5941_biicl_b2b_report_finalversion.pdf (accessed 08/03/14).
[6] Ibid at p. 30.
[7] Ibid at p. 33.
[8] Ibid at p. 34.
[9] Ibid at pp. 33-4.

Specialisation is preferable because it would allow for the team to build up expertise in this area and therefore work more efficiently and effectively in identifying UTPs.

One of the most important recommendations in the 2012 Models of Enforcement Report was that any enforcement mechanism should be based on the principle of fair dealing. In the EU Unfair Commercial Practices Directive, which applies in the business-to-consumer context, this principle is couched as a prohibition on unfair commercial practices as defined by reference to what is considered as "unfair":

> *A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligation arising under the contract to the detriment of the consumer.*[10]

This Directive applies in the context of judicial proceedings for consumers to obtain redress for unfair commercial practices and so has a different overarching framework than the regulatory structure we are suggesting in this paper. However, we suggest that such a general prohibition on unfair trading practices could form the basis for EU regulation in this area. Specifically, we suggest that the EU framework could incorporate language similar to that used in the UK Groceries Code on fair dealing:

> *A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.*[11]

In the context of the EU Directive, unfair practices can occur before, during and after contract negotiation and might include:

- Pre-negotiation payments, i.e., requiring payments for "listing" even being considered as a supplier;
- Subjecting suppliers to unfair penalties and clauses in contracts;
- Abuse of access to confidential information, e.g., regarding costs;
- Imposing retroactive changes to agreements post-negotiation of the contract; or
- Delisting or threats of delisting.

Other types of offences might also be included, perhaps drawing from existing regulation in other Member States, such as those contained in the French Commercial Code: 'submitting a trading partner to obligations which create a significant imbalance in the rights and obligations of the parties'; 'attempting to obtain grossly unfair conditions by threat of a full or partial break in commercial relations'; and 'breaking off a commercial relationship without written notice'.[12] It would also be helpful to include interpretative guidelines, such as that provided in the Directive on unfair terms in consumer contracts with regard to the determination of whether a contractual term is unfair, as discussed above. In Australia, the regulatory framework is based on the concept of "unconscionable conduct" and serves as the basis upon which an investigation into UTPs can be conducted.[13] In making an assessment of whether such conduct has occurred, a large number of factors can be considered, including the bargaining position of the parties, the extent to which the parties acted in good faith and the existence of any undue influence or pressure.[14]

---

[10] Directive (EC) No 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

[11] The Groceries (Supply Chain Practices) Market Investigation Order, Schedule 1, Clause 2.

[12] BIICL 2012 Report, above n 5 at p. 7.

[13] Australian Competition and Consumer Act 2010, Schedule 2, Part 2-2, ss 20-22A.

[14] Ibid at ss 21-22.

The following sections build on the principles established in the 2012 BIICL Models of Enforcement Report by focusing specifically on how to build an effective framework to enforce the principles at the EU and national levels, including specific discussion of essential building blocks going to the details of enforcement.

2. BUILDING AN EFFECTIVE ENFORCEMENT FRAMEWORK

In its Green Paper from 2013, the Commission stated that it was clear that a number of UTPs were occurring in the Member States and that it "may be necessary to ensure the existence in all Member States of a common set of enforcement principles."[15] If, in the context of UTPs, no legally binding law with enforceable principles is established, it will be very difficult to achieve a situation where there is uniform protection against UTPs in the Member States. Discussion of these issues will continue at the national level, and uneven enforcement will prevail. This is exactly the type of situation which the EU wishes to avoid because it leads to distortions in the internal market. To avoid this outcome, the EU should adopt binding legislation based on a set of common principles, as suggested in the BIICL Models of Enforcement Report. The legal basis for how such legislation might be created is discussed below in Part 5.1. One of the major questions to be addressed in such legislation is the nature of EU-level involvement in enforcement. This paper suggests that the EU should make the Member States primarily responsible for enforcing against UTPs according to a legislative set up by the EU, and that the European Commission (preferably DG Internal Market) should play a role in enforcement. This section discusses what the overall framework might look like, with particular reference to the European Competition Network (ECN) and the Agency for the Cooperation of Energy Regulators (ACER).

2.1 The European Competition Network (ECN)

The ECN was established by Regulation 1/2003,[16] which implements the competition law rules in Articles 101 and 102 of the TFEU. Further details of its operation are found in a 2004 Commission Notice.[17] The ECN is a network of competition authorities in the Member States that have the authority or responsibility to enforce those Treaty articles. The motive behind creating the ECN was to ensure that EU competition rules are applied effectively and uniformly in the Member States, and to strengthen the position of the national competition authorities.[18] The ECN framework is based on the principle of parallel enforcement of the same law by both the Member States and the Commission (Article 101 and 102 TFEU). Because of this, one of the aims of the ECN is to ensure that EU rules are applied consistently among the Member States. The Regulation specifically provides for parallel enforcement of those rules shared by the EU Commission and the relevant authorities in the Member States. Depending on the circumstances of a particular case, the Member States may choose to initiate proceedings alone, with other Member States, or the Commission may take control of a case. The particulars of this process will be discussed in more detail below in Part 4.1. However, it is important to note here that the ECN is "dedicated to…effective enforcement".[19] It is therefore largely focused on coordination of enforcement and has its own rules regarding the allocation of cases at the national or European level, depending on which is best placed to carry out an investigation. The ECN must ensure that cases in need of detailed investigation are allocated and assessed.[20] The ECN also has a role to play with regard to making non-binding recommendations on investigating and decision-making powers for

[15] Green Paper, above n 2 at p. 17.
[16] 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.
[17] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/03.
[18] Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 15435/02 ADD 1, available at: http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (accessed 28/02/14).
[19] Ibid at para 5.
[20] Ibid at para 14.

policy-makers at the national level. It may also issue resolutions which set out common positions regarding certain areas of enforcement.

2.2 The Agency for the Cooperation of Energy Regulators (ACER)

ACER was established by an EU Regulation in 2010 to assist national energy regulatory authorities in carrying out their functions.[21] It was created in part to provide a solution to the problem of a lack of independence at the national level of national regulatory authorities from the state.[22] ACER is what is known as a decentralised agency of the EU. This means that it is considered independent from the EU institutions, although the Commission has a strict supervisory role and is responsible for setting out its budget. ACER is also considered a 'network agency' which means that it is made up of pre-existing networks in the sector which are absorbed into the ACER Board of Regulators, which will then, with its Director and Administrative Board, cooperate with the Commission and the national regulatory authorities. Its authority is the result of a delegation of powers by the European Commission.

The basic tasks of ACER are found in its establishing Regulation. Many of its objectives are quite particular to the energy industry and are technical in nature, so for that reason will not be duplicated in this paper. Broadly speaking, ACER is meant to provide a framework for cooperation with national regulatory authorities and assist their action at the EU level, as well as providing a monitoring and advisory role. In terms of the former, ACER is responsible for monitoring the functioning of the gas and electricity markets in general, and wholesale energy trading.[23] ACER is also capable of issuing recommendations and opinions regarding issues within its competence, but these are not binding and they are only issued upon request of the Commission or the national authorities. Because EU agency law prohibits agencies from taking decisions of general application,[24] ACER's decision-making powers are strictly limited to specific technical issues on a case-specific basis in relation to cross-border issues. For example, ACER make take decisions relating to terms and conditions of access to cross-border infrastructure.[25] ACER is, however, to be considered as an additional forum for dispute resolution in that it can take decisions in certain specified areas of regulation where there has been long-term disagreement among national authorities. However, this decision-making power is subject to a Commission veto. Despite its limited autonomy, some commentators have indicated that ACER could have "significant influence" if the Commission chooses generally to comply with ACER's recommendations and opinions.[26]

2.3 Comparing the Models

Both of these examples could work within the context of enforcing against UTPs. However, there are some key differences that should be discussed. Although ACER is an agency of the EU, it appears that its primary task is to be advisory in nature. Although it can issue recommendations and opinions regarding its subject matter, these are not binding and can only be issued upon request of either the Commission or the national regulatory authorities. ACER therefore seems to be focused less on enforcement and more on standard setting and implementation and creation of EU rules and standards. The ECN, by contrast, is clearly focused on enforcement. The Commission and the Council have commented that the ECN is "dedicated" to enforcement of competition rules. The Commission Notice providing detailed rules of cooperation within the ECN

[21] Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.
[22] L Hancher and A de Hauteclocque, 'Manufacturing the EU Energy Markets: The Current Dynamics of Regulatory Practice' (2010) 11 Competition & Reg. Network Indus. 307, 312.
[23] Regulation (EC) No 713/2009, above n 21 at Chapter II.
[24] Case 9/56 Meroni &Co Industrie Metallurgiche SpA v High Authority of the European Coal and Steel Community.
[25] Hancher and Hauteclocque, above n 22 at p. 316.
[26] Ibid.

is therefore focused to a large extent on enforcement allocation rules that determine whether one or more Member States should undertake investigations or whether the Commission should have primary responsibility.[27]

Which model is chosen will depend on what the Commission considers its priority. If it believes that the focus should be on standard setting rather than enforcement, the ACER model is more appropriate. However, if the problem is a gap in enforcement, which we suggest and which the Commission seems to agree in its Green Paper, an ECN-like model may be preferable. One aspect of the ACER model which might be helpful in the context of UTPs is the ability of ACER to issue case-by-case decisions regarding specific technical cross-border issues, such as terms and conditions of access.

	ACER	ECN
Focus	• Focus on standard-setting and interpretation of rules	• Focus on enforcement
Main role and relationship with EU Commission	• Advises Commission	• Ensures consistent application of EU competition rules • Commission takes part
Relationship with national enforcement authorities	• Works with national regulatory authorities	• Comprised of national regulatory authorities
Policy-making role	• Issues non-binding opinions and recommendations	• Issues non-binding recommendations and resolutions
Decision-making powers	• Limited decision-making powers on case-specific issues	• Rules for allocation of investigations between Member States or EU
Dispute resolution	• Limited power to resolve cross-border national disputes	• Not applicable

3. DETAILS OF NATIONAL ENFORCEMENT

This Section considers the features and procedures that any national-level enforcement mechanism should possess to deal with UTPs. The features and procedures have been selected because it is felt that they would best meet criteria set out by Internal Market Commissioner Barnier in 2011, and build on the positive characteristics of enforcement identified in the BIICL Models of Enforcement Report 2012. As in the 2012 BIICL Models of Enforcement Report, we emphasise here that any enforcement mechanism should be sector-specific, or at least include a specialised team within a more general body to build up expertise and to allow for more swift and effective enforcement.

Before a network can be put in place, **national authorities** with the power to regulate and enforce against UTPs must first be established or identified. The Commission Green Paper discussed some preferable aspects in relation to principles of enforcement, such as the ability to conduct ex-officio investigations, to preserve anonymity and to impose deterrent sanctions.[28] It is not necessary that these bodies regulate UTPs in exactly the same way, but it would be preferable if they operated according to the same general principle, perhaps as created by the EU institutions. The discussion that follows emphasises, not the principles according to which these bodies will

[27] Commission Notice, above n 17at Section 1.
[28] Green Paper, above n 2 at p. 17.

operate, but rather the **minimum essential features** that should form part of their enforcement frameworks.

The ECN scheme recognises that **responsibility for enforcement may be split among several authorities** in the context of competition investigations.[29] This practice is also present in some Member States regarding the regulation of UTPs. France, for example, combats UTPs through a soft law authority called the Commission d'Examen des Pratiques Commerciales,[30] but also through use of its competition law and investigations by the Minister for the Economy.[31] Member States may find that this multi-pronged approach by various entities is the most effective way of targeting UTPs.

The discussion below will demonstrate some of these and other essential features that the EU should require all national enforcement authorities to possess.

3.1 Scope and Access

Member States will need to decide which retailers will be **subject to regulation**. For example, the enforcement mechanism could apply to all retailers and suppliers doing business in their territory, or only to those with a specific annual turnover, market share, or other features which acts as a proxy indicator that a retailer has significant power. In the UK, the Groceries Code is applicable to grocery retailers whose annual turnover in the UK exceeds £ 1 billion (approximately €1.25 billion). Alternatively, the enforcement mechanism could apply to retailers possessing a threshold market share. In 2000 the UK Competition Commission proposed that retailers with more than an 8% market share had sufficient market power to apply UTPs and therefore were required to comply with the then-existing statutory supermarket code of practice. Interestingly, in Hungary, the enforcement mechanism applies to all actors who buy foodstuffs or agricultural projects for resale without further processing.[32]

It is important that any enforcement mechanism be equipped to identify and respond to the problem of **buying alliances**. A buying alliance is formed when a group of retailers agree that they will pay the same price for a product, or to buy from the same supplier. This behaviour amounts to what is known in the competition field as purchase price fixing or a purchasing cartel, and will be considered illegal under competition law (Article 101(1) TFEU) if its object is to restrict, prevent or distort competition. In the *GlaxoSmithKline* case from 2010, the Court of Justice of the EU took an upstream approach and considered the effects of concerted buying on suppliers and other competitors, rather than consumers. The Court held that in order to determine whether an agreement has an anticompetitive object, it is not necessary to prove the existence of harm to consumers because the act of price fixing and the upstream distortion in competition were sufficient to establish a violation.[33] Under competition law, the members of the alliance can argue that their agreement should be exempted from the rule in Article 101(1) against fixing purchase prices because the agreement satisfies the conditions in Article 101(3). These conditions are that:

- the agreement results in efficiency gains;
- the price fixing is necessary to achieve the efficiency gains;
- the gains are passed on to consumers; and
- competition in the product at issue is still largely intact.[34]

Although buying alliances can provide smaller undertakings with the opportunity to acquire increased bargaining power, this justification is arguably less present when large retailers enter

[29] Commission Notice, above n 17at para 2.
[30] BIICL 2012 Report, above n 5 at pp. 14-15.
[31] Ibid at pp. 6-7.
[32] Hungary, Act XCV (2009), Art 2(c).
[33] Case C-501/06 *GlaxoSmithKline Services Unlimited v. Commission*. See also Case C-8/08 *T-Mobile Netherlands and others*.
[34] A Ezrachi, 'Buying Alliances and input Price Fixing' (2012) 8(1) Journal of Competition Law & Economics 47.

into buying alliances against their suppliers. For example, a recent alliance was formed between four large European supermarket chains which together have a combined turnover of 88 billion Euros.[35] Although it is possible to take care of these issues via competition law, if the alliance proves that its pricing agreement falls under the exemption in Article 101(3) then the suppliers will have no legal recourse. National enforcement mechanisms should make provision to consider these alliances especially in light of suppliers' ability to compete and carry on business, with less of a focus on consumer benefit than under the exceptions in Article 101(3). Therefore, if a provision like this is applied in the context of the food supply chain, we suggest that no similar exception be included. Moreover, if the effects of a buying alliance are felt within the national territory, the enforcement authority should have jurisdiction over the retailers involved, regardless of their geographic location.

A broader issue is whether the national mechanism would be open to non-EU suppliers. The UK GSCOP applies to suppliers "established anywhere in the world".[36] Similarly, a Bill recently put forward in Ireland which includes provisions for regulating the grocery supply chain applies to suppliers "whether located in the State or not".[37] We recommend that, insofar as possible, the enforcement body should be accessible to all actors in the food supply chain, **regardless of their geographical origin** so that suppliers based outside of the EU but selling into it can take advantage of the protection offered by the enforcement mechanism. Moreover, such coverage would ensure that supermarkets cannot abuse their relationships with third country suppliers, thus resulting in discrimination against non-EU suppliers doing business within the EU which would distort competition. In a strictly national context, this should not be a problem. The obligation to adhere to national law would apply to businesses present in the Member State and therefore also to all of their dealings with suppliers who are selling into Member State territory. To determine otherwise would be to create a two-tiered system for enforcement in each Member State, which would produce an onerous burden on the national enforcement authorities.[38] If there is a binding law at EU-level, the law itself could mandate that national authorities provide for access to all suppliers selling into the EU.

As discussed above in Part 1.3 enforcement mechanisms should operate with the principle of **fair dealing** in mind. This principle should operate so as to effectively catch the coercive behaviour which often results in suppliers signing off on contracts containing unfair terms.

Linked to the above is the fact that, because retailers are considered private legal entities, they will be subject to regulation in any Member State in which they do business, regardless of where they are incorporated. This means, for example, that even though a retailer may be registered in the UK, it can be subject to regulation by another Member State authority (or the EU Commission) without that Member State having to coordinate or notify the UK that such an investigation is going to or is taking place. This applies in a similar manner to non-EU retailers and suppliers.

Finally, it is important to stress that any national enforcement body (or the EU Commission) would be able to investigate the behaviour of actors in the food supply chain, regardless of provisions on governing law or jurisdiction in contracts. Once a regulatory enforcement framework is created that applies to certain retailers, it will apply to all of their contractual dealings, despite any provisions regarding applicable law in case of dispute. Choice of contract law would remain an issue for enforcement mechanisms that are dispute resolution-based and do not carry out investigations similar to competition authorities, for example.

---

[35] See, e.g., the buying alliance which was recently formed among four large European supermarket chains: http://uk.reuters.com/article/2014/02/14/uk-retail-europe-alliance-idUKBREA1D0K620140214 (accessed 17/03/14).
[36] UK Groceries Order 2009, above n 11 at s 2.
[37] Irish Bill 2014, above n 4 at s 76 (which inserts new s 63A).
[38] The system would be 'two-tiered' in the sense that two separate enforcement regimes would exist for largely the same bad practices, one applying to cases involving parties located within the EU and the other would apply to cases involving parties based outside of it. Combining the two into one system for regulation and enforcement would reduce the administrative burden on the national regulatory authority.

3.2 Investigations

The BIICL Models of Enforcement Report suggested that the mechanism should be capable of undertaking ex officio investigations and basing investigations on credible complaints from affected parties or from credible third parties. What follows below is a more detailed discussion as to how these investigations might take place, particularly so as to adequately address the issue of supplier fear. At this point, it is important to note that there is, of course, already a mechanism in place for controlling UTPs: action by suppliers to enforce contracts. However, although it is in principle available, it is in practice, virtually ineffective due to: (1) the high level of fear of retailer retaliation on the part of suppliers, and (2) the ability of retailers to effectively coerce suppliers into signing contracts containing unfair terms. This latter behaviour in particular is a problem where existing national solutions focus on contractual solutions and require retailers to contract fairly with suppliers because retailer power to achieve what they want contractually through coercion is not eliminated.

The procedure by which an investigation may be initiated should be set out clearly in any operational rules and made public. This includes any applicable standard of evidence that would operate as a **trigger** to launch an investigation. A formal investigation should be distinguished from informal inquiries regarding behaviour in the sector. An enforcement authority may spend several months interviewing aggrieved parties or credible third parties with relevant information, in order to obtain an opinion as to whether a formal investigation should be launched. However, a certain amount of information will be necessary to reach the launch threshold, and this differs from country to country. For example, a formal investigation may not be triggered unless the enforcement authority has reasonable grounds (based on the preliminary information supplied) "to suspect" that a violation has occurred.[39] Alternatively, an investigation may be initiated when the enforcing body has "reasonable grounds to believe" or a "reason to believe" that a violation has occurred.[40] A "reason to believe" standard or a "reasonable grounds" standard is a lower threshold than a "suspect" standard and may be better in the context of UTPs and the likelihood that few suppliers will be willing to come forward with the preliminary information needed for an authority to build a case. **Prioritisation** rules should also be established in case of numerous complaints.[41] Such rules may consider issues such as the impact an individual investigation might have on parties involved or the sector as a whole; whether the practice is widespread, repeat, or harms indirect suppliers or consumers; and available resources on balance with severity or number of complaint(s).

In collecting that information, it is vital that the enforcement authority have rules in place to allow for the collection of confidential information to protect the anonymity of the information source and to combat supplier fear of retaliation. Therefore, any procedural rules concerning investigations must provide for rules to protect **confidentiality and anonymity**. Various methods for doing this exist, and perhaps a good illustration lies in the Australian model.[42] Australia permits credible third parties to supply it with preliminary information used by the competition authority in its determination of whether to launch a formal investigation. Indeed the 2012 BIICL Models of Enforcement Report recommended that third parties with knowledge of UTPs, for example, trade associations, trade unions, service providers in the sector and civil society organisations, should be capable of bringing cases of alleged violation before the responsible national authority in part to alleviate the problem of supplier fear of retaliation and the reluctance of parties *directly* involved to complain about UTPs. In addition, all notes relating to the information collected or discussions between the enforcement authority and the parties supplying information are

[39] This is the standard in the UK for investigations by the Adjudicator. See Groceries Code Adjudicator, 'Statutory guidance on how the Groceries Code Adjudicator will carry out investigations and enforcement functions' (2014) s 8.
[40] Irish Bill 2014, above n 4at s 76 (inserting new s 63C(2)). See also Australian Competition Act 2010, above n 13at s 155(1).
[41] UK Groceries Code Adjudicator Statutory Guidance, above n 39.
[42] Derived from conversations by the authors with a representative from the Australian Competition and Consumer Commission.

generalised so that they do not contain pertinent names and dates, or any information which would identify the complaining party. This could also include the collection of copies of documents with identifiers redacted. All complaining parties should be given a coded identification name or number and no record of actual identities should be kept to prevent a paper trail enabling retailers to ascertain which suppliers complained to the authorities.

It is also extremely important that any regulatory framework include a **statutory power** to enable the enforcement authority to collect information anonymously and keep it confidential. The Australian competition authority (which handles these cases) currently has no such power, although it collects information anonymously in practice. The problem is that the party under investigation is able to challenge its investigation by asking the competition authority to prove that it had the requisite reason to believe a violation had occurred. This would therefore impact the enforcing authority's ability to obtain confidential information. A contact at the Australian authority indicated that it is prepared to argue that that there is a public interest in not identifying these parties because otherwise enforcement in this field would not be possible. As the authority is currently putting together its first investigation in the food supply chain sector, it has not yet had to test this legal argument, but it feels that it is likely to be successful. If the law itself provided for the capability of collecting confidential information, this would not be a problem. Not only should the law state that information can be collected confidentially, it should also state clearly that no one can have access to the information.

Any regulatory framework should clearly distinguish between confidential information provided by suppliers and credible third parties to help an enforcement authority in its determination of whether to launch a formal investigation, and the formal evidence that the authority relies on in its case against a supermarket. **Formal evidence** to be used in a case should not consist of any of the information provided confidentially in the preliminary stage. Rather, formal evidence should be comprised of information given to the enforcement authority by either the retailer or the supplier as a result of statutory powers to compel the production of relevant documents. That way, the suppliers will not be viewed as having cooperated or schemed with the enforcement authority in a way that is damaging to the relationship between the retailer and the supplier, as both parties may be compelled to provide information. Moreover, this resolves any problems regarding the retailers right to defend themselves and face the accusations made against them. None of the evidence against them will be confidential if it has been compelled through a formal process. Therefore, any regulatory framework should include procedures for compelling information. This might include, for example, rules requiring the enforcement authority to issue written notice to the retailers and suppliers detailing the exact information sought, who should provide it, in what form, any deadline for supply of the information, and any consequences for failing to comply with the request. It is also important to remember that anonymity can be further protected during the process of compelling evidence by ensuring that evidence is compelled from a number of suppliers, to shield them within a group and prevent them from being identified.

Linked to the issue of anonymity is the **burden of proof** in the applicable regulatory framework. Many systems currently place the burden of proof on the accusing party (i.e., the supplier). This practice may compromise supplier anonymity if they are forced to reveal enough information to make their case. If the burden of proof is on the retailer to demonstrate that it did not engage in UTPs, supplier participation would be unnecessary. An equally effective way of dealing with this issue is to place the burden of proof on the regulatory authority to prove its case. This is the typical situation in the context of competition authorities, for example. The issue of who bears the burden of proof should be explicitly set out in legislation. We suggest that the burden lie with the enforcing authority.

It may also be useful to require any retailers subject to the mechanism to provide the enforcing authorities with a complete **list of its suppliers** so that the authority can actively monitor the relationships and check whether UTPs are being applied in the context of those contracts. Finally,

it is important that **strict timings** are applied to ensure that grievances are heard as soon as possible, and so that corrective or punitive action can be imposed quickly and effectively.

SUPPLIER FEAR AND ANONYMITY

Combating Supplier Fear

Scenario: A supplier has been subject to the UTP of being continually pressed to make additional payments. It wants to go to the enforcing authority, but is afraid that if it does , its identity will be revealed and its relationship with the retailer, and its business, will be terminated.

Question: How will the supplier's identity be kept confidential?

Answer: Adequate procedures to protect anonymity and deal with confidential information will allow the supplier to provide information through one of the following tools:

- Using a credible third party to provide information to the authority;
- Engaging in a confidential telephone exchange with an authority that is statutorily required to keep the discussions confidential (and here, the supplier has the option whether or not to remain anonymous);
- Supplying redacted documents to the enforcing authority;
- The enforcing authority would only keep generalised notes of any discussions;
- The enforcing authority would assign a coded identification name or number to the supplier that cannot be traced back to any document/conversation revealing the complainant's actual identity;
- Any information provided anonymously would not be used as evidence in the formal investigation by the enforcing authority;
- The burden of proof would rest on the enforcing authority, which would negate any need for the supplier to openly participate in the investigation.

Protecting Anonymity in Multi-State Cases

Scenario: A supplier from South Africa decides to come forward about UTPs it has been experiencing. The South African supplier gives information anonymously to an enforcement authority in the UK regarding a retailer that does business there and sells the suppliers' goods.

As it turns out, the retailer is committing these UTPs against suppliers doing business in France as well, and the UK enforcement authority wants to confer with the French enforcement authority to determine who is best-placed to formally investigate.

Question: How will the South African suppliers' identity be kept confidential during these multi-country and agency discussions?

Answer: The tools discussed in the 'Combating Supplier Fear' box should apply in this context without exception. However, because there is even more room for accidental leakage, specific considerations should be put in place, including:

- Discussions between national authorities to take place orally only so as to eliminate the possibility of a paper trail;
- Any inspection of hard copy information regarding existence of UTPs provided by the supplier must be conducted in person;
- All documents must be sufficiently redacted so as to eliminate reference to key information that might enable identification of the complainant.

3.3 Enforcement Tools

We suggested in our Models of Enforcement 2012 report that any enforcement body be capable of imposing enforcement measures with 'teeth', such as **dissuasive financial penalties**. Sanctions should be sufficient to ensure that the violating party cannot still profit from its bad behaviour to

avoid situations where retailers are engaging in a normal cost-benefit analysis of whether it makes business sense to continue the UTPs.[43] Research indicates that judicially-imposed sanctions are often not enough to achieve deterrence because they often fall short of the gain retailers experience resulting from the UTPs.[44] There should also be a clear method for the calculation of financial penalties. The Irish Bill contemplates a stepped approach, which considers whether the breaching party has been held liable for a breach on a previous occasion, and may result in fines ranging from €3,000 to €100,000.[45] In Hungary, the fine may be increased one and a half times if a retailer commits the same offence on a separate occasion within two years.[46] The UK Groceries Code Adjudicator calculates fines according to a five-step approach which considers:

- the seriousness of the infringement;
- turnover in the UK;
- the duration of the infringement;
- any aggravating factors, such as the existence of intentional and repeated breaches or failures to comply with recommendations;
- any mitigating factors, such as cooperation with the investigation or time taken to remedy the breach;
- desired deterrent effect; and
- proportionality.[47]

While financial penalties should definitely be one of the tools at the disposal of the national enforcement body, a **number of other tools** may be usefully employed. It is key that the enforcement authority has some degree of flexibility in deciding which enforcement measure it wishes to pursue. Flexibility will allow the authority to respond to specific circumstances of a case. Other useful enforcement measures are:

- the ability to engage in an informal dialogue and make recommendations;
- publication of information about the violation (the 'naming and shaming' method);
- the ability to order cessation of any UTPs even without actual proof of loss or damage, or of intention or negligence on the part of the retailer, or a large company purchasing within the food chain;
- an internal audit of retailer business; and
- criminal penalties, such as incarceration.

With regard to the internal audit tool, we suggest that it might be possible for an enforcing authority to enter into a full investigation (or audit) of all current contracts held by retailers, and to also require prior approval of contract terms, for example, requiring specific wording. This could essentially be likened to a tax audit, something that the retailers would certainly wish to avoid, and which might lead to improved behaviour on the part of retailers in order to avoid such an audit. Each of these methods can be used on their own or in combination, depending on the nature of the behaviour at issue.

In additional to financial penalties, the Irish Bill mentioned above also provides for enforcement through a term of **imprisonment**. As with the financial penalties, a stepped approach is taken that considers whether the guilty party has had previous violations, and adjusts the prison term accordingly, providing for a longer term for repeated offences.[48] Thus, a party guilty of applying UTPs may be imprisoned anywhere from six months to two years. It is important to note, however,

[43] Richard B Macrory, 'Regulatory Justice: Making Sanctions Effective' (November 2006), pp. 13-15; 20.
[44] Ibid at p. 14. In the UK, judicially-imposed fines for breach of contract were typically low, around £1,000. This meant that this type of enforcement did not act as a sufficient deterrent in cases where the commercial benefits of exercising UTPs were greater than the fine imposed for a breach.
[45] Irish Bill 2014, above n 4 at s 76 (inserting new s 63E). See also Explanatory Memorandum, p. 12, which provides the exact language.
[46] Hungary, Act XCV (2009), Art 6.
[47] Groceries Code Adjudicator Statutory Guidance, above n 39 at s 71.
[48] Irish Bill 2014, above n 4 at p. 12, which provides the exact language.

that in a context where criminal penalties may be imposed, it is often the case that the burden of proof will be elevated to a beyond a reasonable doubt standard. This may therefore negatively impact the complaining parties' anonymity.

Professor Macrory has established factors that should be considered when deciding which type of enforcement measure to use. He suggests that **enforcement measures should**: (1) be aimed at changing behaviour (we would suggest that this aim should apply not only in context of the parties directly involved, but also more broadly in terms of business culture); (2) aim to eliminate any loss deemed acceptable by the violating party, or related financial gain; (3) be appropriate in light of the parties and issues involved (i.e., be individualised); (4) be proportionate in consideration of the nature of the behaviour and the harm caused; (5) aim to redress any harm caused (in addition to actual compensation); and (6) aim to deter future bad behaviour.[49]

Depending on the harm at issue, it may be that the enforcement body will choose to start soft, for example, with a dialogue and informal exchange of information, but then escalate response depending on whether there is a failure to comply with a recommended course of action. Factors such as the seriousness of the breach, the number of suppliers affected, the harm caused, the likelihood of achieving deterrence, or the likelihood of a successful outcome should be considered when deciding which method to employ.[50]

We also suggest that some form of **appeal** be available. This could be within the regulating body itself, for example, by a three-person review panel, or through a private right of action before a judicial authority. If the structure is set up in the context of binding EU legislation, the Court of Justice of the EU may be available as a court of last appeal, or the national bodies may be able to refer cases to the Commission for infringement proceedings under Article 258 TFEU. However, it should be noted that an appeal mechanism may impinge on the anonymity of the supplier, especially if the appeal is taken before a court. In such cases, special procedures should be developed which would allow legal counsel for the retailer to examine confidential documents with identifying information sufficiently redacted so as to prevent identification of the supplier. Perhaps one way of doing this would be to create a system where the legal representation for the retailer is given access to the documents based on an oath given that he or she will not reveal the identity of the complaining party. This would allow verification of the existence of the evidence while still mainlining anonymity.

4. NATIONAL NETWORKS AND EU OVERSIGHT

This Section is focused on the relationship between each of the national enforcement authorities, and between the national enforcement authorities and the EU. In defining that relationship, some important issues concerning coordination should be considered.

4.1 Case Allocation

A situation may arise whereby the same UTPs committed by the same company or companies are being complained of in more than one Member State. It is therefore necessary to establish rules to determine which Member State or States should be responsible for formally investigating. The ECN includes **principles of allocation** for this type of situation. It specifies that cases may be handled by a single national body, several national bodies acting together, or by the Commission.[51] Issues of allocation should be considered right at the outset, although normally the body that receives the complaint or originally launches its own investigation should remain in charge of the case. Reallocation is meant to be quick and efficient, and not to delay

[49] Macrory, above n 43 at p. 35.
[50] UK Groceries Code Adjudicator Statutory Guidance, above n 39 at para 51.
[51] Commission Notice, above n 17at para 5.

investigations.[52] Essentially, the aim is to ensure that the national body best placed to deal with the case, for example, because of a material connection between the infringement and the territory of a Member State, has primary authority for handling the investigation.[53] Paragraph 10 of the Notice on ECNs reads: "It follows that a **single** [national competition authority] is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory." This standard could be easily transplanted to the context of UTPs with a focus on where the effects of the harm are primarily felt.

Parallel action may be the best approach when the UTPs are occurring in **two or three Member States**, and are having a substantial effect on the food supply chain in those States.[54] In cases involving parallel action, the national bodies should make every effort to coordinate their action, and should designate one body as the lead authority.[55] The ECN specifies that the **Commission** will be considered to be best placed where the practice (in our case, the UTPs) has effects in **more than three** Member States, or where the behaviour may be linked to other areas of EU regulation that would be better applied by the Commission.[56] For example, if the behaviour complained of is also affecting a policy area over which the EU has a high level of competence or a common policy area, such as agriculture, it would make more sense for the Commission to take responsibility for enforcement.

Where the Commission has decided independently to initiate its own proceedings, or if it has been allocated a case because it is considered the best placed to act, the Member States are precluded from acting.[57] However, Member States are not prohibited to act just because another Member State is undertaking an investigation. Moreover, a national authority is not precluded from acting where another national authority already dealt with a case. This "leaves scope for appreciation of the peculiarities of each individual case."[58] That is to say that some Member States may have particular reasons for wanting to investigate a certain case that were not present in another Member State which rejected the complaint. Alternatively, the rejecting Member State may have only rejected a case because it was unable to collect all the necessary evidence.[59] The decision of which Member State is best placed to take forward an investigation occurs on an informal basis between members of the ECN, considering such factors as available monetary and personnel resources, and the enforcement priorities of authority at the time.

These rules could be applied in the context of regulation of UTPs by the Member States. Member State bodies should be capable of carrying out investigations on their own, but they should also have the option of working with other Member State authorities to combat UTPs, particularly where abuse is widespread and involving retailers that do business in more than one Member State. It would also be preferable to have the option of the EU taking responsibility for cases involving several Member States because the Commission will have more resources to handle widespread UTPs, not only financially but also with regard to its ability to more easily deal with a multi-state situation without getting caught up in coordination details or any political sensitivities at the national level, and also because it can impose larger fines.

4.2 Information Sharing

Procedures for notice and exchange of information should be put in place. The ECN includes rules regarding notice and information sharing. For example, in order to achieve case allocation quickly the national authorities are required to **notify each other and the Commission** of their

[52] Ibid at para 7.
[53] Ibid at paras 8-9.
[54] Ibid at para 12.
[55] Ibid at para 13.
[56] Ibid at paras 14-15.
[57] Ibid at paras 50-57.
[58] Ibid at para 17
[59] Ibid at para 17; see also Council Regulation (EC) No 1/2003, above n 16 at Art 13.

intention to launch an investigation.[60] Likewise, the Commission is obligated to inform the national authorities.[61] This is achieved through the transmission of a short written form briefly outlining the details of the case, including the type of parties concerned, the product involved, the alleged infringement and its duration, and the origin of the case.[62] Again, measures must be taken to ensure the protection of anonymity of the complaining parties, so this information should be generalised as far as possible.

If a national enforcement body suspends or terminates proceedings because another Member State body is pursuing the case, it can transfer any information it has gathered, including from the complainant, to the Member State dealing with the issue.[63] In the context of UTPs, special measures will need to be established to preserve anonymity and confidentiality in the transmission of case information between national authorities and the Commission.

4.3 Advisory Mechanism

Another issue to consider is whether an advisory committee should be created. Within the ECN, an advisory committee made up of experts from the various national enforcement bodies was established to provide assistance on individual cases and general issues of the application of EU law. The Advisory Committee must be consulted by the Commission prior to the Commission taking any decision, and may be consulted by the national competition authorities.[64] In the latter context, it is also contemplated that the Advisory Committee serve as a forum for discussion of appropriate case allocation.[65] The Committee must also be consulted by the Commission regarding any draft competition regulations, and may be consulted during the adoption of notices and guidelines.[66] The ACER, by contrast, itself functions primarily as an advisory body, although much of its advice is only provided upon request.

Regarding membership, **two models** are foreseen. The first model could reflect the arrangement of the ECN in that it would be comprised of experts from national enforcement bodies. The national experts could be complemented by representatives from the Commission to assist with interpretation of EU rules and/or principles, depending on which sort of regulatory regime was endorsed by the EU. Alternatively, the committee could include users of the mechanism as well as experts not only from enforcement bodies, but perhaps also independent legal and agricultural experts. For example, a portion of the membership could be made up of suppliers, farmers and retailers. These individuals would then be complemented by some representation from the national enforcers, and also by the EU Commission.

The role of any advisory body will depend to a large extent on its makeup. If it is composed of experts drawn from the national enforcement bodies, it could perform a more substantive role like that of the Advisory Committee in the ECN. However, if the advisory body comprises a range of stakeholders, it will mainly only be able to advise as to the current situation in the market or in a given Member State, and will not be persuasive in a way similar to the ECN Advisory Committee. In any case, the advisory body should not have a final veto in the context of determinations whether to launch an investigation, or with regard to the outcome of an existing investigation. It should also not possess any decision-making powers. These capabilities should be reserved for the national enforcement authorities and the Commission.

[60] Commission Notice, ibid at para 17; see also Council Regulation (EC) No 1/2003, ibid at Art 11(3).
[61] Commission Notice, ibid; see also Council Regulation (EC) No 1/2003, ibid at Art 11(2).
[62] Commission Notice, ibid.
[63] Ibid at para 23.
[64] Ibid at paras 59-61.
[65] Ibid at para 62.
[66] Ibid at paras 63-64.

5. LEGAL AND PRACTICAL ISSUES

This Section will evaluate some legal and practical issues surrounding effective enforcement at the national and EU levels, including legal basis for EU action, the relationship with national enforcement frameworks, funding, the need for binding regulation and the steps necessary to achieve it, the relationship with non-EU enforcers, and how a binding enforcement mechanism might prompt improved activity within the voluntary approach of educating businesses that UTPs should not be applied. In particular, due to the impact that the climate of fear has had on the ability to adequately address the problem of UTPs, this Section of the Report attempts to emphasise the careful attention that must be paid to practical issues which will influence whether an enforcement mechanism is going to be effective in stopping UTPs.

5.1 Legal Basis for EU Action

The EU has recognised that the application of UTPs is a European problem, in part due to the fact that purchasing for retailers to re-sell products in several EU Member States is coordinated. Therefore, this paper does not consider the legal basis for a purely national enforcement system. Rather, it will consider what might be necessary for the EU to establish a mechanism rooted in binding EU legislation (like the ECN or the ACER model).

The Commission's January 2013 Green Paper makes it clear that the EU believes, not only that UTPs are problematic in the Member States, but also that national frameworks for regulating UTPs are fragmented, as some Member States regulate these issues through competition law, others through civil or commercial law, and still others are only at the beginning of the process.[67] This means that suppliers and retailers will be subject to differing levels of regulation depending on where they are doing business, which means that the internal market is being distorted. The Green Paper does not, however, discuss the appropriate legal basis for EU action; the Commission believes that EU action is permitted based on resulting market distortion from the perspective of the consumer, and from its experience within the High Level Forum, which demonstrated that there is a gap in enforcement of UTPs at the Member State level.[68]

In light of this, it would seem that the most obvious legal basis for EU action would be Article 114 TFEU, which empowers the EU institutions to adopt measures which have as their object the functioning of the internal market. This was the basis for the Unfair Commercial Practices Directive, which applies to relations between retailers and consumers, and which was discussed above in Part 1.2 and in the BIICL Models of Enforcement Report.[69] Article 114 could also serve as the legal basis for any instrument on unfair trading practices in business-to-business relationships. Article 114 does not require unanimous consent, but rather only a majority vote.

In the BIICL Models of Enforcement Report, we suggested two additional Treaty bases for EU action in the field of UTPs between retailers and suppliers in the food supply chain. In particular, it was suggested that either Article 115 or 116 of the TFEU could be employed.[70] Article 115 gives the EU the power to mandate that legislation be adopted in order to harmonise national laws that are directly affecting the internal market. Article 116, though seldom-used, allows similar action to occur, but is based on resolving national laws that distort competition conditions.

[67] Green Paper, above n 2 at pp. 10-12.
[68] Ibid at p. 3.
[69] BIICL 2012 Report, above n 5 at p. 32.
[70] Ibid at p. 32.

Article 114 TFEU:

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure…adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Article 115 TFEU:

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 116 TFEU:

Where the Commission finds that a difference between the provisions laid down by law, regulations or administrative action in the Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

Either of those Articles offers a legal basis to create legislation in which a network akin to the ECN is created and overseen by the Commission.

It should be noted that Article 115 requires unanimous agreement of the Member States in the Council. This might be difficult to achieve, particularly with regard to those Member States who either believe that UTPs are not a problem in their territory, or that their current system for regulation is adequate. Therefore, if for some reason Article 114 is considered inappropriate, we suggest recourse to Article 116, which does not require unanimity, but rather a majority vote. Article 116 allows the adoption of directives to correct distortions in the market. Directives will give the Member States breathing room in terms of retaining aspects of enforcement mechanisms already in place (see discussion below in part 5.2), while simultaneously mandating that such mechanisms be brought in line with a directed minimum standard, and according to specified rules or principles.

We suggest that the responsible Directorate General (DG) for these issues be **DG Internal Market** rather than DG Competition, as previous research has demonstrated that competition law cannot adequately regulate these issues because of its emphasis on consumer welfare, rather than on 'fair trading' as between undertakings.[71]

[71] Ibid, and in particular fn 2.

5.2 Choice of Legislative Instrument

The discussion in Sections 3 and 4 is aimed at illustrating not only how the national enforcement bodies can interact with each other, but also how the EU might be involved with national level enforcement. Should the EU adopt legislation, it could take on the role of coordinator as well as enforcer alongside the Member States, each striving for the uniform implementation of EU law.

As the 2012 BIICL Models of Enforcement Report demonstrated, the EU Member States are at **different stages of addressing UTPs**, ranging from no enforcement at all, to enforcement via contract law or competition, or enforcement via dedicated bodies. No matter which type of framework the EU adopts, whether a Regulation or a Directive, it would of course be preferable to implement certain minimum principles and procedures, for example, those described above. This would ensure that Member States cannot apply existing legislation in a biased manner. Adoption of a Regulation would mean that the way in which national enforcement bodies should be set up will be described in detail. This would therefore require some Member States to effectively start from the ground up, even some who have already been regulating these issues. Consequently, this seems to counsel in favour of the EU adopting a Directive, which establishes objectives but leaves it to the Member States to determine how to reach them.

5.3 Relationship with the Current Voluntary Framework

The currently voluntary framework created by the High Level Forum is a framework for companies and trade associations rather than states. It educates participating companies, requests that members commit not to apply UTPs and proposes a dispute settlement approach. This framework could serve as **a mechanism as first resort** that companies can use if they feel that they would be able to resolve their disputes through a more arbitrative setting. Depending on the genuineness of the desire to actually stop UTPs by participating companies, trade associations potential future members and choices of 'victim companies', the voluntary framework's dispute resolution options may or may not be used. It may be of interest to the EU and the Member State governments to assess its functioning on a regular basis, but this should not result in inaction by the European Commission, given previous widespread failure of voluntary approaches to address the problem of UTPs.

A binding framework can and should operate alongside the voluntary approach. A binding framework based in legislation with clear rules and procedures as described in the above sections of this paper would provide the parties with a better opportunity to combat UTPs on a more confidential and protected basis than the dispute resolution offered under the voluntary framework. Suppliers who fear that any action against a retailer engaging in UTPs might result in retaliation by retailers, need the option of going to the national enforcement body. If the supplier considers the voluntary framework to be suitable, it could also make that choice. Either choice should be considered valid, and it should not be considered necessary to consult the voluntary framework as first step. The parties should be free to go straight to the binding framework if that is what they feel comfortable doing. The important point is that dispute resolution alone will not be an effective option where the supplier is afraid to confront the retailer directly.

Having both a voluntary and a binding framework in place will likely contribute to better enforcement overall. This is the approach in France, which makes use of a non-binding dispute resolution framework as well as regulatory enforcement actions.[72]

5.4 Relationship with Non-EU Enforcers

It is important to consider that in some cases, authorities outside the EU Member States may be involved in an investigation of the same parties because, for example, the harmful practice is

[72] More details on the French approach is available in BIICL 2012 Report, ibid at pp. 6-7; 14-15.

being perpetrated uniformly everywhere the retailer is doing business. We have already demonstrated above in Part 4 how the Member States might cooperate with each other and with the EU in terms of joint investigations, and we re-emphasise the importance of those practices in the international context. Member States should be prepared to cooperate with representatives from the enforcement authorities of non-EU Member States in a way similar to that described above, in particular concerning joint investigations and information sharing. This could perhaps be done through the International Competition Network, or a similar network, in which every EU Member State and the Commission are members.[73] ACER, for example, can include participation of third countries.[74] Although the ECN does not allow for this option, non-EU enforcement authorities can approach the ECN and request that an issue be addressed. For example, a non-EU authority may indicate that some behaviour occurring within the EU market is negatively impacting the non-EU market. This is referred to as 'positive comity'. We suggest that when a non-EU country is involved, allocation rules should operate so as to give the Commission investigatory powers. This should be the case particularly when more than three Member States are being affected.

Particulars of cooperation internationally should include:[75]

- Designation of an 'international liaison' within the enforcement authority who would be responsible for coordinating consultations, and gathering and transferring information between enforcement authorities;
- Immediate contact between national enforcement authorities when one enforcement body learns of a related investigation in another country;
- Mutual notification at key milestones, such as at initiation of an investigation (formal or informal), prior to adopting a final opinion or decision and/or imposing remedial measures;
- Consultation during analysis of the case and in relation to possible remedial action (including sharing draft proposals or opinions) according to methods that respect confidentiality and anonymity;
- Sharing publicly available information, or any other relevant information (with due regard for confidentiality obligations). Helpful information might include: the problematic practice at issue, the name and activities of business under investigation, their geographic areas of business, the types of suppliers affected and the identification of any other countries which might be experiencing similar problems.

Cooperation will be especially important regarding the determination of whether to impose sanctions. Where harm occurs across multiple countries, cooperating agencies will have the opportunity to design a mutually-effective sanctions regime that can address common areas of concern, avoid imposing conflicting or inconsistent obligations on the offending party, and dissuade poor practice in countries where UTPs were previously applied.

5.5 Funding

There are several funding models that can be used at the national level. The UK Groceries Code Adjudicator is funded by what is called '**levy funding**'.[76] This means that the designated retailers

[73] Information on the International Competition Network (ICN) is available at: http://www.internationalcompetitionnetwork.org/ (accessed 05/03/14). The ICN has stated that "Enforcement cooperation is a critical aspect of competition agency enforcement in matters that have cross border effects." See ICN Steering Group, 'International Enforcement Cooperation Project', March 2012, available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf (accessed 05/03/14), p. 4. The ICN examined the issue of buying power in 2008, but seems to have largely abandoned the issue. See ICN, 'Report on Abuse of Superior Bargaining Position' (2008) prepared by the Task Force for Abuse of Superior Bargaining Position for the 7th annual ICN Conference. See also M Vander Stichele and B Young, 'The Abuse of Supermarket Buyer Power in the EU Food Retail Sector' (2009).

[74] Regulation (EC) No 713/2009, above n 21at Art 31.

[75] US-EU Merger Working Group, 'Best Practices on Cooperation in Merger Investigations', 14 October 2011, available at: http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (accessed 05/03/14).

will be responsible for covering the Adjudicator's actual and estimated expenses, regardless of whether they are fined for breaches of the Code. Payments need not be uniform across all retailers. The Adjudicator may require different retailers to pay different amounts as long as the amount can be supported by objective criteria set by the Adjudicator that reflects the estimated amount of time the Adjudicator believes it will spend on dealing with matters related to the retailers charged more.[77] The Adjudicator can also be supported by the Secretary of State, but under a loan or grant framework.[78] The UK's Independent regulator and competition authority for the UK communications industries (Ofcom) is also funded in this way. It receives financial support from a variety of sources, including license fees for television or radio broadcasting.[79] In both of these contexts, the businesses are effectively paying to be regulated in a dedicated and fair manner.

Funding at the EU level will be less of an issue because if the EU decides to act, it can then allocate funds from its overall budget depending on the level of EU involvement.

Regardless of how it is funded, it is vital that enough funding is allocated to ensure that the national mechanisms are **adequately staffed**. Otherwise, it will be difficult to deal with problems effectively and efficiently. Having enough staff will also ensure that the investigatory and enforcement processes run smoothly so that the mechanism as a whole is effective, especially with regard to maintaining confidentiality and anonymity, which will build trust in the users to approach the enforcer and result in the elimination of UTPs and a better functioning internal market.

6. CONCLUSION

The above discussion illustrates that there are many practical and legal issues that must be considered before choosing a form of enforcement. We suggest that the most realistic way forward would be to give the **Member States primary responsibility** for enforcement of UTPs with the participation of the EU, according to **uniform principles** developed at the EU level.

The effectiveness of any enforcement mechanism will depend on the level of attention it gives to practical detail, especially in relation to protection of the anonymity and confidentiality of suppliers who complain about UTPs. The issue of supplier fear has a very great impact on design and should be adequately considered by the EU when building its enforcement mechanism.

With that in mind, the **main conclusions** to be drawn from this paper are:

1) The EU should legislate to create a network of national enforcement authorities which operate according to minimum principles and procedures developed at the EU level.

2) The Member States should designate a competent authority or authorities and give it (them) the power to supervise and enforce against UTPs up to the following standards:
   a. The national enforcement mechanisms should be accessible to all actors in the food supply chain, regardless of geographical origin;
   b. Specific rules should be set out concerning investigatory procedure, including rules relating to the protection of anonymity and confidentiality;
   c. The enforcement authorities should have a number of different enforcement measures at their disposal to allow for flexibility of response, and these measures should aim at changing behaviour and deterrence;

[76] Groceries Code Adjudicator Act 2013 s 19.
[77] Ibid at s 19(5).
[78] Ibid at s 20.
[79] Ofcom, 'Financial performance', available at: http://www.ofcom.org.uk/about/annual-reports-and-plans/annual-reports/ofcom-annual-report-2008-09/financial-performance/ (accessed 11/03/14).

d. Funding for the national frameworks should be derived, in the form of a levy, from the companies that are being regulated.

3) Coordination should include:
   a. A clear system for case allocation should be developed for situations involving harm in multiple Member States, with the recognition that parallel action among Member States or sole EU action may sometimes be appropriate.
   b. Information sharing between Member States, and between Member States and the EU concerning ongoing investigations is vital to comprehensive enforcement of UTPs.

4) EU action should be based on a Treaty provision that can accommodate the current disparate situation of regulation in the Member States, such as Articles 114, 115 or 116. This will allow gaps in Member State enforcement to be filled, and permit existing national approaches to be reviewed in order to create a consistent and effective approach.

5) Methods for international cooperation with non-EU enforcement authorities should be developed to address situations having an impact both inside and outside the EU.

6) The current voluntary framework's dispute resolutions options should remain available for suppliers to use, if they are not concerned about their anonymity. It can be foreseen that the voluntary framework may usefully evolve its educational and discussion forum roles once national enforcement authorities are capable of providing an effective route to stopping UTPs through procedures which respect anonymity and allow for the application of dissuasive sanctions.

Developing national and EU-level frameworks for enforcement will also involve a number of **key choices** for the EU and for the Member States:

- The EU will have to determine the nature of its role with regard to enforcement and whether it wants primary responsibility for enforcement or whether it wants to instil the Member States with primary responsibility;
- Which food businesses will be subject to the enforcement mechanism, as determined by size, or power or placement within the supply chain;
- Whether the mechanism will be accessible to all actors in the food supply chain regardless of geographical origin; and
- The range of sanctions at the disposal of the enforcement authorities.

This Briefing Paper was not commissioned by the European Commission. It was produced with the support of the European Union. The views expressed in it are exclusively those of the participating organisations and can under no circumstances be regarded as reflecting the position of the European Union.