

EU, COMPETITION & PROCUREMENT

Food for Thought: *Unfair Trading Practices in the Agricultural and Food Supply Chain*

While there are analogies between the now revoked Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (**Grocery Goods Regulations**) and the European Union (Unfair Trading Practices in the agricultural and food supply chain) Regulations 2021 (**UTP Regulations**), the UTP Regulations differ in a number of material respects and deserve much food for thought.

7 MIN READ

Food for Thought: Unfair Trading Practices in the Agricultural and Food Supply Chain

The UTP Regulations (which transpose Directive (EU) 2019/633 (**UTP Directive**)) took effect on 1 July 2021 and govern relations between buyers and suppliers in the agricultural and food product supply chain in certain circumstances.

The UTP Regulations provide for trading practices which are unconditionally prohibited (e.g., unilaterally altering certain terms of a supply agreement) and those which are conditionally prohibited. In the latter case, the relevant practices (e.g., requiring a supplier to pay for the marketing by the buyer of the products) are prohibited unless a written agreement is in place between the parties which expressly allows for such practices.

Under the Regulations, the power to initiate investigations into alleged breaches and to summarily prosecute offences (or to refer indictable offences to the DPP) lies with the Minister for Agriculture, Food and the Marine (**Minister**). The maximum penalties that may apply for indictable offences have increased vis-à-vis the Grocery Goods Regulations and now stand at up to €500,000 and/or three years' imprisonment. The CCPC's enforcement powers in this area have therefore ceased and there is no longer an obligation on grocery businesses to submit an annual compliance report to the CCPC in relation to their interactions with suppliers.

Principal Features of the UTP Regulations

The principal features of the UTP Regulations are summarized in greater detail in the table below. While analogous in many ways to the Grocery Goods Undertakings, as noted above, the UTP Regulations differ in a number of material respects, including as regards scope, relevant enforcement authority and applicable penalties:

Features of the UTP Regulations	Comment
Scope	<p>The UTP Regulations apply to unfair trading practices which relate to the “agricultural and food products” listed in Annex I to the Treaty on the Functioning of the European Union as well as to products not listed in that Annex, but processed for use as food using products listed in the Annex.</p> <p>In order to ensure that only buyer-supplier relationships involving a relative level of inequality of bargaining power are caught by the Regulations, their applicability is limited to sales between suppliers whose turnover falls below prescribed turnover thresholds and buyers whose turnover exceeds specified turnover thresholds (as well as to all public authority purchasers).</p> <p>The UTP Regulations require either the buyer or the supplier or both to be established within the EU and apply only on a B2B basis (rather than to agreements entered into between suppliers and consumers).</p>
Prohibited Practices	<p>The UTP Regulations prohibit buyers from engaging in a number of specified practices.</p> <p>Delayed Payment</p> <ul style="list-style-type: none"> ▪ A buyer cannot pay a supplier for perishable agricultural and food products (under a supply agreement which provides for delivery on a regular basis) later than 30 days after the end of: <ol style="list-style-type: none"> i. an agreed delivery period in which deliveries have been made (which cannot be longer than one month); or ii. the date on which payment for that delivery period is set (whichever of these two dates is the later). <p>Where the relevant supply agreement does not provide for the delivery of products on a regular basis, the prohibition will apply to payments made more than 30 days after the later of either the date of delivery or the date on which the amount payable is set. For non-perishable agricultural and food products, this period is extended and “60 days” is substituted for references to “30 days”.</p> <p>Unlike the Grocery Goods Regulations, no general derogation is available where the supply agreement makes provision for a different timeframe in respect of payments.</p>

Features of the UTP Regulations	Comment
Prohibited Practices	<p>Cancellation at Short Notice</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer cannot cancel orders of perishable agricultural and food products at such short notice (considered as less than 30 days' notice, although a shorter period can be prescribed for specific sectors) that a supplier cannot reasonably be expected to find an alternative means of commercializing or using them. <p>Unilateral Changes to Terms</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer cannot unilaterally change certain terms of a supply agreement (e.g., those that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standard, the terms of payment or the price). This compares with the Grocery Goods Regulations, which prohibited the variation, termination or renewal of a supply agreement, other than where the contract expressly provided for same and where reasonable notice was provided by the buyer. <p>Unrelated Payments</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer is prohibited from requiring payment from a supplier that is unrelated to the sale of the agricultural and food products of the supplier. <p>Payments for Deterioration/Loss</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer cannot require a supplier to pay for the deterioration and/or loss of agricultural and food products that occur on the buyer's premises or after ownership has been transferred to the buyer, where this is not caused by the negligence or fault of the supplier. This prohibition is unconditional and the possibility for making express contractual provision for wastage/shrinkage payments (as contained in the Grocery Goods Regulations) is not replicated in the UTP Regulations.

Features of the UTP Regulations	Comment
<p>Prohibited Practices</p>	<p>Written Confirmation of Terms</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer cannot refuse to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation. This is a less onerous obligation than that contained in the Grocery Goods Regulations, which required all grocery goods contracts to be recorded in writing (and not just in circumstances where the supplier had requested a written contract). <p>Disclosure of Trade Secrets</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer is prohibited from unlawfully acquiring, using or disclosing trade secrets of a supplier. <p>Acts of Commercial Retaliation</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer is prohibited from threatening to carry out, or carrying out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights (e.g., by filing a complaint or cooperating with enforcement authorities). <p>Compensation for Examining Customer Complaints</p> <hr/> <ul style="list-style-type: none"> ▪ A buyer cannot require a supplier to compensate it for the cost of examining customer complaints relating to the sale of the supplier’s products, in the absence of negligence or fault on the part of the supplier.
	<p>The following prohibitions formerly contained in the Grocery Goods Regulations are not expressly replicated in the UTP Regulations, namely the prohibition on:</p> <ul style="list-style-type: none"> ▪ requiring a supplier to obtain goods/services from a third party from whom the buyer receives payment; ▪ imposing liability for non-performance of the contract due to circumstances beyond the reasonable control of the party concerned; ▪ failing to provide, at the request of a supplier, a forecast of the goods required by the buyer in respect of a specified period; or ▪ compelling a supplier to make a payment or grant any allowance for the retention, increased allocation or better positioning of shelf space for the grocery goods of the supplier.

Food for Thought: Unfair Trading Practices in the Agricultural and Food Supply Chain

Features of the UTP Regulations	Comment
Conditional Prohibitions	<p>The UTP Regulations also contain certain “conditional” prohibitions – i.e., prohibitions which can be disapplied where the supply agreement or a subsequent agreement between the buyer and supplier expressly permits such actions. The prohibitions concerned involve a buyer:</p> <ul style="list-style-type: none"> ▪ returning unsold agricultural and food products to the supplier without paying for the unsold products and/or their disposal; ▪ charging a supplier as a condition for stocking, displaying or listing its agricultural and food products or of making them available; ▪ requiring a supplier to bear all or part of the cost of any discounts on agricultural and food products sold by the buyer as part of a promotion; ▪ requiring the supplier to pay for the advertising by the buyer of agricultural and food products; ▪ requiring the supplier to pay for the marketing by the buyer of agricultural and food products; or ▪ charging the supplier for staff for the fitting-out of premises used for the sale of the supplier’s products.
Grace Period	<p>While the UTP Regulations automatically applied to new supply agreements (either written nor oral) concluded after 28 April 2021, a 12 month grace period was granted to existing supply agreements concluded before the making of the Regulations. That grace period expired on 28 April 2022.</p>
Enforcement Authority	<p>As a result of the revocation of the Grocery Goods Regulations, the CCPC’s previous enforcement responsibilities in respect of those Regulations have ended.</p> <p>The Minister has been designated as the relevant enforcement authority under the UTP Regulations. However, as detailed further below, it is the Government’s intention to enact new legislation in due course, which will transfer the enforcement functions currently accorded to the Minister to a newly established statutory authority known as the Office for Fairness and Transparency in the Agri-Food Supply Chain (OFTASC).</p> <p>Under the UTP Regulations, the Minister is charged with receiving complaints from suppliers (or from certain third parties, such as producer organizations, at the request of suppliers) and for determining whether to initiate an investigation on foot of the complaint or otherwise.</p> <p>While there is no longer an obligation on buyers to submit an annual compliance report, the UTP Regulations oblige the Minister to publish an annual report detailing the number of complaints received and investigations opened/closed each year, as well as the nature of the complaint, the outcome of each closed investigation and the decision taken (subject to any confidentiality requests from the complainant).</p>
Penalties	<p>On conviction on indictment, the UTP Regulations provide for penalties of up to €500,000, 3 years imprisonment or both. Accordingly, the penalties that may be imposed under the UTP Regulations are more onerous than those which previously applied under the Grocery Goods Regulations.</p> <p>The UTP Regulations also allow for the issuing of compliance notices requiring the person(s) on whom they are served to take actions specified in the notice, failing which they will be deemed to have committed an offence and may be liable to the maximum criminal penalties detailed above.</p>

Future of the UTP Regulations

The Department of Agriculture, Food and the Marine has recently published the General Scheme of the Agricultural and Food Supply Chain Bill 2022 (**Bill**). Once enacted, this will establish OFTASC, which will be responsible for ensuring fairness in dealings between buyers and suppliers in the agri-food sector. It is also foreseen that it will have a price/market analysis and reporting function, as well as responsibility for raising awareness in relation to unfair trading practices.

The Department has indicated that it is the Minister's intention to repeal the current UTP Regulations and to use the enabling provisions in the Bill to provide for the transfer of responsibility for UTP enforcement functions from the Department/Minister to the remit of OFTASC. This is expected to occur at the time of commencement of the Act. It

is envisaged that OFTASC's powers will include investigating suspected breaches of the rules on unfair trading practices, bringing summary proceedings and referring cases to the DPP where it has reasonable grounds for believing that an indictable offence has been committed.

Conclusion

Buyers of agricultural and food products should remain cognizant of the provisions of the UTP Regulations when dealing with their suppliers and should bear in mind that the Regulations differ in a number of material respects from the Grocery Goods Regulations, including as regards scope, applicable prohibitions, enforcement authority and potential penalties.

Regard should also be had to the Bill which, once enacted, will lead to the revocation of the existing Regulations and the transfer of the enforcement powers currently vested

in the Minister to a newly created statutory body. Businesses would therefore be well-advised to track the timing and evolution of the Bill, which is likely to introduce further significant changes in relation to the regulation of the agri-food sector in the State.

For further details of how your business can ensure that its practices comply with the UTP Regulations and of how it can best prepare for the enactment of the Bill, please feel free to contact any member of [A&L Goodbody's EU, Competition and Procurement team](#).

Resources



[A&L Goodbody's EU, Competition and Procurement team](#)

[READ MORE](#)