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Unfair trading practices in business-to-business relationships in the agricultural and food supply chain. Towards the implementation in Italy of Directive (EU) 2019/633.



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After a long legislative process, on 8 May 2021 the Italian 2019-2020 European delegation law (Law No. 53 of 22 April 2021 - *Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union*) came into force, laying down the principles and criteria for the implementation of European directives, including Directive (EU) 2019/633 on unfair business-to-business trading practices in the agricultural and food supply chain (the “UTP Directive”).

The implementing provisions, to be adopted on the basis of the principles and criteria laid down in the European delegation law, will amend and supplement the rules already in force in Italy on the transfer of agricultural products and foodstuffs, providing for a stricter regime than the minimum level of protection introduced by the UTP Directive.

The deadline for the adoption of the implementing provisions provided for in the UTP Directive expired on 1st May 2021 and the relevant measures shall be applied from **1st November 2021**.

The 'minimum' protection level provided by the UTP Directive

The purpose of the UTP Directive is to harmonise at a European level the protection of suppliers of agricultural and food products in their relations with buyers through the provision of a minimum list of trading practices to be considered always prohibited (the so-called “*black list*”) and a list of trading practices permitted only if agreed in clear and unambiguous terms in the supply agreement (the so-called “*grey list*”).

Scope of the UTP Directive

The rules laid down by the UTP Directive apply to sales of agricultural and food products between suppliers and buyers of certain economic sizes as identified by the turnover thresholds laid down in Article 1(2) of the UTP Directive¹.

The agricultural and food products covered by the UTP Directive are all those listed in Annex I of the TFEU² and other products processed for use as food using such products.

The provisions of the UTP Directive only concern B2B relations and are intended to protect suppliers only. Therefore, contracts with consumers are excluded.

The new rules apply to sales where at least one of the contracting parties is established in the European Union.

¹ The UTP Directive applies to unfair trading practices relating to sales of agricultural and food products by: (i) suppliers with an annual turnover not exceeding **EUR 2 million** to buyers with an annual turnover of **more than EUR 2 million**; (ii) suppliers with an annual turnover of between **EUR 2 million and EUR 10 million** to buyers with an annual turnover of more than **EUR 10 million**; (iii) suppliers with an annual turnover of **between EUR 10 million and EUR 50 million** to buyers with an annual turnover of **more than EUR 50 million**; (iv) suppliers with an annual turnover of between **EUR 50 million and EUR 150 million** to buyers with an annual turnover exceeding **EUR 150 million**; (v) suppliers with an annual turnover of between **EUR 150 million and EUR 350 million** to buyers with an annual turnover **exceeding EUR 350 million**. If the buyer is a public authority, the turnover thresholds set out in Art. 1(2) of the UTP Directive do not apply, provided that the turnover of the supplier does not exceed EUR 350 million.

² https://eur-lex.europa.eu/resource.html?uri=cellar:c382f65d-618a-4c72-9135-1e68087499fa.0013.02/DOC_5&format=PDF

The black list

The UTP Directive provides that trading practices resulting in the following are always prohibited:

- payment terms of more than 30 days for perishable products and more than 60 days for other agricultural and food products, in accordance with periods identified according to different criteria;
- the cancellation of orders for perishable products at such short notice that the supplier cannot reasonably be expected to find an alternative way to commercialise or use them;
- unilateral changes by the buyer of the terms relating to frequency, method, place, timing or volume of supply or delivery of the products, quality standards, terms of payment or prices or, in certain cases, of the terms relating to the provision of services;
- request of payments from the supplier that are not related to the sale of the supplier's agricultural and food products;
- request of payments from the supplier for deterioration and/or loss of products occurring on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the supplier's negligence or fault;
- the refusal to confirm in writing the terms of a supply agreement at the supplier's request, except in certain cases;
- the unlawful acquisition, use or disclosure by the buyer of the supplier's trade secrets;
- threatening or carrying out acts of commercial retaliation against the supplier if it exercises its contractual or legal rights;
- request of compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products, despite the absence of negligence or fault on the part of the supplier.

Each Member State may introduce additional unfair trading practices that are always prohibited.

The grey list

The UTP Directive also provides that the following trading practices are prohibited, unless previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer:

- the buyer returns unsold agricultural and food products to the supplier without payment for such unsold products and/or their disposal;
- the supplier is charged a payment as a condition for stocking, displaying, listing or making its products available on the market;
- the buyer requires the supplier to bear the cost of discounts on agricultural and food products sold by the buyer as part of a promotion;
- the buyer requires the supplier to pay the costs of the purchaser's advertising of the products;
- the buyer requires the supplier to pay for the marketing by the buyer;
- the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.

The implementation of UTP Directive in Italy

The transposition of the UTP Directive will result in the amendment and strengthening of the provisions currently in force in Italy regulating the sale of agricultural and food products, maintaining the scope thereof - which is broader than that provided for by the UTP Directive - and introducing new provisions in the direction of greater protection of traders in the agricultural and food supply chain.

The current Italian framework

The provisions implementing the UTP Directive will mainly affect Article 62 of Decree-Law no. 1/2012 - the so-called "Cresci Italia" decree, converted by Law no. 27/2012 - ("Art. 62"), which regulates trading relationships between traders in the agricultural and food supply chain.

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Such provisions currently require that supply agreements concerning agricultural and food products are in writing - and to this extent the decree implementing Art. 62³ now provides that such requirement may be fulfilled by equivalent means – and specifies the minimum content thereof.

It also prohibits the following practices:

- a directly or indirectly imposing unjustifiably onerous contractual terms, as well as non-contractual and retroactive terms;
- b applying objectively different terms for the performance of equivalent obligations;
- c making the conclusion and performance of the agreements and the continuity and regularity of trading relations subject to the performance of obligations which, by their nature and according to commercial uses, have no connection with the subject matter of the agreements or the trading relations;
- d to obtain the performance of undue unilateral obligations not justified by the nature or content of the trading relationship;
- e to adopt any further commercial conduct which appears unfair also considering the overall commercial relations characterising the supply terms.

Mandatory payment terms are also set out, i.e. within 30 days for perishable products and within 60 days for other products, starting from the last day of the month in which the invoice is received, and the application of increased interest in the event of delay.

While the UTP Directive provides for a "unilateral" protection of the supplier, the current Italian rules may apply to the benefit of both the supplier and the buyer.

In addition to the unfair practices envisaged by Art. 62, the provisions under Article 78 paragraphs 2-*bis*, 2-*ter* and 2-*quater* of Law Decree no. 18/2020 (converted by Law no. 27/2020)⁴ have been recently introduced as a measure to support companies in connection with the epidemiological emergency caused by COVID-19.

Protection irrespective of the economic size of the operators

The Italian legislator, considering the actual dynamics of supply and demand in the agricultural and food supply chains in Italy, has provided that the provisions on unfair trading practices apply irrespective of the economic size of suppliers and buyers, in continuity with Art. 62.

The new implementing provisions will therefore apply to all suppliers of agricultural and food products operating in Italy, regardless of the turnover thresholds laid down in the UTP Directive.

Written form

The European delegation law provides for confirmation of the requirement to conclude supply agreements concerning agricultural and food products i) in writing, specifying that such requirement cannot be fulfilled solely by equivalent means, and (ii) prior to delivery⁵.

Also in this respect, the Italian legislation is stricter than the provisions of the UTP Directive - which does not provide for a general requirement to conclude written contracts - providing that the requirement of the written provided for by Art. 62 continues to apply, though excluding that such requirement may still be satisfied by equivalent forms, such as invoices and transport or delivery documents.

Further prohibited unfair practices

By virtue of the possibility for the Member States to introduce stricter national rules to combat unfair trading practices, the European delegation law provides that, in addition to the list provided for in the UTP Directive,

³ Ministerial Decree no. 199 of 19 October 2012 concerning the "Implementation of Article 62 of Legislative Decree no. 1 of 24 January 2012, converted, with amendments, by Law no. 27 of 24 March 2012".

⁴ Pursuant to Art. 78 (2-*bis*), it is considered an unfair commercial practice within the meaning of the UTP Directive to make the purchase of agricultural and food, fisheries and aquaculture products subject to non-compulsory certification relating to COVID-19 and not indicated in supply agreements for the delivery of products on a regular basis prior to those agreements.

⁵ This requirement shall not apply to contracts with consumers and in case of simultaneous delivery and payment of the agreed price.

the following practices shall be considered unfair:

- the sale of agricultural and food products through the use of electronic tenders and auctions with double discounts;
- the sale of agricultural and food products under excessively onerous contractual terms, including that of selling at prices manifestly below production costs;
- the absence of at least one of the requirements set forth by Article 168(4) of Regulation (EU) no. 1308/2013 on the common organisation of the markets in agricultural products.

In addition, the regulation of sales below cost, as set out in Presidential Decree no. 218/2001, shall be revised in relation to the sale below cost of fresh and perishable food products.

Complaints and mediation or alternative dispute resolution mechanisms

In accordance with the provisions of the UTP Directive, the European delegation law sets out that the principle of confidentiality of complaints to the authority shall be strictly implemented and the protection of anonymity of complaints concerning unfair trading practices shall be guaranteed.

It is also provided for the possibility of using mediation or alternative dispute resolution mechanisms.

Penalties

With reference to penalties, the European delegation law establishes that effective, proportionate and dissuasive penalties shall be provided for, taking into account the nature, duration, recurrence and gravity of the infringement, **up to the 10% of the turnover** achieved by the operator in the last financial year. Such provision will result in an increase in the penalties provided for in Article 62, which are currently up to EUR 500,000 for certain infringements and consider various parameters⁶.

Enforcement authority

An important innovation concerns the designation of the **Central Inspectorate for the protection of quality and fraud repression of agri-food products (ICQRF)** as the enforcement authority responsible for supervising the application of the provisions governing trading relations in the sale of agricultural and food products, as well as the application of the prohibitions provided for by the UTP Directive and the relevant penalties. The authority currently competent for the application of Article 62 in Italy is, in fact, the Antitrust Authority (AGCM), which since 2012 has intervened several times in the application of such provision both in terms of enforcement and through moral suasions.

⁶ For infringements of the requirements relating to the written form and the minimum content of the agreement, the penalties range from EUR 516 to 20,000 and are proportionate to the value of the transaction; for the unfair practices provided for in par. 2, the penalties range from EUR 516 to 3,000, taking into account the advantages gained by the offender; for the infringement of the payment terms, the penalties range from EUR 500 to 500,000, depending on the company's turnover and the occurrence and extent of the delays.

How to get ready to comply to the new framework

Although the implementing provisions have not yet been adopted, the European delegation law provides useful elements to allow companies operating in the agricultural and food chain to already plan some measures to comply with the new framework.

The measures provided for by the UTP Directive will in fact apply to supply agreements concluded after the date of application of the national transposition measures, whereas supply agreements concluded before the date of publication of the national transposition measures will have to be brought into compliance within 12 months after that date of publication.

It is therefore recommended to start carrying out an analysis of existing relationships involving to the supply of agricultural and food products in order to verify the applicability of the new provisions and identify any terms that will need to be amended. In addition, it is also appropriate ensuring that new supply agreements concerning agricultural and food products already comply with the provisions of the UTP Directive and the additional provisions that are being implemented at national level.

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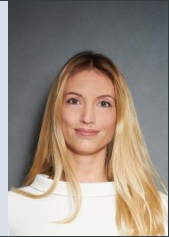


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