

SUBSIDIARY LEGISLATION 117.42**UNFAIR TRADING PRACTICES IN THE FOOD
SUPPLY CHAIN REGULATIONS**

18th June, 2021

LEGAL NOTICE 266 of 2021.

1. (1) The title of these regulations is the Unfair Trading Practices in the Food Supply Chain Regulations.

Citation, scope and applicability.

(2) The scope of these regulations is to transpose and implement Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, as may be in force from time to time.

(3) These regulations shall apply according to sub-regulations (4) and (5), and the responsibilities, functions, obligations and rights provided according to these regulations shall only be applicable accordingly:

Provided that the Board shall consider all complaints received for investigation and in such cases the Board may only issue recommendations:

Provided further that these regulations shall not apply to agreements between suppliers and consumers.

(4) These regulations apply to certain unfair trading practices which occur in relation to the sale of agricultural and food products whenever the supplier and, or buyer is based in Malta, and when such sales are effected by:

(a) suppliers which have an annual turnover not exceeding two million euro (€2,000,000) to buyers which have an annual turnover of more than two million euro (€2,000,000);

(b) suppliers which have an annual turnover of more than two million euro (€2,000,000) and not exceeding ten million euro (€10,000,000) to buyers which have an annual turnover of more than ten million euro (€10,000,000);

(c) suppliers which have an annual turnover of more than ten million euro (€10,000,000) and not exceeding fifty million euro (€50,000,000) to buyers which have an annual turnover of more than fifty million euro (€50,000,000);

(d) suppliers which have an annual turnover of more than fifty million euro (€50,000,000) and not exceeding one hundred and fifty million euro (€150,000,000) to buyers which

have an annual turnover of more than one and hundred fifty million euro (€150,000,000); and

(e) suppliers which have an annual turnover of more than one hundred and fifty million euro (€150,000,000) and not exceeding three hundred and fifty million euro (€350,000,000) to buyers which have an annual turnover of more than three hundred and fifty million euro (€350,000,000):

Provided that the annual turnover of the suppliers and buyers referred to in paragraphs (a) to (e) shall be understood in accordance with the relevant parts of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises and in particular Articles 3, 4 and 6 thereof, including the definitions of "autonomous enterprise", "partner enterprise" and "linked enterprise", and other issues relating to the annual turnover:

Provided further that these regulations shall also apply in relation to sales of agricultural and food products by suppliers which have an annual turnover not exceeding three hundred and fifty million euro (€350,000,000) to all buyers which are public authorities.

(5) These regulations shall also apply to services, insofar as explicitly referred to in regulation 8, provided by the buyer to the supplier.

Interpretation.

2. (1) For the purposes of these regulations, unless the context requires otherwise, the following definitions shall apply:

Cap. 117.

"Act" means the Supplies and Services Act;

"agricultural and food products" means products listed in Annex I to the Treaty on the Function of the European Union, as well as products not listed in that Annex, but processed for use as food using products listed in that Annex;

"Board" means the board established according to regulation 3;

Cap. 460.

"buyer" means any natural or legal person, irrespective of that person's place of establishment, or any public authority in the European Union as defined under the European Union Act, who buys agricultural and food products and the definition "buyer" may include a group of such natural and legal persons;

"Directive" means the Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, as may be in force from time to time;

"perishable agricultural and food products" means agricultural and food products that by their nature or at their stage of processing are liable to become unfit for sale within thirty (30) days after harvest, production or processing;

"public authority" means national, regional or local authorities, bodies governed by public law or associations formed by one (1) or more such authorities or one (1) or more such bodies governed by public law;

"recommendations" means suggestions issued by the Board to anyone concerned in an investigation, but said suggestions shall not include any order or obligation;

"Sectoral authorities" means the departments, or other public bodies, responsible for fisheries, aquaculture and agriculture;

"supplier" means any agricultural producer, fisherman or any natural or legal person, irrespective of their place of establishment, who sells agricultural and food products and the term 'supplier' may include a group of such agricultural producers, fishermen or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations.

(2) Save as otherwise provided in this regulation, the definitions of the Act and the Directive shall apply to these regulations:

Provided that should a definition be provided in the Directive, such definition shall prevail and apply accordingly for the purposes of these regulations.

3. (1) There shall be an Unfair Trading Practices (Agriculture and Fisheries) Board, acting as the enforcement authority for the purposes of the Directive, in accordance with these regulations.

Unfair Trading
Practices
(Agriculture and
Fisheries) Board.

(2) The Board shall consist of seven (7) members, appointed by the Minister responsible for trade upon a recommendation by the Minister responsible for agriculture and fisheries, being:

(a) an advocate having at least five (5) years professional experience who shall preside over the proceedings of the Board and have a casting vote in addition to his original vote in case of equality of votes;

(b) a representative of the department responsible for agriculture;

(c) a representative of the department responsible for fisheries and aquaculture;

(d) a representative of the department responsible for commerce;

(e) a member, whether a public officer or not, having adequate expertise in matters relating to the markets concerned, its operators, the situation of suppliers and the trading practices involved as affecting suppliers based in Malta in particular; and;

(f) two (2) other members recommended by the Minister responsible for fisheries and agriculture:

Provided that the Board shall be assisted by a registrar who shall assist the Board as its secretary and shall be responsible for its documentation and for all communications necessary according to these regulations, as may be instructed by the board:

Provided further that the registrar shall not be a member of the Board and shall not have the right to vote in its proceedings:

Provided further that the Board shall decide on its matters by simple majority and provided that at least four (4) members are present or otherwise express their vote in writing, and said four (4) members shall always include the representative of the department responsible for agriculture or the representative responsible for fisheries and aquaculture according to the specific sector relevant to the case being discussed:

Provided further that the members of the Board shall not be entitled to vote if they have a conflict of interest or were involved in any investigation or complaint in any capacity beyond that of member of the Board.

(3) All representatives referred in sub-regulation (2) shall be nominated by the respective body, and all members of the board shall serve for a period of three (3) years from the date of appointment:

Provided that all members may resign their position by a notice in writing submitted to the Minister.

(4) The Minister responsible for agriculture and fisheries may determine any remuneration due to Board members and the registrar, unless the same are public officers who may serve on the Board by virtue of their office.

(5) The Board shall have all powers, functions and responsibilities to be given to an enforcement authority or performed by it according to the Directive, in particular those under Articles 6 and

8 of the Directive:

Provided that any sanctioning shall be according to the provisions of these regulations.

(6) The Board may require and shall receive the assistance of sectoral authorities in performing an investigation, and for so doing may give such directions as may be reasonable for the purposes of an investigation:

Provided that for such assistance, the Board shall liaise with the relevant head of department or any delegated appointed by the latter to liaise with the Board for the purposes of these regulations:

Provided further that assistance according to these regulations shall also include the exercise of any power given to the relevant department, or its officers, at law.

(7) The Board may request and shall be provided with any information held by the sectoral authorities and from any person in any manner involved, concerned or regulating the sectors affected by the Directive or having an interest therein:

Provided that all information so requested shall be deemed confidential for all intents and purposes at law and may not be disclosed by the Board unless required by these regulations, by the Directive or by any other law, or unless such disclosure is ordered by any competent authority.

(8) In the exercise of its functions according to these regulations, the Board shall act independently and not be subject to the control of any other person or authority in said exercise and in its conclusions on any complaint and, or investigation.

4. (1) The Board shall act as the enforcement authority according to the Directive and these regulations, with a view to advancing the purposes of the Directive according to its subject matter and scope, and without prejudice to the generality of the foregoing it shall:

Functions of the Board.

(a) discuss, suggest and publish best practices to be adopted by sectoral authorities and operators to avoid the possibility of, or halt the continuation of, practices which are contrary to the Directive or which hinder its purposes;

(b) suggest minimum requirements for complaint forms to be received by it from market operators;

(c) provide advice to the sectoral authorities for the purpose of achieving the goals of the Directive and these regulations;

(d) generally assist, coordinate and instruct the sectoral authorities for the purposes of these regulations, in relation to any complaint, investigation or query submitted according to these regulations;

(e) indicate to the sectoral authorities any evidence that it might be deemed advisable to gather for the purposes of any investigation according to these regulations;

(f) provide recommendations on the manner in which a sectoral authority may exercise its functions so as to hinder the development or continuation of prohibited practices;

(g) initiate and conduct investigations on its own initiative or on the basis of a complaint falling within the scope of the Directive;

(h) investigate any complaint on any alleged unfair trading practice as received from a supplier and determine whether the complaint falls under the scope of the Directive;

(i) provide its decision on any investigation falling within the scope of the Directive to those concerned by it, whether such decision resulted from a complaint, or whether it was initiated according to its own discretion;

(j) give all those orders as may be given by an enforcement authority according to the Directive, in particular the order to stop any prohibited practice; and

(k) act as the single contact point for the purposes of the Directive.

(2) The Board, and a sectoral authority acting upon its instructions, may:

(a) require the provision of any information and, or document from any person which they deem relevant to any investigation; and

(b) conduct inspections on the premises of any operator.

(3) Without prejudice to any confidentiality obligations under these regulations, the Directive and at law, the Board shall publish its decisions and may do so at regular intervals, whether individually or as part of a collection of decisions.

(4) When acting as the single contact point and as an enforcement authority, the Board shall do all that is required by the Directive to fulfil said function, inclusive of submission of reports as

referred in the Directive, as well as participating in all discussions with the European Commission, as provided by the Directive.

(5) For the purposes of sub-regulation (4) the Board may require that it be provided with any information or documents known or held by the sectoral authorities, if it deems it necessary or expedient to fulfil those purposes.

5. Save as otherwise provided in these regulations, the Board shall regulate its own procedures and meet at least once each calendar year. Procedures of the Board.

6. (1) Suppliers may submit complaints on alleged unfair trading practices to the relevant sectoral authority or to the Board: Complaints by suppliers.

Provided that a sectoral authority shall, upon receipt, refer the complaint to the Board:

Provided further that a complaint shall be considered only if the supplier and, or the buyer are based or operate in Malta or the alleged unfair trading practices are performed, in whole or in part, in Malta.

(2) Complaints shall be submitted in writing, and the complainant shall sign the complaint:

Provided that nothing in this regulation shall be construed as hindering any person from providing anonymous information to the Board or a sectoral authority, and likewise nothing in this regulation shall be construed as hindering the Board in investigating any such information at its own discretion and according to these regulations.

(3) The Board shall inform the complainant that it is considering his complaint at the latest within twenty (20) working days from receipt of the complaint, and it shall update the complainant on the status of the investigation and the outcome thereof at reasonable intervals and upon the conclusion of the investigation.

(4) Without prejudice to regulation 5, the Board may allow, or require, the complainant to amend his complaint so as to clarify the complaint itself, the facts relevant to it or to the practices complained of.

(5) Submission of complaints according to these regulations shall be subject to a fee of fifty euro (€50) payable to the Board.

The Secretary of the Board, or any other public officer as may be delegated by the Board from amongst those referred under sub-regulation (2) of regulation 11, shall be responsible for the processing

and collection of said fee.

Confidentiality of
complaints.

7. (1) Upon the request of the complainant, the Board and the relevant sectoral authority shall take the necessary measures for the appropriate protection of the identity of the complainant or anyone else concerned, and for the appropriate protection of any other information the disclosure of which is specifically indicated by the complainant as harmful to his interests or to those of anyone else concerned.

(2) Whenever the provisions of this regulation are applicable, the Board may abstain from taking any decision if that would risk revealing the identity of a complainant or would risk disclosing any other information in respect of which the complainant considers that such disclosure would be harmful to his interests or to those of anyone else concerned:

Provided that the complainant shall identify the relevant information according to sub-regulation (1).

Prohibited
practices.

8. (1) The following unfair trading practices shall be prohibited:

(a) without prejudice to sub-regulation (2), the buyer pays the supplier, where the supply agreement provides for the delivery of products:

(i) if said delivery is on a regular basis and it concerns perishable agricultural and food products, later than thirty (30) days after the end of an agreed delivery period in which deliveries have been made or later than thirty (30) days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;

(ii) if said delivery is on a regular basis and it concerns other agricultural and food products, later than sixty (60) days after the end of an agreed delivery period in which deliveries have been made or later than (60) days after the date on which the amount payable for that delivery period is set, whichever of those two dates is the later;

(iii) if said delivery is not on a regular basis and it concerns perishable agricultural and food products, later than thirty (30) days after the date of delivery or later than thirty (30) days after the date on which the amount payable is set, whichever of those two dates is the later; or

(iv) if said delivery is not on a regular basis and it concerns other agricultural and food products, later than

sixty (60) days after the date of delivery or later than sixty (60) days after the date on which the amount payable is set, whichever of those two dates is the later:

Provided that for the purposes of the payment periods in sub-paragraphs (i) and (ii), the agreed delivery periods shall in any event be considered not to exceed one (1) month:

Provided further that for the purposes of points (iii) and (iv), where the buyer sets the amount payable, the payment periods referred to in sub-paragraph (iii) shall start to run from the end of an agreed delivery period in which the deliveries have been made, while the payment periods referred to in sub-paragraph (iv) shall start to run from the date of delivery:

Provided further that paragraph (a) shall be without prejudice to the consequences of late payments and remedies as provided according to the Commercial Code, which shall apply, by way of derogation from the payment periods set out in the Commercial Code, on the basis of the payment periods set out in these regulations:

Cap. 13.

Provided further that paragraph (a) shall be without prejudice to the option of a buyer and a supplier to agree on a value sharing clause within the meaning of Article 172a of Regulation (EU) No 1308/2013;

(b) the buyer cancels orders of perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products:

Provided that a notice of less than thirty (30) days shall always be considered as a short notice;

(c) the buyer unilaterally changes the terms of a supply agreement for agricultural and food products that concern the frequency, method, place, timing or volume of the supply or delivery of the agricultural and food products, the quality standards, the terms of payment or the prices, or as regards the provision of services insofar as these are explicitly referred to in sub-regulation (2);

(d) the buyer requires payments from the supplier that are not related to the sale of the agricultural and food products of the supplier;

(e) the buyer requires the supplier to pay for the deterioration or loss, or both, of agricultural and food products

that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier;

(f) the buyer refuses 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 save if the supply agreement concerns products to be delivered by a member of a producer organisation, including a cooperative, to the producer organisation of which the supplier is a member, if the statutes of that producer organisation or the rules and decisions provided for in, or derived from, those statutes contain provisions having similar effects to the terms of the supply agreement;

(g) the buyer unlawfully acquires, uses or discloses the trade secrets of the supplier within the meaning of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure;

(h) the buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises his contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation;

(i) the buyer requires 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;

(j) trading practices falling under the provisions of the proviso of paragraph (c) of sub-regulation (3).

(2) Paragraph (a) of sub-regulation (1) shall not apply to payments:

(a) made by a buyer to a supplier where such payments are made in the framework of the school scheme pursuant to Article 23 of Regulation (EU) No 1308/2013;

(b) made by public entities providing health care according to article 26D of the Commercial Code;

(c) made under supply agreements between suppliers of grapes or must for wine production and their direct buyers:

Provided that specific terms of payment for the sales transactions are included in standard contracts which have been made binding pursuant to Article 164 of Regulation (EU) No 1308/2013 before 1 January 2019, and that this extension of the standard contracts is renewed from that date without any significant changes to the terms of payment to the disadvantage of suppliers of grapes or must, and that the supply agreements between suppliers of grapes or must for wine production and their direct buyers are multiannual or become multiannual.

(3) The following practices shall be prohibited unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer:

(a) the buyer returns unsold agricultural and food products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both;

(b) the supplier is charged payment as a condition for stocking, displaying or listing its agricultural and food products, or of making such products available on the market;

(c) the buyer requires the supplier to bear all or part of the cost of any discounts on agricultural and food products that are sold by the buyer as part of a promotion:

Provided that this trading practice shall be prohibited, notwithstanding an agreement as aforesaid, unless the buyer, prior to a promotion that is initiated by the buyer, specifies the period of the promotion and the expected quantity of the agricultural and food products to be ordered at the discounted price;

(d) the buyer requires the supplier to pay for the advertising by the buyer of agricultural and food products;

(e) the buyer requires the supplier to pay for the marketing by the buyer of agricultural and food products;

(f) the buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.

(4) Upon determining that a prohibited practice according to this regulation is in effect between a supplier and a buyer, the Board shall order their immediate cessation.

9. Where a payment is required by the buyer for the situations referred to in paragraphs (b), (c), (d), (e) or (f) of sub-regulation (3) of regulation 8, if requested by the supplier, the buyer

Provision of estimates.

shall provide the supplier with an estimate in writing of the payments per unit or the overall payments, whichever is appropriate, and, insofar as the situations referred to in paragraphs (b), (d), (e) or (f) of sub-regulation (3) of regulation 8 are concerned, shall also provide, in writing, an estimate of the cost to the supplier and the basis for that estimate.

Mandatory provisions.

10. Notwithstanding any other law, any prohibition according to regulation 8 shall constitute overriding mandatory provisions which are applicable to any situation falling within the scope of those prohibitions, irrespective of the law that would otherwise be applicable to the supply agreement between the parties.

Proceedings and damages.

11. (1) Without prejudice to sub-regulation (7), if the Board determines that an unfair trading practice falling within the scope of the Directive is in place to the detriment of a supplier, it may draw up a report on the facts relevant to the complaint and, or investigation, and the findings thereof, and said report shall include a description of the relevant unfair trading practices and a quantification, by way of estimate, of the damages suffered and to be suffered by the suppliers up to the cessation of the unfair trading practice.

(2) For the purposes of sub-regulation (1) the Board may invite the parties concerned to a mediation procedure in front of the Board so as to come to an agreed report and a quantification of damages.

(3) If the parties concerned agree with the conclusions of the report referred in this regulation and the damages therein estimated, they may come to a written agreement approved, witnessed and signed by a duly authorised representative of the Board, and by which said damages are liquidated in satisfaction of all claims related to the unfair trading practices between the concerned parties:

Provided that said agreement shall allow for partial payments to be made as may be agreed and approved according to this regulation:

Provided further that said agreement may provide for daily penalties for events of default:

Provided further that upon the expiry of any term provided in said agreement or in default of any payment therein agreed, the agreement shall be considered as an executive title for all intents and purposes at law.

(4) Any mediation procedure or agreement according to this regulation shall be subject to a temporary cessation of the practice determined as being an unfair trading practice while the mediation is underway and during the relevant period of the agreement reached.

(5) Should the parties concerned agree as provided according to sub-regulation (3), and should the unfair trading practice concerned have been definitely ended, no further action of any nature whatsoever, inclusive of proceedings according to regulation 12 or any other law, shall lie against the party otherwise liable.

(6) In the absence of any agreement according to the preceding sub-regulations, the Board shall proceed to finalise its report and provide it to the concerned parties and anything done according to these regulations shall be without prejudice to any right pertaining to the concerned parties.

(7) The supplier and, or the buyer, may contest the finding, or lack thereof, of an unfair trading practice by the Board by application to the Administrative Review Tribunal within twenty (20) days from said finding being final according to these regulations, and for such purposes the Administrative Review Tribunal shall be deemed to have jurisdiction according to law:

Provided that if the Administrative Review Tribunal determines that an unfair trading practice has occurred, it shall also liquidate the damages suffered by the supplier, with interest according to law.

12. (1) Any person who hinders or obstructs, in any manner whatsoever, the Board or a sectoral authority, as well as any person appointed by the same, in the exercise of their functions according to these regulations, or fails to collaborate in an investigation according to these regulations, shall be guilty of an offence and be liable to a fine (*multa*) not exceeding two thousand three hundred and twenty-nine euro and thirty-seven cents (€2,329.37). Offences.

(2) Any person who when ordered by the Board to cease an unfair trading practice persists in such a practice, and failing an agreement according to regulation 11, shall be guilty of an offence and be liable to a fine (*multa*) not exceeding two thousand three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) or a fine calculated on the profit made by the offender in connection with the transaction in contravention to these regulations:

Provided that when the fine is so calculated, it may not exceed five times the profit made by the offender.

(3) Any criminal proceeding according to this regulation shall only be initiated upon a complaint by the Board.

13. (1) Judicial and legal representation of the Board shall vest in its chairperson, or any other member as duly authorised by the Board. Representation and staff.

(2) The Board shall be assisted by such staff, being public officers, as may be assigned to it by the Minister responsible for fisheries and agriculture.

Transitory provisions.

14. (1) All supply agreements in force upon the coming into force of these regulations and falling within the scope of these regulations shall comply with the provisions of these regulations within one (1) calendar year from the date of entry into force of these regulations.

(2) The Board may order operators to comply with the provisions of these regulations before the end of the period referred in sub-regulation (1) and in the absence of such order, all operators shall comply with the provisions of the Directive within said period.

(3) Any person who fails to comply with the provisions of sub-regulations (1) and (2) shall be guilty of an offence and *mutatis mutandis* shall be liable to the fines (*multi*) provided under sub-regulations (1) and (2) of regulation 12.
