

The Regulation of UTPs and the Enforcement of UTP's Act in Croatia

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Contents

- Legal basis
- Significant bargaining power
- Prohibited practices/List of UTPs
- Proceedings
- Imposing fines
- Statistic, effects and challenges
- Case studies
 - CCA against TRGOCENTAR
 - CCA against MLIN I PEKARE

Abbreviations

UTP - Unfair trading practices

CCA - Croatian Competition Agency

2017 UTPs Act - The Act on the prohibition of unfair trading practices

2021 UTPs Act - Act on the Amendments to the Act on the prohibition of unfair trading practices

Directive - 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

B2B - business-to-business

GAPA - General Administrative Procedure Act

Legal basis

- CCA is empowered for the enforcement of the UTPs Act, decision making body is Competition Council which is authorized to adopt decision by a majority vote of at least three votes, with no member being allowed to abstain from voting
- The 2017 UTPs Act – response to the great disorder and unfair trading practices that were often applied in business relations between buyers and suppliers of agricultural and food products on the Croatian market
- The aim and purpose: establishing, ensuring and protecting fair trading practices
- The 2021 UTPs Act – result of the implementation of the Directive (EU) 2019/633, but also a terminological adjustments and series of novelties based on the experience gained from the three-year application of this piece of legislation in Croatia

Legal basis

- The Croatian legislature, decided for certain solutions that are stricter national rules that provide for a higher level of protection against unfair trading practices in B2B relationships in the agri and food supply chain beyond the Directive, such as, the low threshold of total annual turnover of the buyer and bargaining power of the supplier is not determined at all; 2021 UTPs Act laid down mandatory provisions of the contract; the Croatian legislator included 2 UTPs from the Grey list to the Black list; 2021 UTPs Act laid down additional UTPs that have been blacklisted in Croatia
- In order to help addressees understand and comply with this new rules, the CCA organized together with the Ministry of Agriculture a series of workshops for businesses and collected questions related to the application of the UTPs Act through the trade associations of agricultural producers and food industry, law firms and directly from the addressees of the UTPs Act, the answers were consolidated in a single document made publicly available at the CCA website
- The procedure for amending the Revised UTPs Act 2021 is ongoing in order to harmonize its provisions with the introduction of the EUR in Croatia and amend certain provisions in terms of better clarification and clarity of certain provisions

Significant bargaining power

- In accordance with the provisions of the 2021 UTPs Act UTPs can be imposed from a buyer with significant bargaining power to his supplier(s) of agricultural and food products
- Significant bargaining power is held by any buyer with total annual turnover exceeding HRK 15 million (approx. EUR 2 million)
- The 2021 UTPs Act determines total annual turnover as the sum of the total annual turnover of a buyer realized in Republic of Croatia and total annual turnovers of its related companies realized at the global level (that sum has to be reduced by the amount realized from the sale of goods or the provision of services between that buyer and its related companies)
- UTPs Act excluded the obligation to determine the supplier's annual turnover

Prohibited practices

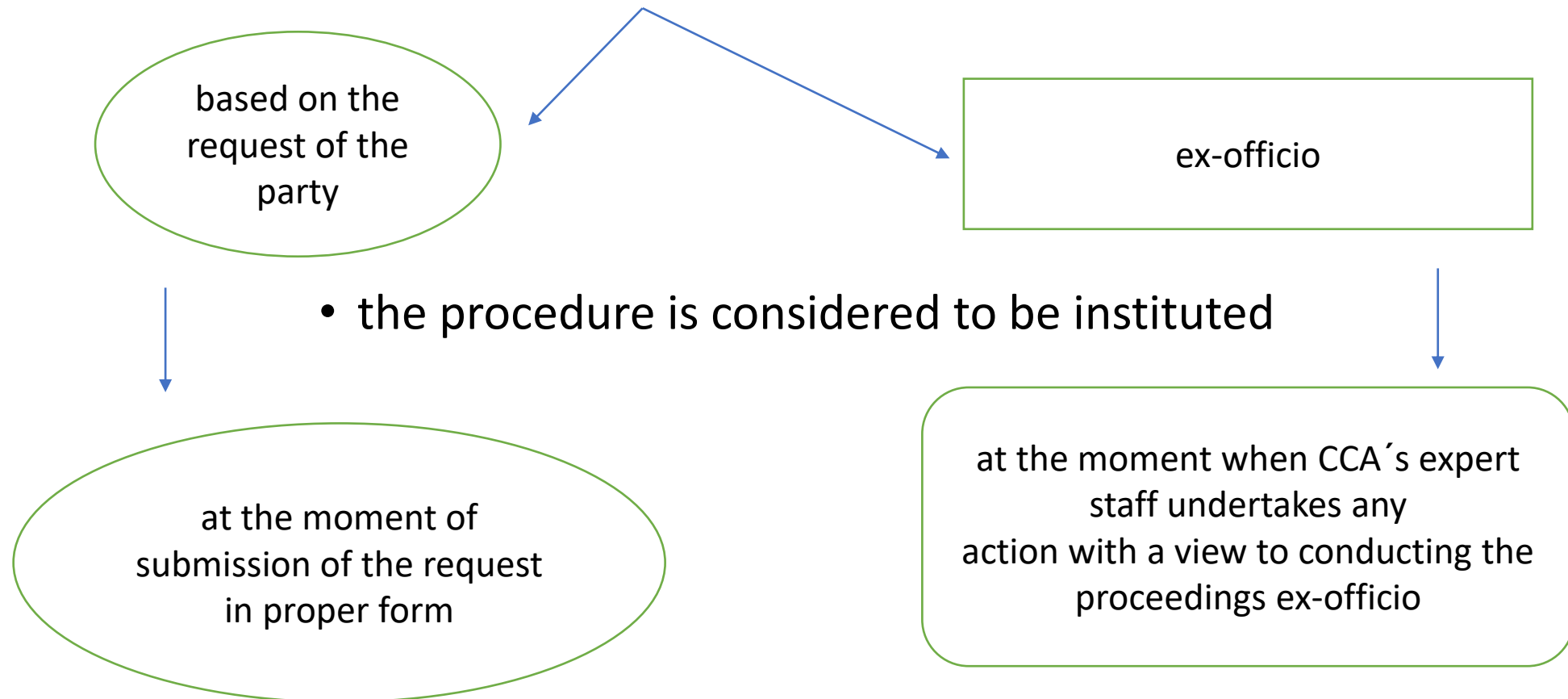
- Conducting business between the supplier and the buyer of agri and food products without a written contract and/or without provisions relevant to the business relationship is considered an UTP
- Provisions essential for a specific business relationship, especially 6 provisions regulating:
 1. the price of the product and/or the method of calculation (setting) of the price,
 2. the quality and the type of the agri or food product that is being delivered,
 3. the conditions and payment deadlines (not exceeding 60 days from the day of delivery, not exceeding 30 days from delivery for fresh, perishable products),
 4. delivery terms and deadlines,
 5. place of delivery definable and/or determinate by the address of the place of delivery, and
 6. duration of the contract.
- There are only few exceptions

Prohibited practices/List of UTPs

- 2021 UTPs Act introduced a general norm/prohibition on unfair trading practices in the agrifood chain ->> this is contained in the provision of Art. 4. of the 2021 UTPs Act
- 2021 UTPs Act exhaustively prescribes which trading practices are deemed to be unfair (*numerus clauses*)
- Black list
- Grey list
- Identified infringements – buyers (traders)
- Identified infringements – buyers (processors)

Proceedings

- UTPs administrative proceedings is initiated in accordance with the provisions of GAPA:



Proceedings

- The proceedings can be divided into five parts:
 1. Initiation of administrative proceedings
 - based on the request of the party
 - ex officio in the public interest
 2. Investigation procedure
 3. Evaluation of evidence and preparation of the Notification on the preliminary established factual situation
 4. Oral hearing
 5. CCA's decision on whether the UTPs Act has been violated and whether the conditions for imposing a fine have been met

Imposing fines

- After establishing that the buyer has used significant bargaining power by imposing unfair trading practices on its supplier(s) or violating the provisions of the UTPs Act, the CCA will decide on the existence of the conditions for imposing the fine and determine its amount, as well as the deadlines and the manner of its execution
- UTPs Act defines which are serious and which are lighter violations and accordingly defines the maximum amount of fines
- 2021 UTPs Act set only maximum level of fines, up to HRK 5 mil (approx. EUR 666.000)
- CCA takes into account the gravity, the scope, the duration and the consequences of the imposed UTP
- The determined amount of fine is reduced or increased depending on the mitigating and/or aggravating circumstances
- Fines aim at establishing, ensuring and protecting fair commercial practices that protect participants in the food supply chain, punishing the buyer for violating the UTPs Act and deterring other buyers from violating the UTPs Act
- In compliance with the principle of transparency and in line with the provision regulating the publication of its decisions on its website, the CCA makes available to the public the information on the cases it opens and proceedings it carries out against buyers (the decision is published on the CCA website with confidential business information left out)

Statistic

- From the day of entry into force of the 2017 UTPs Act on 7 December 2017 until today, the CCA has opened 455 ex-officio proceedings (non-administrative and administrative proceedings), of which 52 ex-officio administrative proceedings
- Out of this total, 40 were administrative proceedings within the meaning of the 2017 UTPs Act, and 12 within the meaning of the 2021 UTPs Act
- There have been 42 closed administrative proceedings and in 27 thereof the CCA identified unfair trade practices, whereas in 15 cases it terminated the proceeding
- Total imposed administrative fines in amount of EUR 1.017.163,61
- The claims before relevant administrative courts (the first instance administrative court) were submitted against 13 decisions of the CCA
- In 6 cases, the plaintiffs have appealed against the judgments of the administrative courts before the High Administrative Court of the Republic of Croatia
- So far, the High Administrative Court of the Republic of Croatia upheld 5 CCA's infringement decisions. In one of the cases, the High Administrative Court dismissed the plaintiffs appeal against the decision of the first instance court, which had dismissed the lawsuit as inadmissible
- Since the beginning of the so-called full application of the 2021 UTPs Act that started on 1 March 2022, the CCA has been conducting preliminary market investigations

Positive effects of the UTPs Act

- The implementation of the UTPs Act showed very quickly its positive effects
- Already in the first two years since the entry into force and the start of full application of the 2017 UTPs Act it was evident that the new legal framework brought about positive changes compared with the previous business models that favored the traders
- The 2017 UTPs Act improved the business relations by prohibiting harmful practices or regulating certain practices by making them sustainable for both parties - suppliers and traders
- Some of the noted positive effects:
 - improved legal certainty by prescribing the mandatory content and the form of the contracts, increased compliance with contractual obligations, the rules for issuing invoices and the rules relating to the application of the general terms and conditions
 - introduction of financial discipline in relation to the terms of payment
 - increased liquidity in the agriculture and food sector, given that payment deadlines have been set to 30 days for fresh products and 60 days for other agricultural and food products
 - suppliers have been relieved from great uncertainties and related costs that previously existed in the relationship between the suppliers and buyers (traders), and particularly in relation to:
 - contented behavior of traders in terms of contracts and termination of contracts
 - the risks that had been borne exclusively by the suppliers
 - extra charges for slotting fees and product placement that have been mostly eliminated by the 2017 UTPs Act
 - various bonuses and unpredictable amounts of bonuses payable to the buyers (traders)
 - improved market position of the suppliers given that the 2017 UTPs Act introduction of the provisions prohibiting the removal of any products from the product list agreed under the contract and the reduction of the volumes of agreed agricultural or food products without due notice of the trader within the time period stipulated by the contract or at least 30 days where the time period is not defined by the contract

Challenges

- Through the media and its official website CCA has always been trying to sensitize the public about the need to protect fair trading practices and has been appealing to addressees to report spotted irregularities and actions that they consider to be unfair trading practices in B2B relationships, leaving the possibility to do so anonymously or with the possibility of protecting the petitioner's/complaint's identity and/or revealed information (fear factor)
- Unfortunately, in situations where the petition/complaint is submitted anonymously, or when the applicant/complainant of such a petition has requested identity protection and/or information protection, the presentation of evidence establishing unfair trading practices is limited, and very often impossible
- Given the reluctance of suppliers to file complaints or provide information about possible unfair practices by individual buyers for fear of commercial retaliation, CCA regularly conducts market research to determine whether buyers have aligned their contracts and operations with their agri and food suppliers with the provisions of the UTPs Act
- In this respect, the CCA's expert staff shall examine whether the buyer and the supplier operate based on a contract, which must be concluded in writing prior to the delivery of the agri and food products and should contain all the provisions relevant to the business relationship of the contracting parties
- In this direction, it is still necessary to go and work on improving all mechanisms in combating prohibited unfair trading practices

Case studies – CCA against TRGOCENTAR and CCA against MLIN I PEKARE

- Conducted by applying the 2021 UTPs Act
- TRGOCENTAR and MLIN I PEKARE are Croatian retailers
- Proceedings were initiated from market research, started in March 2022 (after the 2021 UTPs Act became fully applicable)
- Purpose of conducting market researches: to determine whether buyers have aligned their contracts and operations with the provisions of the 2021 UTPs Act
- Subjects of research – 22 buyers
- Until this moment CCA initiated 8 ex officio administrative proceedings based on this market research
- 2 cases where CCA brought infringement decision
- Other proceedings are ongoing

Case study – CCA against TRGOCENTAR

- CCA determined annual turnover
- CCA requested buyer to submit data about:
 - Suppliers of agricultural and food products
 - Realized purchase value with those suppliers
- CCA selected three suppliers, using sample method, and requested buyer to submit:
 - Contract that is in force and all addendums to the contract
 - Financial and accounting documentation for a period of time from January 1, 2022 to April 30, 2022
 - Explanation do they account supplier's invoice with the date of issue or with the date when they received the invoice
 - Written statement on whether the supplier's invoice accompanies the delivery of the goods or whether the invoice for good is delivered in another way or time
- CCA analyzed received documentation from legal and economic standpoint

Case study – CCA against TRGOCENTAR

- Expert staff decided that there are indication that the buyer has violated 2021 UTPs Act ->> CCA initiated ex-officio proceeding by sending the Notification of initiation of the procedure
- Ex-officio proceeding
 - CCA used data collected in market research
 - Requested buyer some additional documentation and clarifications
 - Held an oral hearing
- Expert staff informed the Competition Council about all relevant facts and circumstances ->> the Competition Council preliminary decided that TRGOCENTAR has violated 2021 UTPs Act provision by imposing UTP
 - Notification on the preliminary established factual situation (SO)
 - Invitation to the oral hearing and delivery of written defense

Case study – CCA against TRGOCENTAR

- Upon the conclusion of oral hearing expert staff presented the Competition Council:
 - All relevant facts and circumstances
 - Content of buyer's written defense
- Infringement decision
 - TRGOCENTAR made payments to its supplier of fresh chicken eggs within a period longer than 30 days
 - 62 of 66 analyzed invoices have been paid in period longer than 30 days
 - Imposed fine in the amount of HRK 100.000 (approximately EUR 13.000)
- TRGOCENTAR paid the imposed fine without contesting the decision

Case study – CCA against MLIN I PEKARE

- CCA determined annual turnover
- CCA requested buyer to submit data about:
 - Suppliers of agricultural and food products
 - Realized purchase value with those suppliers
- CCA selected 3 suppliers, using sample method, and requested buyer to submit:
 - Contract that is in force and all addendums to the contract
 - Financial and accounting documentation for a period of time from January 1, 2022 to April 30, 2022
 - Explanation do they account supplier's invoice with the date of issue or with the date when they received the invoice
 - Written statement on whether the supplier's invoice accompanies the delivery of the goods or whether the invoice for good is delivered in another way or time
- CCA requested two suppliers to submit documentation and explanations
- CCA analyzed received documentation from legal and economic standpoint

Case study – CCA against MLIN I PEKARE

- Expert staff decided that there are indication that the buyer has violated 2021 UTPs Act
- CCA conducted ex-officio administrative proceeding
 - Notification of initiation of the procedure
 - Requested buyer some additional documentation and clarifications
 - Held an oral hearing
 - Notification on the preliminary established factual situation (SO)
 - Invitation to the oral hearing and delivery of buyer's written defense
 - Infringement decision

Case study – CCA against MLIN I PEKARE

- Infringement decision
 - contract between MLIN I PEKARE and its supplier of fresh chicken eggs in a period of 28 days did not contain:
 - provision on the price of the product
 - provision of the quality and type of product that is supplied to the buyer
 - CCA imposed fine in the amount of EUR 1.500
- MLIN I PEKARE paid the imposed fine without contesting the decision

Thank you for your attention!

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