

EU, COMPETITION & PROCUREMENT

## The Agri-Food Regulator: *monitoring trade in the Agri-Food Supply Chain*

Ireland has a new State body tasked with enforcing unfair trade law and analysing market structure in the agricultural and food products supply chain.

The Agri-Food Regulator has a statutory mandate to promote fairness and transparency in the agri-food supply chain by providing legal protection against specific unfair trading practices affecting suppliers of agriculture or food products. More broadly, by investigating the potential for uneven bargaining power and economic imbalances in individual trade relations between the actors in the chain.

11 MIN READ

## HIGHLIGHTS

- The Irish Agri-Food Regulator has recently published its first Strategy Statement for 2024-2026.
- The Agri-Food Regulator is a new supervisory authority with responsibility for the enforcement of agri-food unfair trading law in Ireland and the designated enforcement authority under the Unfair Trading Regulations 2023 (**UT Regulations**). It also has statutory powers to collect, analyse and publish regular reports on price and market data relating to the agricultural and food supply chain.
- The Strategy Statement sets out a plan to create more transparency on how the food supply chain works, especially with regard to 'price formation mechanisms'. The Agri-Food Regulator has started requesting information from businesses across the industry and the publication of a number of sectoral reviews is planned in the coming months.
- The Agri-Food Regulator has the power to conduct 'dawn raids' on businesses to gather evidence of possible breaches under the UT Regulations. The Agricultural and Food Supply Chain Act 2023 expands the potential for dawn raids to breaches of unfair trading law in the sector beyond the UT Regulations, including possible future Ministerial regulations relating to transparency and information asymmetry in the agricultural and food supply chain.
- The Agri-Food Regulator does not have investigative or enforcement powers for breaches of competition law in the agri-food sector but has publicly said that where it comes across practices that are potentially anti-competitive, it will pass information on to the Competition and Consumer Protection Commission (**CCPC**).
- A person or company guilty of an offence for breaching unfair trading law is liable, on summary conviction, to a fine of €5,000 and/or imprisonment up to six months. A serious breach of the UT Regulations may be tried on indictment. A conviction on indictment is subject to a potential fine of up to €10m or 10% of the aggregate turnover (whichever is greater) and/or imprisonment up to three years.



An Rialálaí Agraibhia (the **Agri-Food Regulator**) is an independent statutory office established under the Agricultural and Food Supply Chain Act 2023 (the **2023 Act**). The 2023 Act gives further effect to Directive 2019/633 on unfair trading practices in the agricultural and food supply chain.

The Agri-Food Regulator is concerned with promoting fairness and transparency in the agri-food supply chain. Its statutory remit and focus is on business-to-business relationships within the supply chain with the ultimate purpose of serving the needs of the agricultural and food sector (particular in farming, fishing and small food businesses).

The Agri-Food Regulator is made up of a Board which makes decisions about the Office's policies and strategic approach to key functions while the Executive Staff implements the agreed policies and workplan.

The functions formerly vested in the Minister for Agriculture, Food and Marine (the **Minister**) to enforce laws against unfair trading practices are now transferred to

the Agri-Food Regulator which is now the designated authority under the Agricultural and Food Supply Chain (Unfair Trading) Regulations 2023.

### Strategy Statement 2024 – 2026

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The Regulator has recently published its Strategy Statement for the years 2024 – 2026. The Strategy Statement for the next three years has four key objectives:

- enforcement of agri-food unfair trading law
- improved transparency on the functioning of the agri-food supply chain
- effective communication and engagement with stakeholders in promoting fairness and transparency
- building of organisational capacity with optimal use of resources to deliver an efficient and effective service

### Functions of the Agri-Food Regulator

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The Agri-Food Regulator has assumed responsibility for enforcement of the UT Regulations.

The UT Regulations apply to buyers at any stage in the supply chain whose annual turnover is greater than €2m and is greater than that of their suppliers. It also applies to a supplier where the buyer is a public authority. On the next page, we provide a high-level overview of the operation of the UT Regulations. Non-exhaustively, behaviours that can be found to have breached the UT Regulations could include cancelling orders of perishable agri-food products at short notice, a failure to make payments on time, requiring a supplier to pay for deterioration or loss of an agricultural or food product that occurred on buyer premises, refusing a request by a supplier to confirm the content of an oral supply agreement or an oral framework agreement in writing, and threatening commercial retaliation against suppliers who exercise their contractual statutory rights. There are 16 prescribed practices under the Regulations.



## The UT Regulations

**The key principle:** To protect farmers, producer organisations and other weaker suppliers of agricultural and food products against stronger buyers.

To protect weaker suppliers, the UT Regulations prohibit 16 specific unfair trading practices (UTPs). In doing so it distinguishes between “black” and “grey” practices. Whereas black unfair trading practices are prohibited, whatever the circumstances, grey practices are allowed if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner.

The rules on “black” or “grey” practices apply to all supply agreements whether these are agreed orally or are in writing.

**What is a weaker supplier?** A supplier that has an annual turnover less than that of the buyer, where the buyer’s annual turnover is >€2m. It also applies to a supplier to a buyer which is a public authority.

## TEN BLACK TRADING PRACTICES

*(Always prohibited)*

1. Payments later than 30 days for perishable agricultural and food products.
2. Payment later than 60 days for other agri-food products.
3. Short-notice cancellations of perishable agri-food products.
4. Unilateral contract changes by the buyer.
5. Payments not related to a specific transaction.
6. Risk of loss and deterioration transferred to the supplier.
7. Refusal of a written confirmation of a supply agreement by the buyer, despite request of the supplier.
8. Misuse of trade secrets by the buyer.
9. Commercial retaliation by the buyer.
10. Transferring the costs of examining customer complaints to the supplier.

## SIX GREY TRADING PRACTICES

*(Allowed but subject to clear and unambiguous agreement beforehand)*

1. Return of unsold products.
2. Payment by the supplier for stocking, display and listing.
3. Payment by the supplier for promotion.
4. Payment by the supplier for marketing.
5. Payment by the supplier for advertising.
6. Payment by the supplier for the staff of the buyer or for fitting out of the buyer’s premises.

A breach of either the Black UTPs or the Grey UTPs is an offence under the UTP Regulations and can be prosecuted summarily by the Minister for Agriculture or on indictment by the Director for Public Prosecutions.

## KEY POINTS

### Which products are covered?

The list of products covered by the UT Regulations is extremely broad (e.g., fish, meat, dairy produce, cereals, malt, starches or food processed from these products).

### When did it come into effect?

All supply agreements covered by the UT Regulations must comply with the UT Regulations from 28 April 2022.

### Who enforces the rules?

The new Agri-Food Regulator.

### The Authority has the power to:

conduct investigations following receipt of complaint or on its own initiative; require buyers and suppliers to provide information and to carry out unannounced on-site inspections.

To protect supplier interests, the Agri-Food Regulator will publish guidelines outlining the supplier protections that are in place and increasing awareness of the prohibited practices.

The 2023 Act expands the functions of the Agri-Food Regulator to enforcing agri-food unfair trading law more broadly, whether under legal provisions found in European Union legislation or new regulations which the Minister has the power to make under the 2003 Act.

The 2023 Act has a central objective of reporting on market prices in the agricultural and food sector. The Agri-Food Regulator sees the publication of these type of market analyses as a core function of its role. The Regulator's new CEO, Niamh Lenehan, has said that her office will be focused on enabling greater transparency on how the food supply chain works, particularly with regard to 'price formation mechanisms'. The Regulator will have an opportunity to show in practice what it means by this slightly obscure aim when it publishes the

first of several planned sectoral reviews in the coming months. A data request was issued to businesses operating in the egg production industry in June 2024 and a press release indicates that data requests in other sectors are also planned.

We anticipate that the Agri-Food Regulator, in line with its Strategy Statement, will publish analyses of information about price and market data relating to the supply chain of each agri-food sector that it examines. It has a mandate to conduct and commission research and surveys and publish findings and reports. The Regulator has also stated that it will consider matters outside the State in so far as they are or may be relevant to the Irish market. However, an important measure of the new regulator's impact will be the extent to which it is willing to invoke powers to compel businesses under its supervision to produce documents and records so as it can carry out its function. We look further at these powers of enforcement below.

### Enforcement powers

As the designated Enforcement Authority under the UT Regulations, the Agri-Food Regulator has the power (like the CCPC) to conduct 'dawn raids' on businesses. These are unannounced inspections - entering a premises, examining records and inspecting and taking copies of anything used in connection with agri-food products.

The Agri-Food Regulator may commence an investigation into an alleged or suspected unfair trading practice where the Regulator has reasonable grounds for believing that:

- a. an offence is being (or is about to be) committed on the premises, or
- b. evidence of an offence is likely to be found on the premises.

The Agri-Food Regulator can only enter a premises with the consent of the owner or having obtained a search warrant from the District Court, unless the Regulator "*has reasonable grounds for believing that before a search warrant can be obtained evidence of an offence...is likely to be disposed of or destroyed*".



The Agri-Food Regulator may also require a person to provide information relevant to any record relating to an agricultural or food product. It is an offence to make a statement to the Regulator that is false or misleading in a material way.

Where the Agri-Food Regulator is satisfied that the company it is investigating has breached the UT Regulations, it will serve a compliance notice on the company providing it with an opportunity to correct the breach and stipulating the time within which the company must take action. The company must then carry out the actions required by the regulator or it will be guilty of an offence. The company could, alternatively, appeal the compliance notice to the Circuit Court.

A person or company guilty of an offence for breaching unfair trading law is liable, on summary conviction, to a fine of €5,000 and/or imprisonment up to six months. A serious breach of the UT Regulations may be tried on indictment. A conviction on indictment is subject to a potential fine of up to €10m or 10% of the aggregate turnover (whichever is greater) and/or imprisonment up to three years.

### Compliance reporting and designated liaison officer

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Buyers of agri-food products with annual turnover above €50m, are deemed to be 'compliance reporting buyers' under the UT Regulations. All compliance reporting buyers are required to designate a suitably qualified liaison officer from their staff to communicate with the Agri-Food Regulator in relation to the UT Regulations. The deadline for designating a liaison officer was **13 June 2024**, and the relevant person's name, position and contact details must be sent to the Agri-Food Regulator by any compliance reporting buyers as of this date.

All compliance reporting buyers are also required to submit an annual compliance report to the Agri-Food Regulator not later than 31 March of each year detailing their compliance with the UT Regulations to cover the period of the previous calendar year. The first report is due to be submitted to the Regulator by **31 March 2025**.

Under the 2023 Act, the Agri-Food Regulator may specify arrangements for the preparation by buyers or suppliers of an annual compliance report in respect of compliance with the UT

Regulations. This may include the maintenance of specified records by trading partners in the agri-food supply chain in relation to the sale or supply of products.

### The Agri-Food Regulator and competition law

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The Agri-Food Regulator's work on unfair market practices could be seen as a narrow aspect of the much wider competition law remit of the CCPC. However, the CEO of the Agri-Food Regulator has said emphatically: *"We do not have a role in competition law. An Rialálaí Agraibhia's role in that space is that in the course of our work we come across any practices or anything we feel does not look quite right, we have a duty to pass that on to the relevant authority"*.

The 2023 Act imposes an obligation on the Agri-Food Regulator to *"consult and cooperate with other authorities...with responsibility for the promotion of trading fairness and transparency (whether in relation to the agricultural and food sector or otherwise)"*, which would clearly apply to the relationship between the Agri-Food Regulator and the CCPC.



It might also apply to the new [EU agri-food chain Observatory \(AFCO\)](#) which held its first meeting on 17 July 2024. This is a European Commission initiative intended to bring together agri-regulators and stakeholders throughout the EU to share information on the functioning of the food supply chain and increase transparency on prices, structure of costs and distribution of margins. Speaking to a meeting of Swedish farmers earlier this year, European Commission President, Ursula von der Leyen, linked the establishment of AFCO to preventing below cost selling in the food chain.

Potentially anti-competitive practices, such as below cost selling, will remain part of the CCPC's remit in Ireland. However, the Agri-Food Regulator will be central to producing reliable information in a trustworthy manner that might then lead to identifying trading practices that have negative impacts on the functioning of the supply chain. The CCPC operates within a strengthened regime of competition enforcement since the introduction of the Competition (Amendment) Act 2022 and

it is now equipped with the tools to carry out more competition investigations, where there is credible evidence of potentially anti-competitive conduct. Stakeholders in the agri-food sector will be closely watching the Agri-Food Regulator's work in producing evidence which might then cause the CCPC to act.

#### Future developments

The 2023 Act includes a placeholder for the Minister to make further regulations to expand the powers of the Agri-Food Regulator beyond breaches of unfair trading law. It provides that the Minister can introduce regulations to assist in collecting price and market information *"to address issues of lack of transparency and information asymmetry in the agricultural and food supply chain"*.

This is a potentially interesting provision since it envisages the Agri-Food Regulator having an active role in examining commercial or market imbalances in the supply chain - for example, cost margins or routes to market - beyond the specific

trading practices that are addressed in the UT Regulations.

In other EU Member States, laws regulating the food supply chain address environmental, social and governance (ESG) concerns. This has been achieved, mainly under the Corporate Sustainability Due Diligence Directive (CSDDD, or CS3D) - a package of measures designed to promote sustainable economic growth across the EU by preventing adverse impacts on human rights and the environment within a company's *"chain of activities"*. The proposed final draft CSDDD was approved in the European Parliament on 24 April 2024.

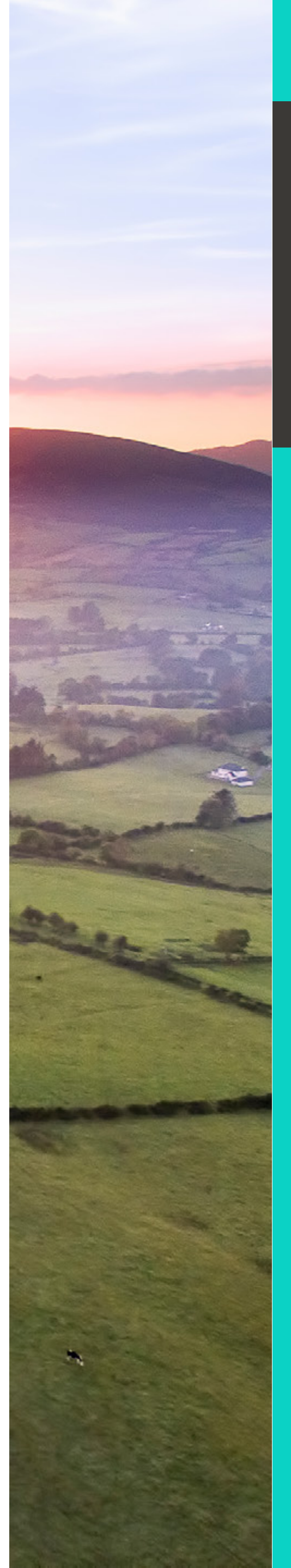
Germany and France have already adopted laws under the CSDDD. Germany has adopted the Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz) which came into force on 1 January 2023. France has adopted a Duty of Vigilance Law (Loi de vigilance) which came into force in March 2017.

However, despite pressure from industry stakeholders to review the Agri-Food Regulator's powers, the Minister, Charlie

McConalogue [has said](#) *"I do not see any reason at this time to review the powers of the Agri-Food Regulator under the act or regulations made under the act"*.

We are closely following the work of the new Agri-Regulator and we will provide further updates as soon as it begins to implement its Strategy Statement.

For further information in relation to this topic, please contact [Anna-Marie Curran](#), [Damien Ryan](#) or any member of the [EU, Competition & Procurement Group](#).



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