



UNFAIR TRADE PRACTICES Transposition of UTP Directive

The (long) awaited Decree-Law No. 76/2021 of August 27, was published on 27 August 2021, and transposes Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices (or UTP) in business-to-business relationships in the agricultural and food supply chain. The Decree-Law will enter into force on 1 November 2021.

This new legislation brings with it very relevant innovations for the market, namely regarding the commercial relationship between **buyer** and **supplier**, providing an important additional level of protection to the latter, and taking the opportunity to establish, in certain cases, rules applicable across the market, not limited to the agri-food sector.

Thus, the Decree-Law introduces significant changes to two statutes currently in force in the national legal order:

Decree-Law No. 118/2010 of 25 October (and subsequent amendments), which defines the maximum terms for the payment of contractual prices for the purchase and sale or supply of foodstuffs intended for human consumption, and

Decree-Law No. 166/2013 of December 27 (and subsequent amendments), which establishes the regime applicable to individual restrictive trade practices (PIRC).

1. Payment terms:

Scope of application: in accordance with the provisions of the UTP Directive, the new rules on payment terms apply to contracts entered between:

- i) **single or collective suppliers in the agri-food sector**, whose annual turnover does not exceed 350 million

euros, also being applicable to producer organizations and their associations;

- ii) **individual or collective purchasers of agricultural and food products or groupings of these**, or purchasers who are **public entities** (including the direct, indirect or autonomous administration of the State).

Prohibited practices regarding payment terms: in transactions involving **agricultural or food products**, in cases where there is a significant difference in the bargaining power of the supplier and the buyer - the legislation specifies, as measurement criteria, a set of levels with minimum and maximum limits of annual turnover - establishing the **prohibition of payment of the price after the expiry of the period of**:

- 1) **30 days**, for perishable agricultural and food products (with some exceptions for certain non-perishable products); and
- 2) **60 days**, as a rule, for non-perishable agricultural and food products.

Perishables are agricultural and food products that, by their nature or by their stage of processing, are likely to become unfit for sale within 30 days after the date of harvest, production or processing.

2. Individual Restrictive Trade Practices (“PIRC”):

The new law maintains the previous legislative logic of enshrining, on the one hand, the prohibition of certain abusive business practices regardless of the

sector and, on the other hand, the prohibition of specific commercial conduct in the agri-food sector. The ranges for both have been broadened.

Effectively, regardless of the sector in which they occur, prohibited business practices are those that translate into:

- ▶ **penalties for the supplier for difficulties in the supply of disproportionate orders** compared to the purchaser's normal consumption quantities or the seller's usual delivery volumes, when the supply that, under normal conditions would have been completed, cannot be completed for unforeseen reasons or reasons of *force majeure*;
- ▶ the **illegal acquisition, use or disclosure of the supplier's trade secrets**, as set out in the Industrial Property Code;
- ▶ **threatening or carrying out acts of commercial retaliation** against a supplier who exercises his contractual or legal rights, in particular when making a complaint to the competent authorities or cooperating with the competent authorities in the course of an investigation.

The prohibition of certain practices that were previously exclusive to relationships with micro or small company suppliers, producers or cooperatives is extended to other sectors. This is the case of the prohibition of imposing a payment, directly or in the form of a discount, for example for **the non-fulfilment of the buyer's expectations regarding the volume or value of sales**, for **costs related to transport and storage after the delivery of the product**, or as a **contribution to the opening of new establishments or the remodeling of existing ones**.

Regarding the agri-food sector in particular, the law makes a distinction between business practices that are:

- ▶ Absolutely **prohibited** in any situation, when undertaken by the buyer; and
- ▶ conditionally prohibited depending on whether there is a **clear and unequivocal provision in advance** in the supply agreement, or in any subsequent agreement concluded between supplier and buyer.

Violation of these rules constitutes an economic administrative offence, being punishable in accordance with the sanctions framework that was already in force, and may, in the case of a very serious administrative offense committed by a large company, amount to a maximum value of 2.5 million euros.

3. Monitoring:

In both cases, the entity responsible for monitoring compliance with the rules is **ASAE**.

The new Decree-Law introduces some important innovations in terms of the **investigation** and **report** procedure.

On the one hand, the possibility is expressly foreseen for ASAE to trigger the inspection **actions** it deems necessary for that purpose, as well as to impose **fin**es.

On the other hand, there is the possibility for companies or associations (on behalf of their members) to file a **complaint**, regarding business practices prohibited by the Decree-Law, expressly guaranteeing the right to confidentiality of the identity of the company, association and, in the latter case, its members, except before the supervisory entity.

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